

Comment,
**BLACK CHILD, WHITE PARENTS:
BALANCING BIOLOGY AND BOND IN
MODERN TRANSRACIAL ADOPTIONS**

Transracial adoption disrupts the normative nuclear family by joining “racially different parents and children” together.¹ Transracial adoption is the most visible form of adoption because the family’s physical differences are more obvious to the everyday onlooker.² In the United States, the adopting parents are almost always white, and the adoptees are almost always children of color.³

Transracial adoption is not a novel topic.⁴ Over the last 75 years, the topic has aroused an “acrimonious debate” between those for and those against it:⁵ those who view transracial adoption as “positive for both the children and society as a whole” and “those who view [it] as injurious to Black⁶ children and

¹ See generally David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC, Mar. 2020, at 54-69; Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 FUTURE CHILD. 104, 104 (1993).

² Richard M. Lee, *The Transracial Adoption Paradox: History, Research, and Counseling Implications of Cultural Socialization 2*, NAT’L INST. HEALTH (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2366972/pdf/nihms-46199.pdf>.

³ Children’s Bureau, U.S. Dep’t of Health & Hum. Servs., *Trends in Foster Care and Adoption: FY 2011 - FY 2020 (The AFCARS Report)* 1, https://www.acf.hhs.gov/sites/default/files/documents/cb/trends_fostercare_adoption_11thru20.pdf (last visited Dec. 15, 2021) [hereinafter Children’s Bureau, *The AFCARS Report*].

⁴ Ellen Herman, *Transracial Adoption*, THE ADOPTION HISTORY PROJECT, <https://pages.uoregon.edu/adoption/topics/transracialadoption.htm> (last visited Mar. 1, 2022).

⁵ Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, DUKE J. GENDER L. & POL’Y. 131, 131 (2005).

⁶ For consistency purposes, this author has chosen to use the term Black when referencing race. However, quoted material remains as it appears in its original work. Capitalizing Black aligns with the Associated Press’ current style guide. This author acknowledges the current debate on capitalizing Black when used in the context of race. Proponents argue it is more than a typographical change; it is a recognition of a person’s sense of self and identity. Opponents argue capitalizing Black but not white recognizes white privilege by giving white people a pass on seeing themselves as a privileged race. The use of Afri-

Black communities.”⁷ During the 1960s, transracial adoption started gaining momentum.⁸ In response to the number of Black children in foster care, social welfare agencies relaxed racial matching practices in favor of placing Black children with white families.⁹ In response, spurred by the assassination of Martin Luther King Jr., Jim Crow laws, and other racial injustices, Black social workers vehemently voiced their opposition to the practice.¹⁰ In the 1990s, Congress introduced legislation prohibiting federally funded child welfare agencies from delaying or denying a child’s placement based on race.¹¹ Recently, the debate has reignited in response to three major occurrences: the successive murders of Ahmaud Arbery, Breonna Taylor, and George Floyd in 2020; the disproportionate impact of COVID-19 on the Black community, and the Black Lives Matter social movement’s mission to draw attention to the racism, discrimination, and inequality Black Americans endure more than fifty-five years after the enactment of the Civil Rights Act and more than 150 years after the abolition of slavery.¹²

can Americans is also part of the debate. For more information, see John Eligon, *A Debate over Identity and Race Asks, Are African-Americans ‘Black’ or ‘black’?*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/black-african-american-style-debate.html>.

⁷ Howe, *supra* note 5, at 131.

⁸ Leon W. Chestang, *Forward to Rhonda M. Roorda, In Their Voices: Black Americans on Transracial Adoption* ix, ix (Colum. Univ. Press 2015); *See also* Karen Valby, *The Realities of Raising a Kid of a Different Race*, TIME, <https://time.com/the-realities-of-raising-a-kid-of-a-different-race/> (last visited Feb. 19, 2022).

⁹ Chestang, *supra* note 8, at ix.

¹⁰ *Id.*

¹¹ Laura Radel & Allon Kalisher, *The Multiethnic Placement Act (MEPA): Analysis and Trends After 25 Years*, 162 ADOPTION ADVOC. 2 (Dec. 2021), https://adoptioncouncil.org/themencode-pdf-viewer-sc/?tnc_pvfw=zmlsZT1odHRwczovL2Fkb3B0aW9uY291bmNpbC5vcmevY29udGVudC91cGxvYWZlZlZlMjE2MTEvQWRvcHRpb24tQWR2b2NhdGUtTm8uLTE2Mi5wZGYmc2V0dGluZ3M9MTEwMDEwMTAxMDAxMDAxMDAxMDAwMCZsYW5nPWVuLVVT#page=&zoom=page-height&pagemode=thumbs.

¹² Malachy Browne et al., *How the Police Killed Breonna Taylor*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/video/us/100000007348445/breonna-taylor-death-cops.html>; Centers for Disease Control and Prevention, *Health Equity Considerations and Racial and Ethnic Minority Groups* (last visited Jan 25, 2022). CDC COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>; Richard Fausset, *What We Know*

In 2020, the American foster care system served 632,000 children.¹³ More than 400,000 of these children remained in foster care at the end of the government's fiscal year, and more than 115,000 of these children were waiting to be adopted.¹⁴ Eighteen months is the average amount of time a child spends in state care, and 5% of children remain in foster care for five or more years.¹⁵ The average age of a child waiting to be adopted is eight.¹⁶ Currently, the proportion of males to females waiting to be adopted is 52% to 48%, respectively.¹⁷ In 2020, 40% of children available for adoption were Black.¹⁸

This Comment does not definitively take a position in favor of or opposition to transracial adoption. Ample academics have sufficiently and sophisticatedly argued both sides of the debate.¹⁹ Rather, this Comment accepts that a transracial adoption is a legal form of adoption, and therefore, it advocates for policies and practices that prioritize consciously selecting a family for each specific child, including consideration of a parent's race or parent's preparedness for the specific struggles that come with rearing a child of a different race. This Comment proceeds in four parts. Part I provides the history of transracial adoption in the United States. Part II examines federal legislation and state laws

About the Shooting Death of Ahmaud Arbery, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>; History.com Editors, *George Floyd Is Killed by a Police Officer, Igniting Historic Protests*, HISTORY.COM (2021), <https://www.history.com/this-day-in-history/george-floyd-killed-by-police-officer> (last visited Dec. 15, 2021); History.com Editors, *Jim Crow Laws*, HISTORY.COM (2018), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws#:~:text=in%201964%2C%20President%20Lyndon%20B,to%20keep%20minorities%20from%20voting> (last visited Dec. 15, 2021); See generally Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

¹³ Children's Bureau, *The AFCARS Report*, *supra* note 3, at 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 1.

¹⁸ Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents' Perspective*, 20 HARV. L. REV. 167, 170 (2004).

¹⁹ Howe, *supra* note 5, at 131.

surrounding transracial adoption, and Part III offers key considerations surrounding transracial adoption.

While beyond the scope of this Comment, the author wishes to make note of the forced removal of American Indian children from their families and tribes throughout the 1950s, 1960s, and 1970s.²⁰ Congress passed the Indian Child Welfare Act (ICWA) in 1978 to stop the “irreversible decimation” of American Indian children.²¹ Despite ICWA, Native children continue to be four times more likely to be removed from their families than their white counterparts.²² Although progress has been made through ICWA, American Indian children still need greater protection.²³

I. The Historical Context of the Transracial Adoption Debate

Contentious conversations surrounding transracial adoption have always centered on the role of race in such adoptions. More specifically, the capability of white adoptive parents to meet the cultural needs of adopted Black children. This part of the paper, Part I, provides a brief history of transracial adoption within the United States and how the contours of the debate have shifted with society.

Before World War II, racial matching was the “prevailing policy and practice” of welfare and adoption agencies.²⁴ Prospective parents were only matched to children who were physically, religiously, educationally, emotionally, and culturally similar to them.²⁵ Race was the determinative factor because it physically preserved the archetypal family associated with that period.²⁶ Af-

²⁰ Cynthia G. Hawkins-Leon & Carla Bradley, *Race and Transracial Adoption: The Answer Is Neither Simply Black or White Nor Right or Wrong*, 51 CATH. U. L. REV. 1227, 1238 (2002).

²¹ *Id.*

²² *Id.*

²³ See generally National Indian Child Welfare Association, *About ICWA*, NICWA (2020), <https://www.nicwa.org/about-icwa/> (last visited Dec 14, 2021).

²⁴ See generally Morrison, *supra* note 18, at 170.

²⁵ *Id.* at 160.

²⁶ EVAN B. DONALDSON ADOPTION INSTITUTE, *Finding Families for African American Children: The Role of Race & Adoption from Foster Care, POLICY AND PRACTICE PERSPECTIVE*, May 2008, at 12, <https://www.nationalcenteronadoptionandpermanency.net/post/finding-families-for-african-american-children-the-role-of-race-law-in-adoption-from-foster-care>.

ter WWII, society's preference for mirror-image families slowly shifted as thousands of children suddenly needed homes.²⁷ Specific to race, two events occurred in 1948.²⁸ First, the U.S. Children's Bureau listed race in its reporting system, revealing a disproportionate number of Black children within the foster care system.²⁹ Second, the first publicly recorded transracial adoption occurred in Minneapolis, Minnesota, when a white couple adopted a Black child.³⁰ By the 1950s, transracial adoptions were legally permitted, but very limited in number.³¹ Racial segregation laws and anti-miscegenation laws, especially in the South, effectively barred the practice of transracial adoption until the cultural and political shifts of the Sixties.³²

Spurred by the Civil Rights Movement and second-wave feminism, societal views regarding race and gender started to evolve in the mid-1960s.³³ The legalization of abortion, increased use of contraceptives, and budding acceptance of single parenting collectively decreased the number of white infants relinquished for adoption.³⁴ Concurrently, the media was drawing attention to the plight of minority children in foster care.³⁵ The number of white couples desiring to adopt white babies surpassed the number of available white children, so adoption agencies responded by relaxing their racial matching policies.³⁶ For example, the Child Welfare League of America's (CWLA) policy went from uniformly adhering to racial matching to openly sup-

²⁷ *Id.*; Morrison, *supra* note 18, at 170.

²⁸ Morrison, *supra* note 18, at 162.

²⁹ *Id.*

³⁰ DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW 663 (7th ed. 2020).

³¹ *See generally id.*

³² EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 26, at 13; Jessica M. Handley, *Transracial Adoption in America: An Analysis of the Role of Racial Identity Among Black Adoptees and the Benefits of Reconceptualizing Success Within Adoptions*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 689, 690 (2020).

³³ History.com Editors, *The 1960s*, HISTORY.COM (2010), <https://www.history.com/topics/1960s/1960s-history> (last visited Dec. 15, 2021); Martha Weinman Lear, *The Second Feminist Wave: What Do These Women Want?*, N.Y. TIMES, Mar. 10, 1968, at 23.

³⁴ EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 26, at 13.

³⁵ *Id.*

³⁶ *Id.*

porting the creation of racially diverse families.³⁷ From 1968 to 1971, the number of transracial adoptions continued to rise.³⁸ In 1968, 733 Black children were adopted by a white family, and by 1971, the number reached 2,574.³⁹ At the same time, a resistance led by Black community leaders was also gaining momentum, and in 1972, the National Association of Black Social Workers (NABSW) published a position paper vehemently opposing transracial adoption.⁴⁰ The NABSW stated, “Black children should only be placed with Black families” to ensure the child “receives the total sense of [self].”⁴¹ Black children “belong physically, psychologically, and culturally” in Black families.⁴² Transracial adoption is “tantamount to racial and cultural genocide.”⁴³ The NABSW felt white parents, by pedigree, were incapable of understanding racism, and thus, incapable of preparing a Black child to survive within a racist society.⁴⁴ Transracial adoption was merely an extension of Black racism aimed at the Black culture’s children, the culture’s most susceptible and vulnerable.⁴⁵ As more Black leaders voiced their opposition to transracial adoption, including specifically calling out the adoption system’s vague efforts to recruit Black adoptive families, transracial adoptions started to decline.⁴⁶ Foster, adoption, and welfare agencies

³⁷ CHILD WELFARE LEAGUE OF AMERICA, *Our Story*, <https://www.cwla.org/about-us/history/> (last visited May 1, 2021). The CWLA is an amalgamation of hundreds of private and public agencies. *Id.*

³⁸ Jane Patterson Auld, *Racial Matching v. Transracial Adoption: Proposing a Compromise in the Best Interests of Minority Children*, 27 FAM. L.Q. 447, 449 (1993).

³⁹ Morrison, *supra* note 18, at 171. In 1969 and 1970 there were 1,447 and 2,284 transracial adoptions, respectively. Auld, *supra* note 38, at 449.

⁴⁰ NAT’L ASS’N OF BLACK SOCIAL WORKERS, POSITION STATEMENT ON TRANSRACIAL ADOPTION 1 (1972), [https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_\(b\).pdf](https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_(b).pdf) [hereinafter NAT’L ASS’N OF BLACK SOCIAL WORKERS]; Morrison, *supra* note 18, at 170.

⁴¹ NAT’L ASS’N OF BLACK SOCIAL WORKERS, *supra* note 40, at 1.

⁴² *Id.*

⁴³ ABRAMS ET AL., *supra* note 30, at 663.

⁴⁴ RITA J. SIMON & HOWARD ALSTEIN, ADOPTION, RACE, AND IDENTITY 9 (1992).

⁴⁵ *Id.*

⁴⁶ *Id.* Historically, until the mid-twentieth century, denied adoption services, Black people, instead, informally adopted at significant rates to ensure Black children were cared for within their family and community. Despite de-

were “significantly influenced” by the cumulative response to the NABSW’s position paper.⁴⁷ In response, agencies and organizations that had relaxed their racial matching policies during the 1960s were now reverting to policies that favored racial matching.⁴⁸ Between 1971 and 1974, the number of transracial adoptions successively declined, and in 1974, the annual number of transracial adoptions dropped below 1,000.⁴⁹

Throughout the 1980s, the ramifications of the War on Drug laws greatly impacted Black families.⁵⁰ Black males were convicted more and received longer prison sentences than their white counterparts who had committed comparable offenses.⁵¹ At the same time, Black children were continuing to far outnumber white children in foster care.⁵² In 1981, 6,000 children were available for adoption in New York.⁵³ 60% of these children belonged to a minority group, even though the city’s 1980 Census reported that only 6.9% of the population was Black.⁵⁴ Subsequently, during the 1980s and early 1990s, state adoption and welfare agencies were once again reassessing their adoption policies regarding the placement of minority children. The National Council for Adoption estimated 12,000 transracial adoptions occurred in 1992.⁵⁵

segregation and integration, this long history of discrimination continued to make Black people reluctant to enter the sphere of formal adoption. *Id.*

⁴⁷ CWLA, *supra* note 37. As a response to the NABSW’s 1972 position paper, the CWLA reversed its policy back to racial matching. *Id.* Morrison, *supra* note 18, at 171-172; SIMON & ALSTEIN, *supra* note 44, at 13.

⁴⁸ Morrison, *supra* note 18, at 172.

⁴⁹ Auld, *supra* note 38, at 450.

⁵⁰ History.com Editors, *War on Drugs*, HISTORY.COM (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> (last visited Feb. 20, 2022).

⁵¹ *Id.*

⁵² Diane Greenberg, *Adoption: New Views on Blacks*, N.Y. TIMES (July 19, 1981), <https://www.nytimes.com/1981/07/19/nyregion/adoption-new-views-on-blacks.html>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Leslie Doty Hollingsworth, *Promoting Same-Race Adoption for Children of Color*, 43 SOC. WORK 104, 106 (Mar. 1998), <https://www.jstor.org/stable/23717294>. The actual number of transracial adoptions in 1992 is unknown because at that time the federal government did not require such reporting from states. Today, states must collect and report data for every child placed by a state welfare or adoption agency. *Id.*

In the 1990s, Congress passed federal legislation to address the escalating number of Black children waiting in foster care.⁵⁶ These federal laws were enacted to reduce the number of minority children entering and then remaining in foster care for prolonged periods.⁵⁷ At the time, race could be used as a determinative factor, and as a result, racial matching existed as an “unwritten policy” in many foster and adoption agencies.⁵⁸ Later, federal laws, like the Multiethnic Placement Act of 1994, banned race as a determinative factor in favor of using race as a consideration so long as it did not deny or delay a child’s placement.⁵⁹

II. Transracial Adoption and the Law

Several federal and state laws guide child welfare agencies in assessing the best interests of the child, including the role of race in a placement decision. This part of the paper, Part II, examines the federal and state laws that affect transracial adoption.

A. Federal Laws Relating to the Role of Race in an Adoption

1. Application of The Multiethnic Placement Act (MEPA) and Interethnic Placement Act (IEP)

In 1994, Congress passed the Multiethnic Placement Act (MEPA) in response to the “spirited and sometimes contentious” ongoing debate surrounding transracial adoption.⁶⁰ The MEPA, considered a “revolutionary act in [its] concept,” was amended by the Interethnic Adoption Provisions (IEP) in 1996.⁶¹ Leading up to the passage of the MEPA-IEP, racial matching practices were preferred.⁶² In fact, transracial placements were only considered as a “last resort.”⁶³ During the 1970s, 1980s, and 1990s, it

⁵⁶ Hawkins-Leon, *supra* note 20, at 1241.

⁵⁷ Morrison, *supra* note 18, at 173.

⁵⁸ Hawkins-Leon, *supra* note 20, at 1242.

⁵⁹ Hollingsworth, *supra* note 55, at 106.

⁶⁰ Joan Heifetz Hollinger, *A Guide to the Multiethnic Placement Act of 1994 As Amended by the Interethnic Adoption Provisions of 1996*, ABA CENTER ON CHILD. & THE LAW, 1998, at 1.

⁶¹ *Id.*; ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 135 (1999).

⁶² Hollinger, *supra* note 60, at 4.

⁶³ *Id.*

was widely accepted that a child's needs stemmed from "immutable racial characteristics," and it was assumed children would want to be placed in a family racially or ethnically homogenous to them.⁶⁴ Furthermore, during these three decades, there was a rational concern, especially among Black social workers, that Black children raised within a white household would not form a strong connection to their racial or ethnic heritage.⁶⁵ Unfortunately, efforts to recruit Black foster and adoptive parents were insufficient, and the welfare system fell short of finding enough suitable homes for Black children.⁶⁶ It remains arguable if the precipitous rise of children in foster care was an unintended consequence of racial matching policies or the inevitable outcome of discriminatory practices of the child welfare system.⁶⁷ The rising number of Black children experiencing prolonged stays in foster care while waiting for the appropriate permanent placement once again thrust the foster care system into the political spotlight.⁶⁸

Congress enacted the MEPA-IEP to remove the barriers that were causing placement delays and denials within federally funded foster care and adoption agencies.⁶⁹ The two most salient barriers were racial matching policies and minority recruitment practices.⁷⁰ Attempting to overcome these reported stumbling blocks, the MEPA-IEP prohibited using the prospective parent's and child's race, color, or national origin (RCNO) to delay or deny a placement.⁷¹ Additionally, the MEPA-IEP required more diligent recruitment efforts of racially and ethnically diverse foster and adoptive parents.⁷² Federal programs and agencies found in violation of the law were subject to penalties, including a reduction or termination in their federal funding.⁷³ The government reduced first-time violators' federal funding by 2%, then 3% for a second violation, and 5% for three or subsequent viola-

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 5.

⁶⁷ Hawkins-Leon, *supra* note 20, at 1243.

⁶⁸ *Id.*

⁶⁹ Hollinger, *supra* note 60, at 1.

⁷⁰ *Id.*

⁷¹ Hawkins-Leon, *supra* note 20, at 1243.

⁷² Hollinger, *supra* note 60, at 1.

⁷³ *See* Hawkins-Leon, *supra* note 20, at 1243.

tions.⁷⁴ In 2003, the U.S. Department of Health and Human Services (HHS) fined Hamilton County, Ohio, \$1.8 million for sixteen violations.⁷⁵ The MEPA-IEP does not apply to American Indian children.⁷⁶

a. *Inconsistent Application of MEPA-IEP Across the States*

Congress enacted the MEPA-IEP to move more children, more quickly out of transitional placements into forever families. Its success, however, remains controversial.⁷⁷ The primary purpose of the MEPA-IEP was to preclude the use of RCNO to delay or deny a child's placement; however, across the states, there is no "degree of uniformity" in the application of the federal law.⁷⁸

Eight states seemingly prohibit the use of RCNO to deny or delay a placement.⁷⁹ Three of these states prohibit race discrimination *without qualification*, and two of these states specify an adoption cannot be delayed or denied *solely* because of race.⁸⁰ Seven other state statutes and the District of Columbia's statute reference race without a qualifying explanation on the weight it can hold in a placement decision.⁸¹ Another set of states only allows the placement of children of a different race than the prospective parents if there are "no other reasonable alternatives."⁸² These states use a tiered approach to place children: first preference is for blood relatives, second preference is for a same-race family, and third preference is for a family that is "knowledgea-

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See generally Kelly Cruze, Note, *Changing Identities, Unchanging Standards: Race as a Factor in Transracial Adoptions*, 13, *RUTGERS RACE & L. REV.*, 97, 105 (2011).

⁷⁸ *Id.*

⁷⁹ Morrison, *supra* note 18, at 174. The eight states are California, Connecticut, Kentucky, Maryland, New Jersey, Pennsylvania, Texas, and Wisconsin.

⁸⁰ Morrison, *supra* note 18, at 174 (emphasis added). Pennsylvania, Texas, and Wisconsin are the three states that prohibit race discrimination without qualification. Connecticut and Maryland are the two states that specify an adoption cannot be delayed or denied "solely" based on race. *Id.*

⁸¹ See Handley, *supra* note 32, at 692; Morrison, *supra* note 18, at 174. These states are Colorado, Illinois, Indiana, Montana, New York, Oklahoma, South Carolina, and the District of Columbia. *Id.*

⁸² Morrison, *supra* note 18, at 175.

ble and appreciative.”⁸³ In one state, at the birth parent’s request, an agency may deny an adoption based on race.⁸⁴ These various state interpretations of the MEPA-IEP’s provision that an adoption may not be delayed or denied based on RCNO illustrates the inconsistency in the application of the federal law from jurisdiction to jurisdiction.⁸⁵

The NABSW stated the MEPA-IEP is “flawed and failed legislation” that should be repealed.⁸⁶ Proponents have proposed that Black children live longer in foster than white children because of faulty practices and policies that emphasize racial matching.⁸⁷ Conversely, opponents opine that the MEPA-IEP has had a “chilling effect” on the efforts to recruit, train, and service culturally diverse families seeking to adopt.⁸⁸ Once in foster care, Black children are less likely to return home, more likely to wait longer for permanent placement, and more likely to age out of the system before being adopted.⁸⁹ They are also more likely to bounce from foster home to foster home, which is commonly referred to as “foster care drift.”⁹⁰

2. *Application of the Adoption and Safe Families Act*

In 1997, in response to concerns that children were remaining in foster care for unnecessarily prolonged periods or were drifting across multiple foster care placements, Congress enacted

⁸³ *Id.*

⁸⁴ *Id.* This state is Kentucky. *Id.*

⁸⁵ Handley, *supra* note 32, at 692; Morrison, *supra* note 18, at 174.

⁸⁶ Nat’l Ass’n of Counsel for Child., *The National Association of Black Social Workers (NABSW) Calls for the Repeal of the Multi-Ethnic Placement Act (MEPA) and Inter-Ethnic Placement Act (IEPA) 2*, (Winter 2021), https://cdn.ymaws.com/www.nabsw.org/resource/resmgr/2021_position_papers/2021_4304_repeal_mepa_iepa.pdf.

⁸⁷ John Sciamanna & Shaquita Ogletree, *HOT TOPIC Racial Equity in Child Welfare: Address the Roadblocks*, CHILD WELFARE LEAGUE OF AMERICA ADVOCACY TEAM (Apr. 2021), https://www.cwla.org/wp-content/uploads/2021/04/2021_HotTopic_EQTRRev.pdf. Texas was the first state to pass a statute prohibiting “the use of race to delay, deny, or other discriminate” in child placement decisions. Congress modeled the MEPA after the Texas statute. *Id.*

⁸⁸ *Id.*

⁸⁹ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 13 (2002).

⁹⁰ Nat’l Ass’n of Counsel for Child., *supra* note 86, at 2.

the Adoption and Safe Families Act (ASFA).⁹¹ The law was the “most significant [legal] overhaul” to the child welfare system since the 1980s.⁹²

The twofold purpose of ASFA was to shorten the length of time a child spends in foster care and to speed up the process of freeing up a child for adoption.⁹³ Under the law, once a child has remained in foster care for “15 out the previous 22 months, a state is required to file a petition to terminate a parent’s rights.⁹⁴ This is commonly referred to as the 15/22 rule, and it continues to be a central and controversial piece of ASFA.⁹⁵ The rule requires adoption and foster agencies to make “reasonable efforts” to preserve and reunify families.⁹⁶ The sticking point is that “reasonable effort” is broadly defined, and the states vary in their interpretations of what constitutes reasonable “service and support.”⁹⁷ Other terms commonly associated with reasonable efforts include “family reunification,” “family preservation,” “family support,” and “preventive services.”⁹⁸

Another provision of ASFA allows states to earn a federal bonus for each adoption that goes above the finalized number of adoptions in the preceding fiscal year.⁹⁹ Under this “bounty-like program,” now referred to as the Adoption and Legal Guardianship Incentive Payments, states receive thousands in their pocketbook for every child adopted above the previous year’s total.

⁹¹ Laura Radel & Emily Madden, U.S. Dep’t of Health & Hum. Servs., *Freeing Children for Adoption within the Adoption and Safe Families Act Timeline: Part 1 – The Numbers 2* (Feb. 2021), <https://aspe.hhs.gov/sites/default/files/private/pdf/265036/freeing-children-for-adoption-asfa-pt-1.pdf>.

⁹² *Id.*

⁹³ Hawkins-Leon, *supra* note 20, at 1245.

⁹⁴ *Id.* Termination of parental rights (TPR) must be determined for each parent. See Children’s Bureau, *Grounds for Involuntary Termination of Parental Rights* (July 2021), U.S. Dep’t of Health & Hum. Servs., <https://www.childwelfare.gov/pubpdfs/groundtermin.pdf>.

⁹⁵ Emilie Stoltzfus, U.S. Cong. Research Serv., *Child Welfare: Structure and Funding of the Adoption Incentives Program Along with Reauthorization Issues* 4 (Apr. 18, 2013), <https://sgp.fas.org/crs/misc/R43025.pdf>.

⁹⁶ Children’s Bureau, U.S. Dep’t of Health & Hum. Servs., *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency For Children 2* (Sept. 2019), <https://www.childwelfare.gov/pubpdfs/reunify.pdf>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Hawkins-Leon, *supra* note 20, at 1246.

As required by ASFA, each state, the District of Columbia, and Puerto Rico have passed legislation in compliance with the law.¹⁰⁰ In 2000, the federal government awarded nearly 11 million dollars total to 35 states and the District of Columbia for their increased number of adoptions over the “base” year, and by 2013, the federal government had awarded \$375 million in incentive funds to eligible states and the District of Columbia.¹⁰¹ The payment program has been revised and reauthorized numerous times over the years.¹⁰² Currently, a state receives at least \$4,000 for each additional child adopted over the previous year, and it receives \$10,000 if the child qualifies as an older child, defined as 14 years or older.¹⁰³

Black communities experience a higher rate of single-parent households, incarceration, substance abuse, and poverty.¹⁰⁴ Therefore, Black children are the most vulnerable to federal statutes regulating the role of race in adoption.¹⁰⁵ Neither the MEPA-IEP nor ASFA incorporates a best interests standard, and by not placing the child’s best interests above all concerns, the legislation detrimentally affects adopted children.¹⁰⁶ In other words, in practice, states may implement ASFA in a manner that places the “parents’ interests above the child’s interests.”¹⁰⁷

B. *Case Law Relating to the Role of Race in an Adoption*

Historically, state segregation laws banned interracial families from forming, but in 1967, the U.S. Supreme Court unanimously struck down a state’s anti-miscegenation statute.¹⁰⁸ Thereby, effectively legalizing interracial marriage.¹⁰⁹ Four months after the *Loving v. Virginia* decision, a white couple’s long-pending adoption of a mixed-race infant boy was final-

¹⁰⁰ *Id.*

¹⁰¹ Hawkins-Leon, *supra* note 20, at 1246; Stoltzfus, *supra* note 95, at 6.

¹⁰² Stoltzfus, *supra* note 95, at 5.

¹⁰³ 42 U.S.C. § 673(b) (2022).

¹⁰⁴ See Handley *supra* note 32, at 691

¹⁰⁵ *Id.*

¹⁰⁶ Hawkins-Leon, *supra* note 20, at 1246.

¹⁰⁷ *Id.* at 1250.

¹⁰⁸ *Loving v. Virginia*, 388 U.S. 1, 12 (1967); Morrison, *supra* note 18, at 174.

¹⁰⁹ *Loving*, 388 U.S. at 19.

ized.¹¹⁰ This form of adoption was a presumed first for the District of Columbia.¹¹¹ *Loving* legally opened the door for interracial families to exist, and seventeen years later, in another unanimous decision, the Court ruled it would not change a child custody order simply because the custodial parent entered into an interracial marriage.¹¹² *Palmore v. Sidoti* was the first time the Court examined the constitutionality of considering race as a factor in evaluating the best interests of the child in a custody dispute. The Court acknowledged ethnic prejudices existed in society, but private biases could not be “controlled” by the Constitution nor “tolerated” under it, and thus, race was not a “permissible consideration” to remove a young child from the custody of its mother.¹¹³ Despite the Court’s rulings, some states resisted these perceived progressive holdings.¹¹⁴ Alabama, for example, did not remove the anti-miscegenation law from its state constitution until 2000, more than thirty years after *Loving* and more than fifteen after *Palmore*.¹¹⁵

When biology and bond are at odds in competing adoption petitions, the court must determine which placement is in the best interests of the child. Today, all fifty states and the District of Columbia have a “best interests of the child” statute outlining the factors that must be considered when determining a child’s placement.¹¹⁶ The best interests standard involves a multifactor analysis which varies by state.¹¹⁷ In Minnesota, there are twelve best-interests factors that a court must consider when determin-

¹¹⁰ Diane Bernard, *A White Couple, a Mixed-race Baby and a Forbidden Adoption*, WASH. POST (Mar. 10, 2019), <https://www.washingtonpost.com/history/2019/03/10/white-couple-mixed-race-baby-forbidden-adoption/>.

¹¹¹ *Id.*

¹¹² *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984).

¹¹³ *Id.* at 433.

¹¹⁴ Aaron Blake, *Alabama Was a Final Holdout on Desegregation and Interracial Marriage. It Could Happen Again on Gay Marriage*, WASH. POST (Feb. 9, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/02/09/alabama-was-a-final-holdout-on-desegregation-and-interracial-marriage-it-could-happen-again-on-gay-marriage/>.

¹¹⁵ *Id.*

¹¹⁶ Children’s Bureau, U.S. Dep’t of Health & Hum. Servs., *Determining the Best Interests of the Child* 1 (June. 2020), https://www.childwelfare.gov/pubPDFs/best_interest.pdf. [hereinafter Children’s Bureau, *Best Interests of the Child*].

¹¹⁷ *In re M.F.*, 1 S.W.3d 524, 532 (Mo. 1999).

ing a child's placement, and in Missouri, there are eight.¹¹⁸ In some states, every factor listed must be considered, and in other states, the court is encouraged to review any relevant factor, including those not explicitly listed within the statute.¹¹⁹ While the factors that shape the analysis vary, the invariable consensus is that every child deserves to live in a safe, secure, and stable home.

In Missouri, a paternal aunt and long-term foster parents filed competing petitions to adopt a bi-racial child.¹²⁰ The Missouri Court of Appeals for the Western District affirmed the bonded white foster parents' petition over the biological Black aunt's petition.¹²¹ The court considered a "myriad of factors" to determine what was in the child's best interests.¹²² The evidence weighed equally in favor of the foster couple's and the aunt's ability to provide "good care" and to meet the child's cultural, racial, and ethnic needs.¹²³ The aunt's extended family included "different ethnic and racial backgrounds," and the foster parents were raising the child in a "multicultural environment" with exposure to and education on the child's "African American heritage."¹²⁴ Here, "no single factor was absolute," and the "degree of bonding" with the foster parents and the "biological relationship" with the aunt were both "significant factors."¹²⁵ Biology was not seen as a determinative factor, and overall, the court found the foster parents offered more stability, and therefore, were overall the better fit.¹²⁶

Contrasting Missouri's approach, some states, like Minnesota, use a tiered approach to placement decisions based on the best interests of the child.¹²⁷ However, while listed in a hierarchical manner, in function, the order often operates as more of a

¹¹⁸ MINN. STAT. § 518.17(a)(1-12) (2021); MO. REV. STATE § 452.375 (2021).

¹¹⁹ See generally Children's Bureau, *Best Interests of the Child*, *supra* note 116, at 3.

¹²⁰ *In re M.F. v. D.A.H.*, 1 S.W.3d 524, 533 (Mo. Ct. App. 1999).

¹²¹ *Id.*

¹²² *Id.* at 532.

¹²³ *Id.* at 533, 535.

¹²⁴ *Id.* at 534-35.

¹²⁵ *Id.* at 533, 536.

¹²⁶ *Id.* at 534, 536.

¹²⁷ MINN. STAT. § 260C.212 (2021).

discretionary guide than a mandatory procedure.¹²⁸ In 2013, the Supreme Court of Minnesota affirmed an adoption petition in favor of white foster parents over Black, biological grandparents.¹²⁹ At the time of the contested adoption, each child had “continuously resided with [the] foster parents” since birth, or over two years.¹³⁰ The grandmother did contact the county to “express[] [her] interest” in adopting the children within the first few months of their birth.¹³¹

Minnesota’s highest court interpreted a statute’s use of “*shall consider* placement consistent with the child’s best interests . . . in the following order” as an invitation for the judiciary to form an opinion rather than an order to automatically select kin over “an important friend with whom the child [] resided or had significant contact.”¹³² Furthermore, the court held the statute required it only look at the grandparents’ petition before looking at the foster parent’s petition.¹³³ The statute did not require the court to decide the grandparents’ petition before moving on to consider the foster parents’ petition.¹³⁴

The court noted the “consideration requirement” was not meaningless under the best interests analysis because when competing petitioners were “equally qualified,” biology did supersede bond.¹³⁵ Here, though, there were “real concerns” with the grandparent’s “ability to recognize” and seek out the specialized medical, educational, and development services the children needed as a result of their prenatal exposure to cocaine.¹³⁶ The grandparents also claimed the cultural needs of the children were

128 *Id.*

129 *In re* Petition of S.G., 828 N.W.2d 118, 127 (Minn. 2013).

130 *Id.* at 121.

131 *Id.*

132 MINN. STAT. § 260C.212; *See also* S.G., 828 N.W.2d at 124 (emphasis added).

133 S.G., 828 N.W.2d at 124.

134 *Id.*; *See also* ABA, *Best Interests Was Proper Standard in Adoption Contest*, CHILD L. PRACTICE TODAY (May 2013), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/may-2013/best-interests-was-proper-standard-in-adoption-contest/.

135 S.G., 828 N.W.2d at 125.

136 *Id.* at 126.

not adequately considered by the court.¹³⁷ The court found the white foster parents “could support the cultural needs of the girls” because the foster parents “felt it was important for the [girls] to learn about their family and its traditions.”¹³⁸ The foster parents had already adopted two racially diverse children, and a Black friend was living with the family.

State by state courts differ in their approach to balancing the “proper role of race” in adoption proceedings.¹³⁹ Uniformly, a majority of states follow the best interests of the child standard, however, each state’s approach is individually its own, and this creates inconsistency across the United States.¹⁴⁰

III. Key Considerations Surrounding Transracial Adoption

The idyllic nuclear family of the 1950s and 1960s is no longer representative of modern society.¹⁴¹ Categorically, families are more diverse, and society must adapt to the reality of contemporary American life. The Cleavers are no longer the *Modern Family*.¹⁴² While the family structure is changing, transracial families still have to navigate a world occupied by a white majority.

¹³⁷ *Id.*

¹³⁸ *Id.* at 127.

¹³⁹ Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 932 (1994).

¹⁴⁰ *S.G.*, 828 N.W.2d at 127.

¹⁴¹ Brooks, *supra* note 1, at 54.

¹⁴² *Leave It to Beaver* was an American sitcom that ran for six seasons (1957-1963). The sitcom centered on the everyday life of the perfect American family living in a beautiful suburban home complete with a white picket fence. *Leave It To Beaver*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/media/encyclopedias-almanacs-transcripts-and-maps/leave-it-beaver> (last visited Mar. 1, 2022). *Modern Family* was an ABC sitcom that ran for eleven seasons (2009-2020). The sitcom follows the Pritchett-Dunphy-Tucker family. The sitcom focuses on three unique families that form one larger and blended family unit. The sitcom provides an honest, and often hilarious, look into the lives of the family as together they navigate second marriages/second families, transracial adoption, gay marriage, and gender roles. *Modern Family*, ABC, <https://abc.com/shows/modern-family/about-the-show> (last visited Mar. 1, 2022). The two sitcoms aired six decades apart, and each is representative of its time. One is not good, and one is not bad. Comparing the two provides a glimpse into society’s progress over the last sixty years.

A. *One-Way Direction*

The reality is that transracial adoption occurs almost exclusively unilaterally.¹⁴³ In America, transracial adoption essentially functions as a one-way ticket with Black children being adopted by white people.¹⁴⁴ Research and data on adoptions of a white child by a Black family are regrettably bleak, and the few documented cases expose society's instinctive bias against dark skin parenting light skin. In 2021, a white woman approached a Black man in Pennsylvania and accused him of “kidnapping” his two white toddler sons. He was watching them play at the neighborhood park.¹⁴⁵ Harry Moore and his wife, Jennifer McDuffie-Moore, who is also Black, started fostering the twin boys after they were separated at birth from their white, drug-addicted biological mother.¹⁴⁶ After fostering the boys for two years, the Moores officially adopted both boys.¹⁴⁷ The Moore's story is representative of the harassment and accusations Black adoptive parents endure simply because they are parents of a white child.¹⁴⁸ Conversely, white mothers are praised for saving their Black children.¹⁴⁹

Black families have rarely adopted white children. Racism is a big reason for this. Additionally, while it seems there are significantly more white parents looking to adopt, recruitment and outreach efforts are also lacking within Black communities.¹⁵⁰

B. *Surviving in a Racist Society*

In its 1972 position paper the NABSW stated transracial adoption was “tantamount to racial and cultural genocide.”¹⁵¹

¹⁴³ Hawkins-Leon, *supra* note 20, at 1256.

¹⁴⁴ *Id.* at 1233.

¹⁴⁵ Yaron Steinbuch, *Black Pennsylvania Couple Accused of Kidnapping Their Adopted White Kids*, N.Y. POST (Aug. 9, 2021), <https://nypost.com/2021/08/09/black-couple-accused-of-kidnapping-their-adopted-white-kids/>. *See also* Maressa Brown, *As Black Parents Raising a White Child, We Face Racism Every Day*, PARENTS (June 25, 2020), <https://www.parents.com/parenting/dynamics/as-black-parents-raising-a-white-child-we-face-racism-everyday/>.

¹⁴⁶ Steinbuch, *supra* note 145.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Brown, *supra* note 145.

¹⁵⁰ Morrison, *supra* note 18, at 169-70.

¹⁵¹ ABRAMS ET AL., *supra* note 30, at 663.

The NABSW opposed adoption agency practices that were covertly and overtly screening out Black families, and it “denounce[d] assertions” that Blacks would not adopt, arguing the adoption process functioned to “screen out” Black families who sought to adopt.¹⁵² Critics argued Black social workers preferred Black children to remain in foster care over a white family adopting the Black child.¹⁵³ This is a misinterpretation of the NABSW’s position.¹⁵⁴ The NABSW was a voice advocating for Black family preservation. It was not arguing for Black children to remain in foster care, but rather, that the adoption process inherently “screen[ed] out” Black adoptive parents.¹⁵⁵ It “denounce[d] assertions” that Black people would not adopt.¹⁵⁶ It called for placing children with their relatives.¹⁵⁷ The NABSW has not published an official position on transracial adoption since 1972, but it remains committed to fighting for the best interests of all Black children and Black families, which includes a commitment to non-discriminatory adoption services.¹⁵⁸

The “sad reality” is that skin color does matter, and skin color does trigger certain stereotypes and assumptions, even in the most well-intentioned human.¹⁵⁹ Opponents of transracial adoption argue that white parents, by pedigree, are incapable of understanding racism.¹⁶⁰ White parents do not and cannot share adequate survival skills to cope with racism.¹⁶¹ Race visually distinguishes those who were not from those who were “enslaved, physically segregated, politically disenfranchised, physically brutalized, socially stigmatized, and economically oppressed.”¹⁶² The

¹⁵² NAT’L ASS’N OF BLACK SOCIAL WORKERS, *supra* note 40, at 3.

¹⁵³ J. Toni Oliver, *In Adoption, Does Race Matter*, N.Y. TIMES (Feb. 2, 2014), <https://www.nytimes.com/roomfordebate/2014/02/02/in-adoption-does-race-matter/adoptions-should-consider-black-children-and-black-families#:~:text=the%20National%20Association%20of%20Black%20Social%20Workers%20fights%20for%20the,when%20deemed%20appropriate%20%E2%80%93%20transracial%20adoption.>

¹⁵⁴ *Id.*

¹⁵⁵ NAT’L ASS’N OF BLACK SOCIAL WORKERS, *supra* note 40, at 3.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Hawkins-Leon, *supra* note 20, at 1259.

¹⁶⁰ SIMON & ALSTEIN, *supra* note 44, at 14.

¹⁶¹ Hawkins-Leon, *supra* note 20, at 1259.

¹⁶² *Id.* at 1258, 1259-60.

unfortunate truth is that love is not all you need, and adoptive parents of Black children must recognize and combat the pervasiveness of institutional and individual racism.

C. *Racial Identity*

Who are you? A person's identity centers on an "individual[']s] conception" of who she is and who she is not.¹⁶³ A person's sense of identity begins in infancy, but the major exploration and resolution of one's identity do not occur until adolescence.¹⁶⁴ By default, adopted people live life with dual identities, and for transracially adopted children, there is an additional layer of complexity between grasping onto their biological roots while also blending in with their adoptive family. For minority children adopted by white parents, studies show it is even more critical to integrate the child's race into the child's identity to develop healthy self-worth.¹⁶⁵

When white parents adopt a Black child, to serve the child's best interests the parents must prioritize nurturing the child's sense of racial and personal identity.¹⁶⁶ A lack of exposure to the Black community and culture will only further isolate the child from developing pride, acceptance, and understanding of his or her heritage.¹⁶⁷

The New York Family Court in *In the Matter of B.* stated, "[T]he concept of [B]lack pride is an important one; that this child's self-image and acceptance of his [B]lack identity are crucial to his adjustment in life and his place in the world."¹⁶⁸ Balancing the best interests of the child, in that case, the court determined the child was entitled to his "Black pride," and to be returned and raised by his Black parents as opposed to his white foster mother.¹⁶⁹ The foster mother's home provided more material comforts, and while "not ideal," the natural parents were "nevertheless adequate under proper supervision"¹⁷⁰ It was not

¹⁶³ Hawkins-Leon, *supra* note 20, at 1256.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1258.

¹⁶⁷ *Id.* at 1257.

¹⁶⁸ *Matter of B.*, 89 Misc. 2d 493, 496 (N.Y. Misc. 1977).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 494-95.

within the court's legal or moral purview to "superimpose [its] own values" on those before it.¹⁷¹ On the historical timeline, this case falls after the NABSW published its position paper in 1972, but before the enactment of MEPA-IEP.

Identity-related reasons are key motivators for why adopted adults search for their birth families.¹⁷² Adopted people seek to find "the part . . . that is missing," and advances in DNA technology and the advent of genealogy websites are making it easier for adopted people to discover their heritage and genetic history.¹⁷³

III. Conclusion

Adoption from foster care is about recruiting and preparing families for the child, and not vice versa. Every adoption decision should be based on each child's individual needs. A child's best interests are paramount, and in transracial adoption, that interest includes the consideration of race.

Current federal policies prohibit delaying or denying an adoption based on RCNO. These policies are intended to decrease the number of Black children in foster care and to reduce the amount of time Black children spend in foster care. The policy may be well-intentioned, but it also arguably overlooks the importance of matching a child with the right forever family over the first available forever family in the vein of adhering to a federal policy.

Ongoing connections to one's racial heritage serve a child's best interests, regardless of if the child is adopted by Black or white parents. Adoption practices should prioritize the importance of culture and race in forming a child's sense of self and identity. When selecting an adoptive family for a Black child, race does not have to be determinative, but it should be a consideration. The racial and cultural mix of the family's community will determine if the child's status is a "source of visible difference or not," which will impact the child's sense of self and identity.¹⁷⁴ The adoptive family must demonstrate an awareness,

¹⁷¹ *Id.* at 496.

¹⁷² EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 26, at 16.

¹⁷³ *Id.*

¹⁷⁴ SETH J. SCHWARTZ, KOEN LUYCKX, & VIVIAN L. VIGNOLES, 1 HANDBOOK OF IDENTITY THEORY AND RESEARCH 590 (2011).

sensitivity, and commitment to the raising of a transracially adopted child.

In 2020, the combined unjust killings of Black people and the global pandemic reignited a social calling to transform and reorient this country into one that ensures equity and justice for all. A calling has risen to form a society that consciously fights against racism not only institutionally but also individually, which at its most intimate level is within the family. Efforts to make transracial adoption more widely understood and accepted are underway, and society must take personal responsibility for embracing the various forms of today's modern families.

Aleigh Flournoy