

THE TRANSRACIAL ADOPTION CONTROVERSY: AN ANALYSIS OF DISCOURSE AND SUBORDINATION

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INTRODUCTION

The debate over transracial adoption¹ is alive and well. After two decades, this topic continues to generate spirited, heated exchanges between those who view transracial placements as positive for both the children and society as a whole and those who view them as injurious to Black² children and Black communities.

1. Transracial adoption can be defined as an adoption in which the adoptive parents and child are of different racial backgrounds. This Article will focus on the adoption of Black children by white adults. It will not discuss the adoption by whites of children from other ethnic groups, nor will it compare issues involving the adoption of Black children with issues pertaining to the adoption of Native American children, which is governed by the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1988 & Supp. IV 1992). Black-white adoptions are sufficiently complex to warrant separate treatment. See Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 53 n.6 (1990-91). Although many transracial adoptions involve children of other ethnic groups, see *infra* notes 111-12 and accompanying text, these adoptions may raise some different issues because of the distinct ethnic histories or varying degrees of acceptance of the particular group by the dominant society. There has been some research on transracial adoption of children who are not Black. See, e.g., William Feigelman & Arnold R. Silverman, *The Long-Term Effects of Transracial Adoption*, 58 SOC. SERV. REV. 588 (1984) (comparing the adoption of Korean, Columbian, and African-American children with the inracial adoption of white children); Dong Soo Kim, *Issues in Transracial and Transcultural Adoptions*, 59 SOC. CASEWORK 477 (1978) (addressing the adoption of Korean children). There is a serious need to devote further attention to transracial adoptions of Indian, Latino, and Asian children and to comparisons that may be drawn between the different groups.

2. In this Article, the word *Black* will appear with a capital B. See Kimberlé W. Crenshaw, *Race, Reform, Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331, 1331-32 n.2 (1988) (stating that Blacks, like Asians, Latinos, and other minorities, constitute a specific cultural group and thus require denotation as a proper noun); see also Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 n.12 (1991) (stating that *Black* should be capitalized because it has deep political and social meaning as a liberating term).

It is interesting that the subject continues to inspire such passions.³ Issues such as affirmative action or housing discrimination are of far greater centrality to the relationship between Blacks and whites than transracial adoption. In addition, health care, education, the homicide rate among African American male teenagers, rates of incarceration, and infant mortality, for example, are matters of far greater urgency for the African American community than transracial adoption.⁴ Moreover, the number of transracial adoptions in this country has always been small. For example, in 1987 the adoption of Black children by white parents represented only 1 percent of all adoptions.⁵ In the final analysis, as also evidenced by the low rates of interracial marriages in this country,⁶ it appears that the

3. The subject of transracial adoption has received a great deal of public attention, including scores of newspaper and magazine articles. Two years ago, the television program "60 Minutes" devoted a segment to the subject. *60 Minutes* (CBS television broadcast, Oct. 25, 1992). Transracial adoption has also proved to be a popular subject on television talk shows. Phil Donahue, Oprah Winfrey, Sally Jessey Raphael, and Geraldo Rivera have all devoted entire shows to the subject. In addition, numerous law review articles on transracial adoption have been published in the last ten years. See, e.g., Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Transracial Adoption*, 139 U. PA. L. REV. 1163 (1991); James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487 (1988); Timothy P. Glynn, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925 (1993); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503 (1984); Rebecca L. Koch, *Transracial Adoption in Light of the Foster Care Crisis: A Horse of a Different Color*, 10 N.Y.L. SCH. J. HUM. RTS. 147 (1992); Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487 (1991); Angela T. McCormick, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303 (1989-1990); Shari O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485 (1986); Perry, *supra* note 1; Marlon N. Yarbrough, *Trans-racial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. REV. 353 (1988); see also Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303 (1967-68); D. Michael Reilly, *District of Columbia Survey: Constitutional Law: Race as a Factor in Interracial Adoptions*, 32 CATH. U. L. REV. 1022 (1983).

4. For a detailed discussion of the state of Black America, see GERALD D. JAMES & ROBIN M. WILLIAMS, JR., NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* (1989); NATIONAL URBAN LEAGUE, *STALLING OUT: THE RELATIVE PROGRESS OF AFRICAN AMERICANS* (1989). These studies set forth statistical comparisons between Blacks and whites confirming the correlation between race and such factors as poverty, unemployment, likelihood of incarceration, infant mortality, lower educational attainment, and shorter life expectancy. See also ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992) (discussing race relations and racial divisions in the United States).

5. RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION, RACE AND IDENTITY: FROM INFANCY THROUGH ADOLESCENCE* 14 (1992). One author found only four cases nationwide before 1970 in which adoption agencies placed white children with Black parents. DAWN DAY, *THE ADOPTION OF BLACK CHILDREN* 99 (1970).

6. In 1970, there were 65,000 Black/white interracial married couples out of a total of 44,598,000 married couples in the United States. By 1980, that figure had risen to 167,000 out of 49,714,000 married couples, and by 1992, the figure was 246,000 out of 53,512,000 married couples. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1993*, at 54 (113th ed. 1992).

vast majority of Americans, Black and white, have no burning desire to live in racially integrated families. So what's all the shouting about?

In a country that is preoccupied with race, and where racial issues continue to permeate so many public and private discussions, the subject of transracial adoption addresses some of the most complex and sensitive aspects of the politics and psychology of race and racism in America. The old cliché, "Would you want your daughter to marry one?," overused and ridiculed though it is, seems to capture something fundamental about the way many white Americans think about the limits of social relationships between the races.⁷ It asks what are really ultimate questions: "Where do you draw the the line with respect to 'those' people?" "Would you want one of 'them' to be part of your family?" The sentiment that the cliché reflects is not an exclusively white one. Some Blacks, including those who may seek racial integration in other areas of life, are also unenthusiastic about the idea of interracial families and relationships.⁸ On the other hand, people of either race may see the formation of more interracial families as a reflection of positive steps toward a truly nonracist society.⁹

7. White opposition to interracial relationships has long been discussed by historians and sociologists. See, e.g., OLIVER C. COX, *CASTE, CLASS AND RACE: A STUDY IN SOCIAL DYNAMICS* 387, 526-27 (1948); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 58-60 (1964). See generally CALVIN C. HERNTON, *SEX AND RACISM IN AMERICA* (1st Black Cat ed. 1988). In a recent study conducted by the National Opinion Research Center at the University of Chicago, one out of every five whites stated that they believed interracial marriage should be illegal. Further, 66 percent of whites said they would oppose a marriage between a close relative and a Black person. Only 6 percent said that they would favor it. Isabel Wilkerson, *Black-White Marriages Rise, but Couples Still Face Scorn*, N.Y. TIMES, Dec. 2, 1991, at A1.

8. See DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL* 74-88 (1992) [hereinafter BELL, *FACES AT THE BOTTOM OF THE WELL*] (discussing Black opposition to interracial marriages and relationships); DERRICK A. BELL, *AND WE ARE NOT SAVED* 198-214 (1987) [hereinafter BELL, *AND WE ARE NOT SAVED*] (same); DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* 69-74 (2d ed. 1980) (same). Research indicates that a substantial number of Blacks are indifferent to the question of interracial marriage. In a recent survey, nearly two-thirds of Blacks said they would neither favor nor oppose a relative's marriage to someone of a different race. Wilkerson, *supra* note 7, at A1. For discussion of Black opposition to transracial adoption, see *infra* text accompanying notes 47-51.

9. For example, the increase in interracial marriages has been attributed to the invalidation of laws prohibiting the practice and the decrease of rigid racial segregation with a concomitant increase in social contact between the races in the schools, the workplace, and other social situations. ANDREW BILLINGSLEY, *CLIMBING JACOB'S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES* 250-51, 253 (1992).

At some level, transracial adoption implicates the charged topic of the sexualization of racism in the United States. Former laws prohibiting interracial marriages, see *infra* note 83, as well as the continuing scorn that interracial couples face in this society, see Wilkerson, *supra* note 7, at A1, reflect the preoccupation this nation continues to have with the idea of interracial sex and marriage. While transracial adoption is different from interracial marriage, it also involves Blacks and whites living together in the intimate setting of the family. Thus, in some ways, both interracial marriage and transracial adoption violate the last taboo—the taboo against interracial families. In cases involving transracial adoption, the sexualization of racism is illustrated in the concern expressed about whom transracially adopted children will be able to date when they reach adolescence. See, e.g., *Davis v. Berks County Children and Youth Servs.*, 465 A.2d 614, 623 (Pa. 1983) ("Although the adopting/

Today, after more than twenty years of research, most studies have concluded that children are not detrimentally affected by being raised by parents of a different race.¹⁰ On the other hand, virtually all of the researchers conclude that children should be placed for adoption with families of the same race whenever possible.¹¹ The seeming contradiction in these conclusions, as well as limitations of the research itself,¹² suggests that it is still too early to draw any final conclusions about the long-term effect of transracial adoption on Black children.

This Article looks behind this important discussion to examine the *ways* in which transracial adoption is discussed and how this discussion affects the children who may be adopted and the communities from which they come. The Article does not focus on whether transracial adoption itself proves harmful to the individual adopted Black child. Nor does it focus on whether a policy preference for placing Black children with Black adoptive parents can withstand constitutional analysis under recent Supreme Court decisions.

Much of what I have to say bears on matters difficult to measure in any objective way, including subconscious motivations, assumptions, value judgments, and intensely personal feelings about race. Where possible, I offer documentation to support propositions about Blacks' and whites' perceptions of racial issues. However, much of what I offer comes from my personal experiences, observations, and insights.

My interest in what I call a discourse analysis of transracial adoption results from a number of experiences I have had discussing race and child placement before different audiences. Several years ago, while writing an article about the role of race in various child placement contexts,¹³ I

foster family may not object to transracial dating and marriage, friends, neighbors and relatives may well express disapproval."'). Researchers have also directed attention to this issue. See, e.g., OWEN GIL & BARBARA JACKSON, *ADOPTION AND RACE* 49 (1983) (discussing dating patterns of transracial and inracial adolescent adoptees); RUTH G. MCROY & LOUIS A. ZURCHER, JR., *TRANSRACIAL AND INRACIAL ADOPTEES: THE ADOLESCENT YEARS* 82 (1983) (same). The discussion of potential problems raised by interracial dating during adolescence has been so frequent that it is commonly referred to as "the puberty argument." See Grossman, *supra* note 3, at 330; Howard, *supra* note 3, at 545. As long as social relationships between the races remain mostly at arm's length and in a state of inequality, there will continue to be a somewhat bizarre and prurient fascination with the idea of interracial families—whether created by marriage or adoption.

10. See *infra* note 102 and accompanying text.

11. See, e.g., GIL & JACKSON, *supra* note 9, at 139; LUCILLE J. GROW & DEBORAH SHAPIRO, *BLACK CHILDREN, WHITE PARENTS: A STUDY OF TRANSRACIAL ADOPTION* 239 (1974); RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTEES AND THEIR FAMILIES* 142 (1987).

12. See *infra* text accompanying notes 103-08.

13. See Perry, *supra* note 1. The article presented a contextual analysis of the issue of race in four different settings: custody modification disputes between parents of the same race when the custodial parent has entered into a subsequent interracial marriage; custody disputes over the biracial children of a divorcing interracial couple; disputes in which white foster parents seek to adopt a child of a different race already in their care; and initial

presented a draft to two different groups: a group of Black legal scholars and a group of predominately white legal scholars. The differing responses of the two groups were intriguing. Many of the Black legal scholars argued that race should be a relevant issue in all of the contexts I was examining. In contrast, in the predominately white group, many participants expressed the view that race should not be a factor in any of the same contexts. I have had similar experiences teaching race and child placement issues in my family law classes. Each year, most of my Black students tend to feel that race should be a consideration in custody and placement decisions; my white students tend to feel that it should not be.

As a result of these experiences and other discussions I have had about transracial adoption, I have concluded that views on the subject reflect two very distinct perspectives. The first I call *liberal colorblind individualism* and the second *color and community consciousness*. These two perspectives go far beyond transracial adoption; they represent different approaches to the basic analysis of race and racism in America. One purpose of this Article is to explore these two very different perspectives and how they continue to shape the transracial adoption debate. An additional goal of the Article is to press beyond the discussion to date and more fully articulate a color and community consciousness perspective on transracial adoption, particularly for a legal audience.¹⁴

Transracial adoption is a sensitive subject. A meaningful discussion requires the disclosure of seldom discussed, often profoundly personal, feelings about racial relationships at both intimate and political levels. Thus, a discussion of transracial adoption may require us to write or say out loud some of those things that are probably more often discussed in hushed tones in small, racially homogenous groups.

Advocates of transracial adoption may feel attacked and believe that their well-intentioned efforts toward a nonracist society are unappreciated by the intended beneficiaries. On the other hand, members of minority groups whose children are being adopted may feel they are being lectured about their own interests by persons who neither share their circumstances nor understand their lives and history.¹⁵ Some of the latter may be persons

adoptions when the child has no relationship—psychological or biological—to any prospective adoptive parent.

14. In attempting to do so, I do not claim to be making a definitive statement of the minority perspective. I recognize that Black people are a diverse group in terms of education, experiences, income, and perspectives. However, I do offer a minority perspective on the issue of transracial adoption that I believe many Blacks would share.

15. It is not only Blacks in America who have expressed concern about the adoption of children of their group by others. Some countries that have served as primary sources of children for intercountry adoptions are now reconsidering the wisdom of permitting such access by foreigners to their children. Some of these countries have determined to reduce the number of children available for adoption by foreigners; some plan to ban the practice altogether. See, e.g., Tamar Lewin, *South Korea Slows Export of Babies for Adoption*, N.Y. TIMES, Feb. 12, 1990, at B10 (explaining desire of Korea to end what it sees as a tainted image of "baby exporter"); *South Korean Adoptions*, WALL ST. J., Mar. 12, 1990, at A6

who oppose transracial adoption altogether. Others, like myself, are disturbed by the direction and potential implications of some of the recent protransracial adoption discourse.

I do not unequivocally oppose transracial adoption, but I strongly support the placement of Black children with Black adoptive parents whenever feasible. I also strongly support efforts to recruit more Black adoptive families.¹⁶ I respect the courage of people who are willing to adopt transracially. In a society in which race is an obsession, these people have demonstrated a willingness to take on the final taboo. Transracial adoptions subject these families to experiences and pressures they otherwise would probably never face. At the same time, the desire to adopt transracially does not immunize white families from the need to examine their own possible racism or to examine the ways in which advocacy of transracial adoption can reinforce Black subordination.¹⁷ Such difficult issues must be confronted in any in-depth exploration of transracial adoption. Thus, perhaps the most important goal of this Article is to contribute to the construction of a dialogue about transracial adoption that is open, frank, respectful, and informed.

Part I of the Article provides a brief overview of transracial adoption. In addition, it describes and illustrates the perspectives of liberal colorblind individualism and color and community consciousness. I explore each perspective's historical and present-day origins, suggesting that the differences may be explained by what I call differing racial narratives.

Part II demonstrates the contrasting approaches of these two perspectives toward several aspects of the transracial adoption debate. These aspects include autonomy and choice in the creation of a family, the role of race in parenting, the stake of the Black community in transracial adoption, and the question of cultural genocide. This part has two purposes. The first is to fill a gap currently existing in the legal scholarship on transracial

(discussing an announcement by Korea that foreign adoptions will be reduced and then banned by 1996).

16. For a more detailed discussion of my views on the issue of race in various child placement contexts, see Perry, *supra* note 1. In my earlier article, I argued that race should be given little or no weight in custody modification disputes between parents of the same race when the custodial parent has entered into a subsequent interracial marriage or in custody disputes involving the biracial children of an interracial marriage. *Id.* at 86-95. I also argued that continuity of relationships should be weighed more heavily than race when foster parents seek to adopt a foster child of a different race who has lived with them for a substantial period of time. *Id.* at 96-109. However, I argued that race should be a significant factor in initial foster care placements and in adoption cases in which there is no prior relationship between the child and the prospective adoptive parents. *Id.* at 109-23.

17. As bell hooks has noted:

[S]ubject to subject contact between white and black which signals the absence of domination, of an oppressor/oppressed relationship, must emerge through mutual choice and negotiation. . . . Simply by expressing their desire for "intimate" contact with black people, white people do not eradicate the politics of racial domination as they are made manifest in personal interaction.

BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 28 (1992).

adoption by further articulating the color and community consciousness perspective. The second purpose is to probe behind familiar arguments concerning transracial adoption to explore some of the feelings, perceptions, misperceptions, and failures of communication that keep this controversy alive.

Part III offers a critique of the legal discourse of colorblind individualism. I argue that some of the recent discourse on transracial adoption from that perspective, however well-intentioned, causes effects that may be precisely the opposite of those intended. Thus, rather than promoting racial equality, some recent discussions of transracial adoption from the perspective of colorblind individualism may actually reinforce the subordination of Black people in general and Black children in particular. The reality is that, while the overt discussion of transracial adoption is based on the idea of colorblindness, considerations of race are often at the core of this discourse. Moreover, the discourse of colorblind individualism, ostensibly about individual rights and interests, often reflects the exercise of power by whites as a dominant group.

My specific critique of this discourse begins by exploring the implications of colorblind individualist discourse in transracial adoption for other, racially charged issues. I argue that this discourse may provide an unfortunate, unintended link between its presumably liberal proponents and those seeking to use a doctrine of colorblindness to further a political agenda most Blacks would consider inimical to their self-interest. I offer some observations on the methodology of subordination. I argue that advocates of transracial adoption too often insufficiently recognize the concerns, experiences, and expertise of the members of the communities from which children are adopted.

Following this discussion, I demonstrate how the discourse of colorblind individualism can contribute to the subordination of Black communities, Black families, Black women, and Black children. By contending that Black communities have no role in determining the interests of Black children, proponents of the discourse of colorblind individualism render Black communities invisible and powerless and suggest that it is appropriate to assign to whites alone the power to determine the circumstances under which Blacks will be treated individually or collectively. I explore how this discourse can contribute to the subordination of Black families, and especially Black mothers, by presenting an image of them as less than adequate parents.

Finally, I will demonstrate how the discourse of colorblind individualism reinforces the subordination of the specific group that is the purported object of its concern: Black children. Despite the rhetoric of colorblindness, advocates of this approach usually presume the validity of an adoption system that places a premium on white infants by reserving them for white parents. Thus, the discourse reinforces the assignment to Black

children of a lesser value. Colorblind individualism further affirms the subordination of Black children by selecting them alone to bear the burdens of implementing visions of social equality. Since colorblind individualism conceptualizes transracial adoption as a one-way street where whites adopt Black children, but Blacks do not adopt white children, the emotional discomforts associated with the process of integration are imposed on Black children alone.

I

OVERVIEW OF TRANSRACIAL ADOPTION AND THE PERSPECTIVES ON TRANSRACIAL ADOPTION

A. *Transracial Adoption*

The number of transracial adoptions in this country grew substantially during the 1960s and through the early 1970s.¹⁸ Reasons for this included an increase in the number of children coming into the foster care system and the social consciousness movements of the 1960s.¹⁹ In addition, the popularity of psychological literature on maternal deprivation resulted in increased recognition of the deficiencies of the foster care system.²⁰ Perhaps the most important factor in the rise of transracial adoptions was a new shortage of healthy white infants.²¹ This shortage resulted largely from the increased availability of abortions and contraception,²² and a growing tendency for white unmarried mothers to keep their babies rather than place them for adoption.²³ It has been estimated that more than a

18. It has been stated that between 1968 and 1971 the number of transracial adoptions increased threefold. McROY & ZURCHER, *supra* note 9, at 8; Perry, *supra* note 1, at 109. However, the statistics are unclear concerning the number of transracial adoptions, interracial adoptions, children in foster care, and children in foster care who are available for adoption. Between 1975 and 1991, the federal government did not keep statistics on adoption. Thus, it is difficult to say with any accuracy the number of interracial or transracial adoptions during that period. SIMON & ALTSTEIN, *supra* note 5, at 12-13. In addition, Simon and Altstein have noted that although both public and private agencies arrange such adoptions, they do so quietly because the issue is so controversial. SIMON & ALTSTEIN, *supra* note 11, at 5.

19. Howard, *supra* note 3, at 505, 514.

20. Maternal deprivation theory posited that separating children from their parents could lead to neurosis and instability of character in adulthood. See JOHN BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE 14-15* (1965); ANNA FREUD, *PSYCHOANALYTIC KNOWLEDGE APPLIED TO THE REARING OF CHILDREN*, reprinted in 5 ANNA FREUD, *THE WRITINGS OF ANNA FREUD* 276 (1969). Some have argued that the consequences of separation have been overstated. See, e.g., Michael Rutter, *Maternal Deprivation, 1972-78: New Findings, New Concepts, New Approaches*, 50 *CHILD DEV.* 283, 298 (1979).

21. SIMON & ALTSTEIN, *supra* note 5, at 2. For further discussion about why the number of transracial adoptions increased during this period, see Howard, *supra* note 3, at 505-11.

22. RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION 11* (1977); Howard, *supra* note 3, at 509.

23. For example, whereas one in five unmarried white mothers gave her child up for adoption before 1973, by 1983 the ratio had decreased to one in twelve. Martha F. Riche, *The Adoption Story*, *AM. DEMOGRAPHICS*, Mar. 1986, at 42, 44.

million couples seek to adopt the 30,000 white infants available each year.²⁴ Because of the limited availability of white infants, some white families began to adopt foreign children; others began adopting Black American children.

In a well-known 1972 position paper,²⁵ the National Association of Black Social Workers (NABSW) took a strong position against transracial adoption.²⁶ This group argued that Black children belong physically, psychologically, and culturally in Black families and that transracial adoption constitutes a form of cultural genocide.²⁷ Many writers have stated that, as a result of the position taken by the NABSW, transracial adoptions declined precipitously,²⁸ falling from 2 percent of all adoptions in 1975 to 1 percent of all adoptions in 1987.²⁹ The NABSW has not wavered from its position.³⁰

There is little agreement about the significance and impact of transracial adoption. Some contend that such adoptions are a necessary means of providing homes to Black children and that Black children raised in white families can grow up to be happy, healthy members of society.³¹ Others have argued that Black children will inevitably suffer if white parents raise them.³² These opponents of transracial adoption contend that there is no shortage of Black homes—only a shortage of resources and commitment by whites to recruit and support adoptive Black families and to encourage the placement of Black children in their own extended families.³³

24. Cynthia Crossen, *Hard Choices: In Today's Adoptions, the Biological Parents Are Calling the Shots*, WALL ST. J., Sept. 14, 1989, at A1.

25. NATIONAL ASS'N OF BLACK SOCIAL WORKERS, POSITION PAPER (1972), quoted in SIMON & ALTSTEIN, *supra* note 22, at 50-52 [hereinafter POSITION PAPER].

26. *Id.* at 52.

27. *Id.* at 50; see *infra* text accompanying note 47.

28. See, e.g., JOYCE A. LADNER, MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES 90 (1977); McROY & ZURCHER, *supra* note 9, at 141; Howard, *supra* note 3, at 517; Mahoney, *supra* note 3, at 489.

29. Bowen, *supra* note 3, at 511.

30. See National Ass'n of Black Social Workers, Inc., Preserving Black Families: Research and Action Beyond the Rhetoric 31 (Feb. 1986) (unpublished manuscript, on file with the *New York University Review of Law & Social Change*) ("Nevertheless, NABSW herewith reaffirms its position against transracial adoption and continues to take a vehement stand against the placement of Black children in white homes."); Molly Davis, *Transracial Adoption*, CRISIS, Nov.-Dec. 1992, at 20 (reporting that the NABSW has recently been attempting to build support for a federal act prohibiting all Black-white adoptions); Ellen Hopkins, *Adopting: The Color Line*, MIRABELLA, May 1990, at 63 (concluding from an interview with Leora Neal, an executive director of NABSW, that, while "[t]he stridency exhibited by the NABSW [in 1972] has diminished somewhat," the organization is still opposed to whites adopting Black children). Another important Black organization recently signaled its opposition to transracial adoption. At its July 1993 convention, the NAACP declined to pass a resolution to support transracial adoption as an alternative to foster care for Black children. *The Racial Divide in Adoption*, CHI. TRIB., Jan. 3, 1994, at 10.

31. See, e.g., Bartholet, *supra* note 3, at 1211-16.

32. See, e.g., *infra* note 48 and accompanying text.

33. See *infra* notes 235-36 and accompanying text.

B. *Colorblind Individualism vs. Color and Community Consciousness*

In my analysis of the transracial adoption controversy, I have uncovered two competing perspectives, *liberal colorblind individualism* and *color and community consciousness*. Liberal colorblind individualism has three dominant characteristics. The first is a belief that complete eradication of racism in this country can be achieved. The second is the affirmation of colorblindness as an ideal—that race should not be an important factor in evaluating individuals and that a colorblind society should be our ultimate goal. Finally, the perspective of liberal colorblind individualism emphasizes the individual as the primary unit for the analysis of rights and interests. In many ways, this perspective is grounded in traditional notions of American liberalism.³⁴

The perspective I call color and community consciousness is far more pessimistic about the eradication of racism. Instead, it views racism as a pervasive and permanent part of the American landscape. This perspective recognizes that race has a profound influence in the lives of individuals—in terms of both the choices they make and the choices they believe they have. In addition, the color and community consciousness perspective values a multicultural society, which requires the continued existence of diverse cultures within our society. Finally, while colorblind individualism views the individual as the significant unit for the analysis of rights and interests, color and community consciousness also emphasizes the rights and interests of the group with which the individual is identified. This ideological difference stems from a strong belief in the interrelationship between the subordination of a group as a whole and the oppression of the individuals within that group.³⁵

In thinking about transracial adoption, I have come to associate the perspective of colorblind individualism with white scholars and the perspective of color and community consciousness with minority scholars.³⁶ However, perspectives on racial issues do not divide clearly along racial

34. When I describe this approach to transracial adoption as liberal colorblind individualism, I mean that people who come to the transracial adoption debate from this perspective are likely to be described as liberal in the contemporary American political landscape. In contrast, individuals who embrace colorblind individualism and who would describe themselves as conservatives might, for example, use the principle of colorblindness as a rationale for rejecting affirmative action programs or the creation of voting districts designed to increase minority political representation.

35. For a discussion, in a different context, of the connection between “the dehumanization of the individual and the subordination of the group,” see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419, 1480 (1991) (“[T]he devaluation of a poor, Black drug addict’s decision to bear a child is tied to the dominant society’s disregard for the motherhood of all Black women.”).

36. There is a growing body of work by scholars of color emphasizing the development of racial perspectives on the law. See, e.g., Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992);

lines. Accordingly, I do not suggest that all white scholars agree in whole or in part with colorblind individualism³⁷ or that all minority scholars agree with the perspective of color and community consciousness.³⁸ My description of these as perspectives rather than the views of particular racial or ethnic groups is quite intentional.

Nor do I believe that the perspectives of colorblind individualism and color and community consciousness can always be discussed in absolutes. Perspectives are generally complex and tend to exist along a spectrum rather than at opposite poles. Articles often strongly reflect one or the other of these perspectives,³⁹ but some may combine aspects of both in differing degrees. In some articles, the colorblind individualist perspective may be subtle or implicit. These qualifications notwithstanding, it is my sense that the two paradigms represent fundamentally different approaches to the analysis of transracial adoption and the broader issues of race implicated in the discussion of that subject.

Various elements of the colorblind individualist perspective may be found in the works of several legal scholars, including Professors Elizabeth

Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); Crenshaw, *supra* note 2.

37. See, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) (arguing that the United States is not a colorblind society, that race has a deep social significance, and that the norm of colorblindness supports racial domination).

38. For example, Professors Steven Carter and Randall Kennedy have taken positions on race that are in opposition to those presented in much of the recent Black legal scholarship. See, e.g., STEVEN CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991) (focusing on the costs to Blacks of affirmative action and defending Black conservative thought); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (critiquing perspectives of minority scholars). Cornel West has commented on the diverse perspectives Blacks bring to the analysis of racial issues:

All people with black skin and African phenotype are subject to potential white-supremacist abuse. Hence, all black Americans have some interest in resisting racism—even if their interest is confined solely to themselves as individuals rather than to larger Black communities. Yet how this “interest” is defined and how individuals and communities are understood vary. So any claim to black authenticity—beyond being the potential object of racist abuse and heir to a grand tradition of black struggle—is contingent on one’s political definition of black interest and one’s ethical understanding of how this interest relates to individuals and communities in and outside black America. In short, blackness is a political and ethical construct.

Cornel West, *Black Leadership and the Pit-falls of Racial Reasoning*, in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL REALITY* 390, 393-94 (Toni Morrison ed., 1992).

An extended discussion of whether there is a distinctive Black experience or Black voice in legal scholarship is beyond the scope of this Article. Obviously, much of my discussion assumes that Blacks often do think similarly, albeit not identically, about many issues that implicate race.

39. See, e.g., Bartholet, *supra* note 3 (reflecting the colorblind individualist perspective); Mahoney, *supra* note 3 (same); Bowen, *supra* note 3 (reflecting the color and community conscious perspective); Perry, *supra* note 1 (same).

Bartholet,⁴⁰ Joan Mahoney,⁴¹ and Margaret Howard.⁴² Articles such as those of Professors Bartholet and Mahoney contain an implicit assumption that the phenomenon of whites adopting Black children constitutes a positive step toward a more integrated, nonracist society and sometimes contain the assumption that a preference for placing Black children with Black adoptive parents, either as a matter of statute or administrative policy, is a step backward towards the era of de jure segregation. One scholar on adoption, Professor Joan Hollinger, asks rhetorically, "Do we want a society in which the distinctions we call 'racial' and 'ethnic' continue significantly to determine the lives of individuals?"⁴³ Similarly, Professor Bartholet states that a preference for placing Black children in Black homes is "inconsistent with an appropriate understanding of the role race should play in social ordering."⁴⁴

The colorblind individualist approach often minimizes interests it deems unrelated to those of the individual child. Thus, Professor Margaret Howard argues, "[O]ne consequence of a child centered focus is that social goals independent of the child's interests, but which can be served by policies governing child placement, must be discounted."⁴⁵ Professor Bartholet similarly contends that policies that promote the placement of children with parents of the same race "are inconsistent with the oft-proclaimed principle that the 'best interests of the child' should be determinative."⁴⁶

40. Bartholet, *supra* note 3.

41. Mahoney, *supra* note 3.

42. Howard, *supra* note 3.

43. Joan Heifetz Hollinger, *Responses to 'Where Do Black Children Belong?,' RECONSTRUCTION*, Vol. 1, No. 4, 1992, at 46, 49. Professor Hollinger continues, "By answering 'no' to this question, Bartholet herself renews the historic, integrationist project of building a society in which an individual's destiny is affected by his or her race only to the extent that the individual chooses." *Id.* Professor Hollinger, however, believes that the adoption process should pay attention to the issue of race. While she supports transracial adoption, she also argues that it is important for a Black child to be placed with adoptive parents who would be sensitive to the race-based needs of the child. *Id.* at 50.

44. Bartholet, *supra* note 3, at 1172. Professor Mahoney argues that "if presumptions based on race or gender are unacceptable in other areas, it is curious that they appear to be so acceptable here." Mahoney, *supra* note 3, at 498. As I have already noted, the colorblind perspective is not an absolute. Professor Mahoney states, for example, that "before an agency makes a transracial placement, the agency may wish to ascertain the motives of the parents for taking the child and their ability to provide the child with connections to his or her birth culture." *Id.* at 499.

45. Howard, *supra* note 3, at 545. Professor Howard's views of the significance of race in adoption warrant some elaboration. She states, "Being raised by parents who share their child's racial, cultural, and ethnic heritage has value, and . . . deserves recognition." *Id.* at 555. She also states that a presumption based on race should be one of the factors considered in an adoption. *Id.* at 511. On the other hand, based on her belief that there is and will continue to be a shortage of Black homes, Professor Howard asserts that "arguments about the preferability of in-race as opposed to transracial placements are irrelevant." *Id.* at 535. Because of this view, and her rejection of the interests of the Black community in transracial adoption, *see* note 137 *infra*, I place her within the perspective of color-blind individualism.

46. Bartholet, *supra* note 3, at 1172.

To date, the NABSW has articulated the most vivid expression of the color and community consciousness perspective. The most explicit statement of the NABSW's stance is its 1972 position paper on transracial adoption, which stated in part the following:

We have taken the position that Black children should be placed only with Black families whether in foster care or for adoption Human beings are products of their environment and develop their sense of values, attitudes and self-concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people.⁴⁷

Similarly, the NABSW's president, William Merritt, testified in 1985 before Congress that transracial adoption is not a viable solution for Black children in need of permanent homes.⁴⁸ Mr. Merritt noted that most

47. POSITION PAPER, *supra* note 25, at 50. The paper further stated:

Our position is based on:

1. the necessity of self-determination from birth to death of all Black people.
2. the need of our young ones to begin at birth to identify with all Black people in a Black community.
3. the philosophy that we need our own to build a strong nation

We . . . have committed ourselves to go back to our communities and work to end this particular form of genocide.

The socialization process for every child begins at birth. Included in the socialization process is the child's cultural heritage which is an important segment of the total process. This must begin at the earliest moment; otherwise our children will not have the background and knowledge which is necessary to survive in a racist society. This is impossible if the child is placed with white parents in a white environment.

Id.

48. *Barriers to Adoption 1985: Hearings on S. 99-288 Before the Senate Comm. on Labor and Human Resources*, 99th Cong., 1st Sess. 217-18 (1985) [hereinafter *Hearings*] (testimony of William Merritt, President, National Association of Black Social Workers). In his testimony, Mr. Merritt stated:

Some experts and others believe that transracial adoption (white families adopting Black children) will alleviate the large numbers of Black children in care. However, this is a myth because:

- The majority of white families who would consider transracial adoption want healthy infants and toddlers. However, the majority of Black children in need of adoption are eight years old or older and are special needs children.
- The placement of Black children in white families does not decrease the large number of Black children in need of families.
- Black children who have grown up in white families suffer severe identity problems. On the one hand, the white community has not fully accepted them, on the other hand, they have had no significant contact with Black people.
- Black children adopted transracially often do not develop coping mechanisms necessary to function in a society that is inherently racist against African-Americans.
- Transracial adoptions in the long term often disrupt and Black children are returned to the foster care program. Children suffer a further sense of rejection as they try to understand why their adoptive as well as their biological parents gave them up.

whites are seeking to adopt infants, while most of the Black children awaiting adoption are older or have special needs.⁴⁹ He also expressed concern about the transracially adopted child's ability to develop a healthy racial identity and the coping mechanisms needed to survive in a racist society.⁵⁰ Mr. Merritt concluded with the following statement:

We are opposed to transracial adoptions as a solution to the permanent placement of Black children. We have an ethical, moral, and professional obligation to oppose transracial adoption. We are therefore legally justified in our efforts to protect the rights of Black children, Black families, and the Black community. We view the placement of Black children in white homes as a hostile act against our community. It is a blatant form of racial and cultural genocide.⁵¹

Although some law review articles on transracial adoption take the position that race can be considered as a factor in placement,⁵² there are few I would describe as expressing a color and community consciousness perspective. Even those articles that reflect aspects of color and community consciousness do not necessarily oppose transracial adoption categorically. Instead, like the NABSW, they emphasize the importance of race in the healthy development of Black children and the interconnection between Black children and Black communities.⁵³

C. Sources of the Perspectives: Racial Histories and Racial Narratives

The correlation between an individual's race and her inclination toward either the perspective of colorblind individualism or that of color and community consciousness may be explained by what I call *racial narratives*. Racial narratives represent the mechanism by which people understand the significance of race in contemporary society. These narratives are made up of a combination of factors. One is the actual history of the racial group of which the person is a member. A second is the individual's perception of that history—a perception that may or may not be in accordance with the historical reality. A third factor is the individual's perception of the extent to which race affects people's lives on a day-to-day basis. This perception is based on information from personal experiences, family, friends,

• In addition, what about the over 50 percent hard to place white children who are not being adopted?

49. *Id.* at 217.

50. *Id.* at 217, 222.

51. *Id.* at 218.

52. See, e.g., Eileen M. Blackwood, *Race as a Factor in Custody and Adoption Disputes: Palmore v. Sidoti*, 1 CORNELL L. REV. 209 (1985); Charles P. Wisdom, Jr., *Will Palmore v. Sidoti Preclude the Use of Race as a Factor in Denying an Adoption?*, 24 J. FAM. L. 497, 506 (1985-86) (stating that *Palmore v. Sidoti*, 466 U.S. 429 (1983), does not preclude the use of race in adoption).

53. See Bowen, *supra* note 3; Perry, *supra* note 1.

relatives, and the media. Black and white Americans have different racial narratives; these narratives shape their perception of racial issues.

Black and white Americans came to this country under radically different conditions. The history of white Americans is, of course, complex and lies beyond the scope of this Article. But one important general difference in the experience of whites from that of Blacks is that they did not come as slaves. Instead, they entered a society where they had the opportunity to live their lives as individuals, seeking their fortunes in a new land. As a result, white immigrants were never forced to confront the barrier of racism as Blacks did. Ultimately, most white immigrant groups assimilated into American life, achieving both economic and political power.⁵⁴

The myth that an individual can advance in society as a result of her own personal drive and initiative⁵⁵ remains a powerful one in American culture. For many whites, the myth is supported by a present reality in which the power of whites as a group accords a white individual a certain luxury of individualism. As a member of the dominant, privileged group, a white individual's daily experience does not require her to confront the reality of discrimination or to link her personal welfare to the fortunes of an oppressed group.⁵⁶ Although most whites are probably aware that their individual advantages are partly the function of group advantage, it is unlikely that whites are continually reminded of the advantages of white skin in the way that Blacks are constantly reminded of the disadvantages of Black skin.⁵⁷

54. See generally LAWRENCE H. FUCHS, *THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY AND THE CIVIL CULTURE* (1990); MALDWIN A. JONES, *AMERICAN IMMIGRATION* (2d ed. 1992).

55. As historian Lawrence H. Fuchs has observed:

Early in its history, spokesmen for the new American nation explained that the U.S. was created by God as an *asylum* in which *liberty*, *opportunity*, and *reward for achievement* would prosper. This powerful new myth . . . became the founding myth of a new political culture, uniting white Americans from different religions and national backgrounds.

FUCHS, *supra* note 54, at 2-3.

56. Although some white Americans' close relationships with Blacks as spouses, lovers, or friends give them the opportunity to observe and gain a greater understanding of racism, see also *infra* note 325, empirical data does not conclusively indicate whether personal interaction with Blacks increases whites' sensitivity to the Black experience. See LEE SIGELMAN & SUSAN WELCH, *BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY* 41 (1991) (citing studies that indicate that whites who have Black friends may still not be aware of the prejudice and discrimination Blacks face).

57. Obviously not all whites experience the world from a perspective of power. Class differences in society leave many whites at the lower end of the economic ladder feeling quite powerless. However, these individuals still receive affirmation from society that Blacks do not: they have the psychological advantage of being white in a society that values the commodity of white skin, and they are not the targets of racism. Whatever their economic status, whites in America understand that, in this country, Black people still occupy a lower rung on the ladder. See, e.g., BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 8, at v ("Black people are the magical faces at the bottom of society's well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us.").

In addition to the theme of individualism, the theme of colorblindness is of longstanding in American ideology. Although, until the Civil Rights Movement of the 1950s and 1960s, segregation on the basis of color was the accepted law of this land, colorblindness had long been expressed as an ideal in both public life and in the law.⁵⁸ In the law, the ideal of colorblindness has often been traced to Justice Harlan's dissent in *Plessy v. Ferguson*.⁵⁹ However, a recognizable argument for colorblindness dates back even earlier, to the 1840s, when Blacks in the state of Massachusetts unsuccessfully challenged separate schools for white and Black school children.⁶⁰ From at least that time through the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the decision of *Brown v. Board of Education*,⁶¹ and the civil rights laws of the 1960s,⁶² those who fought racial segregation have argued that the government has no right to classify individuals on the basis of color.⁶³ The ideal of colorblindness is an important facet of our broader American myth of fairness, opportunity, and individualism. In a colorblind society, race is a nonfactor; it should not play any role in benefiting or hindering individuals, particularly since it provides no indication of a person's ability or character.⁶⁴ Under this view, taking race into account would give importance to a factor that should be utterly meaningless.⁶⁵

Although Blacks historically have asserted the ideal of colorblindness as part of their civil rights struggle, in the narrative of most Black people, the ideal of colorblindness is just that—an ideal. It has never been reality. Instead, race is what pervades the history and narrative of Blacks, and the link between the individual and the group has often seemed inescapable.

Obviously, Blacks did not come to this country as a result of individual choice. Instead, they came as a group, involuntarily, as an enslaved

58. For discussions of the colorblindness principle see, for example, Aleinikoff, *supra* note 37; Gotanda, *supra* note 2; Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance and the Myth of Colorless Individualism* in Bostick v. Florida, 67 TUL. L. REV. 1979 (1993); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

59. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."); see Aleinikoff, *supra* note 37, at 1062-63 ("The norm of color-blindness is invariably traced to Justice Harlan's dissent in *Plessy v. Ferguson*.").

60. See *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850), discussed in ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 40-52 (1992).

61. 347 U.S. 483 (1954) (declaring segregated schools unconstitutional).

62. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73-92 (codified as amended in scattered sections of 18 U.S.C., 25 U.S.C., and 42 U.S.C. (1988 & Supp. IV 1992)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971a-1975d, 2000a (1988 and Supp. IV 1992)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 (1988 & Supp. IV 1992)).

63. KULL, *supra* note 60, at 1.

64. Aleinikoff, *supra* note 37, at 1063.

65. *Id.*

people.⁶⁶ They had little opportunity to succeed as individuals on the basis of personal talent, initiative, or hard work. Instead, a Black person's status as a member of the subordinated racial group almost completely determined that individual's fate. No matter how industrious the enslaved individual might be, the fruits of her labors went to others.

Although slavery ended over one hundred years ago, Black people in this country remain inescapably aware of the relationship between the oppression of the individual and the subordinated status of the group.⁶⁷ Despite the elimination of de jure segregation, many Blacks still perceive racism as an enduring part of the American landscape.⁶⁸ Racism pervades every aspect of Black people's lives.⁶⁹ Thus, Blacks of every social, economic, and educational class understand that their difficulty in hailing taxi cabs in our cities is more than just accidental.⁷⁰

66. See, e.g., WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (W.W. Norton & Co. 1977) (1968); J. SAUNDERS REDDING, *THEY CAME IN CHAINS* (1950).

67. In his dissent in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Thurgood Marshall stated:

It is unnecessary in twentieth-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.

Id. at 400 (Marshall, J., dissenting).

Black people's awareness of the common plight of Blacks extends beyond national borders. When Nelson Mandela was released from prison, Roger Wilkins wrote in an op-ed piece in the *New York Times*:

When the son of an African noble house goes defiantly to prison to continue his struggle for freedom, part of us goes with him. And when we get reports of his growth, stubborn dignity, calm, commanding presence and wisdom, we swell again and think of our ancient heritage and bonds of blood. There was thus a surge of pride when the world for the first time gave a black man his regal due during his lifetime. So when the day finally came, we clapped, cheered and cried at the sight of a king—our cousin, the king—walking in the sunshine.

Roger Wilkins, *Mandela: Our Cousin, a King*, N.Y. TIMES, Feb. 22, 1990, at A23.

68. BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 8; ELLIS COSE, *THE RACE OF A PRIVILEGED CLASS* (1993) (using interviews and data to explore the intense anger of middle-class Blacks at continuing prejudice and discrimination despite their high levels of education and relative affluence).

69. This is true at both a practical and a psychological level. As sociologist Robert Staples has said, "Being Black or White affects every element of individual existence, including access to jobs, education, housing, food, and even life or death." ROBERT STAPLES, *INTRODUCTION TO BLACK SOCIOLOGY* 250 (1976). White Americans are often reluctant to acknowledge the extent to which racism is a part of American life. As Professor Peggy Davis has stated: "The claim of pervasive, unconscious racism is easily devalued. The charge has come to be seen as egregious defamation and to carry an aura of irresponsibility. Nonetheless, the claim is well founded. It must be examined and understood, rather than resisted." Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560 (1989).

70. See, e.g., CORNEL WEST, *RACE MATTERS* at x-xi (1993) (recounting the author's own difficulty in hailing a New York City taxicab and describing this event as an "everyday experience of black New Yorkers").

Research suggests that the relationship between the group and personal identity of Blacks is complex.⁷¹ It is obvious, however, that most Blacks experience their membership in a stigmatized group as a powerful part of their daily experience. It is not surprising, therefore, that among Blacks, the importance of race permeates the analysis of social issues and frequently produces a commonality of position.⁷² On issues involving race and racism, Blacks often feel that the welfare of the individual cannot be the only concern. There is a group to protect. That group is the Black community—all Black people of African descent who share a common oppression in this country.⁷³

Most Black people view race as a pervasive force in the lives of whites as well—both at conscious and subconscious levels. Race dramatically affects how whites analyze most social issues and, for the most part, determines which interactions whites have and choose to have with Blacks or other persons of color. Yet research indicates that Blacks and whites have very different views about the role of race in American life.⁷⁴ Whites as a

71. James S. Jackson, Wayne R. McCullough & Gerald Gurin, *Family, Socialization Environment, and Identity Development in Black Americans*, in *BLACK FAMILIES* 242, 242-56 (Harriette P. McAdoo ed., 2d ed. 1988) (discussing current research and expressing the need for additional research and analysis of the relationship between Black group and personal identity).

72. In the context of legal scholarship, Professor Jerome Culp has stated: We cannot separate our blackness from the rest of ourselves. We are both black and scholars, and our blackness influences who we are, what we teach, and how we view the world. We can and do perform within some forms of traditional legal scholarship, but there are some assumptions that we cannot make about the world or how the world functions. We bring that notion of who we are to the discussion, and it does not simply color the discussion; it infuses the discussion with our being.

Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 *DUKE L.J.* 39, 44.

The controversy over the nomination of Clarence Thomas to the United States Supreme Court provided a potent illustration of the way in which many Blacks perceive the link between the individual and the community. Although opinion in the Black community was divided, some Blacks supported Thomas because they simply did not believe that once he was on the Court, he would make decisions contrary to Black interests. Similarly, feelings of pride in the achievement of having a Black man appointed to the Supreme Court prevented some Blacks from engaging in an analysis of Thomas as an individual with conservative political views as opposed to Thomas the Black man who had succeeded against the odds. See, e.g., Maya Angelou, *I Dare to Hope*, *N.Y. TIMES*, Aug. 25, 1991, § 4, at 15 (expressing the belief that once on the Court, Thomas's background of racial discrimination and poverty would guide him to preserve the interests of Blacks). For a collection of essays by Blacks on the Thomas nomination, see *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL REALITY*, *supra* note 38.

73. See *infra* note 133.

74. A recent book analyzes studies discussing the views of both whites and Blacks on the issue of racial inequality in America. SIGELMAN & WELCH, *supra* note 56. A survey of perceived trends in racial prejudice conducted in 1981 revealed that, by more than a three-to-one ratio, Blacks felt the quality of life for Blacks was improving. However, in 1986 and 1989, almost half believed that income and living conditions for most Blacks were deteriorating, and only one in eight felt that conditions were improving. In contrast, seven out of ten whites concluded that the quality of life for Blacks improved during the same decade.

group see racism as less of a problem and are more optimistic about its eradication.⁷⁵ In the view of many Blacks, however, this society is neither colorblind nor is it in the process of becoming so.⁷⁶

Another important part of Blacks' racial narrative is the existence of a close connection between the individual, family, and community. The roots of this connection are in both the African and the African American experience.⁷⁷ The experience of Blacks in slavery was an integral part of the development of this communal family and social life. For the enslaved, the nuclear family was not a protected entity. Children, who could at any moment be separated from their parents by death or sale, often were reared by a slave community.⁷⁸ As a result of this threat, non-kin slave relationships became imbued with symbolic kinship meanings and functions.⁷⁹

Id. at 62-63. The reporters of the study stated: "This perception of the improvement of blacks' lives during the 1980s flies in the face not only of blacks' perceptions but also of the 'objective' reality of declining black income and fragmenting black family structure that occurred during this decade." *Id.* at 63. Summarizing the finding of these and other studies, the authors of the book concluded:

[W]hat stands out most clearly about perceptions of white prejudice and discrimination is the massive perceptual gap that divides blacks from whites. It is hardly an overstatement to say that blacks and whites inhabit two different perceptual worlds. Whites simply do not acknowledge the persisting prejudice and discrimination that are so obvious to blacks.

Id. at 64-65.

75. *Id.*

76. In a recent article, Drew Days III notes several recent developments in education that suggest that some Blacks no longer have faith in the ideal of integration. For example, some Black parents now support efforts to end school desegregation by busing even though a return to neighborhood schools would likely result in an increase in the number of all-Black schools. Other developments include the creation of all-Black male academies, opposition to higher education desegregation plans that threaten the existence of historically Black colleges, and the demands of Black students on white campuses for special facilities for social and cultural events. Drew S. Days III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 54 (1992).

77. A number of scholars have noted the communal nature of African family life. For example, Andrew Billingsley has discussed the important feature of "restraint" in African family life: "Restraint means that the rights of any person must always be balanced against the requirements of the family or the larger group and the rights of others." BILLINGSLEY, *supra* note 9, at 95; see also Niara Sudarkasa, *Interpreting the African Heritage in Afro-American Family Organization*, in BLACK FAMILIES, *supra* note 71, at 27, 30-34 (contrasting the African extended family with the nuclear family of Western societies and describing the importance in the African family of commitment to the collective). Other scholars of African American history have documented the ways in which communal aspects of an African cultural heritage continue to be expressed in present day Black life. See generally MELVILLE J. HERSKOVITS, *THE MYTH OF THE NEGRO PAST* 143-206 (First Beacon Paperback ed. 1958) (1941) (describing survival of African culture in aspects of the daily lives of Blacks, including family life).

78. See, e.g., HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 261-62 (1976) (describing maturation within the slave community of a slave child who had been purchased as a four-year-old and separated from her birth family).

79. Gutman describes the bonds developed in the absence of blood and marriage in the following way:

Fictive, or quasi, kin played yet other roles in developing slave communities, *binding unrelated adults to one another* and thereby infusing enlarged slave communi-

ter slavery, the notion that the extended family encompassed people other than those related by blood or marriage has remained a powerful factor of Black social life.⁸⁰ This collectivity contrasts with the social organization of the dominant American culture, which is centered around the nuclear family.

The differing racial narratives of Black and white Americans affect the way they perceive any number of issues that implicate race. The next section of this Article will explore how these different racial narratives are played out in the transracial adoption debate.

II

INFLUENCE OF THE PERSPECTIVES ON THE TRANSRACIAL ADOPTION CONTROVERSY

The differing perspectives of colorblind individualism and color and community consciousness shape the transracial adoption controversy in several ways. First, colorblind individualism's focus on the individual accords substantial significance to the right of the individual to make decisions regarding family structure without state interference. In contrast, the color and community consciousness perspective focuses on the struggle of Blacks to make choices to create a meaningful family in light of the oppressive circumstances under which many Black families live. Second, colorblind individualism minimizes the significance of racial differences between parent and child. In contrast, from the perspective of color and community consciousness such racial differences must be recognized and addressed. Third, for colorblind individualists, the interests of the Black community have little relevance to the discussion of transracial adoption; only the immediate best interests of the individual child are important. The perspective of color and community consciousness also focuses on the needs of the individual child but does so within the context of the Black community's legitimate stake in transracial adoption. The color and community consciousness perspective sees the individual Black child as inextricably linked to the Black community and inevitably identified with that community. Finally, to colorblind individualists, cultural genocide is a nonissue because of the small number of children who are transracially adopted. From the perspective of color and community consciousness, cultural genocide—the potential loss of Black culture—is an issue of great practical and symbolic importance. The next section will explore the distinct approaches of the two perspectives in the transracial adoption controversy.

ties with conceptions of obligation that had flowed initially from kin obligations rooted in blood and marriage. The obligations to a brother or a niece were transformed into the obligations toward a fellow slave or a fellow slave's child, and behavior first determined by familial and kin obligation became enlarged social obligation.

Id. at 220.

80. See, e.g., HERSKOVITS, *supra* note 77, at 182-85.

A. *Autonomy and Choice in Family Relationships*

Some authors who write about transracial adoption from the color-blind individualist perspective contextualize transracial adoption within the broader governmental control over individual choices regarding family structure.⁸¹ Under this analysis, the acceptance of an individual's decision to transracially adopt is a logical extension of the 1967 Supreme Court decision in *Loving v. Virginia*,⁸² in which the Court struck down a state statute prohibiting interracial marriage. Before the *Loving* decision, a number of states had outlawed such marriages.⁸³ *Loving* has served as a springboard for arguments supporting the right of personal choice in creating families in other contexts, such as artificial insemination,⁸⁴ surrogate motherhood,⁸⁵ nonnuclear family living arrangements,⁸⁶ and gay and lesbian families.⁸⁷ Thus, in attacking policy preferences for placing Black children with Black adoptive parents, Professor Bartholet cites *Loving* as the Supreme Court's endorsement of the idea that "the state is not permitted to insist that race count as a factor in the ordering of people's most private lives."⁸⁸ Under this logic, the choice to create a multiracial family through adoption is an issue of individual rights as much as the choice to create a multiracial family through marriage.

81. See, e.g., Bartholet, *supra* note 3, at 1227, 1241-42 (citing the unconstitutionality of antimiscegenation laws as supporting a rejection of same race preferences in adoption).

82. 388 U.S. 1, 12 (1967).

83. See, e.g., FLA. STAT. ANN. § 1.01(6) (West 1961), § 741.11 (West 1964) (prohibiting marriages between white persons and persons having 1/8 or more "negro blood"), *repealed* by 1969 Fla. Laws ch. 69-195, § 1; VA. CODE ANN. §§ 20-54 (Michie 1960) (prohibiting a white person from marrying anyone with any "trace whatever of any blood other than caucasian"), *repealed* by 1968 Va. Acts 318. In addition, some states specifically forbade transracial adoptions. E.g., LA. REV. STAT. ANN. § 9:422 (West 1965) ("A single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or her race."), *invalidated* by *Compos v. McKeithen*, 341 F. Supp. 264, 268 (E.D. La. 1972); TEX. CIV. STAT. ANN. art. 46a(8) (West 1969) ("No white child can be adopted by a negro person, nor can a negro child be adopted by a white person."), *repealed* by 1973 Tex. Acts 49, ch. 32, § 1. For a discussion of other early racial restrictions on transracial adoption, see Grossman, *supra* note 3, at 308-09.

84. See, e.g., John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 431 n.69 (1983) (discussing the right to select the characteristics of offspring through the selection of donors of sperm and egg).

85. See, e.g., Jean H. Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 646 n.69 (1991) (citing *Loving* in analyzing surrogacy); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1511 n.323 (same).

86. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (declaring unconstitutional a housing ordinance that defined family to exclude a unit consisting of a woman, her son, and two grandsons); Carrie G. Costello, *Legitimate Bonds and Unnatural Unions: Race, Sexual Orientation, and Control of the American Family*, 15 HARV. WOMEN'S L.J. 79, 119-20 (1992) (discussing history of controlling racial and other minorities by controlling the definition of the family).

87. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1191-93 (Wash. Ct. App. 1974) (addressing claim by plaintiffs to enter same sex marriage).

88. Bartholet, *supra* note 3, at 1227.

From a perspective of color and community consciousness, a critical part of the analysis of autonomy and choice in the creation of families derives from both the history and the current conditions that affect the ability of Black people in this country to create and sustain families. Although *Loving* is important, the history of family and autonomy begins before that decision. The history dates back to the time of slavery, when white slave-owners had virtually complete control over the fate of Black families.⁸⁹ Society accorded no respect to Black people's choices to become husbands and wives or to raise children.⁹⁰ White slavemasters had complete control over Black children; slave mothers had no claim to their children under the law.⁹¹ The slaveowner could sell Black children, beat them, kill them, or remove them from their parents to be raised in his home as house servants. The slave had no right to engage in individual, autonomous decision making about family life.⁹²

The question for some Blacks may be whether the system of white control over the fate of Black children has really changed. The number of transracial adoptions in this country started to increase only after white babies became a scarce commodity.⁹³ Social service agencies, largely dominated by whites, began to place Black children in white homes. To some Blacks, this may suggest that the disempowerment of enslaved Blacks has continued in modern-day America. Whites still hold power over the lives of Black children, determining where and with whom Black children will live. Black children are still commodities to be purchased and sold in a white-controlled marketplace.⁹⁴

In contrast, white ethnic and religious groups have placed an emphasis on intragroup adoptive placements for their own children. For example,

89. See generally GUTMAN, *supra* note 78, at 9 ("No slave family was protected in the law . . .").

90. *Id.* at 35-36, 146-49 (detailing sales of slaves that separated spouses from one another and parents from children).

91. See, e.g., *M'Vaughters v. Elder*, 4 S.C.L. (2 Brev.) 307, 314 (1809) ("[T]he young of slaves . . . stand on the same footing as other animals."); Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 140 n.9 (1990); Dorothy Burnham, *Children of the Slave Community in the United States*, 19 FREEDOMWAYS 75, 75-77 (1979).

92. Gerda Lerner observed:

The essence of slavery was that the slave was legally a chattel, a piece of property to be bought and sold and disposed of at the master's will. He had no legal rights . . . As a result of this feature of the slave system . . . the slave was subject to the arbitrary will of his master in all matters. His treatment depended on the personality, circumstances and economic condition of his master.

Gerda Lerner, *Slavery*, in BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 5, 5 (Gerda Lerner ed., 1972).

93. See *supra* text accompanying notes 21-24.

94. A number of writers have noted that the demands of white families, and not an independent analysis of the interests of Black children, prompted agencies to look anew at the concepts of racial matching that had hindered transracial placements. See, e.g., Bowen, *supra* note 3, at 493; Howard, *supra* note 3, at 510.

historically Jewish and Catholic social services agencies have exercised great influence, if not complete control, over decisions regarding the adoptive placements of children from their ethnic or religious groups.⁹⁵ The agenda of these groups has clearly been to place children intraethnically and intrareligiously.⁹⁶ It is troubling that the NABSW is criticized for having the same goal—placing children within their group of origin.

In addition, many Blacks recognize that the oppressive conditions under which Black families live render Black families more vulnerable to state intervention by government agencies and thus cause disproportionate numbers of Blacks to lose custody of their children.⁹⁷ For these families, surviving each day as an intact unit may be a constant struggle; they simply do not have the autonomy to make decisions about everyday family life that the more affluent take for granted. For many Blacks, then, transracial adoption is inextricably linked to the fragility of the Black family, which fragility is a result of racism and oppression. From this perspective, the issue is not autonomy—choosing an orange, green, or blue family—but the survival of Black families in a hostile environment.

95. See, e.g., JACQUELINE BERNARD, *THE CHILDREN YOU GAVE US: A HISTORY OF 150 YEARS OF SERVICE TO CHILDREN* 4, 7-8, 16-17, 48, 106 (1973) (discussing the history of the Jewish Child Care Association); GEORGE P. JACOBY, *CATHOLIC CHILD CARE IN NINETEENTH-CENTURY NEW YORK* 57-58, 123-25 (1974).

96. BERNARD, *supra* note 95, at 48, 106; JACOBY, *supra* note 95, at 123-25; see also HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 915 (2d ed. 1987) ("Since many of the agencies are sponsored by religious denominations, it becomes obvious that they will at least be favoring their own denomination when they come to place children for adoption.").

The importance of religion in adoption has declined but has not disappeared. In 1954, 43 states had religious matching statutes. Note, *Religion as A Factor in Adoption, Guardianship, and Custody*, 54 COLUM. L. REV. 376, 376 n.5 (1954); as of 1989, 17 states continued to require religious matching in at least some adoptive placements, and nine of those states used some form of language requiring matching "whenever practicable." Gregory A. Horowitz, *Accommodation and Neutrality Under the Establishment Clause: The Foster Care Challenge*, 98 YALE L.J. 617, 624 n.46 (1989). Even when not required to do so, agencies may continue to match children with parents of the same religion.

97. For example, the higher rate of reliance on welfare can result in more reports of perceived neglect. Also, the failure of government workers to understand families that deviate from the norm of the nuclear family can contribute to the assessment of these families as inadequate. Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 541 (1983-84); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 629 nn.21-22 (1976). See generally ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, *CHILDREN OF THE STORM* (1972) (exploring racism in the assessment of families and the delivery of services in the child welfare system). The Supreme Court has remarked on the problem of differential standards. See *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) ("[Termination] proceedings are often vulnerable to judgments based on cultural or class bias.").

B. Race and Parenting

Child placement has long been governed by the general principle of the "best interests of the child."⁹⁸ According to this principle, the primary focus in making decisions that affect the lives of children should be on what is best for the child.⁹⁹ Although the best-interests test has been widely discussed, defined, debated, criticized, modified, and even rejected in some contexts,¹⁰⁰ it still retains popularity.¹⁰¹

Therefore, not surprisingly, one of the key issues in the transracial adoption controversy is whether it can be in the best interests of a Black child to have white parents.

1. Sociological Research

For some years, researchers have concluded that transracial parenting has not detrimentally affected the adopted children.¹⁰² What is interesting,

98. See IRA M. ELLMAN, PAUL M. KURTZ & KATHERINE BARTLETT, *FAMILY LAW: CASES, TEXT, PROBLEMS* 492 (2d ed. 1991) (noting that in disputes between parents, while some early 19th century American courts approvingly cited the English paternal preference rule, the American rule quickly became the best interests of the child, and that custody law in the United States can be seen as a strained effort to interpret this standard). It is difficult definitively to determine what constitutes a child's best interests. Some authors argue that an answer to the question requires that we know the options, the possible outcomes of the options, the probabilities of the possible outcomes, and the values to be attached to each result. See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 12-16 (1987); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 257-61. A major criticism of the best interests test is that it requires the exercise of judicial discretion, permitting subjective value judgments to determine the result. The Supreme Court acknowledged this problem in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 835 n.36 (1976) ("[J]udges too may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values.").

99. CLARK, *supra* note 96, at 788-89.

100. See, e.g., *Garska v. McCoy*, 278 S.E.2d 357, 360-62 (W. Va. 1981) (adopting primary caretaker presumption); see also JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) (arguing in favor of psychological parenthood and the "least detrimental alternative" test). For evaluations and criticisms of the best-interests test in the context of a wide range of issues involving race and child placement, see Perry, *supra* note 1. For more general evaluations of the test, see Elster, *supra* note 98; Mnookin, *supra* note 98.

101. See CLARK, *supra* note 96, at 787-88. The best-interests test is not applied equally in all contexts. For example, in a dispute between a parent and a nonparent, the parent can only be deprived of custody upon a showing of unfitness, abandonment, or some other special circumstance. See, e.g., *Bennett v. Jeffries*, 356 N.E.2d 277, 280 (N.Y. 1976).

102. Studies on transracially adopted children usually focus on the children's self-esteem, racial identity, and general adjustment to parents, siblings, and community. Perry, *supra* note 1, at 98. The findings generally conclude that the children's self-esteem is equivalent to intrracially adopted counterparts. See, e.g., GIL & JACKSON, *supra* note 9, at 82-90; SIMON & ALTSTEIN, *supra* note 11, at 75-76, 112; Ruth G. McRoy, Louis A. Zurcher, Michael L. Lauderdale & Rosalie N. Anderson, *Self-Esteem and Racial Identity in Transracial and Inracial Adoptees*, 27 SOC. WORK 522, 525 (1982). Most studies also conclude that transracially adopted children clearly identify themselves as Black persons, see, e.g., Joan F. Shireman & Penny R. Johnson, *A Longitudinal Study of Black Adoptions; Single*

however, is that these conclusions have not compelled opponents of trans-racial adoption to change their views.

There are several reasons why the studies may not have swayed trans-racial adoption's opponents. First, opponents may believe that the results of the studies are overstated, particularly since the studies are not uniformly positive. At least one study found that the development of a positive racial identity seemed to be more difficult for transracial adoptees than for children adopted by adults of the same race.¹⁰³ Another study, comparing white, Colombian, Korean, and African American transracial adoptees, found the latter group to be the least well-adjusted.¹⁰⁴

Second, a number of methodological concerns may cast doubt on the studies' findings. Many of the studies lack control groups and may be biased, either in favor of, or against, transracial adoption, because of the source of their funding or their sponsorship.¹⁰⁵ In some of the longitudinal studies, only a relatively small percentage of the families are still being followed years later.¹⁰⁶ The families who were unsuccessful with

Parent, Transracial and Traditional, 31 SOC. WORK 172, 174 (1986) (showing that transracially adopted children are aware of their Black racial identity earlier than intracially adopted children), and are no less well-adjusted than children adopted intracially. See, e.g., McROY & ZURCHER, *supra* note 9, at 122; William Feigelman & Arnold R. Silverman, *The Adjustment of Black Children Adopted by White Families*, 62 SOC. CASEWORK 529, 533-35 (1981); William Feigelman & Arnold R. Silverman, *The Long-Term Effects of Transracial Adoption*, 58 SOC. SERV. REV. 588, 595-98 (1984) [hereinafter Feigelman & Silverman, *Long-Term Effects*].

103. McRoy, Zurcher, Lauderdale & Anderson, *supra* note 102, at 525. Anecdotal evidence reveals that transracial adoption can leave Black children confused, isolated, and with a negative impression of Black people. See, e.g., Sonia L. Nazario, *When White Parents Adopt Black Babies, Race Often Divides*, WALL ST. J., Sept. 12, 1990, at A1 (providing accounts of several transracial adoptees' struggle with issues of racial identity). McRoy and Zurcher concluded that most of the transracial adoptees they studied acknowledged their racial group memberships but were negative or indifferent to the classification. Although several of the adoptees classified themselves as "human" rather than as an ethnic group member, the authors believed this label was "less a philosophical position than it was problematic ambiguity about racial identity." McROY & ZURCHER, *supra* note 9, at 140. They also concluded that "only a few of the white adoptive families behaviorally responded to the necessity of equipping the child to become bicultural and to realistically perceive the historical and current black-white relations in American society." *Id.*

In another study by Grow and Shapiro, white adoptive parents described their child's attitude toward her Black heritage. "One-third of the children were described as proud of it. For a larger group (44%), the parents said either that they did not know or that the child appeared indifferent. Twenty-four percent of the children were described as having attitudes [such as] confusion, anger, or embarrassment."

GROW & SHAPIRO, *supra* note 11, at 188.

104. The authors nonetheless concluded that age at the time of adoption was a more significant variable in the results than race. Feigelman & Silverman, *Long-Term Effects*, *supra* note 102, at 594-95.

105. Bartholet, *supra* note 3, at 1208 (criticizing empirical studies for emphasizing negative rather than positive aspects of transracial adoption).

106. For example, between 1972 and 1984, Simon and Altstein conducted three studies of the same group of transracially adopted children. In 1972, 201 families participated in the study. By 1984, however, only 88 remained. SIMON & ALTSTEIN, *supra* note 5, at 58-60.

transracial adoption may have dropped out of the studies at a greater rate than those who were successful. In addition, the objectivity of the children and their parents in assessing the transracial adoption relationship must be questioned. Furthermore, the research to date has followed the children only into early adulthood. While it is true that a significant number of life patterns are usually established by this age, we still do not know how the transracial adoption experience will affect particular aspects of adulthood, such as marriage or long-term success in the workplace. These are also important in gauging the true effects of transracial adoption on Black children.¹⁰⁷

Finally, the conclusions of the studies are somewhat contradictory. Most of the researchers have concluded, despite their empirical findings that Black children who are transracially adopted are not detrimentally affected, that Black children should still be placed with Black adoptive parents whenever possible.¹⁰⁸ Apparently, the researchers believe that racial considerations cannot be disaggregated from the "best interests" of the transracially adopted child.

Given all these particular concerns, it is not surprising that the research fails to alter what I believe is a fundamental distrust of whites by many Blacks in this society. This distrust is given voice in the transracial adoption debate.

2. *The Question of Trust*

I have already discussed the fact that many Blacks view race as an inescapable fact of American life and see whites as captives of the American social system's racist values.¹⁰⁹ Events such as the verdict in the first Rodney King case¹¹⁰ tend to support the view that whites are, at best, insensitive to racism, confirming for many Blacks what they feared all along: whites cannot be trusted to see the humanity of Black people or to treat Black people fairly. If Blacks do not trust whites' attitudes toward Black adults, why would they trust whites' feelings toward Black children? I believe that for many Blacks, the sociologists' findings on transracial adoption

107. Increasing emphasis has been placed on examining the long-term effects of childhood experiences. An event such as the divorce of parents may have effects on children that do not surface until significantly later in life. See, e.g., JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* at xviii (1990) (discussing longitudinal studies of children of divorced parents that explore questions such as how divorce affects an individual's subsequent world view and adult relationships, including marriage). To date there has been no systematic critique of the studies of transracially adopted children. There is a need to further examine the methodology, assumptions, and other factors relied upon in the studies before any conclusion is drawn regarding the effects of transracial adoption on Black children.

108. See *supra* note 11 and accompanying text.

109. See *supra* note 74 and accompanying text.

110. See Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1.

simply do not comport with what they have observed and experienced about the role of race in American society.

Many Blacks may believe that Black children are not the children of first choice for many white Americans who adopt transracially. A constant stream of stories in the media depict white families undergoing expense, inconvenience, uncertainty, and great emotional turmoil in their travels around the world in an attempt to adopt white babies or babies of any color—except Black.¹¹¹ What conclusion might Black people draw from the fact that so many white Americans travel across the world to adopt white, Asian, or South American babies when so many Black babies are available right here? First, Blacks may believe that prospective white adoptive parents believe it is “easier” to raise a white, Asian, or Latino baby in American society than it is to raise a Black child. Although all minority groups in this society may suffer from some degree of stereotyping, a hierarchy of negative stereotypes exists. Asians, for example, are the subject of both negative stereotypes and positive stereotypes.¹¹² One would be hard-pressed, however, to name any positive stereotypes this country holds about Black children. The desire to adopt children of color who do not bear the stigma borne by Blacks in this society is not necessarily an indication of bad intentions or racism. Whites may not want—or feel themselves competent—to bear the burden of raising a child who will have to cope with the racial prejudice that Blacks experience. This does suggest, however, that most whites who adopt children do believe that race is an important and probably determining issue.

Second, Blacks may feel that whites travel overseas to adopt white children for a more pernicious reason: whites simply could not envision a Black child as a part of their family under any circumstances. This is not surprising. Blacks in this society are the victims of a plethora of racial

111. For example, Americans have been flocking to the former socialist countries of Eastern Europe in search of white babies. See, e.g., Gabrielle Glasser, *Booming Polish Market: Blond, Blue-Eyed Babies*, N.Y. TIMES, Apr. 19, 1992, § 1, at 8 (stating that a rising number of visas have been granted to Polish infants and toddlers since the fall of communism); Kathleen Hunt, *The Romanian Baby Bazaar*, N.Y. TIMES, Mar. 24, 1991, § 6 (Magazine), at 24 (describing an American's attempt to adopt a Romanian baby); Julie Rubin, *From Russia With Love—Children; The Former Soviet Republic Has Become a Foreign Hot Spot for Americans Seeking to Adopt*, L.A. TIMES, Dec. 9, 1992, at A3 (reporting that increasing numbers of Americans are adopting children from the Russian Republic after the collapse of communism and the shutdown of adoptions from Romania); Marc Silver, Dorian Friedman & Jennifer Fisher, *The Volatile World of Foreign Adoption*, U.S. NEWS & WORLD REP., Jan. 20, 1992, at 63 (describing difficulties encountered in seeking to adopt children from Europe, Asia, and South America).

112. The “model minority stereotype” of Asians has been challenged. See, e.g., Felicia R. Lee, *‘Model Minority’ Label Taxes Asian Youths*, N.Y. TIMES, Mar. 20, 1990, at B1 (arguing that the stereotype results in inflated expectations, causes resentment by other groups, and ignores class, economic, and educational differences among Asians); Ronald Takaki, *The Harmful Myth of Asian Superiority*, N.Y. TIMES, June 16, 1990, § 1, at 21 (arguing that the myth “homogenizes Asian-Americans and hides their differences”).

stereotypes; they are labelled lazy, stupid, crime-prone, and over-sexed.¹¹³ If many whites hold these views of Black adults, even if at a subliminal level, Blacks may wonder if whites could suspend such views when dealing with Black children. After all, Black children grow up to be Black adults. Some whites are probably affirmatively aware of their negative feelings toward Black people; they know that they could not feel the same kind of love, commitment, or willingness to sacrifice for a Black child that they could for a white one. Racial stereotypes are powerful; it is probably not accidental that the category of children least in demand for adoption is Black boys.

Obviously, those whites who do adopt Black children may not have had, or may have worked through, the kinds of feelings described above. Still, the perception among Blacks that Black children are not valued in this country may color the views they have of those whites who are sincere in their desire to adopt Black children. Blacks may believe that the pervasiveness of racism makes it difficult for whites to parent Black children adequately, no matter how sterling their intentions. The next section will address Blacks' skepticism of whites' ability to raise a Black child.

3. *The Relevance of Race in Parenting and the "Survival Skills" Debate*

Arguments from the perspective of colorblind individualism tend to minimize the contention of many Blacks that Black children must confront different challenges than white children. The approach is akin to a philosophy of "love conquers all." In the personal accounts of white mothers' experiences with transracial adoption, they sometimes declare that they could not love their adopted children any more if they had given birth to them.¹¹⁴ Although this is a statement many adoptive mothers would likely make, in the context of transracial adoption it probably means that the mothers feel they could not love these children more if the children had been white.

113. Professor Kimberlé Crenshaw has described the dichotomies between images of Black and whites in this society. Whites are perceived as industrious, intelligent, moral, knowledgeable, law-abiding, responsible, and virtuous, while Blacks are perceived as lazy, unintelligent, immoral, ignorant, criminal, shiftless, and lascivious. Crenshaw, *supra* note 2, at 1371. A 1990 survey conducted by the University of Chicago's National Opinion Research Center studied the images of whites generally, southern whites, Jews, Blacks, Asian Americans, and Hispanic Americans with respect to numerous characteristics including work ethic, preference for welfare dependency as opposed to self-sufficiency, propensity for violence, and intelligence. Blacks and Hispanic Americans received the most negative ratings with respect to each of these characteristics. Blacks had the most negative rating overall. Furthermore, 56.7 percent of non-Blacks rated the intelligence of Blacks as below that of whites. TOM W. SMITH, *ETHNIC IMAGES 5-9* (National Opinion Research Ctr., General Social Survey Topical Report No. 19, 1990); *see also* STUDES TERKEL, *RACE: HOW BLACKS AND WHITES THINK AND FEEL ABOUT THE AMERICAN OBSESSION* (1992) (presenting interviews of Blacks and whites concerning attitudes and perceptions of each other).

114. "This child is as inside my skin as any child could be." Bartholet, *supra* note 3, at 1171 (discussing her own experience with transracial adoption).

Some writers argue that if a child is given love, a good home, and good values, she will grow up healthy, regardless of racism in society and racial differences between her and her parent. One writer stated: "It is certainly not to the advantage of any child to train him to assume a defensive posture toward other people. Rather, his caretakers should instill in him an abiding sense of his own worth, which will equip him to thrive in a multi-racial society."¹¹⁵ Advocates of transracial adoption argue that their position is supported by the research that concludes that Black children are not harmed by being raised in white families.¹¹⁶

Blacks are more likely to reject this "love conquers all" philosophy. Sociologist Joyce Ladner stated:

The notion that love is sufficient is indeed naive. That most of the parents who adopt these children love them is probably indisputable; but whether they understand what their differential needs are and will be as they grow to maturity is a more important question.¹¹⁷

The NABSW goes further, arguing that Black children who grow up in white homes "suffer severe identity problems" and "often do not develop coping mechanisms necessary to function in a society that is inherently racist against African-Americans."¹¹⁸

Black experts on the subject of parenting Black children emphatically believe that discussing questions of race and racism is critical to the healthy psychological and emotional development of Black children.¹¹⁹ A major concern of many Blacks is whether white parents, regardless of their good intentions, can cope with this responsibility.¹²⁰ This skepticism is rooted

115. O'Brien, *supra* note 3, at 495 n.45.

116. Bartholet, *supra* note 3, at 1219-21.

117. Joyce A. Ladner, *Mixed Families: White Parents and Black Children*, SOCIETY, Sept.-Oct. 1977, at 78.

118. *Hearings*, *supra* note 48, at 217.

119. Alvin F. Poussaint & James P. Comer, *The Question Every Black Parent Asks: What Shall I Tell My Child?*, REDBOOK, Jan. 1971, at 111-13. See generally JAMES P. COMER & ALVIN F. POUSSAINT, *BLACK CHILD CARE: HOW TO BRING UP A HEALTHY BLACK CHILD IN AMERICA* (1975); DELORES L. FRIEDMAN, *EDUCATION HANDBOOK FOR BLACK FAMILIES* (1980); DARLENE POWELL HOPSON & DEREK S. HOPSON, *DIFFERENT AND WONDERFUL: RAISING BLACK CHILDREN IN A RACE-CONSCIOUS SOCIETY* (1990); LEON W. CHESTANG, *Racial and Personal Identity in the Black Experience*, in *COLOR IN A WHITE SOCIETY* 83, 93 (Barbara W. White ed., 1982).

120. See *supra* notes 47 & 117 and accompanying text. Although advocates of transracial adoption cite certain studies purporting to demonstrate that the majority of Blacks favor transracial adoption, see *infra* notes 159-60 and accompanying text, I am highly critical of these studies and contend that there has been no conclusive evidence that most Blacks support transracial adoption. See *infra* notes 161-68 and accompanying text. In addition, even studies that purportedly demonstrate Black approval of transracial adoption do not suggest that most Blacks have faith in the ability of whites to raise Black children. In one study, only 31 percent of those interviewed stated that they believed that white families were competent to raise Black children. Rita J. Simon, *Black Attitudes Toward Transracial Adoption*, 39 *PHYLON* 135 (1978). In another study, the respondents split almost evenly on

not only in Blacks' distrust of whites, but also in Black people's awareness that racism is subtle and often exists on an unconscious level.¹²¹

For example, in our society, the dominant standard of beauty is a white one. The standard for unattractiveness is based on how far one's hair, skin, and other features deviate from the Northern-European norm.¹²² Black people know very well that society admires white skin and disdains Black skin.¹²³ Given the acceptance of a white standard of beauty, many Blacks might doubt a white family's capacity to instill a Black female child with pride in her own physical appearance.¹²⁴

A white woman wishing to adopt a Black child may feel that mothering is a colorblind activity. In contrast, most Black women feel that a unique part of their experience of mothering is to transmit the experience of coping as a Black woman in this society to their daughters.¹²⁵ These

the question of whether whites understand Black life enough to adopt a Black child. See Alicia Howard, David D. Royce & John A. Skerl, *Transracial Adoption: The Black Community Perspective*, 22 SOC. WORK 184, 187 (1977).

121. As Professor Charles Lawrence has stated:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes and beliefs that attach significance to an individual's race and induce negative feelings and opinions about non-whites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.

Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

122. For a discussion of the role of racism in the definition of standards of beauty, see FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 41-82 (Charles L. Markman trans., 1967); WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* 32-45 (1969); CALVIN C. HERNTON, *SEX AND RACISM IN AMERICA* 131-36 (2d ed. 1988); see also Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 379 (analyzing the interaction of race and gender in court decision upholding firing of a Black woman from her job for wearing cornrows). Black women novelists have explored Black women's struggle to develop a positive self-image in a society that devalues their physical appearance. See, e.g., TONI MORRISON, *THE BLUEST EYE* (1970).

123. Some white feminists have also demonstrated awareness of the relationship between hair and concepts of femininity in this society. For example, Susan Brownmiller observes:

Who can imagine a fairy princess with hair that is anything but long and blonde, with eyes that are anything but blue, in clothes that are anything but a filmy drape of gossamer and gauze? The fairy princess remains one of the most powerful symbols of femininity the Western world has ever devised, and falling short of her role model, women are all feminine failures to some degree.

SUSAN BROWNMILLER, *FEMININITY* 67 (1984) (discussing Western concepts of femininity as expressed in history and literature and the implications of Black women's deviation from this norm).

124. See Gloria J. Powell, *Coping With Adversity: The Psychosocial Development of Afro-American Children*, in *THE PSYCHOSOCIAL DEVELOPMENT OF MINORITY GROUP CHILDREN* 49, 66-67 (Gloria J. Powell ed., 1983) (discussing personal appearance and hair styles as factors in the socialization process of young Black girls).

125. A number of recent books and articles explore how Black mothers teach their daughters values, culture, and coping skills. See, e.g., Suzanne C. Carothers, *Catching Sense:*

women feel they have a special task to prepare their children for life in a society that is hostile to Black people. They may feel that by advocating transracial adoption, white women reflect the belief that Black women have nothing different to offer a Black daughter than a white mother does.

Some opponents of transracial adoption would argue that what Black mothers uniquely have to offer Black children are "survival skills"; complex skills for dealing with the subtle racism in our society.¹²⁶ A fair amount of debate regarding transracial adoption has focused on this concept of survival skills.¹²⁷ Opponents of transracial adoption have argued that Black adults' own experiences in coping with racism can provide critical and unique insights that a white parent simply cannot.¹²⁸

Writers from the perspective of colorblind individualism tend to be skeptical, or even dismissive, of survival skills.¹²⁹ Some Blacks may interpret whites' skepticism of the survival skills concept as a measure of the invisibility of the challenges and realities Black people face to those who do not share that racial experience. They may also resent what they perceive as a refusal on the part of whites to acknowledge that whites have done anything to make Black people feel they have had to "survive."

Learning from Our Mothers to Be Black and Female, in UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE 232 (Faye Ginsburg & Anna L. Tsing eds., 1990); Gloria I. Joseph, *Black Mothers and Daughters: Their Roles and Functions in American Society, in COMMON DIFFERENCES: CONFLICTS IN BLACK AND WHITE FEMINIST PERSPECTIVES 75* (Gloria I. Joseph & Jill Lewis eds., 1981); see also *DOUBLE STITCH* (Patricia Bell-Scott, Beverly Guy-Sheftall, Jaqueline Jones-Royster, Janet Sims-Wood, Miriam DeCosta-Willis & Lucie P. Futz eds., 1991). For a discussion of some of the obstacles in achieving healthy psychological adulthood for both Black men and women, see GRIER & COBBS, *supra* note 122, at 32-62.

126. As, sociologist Joyce Ladner has noted: "Black survival techniques are thought to comprise a broad repertoire of psychological attitudes and behavioral acts on the overt and covert level. They include gestures, sentiments, feelings, languages, and physical manipulations." LADNER, *supra* note 28, at 80. Bowen, *supra* note 3, at 510 has expanded on this concept:

These survival devices include several learned abilities: to ignore [racial] insults; to decipher the appropriateness of fighting back or submission; to emphasize Black strength, beauty and worth as a countermeasure to the denigration of Blacks in America . . . to evaluate objectively and subjectively the level of nepotistic advantage or same-group favoritism which precludes opportunities and advancement in education, employment or business.

See generally CAROL B. STACK, *OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974). Most survival skills are transferred informally and are largely unrecorded. Bowen, *supra* note 3, at 511.

127. See, e.g., Howard, *supra* note 3, at 539-40 (criticizing the view that transracial adoption destroys the "psycho-survival skills" children need to cope in a racist society); O'Brien, *supra* note 3, at 494-95 (criticizing the view that Black children raised in a white home will fail to develop survival skills to defend against a hostile white majority).

128. See *supra* note 47 and accompanying text.

129. See, e.g., Howard, *supra* note 3, at 540 ("Indeed, [survival] skills might actually handicap the child's ability to learn 'the role of the equal citizen.'"); O'Brien, *supra* note 3, at 494-95 ("The remaining argument advanced by some opponents of interracial adoption has even less substance. It is contended that a black child raised in a white home will be deprived of the opportunity to develop . . . 'survival skills.'").

Advocates of transracial adoption apparently believe that the idea of survival skills is easily defeated with the research findings showing the successful survival of transracial adoptees. Advocates of transracial adoption also tend to believe that the concept of survival skills is essentialist, that is, that it assumes that the members of a particular group are monolithic rather than richly diverse individuals.¹³⁰

From a color and community consciousness perspective, giving credence to the notion of survival skills does not assume all Black people are the same.¹³¹ It does assume that all Black adults share the experience of racism and know their children will also experience racism. Blacks may differ as to what they believe is important to convey to their children about the most effective strategies for dealing with racism; not everyone would preach the same tactics as survival mechanisms. However, it is likely that most Blacks would agree that their children need skills in order to adequately confront the racism they will inevitably experience in their daily lives.

It is obviously impossible to prove that Black children cannot survive without Black parents teaching them survival skills; the transracial adoption studies demonstrate that having non-Black parents does not lead every Black child to a nervous breakdown. It is also probably true that not all Black parents successfully teach their children how to cope effectively with racism in American society. At the same time, advocates of transracial adoption refuse to address directly the implications of researchers' virtually unanimous conclusion that children should be placed in homes with adoptive parents of the same race whenever possible.¹³² At this point, neither advocates nor opponents of transracial adoption seem willing to address the conclusions of the sociologists that undermine their positions. The parties remain at opposite poles in the survival skills debate.

4. *The Stake of the Black Community in Transracial Adoption*

Writers from the perspective of colorblind individualism and writers from the perspective of color and community consciousness differ significantly in evaluating the stake of the Black community¹³³ in determining

130. Feminist jurisprudence offers unique insight into essentialism. See, e.g., ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 4 (1988); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191, 204-05 (1989-90); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990).

131. See *supra* note 38.

132. See *supra* note 11 and accompanying text.

133. Sociologist Andrew Billingsley has noted that people of African descent in America constitute a community in four respects: (1) geographically, since most Black families live in predominately Black neighborhoods; (2) a shared set of values; (3) some degree of identification with a common heritage; and (4) a recognizable set of institutions and organizations that grow out of the common heritage, identify with it, and serve primarily African American people. BILLINGSLEY, *supra* note 9, at 71-73. He states: "It is appropriate then,

transracial adoption policies.¹³⁴ Scholars reflecting the colorblind individualist perspective generally tend to discount the interests of the community from which the child comes and feel that arguments supporting the consideration of the community's views promote separatism. Thus, since she believes that a preference for same-race placements ultimately deprives Black children of the opportunity for permanent homes, Elizabeth Bartholet argues that it "do[es] serious injury to black children in the interest of promoting an inappropriate separatist agenda."¹³⁵ Another writer argues: "[O]ur system does not and must not give legal impetus to desires, from any quarter, to preserve any variety of racial separatism."¹³⁶ Even Professor Howard, who recognizes that the Black child awaiting adoption has an interest in a cultural identity,¹³⁷ takes the position that the child's best interests should be decided without reference to those of the Black community. Indeed, she argues that the interest in recruiting more Black adoptive families is "not congruent with currently waiting children and therefore, is not an interest appropriately considered under a child-centered policy."¹³⁸

The color and community consciousness perspective also focuses on the best interests of the individual child. However, it defines the child's interests more broadly. This broad definition is consistent with an analysis in which the oppression of the group and of the individual are closely connected and the best interests of the child are seen as inextricably linked with the interests of the Black community.¹³⁹ This view is strongly reflected in the NABSW's position paper,¹⁴⁰ the congressional testimony of

to speak of the African-American community in either, all, or any combination of the above respects. The African-American community, at bottom, is the organized or collective expression of the African-American people in the United States." *Id.* at 73. John Langston Gwaltney writes: "Black nationhood is not rooted in territoriality so much as it is in a profound belief in the fitness of core black culture and in the solidarity born of a transgenerational detestation of our subordination." JOHN L. GWALTNEY, *DRYLONGSO: A SELF-PORTRAIT OF BLACK AMERICA* at xxvii (1980).

134. See, e.g., Bartholet, *supra* note 3, at 1247-48 (minimizing interests of the Black community); O'Brien, *supra* note 3, at 494 (same); Bowen, *supra* note 3, at 528 (emphasizing the interests of the Black community); Perry, *supra* note 1, at 117 (same).

135. Bartholet, *supra* note 3, at 1248.

136. O'Brien, *supra* note 3, at 494.

137. Howard, *supra* note 3, at 547. Professor Howard states that minority groups have two interests in the issue of transracial adoption: first, an interest in deciding whether children of the group are adopted by non-group members and second, an interest in the group maintaining its racial and cultural identity. *Id.* at 530-31. She then rejects the validity of the first interest because "Blacks . . . do not appear to have reached a consensus on the issue of transracial adoption . . ." *Id.* She ultimately rejects the second interest, too, based on her belief that the transracial adoption of Black children does not constitute cultural genocide. *Id.* at 532.

138. *Id.* at 503.

139. See, e.g., Bowen, *supra* note 3, at 528 (arguing that the desires of the Black community must inform transracial adoption policy).

140. See *supra* note 47 and accompanying text.

the NABSW president,¹⁴¹ and legal scholarship that examines transracial adoption from a color and community consciousness perspective.¹⁴²

It could be argued that the color and community consciousness perspective is fundamentally communitarian.¹⁴³ To the extent that such a perspective posits that the identity of an individual is derived from the community,¹⁴⁴ it focuses on achieving the common good rather than individual rights. The communitarian approach does not accept liberalism's focus on individual autonomy but instead views the individual as strongly connected with the community.

Communitarian theory and its divergence from liberalism is complex and controversial.¹⁴⁵ Although, in its broad outlines, communitarian theory might reflect the color and community consciousness perspective, one does not need to debate the fine points of communitarian theory or its application to African American political and social thought in order to acknowledge a connection between the individual and the society. The African American tradition of linking the individual's fate with the community's long preceded debate about the application of communitarian theory to the concerns of racial minorities. Even without communitarian theory,

141. See *supra* notes 47-51 and accompanying text.

142. See Bowen, *supra* note 3, at 528 (stating that the political ideologies and desires of the Black community should be considered in determining policies on transracial adoption); Perry, *supra* note 1, at 109-27 (discussing the importance of the link between the welfare of the Black community and the welfare of all Black children).

143. At least one minority scholar has argued that a communitarian perspective is preferable to liberalism in advancing the goals of minorities. Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2053-54 (1991):

[I]t is liberalism's preoccupation with the individual and the individual's participation within particular interest groups that fosters a focus on self and allows differences—such as race, ethnicity, and gender—to divide our society . . . [T]he goal of . . . the eradication of racism in our social relations . . . can be more easily realized pursuant to a communitarian perspective . . .

See generally Amy Gutman, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 303 (1985).

Communitarianism has been defined as a spirit of community which restores an ethic of civic responsibility throughout the society. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA* (1993). However, substantial confusion exists regarding the meaning of communitarianism. See, e.g., Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 691 (1992). Gardbaum analyzes three different claims people use to describe *community*: (1) community as a causal factor in the constitution of personal identity (antiatomism), (2) community as a particular substantive value (strong communitarianism), and (3) community as the source of value (metaethical communitarianism). *Id.* at 692. He asserts that using the term community to describe so many different types of claims has resulted in a discussion "predicated on the false assumption that all talk of community must relate to, and be accommodated in, one debate, i.e., the communitarian debate." *Id.* at 688.

144. See MICHAEL J. SANDEL, *LIBERALISM AND ITS CRITICS* 6 (1984) (arguing that individuals are not essentially self-constituted, unencumbered, and self-sufficient but are partly defined by the communities they inhabit).

145. See Gardbaum, *supra* note 143, at 692 (arguing that the communitarian-liberal debate is not based on true disagreement but largely on conceptual misunderstanding).

we can see that Black children should not be treated as if they come from no community or from a cultural tradition without value.

Critics of transracial adoption have several concerns. A primary concern is that a focus only on the interests of the individual child will divert attention from the systemic conditions of American society that engender racial oppression. Because racial oppression is a group experience and not simply an individual one, solutions must address the conditions facing the group as a whole in order to be effective. The fear is that solutions to the serious problems confronting Black people will be pushed aside, and optimistic, heart-warming stories about white parents and Black children sharing happy, loving relationships will take center stage.

A second concern is group preservation.¹⁴⁶ Black children raised by white parents may fail to identify with the Black community and will, accordingly, be lost as a resource to that community.¹⁴⁷ Since Blacks as a group are embattled, the loss of children threatens the entire group, not just the individuals.

Some studies of transracial adoption suggest that this fear is not unfounded. One study described racial identity as "more of a problem" for Black children raised in white families than for children raised in families of the same race as the child.¹⁴⁸ Another found that the children studied had "little evidence of a positive sense of racial identity."¹⁴⁹ Several studies have found that where white adoptive families made little effort to affirm the child's racial heritage, the children had negative perceptions of Black people and felt themselves "lucky" to have been adopted by whites.¹⁵⁰

A third concern involves the principle of self-determination for the Black community. Although self-determination has meaning in international law, American law recognizes no such right for minority groups.¹⁵¹

146. This concern is sometimes very explicit. The former president of the NABSW stated: "Our position is that the African-American family should be maintained and its integrity preserved. We see the lateral transfer of Black children to white families as contradictory to our preservation . . ." Walter Leavy, *Should Whites Adopt Black Children?*, *EBONY*, Sept. 1987, at 76, 78 (quoting Dr. Morriss Jeff, then president of NABSW). The article states that the challenge is to extend successful Black adoption programs and expresses the hope that the day will come when the racial identity of all adoptive parents will be irrelevant. *Id.* at 79.

147. One writer noted with respect to the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1988 & Supp. IV 1992), that "[a] basic assumption of the Act is that Indian children are essential tribal resources . . ." Joan H. Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DET. L. REV. 451, 456 (1988).

148. McRoy, Zurcher, Lauderdale & Anderson, *supra* note 102, at 525.

149. GIL & JACKSON, *supra* note 9, at 81.

150. *Id.* at 81; McROY & ZURCHER, *supra* note 9, at 138-41.

151. Even in international law and international affairs, the concept of self-determination is not clearly defined. The "principle of . . . self-determination of peoples" is recognized in the United Nations Charter. U.N. CHARTER art. 1. It has been discussed in the context of arguments for the independence of colonized countries during the post-World

Still, the essence of the idea—that one group should not dominate another and that people should have a say in matters that affect their own future—is consistent with American democratic ideology. The term *self-determination* appears frequently in discussions of transracial adoption.¹⁵² While there does not appear to be one clearly agreed-upon meaning of self-determination in the transracial adoption context, under any definition the white social services bureaucracy should not have final decision-making power without consideration of the Black community's views. Indeed, the fundamental point of self-determination is that the community affected should have the right to make determinations that fundamentally affect its welfare.

For Blacks, self-determination is closely identified with the political philosophy of Black Nationalism.¹⁵³ Some writers who embrace colorblind individualism charge opponents of transracial adoption with being nationalists, as if that charge would be disputed or considered offensive. This is not necessarily the case. Certainly not all Blacks who oppose transracial adoption would label themselves nationalists, but a long and respected tradition of Black Nationalism exists in many Black communities.¹⁵⁴ The

War II period. See Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 258 (1981). However, there is little agreement on its scope beyond that context. *Id.* at 258-59. The idea is frequently invoked by American minority groups in diverse contexts, ranging from arguments in favor of establishing separate states to more reformist measures, such as community control of school districts or reallocation of election districts for increased representation by particular groups. See, e.g., E. ERIC LINCOLN, *THE BLACK MUSLIMS IN AMERICA* 98-102 (1973) (discussing the Nation of Islam's argument that blacks have a right to land within the United States for the establishment of a separate state or territory).

152. See, e.g., Bowen, *supra* note 3, at 502 (arguing that a policy encouraging and supporting the placement of Black children with relatives promotes the value of "group self-determination").

153. See STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 47 (1967) ("The goal of black self-determination and black self-identity—Black Power—is full participation in the decision-making processes affecting the lives of black people, and recognition of the virtues in themselves as black people."). Professor Manning Marable has defined Black Nationalism to include the following: a strong personal pride in one's black cultural and ethnic heritage, an advocacy of separate black economic and social institutions within black communities, a rejection of the tactics and principles of integrationist black leaders, a commitment to struggle against white authority, oppression, and racism, and an approach to the world from a cultural frame of reference reflecting positively upon the black human experience.

MANNING MARABLE, *FROM THE GRASSROOTS: ESSAYS TOWARD AFRO-AMERICAN LIBERATION* 2 (1980).

For discussions of Black Nationalism see, for example, TONY MARTIN, *RACE FIRST: THE IDEOLOGICAL AND ORGANIZATIONAL STRUGGLES OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION* (1976) (discussing the grass roots mass movement established by Garvey in the face of opposition by a wide spectrum of opponents); ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X passim* (1965).

154. Marcus Garvey's Universal Negro Improvement Association movement in the 1920s and the Nation of Islam in the 1960s are examples of popular movements in Black

spectrum of that philosophy ranges from those who advocate the establishment of a separate Black nation,¹⁵⁵ to those who seek politically and economically to empower existing Black communities,¹⁵⁶ to those who focus on symbols of cultural nationalism, such as Afro-centric dress and hair-styles.¹⁵⁷ Blacks associated with nationalist traditions are likely to be against transracial adoption—and very proud of their position.

An attempt to take into account the concerns of the transracially adopted child's community raises various empirical and political questions. What is the definition of a *community* or, in particular, the *Black community*?¹⁵⁸ Who speaks for a community? What is the nature of a community's interest in the children with which it is associated? How does the Black community as a whole actually feel about transracial adoption?

No research provides or even suggests a definitive answer to this last question. Some advocates of transracial adoption argue that research demonstrates that a substantial part of the Black community approves of transracial adoption.¹⁵⁹ In a recent article, for example, Rita Simon states that the NABSW does not represent the beliefs and desires of "rank and file" Black people in the United States and that "polls indicate that the overwhelming majority of black and white Americans—some 71 percent of both races—support transracial adoption."¹⁶⁰

There are a handful of studies on Black attitudes toward transracial adoption.¹⁶¹ The results of these studies should not be overstated. One

communities that emphasized Black Nationalism. The recent resurgence in the popularity of Malcolm X, as well as the continuing popularity in Black communities of controversial figures such as Minister Louis Farrakhan, demonstrates that the label *Black Nationalist* does not have a negative connotation in many Black communities. A recent speech delivered in New York City by Mr. Farrakhan drew over 20,000 people. Otto Strong & Rose Kim, *Farrakhan Rips Social Ills*, N.Y. NEWSDAY, Dec. 19, 1993, at 3. Reflecting on that rally and on the appeal of Mr. Farrakhan, journalist Sheryl McCarthy noted:

Many black people who see so many of their own being sucked into the abyss, and hear endlessly bad press about themselves, want to understand what exactly is going on. We need a context in which to interpret our condition, and for some, Louis Farrakhan provides that. He speaks to the desolation of the black spirit.

Sheryl McCarthy, *Farrakhan Fills a Need for Answers*, N.Y. NEWSDAY, Dec. 20, 1993, at 6. 155. See, e.g., LINCOLN, *supra* note 151.

156. See MARABLE, *supra* note 153.

157. Caldwell, *supra* note 122 (discussing Afro hairstyles as a celebration of self-esteem, a rejection of the shackles of racist oppression, and a claim to cultural identity).

158. See *supra* note 133; see also Regina Austin, 'The Black Community,' *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1769-75 (1992) (discussing the complexity of defining "the Black community" in a period when Blacks may not always live in separate communities from whites and where Black culture and politics are not as clearly defined as in earlier historical periods).

159. See, e.g., Bartholet, *supra* note 3, at 1236. ("Reported surveys of black community attitudes indicate substantial support for transracial adoption . . .").

160. Rita J. Simon, *Transracial Adoption in South Africa: Phase I*, RECONSTRUCTION, Vol. 2, No. 1, 1992, at 102, 104.

161. See Elizabeth Herzog, Cecelia E. Sudia & Jane Harwood, *Some Opinions on Finding Families for Black Children*, 18 CHILDREN 143 (1971); Howard, Royce & Skerl, *supra* note 120, at 184; Simon, *supra* note 120, at 135.

study by Simon involved 324 middle-class Blacks.¹⁶² Forty-five percent stated that they approved the practice of transracial adoption. However, only 39 percent stated that believed that white parents are competent to raise Black children. Only 31 percent stated that they believed transracially adopted Black children would be able to grow up feeling that they belonged to the Black community.¹⁶³

Another study, by Herzog, involved one hundred persons in five large cities.¹⁶⁴ The interviewees were not exclusively Black. They included adoptive parents, members of social agencies, and persons in key positions in Black communities. The researchers found that the community representatives were slightly more often opposed to transracial adoption, with Black respondents divided evenly for and against such placements.¹⁶⁵

In yet another study, by Royce, of 150 Black households in a moderately-sized, midwestern city, respondents split almost evenly on the question of whether whites understood Blacks well enough to adopt a Black child.¹⁶⁶ Almost 57 percent of the respondents said that they have an open attitude toward transracial adoption, and 81 percent said that they prefer transracial adoption to keeping a child in foster care or in an institution.¹⁶⁷

That a relatively significant number of Black people interviewed for these studies do not oppose transracial adoption is not surprising. Given this country's history of de jure segregation, including antimiscegenation laws, it would also not be surprising if most Blacks were to state that they do not oppose intermarriage. The important inquiry is not whether most Blacks unequivocally oppose transracial adoption, but under what circumstances they believe it is acceptable and whether they favor placing Black children with Black parents whenever feasible. In more than one of the studies, a majority of the subjects expressed skepticism about the ability of white adoptive parents to meet the psychological needs of Black children,¹⁶⁸ which suggests that they might prefer that Black children be placed with Black parents where possible. A definitive conclusion about the attitudes of the Black community concerning transracial adoption would require studies involving more respondents and more nuanced questioning.

The point here is not to belabor the validity of the concepts of self-determination, Black Nationalism, or communitarianism or to resolve complex issues concerning the relationship between children and the

162. Simon, *supra* note 120.

163. *Id.* at 140.

164. Herzog, Sudia & Harwood, *supra* note 161.

165. *Id.* at 146.

166. Howard, Royce & Skerl, *supra* note 120, at 186.

167. *Id.* at 185-86.

168. See, e.g., *id.* at 186 (reporting that more than one-half of the respondents in the study agreed with the statement, "Black children have special problems that white parents cannot understand or cope with"); Simon, *supra* note 120, at 140 (reporting that only 39 percent of study participants agreed with the statement that "white parents know how to raise black children").

communities with which they are identified. Rather, the point is simply to acknowledge that these communities have concerns that affect their understanding of the "best interests" of the transracially adopted child.

C. *The Question of Cultural Genocide*

The color and community consciousness perspective represents more than mere pessimism about the future of relationships between the races. This complex perspective also embodies the view that multiculturalism, rather than colorblindness, is the desired goal of a nonracist society. Cultural difference is viewed as valuable and worth preserving.

When a minority culture is threatened with eradication, the term *cultural genocide* is often invoked.¹⁶⁹ Cultural genocide has two connotations. First, a particular practice may constitute a threat to the existence of a group or that group's culture. Given the numbers and fertility rates of Blacks in this country,¹⁷⁰ it seems clear that the transracial adoption of a small number of children poses no serious threat to the existence of Black people or Black culture as a whole and thus does not qualify as cultural genocide under the term's first connotation.¹⁷¹ But cultural genocide may

169. See Leon Chestang, *The Dilemma of Biracial Adoption*, SOC. WORK, May 1972, at 100, 103; POSITION PAPER, *supra* note 25, at 52. Genocide is "the use of deliberate systematic measures (as killing, bodily or mental injury, unlivable conditions, prevention of births) calculated to bring about the extermination of a racial, political, or cultural group or to destroy the language, religion, or culture of a group." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 947 (3d ed. 1981).

170. For example, in 1988, for white women there were 43.7 live births per 1,000 women aged 15-19, 102.5 for women aged 20-24, and 111.6 for women aged 25-29. For Black women there were 105.9 live births per 1,000 women aged 15-19, 157.5 for women aged 20-24, and 112.8 for women aged 25-29. 1 NATIONAL CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVS., VITAL STATISTICS OF THE UNITED STATES, 1988—NATALITY 13 (1988).

171. When language referring to genocide is used in the adoption context, a comparison is sometimes made between Blacks and Native Americans. The adoption of Native American children is regulated by a complex set of laws. The Indian Child Welfare Act of 1978 was passed in response to the alarming number of Native American children who were being removed from reservations. 25 U.S.C. §§ 1901, 1915 (1988). The Act provides jurisdictional and procedural devices to reduce the placement of Indian children in non-Indian homes either for adoption or foster care and gives tribes a right to be heard regarding the adoption of their children. *Id.* §§ 1911-1922; see also Hollinger, *supra* note 147, at 456-57 (describing the provisions of the Act).

There are some similarities between the situation of Blacks and Native Americans. Both groups share histories of segregation, discrimination, and oppression. Both suffer from low income, poor health, poor education, and high unemployment. In both cases these conditions have resulted in the placement of a disproportionately large number of children in foster care. See Bowen, *supra* note 3, at 522 n.185 (comparing conditions of Blacks and Native Americans). However, Native Americans are in danger of disappearing as an ethnic group altogether. See, e.g., Hollinger, *supra* note 147, at 456 (noting that "tribal survival depends" on Indian children); Stan Watts, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Best Interests of Children, Families, and Tribes*, 63 S. CAL. L. REV. 213, 213 (1989) ("The steady flow of a disproportionately high percentage of Indian children from their families and tribes to non-Indian foster and adoptive homes threatens to deprive tribes of the most basic necessity for their survival—a next generation."). In con-

also refer to the effect of depriving individuals of the experience of their own culture. Transracial adoption clearly poses that threat to the Black children transracially adopted.

Often, advocates of transracial adoption believe the practice poses no threat of cultural genocide either to the group or to the individual child. Thus, one writer states:

The NABSW has referred to the practice of transracial adoption as 'cultural genocide.' Unless, however, the numbers of children adopted transracially were to increase enormously beyond what they currently are, the culture of African-Americans will not be destroyed. Nor need the culture of those children adopted by white families be lost. In fact, it can be shared with parents who might not have had that opportunity but for the adoption.¹⁷²

Professor Bartholet agrees:

There is no compelling necessity for racial matching, on a level comparable to a national emergency threatening the survival of the nation. The black community within this nation is not threatened with extinction . . . [P]lacing more . . . [Black children] for adoption transracially poses no realistic threat to the existence of that community or the preservation of its culture.¹⁷³

These views do not begin to capture the complexity of this issue for many Black people in terms of either terminology or substance.

The view that cultural genocide applies to groups and not to individuals finds some support in international law. For example, although the U.N. Convention on the Prevention and Punishment of the Crime of Genocide defines "forcibly transferring children of the group to another group" as genocide, it also defines genocide as acts done "with intent to destroy "in whole, or in part, a national, ethnical, racial or religious group as such."¹⁷⁴ Based on this definition, it could be suggested that the small number of transracial adoptions renders the cultural genocide argument untenable.

Some critics of transracial adoption have framed the genocide argument in both individual and group terms. Professor Leon Chestang has argued that genocide has both a political and a social meaning. Chestang argues that an individual Black person whose cultural connection to other

trast, the relatively high birthrates of African Americans ensure that they are not in danger of physically disappearing.

172. Mahoney, *supra* note 3, at 501; see also Howard, *supra* note 3, at 532.

173. Bartholet, *supra* note 3, at 1231.

174. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278, 280. Although the United States is not a signatory to the convention, the U.S. Code contains a provision similar to the U.N. Convention on genocide. Under 18 U.S.C. § 1091 (1988), a person commits genocide when, "whether in time of peace or in time of war, . . . with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group . . . [she] transfers by force children of the group to another group, or attempts to do so . . ."

Blacks has been destroyed will be unprepared for life in this race-conscious society.¹⁷⁵ This argument echoes the assertions made in connection with the concept of survival skills.¹⁷⁶

It may be that genocide is not the most appropriate term for expressing the concerns of some Blacks regarding the cultural implications of transracial adoption. However, it is still important to understand why Blacks have seized upon this language. Genocide is a powerful word, and its continued use is both strategic and symbolic. It represents Blacks' attempt to seize the terminology of the debate about race by naming their own experience.¹⁷⁷

Furthermore, framing transracial adoption as an issue of genocide is part of a larger history of Black Americans seeking to obtain international recognition of their struggles in America. As part of this strategy, a group of prominent Black Americans, including Paul Robeson, presented a petition to the United Nations in 1951 under the United Nations Genocide Convention. It alleged that the treatment of Blacks in the United States constituted genocide under the terms of that document.¹⁷⁸ The petition was presented over the protests of white American law school professors, who argued that the Convention was inapplicable to the situation of Black Americans.¹⁷⁹

Describing transracial adoption as genocide also may reflect a belief by some Blacks that genocide can occur in an incremental manner. For example, the daily conditions under which Black Americans have lived may be considered by some to be a slow form of genocide. From this perspective, transracial adoption appears as part of a larger pattern of actions reflecting white America's desire to rid itself of Blacks.

One need only stroll through an inner-city Black neighborhood and listen to street corner orators or examine posters taped to buildings to conclude that this theme of genocide is a popular one among the Black masses. In a 1990 telephone poll conducted by the *New York Times* and WCBS-TV News, 25 percent of the Blacks polled stated that it was "true" that the government was deliberately encouraging drug use among Blacks; another 35 percent stated that it "might possibly be true." Ten percent thought it was "true" that AIDS had been intentionally created in a

175. See Chestang, *supra* note 169, at 103-04.

176. See *supra* text accompanying notes 126-32.

177. See, e.g., Crenshaw, *supra* note 2, at 1336 ("History has shown that the most valuable political asset of the Black community has been its ability to assert a collective identity and to name its collective political reality."); Greene, *supra* note 58, at 2043 ("Blacks must trust their own stories and their own experiences as sufficient guides for action.")

178. We Charge Genocide: The Crime of Government Against the Negro People, *discussed in* WILLIAM L. PATTERSON, *THE MAN WHO CRIED GENOCIDE: AN AUTOBIOGRAPHY* 179 (1971). The petition detailed the oppressive conditions under which Blacks lived, particularly between 1946 and 1951, and focused on issues ranging from poverty and discrimination to terrorism by the Ku Klux Klan. *Id.* at 181-82, 192, 203.

179. *Id.* at 178-79.

laboratory in order to infect Blacks; another 19 percent thought that this "might possibly be true."¹⁸⁰ While such extreme conspiracy theories might seem untenable, it was revealed several years ago that the federal government had conducted an experiment for thirty-five years in which Black men in Tuskegee, Alabama, were left untreated for syphilis so that the progression of the disease could be studied.¹⁸¹ Such horrific cases of racism confirm the beliefs of those who suspect that a genocidal plot exists against Black people in this country.

In contrast, advocates of transracial adoption view transracial adoption as an opportunity to enrich cultural exchange between adoptive parents and children.¹⁸² Indeed, it is unlikely that most transracial-adoption supporters would believe they are eradicating or even devaluing the culture from which their adoptive children come. Instead, they might consider themselves as purveyors of multiculturalism.¹⁸³ But labelling transracial adoption a cultural exchange oversimplifies a complex issue. Let us suppose, for example, that a Jewish family in Israel wished to adopt a Palestinian child. Should that child be raised Jewish? Or hypothesize the unlikely situation of a Palestinian family adopting a Jewish child. If the family was willing to raise the child with exposure to Jewish traditions, should the family's own judgment as to the manner of exposure be deemed sufficient to preserve the child's cultural heritage? Is it important to preserve that heritage at all?

The issues raised by such scenarios, of course, are complex. Several researchers on transracial adoption conclude that transracial adoptees have a more positive sense of their racial identity if their families make a conscious effort to affirm the child's cultural heritage.¹⁸⁴ But if children have the right and the need not to be deprived of the everyday experience of their birth culture, what level of exposure is sufficient to prevent a child from being deprived of that culture? Writers from the perspective of color-blind individualism espouse the belief that a white family can provide a Black child with an appropriate cultural experience through exposure to Black culture. Blacks may see this as insulting, suggesting that Black culture is no more than seeing a play with Black actors and a Black theme, reading a book about Jackie Robinson, or occasionally eating some greens and fried chicken. Blacks may view the essence of culture as the

180. Jason DeParle, *Talk of Government Being Out to Get Blacks Falls on More Attentive Ears*, N.Y. TIMES, Oct. 29, 1990, at B7.

181. See JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1981).

182. See, e.g., Mahoney, *supra* note 3, at 499-501.

183. See *id.* at 500. In describing her interactions with her African American adopted daughter, Professor Mahoney states, "Just as Rachel gets to be a part of our culture, to become Jewish and Irish by adoption, so we get to participate in hers."

184. See LADNER, *supra* note 28, at 255; Ruth G. McRoy, Louis A. Zurcher, Michael L. Lauderdale & Rosalie E. Anderson, *The Identity of Transracial Adoptees*, 65 Soc. CASEWORK 34, 38-39 (1984); see also McROY & ZURCHER, *supra* note 9, at 139.

day-to-day experience of family life—the reality of living as a Black person in America.

For many Blacks, troubling questions remain. How is this proposed process of cultural exchange, for example, prevented from ultimately becoming a process of cultural imperialism?¹⁸⁵ A danger exists that as a result of the status and power dynamic of the parent-child relationship, a parent may be unable to convey to a child of a different race that the child's birth culture is different from, but equal to, the parent's culture. This danger is greatest when the society in which the child is raised perceives the child's birth culture as disabling. The concern is that the minority culture will be viewed as subordinate and, therefore, inferior.

Furthermore, it should not take the adoption of a Black child for a white family to decide that exposure to multiculturalism is desirable. Some Blacks may believe that racism is pervasive and enduring in part because so few whites think it is important to educate themselves about Black culture and history. All white families, whether or not they adopt a Black child, should have multicultural experiences that teach them to value the history and culture of people from diverse groups. Indeed, many Blacks might see it as more important for white families to raise white children who respect Black people and Black culture than it is for them to adopt Black children.

In the past few years, the legislatures in a number of states have passed what have come to be known as "Minority Heritage Preservation Acts,"¹⁸⁶ designed to ensure that substantial weight is given to placing children into adoptive settings in which their cultural heritage can be preserved. The statutes generally provide a list of preferences in placing children for adoption with families of ethnically similar makeups: (1) relatives, (2) a family of the same racial or ethnic group, or (3) a family of a different racial or ethnic group where that family is knowledgeable about and appreciative of the child's racial or ethnic heritage.¹⁸⁷ These statutes are controversial¹⁸⁸ and will likely be the subject of legal challenges.¹⁸⁹

The federal government has recently entered the debate. The Multiethnic Placement Act of 1993 is now pending in Congress.¹⁹⁰ This Act

185. See generally EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1993) (exploring the relationships between political, military, and economic conquest of non-Western societies by the West and the ways in which the culture of the dominated becomes subordinated and devalued).

186. See, e.g., ARK. CODE ANN. § 9-9-102 (Michie 1993); MINN. STAT. ANN. §§ 259.255, 259.28(2) (West 1992).

187. See sources cited *supra* note 186.

188. See, e.g., Timothy P. Glynn, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925 (1993).

189. The original version of the Minnesota statute was held unconstitutional as a denial of equal protection because it only required the court or agency to implement a racial preference when considering the adoption of minority children. *In re D.L.*, 479 N.W.2d 408 (Minn. Ct. App. 1991), *aff'd on other grounds*, 486 N.W.2d 375 (Minn. 1992).

190. S. 1224, 103d Cong., 1st Sess. (1993).

would prohibit any agency that receives federal assistance from delaying or denying the foster care or adoptive placement of a child solely on the basis of race, color, or national origin.¹⁹¹ However, it does provide that the agency may consider a child's race, color, or national origin in arriving at a placement decision, if these factors are in the best interests of the child and if they are considered in conjunction with other factors.¹⁹² Also, while the bill forbids the use of race, color, or national origin to "delay or deny" placement,¹⁹³ it implicitly permits agencies some reasonable period of time to seek adoptive parents of the child's background. Whatever the outcome of these legislative proposals and enactments, the debate on the issue of cultural genocide is likely to continue.

III DISCOURSE AND SUBORDINATION

While the discourse of colorblind individualism purports to serve the goal of racial equality, it can, in fact, serve to affirm white domination.¹⁹⁴ For example, some colorblind individualists have argued that opposition to transracial adoption celebrates a marriage between Black Nationalists and racial segregationists.¹⁹⁵ Yet this portrayal is both inaccurate and simplistic. The ultimate goals of Black Nationalists and racial segregationists clearly are not the same. Although many Black Nationalists may view separatism as a route to freedom for Black people, they clearly would oppose the kind of laws that segregationists would embrace. In equating the two disparate groups, colorblind individualists deny the strength and independence of the Black Nationalists and suggest that Black Nationalists are no more than the unwitting tools of white supremacists.

Colorblind individualism, not Black Nationalism, poses a real threat to the interests of Black people in achieving racial equality. Colorblind individualism must be examined within the context of the larger debates on other racial issues in this society. When seen in that perspective, it becomes clear that colorblind individualism threatens an unfortunate alliance

191. *Id.*

192. *Id.* § 3(a)(2).

193. *Id.* § 3(a)(1)(B).

194. A number of scholars have pointed out the ways in which a colorblind constitutional analysis can foster racial domination. *See, e.g.,* Aleinikoff, *supra* note 37; Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 959 (1993) (arguing that the imposition of transparently white norms is a unique form of unconscious discrimination); Gotanda, *supra* note 2; Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1394 (1991) (discussing how a supposedly neutral standard to evaluate foreign accents is an opportunity to exercise power); Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2137 (1989) (discussing how supposed merit principles foster domination).

195. *See* Bartholet, *supra* note 3, at 1246.

between a modern, liberal approach and the racially conservative politics of the 1980s and 1990s.¹⁹⁶

In recent years, conservatives have used the doctrine of colorblindness to attack programs designed to open opportunities for minorities, especially with respect to employment. These advocates of colorblindness believe that affirmative action undermines standards of merit in order to redistribute social goods proportionately for minority groups.¹⁹⁷ Colorblindness may have been the rallying cry of liberals during the years when Martin Luther King, Jr., dreamed of the day when all people would “be judged not by the color of their skin but by the content of their character.”¹⁹⁸ Those advocating colorblindness today, however, are often not the proponents of racial equality. In the 1990s, colorblindness has become a doctrine of conservatives rather than of liberals.

A similar analysis can be applied to the idea of individualism, which, like colorblindness, is a grand myth of American history.¹⁹⁹ Although much of the nation’s liberal doctrine is steeped in the ideal of the individual, the groups to which the individual belongs dramatically affect the life one lives or is permitted to live.²⁰⁰ This is true whether one is a member of a powerful or a powerless group. Apparently addressing this fact, the law not only recognizes the rights of individuals, but often the rights of a group. Children, veterans, the disabled, and Native Americans are all examples of groups that have, sometimes after years of struggle, achieved legal recognition of certain rights as groups.²⁰¹

In the 1990s, individualism, like colorblindness, is a doctrine of political conservatism. It has been used to promote the idea that those who have not succeeded in this society lag behind because of personal deficiencies.²⁰² A focus on individualized, rather than systemic, solutions to the dilemmas confronting Blacks was epitomized by President Bush’s “thou-

196. Professor Bartholet’s article makes this link explicit when she uses the affirmative action cases of the 1980s to support her argument for transracial adoption. Bartholet, *supra* note 3, at 1228-37; *see also infra* text accompanying notes 297-308.

197. Aleinikoff, *supra* note 37, at 1064 (describing and criticizing the colorblind approach).

198. This quotation is from Martin Luther King, Jr.’s famous “I Have a Dream” speech, which was delivered at the March on Washington on August 28, 1963. MARTIN LUTHER KING, JR., *I Have a Dream, as excerpted in THE WORDS OF MARTIN LUTHER KING, JR.* 95, 95 (Jean Highland ed., 2d ed. 1987).

199. *See supra* note 55.

200. *See supra* text accompanying notes 66-74.

201. *See, e.g.*, Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1988 & Supp. IV 1992) (giving tribal courts responsibility over placement of Indian children in foster and adoptive homes); Americans with Disabilities Act of 1990, 42 U.S.C. 12101 (Supp. IV 1992) (providing equal opportunity for individuals with disabilities).

202. *See, e.g.*, Lucy A. Williams, *The Ideology of Division: Behavior Modification and Welfare Reform Proposals*, 102 YALE L.J. 719, 742 (1992) (describing the New Right’s portrayal of welfare recipients as people who “had not seized the offered opportunity, did not share the national work ethic, and whose values seemed to deviate dramatically from the national ideology.”).

sand points of light” approach, which emphasized individual volunteerism over governmental activism in combatting societal problems.²⁰³ In the context of transracial adoption, individualism suggests that the problems confronting Black families in the society can be addressed by individually-based solutions—in this case, the adoption of individual Black children by white families.

It is important to keep in mind the distinction between antidiscrimination and antisubordination.²⁰⁴ Advocates of antidiscrimination argue that it is inappropriate to treat people differently on the basis of such attributes as race or gender. They focus on the effect on the individual of alleged discrimination.²⁰⁵ Thus, antidiscrimination law addresses aspects of the racial hierarchy that deny Black people formal equality. Antisubordination analysis, on the other hand, addresses broader issues. It focuses on the role of society in creating the subordination of a group and the way in which the law deals with that subordination.²⁰⁶ Under such an analysis, requiring similar treatment of individuals from distinct groups may actually reinforce subordination, when the circumstances under which the groups live are very different. The goal of antisubordination is not simply a society in which everyone is treated “equally” but rather a society in which each member is guaranteed equal respect as a human being.²⁰⁷

A method of discourse can subordinate. The manner in which people speak about a group can reinforce the powerlessness and oppression that the group already experiences. In the context of transracial adoption, the discourse of colorblind individualism promotes a view that the Black community is invisible, powerless, and irrelevant to the determination of

203. See EXECUTIVE OFFICE OF THE PRESIDENT, THE POINTS OF LIGHT MOVEMENT: THE PRESIDENT’S REPORT TO THE NATION (1993); PRESIDENT’S ADVISORY COMM. ON THE POINTS OF LIGHT INITIATIVE FOUND., REPORT TO THE PRESIDENT (1989); WHITE HOUSE, THE POINTS OF LIGHT INITIATIVE: COMMUNITY SERVICE AS A NATIONAL POLICY (1989). For commentary on the proposal, see Sydney H. Schanberg, *Bush’s Points of Light Proposal: Good, but Foolish*, N.Y. NEWSDAY, June 23, 1989, at 81.

204. There are two competing views of equal protection law—the antidiscrimination principle and the antisubordination principle. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1514, § 16-22, at 1521 (2d ed. 1988) (stating that the antidiscrimination principle focuses on acts of prejudice, whereas antisubjugation focuses on legally reinforced systems that treat some people as second-class citizens); Paul Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) (defining the antidiscrimination principle as one disfavoring classifications, decisions, and policies based on race; noting that other principles may be needed to address questions of economic justice); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005-14 (1986) (arguing that the antidifferentiation model ignores the larger societal context in which discrimination takes place, while the antisubordination model seeks to eliminate power disparities in the society); Crenshaw, *supra* note 2 (arguing that society refuses to recognize the role of racial subordination); Roberts, *supra* note 35, at 1450-56 (applying antisubordination principles to the actions of some state governments in criminally prosecuting pregnant drug addicts).

205. Colker, *supra* note 204, at 1005.

206. *Id.* at 1005-09.

207. Roberts, *supra* note 35, at 1454.

policies that affect Black children. The discourse reserves to whites the power to determine when and under what circumstances Blacks will be treated as individuals or as a group. Furthermore, the discourse of colorblind individualism promotes some very damaging myths and assumptions about Black families and, in particular, about Black mothers. In addition, this discourse reinforces the subordination of Black children by affirming an adoption system that places a premium on white children and places the emotional burdens of integration on Black children alone.²⁰⁸

A. *Discourse and Methodology: Who Speaks? Who Is Heard?*

Much colorblind individualist discourse fails to seriously consider Black perspectives on many relevant issues.²⁰⁹ Although not all writers are guilty of this to the same degree,²¹⁰ it does appear to be a troubling trend. Black authorities on the needs of Black children are, for the most part, ignored. Often, writers do not even acknowledge that sources of expertise exist.²¹¹ Colorblind individualists also give short shrift to Black history and the political concerns of the Black community.²¹² These writers dismiss Black people's concerns regarding the long-term political implications of transracial adoption for Black Americans as separatist or nationalist.²¹³ As a result, some of the colorblind individualist discourse is less enlightening about transracial adoption than it is about the authors' perceptions of Black people, class, and cultural hierarchies.²¹⁴ The object of the discussion can easily be reduced to invisibility, its voice ignored. Thus, as

208. The connection between discourse and power is the subject of an extensive literature, often associated with the work of Michel Foucault. See MICHEL FOUCAULT, *L'ORDRE DU DISCOURS* (1971).

209. A number of minority legal scholars have made this argument in varied contexts. See, e.g., Derrick A. Bell, *The Supreme Court, 1984 Term—Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 2, 52-54 (1985); Culp, *supra* note 72, at 48 ("White scholars traditionally have heard black scholars only when what they have said and claimed were compatible with white concerns."); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

210. Howard devotes some attention to the concerns of the Black community in her article on transracial adoption. See Howard, *supra* note 3, at 530-33.

211. Authors are increasingly writing about the developmental needs of Black children. See sources cited *supra* note 119. Significant literature already exists concerning the psychology of racism and the effects of racism on the psyche of Black people. See sources cited *supra* notes 119, 122, 124-26. However, in discussing whether Black parents provide "survival skills" to Black children, see *supra* discussion in part II.B.3, advocates of transracial adoption address neither the existence nor the possible implications of this literature. They tend to either dismiss the concept of survival skills, e.g., O'Brien, *supra* note 3, at 502, or assume that whites are equally capable of providing such skills. E.g., Barholet, *supra* note 3, at 1232-33. They assume that any questions about the competence or desirability of white parents raising Black children are adequately addressed by the studies, most of which have been conducted by whites.

212. See *supra* part II.C.

213. See, e.g., Barholet, *supra* note 3, at 1248; O'Brien, *supra* note 3, at 494.

214. See Aleinikoff, *supra* note 37, at 1070; see also EDWARD W. SAID, *ORIENTALISM* (1978). In Said's classic work, which explores the relationship between the West and the Arab world, he explains that the term *Orientalism* has several interdependent meanings. *Id.*

Alexander Aleinikoff has commented: "In a powerful way, whites create and reflect a cultural understanding of blackness that requires little contribution from blacks. The dominant and dominating story excludes or ignores black representations of blackness not out of vindictiveness or animus, but because the black stories simply don't register."²¹⁵ It is ironic that the most recent articles on transracial adoption begin with personal narratives about the authors' own experiences with transracial and/or international adoption.²¹⁶ Presumably, the authors include these narratives to enhance their arguments with the power of personal testimony and authenticity.²¹⁷ But the authors fail to balance these narratives with any discussion of the views and experiences of Black individuals and communities. They have rendered the Black community invisible by using themselves as the reference point for a personalized discussion of transracial adoption.

While rendering the Black community invisible, the discourse of color-blind individualism also reinforces the subordination of Black communities. When proponents of this perspective accord no importance to the views and interests of the communities from which Black children come, they disconnect these children from the Black community. This disconnection runs counter to the inextricable link in virtually every arena of American life between all Black individuals and Blacks as a group.²¹⁸ Blacks cannot extricate themselves from this linkage, yet when whites decide that they wish to adopt Black children, the power of the dominant group is exercised to make an exception to this linkage. Thus, whites alone hold the power in the system to determine the circumstances under which Blacks will be treated as individuals and under which they will be treated as a group.²¹⁹

at 2. In essence, Said views Western depictions and explanations of the Arab world as products not of reality but of the Western imagination.

Orientalism can be discussed and analyzed as the corporate institution for dealing with the Orient—dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, selling it, ruling over it: in short Orientalism is a Western style for dominating restructuring and having authority over the Orient.

Id. at 3.

215. Aleinikoff, *supra* note 37, at 1070.

216. Professor Bartholet adopted two children from Peru, Bartholet, *supra* note 3, at 1164-74, while Professor Mahoney adopted an African American child. Mahoney, *supra* note 3, at 487.

217. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) (discussing the power of personal narratives).

218. See *supra* text accompanying notes 66-73.

219. An interesting example is posed by the issue of biracial children. Various people have asked me whether the analysis of transracial adoption should differ for those children who are, at least in biological terms, part white. Presumably these questioners seek to press the argument that whites should be deemed equally entitled to adopt such children. Cf. Bartholet, *supra* note 3, at 1173 n.8 ("These biracial children can be seen as at least a partial racial match with their white adoptive parents."). The social reality is that, in this country, children who are part Black are considered Black. Indeed, this country historically has maintained a system of racial classification in which one drop of Black blood was deemed sufficient for exclusion from the white race. See, e.g., A. Leon Higginbotham, Jr., & Bar-

B. *Transracial Adoption Discourse and Dangerous Mythologies*

The subject of white families adopting Black children has lent itself to humorous portrayal in the media. Two popular television shows in the 1980s, "Webster" and "Different Strokes," involved whites who had adopted Black male children.²²⁰ In both shows, the Black children, although very cute, were seriously undersized for their ages. This physical feature only added to the humor, absurdity, and unreality of the situation. However, in real life, the discussion about transracial adoption is not very funny and not very cute. The colorblind individualist discourse can promote dangerous myths.

In this section, I will focus primarily on Professor Elizabeth Bartholet's recent article *Where Do Black Children Belong?: The Politics of Race Matching in Transracial Adoption*.²²¹ I focus on this article because it is likely to be widely read and influential in future thinking about the subject.²²² Although in many ways the article is comprehensive and informative, it is also an example of the way in which discourse arising out of the perspective of colorblind individualism, can, when taken to its extreme, contribute to racial subordination. In some instances, the article downplays, ignores, or misunderstands important aspects of Black life and Black history. On other occasions, it specifically or implicitly conveys negative images of Black families.

1. *The Impression That Transracial Adoption Will Substantially Impact the Numbers of Black Children in Foster Care*

One false impression that Professor Bartholet's article conveys is that policies preferring Black adoptive parents for Black children are primarily responsible for the number of Black children remaining in foster care on a long-term basis. The argument is essentially as follows: There are many Black children in foster care in need of homes. There are many white

bara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Antebellum and Colonial Virginia*, 77 *GEO. L.J.* 1967 (1989). Although the system of classification that has always deemed biracial children Black is clearly racist and offensive, it would indeed be an anomaly to treat biracial children as other than Black only when whites seek to transracially adopt them.

220. See Aldone Collier, *Emmanuel Lewis*, *EBONY*, Feb. 1984, at 35; Anne Marie Dunatov, *The Black and White Family: Mutual Need Rekindles the Debate on Interracial Adoption*, *AM. HEALTH*, Mar. 1990, at 118.

221. Bartholet, *supra* note 3.

222. The author of the article is a professor at Harvard Law School, and the article was published in one of the country's most prestigious law reviews. Here I am reminded of Michel Foucault on the relationship between power and discourse. Foucault examines the ways in which the status of the writer and the context in which the writing appears affects the power of the content of the message. See generally MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (1972); FOUCAULT, *supra* note 208. For an example of the application of Foucault's analysis to the legal context, see Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 *S. CAL. L. REV.* 2599 (1992).

families who would be willing to adopt them. However, because the policy of most social agencies is to place children with families of the same racial background, Black children remain trapped in foster care, while white families who wish to adopt them are not permitted to do so.²²³ Professor Bartholet implies that positions like those of the NABSW against transracial adoption are responsible for this predicament.²²⁴

This leaves open the question of why the white social work establishment, according to Bartholet, acceded to the wishes of Black social workers. There are a number of possibilities. One is that the position of the NABSW against transracial adoption fit comfortably with the true feelings of many white social workers, who think that transracial adoption is undesirable. Such feelings could be attributed to racist views about interracial families or to a sincere belief that Black children are better off in Black families. Alternatively, white social workers may have simply felt that it was appropriate to defer to the judgment of their Black colleagues on an issue involving Black children. Or perhaps, despite official deference given to the position of the NABSW, transracial placements in fact continued.²²⁵

A rather stark example of Professor Bartholet's approach appeared in a recent issue of the magazine *Reconstruction*.²²⁶ Accompanying the article, an abbreviated version of her longer article on transracial adoption,²²⁷ were several pages of pictures of children, overwhelmingly Black, eligible for adoption.²²⁸ Most of the children were between four and fifteen years old. None were newborns. Most were described as mentally retarded, developmentally delayed, or as having suffered from abuse or neglect. Professor Bartholet's article, in combination with the pictures, seemed designed to convey the impression that, but for those ill-informed Black social workers who consistently oppose transracial adoption, these Black and Hispanic children would have permanent homes.

Most likely, some relationship exists between racial matching policies and the number of Black children in foster care. However, in her zeal to eliminate race as a factor in adoption, Professor Bartholet overstates her case. She relies largely on inferences drawn from other research and on

223. See Bartholet, *supra* note 3, at 1193-1223.

224. In discussing the influence of the 1972 NABSW position paper, Professor Bartholet writes: "Adoption agency bureaucrats moved swiftly to accommodate the position taken by the NABSW." *Id.* at 1181. She notes that, at present, a social worker contemplating placing a Black child transracially "risks invoking the wrath of the NABSW and other vocal critics of transracial adoption" and that there "appear to be many adoption workers who are either sympathetic with the NABSW's position or feel intimidated by NABSW advocates . . ." *Id.* at 1195.

225. Simon and Altstein have noted: "Most adoption agencies would rather not draw attention to themselves by actively supporting or encouraging [transracial] placement." SIMON & ALTSTEIN, *supra* note 5, at 13.

226. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, RECONSTRUCTION, Vol. 1., No. 1, 1992, at 22.

227. Bartholet, *supra* note 3.

228. Bartholet, *supra* note 226, at 24, 44-45, 55.

secret interviews²²⁹ to support her contention that this is in fact the way the system works. She admits, however, that no systematic study demonstrates that policies favoring the placement of Black children with Black parents delays or denies Black children placement in adoptive homes.²³⁰

The relationship between agencies' practice of preferring Black adoptive homes for Black children and the long-term presence of many Black children in foster care is not as clear as Professor Bartholet claims. Other very powerful explanations exist. First of all, many children in foster care are not free for adoption.²³¹ The response to this, of course, could be that parental rights to these children should be terminated promptly, making them available for adoption. However, such a policy would stand the *raison-d'être* of foster care on its head. The foster care system, which was designed to provide care for children while their natural parents work out particular difficulties or reorganize major aspects of their lives,²³² should not serve primarily as a conduit to funnel children into new families. A policy that demanded the instantaneous termination of the parental rights of Black parents to improve the chance that their infants might be adopted

229. Bartholet, *supra* note 3, at 1183 n.50. She states, "My own investigation has included interviews with a wide array of leaders in the adoption world and experts on racial matching policies, together with a review of the relevant literature." *Id.* at 1185. Although she provides a long list of the names of the interviewees, she does not cite to these people as sources for specific views because she does not want to "risk unnecessary embarrassment to persons who were willing to talk to me on a forthright basis" and notes that "[i]t is an unfortunate aspect of the current debate that many persons who are highly critical of current racial matching policies are fearful of expressing their views publicly." *Id.* at 1183 n.50. She does provide that the notes of her interviews and the written comments upon which she relies are in her files at her office. *Id.*

230. Bartholet, *supra* note 3, at 1183 n.50.

231. The most recent book by Simon and Altstein, *supra* note 5, makes it clear that it is extremely difficult to find accurate statistics on adoption. They note, "In April 1983, the North American Council on Adoptable Children (NACAC) reported that federal authorities . . . estimated the number of children in foster care to be 'approximately 500,000-750,000,' 60 percent of whom were racial or ethnic minorities." *Id.* at 13. According to the Council, "Approximately 100,000-120,000 children in foster care were legally free for adoption," and "about 30 percent of these were black." *Id.* Simon and Altstein thus extrapolated that there were 33,000-40,000 Black children awaiting adoptive placement. *Id.* However, they go on to state that the Department of Health and Human Services reported that, in 1982, there were only 243,000 children in foster care, and only 50,000 were free for adoption. *Id.* Apparently, no racial designations were provided with respect to this information. Finally, Simon and Altstein state that, in "1984, the president of the National Committee for Adoption suggested that of the approximately 2 million white couples who would like to adopt, about 68,000 would do so transracially." *Id.* However, the authors do not indicate whether the families that express a willingness to adopt transracially would be willing to adopt Black children and more specifically the kind of Black children most in need of adoptive homes—children who are older, disabled, or need to be adopted in sibling groups.

232. *See, e.g.,* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 824 (1977) (stating that children are placed in foster care "when physical or mental illness, economic problems or other family crises make it impossible for natural parents . . . to provide a stable homelife for their children for some limited period").

by white families would be both racist and unwise.²³³ A second reason why some Black children stayed in foster care for such long periods was the financial structure of foster care agencies. It was sometimes more advantageous, from a funding perspective, for agencies to keep children in foster care than to release them for adoption.²³⁴ Finally, many Black children remain in foster care with people unrelated to them because agencies do not strive to place Black children with their extended families.²³⁵ It also

233. In the 1970s and 1980s, substantial emphasis was placed on the desirability of prompt termination of parental rights and placement for adoption of children for whom return to the natural parents seemed unlikely. See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 442-43 (1983). This approach has been questioned. *Id.* It has been argued that the movement toward prompt termination of parental rights is misguided because it assumes that adoption is always preferable to a long-term, stable, permanent foster care placement. See PAUL D. STEINHAUSER, *THE LEAST DETRIMENTAL ALTERNATIVE: A SYSTEMATIC GUIDE TO CASE PLANNING AND DECISION-MAKING FOR CHILDREN IN CARE* 225 (1991) (arguing that it is important to distinguish between planned, permanent foster care and indifferent, long-term fostering resulting from lack of planning, drift, inadequate service, and agency neglect and that permanency in living arrangements and continuity of key relationships are more important than whether a home is adoptive or foster).

Arguments for terminating parental rights are premised on the concept of the exclusivity of the nuclear family. In thinking about the concept of nontraditional families, it is possible for the analysis to extend beyond the idea that a family can be nonbiological and interracial. We might also ask whether a family can be constructed without adhering to the norm of exclusive parenthood. Indeed, in recent years the whole concept of exclusive parenthood has been challenged. See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882 (1984) (urging that states develop options that do not presume the exclusivity of parenthood, especially where relationships have been formed outside of the nuclear family); Candace M. Zierdt, *Make New Parents but Keep the Old*, 69 N.D. L. REV. 497, 499 (1993) (advocating a form of adoption where the birth-parent retains visitation rights, but the adoptive parents have physical and legal custody of the child). It would be interesting to think about the possibility of an arrangement in which white adoptive parents share a Black adopted child with her Black birth parents.

234. See Note, *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U. L. REV. 446, 458 n.75 (1976) (citing reasons children remained in foster care, including financial arrangements wherein the discharge of children may result in an agency's loss of per capita funds and the reluctance of some public agencies to incur legal costs associated with the termination of parental rights). Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-617 (1988 & Supp. IV 1992) provided federal financial assistance for foster care payments and services. No federal participation, however, was provided for state adoption assistance programs. Barbara L. Atwell, "A Lost Generation": *The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980*, 60 U. CIN. L. REV. 593, 598 (1992). This financial disincentive increased the likelihood of children remaining in foster care, rather than being placed for adoption. *Id.* at 598-99. The Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670-679a (1988 & Supp. IV 1992), attempts to address this problem by providing federal financial assistance for qualified adoption programs directed at children with "special needs," such as handicapped children, older children, or children of minority groups. 42 U.S.C. § 673 (1988).

235. In response to the article by Professor Bartholet in *Reconstruction*, two social workers wrote:

[I]n tapping into the extended families of waiting children we have found many relatives to be willing and able to provide permanent, nurturing, and safe homes. We have also become very familiar with resistance to placement with relatives. . . . Many professionals involved in the field of child welfare believe that abuse and

appears that many agencies have been reluctant to work with Black families in the adoption process.²³⁶ Indeed, the long periods of time many Black children remain in foster care must be examined as part of a much larger system of inadequate provision of child care services to minority children.

As Professor Ketayun Gould has observed:

The systemic failure to make an accurate assessment of the plight of minorities of color has resulted in minority children receiving insufficient, inadequate, and often inappropriate and damaging child welfare services. Research in this area has demonstrated clearly that minority children of color enter the welfare system in disproportionate numbers, remain in the system longer than white children, and have a disproportionate number of undesirable experiences in the system. . . . Moreover, African-American children fare worse than white children or any other minority children of color on all measures of service delivery and evaluation, such as recommended versus actual length of placement, placement time and number of services, provision of adoption services, and worker contact with child and principal child caring person.²³⁷

It is very convenient for advocates of transracial adoption to gloss over the fact that the debate over transracial adoption is really a struggle over Black babies instead of a struggle over the full range of Black children available for adoption. It has been reported that "only 1% or less of the white families willing to adopt Black children request children who are most in need of families: children over eight years of age, sibling groups

dysfunction are systemic and cross generational lines. Some feel that once one family member has abused or neglected a child, the rest of the family is "just no good."

Victoria Nielsen & Katherine Baker, *Correspondence, Trans-racial Adoption*, RECONSTRUCTION, Vol. 2, No. 1, 1992, at 105, 108-09.

236. In describing the rise of transracial adoptions, one social worker states that colleagues who provide adoptive services were "white and middle-class and therefore comfortable with a like clientele." Lillian B. Lansberry, *Responses to "Where Do Black Children Belong?"*, RECONSTRUCTION, Vol. 1, No. 4, 1992, at 46, 52. When there was a decrease in the availability of white babies and an increase in the availability of Black babies, "[u]naccustomed to working with families of color, these agencies were more comfortable trying to fit the existing children into the families of their adoptive applicants than they were in learning how to work with a new group of families." *Id.* at 52-53.

237. Ketayun H. Gould, *Limiting Damage Is Not Enough: A Minority Perspective on Child Welfare Issues*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE 58, 59 (Joyce E. Everett, Sandra S. Chipungu & Bogart R. Leashore eds., 1991) [hereinafter CHILD WELFARE]; see also NORTH AM. COUNCIL ON ADOPTABLE CHILDREN, RACE AND CHILD WELFARE FACT SHEET (1992) (on file with the *New York University Review of Law & Social Change*) ("Most children languish in foster care because of the disarray in that system, not because workers are trying to place children with families of the same race.").

and emotionally and physically handicapped children."²³⁸ This statistic belies the fantasy world of the television sitcom, in which whites are shown adopting "cute" older Black children with growth disorders. The reality is that most white families that are willing to adopt transracially are not interested in these children. They want Black newborns, not older children with emotional or physical disabilities.²³⁹

Another fact glossed over by advocates of transracial adoption is that there are also plenty of white children available for adoption. These children, like most of the Black children available, are older, physically or emotionally disabled,²⁴⁰ or are siblings in need of the same placement.²⁴¹ If white families want to adopt children who are in need of homes, we must ask why they are not rushing to adopt these children. Parents may prefer to adopt infants so that they can start with a "clean slate," rather than adopt an older child who may have already been adversely affected by others. These parents may even be motivated by the belief that they can ultimately evaluate their own accomplishments as parents through their children's achievements, looking not at how far the child has come but how well she has done in society. It is questionable whether this attitude is consistent with healthy parenting for any child, Black or white.

Arguments that Black children are trapped in foster care because of agencies' antitransracial policies can easily become a type of rescue fantasy—a modern-day version of "white man's burden." Such arguments depict Black people as unwilling or unable to help themselves, while they let whites off the hook—permitting them to believe they are willing to do something significant to help Black people, while the systemic problems confronting the vast majority of Black children go unaddressed.²⁴²

238. New York Chapter—National Ass'n of Black Social Workers, *Transracial Adoption Update* 3 (1978) (unpublished manuscript, on file with the *New York University Review of Law & Social Change*) [hereinafter *Transracial Adoption Update*]. Simon and Altstein noted that, in 1987, the number of Black adoptable infants was declining and that 87 percent of the Black children placed for adoption were between 6 and 17 years of age. SIMON & ALTSTEIN, *supra* note 11, at 124-25.

239. Ironically, the category of adoptive children least in demand is the one portrayed in the television sitcoms—older Black boys. See *Transracial Adoption Update*, *supra* note 238, at 9 (noting that prospective adoptive families regardless of race, seem to prefer to adopt girls); see also WILLIAM L. FEIGELMAN AND ARNOLD R. SILVERMAN, *CHOSEN CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS* 44-45 (1983) (noting difficulty of placing male children). It is reasonable to assume that older Black boys with growth disorders would be considered even less desirable.

240. Agencies also have difficulty placing older and handicapped white children. Bowen, *supra* note 3, at 506; *Transracial Adoption Update*, *supra* note 238, at 3. See generally Richard Lacayo, *Nobody's Children: In the World of Adoption, Where Healthy White Infants Are Hoily Pursued, a Burgeoning Group of "Special Needs" Kids Is Left Behind*, *TIME*, Oct. 9, 1989, at 91.

241. Lansberry, *supra* note 236, at 53.

242. As Marian Wright Edelman, President of the Children's Defense Fund, has observed, "Black children, youth and families remain worse off than whites in every economic indication of American life—and the gap is widening." Marian Wright Edelman, *Black Children in America*, in NATIONAL URBAN LEAGUE, INC., *THE STATE OF BLACK AMERICA*

Discourse that promotes the myth that white families are needed to rescue Black children from foster care implies another myth—that Black families are unwilling to adopt Black children. This myth flies in the face of the long tradition of Black people accepting needy Black children into their homes, through informal and traditional adoption. Informal adoption has long existed in the Black community.²⁴³ During slavery, when parents could be sold away from their children whenever the slaveowner so desired, adults often ended up raising children who were not their biological offspring.²⁴⁴ The custom of nonrelatives raising children continued in the Black community long after slavery ended²⁴⁵ and continues to this day.²⁴⁶ To the extent that Black families have not adopted through traditional channels, it is well-established that adoption agencies' criteria historically excluded many Black families.²⁴⁷ Finally, research demonstrates that Black people do indeed adopt through traditional channels. Indeed, middle-income Black families adopt at a higher rate than their white counterparts.²⁴⁸ Furthermore, research has shown that Blacks adopt relatives at a

1989, at 63, 65 (1989). A Black infant is more than twice as likely as a white infant to die during the first year of life. *Id.* at 64. A Black child's father is twice as likely as a white child's father to be unemployed. *Id.* A Black child is 40 percent more likely than a white child to be behind average grade level in school and 15 percent more likely to drop out. *Id.* Blacks are three times as likely as whites to be poor, and nearly half of all Black children live in poverty. JAMES & WILLIAMS, *supra* note 4, at 8, 19. The rate for death by homicide for Black males aged 15 to 24 years old was 114.8 per 100,000, as compared to 12.8 per 100,000 for white males of the same age. *Id.* at 411-16.

243. See ROBERT B. HILL, *INFORMAL ADOPTION AMONG BLACK FAMILIES* at iv (1977), cited in Bowen, *supra* note 3, at 491.

244. See *supra* notes 77-79 and accompanying text.

245. GUTMAN, *supra* note 78, at 226-29 (discussing how Black children orphaned by the sale or death of their parents were taken into the families of former slaves and detailing the contributions of Blacks in opening orphanages for Black children).

246. BILLINGSLEY, *supra* note 9, at 29-31 (describing the informal adoption of children by blood relatives and the "relationship of appropriation" among African Americans, in which people become a part of a family unit "simply by deciding to live and act toward each other as family").

247. See, e.g., Ruth G. McRoy, *An Organizational Dilemma: The Case of Transracial Adoptions*, 25 J. APPLIED BEHAVIORAL SCI. 145, 154 (1989) (indicating that Black families are "screened out" and then blamed for their failure to adopt). Simon and Altstein note three factors that reduce the number of Blacks adopting through traditional channels: (1) the failure of agencies to recruit in Black communities using community resources, (2) historic suspicions among some Blacks concerning public agencies that lead them to restrict their contacts with such institutions, and (3) the perception among Blacks that their less affluent neighborhoods would preclude agencies' approval of them. SIMON & ALTSTEIN, *supra* note 5, at 18; see also TOM GILLES & JOE KROLL, *BARRIERS TO SAME RACE PLACEMENT* (North Am. Council on Adoptable Children, Research Brief No. 2, 1991) (on file with the *New York University Review of Law and Social Change*) (presenting results of study of adoption agencies and discussing the lack of effective recruiting activity and the negative perceptions of adoption agencies toward prospective Black parents).

248. Andrew Billingsley states:

While it is not generally reported, middle income African-American families adopt children at a higher rate than their white counterparts. This fact is often obscured by the practice of comparing black and white families from samples composed primarily of low-income black families and middle-income white families. Indeed,

higher rate than do whites.²⁴⁹ Discourse that gives short shrift to the history and tradition of Blacks caring for Black children suggests that Blacks lack concern, lending powerful support to the argument that transracial adoption is necessary.

2. *The Myth of the Inadequate Black Family*

American culture embodies many negative stereotypes about Black people.²⁵⁰ For instance, in the well-known "deficit" model, the Black family is seen as a dysfunctional institution that is responsible for the troubled conditions of Black America.²⁵¹ One would have to have recently arrived from another planet to be unaware of the current vogue of blaming the Black family for all the ills Blacks suffer in this society. The view seems to be that the problems afflicting Black children, from poor education, to ill health, to criminal acts, are the result of poor parenting and a lack of "family values," rather than poverty or racism. Black mothers are stereotyped as welfare queens, Black fathers as powerless and irresponsible.²⁵²

The image of the "incompetent" Black family can lead to the assumption that Black children are actually better off in white families than in Black ones. The NABSW's position against transracial adoption is grounded in the view that there is a need to protect Black families from this kind of defamatory public discourse and its very real effects. Many Blacks might perceive this need to be at least as great now as it was when the NABSW issued its position paper in 1972.²⁵³

if black married-couple families are compared with similar white families, the formal adoption rate is higher among the black couples.

BILLINGSLEY, *supra* note 9, at 29.

249. See Christine A. Bachrach, Patricia F. Adams, Soledad Sambrano & Kathryn A. London, *Adoption in the 1980s*, ADVANCE DATA, Jan. 5, 1990, at 6.

250. See *supra* note 113.

251. See, e.g., OFFICE OF POL'Y PLANNING AND RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) (the Moynihan Report) [hereinafter MOYNIHAN REPORT]. The report described Black families as a "tangle of pathology." *Id.* at 29. It concluded: "At the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family. It is the fundamental source of the weakness of the Negro community at the present time." *Id.* at 5; see also Jewell H. Gresham & Lerone Bennett, Jr., *White Patriarchal Supremacy: The Politics of Family in America*, NATION, July 24, 1989, at 116, 117-19 (discussing the way in which the Moynihan Report and a CBS program, "The Vanishing Black Family," promoted this image).

252. See MOYNIHAN REPORT, *supra* note 251, at 5-14 (citing studies that show an increase of welfare-dependent Black families).

253. Some examinations of the Black family do not present a model of deficits and pathology, but instead emphasize Black families' survival, strength, and resilience in the face of overwhelming pressures and odds. See, e.g., THEODORE R. KENNEDY, YOU GOTTA DEAL WITH IT: BLACK FAMILY RELATIONS IN A SOUTHERN COMMUNITY (1980) (describing and analyzing the survival strategies of four Black extended families); Paula Giddings, *Foreword* to BILLINGSLEY, *supra* note 9, at 11, 11 ("[I]n looking at the African-American family through the lens of what it has done, against all odds, to sustain its coherence brings one to a very different conclusion than looking at it merely as a deficit model.").

Laboring under the image of Black families as inadequate, the color-blind individualist is in danger of promoting the myth that white families are not just equally capable of raising a Black child but are more capable.²⁵⁴ Again, Professor Bartholet's article provides an example.²⁵⁵ In support of her arguments regarding the advantages of transracial adoption for Black children, Professor Bartholet cites and discusses studies purporting to show that Black children raised by white adoptive parents have generally higher scores on intelligence tests than Black children raised by Black adoptive or biological parents.²⁵⁶ Although she does acknowledge that I.Q. tests "can, of course, be challenged as culturally biased,"²⁵⁷ she still cites these tests to support the notion that whites' parenting skills are superior to those of Blacks. For many Blacks, using such studies to support transracial adoption can only reaffirm their skepticism about the practice of transracial adoption altogether.²⁵⁸

Not surprisingly, Professor Bartholet rejects the "survival skills" argument discussed earlier.²⁵⁹ Instead, she argues that "there is no evidence

254. It should be noted that this view lies outside mainstream views of transracial adoption advocates. In their most recent book, Simon and Altstein state:

Very few, if any, responsible organizations or individuals support transracial adoption as a placement of first choice. . . .

In fact, arguments are rarely, if ever, heard in favor of transracial adoption that do not define it as 'second best' to permanent inracial placement and do not also include strong support for community agencies to vigorously recruit minority adoptive parents."

SIMON & ALTSTEIN, *supra* note 5, at 31-32. Since "the beginning of the 1990s, the major child welfare and adoption organizations remain strongly committed to the idea of recruiting minority adoptive parents for similar children." *Id.* at 33.

Rita J. Simon states, "I know of no evidence that suggests that adoptions of black children by black families are not as successful as adoptions of black children by white families." Rita J. Simon, *Responses to "Where Do Black Children Belong?,"* RECONSTRUCTION, Vol. 1, No. 4, 1992, at 46, 51. She considers herself to be an advocate for transracial adoptions but feels that they "should be pursued only when no appropriate permanent same-race placements are available." *Id.*

255. Bartholet, *supra* note 3, at 1221-23.

256. *Id.* at 1222 n.159 ("There is, for example, some evidence that transracial adoption has a positive impact on certain classic measures of intelligence and intellectual achievement.").

257. *Id.*

258. There is a long history of research purporting to demonstrate the genetic intellectual inferiority of Blacks. See, e.g., Arthur R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1 (1969); Arthur R. Jensen, *Reducing the Heredity-Environment Uncertainty: A Reply*, 39 HARV. EDUC. REV. 449 (1969) (arguing that Blacks have lower I.Q.s than whites as a result of genetic attributes). However, recent work has exposed connections between the decision to undertake such studies and the researchers' attitudes about race. See, e.g., STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (1981) (exploring the political nature of theories of intelligence based on biological determinism). For a discussion of the historical development and political use of intelligence testing in relation to minority group children, see Eligio Padilla & Gail E. Wyatt, *The Effects of Intelligence and Achievement Testing on Minority Group Children*, in *THE PSYCHOSOCIAL DEVELOPMENT OF MINORITY GROUP CHILDREN*, *supra* note 124, at 417.

259. See *supra* part II.B.3.

that Black parents do a better job than white parents of raising black children with a sense of pride in their racial heritage and culture."²⁶⁰ Indeed, she argues that white adoptive parents are likely to be more effective than Black adoptive parents at providing Black children with the skills necessary to survive in America. She states:

Critics of transracial adoption have claimed that only blacks can teach black children the coping skills needed for life in a racist society, but there seems at least as good an argument for the proposition that whites are in the best position to teach black children how to maneuver in the white worlds of power and privilege. Indeed it seems clear that for black children growing up in a white-dominated world, there would be a range of material advantages associated with having white parents and living in the largely white and relatively privileged world that such parents tend to frequent.²⁶¹

Such an argument, however sincere, reflects profound naïvete and misinformation. First, the argument is based on the erroneous assumption that most whites who adopt transracially move in the corridors of power and privilege.²⁶² Research on transracial adoption shows, however, that most of the whites who adopt transracially are middle- to slightly upper-middle-class people.²⁶³ Thus, even if success in corporate America is a desirable goal for a Black child, a white schoolteacher is in no better position than a Black schoolteacher to familiarize a Black child with corporate success. Secondly, even if whites as a group have more privilege and can thus introduce their children more readily to white privilege, the argument fails to understand that the experience of a Black person operating in the white world of power and privilege may be more helpful to a Black child than

260. Bartholet, *supra* note 3, at 1220. Professor Mahoney echoes a similar view. She states, "[T]here is no guarantee that Black families will provide either their birth children or their adopted children with cultural contact and a positive self-image." Mahoney, *supra* note 3, at 498.

261. Bartholet, *supra* note 3, at 1222.

262. *Id.*

263. Whether this counts as moving in corridors of power and privilege partly depends on the meaning of "power and privilege." Studies show that most white couples who adopt transracially are well-educated. However, most of the fathers were in relatively lower-paying occupations, such as the ministry, social work, or academics. In one study by Simon and Altstein, 68 percent of adoptive fathers occupied such positions. Another 12 percent were businessmen. The other 20 percent were clerical workers, salesmen, skilled laborers, or graduate students. Many of the mothers were college graduates, although none of them held full-time jobs outside their homes. SIMON & ALTSTEIN, *supra* note 5, at 61-62. The results of this study were consistent with a 1974 study by Grow and Shapiro. See GROW & SHAPIRO, *supra* note 33, at 42. Thus, Professor Bartholet may be referring to a more modest status than the phrase "power and privilege" suggests.

that of a white person functioning in the same environment.²⁶⁴ Professor Bartholet fails to understand a fact, obvious to any Black professional: a Black person needs to know different things than a white person does in order to succeed in the same setting. Indeed, the love, respect, and affection that a white family might give to a Black child might, in fact, be misleading, since such treatment, if unaccompanied by education about race and racism, fails to prepare the child for the racism that exists in the external environment. Finally, Professor Bartholet's argument seems to suggest that if Blacks do not succeed in the white world of power and privilege, it is because their parents were incapable of providing them with the proper tools. Underlying this is an assumption that Blacks do not understand the wider culture. The reality, however, is that Black parents understand the necessity of preparing their children to live in both the Black and the white worlds.²⁶⁵

Moreover, the idealization of the relationship between white adoptive parents and their Black children ignores the need for the parents to confront their own possible racism. A white individual's willingness to adopt a Black child does not immunize her from the need to examine whether racism is affecting her relationship with her own transracially adopted child. It is in the child's interest for the parent to confront rather than ignore the implications of racism.

Professor Bartholet's failure to understand the important differences between a white experience and a Black experience in America is an example of the invisibility of the Black experience to many whites.

3. *Use of the Foster Care Cases*

One interesting illustration of the way in which the colorblind individualist perspective paints a negative image of the Black family can be seen in discourse about the removal of Black foster children from the homes of white foster parents.

The public is becoming increasingly familiar with the following scenario: at birth, a Black child is placed with a white foster care family. The child thrives in that environment, and strong and tender emotional bonds develop between the child and the foster parents. The child is then abruptly removed by the agency and returned to her Black parent. Within a

264. See, e.g., GEORGE DAVIS & GLEGG WATSON, *BLACK LIFE IN CORPORATE AMERICA* (1982) (examining the personal and professional lives of Black men and women in workplaces dominated by white males).

265. See, e.g., Ronald L. Taylor, *Child Rearing in African American Families*, in *CHILD WELFARE*, *supra* note 237, at 119, 132 ("It is generally acknowledged that the most encompassing socialization goal of African American parents of all socioeconomic backgrounds is the preparation of their children to function in both the African American and mainstream cultures.") (citations omitted).

month, the child is either severely injured or dead.²⁶⁶ In an alternative scenario, a Black child is removed from white foster parents who are the only parents the child has ever known. The scene is heart-wrenching, with both the child and parents weeping hysterically as social workers literally rip the child from the foster parents' arms.²⁶⁷

Similar scenarios appear in some legal scholarship. Professor Bartholet, for example, provides the following narrative:

The white parents have poignant stories to tell. Often they have been given a child in very poor physical or psychological shape, or with serious disabilities, and have nursed the child through hard times. The child has thrived under their care and feels a close attachment. They feel a similar attachment and want to adopt so that the child will be a permanent part of their lives. The agency can offer nothing but a shift to a new foster family as an alternative.²⁶⁸

Cases involving white foster parents who are threatened with the loss of their Black foster children²⁶⁹ are used to undermine arguments in favor of considering race in the adoption of children.²⁷⁰ These cases, however,

266. See, e.g., Cameron McWhirter & Andrew Gottesman, *A Call for Children's Rights: Boy's Death Stirs Custody Reform Move*, CHI. TRIB., Apr. 30, 1993, at 1; Cameron McWhirter & Andrew Gottesman, *For Joseph, Home Wasn't with His Mom*, CHI. TRIB., Apr. 21, 1993, at 1. These articles involve the case of a Black child whose mother suffered from a severe case of mental illness. After his removal from a white foster home at the age of three, he was returned to his mother and was soon killed by her.

267. See, e.g., Jo Beth Eubanks, *Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind?*, 24 ST. MARY'S L.J. 1225, 1226 (1993). In this article, the author argues against the consideration of race in adoption and describes a television news-report of a controversy involving the attempt of a white family in Texas to adopt its African American foster child:

The video film footage is searing—a crying, screaming three-year-old African-American child, Christopher, is forcibly removed from the only family he has ever known, the Caucasian couple who have been his foster parents since he was five weeks old.

See also Kathy Dobie, *Nobody's Child: The Battle over Interracial Adoption*, VILLAGE VOICE, Aug. 8, 1989, at 18.

268. Bartholet, *supra* note 3, at 1192.

269. See, e.g., *Drummond v. Fulton*, 563 F.2d 1200 (5th Cir. 1977) (en banc), cert. denied, 437 U.S. 910 (1978) (involving an agency's removal of a child after foster parents requested adoption); *McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988) (involving an agency's removal of a child for placement with Black foster parents); *In re* Petition of D.I.S., 494 A.2d 1316 (D.C. 1985) (pitting a foster mother against the child's maternal grandmother); *In re* R.M.G., 454 A.2d 776 (D.C. 1982) (involving a dispute between white foster parents and Black grandparents); *Rockefeller v. Nickerson*, 233 N.Y.S.2d 314 (Sup. Ct. 1962) (denying order requiring agency to accept the application of a white couple for adoption of a Black child); *In re* Davis, 465 A.2d 614 (Pa. 1983) (involving a dispute between elderly white foster parents and Black couple).

270. See, e.g., O'Brien, *supra* note 3, at 489-90. O'Brien discusses *Drummond*, 563 F.2d at 1200, one of the most significant decisions that denied white foster parents permission to adopt a Black child for whom they had cared for several years, even though no other potential adoptive parents were available. O'Brien states, "[*Drummond*] is illustrative of

do not support that general proposition. They simply raise the question of the weight race should be given when Black children have been placed with white families for sufficiently long periods to form psychological bonds with them. In an earlier article, I argued that courts frequently give too much weight to the issue of race and inadequately consider the psychological bonding that takes place between children and their foster parents.²⁷¹ However, these cases have little bearing on the question of whether race should be considered as a factor in adoptive placements when no prior relationship exists between the child and prospective adoptive parents.

There are no known cases involving a dispute between a white couple and a Black couple over the adoption of a Black infant who has had no previous relationship with either couple. In discussing the foster care cases, however, writers usually fail to acknowledge the different concerns involved in using race as a factor in adoptive placements when the child is a stranger to both sets of parents. Thus, the impression left in the reader's mind is that a child is likely to be harmed when race is used as a factor in any proceeding in which a white family is attempting to adopt a Black child. What is needed is a contextual analysis of the race factor, which keeps the foster care setting and the initial adoption setting conceptually and analytically separate.

In addition, the treatment of the cases involving separation of Black children from white foster parents is imbued with racial biases. In light of the statistics that show that many children in foster care are subject to being moved numerous times,²⁷² Black families have probably also been distraught by the removal of Black foster children from their homes. The media has not reported public outrage over such removals. As a result, some Blacks may feel that sympathy for white foster parents who have been separated from their Black foster children is based, at least in part, on the assumption that they are superior parents to any Black adoptive or foster family.

4. *Transracial Adoption Discourse and Black Mothers*

An unfortunate subtext of the attack on the parenting skills of the Black family is an attack on the mothering skills of Black women. It is, after all, mothers who still play the dominant role in child-rearing. Black women in general and Black mothers in particular, have been the subject of

the abuse to which the permissibility of the use of the factor of race in adoption proceedings is susceptible." *Id.* at 490. Other authors discuss these cases more broadly to support transracial adoption. *See, e.g.,* Mahoney, *supra* note 3, at 493 n.39 (noting that her discussion is based on the right of the child not to be discriminated against).

271. *See* Perry, *supra* note 1, at 96-109.

272. In *Smith v. Organization of Foster Families for Reform*, 431 U.S. 816, 837 (1977), the Supreme Court noted that, in New York, 60 percent of the children in foster care had more than one placement and 28 percent had three or more placements; *see also* Howard, *supra* note 3, at 506.

numerous negative stereotypes.²⁷³ The Black mother, characterized as a "matriarch," has often been blamed for the condition of the Black family.²⁷⁴

Black women have been entrusted with raising white children for centuries, as domestic servants or nannies. As more and more white women enter the work force as professionals, it is likely that more and more women of color will be raising white children. It is interesting that as the transracial adoption debate intensifies, Black women, who for so many years raised white children while simultaneously raising their own, are now perceived as lacking adequate child-rearing skills.

The negative portrayals of Black parents in some of the current discourse²⁷⁵ raise the question of whether advocates of transracial adoption believe that white women are generally better at mothering than Black women. The portrayals also raise questions as to whether white women advocates of transracial adoption believe they can mother Black children better than Black women can or whether they believe that their material advantages or other benefits derived from intimate association with powerful white males put them in a better position to carry out the tasks of motherhood. Even if the protransracial adoption articles do not suggest that Black mothers are inadequate, they suggest, at the least, that Black mothers have nothing to offer to Black children that a white mother cannot provide.

5. *Race and Class Intersection in the Image of Black Families*

White families are generally wealthier than Black families in American society.²⁷⁶ Not surprisingly, research indicates that white adoptive families have higher income and educational levels than Black adoptive families.²⁷⁷ This intersection of class and race is reflected in the discourse surrounding transracial adoption.

273. For a detailed discussion of the devaluation of Black mothers in this society, see Roberts, *supra* note 35, at 1436-50. Professor Roberts remarks, "Several popular images denigrating Black mothers—the licentious Jezebel, the careless, incompetent mother, the domineering matriarch, and the lazy welfare mother—have reinforced and legitimated their devaluation." *Id.* at 1437.

274. See, e.g., MOYNIHAN REPORT, *supra* note 251, at 29-30. In describing Black families, the Moynihan Report stated, "A fundamental fact of Negro American life is the often reversed roles of husband and wife," *id.* at 30, and summarized the condition of the Black family as "[i]n essence, . . . forced into a matriarchal structure which . . . seriously retards the progress of the group as a whole." *Id.* at 29.

275. See *infra* text accompanying note 279; *supra* text accompanying notes 256-58, 261.

276. According to a study by the U.S. Census, the median net worth of Black families in 1984 and 1988 was less than 10 percent of the median net worth of white families. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-70, No. 22, HOUSEHOLD WEALTH AND ASSET OWNERSHIP: 1988, at 9 (1990) (reporting that the 1988 median household net worth was \$43,279 for whites and only \$4,169 for Blacks).

277. A 1983 study found that white adoptive parents had only a slightly higher income than Blacks who adopted. However, in 83 percent of the Black families, the family income represented the salaries of both husband and wife, in contrast to only 40 percent of the

In Professor Bartholet's article, the issues of race and class intersect to create an image of the inadequacy of Black parents. First, Professor Bartholet's discussion of white parents' ability "to teach Black children how to maneuver in the white worlds of power and privilege"²⁷⁸ embodies powerful assumptions about the inability of lower-middle and working-class parents to provide children with the skills to succeed in the larger world. Professor Bartholet argues that the use of recruitment and subsidies, which tend to increase the number of potential Black adoptive parents, can easily lead to a dangerous situation:

[Children would be placed in] families that are as a group significantly different in socio-economic terms from typical white adoptive families and rate significantly lower according to traditional parental screening criteria The important question here is whether placements are being made on a frequent basis with families that should be seen as substandard or as significantly less fit to provide appropriate parenting than waiting white adoptive parents Recruitment can be used to pressure people who have no genuine interest in parenting to adopt children for whom they are told no home is available. Subsidies can be used to encourage people who have very real financial needs but no real interest in a child to agree to an adoptive placement.²⁷⁹

This analysis of the motives of low-income people in adopting children is very troubling. Under Professor Bartholet's analysis, the Black woman who wishes to adopt, but who needs a subsidy to do so, is in danger of being perceived as a new kind of "welfare queen."²⁸⁰ The implication is

white families. McROY & ZURCHER, *supra* note 9, at 19, 21. The same study found that 55 percent of the Black adoptive mothers had completed college or above, while 82 percent of the white adoptive mothers had done so. *Id.* Only 25 percent of the Black adoptive fathers had completed college or above, while 86 percent of the white adoptive fathers had done so. *Id.*

278. Bartholet, *supra* note 3, at 1222.

279. *Id.* at 1206.

280. For example, Professor Bartholet states:

Current recruitment policies mean that we are reaching out to those living on welfare and other marginal incomes to find same-race parents.

But adoption subsidy and foster payment programs have not been conceived of as forms of welfare benefit programs. The rationale for these kinds of payments is that we want to enable people who are interested in parenting to do so. It is a very different thing to use these payments to raise the income level of people who have no particular interest in parenting but will agree to do so for a fee. To the degree that the adoption subsidy and foster care payment programs have in fact become financial benefit programs, they raise very troubling questions from the viewpoint of children.

Id. at 1235 n.204.

Adoption subsidies were not created for the sole purpose of encouraging Blacks to adopt Black children. Most statutes benefit only those children considered to have "special needs." Racial heritage is only one of several factors that places children in this category. Other factors include age, physical or emotional handicaps, mental retardation, or the need

that a Black child is better off in a middle-class white family than in a working-class Black one.²⁸¹

Underlying Professor Bartholet's discussion of recruitment and subsidies is an assumption that the white middle-class nuclear family provides the proper model for an adoptive family, and Black families are acceptable only to the extent that they mirror that model. She states: "Some [adoptees] are of course going to middle class black couples that look like the classic white adoptive family. But recruitment has never produced enough such couples for the minority children in need."²⁸²

From a feminist perspective, the emphasis on wealth and professional position as measures of merit in decisions about child placement is disturbing. Let us, just for a moment, replace the variable of race with the variable of gender. Assume that a male corporate lawyer decides to divorce his wife. The wife was a housewife during the marriage but, as a result of the economic pressure created by the divorce, must now take a job. She becomes, say, a low-paid secretary. There are two children of the marriage, ages nine and eleven. The husband clearly earns more money than the wife and will continue to do so. He is also in a better position to instruct the children about the white world of power and privilege. He has recently remarried, and his new wife plans to work as a housewife, thereby offering the children a traditional two parent home. Should the husband's greater economic wealth, superior professional standing, and more traditional domestic relationship assist him in a custody suit?²⁸³ Most feminists would argue that the husband should not be advantaged by his economic status, which has been largely created by institutionalized gender bias.

Why should the analysis be any different in the context of transracial adoption? It is troubling that the issue of wealth disparity between the races is used to block the adoption of Black children by Blacks, instead of to support improving the economic status of Blacks.

to be placed as part of a sibling group. See, e.g., CAL. FAMILY CODE § 8545 (Deering 1993); FLA. STAT. ch. 409.166 (1991).

281. See Bartholet, *supra* note 3, at 1207 ("We should not romanticize about what it is like to live on the social and economic margins of society.").

282. *Id.* at 1206.

283. This scenario is not far-fetched. Because women typically earn less than men, when wealth is taken into account for custody decisions, women can lose custody over their children even if they possess better parenting skills. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 240-43 (1985) (discussing some courts' consideration of financial resources in deciding which parent can provide better care and noting that because men are more likely to remarry within the first year after divorce, "if the court considers a two-adult family preferable, that standard will favor men"); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 *WOMEN'S RTS. L. REP.* 235, 237 (1982) (arguing that courts have shifted "from valuing the mother's nurturance during early years to evaluating the ability to support as a determining criterion").

Professor Bartholet also complains that insubstantial efforts are being made to recruit white families to adopt Black children.²⁸⁴ For example, with respect to minority children with severe disabilities and older minority children, most of whom have some problem in addition to age, she states: “[R]ecruitment has not been used in a positive way to encourage white families to adopt hard-to-place minority children.”²⁸⁵ She takes no position, however, on whether the recruited white families should obtain subsidies to enable them to adopt and whether, if they were given subsidies, *their* motives for adopting would also be suspect. She does not express concern that recruitment of white parents for these children would result in adoptions by people who would be “substandard” or “less fit to provide appropriate parenting.”²⁸⁶

Professor Bartholet’s attack on the recruitment of Black adoptive parents seems to come from an assumption that wealth and social class are the most relevant variables in predicting good parenting. In America, however, most Black families have raised healthy Black children without either of these presumed advantages. Professor Bartholet’s perspective on the recruitment of Black adoptive parents also reflects an assumption that all people are automatically aware of the complete range of options available to them in this society. Many Black families are already caring for children in extended families.²⁸⁷ Recruitment efforts that informed Black families of the need of Black children for homes and the financial assistance available if they do choose to adopt could well increase the number of prospective Black adoptive parents. Many Blacks, who live each day in a world where the notion of limitation is palpable, may need to be specifically informed that certain options exist. Thus, although Blacks have a long history of both informal and formal adoption, recruitment may be both necessary and appropriate in order to encourage more Blacks to adopt.²⁸⁸

284. Bartholet, *supra* note 3, at 1204.

285. *Id.*

286. *Id.* at 1206.

287. See BILLINGSLEY, *supra* note 9, at 28-31.

288. Professor Carol Williams has discussed the development of a recognition of the need to recruit Black adoptive families:

Concerns that the African American community did not know that the children needing [sic] permanent families were well founded. In the past, the needs of families and vulnerable children were visible to family members, neighbors, churches, and communities. With the geographic mobility of families, the changing structure of communities, and the emergence of the public child welfare system, which valued confidentiality and relied on out-of-home placement, it became increasingly difficult to identify the needs of children. The lay person in the community was unlikely to understand that many children had become social and legal orphans. Outreach and education efforts were appropriate responses and resulted in increased adoptions.

Carol C. Williams, *Expanding the Options in the Quest for Permanence*, in CHILD WELFARE, *supra* note 237, at 266, 272 (citations omitted).

There have been a number of successful efforts to recruit more Black adoptive parents. See, e.g., Bowen, *supra* note 3, at 502-03; Perry, *supra* note 1, at 113 n.211. In a recent study,

C. Colorblind Individualism and Black Children

1. The Affirmative Action Analysis

*Palmore v. Sidoti*²⁸⁹ is the Supreme Court's most direct statement on issues of race and child placement. The case involved a custody dispute between a divorced white couple. Originally, custody of their three-year-old daughter was awarded to the mother. However, after the mother married a Black man, the child's father sued to obtain custody of the child. The state court ordered a change in custody from the mother to the father based solely on the grounds that the child would be stigmatized if she were raised in a home with her mother and a Black stepfather. The United States Supreme Court reversed.

The Supreme Court noted that consideration of race, a suspect classification, is subject to strict scrutiny and that the use of race as the basis for governmental action must be justified by a compelling state interest and must be necessary to the accomplishment of a legitimate purpose.²⁹⁰ The Court went on to state that "[t]he goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."²⁹¹ The Court found, however, that in the case before it, the lower court had used race as the sole basis for its decision²⁹² and that, as a result, the decision to award

Barriers to Same Race Placement, conducted by the North American Council on Adoptable Children, the researchers found a striking difference in the rates of placement of Black and Hispanic children in same-race homes between agencies specializing in minority placement and traditional agencies. The study found that the specialized agencies placed approximately 94 percent of their 341 Black children and 66 percent of their 38 Hispanic children in same-race homes, while traditional agencies only placed 51 percent of their 806 Black children and 30 percent of their 168 Hispanic children. In evaluating these different rates of same-race placement, the authors identified several causes of the discrepancies:

First, 93 percent of minority placement specialists have workers of color on staff, compared to 55 percent of traditional agencies. Secondly, only 41 percent of the specialized agencies charge adoption fees, while virtually all (91 percent) traditional agencies do. More importantly, when fees are charged, they average \$1439 among minority placement specialists but a much higher \$5780 in traditional agencies. While it is true that many (71 percent) traditional agencies employ sliding fee scales—or, in much rarer instances, waive fees altogether—when working with families of color, their average rates remain substantially higher than those of their specializing counterparts. And thirdly, 82 percent of the agencies specializing in minority adoption have formal, written policies strongly emphasizing racial matching of adoptive children with adoptive families, versus a significantly lower 30 percent of traditional agencies.

GILLES & KROLL, *supra* note 247, at 17.

289. 466 U.S. 429 (1983).

290. *Id.* at 432-33.

291. *Id.* at 433.

292. The Court concluded that the lower court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race. Taking the court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.

custody to the father violated the Equal Protection Clause of the Fourteenth Amendment.

The *Palmore* decision could be criticized as being both vague and narrow. The Court did not discuss the application of its decision to other child placement contexts.²⁹³ Nor did it suggest how much weight race can be given in determining proper child placement. In addition, although *Palmore* states that the best interests of the child constitutes a substantial state interest sufficient to withstand an equal protection challenge, the Court made no attempt to define "the best interests" of the child or to discuss the relationship between race and the best interests test.

Commentators are not in agreement on the application of *Palmore* to adoption.²⁹⁴ Still, despite its narrow holding, and the lack of agreement as to its wider implications, *Palmore* is the most direct statement the Supreme Court has issued on the use of race in child placement. The case suggests that race may be considered as a factor, if such consideration serves a child's best interests. The Court did not rule out race as a factor to be considered in the child's best interests²⁹⁵ but only noted that it could not be the sole factor.²⁹⁶

Using *Palmore* as the framework for determining proper child placement focuses the transracial adoption debate on the extent to which racial considerations are within the definition of the best interests of the child. For instance, Professor Bartholet's argument against the use of race in adoption is premised on the assumption that Black children are harmed rather than benefitted by policies that favor placing them with Black adoptive parents. In her view, such a policy preference in adoption clearly does not further Black children's best interests. Thus, Professor Bartholet would conclude that, under *Palmore*, using race as a factor in adoption is impermissible.

But Professor Bartholet does not endorse the analysis set forth in *Palmore*. Instead, she urges a different analytical framework. She argues that a policy preferring Black adoptive parents for Black children should be analyzed under recent Supreme Court decisions governing affirmative

Id. at 432.

293. The Court stated, "The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody." *Id.* at 434.

294. See, e.g., O'Brien, *supra* note 3 (stating that *Palmore* precludes the use of race as a factor in adoption); Marshall H. Silverberg, *Palmore v. Sidoti: Equal Protection and Child Custody Determinations*, 18 FAM. L.Q. 335 (1984) (same); Perry, *supra* note 1 (stating that *Palmore* does not preclude the use of race as a factor in adoption); Wisdom, *supra* note 52 (same).

295. Although the focus of this Article is not on the constitutional issues surrounding transracial adoption, underlying my analysis is the view that the interests of Black children, both individually and as a group, can be served by considering race as a factor.

296. 466 U.S. at 432.

action²⁹⁷ and that, under these decisions, the use of race in placing children for adoption is clearly unconstitutional.²⁹⁸

Professor Bartholet proposes that the issue of transracial adoption be examined under the test established by the Supreme Court in *City of Richmond v. J.A. Croson Co.*²⁹⁹ In that case, the Court struck down an affirmative action program for minority contractors. The Court held that affirmative action programs are subject to strict scrutiny and such programs can be justified only if shown to be essential to remedy past discrimination.³⁰⁰ Professor Bartholet argues that a preference for placing Black children with Black adoptive parents is not a matter of compelling necessity and cannot be rationalized as a program designed to eliminate or remedy the effects of prior discrimination or otherwise benefit Blacks as a group.³⁰¹ She argues that such a preference promotes segregation rather than integration. It is not benign, because it harms Black children awaiting adoption.³⁰² Finally, she argues that a preference for placing Black children in Black adoptive homes is not analogous to the affirmative action programs the Court has accepted in the past.³⁰³

Professor Bartholet's analogy between transracial adoption and affirmative action is a strange one. Not every issue in which race is a factor warrants analysis in terms of affirmative action. In many contexts, consideration of race is indeed relevant to the pursuit of legitimate and important governmental goals.³⁰⁴ As Aleinikoff has noted, these goals include the participation of minorities on juries, voting plans and districts that strengthen minority votes and enable the election of representatives from minority communities, including works by minority authors in the college curriculum, and integration via race-based school assignment and housing plans.³⁰⁵ The well-publicized issues of school busing or school assignments for the purpose of integration are not discussed within the framework of affirmative action. Similarly, a policy that encourages the placement of Black children with Black families has none of the historical background of affirmative action and simply does not raise the same issues.

Generally, affirmative action programs aim at redistributing to minorities some of the economic benefits from which they have previously been

297. Bartholet, *supra* note 3, at 1228-37.

298. *Id.* at 1243-45.

299. 488 U.S. 469 (1985).

300. *Id.* at 495.

301. Bartholet, *supra* note 3, at 1231.

302. *Id.* at 1231-32.

303. *Id.* at 1232.

304. Aleinikoff, *supra* note 37, at 1064.

305. *Id.* at 1064-65 (citing *Holland v. Illinois*, 493 U.S. 474, 483-84 (1990) (presence of minorities on juries); *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1101 (2d Cir.) (race-based school assignment and housing plans), *cert. denied*, 488 U.S. 946 (1988); 42 U.S.C. § 1973(b) (1988 & Supp. IV 1992) (voting); REDEFINING AMERICAN LITERARY HISTORY (A.L.B. Ruoff & J.W. Ward eds., 1990) (expanding the college curriculum)).

excluded. Although some Black people have been deprived of the opportunity of raising their own children because the state has taken the children away from them, it seems odd to argue that Black people as a group have been excluded from the "opportunity" to raise Black children, which exclusion would warrant affirmative action analysis. By using an affirmative action analysis, Professor Bartholet sets up a transparent argument, which is easily and obviously dismantled.

Most controversies over affirmative action involve the distribution of benefits that have a present or future economic value, such as jobs, admission to college, law school, or medical school, or government programs that provide business opportunities.³⁰⁶ Some whites are hostile to such programs because they fear that they will suffer economic loss, since scarce economic benefits are conferred on another group. Some also believe that less qualified Blacks are being preferred to more qualified whites for the positions in question. Although some whites may indeed argue that they are more qualified than Blacks to raise Black children, in general, most whites would not analogize the opportunity to adopt and raise Black children to obtaining positions in law firms, medical schools, or receiving lucrative government contracts.

Finally, while most affirmative action disputes are based on a dispute over who should receive a particular benefit, the object of the dispute—the benefit itself—has no independent interests relevant to the analysis. In Professor Bartholet's affirmative action analogy, the focus is not really on the child, but on the "benefit" of a Black adoptive child or the "job" of raising a Black child. Although the object of the dispute in an affirmative action case has no independent interest in the outcome, the object in a child placement case—the child—does. This is why *Palmore v. Sidoti*,³⁰⁷ as imperfect a decision as it may be, is a more helpful case for analyzing the role of race in transracial adoption than *Croson*.³⁰⁸ *Palmore* places the focus precisely where it should be—on the interests of the children whose lives will be dramatically affected by whatever decision is made. Affirmative action is not a helpful framework for analysis of the transracial adoption issue.

2. Colorblindness and Choice in the Adoption of Children

As noted in the Introduction, the purpose of this Article is not to debate fully the constitutionality of a preference for placing Black children with Black adoptive parents. However, I am interested in the question of

306. See, e.g., *Metro Broadcasting v. F.T.C.*, 497 U.S. 547 (1990) (licenses to operate radio stations); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (government contracts); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (medical school admissions).

307. 466 U.S. 429 (1984).

308. *Croson*, 488 U.S. at 469.

whether the very attempt to frame the transracial adoption issue in terms of affirmative action contributes to the subordination of Black children.

The basis of Professor Bartholet's affirmative action analysis is the view that a policy preferring Black parents for Black children violates our antidiscrimination principle—in other words, it violates the ideal of colorblindness. So, the question must be asked: Do scholars who challenge a preference for placing Black children with Black parents advocate a truly colorblind system of adoption? One writer asks and unambiguously answers the question: "Should we therefore move to a first come/first served basis in which prospective parents are placed on a list and matched with the child available when their name comes up regardless of the age, sex, race or physical condition of the child? Surely not."³⁰⁹ This author goes on to argue: "[J]ust as prospective adoptive parents may designate the gender or age or physical condition of the child they are interested in, so they should be allowed to designate the race or national origin."³¹⁰

Although Professor Bartholet argues against even a mild preference for same race placement, stating that "even a mild preference is unwise as a matter of social policy,"³¹¹ she also does not appear to favor a truly colorblind system. She states in a footnote that "policies requiring a preference for same-race matching of white children would be extremely hard to justify constitutionally"³¹² but does not otherwise discuss the parameters of a colorblind adoption system. Instead, she avoids the issue by reference to what is "likely" to happen: "Most black and white prospective parents are likely to continue to choose same-race children to the extent such children are available," and "there will still be more black children waiting than there are prospective black families and there will also be many white families waiting to adopt black children."³¹³

Professors Bartholet and Mahoney essentially avoid the question of Blacks adopting white children.³¹⁴ To members of the dominant group, the issue may seem irrelevant in light of the numerous Black children available for adoption and the choice of most Blacks to adopt Black children. However, to members of the subordinated group whose children are being adopted by others, the hypothetical can have substantial symbolic importance. It is not simply a question of what one might choose to do. Equally important is the question of what one has the right to do. For example, although I might choose not to send my child to a school that has very few minority children, it is very important for me to know that I have the right

309. Mahoney, *supra* note 3, at 499.

310. *Id.*

311. Bartholet, *supra* note 3, at 1252.

312. *Id.* at 1252 n.246.

313. *Id.* at 1251 n.245.

314. I posed and discussed this question in my earlier article on race in diverse child placement contexts. See Perry, *supra* note 1, at 121-23.

to do so, should I so desire.³¹⁵ In addition, an acknowledgement that Black women are competent to raise white children other than as domestic workers has some important symbolic value in the dialogue between white and Black women.

It seems clear that advocates of transracial adoption are not in fact arguing for a system based on colorblindness, since they envision neither a purely random assignment of children and parents regardless of race nor a system in which parents and children are matched on a first-come, first-served basis, regardless of race. Instead, they affirm a system based on racial choice. Under this system, race apparently still can be used to match white families with their choice of the valuable commodity of a white baby. White families are, of course, also free to select Black children for adoption. The problem, however, is that this principle operates only one way. Choosing across racial lines is reserved for whites.

Under the choice system, are Black families similarly free to adopt white children? It appears that advocates of colorblind individualism believe that the idea merits little discussion.³¹⁶ Thus, they really advocate a system in which white children are reserved for white families, white families have the opportunity to choose to adopt Black children or white children, and Black potential adoptive parents may only choose Black children. Such a system defends the right of white families to secure the kind of child that is most valued in this society—white infants. It perpetuates the subordination of Black children by reaffirming the idea that they are a less valuable commodity on the market.

Unless Black and white prospective adoptive parents are treated the same, the adoption system will subordinate Blacks. Equal treatment requires either random matching of parents and children regardless of race or extension to Black prospective adoptive parents of the same preference with respect to Black children that whites now enjoy with respect to white children.

3. *The Pursuit of Equality: Do Black Children Alone Pay the Price?*

Some advocates of colorblind individualism claim that Black children who have been transracially adopted grow up to be comfortable in both the Black and the white worlds³¹⁷ and view the creation of interracial families as a positive step in the move toward a truly nonracist society.³¹⁸ The

315. See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

316. If the possibility of such an occurrence is mentioned, it is generally limited to a sentence or two, often in a footnote. E.g., O'Brien, *supra* note 3, at 493 n.35.

317. See, e.g., Bartholet, *supra* note 3, at 1218 ("Transracial adoptees appear more positive than blacks raised inracially about relationships with whites, more comfortable in those relationships, and more interested in a racially integrated lifestyle.").

318. *Id.* at 1248 ("Transracial adoptive families constitute an interesting model of how we might better learn to live with one another in this society.").

vision of transracially adopted Black children as pioneers in the creation of a future, nonracist society can easily affirm the subordination of Black children by its willingness to have them bear a disproportionate burden in changing the society.

Some parallels may be drawn between transracial adoption and the school desegregation process that took place in the 1950s and 1960s. In both situations, Black children were removed from Black communities and placed into white communities allegedly to benefit both the individual children and the society.

There is no denying that school desegregation was an issue of critical importance to the progress of Blacks in this society. De jure segregation was an official statement of the nation's belief in Black inferiority and was an assault on the dignity and humanity of Black people. In that sense, school desegregation had profound symbolic as well as practical significance. However, desegregation of the public schools did not lead to racial equality.³¹⁹

Professor Derrick Bell notes that in the initial era of school desegregation, Black children were most often the bus riders.³²⁰ Professor Bell also explains that when desegregation was implemented, Black schools closed, Black teachers were dismissed, and Black principals were demoted.³²¹ Drew Days III, the present Solicitor General and former Assistant Attorney General for Civil Rights, has noted that segregated classes still exist within desegregated systems.³²² Days argues that the initial focus on desegregating the schools ignored the negative side effects on Black children and the Black community.³²³

Like school desegregation, transracial adoption poses risks to Black children and Black communities. Transracial adoption, however, is not a necessary step for practical or symbolic social progress for Blacks. The emphasis on placing Black children in white homes raises the concern that less emphasis is being placed on strengthening Black homes. Opponents of transracial adoption argue that the key to changing the conditions of Black people lies in strengthening Black communities and families, as opposed to token desegregation into the white world.³²⁴

319. See DERRICK A. BELL, *Neither Separate Schools Nor Mixed Schools: The Chronicle of the Sacrificed Black School Children*, in *AND WE ARE NOT SAVED*, *supra* note 8, at 102 (addressing the sacrifice of Black children's interests in the name of school desegregation).

320. *Id.* at 104.

321. *Id.* at 109; see also Days, *supra* note 76, at 55 ("[S]chools that served not only as educational institutions but as community centers . . . have been closed; . . . black teachers and administrators have been dismissed and demoted disproportionately; and black students have encountered increased disciplinary action in recently desegregated schools.").

322. Days, *supra* note 76, at 55.

323. *Id.* at 55-56.

324. Here I draw a distinction between desegregation and integration. Desegregation involves the placement of Blacks into an institution that is still dominated by the majority in

Transracial adoption does not constitute true integration. It is essentially a one-way street where Blacks bear the personal weight of the integration process.³²⁵ It is Black children who are placed in environments that are dominated by whites. Leaving aside the question of whether or not this results in actual psychological harm, Black children bear the emotional strains of being the minority "outsider" group in the process of integration.

Although Black children are the victims and not the creators of racism, colorblind individualism selects them to bear any discomforts incurred in the battle against racism.³²⁶ Scholars from the colorblind perspective advocate the adoption of Black children by whites but do not argue that white children should be dispersed and isolated in Black families, schools, or other institutions in Black communities in order to further the goal of integration.³²⁷

The argument that transracial adoption creates Black children who are comfortable in both worlds suggests that Blacks feel uncomfortable in the white world due to their own deficiencies or deficiencies of their upbringing and not from the overt, painful, discriminatory, and humiliating

terms of numbers and/or influence. Integration ideally involves people of different ethnic groups living, learning, or working together in an environment in which no group exercises disproportionate power. If integration means anything less than this, it is little different than token desegregation.

325. Some of the research on transracial adoption does indicate that white children in a family that has adopted a Black child may be subject to certain pressures, including hostility and teasing, that they would not have experienced had they not had a sibling who was Black. *See, e.g.,* SIMON & ALTSTEIN, *supra* note 5, at 74-76 (discussing the varying, sometimes negative, reactions of relatives, friends, and neighbors to a family's decision to transracially adopt). Indeed, some transracial adoptive parents indicate that as a result of having adopted Black children, they have undergone a transformation in their own sense of the racial identity of their family and no longer consider their family to be white. *See id.* at 95-96 (44 percent of families in the study considered the racial identity of the family to be "mixed" as opposed to white after they adopted a Black child); Dobie, *supra* note 267.

It is probably true that these individuals, through their close association with Blacks, have forfeited some of the advantages normally associated with being white. On the other hand, it is also true that this only occurs in selected contexts—contexts in which their association with Blacks is known. Although white children in families that have adopted a Black child clearly have an experience of race and racism unlike that of most whites, it would be difficult to argue that they bear anywhere near the racial burden of their Black adopted siblings.

326. In a recent controversy in Richmond, Virginia, white children attending a predominantly Black public school were grouped together in classes, rather than evenly distributed in classes, ostensibly for their social and emotional well-being. *See* Karen DeWitt, 'Clustering' of White Pupils Stirs Richmond Furor, N.Y. TIMES, Dec. 9, 1992, at B13.

327. Such a proposal need not be considered only in the context of transracial adoptions. Why shouldn't white children participate in Black communities by attending schools, churches, or using recreational facilities? The strong opposition that many whites have expressed toward busing their children into minority communities is an example of the way in which the dominant group sees the process of integration or desegregation as a one-way street, in which it is Blacks who are placed in the position of seeking acceptance by whites, but not vice-versa.

treatment that Blacks often suffer every day at the hands of whites.³²⁸ Racism exists in this society not because Blacks have not learned to be comfortable in white environments. Rather, Blacks are not comfortable in white environments because of institutionalized and individualized racism. Eradicating racism does not require the creation of Blacks who are comfortable in both white and Black worlds but the creation of whites who are comfortable in the multicultural society that this nation is rapidly becoming.

The willingness to use Black children as agents in the eradication of racism is an interesting twist to the colorblind individualist perspective. In making Black children the creators of a new society, advocates of transracial adoption focus on more than the interests of the individual child. They betray an agenda no less political than the insistence of some Blacks that the interests of the Black community be considered in formulating policies concerning the adoption of Black children.

CONCLUSION

One of the saddest facts of the transracial adoption controversy is that this is the context in which a significant debate over the welfare of Black children is taking place. Despite the symbolic significance of transracial adoption, and however heatedly it may be discussed, transracial adoption will never provide a solution to the many problems that the vast majority of Black children face in this society.³²⁹ The energy spent on the issue of transracial adoption is not accompanied by energy directed toward improving the material circumstances that so profoundly affect the welfare of the vast majority of Black children who will continue to be raised in Black families in Black communities. This raises the question of whether the transracial adoption debate is really about the interests of Black children at all, or is instead about the right of white people to parent whichever children they choose. We must move the debate back to the interests of the children and go beyond theoretical or political debate. The lives of real children are at stake.³³⁰

328. For a discussion of racial microaggressions—the daily experiences of oppression and humiliation that Blacks suffer—see Davis, *supra* note 69.

329. See *supra* note 242.

330. On the issue of transracial adoption alone, disembodied theory is clearly insufficient. There are many practical questions that will ultimately have to be answered. For example, if there is a policy preference for placing Black children with Black adoptive parents, how strong should that preference be? Can a test be developed to evaluate prospective white adoptive parents for inappropriate attitudes? Is there any way to ensure that white adoptive parents continue to affirm the validity of the child's Black heritage? Should prospective adoptive parents be required to participate in a training program in order to prepare them to parent a Black child? If so, who should offer such training and what should it consist of? Should families seeking to adopt Black children be required to demonstrate that they already have significant ties to Black communities or Black people? Should residence in an integrated community be required? What should the role of parental choice in the placement of children for adoption be?

The issues raised by transracial adoption are complex. This Article has dealt primarily with the discourse concerning transracial adoption rather than the merits of the practice. Further exploration of both the discourse and the merits of transracial adoption will require frank and honest discussion. People who have different perspectives on the subject must communicate. My hope is that this Article will shed light on the ways in which scholars think differently about the issue and will expose some of the perceptions and misperceptions that hinder constructive dialogue. If this Article moves us closer to open and honest discussion about the needs and interests of all Black children, not just those transracially adopted, it will have served its purpose.