Taking Race out of the Equation: Transracial Adoption in 2000

Suzanne Brannen Campbell

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
https://scholar.smu.edu/smulr/vol53/iss4/11
Taking Race Out of the Equation:
Transracial Adoption in 2000

Suzanne Brannen Campbell*

Table of Contents

I. Introduction ........................................... 1600
II. History and Equal Protection Analysis ... 1604
  A. Brief History of Transracial Adoption in the
     United States ........................................ 1604
  B. The Adoption Process and Administrative
     Structure ............................................. 1606
  C. Strict Scrutiny for Racial Classifications in
     Equal Protection Analysis ........................... 1607
  D. Strict Scrutiny as Applied in the Child
     Custody Dispute Context ............................ 1608
III. Should There Be Transracial Adoption?
    The Multiethnic Placement Act of 1994
    and Its Repeal ........................................ 1610
    A. Opposing Viewpoints on Transracial Adoption .. 1610
    B. The Multiethnic Placement Act of 1994 ........ 1613
    C. April 1994 HHS Policy Guidance ................. 1614
IV. The 1996 Legislation: "Removal of
    Barriers to Interethnic Adoption" and
    1997-98 HHS Office of Civil Rights
    Guidance ............................................... 1616
    A. MEPA-IEP ........................................... 1616
    B. The 1997 and 1998 HHS Guidance: Pointing out
       the Loopholes ...................................... 1618
       1. Individual Assessments and Preferences as
          Loopholes .......................................... 1619
       2. Permissible Use of Culture ........................ 1620
       3. The Meaning of Delay or Denial .................. 1620
       4. Other Factors ...................................... 1621
V. Testimony Presented to the House Ways
    and Means Committee, Subcommittee on
    Human Resources—September 15, 1998 ........... 1622
VI. Conclusion ............................................ 1625

* B.A., cum laude, Southern Methodist University, 1997; J.D., Southern Methodist
  University School of Law, 2000. Suzanne Campbell is an associate with Andrews & Kurth,
  L.L.P. in Dallas, Texas.
To some, adoption is the act of adoption—the legal moment in the courthouse.
To some it is the life of adoption that the adopted child lives.
To some it is the life of adoption that the adoptive parents live.
To some it is the life of adoption that the birth parents live.
To some it is the adoptive family, inclusive of the child.
To some it is the extended family of adoption, including the birth parents (whether they are known or unknown, present or not).
To a child, adoption is about being with the family they are in.¹

I. INTRODUCTION

In 1994 James and Patricia Pilkington, a suburban Detroit couple, took a young boy into their home and cared for him like a son.² Early in 1998, three-and-a-half years later, the Pilkingtons began a fight to keep the child, suing the Metro Detroit social service agency and claiming that their efforts to adopt the child have been impeded by racial preferences of social workers and a bias against transracial adoption.³ The service defends on the ground that the biological mother still has parental rights, and points out that the agency’s transracial adoption rate exceeds the national average.⁴

³ This term generally refers to the adoption of a child whose ethnic background differs from that of the adoptive parent(s). See Barbara McLaughlin, Comment, Transracial Adoption in New York State, 60 ALB. L. REV. 501, 502 (1996); see also Owen Gill & Barbara Jackson, Adoption and Race: Black, Asian and Mixed Race Children in White Families 1 (1983) (“In the overwhelming majority of cases this means white parents adopting black or mixed-race children.”). But see Department of Health and Human Services, Answers to GAO Questions Regarding the Multiethnic Placement Act, as Amended (visited Jan. 20, 1999) <http://www.acf.dhhs.gov/programs/cb/policy/im9803a.htm> [hereinafter Answers] (“The Department of Health and Human Services does not classify placements as being ‘intraracial’ or ‘transracial.’”). Throughout this Comment, I will use the terms “interethnic adoption” and “transracial adoption” interchangeably.
⁴ See McLaughlin, supra note 3, at 502. According to the National Association of Black Social Workers, commonly referred to as NABSW, the national average of transracial adoptions is 3.6% of all adoptions. See id. However, getting accurate statistics on adoption is difficult because they are more “approximations than realities.” Shirley C. Samuels, Ideal Adoption: A Comprehensive Guide to Forming an Adoptive Family 18 (1990) (citing lapses in record-keeping as a reason for lack of accurate figures). Since 1994, all states have been required under The Adoption and Foster Care Analysis and Reporting System (AFCARS) to collect case-specific data on all children in foster care for whom the state child welfare agency has responsibility for placement, care, or supervision. States must collect data on all adopted children placed by a child welfare agency or a private agency in contract with the child welfare agency. Further, states are encouraged to report on other adoptions finalized in that state. All reports are made semi-annually. See Foster Care and Adoption Statistics Current Reports (last modified July 30, 1997) <http://www.acf.dhhs.gov/programs/cb/statsafcars/index.htm> (information supplied by the U.S. Department of Health and Human Services with only 19 states reporting for the period between April 1, 1996, through September 30, 1996).
This story is just another example of how the debate over transracial adoption continues despite efforts by the United States Congress and individual state legislatures to halt prejudice in the area of family and adoption law.\(^5\) It may even represent what some would call a loophole: a way for adoption agencies to use the pretext of keeping a family together to continue a long-standing tradition of race-matching in both the public and private adoption spheres.

The debate over transracial adoption has been stirring for almost two decades and has been the subject of many academic essays, as well as newspaper articles and stories in local news.\(^6\) Unfortunately, because the debate centers on the emotionally charged topics of race and family, and

---


affords room for very little middle ground, it is far from over and can hardly be easily resolved when racial prejudices are still deeply ingrained in the U.S. social pattern. It is a fact that minority children are less likely to be adopted; they spend twice the amount of time in foster care awaiting adoption than do Caucasian children, averaging five years total. And it is true that many parents are more than willing to go overseas to adopt children in order to avoid dealing with the adoption services provided in this country.

The debate centers on color, rather than the child. Should an African-American child, for example, be placed with white parents at all? What if those parents have provided a foster home for that child? What if the parents have never in their lives experienced discrimination because of the color of their skin? How will they possibly relate to and raise a child aware of the prejudice that will surround him or her throughout life? And, most importantly, is it realistically possible to take race out of the equation in an adoption or foster care situation? More often than not, the focus of the participants in this discussion is shifted from the ultimate goal—to provide a stable, loving environment for a growing number of children legally available for adoption—to a debate focused on and promoted by racial politics. R. Richard Banks discussed this model of racial politics in a recent article:

I propose that facilitative adoption and race matching are typical of the race-based claims of whites and blacks, respectively. The race-based claims of whites are typically colorblind while those of blacks are often race-conscious. The race-and-adoption controversy thus suggests a model of race politics in which race-based claims predominate, but in which the race-based claims of whites are not perceived as being race-based. Our asymmetrical identification of race-based claims produces a cycle of race politics in which the race-based, but ostensibly colorblind claims of whites appear even more commendable and

7. See Banks, supra note 6, at 898 (describing the two-stage adoption process: “First, there must be a termination of the parental rights of the child’s biological parents. The termination can either be voluntary (e.g., where the parent willingly relinquishes the child for adoption) or involuntary (e.g., where a child is removed from the home due to abuse or neglect.) Second, parental rights must be legally vested in the adoptive parents. Both steps require a judicial proceeding.”).

8. The statistics are grim. According to the NABSW, “Nationally, about 500,000 children are in foster care and 30,000 to 50,000 are eligible for adoption . . . . About 20,000 of those awaiting adoption are black.” See Robinson, supra note 6. The “best interests of the child” standard had long been used by both the adoption agencies and the courts in deciding where to place children available for adoption. See Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (“best interests of the child” standard cited as a compelling governmental interest under a Fourteenth Amendment Equal Protection analysis); Drummond v. Fulton County Dep’t of Family and Children’s Servs., 547 F.2d 835, 850-51 (5th Cir. 1977), cert. denied, 437 U.S. 910 (invalidating a state statute that made it illegal for a white family to adopt a child having mixed black and white parentage) (“This rule contemplates a presumption that the best interests of the child lie with the natural parent, but that this presumption may be rebutted by clear and convincing evidence.”).
politically legitimate.\footnote{Banks, supra note 6, at 927-28.}

For a short time, the original Multiethnic Placement Act (the "MEPA") passed by Congress in 1994 permitted states to consider race and ethnicity in selecting a foster care or adoptive home, but they were restricted from making this determination based solely on race, color, or ethnic origin.\footnote{See MEPA, supra note 5 (sometimes referred to as the "Metzenbaum Act").} In 1996, Congress utilized a section of the Small Business and Job Protection Act to amend the MEPA, making it illegal to consider race when placing a child in a foster or adoptive home, except in rare circumstances.\footnote{See Removal of Barriers to Interethnic Adoption, supra note 5; see also S. Rep. No. 104-279, at 5-6 (1996) (citing reasons for amendment: "The Committee is concerned that [the MEPA of 1996] was not having the intended effect of facilitating the adoption of minority children . . . . [because] it lacked an enforcement provision backed by serious penalties. As a result, the law was ineffective in promoting the best interests of children by decreasing the length of time they wait to be adopted.").}

Unfortunately, the struggle to reconcile race and adoption continues today, over two years later, and is far from resolved.

Part II of this Comment will briefly discuss the history of transracial adoption. I will comment on the process of adoption as well as the standard of review that the United States Supreme Court uses in evaluating racial classifications.\footnote{The U.S. Supreme Court has never issued an opinion on the MEPA or its effects.} This will include a look into Equal Protection under the Fourteenth Amendment and the Constitutional implications in using race as a factor in the selection of adoptive parents. In Part III, I will outline the social policy arguments advanced by supporters and opponents of interethnic adoption, and explain the provisions of the original MEPA as well as the Department of Health and Human Services guidance that accompanied the legislation. Part IV will focus on the amendments to the MEPA in 1996 and the lack of guidance supporting the legislation. In Part V, I will provide a synopsis of testimony given to the House Ways and Means Committee\footnote{Testimony was heard by the Subcommittee on Human Resources of U.S. House Committee on Ways and Means on September 15, 1998.} from various individuals who have a personal and professional interest in the effective implementation of this legislation. Part VI is a conclusion with suggestions for effective implementation of the MEPA.

I will argue that although it is illegal to consider race in the placement of children in both foster and adoptive homes, it is realistically impossible to take race out of the equation, and it is arguably constitutional to consider race in adoption decisions. My argument will highlight the loopholes in the MEPA which grant broad discretion to social workers in adoption placement cases. In addition, an extensive lack of Department of Health and Human Services practical guidance for this legislation poses problems for healthy implementation; therefore, the MEPA's 1996 replacement has had little effect thus far. In fact, race-matching is still very alive in the public adoption process, and it will take much more than a piece of legislation to correct that.
II. HISTORY AND EQUAL PROTECTION ANALYSIS

A. BRIEF HISTORY OF TRANSRACIAL ADOPTION IN THE UNITED STATES

Transracial adoption has a short history in the United States. The first interethnic adoption occurred in Minneapolis, Minnesota, in 1948 when an African-American child was adopted by a white couple.\textsuperscript{14} There was an increase in transracial adoption in the 1950s and '60s as a result of two major factors: the large influx of Asian-American children into the United States,\textsuperscript{15} and the civil rights movement.\textsuperscript{16} The second of these two factors, the civil rights movement, promoted desegregation in America's public schools and began to open America's eyes to the real barriers between the black and white races, as well as the process of transracial adoption.\textsuperscript{17} “As the nation became more aware of the plight of children trapped in foster care, transracial adoptions, which numbered only 733 in 1968, rose to an all-time high of 2574 in 1971. Between 1960 and 1976, there were more than 12,000 recorded transracial adoptions in the United States.”\textsuperscript{18}

But the initial success of transracial adoption would not last long. In 1972, the National Association of Black Social Workers (“NABSW”) published a position paper calling the practice of transracial adoption “genocide” because it did not promote the interests and well-being of African-American children:

[W]e have taken the position that Black children should be placed only with Black families whether in foster care or adoption. Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are a product of their environment and develop their own 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.

Our position is based on:

\begin{itemize}
  \item \textsuperscript{14} See Joyce A. Ladner, Mixed Families: Adopting Across Racial Boundaries 67 (Anchor Books ed. 1978).
  \item \textsuperscript{15} See Information About the Controversy: Transracial Adoption (visited Oct. 1, 1998) <http://www.msu.edu/user/badenama/index4.html>. “Children from war-torn countries without families were adopted by families in the United States. Korean children, Vietnamese children, and European children were placed with Caucasian parents. As more and more racial ethnic minority children within the United States were without families, domestic adoption agencies began to place [the children] with Caucasian families who wanted children.” Id.
  \item \textsuperscript{16} See McLaughlin, supra note 3, at 507.
  \item \textsuperscript{17} See Hollingsworth, supra note 6 (“In the 1960s, widespread use of artificial birth control, the legalization of abortion, and decreased social stigma associated with bearing a child outside of marriage were accompanied by a substantial decrease in healthy white infants available for adoption. There was, however, no corresponding decrease among African American and other children of color . . . .”).
  \item \textsuperscript{18} McLaughlin, supra note 3, at 507-08.
\end{itemize}
The necessity of self-determination from birth to death, of all Black people.

The need of our young ones to begin at birth to identify with all Black people in a Black community.

The philosophy that we need our own to build a strong nation... This is impossible if the child is placed with white parents in a white environment.19

After publication of this position paper, both state and private adoption agencies began implementing provisions in their procedures to promote race-matching, in the “best interests” of the children. Anyone could have predicted the results: “[o]ne year after the NABSW’s pronouncement, transracial placements decreased by thirty-nine percent.”20

For example, in Texas before 1967, state statute prohibited the practice of transracial adoption: “[n]o white child can be adopted by a negro person, nor can a negro child by adopted by a white person.”21 This statute, however, was struck down as violative of both the Texas Constitution22 and the Fourteenth Amendment of the U.S. Constitution23 in In re Adoption of Gomez.24 In fact, Texas was the second-to-last state in the United States to strike down legislation of this kind.25 But despite the affirmative


20. Mabry, supra note 6, at 1353-54.


22. See TEX. CONST. art. I, section 3 (“All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.”).

23. See U.S. CONST. amend. XIV, section 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

24. 424 S.W.2d 656, 657 (Tex. Civ. App.—El Paso 1967, no writ). In Gomez, an African American male sought to adopt his wife’s two white daughters, but was prevented from doing so at the district court level because of Texas law. The court cited to the then-recent case of Loving v. Virginia, 388 U.S. 1 (1967), in recognizing that the U.S. Supreme Court considers any use of race in legislation highly suspect. See Gomez, 424 S.W.2d at 659. In Loving, Chief Justice Warren stated: “At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the ‘most rigid scrutiny.’” Loving, 388 U.S. at 18 (holding state legislation prohibiting interracial marriage a violation of the Fourteenth Amendment). Using this analysis, the court invalidated the law.

25. Almost five years after Gomez, a U.S. District Court in New Orleans struck down a similar Louisiana statute in Compos v. McKeithen, 341 F. Supp. 264, 268 (E.D. La. 1972), with the court stating:

When the advantages of family life in promoting personality development and social adjustment are considered, the disadvantages of an interracial adoption cannot be said to outweigh in all cases the advantages of a home and family life to a child whose only alternatives are institutional life or fos-
introduction of transracial adoption into Texas, it was quickly brought to a halt as a result of the NABSW's position paper, and by 1973, the Child Welfare League of America, an organization whose advice is closely followed by state agencies, had changed its national guidelines on adoption to favor race-matching.26

B. The Adoption Process and Administrative Structure

The adoption process is heavily divided along socioeconomic lines; this is one of the reasons that minorities are less likely to be adopted. In order to understand the distinction, I must first explain the three agencies that prospective parents may work through when seeking to adopt a child: (1) a public state agency, (2) a private state agency, or (3) an independent agency usually consisting of adoption attorneys. Public agencies receive government funds to operate, and are subject to both state and federal laws.27 Private agencies are licensed by the state and receive some form of federal and state funding.28 Lastly, independent agencies and adoption brokers facilitate the adoption process by matching children with parents on a more personal level.29 As a result of the fundamental differences, each of the three agencies cater to different types of parents and children.

Each of these agencies attempt to match children and parents based on the child's needs, the financial situation of the parent(s), and the preference of the parent(s), among other factors. In addition, the agencies give recommendation reports to the court for consideration when the process reaches the second stage of a judicial proceeding.30 Often, great weight is given to agency findings in the courtroom.

Each of these agencies, however, is not governed by the MEPA. The legislation only applies to governmental agencies and agencies that receive federal funds by prohibiting the improper use of race, color, or na-

---

26. See Gilt, supra note 3, at 2 ([T]he Child Welfare League of America stat[ed] that 'it is preferable to place children in families of their own racial background.' One of the reasons for this was that 'children placed in adoptive families with similar racial characteristics can become more easily integrated into the average family group and community.') (citing Child Welfare League of America, Standards for Adoption Services 92 (1973)).

27. These units are typically child welfare agencies.

28. See Banks, supra note 6, at 897-98 (observing that both public and private adoption agencies are involved in a "more ongoing fashion" in the adoption process than are their independent counterparts).

29. See id. at 898 ("Parents who pursue independent adoption are on the whole of higher socioeconomic status and more likely to be white than parents who adopt through the public system."); see also Bartholet, supra note 6, at 2355 (stating that two-thirds of all adoptions take place in the "private agency and independent adoption worlds.").

30. See Banks, supra note 6, at 899. ("Thus, the judiciary customarily validates and gives legal effect to the process and outcome that result from the agency's management of the adoption process.").
tional origin to deny or delay placements. At least in the wholly private sector, then, racial preference is still alive and very common.

C. Strict Scrutiny For Racial Classifications in Equal Protection Analysis

Because of the great amount of weight given to adoption agency recommendations at the judicial level, it is imperative that these agencies manage the process according to constitutional guidelines. As noted above, the U.S. Supreme Court has devised levels of scrutiny for analysis of cases under the Equal Protection Clause of the Fourteenth Amendment. With respect to racial classifications, courts must conduct strict scrutiny review, whereby the governmental interest must be "necessary, compelling" and the means used to achieve the desired end must be "narrowly tailored." The Supreme Court has typically rendered governmental practices and regulations dependent on race to be unconstitutional, even where the classification was intended to benefit historically discriminated-against groups.

Why place benign racial classifications under a strict scrutiny review? The Court in Croson finally agreed "that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments" because "the standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification."

---

31. See Mabry, supra note 6, at 1350.
32. See Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (despite the Court's observation that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious," wartime curfew aimed only at Japanese Americans found to be constitutional; however, the Court deferred to rational basis review); Korematsu v. United States, 323 U.S. 214, 216 (1944) (again, in spite of language stating that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," the Court reverted to Hirabayashi in holding anti-American Japanese legislation valid due to a rational fear during wartime).
35. Adarand, 515 U.S. at 222 (explaining the holding of Croson). In Adarand, the Court held unconstitutional a federal program designed to provide highway contracts to disadvantaged minority subcontractors. Justice O'Connor, writing for the court, attempted to dispel the notion that "strict scrutiny is 'strict in theory, but fatal in fact,'" in noting: "[t]he unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it." Id. at 237.
36. Croson, 488 U.S. at 493-94. In Croson, the city failed to show a compelling interest in its plan to award 50% of subcontractor work to members of a "minority business enterprises" list. The Court noted that the plan's proponents did not show any identified past
tice Scalia, in a concurring opinion in *Croson*, concluded:

The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin.37

D. STRICT SCRUTINY AS APPLIED IN THE CHILD CUSTODY DISPUTE CONTEXT

The Court has released only one opinion related to race and custody: *Palmore v. Sidoti*.38 But the opinion is at best ambiguous, and arguably cannot even be applied to transracial adoption. In *Palmore*, a Caucasian father sought to gain custody of his daughter from her biological mother who was living with, and subsequently married, an African-American man. A Florida trial court found that the child would be socially stigmatized if left in the custody of the racially-mixed couple “despite the strides that have been made in bettering relations between the races in this country . . . .”39 The United States Supreme Court reversed, stating 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.”40 In recognizing social pressures the child would face, the Court found that the prejudices did not justify the use of racial classifications in deciding custody cases. But the Court only closed the door on using those classifications when the result would be harm to the child; it did not preclude the use of race generally.41 “To date, the *Palmore* decision has been interpreted narrowly to apply only to parental custody disputes and, therefore, its impact in other circumstances [adoption] is unknown.”42

One author has argued that *Palmore* does not apply to transracial adoption for three reasons, making this a topic on which the Supreme Court has declined to release an opinion.43 First, *Palmore* did not involve adoption, but rather a custody dispute and the “Court did not, and has not, extended its holding to adoption matters.”44 Second, no matter which parent gained custody of the child in *Palmore*, the parent would be both Caucasian and a biological parent, as opposed to transracial adoption, where the parent is of a different ethnicity and, necessarily, is not

37. *Id.* at 520 (Scalia, J., concurring).
39. *Id.* at 431.
40. *Id.* at 433.
41. See Eubanks, supra note 6, at 1246.
42. *Id.* at 1246-47.
43. See Mabry, supra note 6, at 1386-88. But see Eubanks, supra note 6, at 1247 (reading the Court’s decision more broadly to apply to placement cases, including adoption and foster care).
44. Mabry, supra note 6, at 1387.
biologically related.\textsuperscript{45} Third, the Court did not rule that all racial classifications in custody proceedings were unconstitutional, “[n]either did it preclude consideration of race ‘as it relates to a child’s heritage and which parent is more prepared to expose the child to it.’”\textsuperscript{46}

Most lower courts confronted with the race-and-adoption question have read \textit{Palmore} to apply.\textsuperscript{47} In fact, those courts have read \textit{Palmore} to say that the use of race in an adoption, foster care, or custody proceeding, is constitutional as long as race is not the sole deciding factor in the agency decision for child placement. These courts routinely use the “best interests of the child” standard as the common rule in custody and adoption hearings. Under this standard, “[m]any professionals believe that the crucial factor is that the child belongs in placement with an adult who is the psychological parent and who will serve the best interests of the child.”\textsuperscript{48}

The D.C. Court of Appeals has described this standard as “not contain[ing] precise meaning” whose “lack of specificity is appropriate, however, ‘given the multitude of varied factual situations which must be embraced. . . .’”\textsuperscript{49} The same court added that the standard is not without bounds: “[The standard] requires the judge, recognizing human frailty and man’s limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives.”\textsuperscript{50}

Some factors that a court may include in determining the best interests of a child are: psychological parentage;\textsuperscript{51} continuity of care;\textsuperscript{52} the age of the child; the stability of the adoptive family; financial and other resources available to the adopting family; special physical and emotional

\textsuperscript{45.} See id.
\textsuperscript{46.} Id. at 1387-88.
\textsuperscript{48.} SAMUELS, supra note 4, at 15.
\textsuperscript{49.} In the Matter of the Petition of D.I.S. for the Adoption of S.A.O., 494 A.2d 1316, 1323 (D.C. Cir. 1985) (citing to In re J.S.R., 374 A.2d 860, 863 (D.C. Cir. 1977)).
\textsuperscript{50.} In the Matter of the Petition of D.I.S., 494 A.2d at 1322; see also Coles v. Coles, 204 A.2d 330, 331-32 (D.C. Cir. 1964) (stating additional burdens placed on trial judges when attempting to “promote the welfare of the child.”).
\textsuperscript{51.} “Psychological parenthood refers to the continuing day-to-day relationship that an adult has with the child. This relationship fulfills a child’s psychological needs for a parent and meets his physical needs through interaction, companionship, interplay, and mutuality.” SAMUELS, supra note 4, at 15 (citing JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973)).
\textsuperscript{52.} Continuity of care may play a role in the best interests of a child when that child has been in foster care with the family seeking to adopt him or her.
needs of the child; and blood relationships, if any, in addition to others.\textsuperscript{53}

Whether or not the Supreme Court intended to provide an ambiguous answer is itself unclear, but because the Court left the door open to use of race at least in custody proceedings, the MEPA legislation in 1994 was the first federal action taken to remedy the traditional practice of race-matching in the adoption context. Even this step, however, did not provide a solution because it still allowed race to be considered as one of many factors.

III. SHOULD THERE BE TRANSRACIAL ADOPTION? THE MULTIETHNIC PLACEMENT ACT OF 1994 AND ITS REPEAL

A. OPPOSING VIEWPOINTS ON TRANSRACIAL ADOPTION

In 1996, as part of the American Bar Association’s Conversation on American Pluralism, Identity and Law, a group of people assembled in Cambridge, Massachusetts, to discuss the topic of transracial/interracial adoption.\textsuperscript{54} Participants in the conversation were parents of adopted children with varying cultural and ethnic backgrounds; they came together to promote transracial adoption as “a good and valuable thing,”\textsuperscript{55} as reported by Gail Leftwich:

Accompanying the unwavering commitment was the desire to deal responsibly with the issues of identity and racial and cultural heritage, the appropriate resolution of which the parents viewed as one of their chief obligations.

Thus, white parents talked of seeking integrated neighborhoods in which to live and searching systematically for opportunities to allow their adopted black child to interact with other black children and adults, such as visits to black churches.

Parents of adopted children with different cultural backgrounds described travel to foreign countries to expose their adopted child to the relevant country of birth and collecting artifacts to have in the home . . . .

Racism and bigotry were assumed to be the dominant realities which would shape the adopted children’s experiences in the world, and their parents were driven to provide their children with the tools the parents thought would prepare them to cope with the consequences.\textsuperscript{56}

But an assumed lack of parental ability to deal with the racism and bigotry that will inevitably face each of these children is exactly what

\textsuperscript{53} See generally Tallman, 859 F. Supp. at 1085-86 (citing Michigan Department of Social Services guidelines for adoption evaluations); In Matter of the Petition of R.M.G. and E.M.G., 454 A.2d 776, 781 (D.C. Cir. 1982) (finding of trial court that these factors contribute to the “paramount” concern of the best interests of the child).

\textsuperscript{54} See Gail Leftwich, Transracial Adoption: A Community Conversation, 12 Focus 1 (Fall 1996).

\textsuperscript{55} Id.

\textsuperscript{56} Id.
groups like the NABSW are worried about. Those opposed to transracial adoption, including some social workers and professionals, argue that children suffer when they are raised by families from other cultures unless extensive efforts are undertaken to help the child adjust.

In 1983, authors Owen Gill and Barbara Jackson published results from a study on the effects of interracial adoption. They attempted to pinpoint both the "black community" and "experimental" arguments against the process, but found "little support for the criticisms of transracial adoption... based on the anticipated difficulties of the child."

Arguments like these have also recently been dismissed as lacking a causal element in the unhappiness of adopted children:

A common version of the argument that transracial adoption harms children asserts that the children will develop malformed racial identities. Undeniably, some portion of transracially adopted children may grow up to feel that their racial identity is lacking. Even worse, they may trace various personal problems to their 'inadequate' racial identity and their transracial family. The causal significance they attribute to their transracial family, however, might be more a reflection of where our society trains us to look for causes than of actual causes. If the individual experienced the same problems but had been adopted by a family of the same race, the racial character of the family would probably not be viewed as a likely cause, even though

---

57. See NABSW POSITION PAPER, supra note 19; see also Susan Goldsmith, The Color of Love, NEW TIMES LOS ANGELES, April 30, 1998, Features section (citing testimony of William Merritt, president of the NABSW, before the U.S. Senate in 1985: "We view the placement of black children in white homes as a hostile act against our community... We are, therefore, legally justified in our efforts to protect the rights of black children, black families, and the black community.").


59. See Gill, supra note 3, at 4. "Black community" arguments are:

- criticisms... which see transracial adoption representing in microcosm the oppression of black people in white society. These include: Blacks have always serviced whites. Now they are servicing them in the ultimate fashion, by providing them with children; transracial adoption takes from the black community its most valuable resource which is its children; [and] the black community cannot hope to maintain its pride and dignity if advantage is defined as being brought up in white families.

Id.

60. See id. The second group of arguments is:

- based on the anticipated experience of a black child in a white family, including the following: because of the child's obvious difference of racial and physical background the parents and other members of the family will come to see the child as 'not belonging to this family.' Close and intimate family relations will not develop between the child and other family members... [there] will be a deep sense of personal isolation... Although over time, racial background may be insignificant in the family, it will continue to be crucially significant outside the family... [And] because the children are black, but growing up in white families, they will not be taught the necessary coping mechanisms for dealing with the hostility and rejection of white society.

Id.

61. Id. at 131.
issues of racial identity are present in same-race families. The causal inference, then, may be a matter of interpretive salience rather than causal significance.  

In an attempt to dispel the notions of ill-effects of transracial adoption on children, renowned adoption scholar Dr. Rita J. Simon conducted a twenty-year study on some 200 parents and their transracial adoptees. The study involved sixty percent black children, with children of Korean and Native American descent comprising the other forty percent. Simon found no significant problems with the adoptees, apart from the usual occurrences of bad behavior attributed to personality, age, and gender differences between the siblings.

Interviewers conducted tests, including "doll tests," not only on the adopted children, but also on their "birth children" siblings in an attempt to gain information about the effects of having a brother or sister of a different race. Additionally, the interviewers "gave the children... other projective tests to assess attitudes, identities and awareness on the part of both the adopted and birth children." On the subject of racial awareness, Simon found the adoptees were comfortable with and aware of their racial identity:

We reported conversations about race and racial issues over dinner, watching the TV series "Roots," joining Black churches, seeking out Black godparents, preparing Korean food, traveling to Native American festivals, and having lots of books, artifacts, music, etc. about Blacks, Koreans, Native American, etc. cultures. As the years progressed, it was the children, rather than the parents, who were more likely to want to call a halt to these types of activities. "Not every dinner conversation has to be a lesson in Black history," or "we are more interested in basketball and football than in ceremonial dances" were the comments we heard frequently from the [transracial adoptees] as they were growing up.

Simon and fellow researchers concluded the letter with the following plea: "[M]ove the thousands of children who are available for adoption out of institutions and out of temporary foster placements into permanent homes. Make the move without regard to race. Apply the standard 'best interests of the child' as the first and foremost criterion in child

63. See Examining Barriers to Adoption of Children, 1993: Hearings on S. 1224 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources, 103rd Cong. 98 (1993) (publication by Rita J. Simon, legal and sociology scholar) [hereinafter Simon]. The study lasted from 1971 to 1991, comprising four total contacts with the families throughout the interviewing years. "At each phase of the study, we reported the problems, setbacks, and disappointments, as well as the successes, the joys and the optimism about the future." Id. at 98.
64. See id. at 101.
65. See id. at 100. As a method of testing the children's awareness of racial identity, each was given the opportunity to select black, white, and "in between dolls" at random when playing. The researchers found that unlike all other doll tests done in the past, the children did not favor the white doll. Id. (emphasis added).
66. Id. at 98.
67. Simon, supra note 63, at 100.
The struggle to reconcile race and "the best interests of the child" has had marked effects on the success of transracial adoption; there are at least 107,000 of the 507,000 children currently in foster care awaiting adoption. Children wait an average of two-and-a-half years to be adopted, and according to federal statistics, minority children spend twice as long as whites in foster care. The Multiethnic Placement Act of 1994 was intended to aid in the adoption of minority children, but had little success because the race factor could still be used in placement decisions.

B. The Multiethnic Placement Act of 1994

In 1994, Congress passed the Multiethnic Placement Act. The MEPA denied an agency or entity that received federal funds the ability to use race as the sole factor in denying any person the opportunity to become an adoptive or foster parent. But an agency could use race as one of the factors in making placement decisions. The Act stated:

Prohibition

An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not—
categorically deny to any person the opportunity to become an adoptive or foster parent, or the child, involved; or
delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

Permissible Consideration

An agency or entity to which paragraph (1) applies may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of number of factors used to determine the best interests of a child.

The main goals of the 1994 Act were to shorten an adoptive child's wait for placement, to prevent denial of the opportunity to become a foster or adoptive parent based solely on race, and to diligently recruit culturally diverse and minority adoptive and foster families. According to the Office for Civil Rights of the Department of Health and Human Services ("HHS"):

68. Id. at 102.
70. See id.
71. See MEPA, supra note 5.
72. Id. at (a)(1)(A)-(B).
73. See McLaughlin, supra note 3, at 531; Office for Civil Rights of the Dep't of Health and Human Servs., Memorandum from Dennis Hayashi on Policy Guidance on the Use of Race, Color or National Origin as Considerations in Adoption and Foster Care Placements (Apr. 20, 1995) (found in HHS database at <http://www.hhs.gov>) [hereinafter Policy Guidance].
[The] MEPA permits an agency to consider both a child’s cultural, racial, and ethnic background and the capacity of the foster or adoptive parents to meet the needs of a child of a specific background, as one of a number of factors used in determining whether a placement is in the child’s best interests.74

But, “this factor must . . . be applied on an individualized basis, not by general rules.”75 In particular, the MEPA was designed to aid in the adoption and placement of children who are harder to place, namely minority children.76 In order to further MEPA goals, the mandate was funded: “Under Title IV-E of the Social Security Act, the federal government will match 75% of any state funds used to train staff or foster and adoptive parents; the federal government will match 50% of state administrative funds used for recruitment and child placement activities.”77

C. APRIL 1994 HHS POLICY GUIDANCE

Shortly after the passage of the MEPA, HHS provided extensive guidance to agencies in order to assist them in complying with both Title VI of the Civil Rights Act of 196478 and the MEPA.79 The guidance provided that an agency receiving federal financial assistance could consider race, color, or national origin when making placements only if the agency made a “narrowly tailored, individualized determination that the facts and circumstances of a particular case require[d] the consideration of race, color, or national origin in order to advance the best interests of the child in need of placement.”80

Recognizing that standards for foster care and adoption are generally matters of state law and policy, HHS highlighted state practices that were in violation of the new law, including:

Establish time periods during which only a same race/ethnicity search will occur;

75. Id.
76. See id.
77. Id.
78. See 42 U.S.C. § 2002d (West 1994) (prohibiting recipients of Federal financial assistance from discriminating based on race, color, or national origin in their programs and activities, and from operating their programs in ways that have the effect of discriminating on the basis of those factors). Actual Language: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id.
79. MEPA, supra note 5.
80. Policy Guidance, supra note 73. As part of the individualized decision-making process, other child-related factors often considered are: the child’s current functioning and behaviors; medical, educational and developmental needs; history and past experience; and attachment to current caretakers. See id. When assessing a prospective parent’s ability (and suitability) to care for a child, some factors include: the ability to help the child integrate into the family; ability to accept the behavior and personality of the specific child; and the ability to validate the child’s cultural, racial, and ethnic background. See id.
Establish orders of placement preferences based on race, culture, or ethnicity;

Require caseworkers to specially justify transracial placements; or

[Those practices which] [o]therwise have the effect of delaying placements, either before or after termination of parental rights, in order to find a family of a particular race, culture, or ethnicity.\(^8\)

In addition, HHS set forth a number of methods that agencies were encouraged to utilize in order to develop an adequate pool of families capable of promoting each child's development and case goals. Those methods included both general and targeted recruiting through use of the general media and community organizations, such as religious institutions and neighborhood centers. HHS suggested that all agencies have a "comprehensive recruitment plan" that included:

- A description of the characteristics of waiting children;
- Specific strategies to reach all parts of the community;
- Diverse methods of disseminating both general and child specific information;
- Strategies for assuring that all prospective parents have access to the home study process, including location and hours of services that facilitate access by all members of the community;
- Strategies for training staff to work with diverse cultural, racial, and economic communities;
- Strategies for dealing with linguistic barriers;
- Non-discriminatory fee structures; and

Procedures for a timely search for prospective parents for a waiting child, including the use of exchanges and other interagency efforts, provided that such procedures must insure that placement of a child in an appropriate household is not delayed by the search for a same race or ethnic placement.

Agencies receiving Federal funds may not use standards related to income, age, education, family structure, and size or ownership of housing, which exclude groups of prospective parents on the basis of race, color or national origin, where those standards are arbitrary or unnecessary or where less exclusionary standards are available.\(^8\)

Not less than two year after HHS released this guidance, supporters of the MEPA were disappointed to realize that the legislation did not have

---

\(^8\). Id.

Some states specify an order of preference for placements, which make placement in a family of the same race, culture, or ethnicity as the child a preferred category. Some states prescribe set periods of time in which agencies must try to place a child with a family of the same race, culture, or ethnicity before the children can be placed with a family of a different race, culture, or ethnicity . . . . And some states indicate that children should be placed with families of the same race or ethnicity provided that this is consistent with the best interests of the child.

Id.\(^8\)

Id.
the intended effect of speeding up the adoption process for minority children. In part, it was the practices of state agencies that impeded MEPA progress:

These agencies had been using race in a systematic way to categorize waiting children and prospective parents, and to make matching decisions in the foster and adoption placement process. Race matching had been one of the most important decision-making criteria. It had been considered so important that children had been regularly held in foster or institutional care, rather than placed in adoptive homes, simply because same-race matches were unavailable, even though social workers knew that delay and denial of adoptive homes were likely to do children serious damage. Race had outweighed virtually all other parental fitness factors, and social workers had drastically altered their traditional selection criteria for minority race adopters, in their desperation to find same-race matches for the waiting black children.83

It seemed that the only way to remedy the situation would be to exclude the race factor all together. As discussed below, however, even the “routine” exclusion of race in subsequent MEPA amendments has not helped the situation.

IV. THE 1996 LEGISLATION: “REMOVAL OF BARRIERS TO INTERETHNIC ADOPTION” AND 1997-98 HHS OFFICE OF CIVIL RIGHTS GUIDANCE

A. MEPA-IEP

In August 1996, President Clinton signed the Small Business Job Protection Act of 1996, including section 1808 of the Act entitled “Removal of Barriers to Interethnic Adoption” (“IEP”).84 It repealed section 553 of the original MEPA, cutting “Permissible Consideration” out, and changing the language as shown:

A person or government that is involved in adoption or foster care placements may not - (a) [categorically] deny to any individual the opportunity to become an adoptive or a foster parent, [solely] on the basis of race, color, or national origin of the individual, or of the


84. Labeled as Interethnic Adoption Provisions, the MEPA amendments were part of President Clinton’s and the HHS Administration for Children and Families’ Adoption 2002 plan. The stated goal is to double the number of children adopted or placed in other homes by the year 2002. See Department of Health and Human Services, Executive Summary (last modified Feb. 18, 1997) <http://www.acf.dhhs.gov/programs/cb/special/2002body.htm> (outlining the Adoption 2002 program which focuses special attention “on a special group of children waiting to be adopted—the approximately 100,000 children in the public foster care system who cannot return safely to their own parents and homes.” It was published in response to a Presidential directive issued Dec. 14, 1996, requesting an HHS report on actions to be taken “to move children more rapidly from foster care to permanent homes . . . .”) [hereinafter Executive Summary].
child involved; or (b) delay or deny the placement of a child for adoption or into foster care [or otherwise discriminate in making a placement decision, solely] on the basis of race, color, or national origin of the adoptive or foster parent, or the child, involved.\textsuperscript{85}

Policy guidance to the Office of Civil Rights staff notes that the effect of striking the language shown above "is to clarify that it is not just categorical bans against transracial placements that are prohibited."\textsuperscript{86} Instead, "these changes clarify that even where a denial is not based on a categorical consideration, which is prohibited, other actions that delay or deny placements on the basis of race, color or national origin are prohibited."\textsuperscript{87}

In line with the stated goals of the original MEPA,\textsuperscript{88} Congress did retain section 554, requiring "diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed."\textsuperscript{89}

In addition to the noted language changes, the section imposes penalties on both States and adoption agencies that are non-compliant with the provisions.\textsuperscript{90} In cases where an immediate corrective action plan fails to remedy a problem stemming from noncompliance, the agency or state involved will be subject to "specific graduated financial penalties" as determined by HHS officials.\textsuperscript{91} Penalties imposed "vary according to the State population and the frequency and duration of noncompliance."\textsuperscript{92}

\textsuperscript{85} Memorandum from Dennis Hayahshi on Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996 (June 4, 1997) (available in http://www.hhs.gov/cgi-bin) [hereinafter Hayashi, Memorandum].

\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} See id. The memorandum focuses on the importance of four critical elements: 1) Delays in placing children who need adoptive or foster homes are not to be tolerated, nor are denials based on any prohibited or otherwise inappropriate consideration; 2) Discrimination is not to be tolerated, whether it is directed toward adults who wish to serve as foster or adoptive parents, toward children who need safe and appropriate homes, or toward communities or populations which may heretofore have been underutilized as a resource for placing children; 3) Active, diligent, and lawful recruitment of potential foster and adoptive parents of all backgrounds is both a legal requirement and an important tool for meeting the demands of good practice; and 4) The operative standard in foster care or adoptive placements had been and continues to be 'the best interests of the child.' Nevertheless, ... any consideration of race, color or national origin ... must be narrowly tailored to advance the child's best interest and must be made as an individualized determination of each child's needs and in light of a specific prospective adoptive or foster care parent's capacity to care for that child.

\textsuperscript{89} Id.

\textsuperscript{90} See Hayashi, Memorandum, supra note 85. This "State Plan" requirement will force HHS Office for Civil Rights officials to form a "common protocol for determining compliance with these ... provisions, ... developing corrective action plans and imposing penalties." Id.

\textsuperscript{91} Id.

\textsuperscript{92} Id. "[HHS] has estimated that State penalties could range from less than $1,000 to more than $3.6 million per quarter, and penalties for continued noncompliance could rise"

As of November 1997, almost three months after passage of the amendments, HHS had not yet notified states of the change in the federal law, even though the amendments were effective immediately. In the nine months after passage, HHS slowly released policy compliance guidance to states and Title IV-E agencies regarding formal changes to the MEPA (in the form of language changes shown above, for example). In addition, HHS began drafting what it termed “strong” guidance, promising to issue “model guidelines for State legislation to emphasize that the child’s health and safety is the paramount concern in decisions to terminate parental rights.”

The “strong” guidance released, however, bore a striking resemblance to its predecessor, and failed to answer practical questions for state agencies trying to understand the amendments and avoid penalties for non-compliance. It was only after complaints from state, county, and local caseworkers that HHS released valuable and realistic information to adoption and child welfare agencies. This guidance, finally released in May 1998, is currently available to agencies in question-and-answer format.

The 1997 and 1998 practical guidance is repetitive and once again promotes the “best interest of the child” standard without making casework specific examples available to states’ agency staff. Unfortunately, both Congress and HHS have effectively failed to close the loopholes that frustrated the success of the MEPA the first time around.

What Congress hoped to remedy with the MEPA-IEP is clear—to end the use of race in adoption placement decisions. What Congress really
did was pass an amendment, followed by little government action to ensure its healthy implementation. HHS guidance issued after passage of the 1996 MEPA-IEP states that "the amendments remove potentially misleading language in MEPA's original provisions and clarify that 'discrimination is not to be tolerated,' whether directed at children in need of appropriate, safe homes, at prospective parents, or at previously 'underutilized' communities who could not be resources for placing children." This strong language, however, is severely undercut by the same guidance stating that "any decision to consider the use of race as a necessary element of a placement decision must be based on concerns arising out of the circumstances of the individual case." In effect, HHS is saying that although states and adoption agencies are prohibited from using race as a factor in placement decisions on a routine basis, it really would not violate federal law to do so in some "narrow and exceptional circumstances arising out of the specific needs of an individual child." This loophole is just one of the means by which adoption agencies continue the practice of race-matching despite Congressional efforts to transform the adoption world into a colorblind system.

1. Individual Assessments and Preferences as Loopholes

HHS guidance repeatedly states that "[p]ublic agencies may not routinely consider race, national origin and ethnicity in making placement decisions" and "[a]ny consideration of these factors must be done on an individualized basis where special circumstances indicate that their consideration is warranted." But, while agencies may not rely on generalizations about a child's race, they are "not prohibited from discussing with prospective adoptive ... parents their feelings, capacities and preferences regarding caring for a child of a particular race or ethnicity." The amendments, according to guidance, allow an "individual assessment" of both the child and a prospective parent's ability to serve that child. While that "assessment function must not be misused as a generalized racial or ethnic screen," won't agencies always use this assessment as a way to factor race into the mix?

For example, a caseworker could cite the individual assessment as a means through which race can be used, because it is in the "best interests of the child." The agency would not be using generalizations, but would focus on the particular child and use race despite the prohibition. Further, that parents may cite "preferences" in discussions with agency employees highlights the fact that race will still be used to filter children

98. Hayashi, Memorandum, supra note 85.
100. Answers, supra note 3.
101. Id.
102. Id.
though the adoption placement process. This loophole will increase the amount of litigation wherein plaintiffs must bear the burden of proving that either race, national origin, or ethnicity was illegally used in a placement decision; the easy defense will be that the use of race was not "routine," but that the agency’s employee was ensuring the best interests of the child.

2. Permissible Use of Culture

Another loophole in the amendment is the absence of the word "culture." HHS guidance states that "[t]here are situations where cultural needs may be important in placement decisions," but that "a public agency’s consideration of culture would raise Section 1808 issues if the agency used culture as a proxy for race, color or national origin." This may seem to be a strong warning to agencies that the use of "cultural competency" is not to be a pretext. However, later in the guidance, the strength of the prohibition is significantly lessened by HHS:

The term ‘cultural competency,’ as we understand it, is not one that would fit in a discussion of adoption . . . . However, agencies should, as a matter of good social work practice, examine all the factors that may bear on determining whether a particular placement is in the best interests of a particular child. That may in rare instances involve consideration of the abilities of prospective parents of one race or ethnicity to care for a child of another race or ethnicity.

In stating that the term “cultural competency” . . . is not one that would fit in the discussion of adoption,” HHS is ignoring, or at least skirting, an important issue: that the term “cultural competency” has in fact become a pretext for delaying the placement of children, and a substitute for the term “race-matching.” Despite the fact that culture cannot be used as a “proxy” for impermissible considerations, state agencies will view the HHS guidance a green light for its use—when deemed in the best interest of the child. “The belief that race or cultural heritage is central to a child’s best interests when making a placement is so inherent in social work theory and practice that a policy statement of the National Association of Social Workers still reflects this tenet, despite changes in federal law.”

3. The Meaning of Delay or Denial

The MEPA-IEP confirms that any delay in placement based on impermissible factors is illegal. HHS guidance, however, provides examples of what is meant by delay or denial in the foster care context only; examples

103. This seems to beg the question: Are the concepts of “culture” and “ethnicity” mutually exclusive?
104. *Answers*, supra note 3 (providing as an example a situation “where a child has specific language needs.”).
105. Id. (emphasis added).
106. *Nadel*, supra note 93.
of adoption delays or denials are absent.107 Obviously, while these practical examples will help state agencies understand casework specific treatment for foster care, the lack of examples in the adoption context does not allow those agencies to understand the practical workings of the MEPA-IEP. Why HHS chose not to provide examples on adoption delays or denials (in the context of the amendments) is unknown, but the absence is unmistakable.

To determine if it is in violation of delaying or denying an adoption based on prohibited factors, a state agency will have to look to earlier 1995 guidance released by HHS. To start, the practice of “holding periods,” (keeping a child in agency custody while looking for same-race adoptive parents), is federally prohibited.108 Similarly, an agency may not delay placing a child in an available home because of race.109 An agency may conduct a search for adoptive parents to fulfill a child’s placement needs, but that search cannot, and should not, “be limited to same-race prospective parents except in those rare circumstances where the child has a specific and demonstrable need for a same-race placement.”110 Once again, “specific need” is the loophole.

4. Other Factors

Delay in the adoption placement context is not only a result of using impermissible factors, such as race. In fact, many other social and procedural factors contribute to delays within the child welfare system. Procedurally, for example, high caseloads in state agencies continue to impede the completion of individualized assessments of children awaiting adoption.111 There are also significant court delays in scheduling mandatory review or termination hearings.112 Social factors include the “distinctive physical and emotional needs of children who have been abused or ne-

107. See Answers, supra note 3. The following are a few examples of what would constitute a delay or denial in the foster care context:

1) A white newborn baby’s foster placement is delayed because the social worker is unable to find a white foster home; the infant is kept in the hospital longer than would otherwise be necessary and is ultimately placed in a group home rather than being placed in a foster home with a minority family; 2) A minority relative with guardianship over four black children expressly requests that the children be allowed to remain in the care of a white neighbor in whose care the children are left. The state agency denies the white neighbor a restricted foster care license which will enable her to care for the children. The agency’s license denial is based on its decision that the best interests of the children require a same-race placement, which will delay the permanent foster care placement. There was no individualized assessment or evaluation indicating that a same-race placement is actually in the best interests of the children . . . [and] 4) Different standards may be applied in licensing white versus minority households resulting in delay or denial of the opportunity to be foster parents.

108. See Policy Guidance, supra note 73.
109. See id.
110. Hollinger, supra note 97.
111. Id.
112. See id.
glected which . . . make it difficult to secure appropriate out-of-home care,” incorrect information about the availability of medical assistance for adoptive children, and “cultural norms that are hostile to formal adoption.”

Each of these factors, in addition to the loopholes discussed above, works to frustrate successful implementation of the MEPA-IEP. Granted, there will always be situations in which the loopholes are legally used, and delays can occur on many levels for various reasons. Illegal use of the loopholes, however, will go virtually undetected, hidden by the veil of “culture” or “individual assessment” or “the child’s best interest.” In addition, ineffective management of the adoption process will continue to promote delays for the placement of thousands of children whose natural parents’ rights have been terminated. To reduce delays in the courts and at the state levels, active efforts to oversee the correct implementation of the amendments is imperative.

V. TESTIMONY PRESENTED TO THE HOUSE WAYS AND MEANS COMMITTEE, SUBCOMMITTEE ON HUMAN RESOURCES OF THE HOUSE OF REPRESENTATIVES—SEPTEMBER 15, 1998

In September 1998, several renowned adoption scholars and members of government agencies met with the House Subcommittee on Human Resources to discuss the effects of MEPA-IEP on the social welfare system. The testimony centered primarily on the current state of adoption placements, lack of HHS guidance following passage of the amendments, and, generally, the failure of federal legislation to remedy the on-going practices of race-matching. The following are brief synopses of some statements presented by various individuals on the state of adoption in late 1998.

In his testimony to the Subcommittee, Associate Director of the Income Security Issues, Health, Education, and Human Services Division of the United States General Accounting Office Mark V. Nadel commented on HHS actions taken in the nine months following MEPA-IEP passage. As it had in 1994, HHS notified state agencies of the amendments and stated the revised policy guidance would follow. In addition, HHS notified state agencies of the amendments and stated the revised policy guidance would follow. In addition, the Department provided technical assistance to the states, including reviews of agency placement practices in selected locations.

113. Id. But see Prepared Statement of Richard P. Barth, Ph.D., Frank A. Daniels Professor, School of Social Work, The University of North Carolina at Chapel Hill, Before the House Committee on Ways and Means, Subcommittee on Human Resources, Subject—Research Regarding the Multi-Ethnic Placement Act and Amendments, FEDERAL NEWS SERVICE, Sept. 15, 1998, available in LEXIS, In the News (“My research and experience tell me that there is considerably more acceptance of interethnic and cross-racial placements among the general public than among the professional adoption community.”).

114. See Nadel, supra note 93.

115. Id.
HHS did not, however, take these much needed measures until well after the amendments were enacted, and further, decided it was not necessary to repeat certain assistance activities. "For example, it did not repeat the outreach and training to state officials, nor [did] it [update] the monograph on the act to include information on the amendment."\textsuperscript{116} Additionally, HHS officials told state and federal agencies that it was "not necessary to conduct another comprehensive review of state statutes because they said they would work with states on a case-by-case basis."\textsuperscript{117}

Concerned about the continuing practices of race-matching on the state level, adoption scholar Elizabeth Bartholet noted that is not evident that "MEPA II has had a significant impact to date, or that it will have a significant impact without vigorous enforcement action on the part of the federal government."\textsuperscript{118} In reference to HHS's "tough-sounding Guidance," Bartholet noted that there has been little activity following what she termed "problematic" legislation prohibiting actions that are "blatantly illegal":\textsuperscript{119}

The U.S. Department of HHS, responsible for administrative enforcement, has been awfully quiet . . . . State officials responsible for bringing their agencies into compliance with MEPA are similarly quiet. Listening to the sounds of child welfare activity coming from around the country one gets no sense that the revolutionary change called for by MEPA is in the works. There is instead a deafening silence. All seems to be going more of less as usual . . . . The 1997 Guidance was a start on the job that needed to be done, but there has been no adequate follow-up activity. The problem seems to be that those in charge of enforcement and compliance are, for the most part, believers in the tradition of race matching.\textsuperscript{120}

Bartholet also addressed concerns about the use of "cultural competency" and "kinship care" which "function as convenient endruns around the new MEPA mandate."\textsuperscript{121} In response to an essay written by another adoption scholar, R. Richard Banks,\textsuperscript{122} Bartholet scoffed at Banks' proposition that "the nature of the current debate 'virtually guarantees a move away from race matching':"

Would that were it so . . . . [T]here is enormous resistance to this law, and it appears so far to have had little impact. State social service agencies tend to be committed from top to bottom to their race-matching ways. Private foundations and nonprofit child welfare groups have joined forces with public agencies to promote 'kinship care' in part to help ensure that children in need of homes remain within their racial group. 'Cultural competence' is one of the code phrases in the post-MEPA era for assessing whether agencies remain

\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Bartholet, Statement, supra note 83.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} See Banks, supra note 6.
sufficiently committed to same-race matching and whether they are doing enough to recruit families of color to make same-race placement possible.\textsuperscript{123}

Harvard Law School Professor Randall Kennedy echoed Batholet’s concerns about both “cultural competence” and general state agency “recalcitrance” serving as “pretexts that camouflage racial decision-making.”\textsuperscript{124} Very effectively, Kennedy revealed the inherent problems associated with using “cultural competency” as a consideration in the adoption placement context:

For one thing, [the notion of cultural competency] puts officials in the position of attempting to prescribe ‘racial correctness.’ Fortunately, there exists no authoritative criterion by which to measure what sorts of ideas or conduct can certifiably be deemed properly ‘black’ (or ‘white’ or ‘yellow’ etc.). African Americans (like the individuals constituting all groups in American society) vary tremendously. Many like gospel music or rap. Many do not. Many celebrate Kwanza. Many do not. Many live predominantly in black neighborhoods. Some do not. Many are Christians. Many are Moslems. The idea that public or private welfare officials would homogenize the varied African American community and impose that homogenized stereotype upon white adults seeking to provide children with adoptive homes . . . is a frightening prospect.\textsuperscript{125}

Finally, Dr. Richard P. Barth, a professor in the School of Social Work at the University of North Carolina at Chapel Hill, described research which continues to show the desperate need to move children out of America’s foster care system into permanent homes.\textsuperscript{126} Barth advocates creation of a more comprehensive adoption services research program and a broader approach of “engaging a far larger proportion of the American public in welcoming foster and adoptive children of all types into their homes”:

This challenge is growing greater every day as we are becoming an America where every adult is working outside the home; where family size is dropping; understanding and misunderstanding about the contribution of genetics and pre-natal environments are making adoptive parents more wary; where reproductive technologies are promising more alternatives to adoption; and the cost of raising a child is soaring.\textsuperscript{127}

These statements are encouraging in the fact that members of the academic community recognize that MEPA is in danger, but it will take much more than mere discussion to successfully implement the legislation, achieving the desired results.

\textsuperscript{123} Bartholet, \textit{supra} note 6.
\textsuperscript{125} \textit{Id}.
\textsuperscript{126} See Barth, \textit{supra} note 113.
\textsuperscript{127} \textit{Id}.
VI. CONCLUSION

Too quick to criticize? You bet, and that is the wall that legislators and advocates of this amendment continue to hit. No matter how you slice it, buzzwords like “cultural competency” and “kinship care” have simply become the current versions of race-matching. The removal of the “Permissible Consideration” language in the amendments does little in fact to prevent the consideration of race; it is too important in the intimate family context to ignore, and it is too ingrained in the minds of social workers who have seen first-hand the repercussions of bad placements, and the damaging effects of non-placements. In addition, the “best interests of the child” standard is the proverbial “compelling reason,” and will forever be used to justify a same-race match based upon an individualized assessment of a child and the prospective parents who wish to adopt him or her.

Thus, simply trying to take race out of the adoption equation is not going to decrease the number of children that continue to enter into and remain the America’s child welfare system. Passing an amendment without requisite guidance is not going to do the job either. It is going to take active management on the state level, community education and outreach programs, aggressive recruitment of adoptive parents, and most importantly, judicial compliance.

Naturally, one would think that judicial compliance would be the predominant means of thoroughly implementing the legislation. Surprisingly, though, this was not the case in an Illinois court in early March of 1999. With news that rekindled the transracial adoption debate, the Associated Press reported that a “black former cocaine addict won her battle against a politically powerful white couple for custody of her 3-year-old son Monday in a case that raised questions of race, influence and drugs.”128 The “Baby T” case, as it has been labeled by the media, began in Fall 1998 when white foster parents, the Burkes, attempted to adopt an African-American child and have his mother, Tina Olison, declared unfit.

On March 8, 1999, suburban Kane County Judge Judith Brawka, selected to decide the case because of its heavy political overtones in Chicago, found that “child-welfare experts placed too little emphasis on black culture when they recommended that the black youngster remain with the city Alderman Edward Burke and his wife, state Appellate Judge Anne Burke.”129 The couple had cared for the 3-year-old child since he was 8 days old.

Noting that the mother was now drug free, and citing state law that favors placement of children with their biological parents, Judge Brawka ordered a 12-month conditional transition period in which the child will be returned to his biological mother.

128. Mike Robinson, Ex-addict Gets Her Son Back From Politicians, The Indianapolis Star, Mar. 9, 1999, at A3. Mr. Burke is a city alderman and Mrs. Burke is a state appellate judge. See id.
129. Id.
Judge Brawka's finding, however, that the Illinois Department of Children and Family Services erred in putting too little emphasis on the importance of black culture in Baby T's upbringing is just what the MEPA-IEP is designed to do—it forbids any emphasis. In fact, Federal officials announced a week after the ruling that they are investigating whether Judge Brawka broke the law.

One should commend HHS officials who are stepping in to investigate the decision, but at the same time, the thought of how many other unpublishized cases are being decided in violation of the MEPA-IEP comes to mind. During the "Baby T" trial, a licensed clinical social worker, Samella Abdullah, testifying on behalf of the mother, said that the couple "'cannot provide for his cultural needs.'" If that is not consideration of race, I do not know what is. Is it in the best interests of the child? Maybe. But maybe not. Like the judge said, "He will not be three forever."

So, although race as a factor has literally been taken out of the statute, it still plays a major role in the process, practically speaking. Race cannot be taken out of the equation, and until societal views and state practices are changed, it never will be. And while identifying the problem may seem easy, the answer is more difficult to find. The search for it must begin with reviews of state agency practices and a hope that the tradition of race-matching can be eliminated sooner rather than later.

130. In her ruling, Judge Brawka said, "unless the position of the department is that there is no such thing as African-American culture, this issue deserves more attention than to check a box that says, 'not applicable.'" Mike Robinson, Culture Trumps Power in a Chicago Custody Case, THE BOSTON GLOBE, Mar. 9, 1999, at National/Foreign, A3.
