THE ROLE OF RACE IN CHILD CUSTODY DECISIONS BETWEEN NATURAL PARENTS OVER BIRACIAL CHILDREN

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Since the Supreme Court in 1967 made a marriage between a white man and a biracial[1] black and Native American woman legal in *Loving v. Virginia*,[2] interracial marriage has increased dramatically.[3] The number of biracial children born each year has also risen.[4] The soaring divorce rate of the last twenty years has also included interracial couples.[5]

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1. The term "biracial" assumes a system of racial classifications in which individuals have "singular" ethnic identities. *Cf.* Roger D. Herring, *Developing Biracial Ethnic Identity: A Review of the Increasing Dilemma*, 23 J. MULTICULTURAL COUNSELING & DEV. 29, 31 (1995). An interracial marriage is a marriage between two people of different races. However, defining race is the tricky part of defining interracial. Rather than pinning down a discrete definition of race, this paper recognizes that race is a dynamic structure that is incoherent and contains a number of parts such as ethnicity, culture, and color. It affects different people in different ways, all the time. This conceptualization of race agrees with Ian Haney Lopez's definition of race as an "ongoing, contradictory, self-reinforcing, process subject to the macro forces of social and political struggle and the micro effects of daily decisions." Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994). This note challenges traditional conceptions of race and calls for recognition of the complex racial heritages of "biracial" children.

2. 388 U.S. 1 (1967). Although the Supreme Court's decision was a step in the legitimization of interracial marriages, some "legitimate interracial unions" existed well before the Civil War. PAUL R. SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 235 (1989). The increase in interracial marriages through the 1970s can be attributed to a number of social factors, including "[t]he *Loving* decision, the prominence and increased acceptance of Black people in White minds, and the movement of some Black people into the White middle class." *Id.* at 280.

3. A recent New York Times article claimed that the number of interracial marriages doubled between 1960 and 1970, and tripled between 1970 and 1980. By 1990, there were 1.5 million interracial marriages. Linda Mathews, *Beyond 'Other': A Special Report*, N.Y. TIMES, July 6, 1996, at A1.

4. The 1990 census tallied "two million children younger than 18 whose parents are of different races." Michel Marriott, *Multiracial Americans Ready to Claim Their Own Identity*, N.Y. TIMES, July 20, 1996, at A1.

5. Divorce among all couples crept from 3.1 per 1,000 to 5.0 per 1,000 between 1971 and 1978. Colleen McKinley, *Custody Disputes Following the Dissolution of Interracial Marriages: Best Interests of the Child or Judicial Racism?*, 19 J. FAM. L. 97, 103 (1980-81). By 1980, the rate was up to 23 divorces per 1,000 marriages, but slowed a bit by 1994 to 20.5 divorces per 1,000 marriages. Steven A. Holmes, *Traditional Family Stabilized in the 90's, Study Suggests*, N.Y. TIMES, March 7, 1996, at B12.

This note focuses on custody disputes arising out of the dissolution of marriages between black and white individuals. It is unclear whether these marriages end in divorce at the same rate as same-race marriages. Two different studies completed in the early 1970's reached opposing results, one finding marriages between black and white individuals broke

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These statistics suggest that family courts may be confronting the dissolution of racially mixed families more frequently than before. Without mechanisms to determine the importance of racial heritage to healthy child development, judges are left floundering and relying on their own personal conceptions of how much race should matter in such decisions. In practice, this has led to confusion about how and whether to consider race in custody decisions involving biracial children. For example, a New York court, in *Farmer v. Farmer*, noted that race is not a significant factor in child placement decisions, but cited a substantial number of cases in which race was considered to be significant.[6] Current court practice is difficult to summarize because so few courts are clear about the weight they assign race in custody decisions affecting biracial children. In order to better consider the best interests of the child, judges need a consistent approach to evaluating race in custody disputes that will allow for flexibility while maintaining some degree of predictability.

The best interests of the child test, the test prescribed by statute in most states to determine child placement in custody disputes, takes a broad look at factors which impact the well-being of the child. Under this test, courts have substantial discretion to study parents closely to determine who will provide the best home for the child. While courts need this discretion in order to weigh the myriad of factors which go into an appropriate placement, they also need to carefully consider race's importance to insure that it does not inappropriately impact the best interests of the child balancing test.

In thinking about how race should be considered in custody disputes involving biracial children, family courts are faced with at least three questions. First, do current court practices benefit or harm biracial children? Second, how do society and the courts perceive race with respect to biracial children, and what role does unconscious judicial racism play in custody disputes? Third, what legal test for granting child custody will adequately consider the best interests of the child while counteracting the impact of unconscious racism in the judiciary?

In order to answer these questions, this note examines the history of biracial people. This note is based on a black-white paradigm[7] as much existing literature is focused on black-white custody disputes,[8] and many of

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up at roughly twice the rate of same-race marriages, and the other finding that marriages between black and white individuals broke up slightly less often than same-race marriages. SPICKARD, *supra* note 2, at 327-28.

6. 109 Misc. 2d 137, 143-47 (N.Y. Sup. Ct. 1981). The court looked at a wide range of child placement proceedings, including custody disputes between natural parents, foster care placements, and adoptions.

7. However, much of the analysis presented in this note is relevant to marriages between people of all races. Future works on this topic should expand the scope to encompass custody disputes in marriages between people of races other than black and white.

8. However, see, e.g., Maria P.P. Root's book *Racially Mixed People in America* (dealing with people of a number of different racial backgrounds).

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the judicial decisions concerning interracial custody disputes concern families with one black and one white parent.[9] Children with black and white parents have been classified as black by both society and the law.[10] The growing multiracial movement, which calls for people to embrace all of their racial identities, attempts to move race out of the discrete categories fostered throughout American history. This movement challenges courts by claiming that a person can have a number of racial identities, and forces courts to reconsider whether they can apply the more traditional, narrow definitions of race.

In this historical and social context, this note discusses and questions the best interests of the child test in custody disputes. The limitations of that test provide the legal frame for an examination of custody disputes between black and white parents, with a focus on the role of race in determining the best interests of the child. The current lack of a coherent treatment of race, or any framework for its consideration, creates a muddle that often allows lower courts to award custody based on stereotyped, racist assumptions.

Sociological evidence reveals the harm that current court practices can cause biracial children. Studies observing the importance for biracial children of developing positive dual racial heritages highlight the need for courts to consider the ability of parents to transmit positive racial attitudes. Based on these studies, this note concludes that the development of a strong racial identity is a substantial step in a biracial child's emotional growth and in her development of a strong sense of self. Psychological studies illustrate the critical role parents play in transmitting positive views of both of a biracial child's racial heritages.[11]

Even though studies show that it is important for biracial children to develop positive dual racial identities, perhaps courts are not the appropriate venue to insure that biracial children receive adequate exposure to both of their racial heritages. Two strong arguments against using courts for this purpose are put forward: that court consideration of race serves to reify racial categories; and that court consideration of race violates the Equal Protection Clause of the Fourteenth Amendment. Neither presents a significant bar to the consideration of race in custody disputes involving biracial children.

Once it is established that considering race is important for the best interests of the child, and that courts do not now adequately address race in custody decisions, this note will suggest an alternative approach to custody determinations. The ability and desire of each parent to help the child

9. Eileen M. Blackwood, *Race as a Factor in Custody and Adoption Disputes:* Palmore v. Sidoti, 71 CORNELL L. REV. 209, 216 n.54 (1985).

10. *Id.*

11. Jewelle Taylor Gibbs & Gloria Moskowitz-Sweet, *Clinical and Cultural Issues in the Treatment of Biracial and Bicultural Adolescents*, 72 FAMILIES SOC'Y: J. CONTEMP. HUM. SERVICES 579, 581 (1991).

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learn about her biracial identity should be considered by courts to help determine where the best interests of the child lie. Other alternatives, such as joint custody and ignoring race in custody disputes, are discussed and found lacking. Neither presents a viable option for awarding custody in a manner that protects the best interests of a biracial child.

I.
A History of Biracial People[12]

Historical constructions of race pervade and color current perceptions of race. Thus, it is important to examine the history of biracial people in America to understand where current perceptions stem from, as well as why they are problematic. The historical separation of blacks and whites because of slavery and slavery's surrounding social constructions impacted heavily on biracial people. Biracial people were often conceived through white master rapes of black slaves.[13] Even free individuals who appeared black faced the risk of being trapped by slave catchers and placed in slavery, because the social system privileged an order based in part on phenotype.[14] The assumptions behind the system of derogating people who were identified as black may continue to influence racial perceptions[15] and, indirectly, judicial decision-making in biracial child custody decisions.

A. Pre-Civil War

During slavery, mulattos[16] were generally classified as black as a way of upholding the slavery status quo.[17] Permitting free mulattos to enjoy any of the standing of their white ancestors might have confused social

12. As this note's treatment of race enunciates, race is a flexible construct that means different things to different people. Race is also a historically specific construct. It might not seem to make sense to consider biracial people in the seventeenth century if no such category existed, or at least not the category we consider today. However, this note looks to history in order to show that biracial people were not considered biracial until recently. These racial assumptions have led to current problems with custody determinations involving biracial children.

13. Laws giving children their mother's race implicitly encouraged such abuse by creating an economic incentive for white masters to rape their slaves. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 Mich. L. Rev. 1161, 1176 n.55 (1997).

14. *Id.*

15. *See also* Jewelle Taylor Gibbs & Alice M. Hines, *Negotiating Ethnic Identity: Issues for Black-White Biracial Adolescents*, *in* Racially Mixed People in America 223, 224 (Maria P.P. Root ed., 1992) (stating that people of mixed race are considered black as a legacy of slavery).

16. Throughout this part, I will use the term "mulatto" in an attempt to be more theoretically and historically accurate. Furthermore, use of the term mulatto works against projecting anachronistic constructs into the past.

17. *Cf.* Hickman, *supra* note 13, at 1175-76 (noting the low status legally assigned to mulatto children, and the "early importance of drawing broad boundaries around the Negro race"). This may have been because the slavery status quo was premised on the basic idea that blacks were less able, or less human, than whites in order to justify black servitude and the conditions of slavery. L. Scott Stafford, *Slavery and the Arkansas Supreme Court*, 19 U.

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rules by implicitly granting people with black blood and black physical characteristics the mental capabilities that black people were generally denied. Because of their alleged incompetence, free blacks were given fewer liberties than free whites.[18] An elaborate system of rules classifying mulattos as black grew over time and, when possible, law and court rulings stripped mulattos of any white identity.[19]

Phenotype played a large role in determining race under the law, in part because of its ease of determination.[20] The 1806 state appellate level case of *Hudgins v. Wright*[21] illustrates the importance of physical appearance in judicial considerations of race. There, the court found that three generations of women would be presumptively free if they could prove through their complexion, nose shape, and hair texture that they had no black ancestors.[22] Even though their freedom depended on their genealogy, the determinative proof of their parentage showed through their phenotype. The court granted their freedom because the youngest had "the characteristic features . . . of whites," and her mother had the "long, straight, black hair of the native aborigines of this country."[23] While such a finding was detrimental to slaveholders, it was probably permitted because defining race visually made it easier to police the racial border.

Prior to the Civil War and the end of slavery, mulattos were considered black in order to prevent granting blacks the human characteristics that would have complicated slavery. Often race was determined on the basis of physical characteristics because of its ease of determination.

B. Post-Civil War

With the abolition of slavery, southern states attempted to rigidify segregation through new laws which focused on genetics as well as appearance.[24] For example, the "one-drop rule" declared any person with "one

ARK. LITTLE ROCK L.J. 413, 417-19 (1997). However, race should not be confused with the condition of servitude, as not all mulattos were slaves.

18. For example, black men were not permitted to vote until the passage of the Fifteenth Amendment in 1870. U.S. CONST. AMEND. XV, § 1.

19. SPICKARD, *supra* note 2, at 239-240.

20. Much of the system policing race rested on phenotype. However, a very fair mulatto could "pass" as white and navigate society as a white person. *See, e.g., id.* at 333-38. While the issues raised by passing are relevant in terms of whether a biracial child could pass as black or white, the discussion in Part III shows that such an identity may not be the healthiest choice for a biracial child's emotional development. While the issue of passing merits further discussion, that discussion falls outside of the scope of this note.

21. 11 Va. 134 (1 Hen. & M.)(Va. 1806), *cited in* Lopez, *supra* note 1, at 1 n.1.

22. Lopez, *supra* note 1, at 1.

23. *Hudgins*, 11 Va. at 134, 140-41, *quoted in* Lopez, *supra* note 1, at 1-2.

24. *See* SPICKARD, *supra* note 2, at 272 (noting the rise of Jim Crow laws that treated biracial and black individuals the same).

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drop" of black blood to be black.[25] Such rules took race to be an inescapable, biological fact. In *Plessy v. Ferguson*,[26] a person who "looked white" and had one eighth black ancestry had been refused seating in a train section reserved for white people.

Biracial people were characterized as "'morally and physically the inferior of the pure black' . . . through elaborate 'proofs' of declining intelligence and increasing sterility among people of mixed ancestry."[27] The caricature of the "tragic mulatto" pervaded popular culture. Biracial individuals were sometimes characterized as "lower" than blacks because of their mixed nature: "All mixed races are inherently violent, incoherent, incapable of national government, revolutionary, and are on the down grade of civilization."[28] Many black writers also believed that biracial people were unhappily torn between two worlds, but were more likely to blame social pressures than a bad mixing of blood.[29]

Statements derogating biracial people reinforced beliefs in white superiority, and protected white position and power against feared attacks by individuals who appeared to threaten white privilege because they fell between racial categories. Their challenge to rigid racial boundaries, through their sometimes racially ambiguous appearances, made them the targets of venomous attacks that insured they did not undercut the racially divided southern power hierarchy.[30] Another reason for the virulent attacks on biracial people might have been the predominance of light-skinned biracial people in leadership positions in black communities during the late nineteenth century. In several large cities, "the Black race was led by the 'mulatto elite.'"[31]

Through the 1950's and 1960's, biracial people often had little if any contact with their white ancestors and turned to their black ancestors for support and acceptance. While a "certain number [of biracial people] were able . . . to muster stable biracial identities," most biracial people identified themselves with and were identified, by others, with blacks.[32] Although some organizations, like the Manasseh Society, cropped up in the early

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25. *Id.* at 330. "The function of the one-drop rule was to solidify the barrier between Black and White, to make sure that no one who might possibly be identified as Black also became identified as White." Paul R. Spickard, *The Illogic of Americal Racial Categories, in* RACIALLY MIXED PEOPLE IN AMERICA 12, 19 (Maria P.P. Root ed., 1992). Others argue that the one-drop rule, despite its nefarious character, permitted a more cohesive struggle against racism that would not have been possible under a fragmented system of racial characterization. *See, e.g.*, Hickman, *supra* note 13, at 1188, 1197-1202.

26. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

27. SPICKARD, *supra* note 2, at 254.

28. E.H. RANDLE, CHARACTERISTICS OF THE SOUTHERN NEGRO 118 (1910) *quoted in* SPICKARD, *supra* note 2, at 284.

29. *See* SPICKARD, *supra* note 2, at 329.

30. *See id.* at 285 (noting that between 1885 and 1915 there were over 2,700 lynchings of black men and women in the U.S.).

31. *Id.* at 317.

32. *Id.* at 330-31.

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twentieth century to provide support for interracial families and biracial people, most biracial people "identified themselves as Black and were so regarded by others."[33]

Family court custody decisions during this period often relied on phenotype and presumptions of biracial individuals as black when making custody determinations involving biracial children. Even when courts placed biracial children with their white natural parents, they specifically noted that the biracial children would be considered black by society. In 1950, the Washington Supreme Court stated in *Ward v. Ward*[34] that the two biracial daughters of a marriage between a black man and a white woman were "colored,"[35] and it awarded custody to the father.

Thirty years later, a New York court indicated that little had changed in prevailing perceptions of race, in *Farmer v. Farmer*.[36] It pointed to five experts who "[a]ll agreed that the child of [the] interracial union, with evident black physical characteristics, however subtle, [would] be perceived by society at large as a black child."[37] Both courts seem to deny biracial children their claim to white identities. Perceptions of biracial children as black have remained widespread.

C. *The Multiracial Movement*

Alongside historical trends continuing the separation of blacks and whites, the multiracial movement may stand as a beacon of greater pluralism with its call for recognition of a person's multiple racial identities. This message resonates in the child custody sphere, calling for judges to consider the special issues faced by a child forming a multiracial identity in the placement determination.[38] The multiracial movement questions the assumption that biracial people must choose one racial identity over another, positing the importance of recognizing both racial heritages in order to form stronger self-concepts.[39] The movement points toward acknowledging all of a person's racial heritages and helping biracial people reconcile

33. *Id.* at 333.

34. 216 P.2d 755 (Wash. 1950), *questioned in* Tucker v. Tucker, 542 P.2d 789 (Wash. Ct. App. 1975). This case is discussed further in Part II.

35. *Id.* at 755.

36. 109 Misc. 2d 137 (N.Y. Sup. Ct. 1981). This case is discussed further in Part II.

37. *Id.* at 140.

38. *See infra* Part III.

39. For example, organizations like Project RACE (Reclassify All Children Equally), which seeks to add a multiracial category to the U.S. Census racial classification section, have grown considerably. Kenneth E. Payson, *Check one Box: Reconsidering Directive No. 15 and the Classification of Mixed Race People*, 84 CAL. L. REV. 1233, 1269 n.183, 1279-80 (1996). While the multiracial movement is gaining strength, "much of the nation still accepts the idea that the slightest trace of African blood colors one black." Michael Paul Williams, *Black? White? Or Other? Conventional Race Definitions Being Questioned*, RICHMOND TIMES-DISPATCH, March 12, 1995, at B1.

It is interesting to note that a 1960 estimate states that 23 million white Americans have "some degree of African genetic ancestry." However, most do not claim their ancestry,

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being both black and white in a society that does violence to black and pampers white. It questions whether multiracialism is the new call to pluralism, and focuses on the importance of a multiracial heritage.[40] Its concern with the continuum of race challenges court definitions that circumscribe race to discrete categories and questions racial definitions on the individual level as well.

The growth of multiracial awareness contains many implications for the judicial consideration of race in child custody disputes. First, an emphasis on equal consideration of natural parental races defines race as an essential biological fact, rather than a social construct. Judicial consideration of race in custody decisions may further entrench essentialized conceptions of race. Some also believe that a "multiracial identity . . . [represents] a repudiation of blackness born of [an] unwillingness to identify with a despised minority."[41] While some believe that fully embracing both aspects of one's racial heritage is important to personal reconciliation and growth, others wonder whether there is racism in multiracialism.[42]

The multiracial movement challenges courts to consider race in more flexible ways which recognize all of a child's racial heritages. Such consideration could validate all of a child's racial heritages without minimizing any part of the child's identity. However, taking a step away from the historical valuations assigned to race may still serve to reify the entire notion of race because of its separate consideration.[43]

II. DISCUSSION OF CUSTODY DECISIONS

A. *Child Custody Decisions—The Best Interests of the Child Test*

The current standard for most custody decisions is the best interests of the child test.[44] It is mandated by statute in a number of states and is the

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because in determining white ethnicity, black ethnicity cannot play a role without disenfranchising a white person from her comfortable white heritage. Roger Sanjek, *Intermarriage and the Future of the Races*, *in* RACE 103, 108 (Steven Gregory & Roger Sanjek eds., 1994). In popular culture and the law, genetic blackness is still the indelible mark.

40. *But see*, Hickman, *supra* note 13, at 1258 (questioning the assumption that biracial people are better able to bridge racial divides than people who assert a monoracial identity).

41. Itabari Njeri, *Call for Census Category Creates Interracial Debate*, L.A. TIMES, January 13, 1991, at E1.

42. *See, e.g.*, Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 155-56 (1994) (discussing "racial fundamentalism").

43. For a discussion of how family courts can consider race in the more flexible ways that would seem to be mandated by the multiracial movement, *see infra* Parts IV and V.

44. However, there is some discussion about revising or replacing the best interests of the child standard. *See, e.g.*, David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984) (proposing new standards for child custody determinations).

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generally accepted test in child custody proceedings, although it is implemented in varying ways.[45] Some states leave a broad statutory statement for the judiciary to interpret,[46] while others carefully set out factors for the courts to consider.[47]

Michigan's test for the best interests of the child, which is defined by statute, sets out factors that judges must consider in meeting the test.[48] Judges must "'consider, evaluate and determine' each of the [eleven] factors individually."[49] Michigan's standard, a broad set of considerations, gives judges substantial autonomy. While judges must consider a number of factors, the factors are relatively inclusive and leave judges substantial discretion. Eight other states have adopted the Uniform Marriage and Divorce Act,[50] which contains a statutory set of considerations similar to Michigan's.

The best interests of the child test itself is highly discretionary and places the child at the center of the decision, while parental interests are peripheral.[51] Unfortunately, under this test it is difficult to identify specific

45. Blackwood, *supra* note 9, at 209; *see also*, Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDS's Best-Interest Standard*, 87 MICH. L. REV. 2215, 2218-22 (1991) (discussing the implementation of the Uniform Marriage and Divorce Act).

46. *See, e.g.*, S.D. CODIFIED LAWS § 25-4-45 (WESTLAW through 1996 Sess.).

47. *See, e.g.*, FLA. STAT. ANN. § 61.13 (West, WESTLAW through 1996 2nd Reg. Sess.).

48. Michigan serves as a good example because its statute is so thorough. MICH. COMP. LAWS ANN. § 722.23 (West, WESTLAW through P.A. 1996, No. 275), states in relevant part: "As used in this act, 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court: (a) The love, affection, and other emotional ties existing between the parties involved and the child. (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any. (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs. (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. (e) The permanence, as a family unit, of the existing or proposed custodial home or homes. (f) The moral fitness of the parties involved. (g) The mental and physical health of the parties involved. (h) The home, school, and community record of the child. (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference. (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. (l) Any other factors considered by the court to be relevant to a particular child custody dispute."

49. *In re* Paternity of Jessica Susan Flynn, 344 N.W.2d 352, 359 (Mich. App. 1983) (citing Lustig v. Lustig, 299 N.W.2d 375 (Mich. App. 1980)).

50. Blackwood, *supra* note 9, at 213 n.32.

51. McKinley, *supra* note 5, at 121. The best interests of the child test is also not about social interests. Some theorists consider child placement, particularly in the adoption context, as a way to encourage greater racial plurality. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1216-17 (1991). Roger Sanjek offers a similar claim that through intermarriage different races assimilate into the American dream. Sanjek, *supra* note 39. However, this note does not advocate the use of biracial children caught in custody disputes, or biracial children

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judicial motives for placement unless judges record all of their considerations in their opinions. In particular, the best interests test does not specify the relevance of race.[52] Thus, judges have ample opportunity to overlook, under-consider, or affirmatively hide the role of race in their custody decisions.

B. *Race in Child Custody Decisions—Case Law up to Palmore v. Sidoti*

The lack of structure over the judicial consideration of race in custody cases allows for judges' personal or unconscious biases to play a role in their decision-making.[53] Even a well-meaning judge may make a decision which inappropriately incorporates race without explicitly examining how the issue should be considered in child custody decisions, and thus may not fully consider the best interests of the child.[54] A brief overview of custody and adoption[55] case law will illustrate problems with the discussions of race in child placement proceedings before the seminal United States Supreme Court case *Palmore v. Sidoti*.[56]

Disputes between natural parents over the custody of their biracial children have often been decided by matching children with the parent with whom they share the most racialized physical traits.[57] Washington's Supreme Court stated in the 1950 *Ward v. Ward* decision, a custody case between a black father and white mother, that the biracial children were "colored" and would "have a much better opportunity to take their rightful place in society if they [were] brought up among their own people."[58] The court's assumption that biracial children were de facto "colored" presumes that biracial people can claim only one race. The court assigned those biracial children the race it deemed most appropriate, probably based on appearance.

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generally, as the vehicle for challenging American society's attitudes toward race—such a position places a huge burden on such children and would hardly be in their best interests.

52. Twila Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 59-60 (1990-91).

53. *See infra* text accompanying notes 67-68.

54. For a discussion of the importance to a biracial child's emotional development of developing a racial identity, *see infra* Part III.

55. While transracial adoption presents a different set of challenges for the legal system, it also raises some of the same issues as custody disputes, such as the questionable essential character of race, and the importance of living with parents who encourage positive racial identification and are able to teach coping skills for dealing with racism. While there are relatively few court decisions concerning custody disputes between natural parents over their biracial children, a number of adoption and foster care decisions explicitly discuss the importance of race in their placement determinations. One adoption case, *Reisman v. Tennessee Department of Human Services*, 843 F. Supp. 356 (W.D. Tenn. 1993), will be discussed in Part II.C because of its thorough and instructive treatment of race.

56. 466 U.S. 429 (1984).

57. Rachel Moran, Interracial Intimacy 362 (Nov. 1996) (unpublished manuscript, on file with Rachel Moran).

58. *Ward*, 216 P.2d at 756.

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In 1956, an Illinois county court also awarded custody on the basis of racialized appearance in a dispute between a white mother and a black father, in *Fountaine v. Fountaine*.[59] The judge agreed with plaintiff's petition that the children had "the outstanding characteristics of the Negro race [and that] these children will make a better adjustment to life if allowed to remain identified, reared and educated with the group and basic stock of the plaintiff, their father."[60] However, the judge also noted that if race were not a factor then he would have awarded the mother custody of the children. On review, the Illinois Appellate Court held that "the question of race alone [cannot] outweigh all other considerations and be decisive of the question,"[61] and it reversed and remanded the case. However, the Appellate Court never specified how or whether race should factor into the lower court's decision on remand.

Washington's Court of Appeals stepped away from *Ward*'s holding and relied on *Fountaine* in *Tucker v. Tucker*,[62] a 1975 custody dispute between a black father and a white mother. The state court affirmed a lower court decision granting custody of the child to the mother. It stated that while "the court can and should take into consideration all relevant considerations which might properly bear" upon the custody decision, race could not be the decisive factor in a custody battle.[63]

Still, *Tucker*'s discussion of race and its impact is problematic. The court implies that race-matching based on appearances is acceptable in the calculus of determining the best interests of the child, so long as it is not the determinative factor. This implication is bolstered because the Court of Appeals did not lay any groundwork for the consideration of race itself. Although the determinative impact of race had been diluted, judges apparently were still permitted under this analysis to consider the racialized physical characteristics of parents and children in custody decisions.

Racialized appearance remained important in custody determinations in the early 1980's. The New York Supreme Court granted custody to the white mother rather than the black father in the 1981 case *Farmer v. Farmer*, but noted that all five experts called in the case agreed that the biracial child would be considered black by society at large and would "endure identity problems, which can be exacerbated in her because of the mixed racial heritage."[64] The court considered race as part of its determination of the best interests of the child, but also weighed a number of other

59. 133 N.E.2d 532 (Ill. App. Ct. 1956).

60. *Id.* at 534.

61. *Id.* at 535.

62. 542 P.2d 789 (Wash. Ct. App. 1975).

63. *Id.* at 791.

64. 109 Misc. 2d 137, 140 (N.Y. Sup. Ct. 1981). *Farmer* seems to be an atypical custody case, because five expert witnesses were called to speak about the importance of race in the child's upbringing. This may point to the relative wealth of the participants, or to some other factor that would lead five experts to testify at a child custody hearing.

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factors including evidence that the child was well-cared for by her mother, expert reports claiming that the child would not necessarily suffer maladjustment just because she was raised by her white parent, and a report from the Probation Department recommending placement with the mother.[65]

While the court believed race to be only one factor among the many factors weighed in determining the best interests of the child, it spent at least six and a half pages of an eleven page decision discussing expert testimony on race and the law concerning race in placement decisions. The discussion noted that race is generally not a significant factor in child placement decisions, but it cited a number of decisions in both the child custody and adoption contexts which considered race.[66] Many courts appeared to consider race in placement decisions; few courts, particularly in child custody decisions, were very specific about how they weighed race, perhaps creating a presumption that race was not a significant factor.

The substantial amount of time spent on determining how to consider race both belies claims that it is insignificant and shows the lack of clear statements in case law about its treatment. In the end, the *Farmer* court focused on the mother's ability to help the child develop personally, but did not include a consideration of the mother's ability to help the child develop her racial heritage. A stronger statement of the relevance of race in custody decisions is necessary in order to prevent ill-fated attempts to minimize race which, in the end, do not serve the best interests of the child.

Race clearly plays a role in custody disputes over biracial children, but courts often remain vague about how the races of the child and of the parents mesh with other parenting factors to support the final custody determination. Judges, like all Americans, are socialized to negatively stereotype blacks.[67] Race inadvertently informs judicial decisions, even if judges attempt to be colorblind in their decisions. Judges have preconceived "value systems, cultural biases and stereotypical beliefs"[68] that can influence their judgment, particularly if judges are not vigilant in their self-

65. The court noted that it did not weigh the father's kidnapping of the child during a scheduled visitation period. It also stated that it did not weigh the father's disappearance once the child was found, five months after she was kidnapped. *Id.* at 138-39. However, the court's account of its considerations seems unlikely, as well as not in the best interests of the child.

66. *Id.*

67. Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Lawrence's basic theory is that through the process of constant socialization in American society, people internally inscribe certain stereotypes about racial groups. Even though such inculcation may be fought every step of the way, someone growing up in American society has certain unconscious expectations of different racial groups based solely on social norms. Twila Perry notes that in the foster care scenario, the best interests of the child test does not encourage judges to be "sensitive to their own potential unconscious biases or to the ways in which the use of race may be stigmatizing and may perpetuate past prejudices." Perry, *supra* note 52, at 76. Unconscious racism does not disappear when it becomes an intrafamily dispute.

68. McKinley, *supra* note 5, at 122.

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awareness of possible biases they harbor. Such unconscious and uncountered racism in custody determinations can skew placements so that race becomes determinative and other factors relevant to the child's best interests remain unexplored.

Even judges who make conscious efforts to carefully consider race may not know what to do. Some controversy surrounds the practice of placing a biracial child with minority-race parents so that the child will learn how to cope with discrimination.[69] Alternately, white judges may be aware of the negative opinion they have of black people and refuse to consider "information on the differences that exist among cultures and heritage."[70] Therefore, they may fail to see the different value structures underlying each heritage. Judges may also avoid recording their consideration of race in placement decisions for fear of being called racist. All such concerns work against the well-reasoned consideration of race that should occur in custody determinations.

C. Child Custody Decisions—Case Law from Palmore Onward

The importance of race in a custody modification dispute came before the United States Supreme Court in 1984 in *Palmore v. Sidoti*.[71] There, a Florida trial court had transferred custody from the natural mother to the natural father, both white, because it had found that the white mother's remarriage to a black man was not in the child's best interests. The natural father had argued that the child would be harmed by the societal disapproval greeting her new home, but the Supreme Court held the custody transfer impermissible because it discriminated on the basis of race.[72] The Court stated that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[73]

Palmore could indicate the Supreme Court's disapproval of the consideration of race in any manner in child custody decisions.[74] Yet, state courts have continued to consider race in child placement determinations. Since *Palmore's* inconclusive condemnation of the use of race in child placement

69. *Cf.* NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION PAPER (1972), *reprinted in* TRANSRACIAL ADOPTION 50 (Rita Simon & Howard Alstein eds., 1977) (claiming that in the adoption context biracial children should be placed with black parents in order to learn how to cope with racism). *But see*, Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 956-59 (1994) (claiming that biracial children may benefit from adoptive placements in white homes).

70. McKinley, *supra* note 5, at 121.

71. 466 U.S. 429 (1984).

72. *Id.* at 433.

73. *Id.*

74. The tone of the Court's decision intimates that the Court believed the girl might suffer harm from growing up in a mixed-race home. Myriam Zreczny, *Race-Conscious Child Placement: Deviating From a Policy Against Racial Classifications*, 69 CHI.-KENT L. REV. 1121, 1131 (1994).

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decisions, a few courts have included greater discussions of the role of race in their placement determinations. The expanded discussions have pointed to problems in judicial considerations of race. Current court discussions often do little to overturn assumptions that people who look alike belong together. The 1993 case *Reisman v. Tennessee Department of Human Services*[75] is illustrative because of its in-depth discussion of race in its placement decision, even though the case concerns the adoption of a biracial child, rather than a custody dispute between natural parents.

In *Reisman*, the Reismans, white foster parents, wanted to adopt their biracial foster child. They sued the Department of Human Services because the state's adoption policy was to match babies with families of similar racial backgrounds.[76] Under the Department of Human Services' policy, biracial children were classified as black because of the Department's belief that biracial children would be categorized as black by society and subjected to racial discrimination.[77] The Department felt that placing biracial children with black parents gave them parents who could help them respond to racism and cope with its pain.[78]

The Reismans claimed that either race should not be considered in adoption placements, or consideration of race should be limited to "the applicant's ability and willingness to address the child's racial, ethnic, and cultural needs."[79] Tennessee contended that its standard met the Reisman's demands in that it considered applicants whose experiences had prepared them to "adequately address the child's racial, ethnical [sic] and cultural needs."[80] It further stated that it preferred to place biracial children with black families because biracial children would de facto gain exposure to their "white heritage in school, through the media, the entertainment industry and other similar sources."[81]

The federal District Court found that biracial children were entitled to claim protection as both white and black individuals under the Equal Protection Clause.[82] It then held that Tennessee's treatment of biracial children as black violated the equal protection of biracial children by relegating "the white part of the heritage of a biracial child"[83] to a secondary status. The *Reisman* court found that automatically assigning a black heritage to biracial children and prioritizing adoption placements in homes with black parents violated the Equal Protection Clause of the Fourteenth Amendment.[84]

75. 843 F.Supp. 356 (W.D.Tenn. 1993).
76. *Id.* at 357.
77. *Id.* at 364.
78. *Id.* at 360.
79. *Id.* at 358.
80. *Id.* at 361.
81. *Id.* at 364.
82. *Id.* at 363.
83. *Id.* at 364.
84. *Id.*

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After mandating that biracial children be "classified as biracial children with a biracial culture and a bi-racial heritage,"[85] the District Court concluded that biracial children should be placed in "adoptive homes with biracial families."[86] If no biracial families could be found, the Court allowed placement with parents who would "provid[e] for the children appropriate love and nurture with a commitment to assist the children in solving as much as possible problems created by members of society,"[87] without regard to the parents' races.

The *Reisman* decision explicitly constructs a "biracial heritage" with equal emphasis on both racial heritages. The focus on placing biracial children with a biracial family highlights the court's rigid reliance on race based on biology. The *Reisman* court's decision places children purely on the basis of biology, using race as a proxy to determine parenting skills. The court's statement that a mixed-race couple would be the best placement for a biracial child reinforces the underlying assumption that like belongs with like.[88]

Still, the *Reisman* decision considers the possible effects of race on the child in an unusually nuanced manner. It notes the unique stresses a biracial child may feel when trying to negotiate in society, and attempts to take them into account in its placement decision by seeking a placement that will be sensitive to the possible difficulties facing the child.

Most cases which explicitly consider the impact of race on biracial children are adoption cases like *Reisman*. They differ from custody disputes between natural parents because of the lack of parental genetic ties to the child. Only one custody decision between interracial natural parents since *Palmore* has explicitly addressed the impact of race in its custody determination. *Jones v. Jones*[89] concerned a custody dispute between a Native American father and a white mother. In granting custody to the father, the trial court had stated that it made its determination on a racially neutral basis. On appeal, after discussing *Palmore*, the South Dakota Supreme Court held it "proper for a trial court, when determining the best interests of a child in the context of a custody dispute between parents, to consider the matter of race as it relates to a child's ethnic heritage and which parent

85. *Id.* at 365.

86. *Id.* Although the term "biracial families" is never defined explicitly, it probably refers to a family in which one parent is black and the other white. While discussing *Reisman*, I will continue to use the court's language and will refer to biracial families using this definition.

87. *Id.*

88. Moran, *supra* note 57, at 426.

89. Jones v. Jones, 542 N.W.2d 119 (S.D. 1996). Although this case involves a custody dispute between a white person and a Native American person, and therefore strays from the black-white paradigm assumed in this note, *Jones* is extremely important because its treatment of race in a custody decision between natural parents is so nuanced. Because of its importance, it is included.

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is more prepared to expose the child to it."[90] It recognized that people "form [their] own personal identities, based in part, on [their] religious[,] racial and cultural backgrounds,"[91] and noted that to disallow court consideration of race would claim "that society is not interested in whether children ever learn who they are."[92]

Jones is the first published decision which appears to consider the impact of a child's race in terms of the child's ability to construct a complete personal identity, rather than trying to pigeonhole the child to fit into one racial category or claiming that race is insignificant. The decision recognizes that if the court refuses to consider the child's ability to construct a complete racial heritage, then the court does not fulfill its duty to determine the placement that will serve the best interests of the child.

Early case law showed a strong proclivity among lower state courts toward placing biracial children with their black fathers rather than with their white mothers.[93] One reason explaining why so many courts overturned traditional presumptions of women as the primary caregivers is that these courts relied on race-matching between the parents and the children to determine custody.[94] Such matching may have occurred because of misguided judicial notions about the best place for a child being among people who "look"[95] like her, unconscious judicial racism, or conscious racism[96] either cloaked in racially neutral terms or not discussed at all.

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90. *Id.* at 123-24.

91. *Id.*

92. *Id.*

93. Most interracial marriages between black and white individuals were between black men and white women during this period. In 1970, out of 65,000 interracial marriages, 41,000 were between black men and white women. In 1988, out of 218,000 black-white interracial marriages, 149,000 were between black men and white women. Perry, *supra* note 52, at 61 n.32 (citing BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE, *Interracial Married Couples: 1970-1988, in* STATISTICAL ABSTRACT OF THE UNITED STATES 44 (1990)).

94. Until recently, courts demonstrated a strong maternal preference in custody disputes, particularly for children of "tender years." Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. ST. L.J. 543, 548-49 (1996). In cases involving an interracial marriage between a black man and a white woman, however, many fathers received custody in lower court decisions on the basis of racial matching. *See, e.g.*, *Ward*, *supra* note 56 and accompanying test (Washington Supreme Court's affirmance of the father's grant of custody based at least partially on racial justifications.). Appellate courts continually either remanded such cases for further discussion or simply reversed and granted custody to the white mothers.

95. In fact, greater phenotypic differences can exist between people of the same race than between people of different races.

96. Conscious judicial racism can also play a role in custody disputes. Susan Grossman notes that conscious judicial racism can be cloaked in race-neutral terms. *See* Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 314-15 (1967-68) (discussion of *Murphy v. Murphy*, 143 Conn. 600 (Conn. 1956)). This is born out in case law. Relying on two cases in which white mothers lost custody of their white children after marrying black men, Grossman states that "where a white mother and father are contestants in a custody suit, the mother's remarriage to a Negro will lead a court to rely on ordinarily weak arguments to deny her custody of the

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More recent child placement decisions have begun to grapple with appropriate ways to consider race without violating *Palmore's* interpretation of the Equal Protection Clause. *Reisman* and *Jones* both show courts' increased willingness and ability to struggle with race in placement decisions. This type of analysis of race in placement decisions needs to be extended to more custody cases in order to place children with the parents who are best equipped to help them form complete personal identities.

III.
SOCIOLOGICAL STUDIES

Sociological and psychological studies point to the importance of biracial children positively identifying with both of their racial heritages in developing positive self-images.[97] Children's ability to sculpt their racial identity is an integral element of their personal development of their identity, and ultimately an important element in their emotional health.[98] Courts therefore need to consider which parent is better able to help children create racial identities with which they are comfortable. In light of the importance of a biracial child creating a dual racial identity, the court must consider parents' ability to encourage and enable children to explore all of their racial identities.

A. *The Importance for Biracial Children of Creating a Dual Racial Identity, and Problems Biracial Children Face in Creating a Dual Identity*[99]

Numerous studies have recognized the uniqueness of biracial identity development and shown the importance to a biracial child's emotional health of forming an identity which incorporates her multiple racial heritages.[100] Such incorporation is important because "a strong positive self-concept [is] crucial to emotional health, and a clear racial identity [is] one part of that self-concept."[101]

child. The court will invariably deny that the racial factor is decisive, but such claims are questionable in view of the lack of precedent for some of the arguments which have been used to support these decisions." *Id.* at 317. However, this note does not address conscious judicial racism cloaked in race-neutral terms because it presents a problem requiring different sorts of educational solutions.

97. Herring, *supra* note 1, at 35.

98. SPICKARD, *supra* note 2, at 339.

99. Almost all of the studies relied on in this part use a black-white paradigm. Therefore, when discussing biracial children, all of the references will still be to a child with one white parent and one black parent.

100. Herring, *supra* note 1, at 31-34 (reviewing studies from the last decade and finding that most conclude that biracial people face special challenges in developing dual racial identities). *See also*, Michael R. Lyles, Antronette Yancey, Candis Grace, & James H. Carter, *Racial Identity and Self-Esteem: Problems Peculiar to Biracial Children*, 24 J. AM. ACAD. CHILD PSYCHIATRY 150 (1985) [hereinafter *Racial Identity and Self-Esteem*] (case study).

101. SPICKARD, *supra* note 2, at 339.

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In order to develop a complete sense of self, biracial children need to integrate their "dual racial and cultural identities while also learning how to develop a positive self-concept and a sense of competence."[102] One study found that biracial people who identified predominately as black or white were significantly more likely to feel conflicted than a biracial person who identified as interracial.[103] The results of the study suggested that an "interracial identity is the most conducive to the emotional well-being of interracial children."[104] Failing to identify with one of her racial identities may leave a biracial child feeling misidentified, which will negatively impact her ability to build self-esteem.[105]

Developing comfortable racial identities may be more difficult for biracial children than for children whose parents are both the same race because of the special challenges biracial children face in "consolidating their identities."[106] Biracial people may feel pressured to identify more strongly with their minority race because a white identity is an "illegal identity" for them.[107] On the other hand, biracial people may reject or negatively stereotype their minority heritage in an attempt to lay claim to what they may see as their part of the dominant majority.[108] Many researchers have noted the difficulties some children face in trying to create a biracial identity in a society which expects people to have a "singular ethnic identity."[109] The unique stresses a biracial child faces in creating a positive dual racial identity mandate court concern with issues that impact a biracial child's ability to create a strong racial identity.

B. *The Importance of Family in Creating a Biracial Child's Racial Identity*

A biracial child's "mixed ethnic heritage [may] exacerbate the normal process of identity development by creating ambiguity and uncertainty in

102. Herring, *supra* note 1, at 31, (citing Jewelle Taylor Gibbs, *Biracial Adolescents, in* CHILDREN OF COLOR 322 (J.T. Gibbs & L.N. Huang eds., 1989)).

103. Ursula M. Brown, *Black/White Interracial Young Adults: Quest for a Racial Identity*, 65 AM. J. ORTHOPSYCHIATRY 125, 129 (1995).

104. *Id.*

105. SPICKARD, *supra* note 2, at 339.

106. Gibbs & Moskowitz-Sweet, *supra* note 11.

107. Brown, *supra* note 103, at 128.

108. Gibbs & Moskowitz-Sweet, *supra* note 106, at 582. *See also*, Jewelle Taylor Gibbs, *Identity and Marginality: Issues in the Treatment of Biracial Adolescents*, 57 AM. J. ORTHOPSYCHIATRY 265, 268 (1987)(dealing with biracial adolescents' preferred association with their white heritage and the issues arising out of this).

109. Herring, *supra* note 1, at 31. *See also*, Gibbs & Moskowitz-Sweet, *supra* note 106, at 579 (stating that social pressures for singular racial identifications is normalized, at least in part, by the U. S. Census classification scheme, which allows people to select only one race); SPICKARD, *supra* note 2, at 339 (noting that since society classifies people as black or white, but not both, parents of biracial children must fight against social conventions when encouraging their children to form biracial identities).

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individual identification with parents."[110] A supportive family plays an integral role in helping biracial children confront the special challenges they face in forming a positive racial identity.[111] Biracial children's self-identifications are strongly influenced by parents' views about race, including parental feelings about their own races, their feelings about the child's racial identification, and their willingness to discuss race with their child. One study found it important to encourage parents of biracial children to communicate their attitudes about race "clearly and consistently to their children as well as encourage their children to discuss the complexities and challenges of being biracial/bicultural."[112] In order to be able to help their children create positive racial identities, parents must be willing to search their own feelings about race and come to terms with any ambivalence they feel.[113] The study further suggested that parents be "encouraged to discuss their efforts to expose their teenagers to both [of their] racial/ethnic heritages," implying the importance of the parents' efforts to expose their children to their racial heritages, as well as the importance of open family discussions about race.[114] Parents should not wait to discuss race with their children, but "should begin when the child is becoming racially aware and concerns are raised."[115]

Other researchers have urged parents of biracial children "to acknowledge the differences and to facilitate the formation of a sense of pride in their children's 'doubly rich' heritage."[116] As well as providing a safe space for children to discuss race and identity, parents can provide positive role models who represent both of a child's racial heritages in order to help teach biracial children "that they are and culturally can be members of both races."[117] In addition, "[c]ontact with various racial groups and exposure to black and white cultures" also affect biracial children's ability to form positive self-images.[118] Family activities such as "ethnic-based cultural activities and interracial and intercultural social activities" can help

110. Gibbs, *supra* note 108, at 274.

111. *See* Gibbs & Moskowitz-Sweet, *supra* note 106, at 581.

112. Gibbs & Moskowitz-Sweet, *supra* note 106, at 586.

113. *Id. See also*, *Racial Identity and Self-Esteem*, *supra* note 100, at 152.

114. Gibbs & Moskowitz-Sweet, *supra* note 106, at 586.

115. *Racial Identity and Self-Esteem*, *supra* note 100, at 152.

116. Christine Kerwin, Joseph G. Ponterotto et. al., *Racial Identity in Biracial Children: A Qualitative Investigation*, 40 J. COUNSELING PSYCHOL. 221, 221 (1993) [hereinafter *Racial Identity in Biracial Children*] (citing F. Wardle, *Are You Sensitive to Interracial Children's Special Identity Needs?*, 42 YOUNG CHILDREN 53 (1987)).

117. H. Prentice Baptiste, Jr., *Rearing the Interracial Child*, COMMUNIQUE, Dec. 1983, *quoted in* SPICKARD, *supra* note 2, at 339.

118. Brown, *supra* note 103, at 128.

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bolster biracial children's self-esteem.[119] Further suggestions include insuring that biracial children "participate in the cultural activities of both parents."[120]

A biracial child's ability to form a positive self-image is based in part on her ability to form a positive racial identification. A racial identification which incorporates both of the child's racial heritages has been found to be important to a biracial child's ability to form a positive self-image. Parents play an important role in transmitting positive ideals about a biracial heritage to their children. It is therefore incumbent on courts considering the best interests of a biracial child to consider in its balance which parent can better transmit positive views of both of the child's racial heritages to the child.

IV.
PROBLEMS WITH CONSIDERING RACE IN CUSTODY DECISIONS

While a positive racial identification may be important to a biracial child, one could argue that the law should not step in to try to shape the development of this identification through the consideration of race in custody disputes. The judicial consideration of race in placement decisions may seem to rigidify race by positing that a biracial child's racial identification must be based on biology. Such considerations may also appear to run afoul of the Equal Protection Clause. However, upon examination, neither concern presents a real bar to considering race in custody decisions.

A. Definitional Issues

A consideration of race in custody decisions would use race in a way that is partly biological, in that it would define someone as biracial on the basis of her parents' race.[121] Such a definition conflicts with theories that state that race is a social construction,[122] and might serve to strengthen racial categories. The idea that the law reifies racial categories is very powerful—the one-drop rule helped maintain social structures based on race.[123] Mandating that courts consider race in custody decisions may reinforce socially created racial categories that should be questioned.

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119. Gibbs & Moskowitz-Sweet, *supra* note 106, at 588.

120. *Racial Identity in Biracial Children*, *supra* note 116, at 221 (citing A.J. Adler, *Children and Biracial Identity*, *in* CHILDREN'S NEEDS: PSYCHOLOGICAL PERSPECTIVES (A. Thomas & J. Grimes eds., 1987); R.G. MCROY & L.A. ZURCHER, TRANSRACIAL AND INRACIAL ADOPTEES: THE ADOLESCENT YEARS (1983)).

121. *Cf.* Hickman, *supra* note 13, at 1205 (critiquing the push for a multiracial category on the U.S. Census because of its reliance on a biological view of race).

122. *See, e.g.*, Spickard, *supra* note 2, at 18-19 (discussing the ethnicity and racial identity and their origins).

123. *Cf.* Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1658 (1995)(discussing the one-drop rule).

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However, in creating a pragmatic test to insure the protection of biracial children, theory may falter in the face of difficult realities. Custody law needs to address how biracial children reach their fullest potential in a racist society that is not designed to encourage or accept them. Unlike prior legal classifications which have used race in order to divide people and insure inferior status for some, considering race in custody decisions should work to insure that people do not feel inferior on the basis of their race. Race does not have to be used as a stigma if considered in custody decisions, but can maximize the best interests of the child by insuring a placement which will help the child develop a positive racial identity. Considering race in custody decisions may to some extent reinforce notions of racial categories as real and discrete. However, if courts really question themselves about the meaning of race and the creation of racial identity, perhaps the judicial consideration of race in custody disputes can also help to deconstruct racial categories. In the end, the importance of protecting the best interests of the child outweigh any reifying effects from having courts seriously consider and, hopefully, examine their presumptions about race.

Some could also argue that considering race in custody disputes is a form of biological predeterminism, forcing biracial people to be bicultural. However, a consideration of race which looked at a parent's ability to teach a biracial child about both of her racial heritages just ensures that biracial children have ample information with which to continually define themselves, and that their parents play an encouraging role in helping them explore all facets of their identities. The state is not stepping in and deciding levels of race consciousness or racial identity for children, but is simply saying that children ought not to be limited by parental preconceptions.

Court consideration of race in custody disputes runs the risk of making both parents and biracial children feel trapped by race. However, by forcing a consideration of race and treating different racial heritages as equally valid and valuable, the consideration of race in custody disputes may serve to further discussions about race and the value of categories. If the consideration of race focuses not on defining people but on insuring that biracial children have the tools with which to define themselves, then it presents a pragmatic approach for determining a child's best interests, while minimizing a court's ability to determine how the child should build an identity.

B. *Equal Protection Problems*

The Supreme Court has held in a number of different spheres that statutes which consider race are subject to strict scrutiny and must be narrowly tailored to achieve a compelling government interest.[124] *Korematsu*

124. Regents of the University of California v. Bakke, 438 U.S. 265, 290-91, (1978).

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v. United States subjects race-based classifications to the "most rigid scrutiny,"[125] and *Bolling v. Sharpe* finds such statutes "constitutionally suspect."[126] Elizabeth Bartholet adds that "[r]ace-conscious action has generally been allowed only where it can be justified on the grounds of compelling necessity, or where it is designed to benefit racial minority groups either by avoiding or preventing discrimination."[127]

Strict scrutiny of racial classifications has been upheld in the child custody context in *Beazley v. Davis*.[128] There, the lower court judge looked at a photograph of the children from the marriage. After determining that their physical characteristics "matched" their black father's more than their white mother's, the judge granted custody to the father. In its opinion to overturn and remand, the Supreme Court of Nevada applied strict scrutiny and found that "[i]n the absence of a showing that race in custody proceedings is necessary to the accomplishment of a permissible State policy, such a consideration would constitute an impermissible discrimination in violation of the Fourteenth Amendment."[129]

A consideration of race in child custody decisions that did not assign placements on the basis of race, but merely considered which parent would expose the child to both of her racial heritages, would not be drawing distinctions between people on the basis of their races. Instead, such an inquiry would ask about a parent's nurturing abilities in relation to the child's racial heritages. As the court would not be distinguishing between people on the basis of race, as in *Palmore* and *Beazley*, equal protection concerns could be avoided.[130]

Even under strict scrutiny, a consideration of race in child custody decisions need not contravene the Equal Protection Clause.[131] States have a compelling interest in determining the best interests of the child for placement decisions. The United States Supreme Court made this explicit in *Palmore*, when it stated that "[t]he goal of granting custody based on the

125. Korematsu v. United States, 323 U.S. 214, 216 (1944).

126. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

127. Bartholet, *supra* note 51, at 1227.

128. Beazley v. Davis, 545 P.2d 206 (Nev. 1976).

129. *Id.* at 208.

130. A test which considered a parent's ability to expose a child to all of his or her racial heritages could be applied in all custody disputes, and not only in disputes over biracial children. This would avoid the equal protection argument that such a consideration of race would treat biracial children differently than children with parents of the same race. The test could be expanded to include consideration of ethnicity or culture in order to insure compliance with the Equal Protection Clause. However, a fuller discussion of this topic is beyond the scope of this note.

131. Blackwood argues that a consideration of race is necessary to the state's purpose of determining the best possible placement for biracial children, and that the state "could not reasonably use less intrusive means." Blackwood, *supra* note 9, at 223-24.

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best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."[132] The importance of appropriate placements for children is also shown by the unusual degree of flexibility granted to judges to make custody decisions.

A consideration of race in custody decisions could also be narrowly drawn to insure that judges only consider the parents' feelings toward their child's racial identity and their willingness to transmit important information to the child. This would insure that the focus of the decision remained on the child and on elements in parenting important to the child's emotional development, rather than having an undue focus on the races of the parents.

In *McLaughlin v. Pernsley*, a federal district court held that the use of race as a determinative factor in adoption proceedings violated both the child's and the parents' rights under the Equal Protection Clause of the federal Constitution.[133] However, the court also "recognize[d] that it must determine whether [white] foster parents . . . can adequately provide for a [black] foster child's racial and cultural needs."[134] While the court did not state explicitly why a consideration of race was necessary, it focused on the ability of the white parents to instill a sense of racial identity in their black adopted child. This indicates the court's belief in the necessity of parental involvement in creating the racial identity of a child, and shows that such a consideration of race in a placement proceeding is narrowly tailored enough to withstand strict scrutiny under the Equal Protection Clause.[135]

In light of the importance many studies give to parents helping a biracial child to develop a positive racial identification, there is a strong nexus between the compelling state interest of determining appropriate custody placements for biracial children and the narrowly tailored means of courts considering parental ability to help the child form a strong racial identity.

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132. *Palmore*, 466 U.S. at 433. While the court's language would seem to state that the state interest in making an appropriate child placement is only substantial enough to withstand intermediate scrutiny, contextually the court appears to mean that the state interest is compelling and therefore adequate to withstand the state interest prong of strict scrutiny. Courts have continued to consider race in child placement decisions in both child custody disputes and the adoption arena. *See supra* Part II.C.

133. 693 F. Supp. 318, 324 (E.D. Pa. 1988).

134. *Id.* at 324 & n.6.

135. *See also*, *In re* Moorehead, 75 Ohio App. 3d 711, 723 (Ohio Ct. App. 1991) (noting, in an adoption proceeding, that courts exercising strict scrutiny over child placement decisions which incorporate considerations of race may still "consider race as a factor, along with other factors, in determining the best interests of the child"); *In re* R.M.G. & E.M.G., 454 A.2d 776, 787-88 (D.C. 1982) (permitting the judicial consideration of race in transracial adoptions because of the difficulties transracially adopted children sometimes have in developing racial identities), *criticized in In re* D.I.S., 494 A.2d 1316 (D.C. 1985). *In re D.I.S.* disagreed with the structure for considering race in adoption placements set forth in *In re R.M.G. & E.M.G.*, but it did not disagree with the possible use of race in placement decisions.

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Therefore, considering race in custody disputes over biracial children, insofar as the inquiry relates to parental ability to help the child form a positive racial identity, does not contravene the Equal Protection Clause.

V.
A Suggestion

A biracial child's ability to form a cohesive racial identity is important to her emotional development. Yet even statutes which comprehensively enumerate factors to consider in determining the best interests of the child do not tell judges to consider parental ability to help a child form a positive racial identity. Such an instruction is important to a court's ability to determine the best placement for a biracial child.

This instruction should be placed in a larger list of factors which can guide the judge in determining the best interests of the child. The list should include typical factors, such as "[t]he love, affection, and other emotional ties existing between the parties involved and the child [and] [t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents."[136] An addition to the list would be "whether a parent is willing and able to expose to and educate children on their [racial] heritage."[137]

Under this standard, judges should consider other aspects of parenting important to the child's interests and development, such as each parent's ability to provide a stable home for the child.[138] In order to preserve judicial discretion, the list of factors should not be ranked or weighted. Judicial consideration of race should simply be one factor in the list of factors judges think about when determining custody placements. Judges should include in their opinions any findings they make about parental ability to encourage a child's exploration of both of her racial heritages so that the record is clear about the weight granted to race in custody decisions. Mandating documentation in opinions will create accountability, while forcing judges to consider race in their decisions.

The consideration of parental ability and willingness to encourage biracial children to explore both of their racial heritages need not require

136. Mich. Comp. Laws Ann. § 722.23 (West, WESTLAW through P.A. 1996, No. 275).

137. *Jones*, 542 N.W.2d at 123. The narrowness of this standard is important to its effectiveness. Otherwise, permitting race to be a vague placement factor "facilitates stigmatization by allowing race to become the decisive factor in placement proceedings." Zreczny, *supra* note 74, at 1122. Zreczny, however, concludes that race should not be a factor in placement decisions because it will lead to discrimination, and allow prejudice to taint placements. *Id.* at 1122-23.

138. This note does not presume to generate a comprehensive list of the factors which should guide judicial determinations of the best interests of the child. It simply lists some possibilities to be included in addition to a factor considering parental ability to help a biracial child learn about both of his or her racial heritages.

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expensive expert testimony. Parents can show the racial composition of their child's school or their friendships with people of different races through the testimony of the school principal or acquaintances. Judges can look for indicators like willingness to live in an integrated neighborhood, to send the child to an integrated school, and to socialize with people of different races. Additionally, judges should look to parental willingness and ability to discuss possible tensions that could arise, and to parental willingness to take the child to cultural events important to both of the child's heritages.

Judges should not only consider economic-based criteria.[139] Judges need to consider not just which parent, if either, can afford to live in an integrated neighborhood, but also whether each parent is willing and able to talk to their child about race and to put their child in situations in which the child can learn about both of her racial heritages, whether that means through expensive learning programs or trips to the public library. The best interests of a biracial child cannot be met by looking for the most materially posh or assimilative placement but rather the placement most likely to emotionally nurture her. Considering parental ability to transmit positive messages about both of a biracial child's racial heritages does not need to further prioritize economic status in determining the best interests of the child.

Consideration of race in custody decisions will also promote the best interests of biracial children indirectly by forcing judges to examine their own assumptions about race. As Martha Minow notes, "[j]ustice can be impartial only if judges acknowledge their own partiality."[140] In looking at which parent is more willing and able to expose their child to both of her racial heritages, judges will have to confront their own feelings about race in custody disputes. Considering race in custody decisions will not dismantle judges' stereotyped notions about different races. However, it may jog them to imagine the parents as having equally valid "cultural values and social norms,"[141] because they will have to place the child with the parent who can provide greater exposure to both. The emphasis on inclusion also minimizes equal protection concerns because it does not explicitly favor parents of either race. Hence, "neither party [has] an advantage based on race."[142]

139. Economic-based criteria are often explicit in best interests of the child tests. For example, Michigan's statute states: "The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MICH. COMP. LAWS ANN. § 722.23 (West, WESTLAW through P.A. 1996, No. 275). *See also*, FLA. STAT. ANN. § 61.13 (West, WESTLAW through 1996 2nd Reg. Sess.); LA. CIV. CODE ANN. art. 134 (LEXIS through 1996 Sess.); N.D. CENT. CODE § 14-09-06.2 (Michie, LEXIS through 1997); VT. STAT. ANN. tit. 15, § 655 (LEXIS through 1997 Reg. Sess.).

140. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 74 (1987).

141. McKinley, *supra* note 5, at 122.

142. Perry, *supra* note 52, at 69.

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However, the attempt to make the factors in a custody decision inclusive may actually lead to exclusion. The history of different races in America is a history of conflict, and a parent of one race may feel negatively toward another race. Basing the custody decision in part on a parent's willingness to teach the child about a part of the child's racial heritage which the parent does not share may place some parents in the awkward position of having to promote ideas with which they disagree. Yet troubling issues are also raised if the custodial parent refuses to talk with the child about one race. A rift may grow between the child and the non-custodial parent if the child sees the non-custodial parent as belonging to a group that the custodial parent disparages or will not discuss. Furthermore, the child must reconcile being part of a group that the custodial parent will not talk about or dislikes.

Some also argue that the consideration of factors like where the parents are willing to live and who their friends are creates an Orwellian oversight of the parents.[143] However, the best interests of the child test marginalizes parental concerns by definition. Parents must routinely show not only that they care for their child, but also that they are in good health, that they are morally fit, and that they can provide a more stable, satisfactory environment than the contesting parent.[144]

Others express concern that some of these factors, such as neighborhood and friends, are particularly subject to change.[145] Again, the consideration of race is no different in this regard from the traditional criteria for custody. A relatively stable life can suddenly be thrown into confusion, or a parent may become unable to care for her child. The court simply determines the best placement at the time of its decision.

A. *Other Options*

There are other ways to consider race in custody hearings concerning biracial children, but they have significant flaws. In joint physical custody, both parents spend roughly equal amounts of time with the child.[146] It is generally, but not always, coupled with joint legal custody, in which the parents share in making major decisions for the child.[147] Joint custody would seem to provide the exposure to both parents' racial heritages that is beneficial for biracial children, but it poses other problems for the best interests of the child test in custody decisions.

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143. Bartholet, *supra* note 51, at 1254.

144. MICH. COMP. LAWS ANN. § 722.23 (West, WESTLAW through P.A. 1996, No. 275).

145. Perry, *supra* note 52, at 68.

146. Margaret M. Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 773 (1997).

147. *Id.* at 773.

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Its first limitation is that in shuttling back and forth between parents, the child may become a pawn.[148] Furthermore, children in joint custody arrangements often feel torn between loyalties to their parents, struggle not to hurt their parents' feelings, and lack cohesiveness in their surroundings.[149] Because of this, joint physical custody may be very stressful for a child.[150]

Joint legal custody may be granted without joint physical custody. It is more feasible than joint physical custody, but again the child can become a pawn between the parents, even if the parents get along well enough to make joint decisions.[151] By mandating that the non-custodial parent have an equal voice in major decisions affecting the child, joint legal custody also may impair the autonomy of the custodial parent.[152] Although it could be encouraged if both parents strongly support it, joint legal custody will not work in most cases.

Twila Perry suggests ignoring race altogether in custody decisions.[153] She states that current laws afford "a level of discretion by courts and agencies that permit . . . decisions to be made on the basis of personal biases, unsupported assumptions, and incomplete analyses that are often insensitive to the range of children's needs and that ignore other important interests."[154] If ignoring race actually addressed those concerns, it would be very appealing. But the fact is that "[r]ace remains a significant factor in the way that people cognize their world."[155] People are not color-blind, and telling judges to ignore race will only maintain and hide present problems by not challenging unconscious judicial racism.

Most importantly, ignoring race works against the best interests of the child. A biracial child could be placed with a parent who is unable to help the child confront difficult issues in creating a positive racial identity. Considering the importance of forming a positive racial identity,[156] ignoring race and placing the child with a parent who will not be able to help the child develop a positive identity is not in the best interests of the child.

VI.
CONCLUSION

Forcing judicial consideration of race in custody disputes between natural parents over their biracial children serves a number of important

148. Jana B. Singer and William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 510 (1988).
149. *Id.* at 509-10.
150. *Id.* at 510.
151. *Id.*
152. *Id.* at 504.
153. Perry, *supra* note 52, at 86.
154. *Id.* at 57.
155. Moran, *supra* note 57, at 459.
156. *See supra* Part III.

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goals. Looking at which parent is more willing and able to expose their child to both of her racial heritages better serves the best interests of biracial children by recognizing stresses they may face in developing a positive racial identity and trying to assign custody to the parent best able to cope with any difficulties they may face. By providing judges a structure in which to examine race, this approach to custody determinations can help judges explore any unconscious feelings about race they may have and will lead to decisions based more completely on the best interests of the child. While some could argue that considering race in custody decisions reifies racial categories, to ignore that racial categories and racism currently exist in America sacrifices biracial children to ideals. Considering race in custody decisions is a pragmatic step towards clarifying the best interests of biracial children and striving for the best placements for biracial children.

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