REDEFINING THE TRANSRACIAL ADOPTION CONTROVERSY

RUTH-ARLENE W. HOWE*

I. INTRODUCTION

Transracial adoption is a sensitive topic, evoking acrimonious debate "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 Black children and Black communities."1 Efforts to declare race-matching preference policies or statutory schemes unconstitutional are intensifying.2 Some legal writers assert that such a prohibition is needed in order to avoid or minimize harm to Black3 youngsters in the foster care system.4 In a re-

* Associate Professor of Law, Boston College Law School; 1994-95 Hermon Dunlap Smith Fellow in Law and Social/Public Policy, The Mary Ingraham Bunting Institute of Radcliffe College.

Financial support from The Mary Ingraham Bunting Institute of Radcliffe College and Boston College Law School is gratefully acknowledged. I wish to thank the following people: Laura B. Morris; Theodore H. Howe; Bunting Sisters Leslie R. Brody, Shirley Burgraf, Laura H. Korobkin, Sally E. Merry, and Karen F. Wyche; Boston College Law School Dean Aviam Soifer; and faculty colleagues Anthony Farley, Sanford N. Katz, and James Repetti for their helpful suggestions and comments on earlier drafts. I would also like to thank Bunting Institute Director Florence C. Ladd for her support and encouragement and Melynda Broomfield for her research assistance.

1. Twila L. Perry, The Transracial Adoption Controversy: An Analysis of Discourse and Subordination, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 34 (1993-94). While Perry focuses exclusively on adoptions of Black children by white adults, any adoption in which the adoptive parent and child are of different racial backgrounds may be referred to as a transracial adoption. Id. at 34 n.1.


3. It should be noted that, like Professor Perry, I capitalize the word Black, except when directly quoting another person. See Perry, supra note 1, at 34 n.2 (quoting Kimberlé W. Crenshaw, Race, Reform, Retrenchment: Transformation and Legitimation in Anti-Discrimination Law, 101 HARV. L. REV. 1331, 1331 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
cent law review article analyzing the same-race statutory preference schemes of three states, the commentator concluded that "a child affected by the question of trans-racial adoption is potentially trapped in the middle of dangerous political and legal crossroads."

Race and color continue to be unresolved issues in our society—inextricably tied and merged with issues of power, status, and inequality—that mock American claims of being a democratic land of equal opportunity. Race and color profoundly influence the lives of all within our society, governing the choices one makes and the choices one believes she has. Issues of race and poverty in American society directly contribute to the disproportionate numbers of Black children remaining in the foster care sys-
tem for longer periods of time than other children, due to a shortage of approved Black adoptive homes.

I believe that race cannot be ignored. The key to successful living as a minority person in a discriminating, denigrating society is to have positive affiliations with others like oneself, from whom one can gain support and affirmation, and can learn coping skills. Most individuals are not "color-blind"; skin color and perceptions of racial difference trigger within the beholder unconscious stereotypical expectations and assumptions which then often govern any ensuing social interactions. Thus, to promote and protect a child’s “best interests,” race is an important factor to be considered when evaluating the appropriateness of prospective adoptive parents. Does the person have the awareness, capacity, and sensitivity to prepare the nonwhite child to handle the challenges that will be encountered because of the child’s racial appearance? Advocates for transracial adoption who naively espouse a “Love conquers all” philosophy may represent an assault on the Black

9. See infra note 72 and text accompanying notes 134-36.


11. The reader should note that my views have been shaped by twentieth century life experiences in the United States as a Black, African-American woman—daughter, wife, mother, grandmother, and foster parent: professional training in graduate social work during the mid-1950s, the role of a community activist in the 1960s, legal studies during the 1970s, and strong career and personal commitments to furthering the “best interests” of children, especially those of Black youth.


13. For an example of a classic study documenting this phenomenon, see Pamela C. Rubovits & Martin L. Maehr, Pygmalion Black and White, 25 J. PERSONALITY & SOC. PSYCHOL. 210 (1973) (suggesting explanation of why teachers are often unable to equalize performance levels of Blacks and whites). This study involved the systematic observation of teacher behavior following experimental manipulation of expectations—teachers were told that certain students were “gifted” or “nongifted.” Teachers gave preferential treatment to students labeled “gifted” and, to some extent, the pattern of treatment was dependent on the race of the students. “In general, black students were treated less positively than whites, with blacks labeled ‘gifted’ apparently subjected to more discrimination than those labeled ‘nongifted.’” Id. at 210. Moreover, the observed teacher behavior indicated that the most demanding teachers, “while encouraging whites, tended to ignore blacks.” Id.

14. For a sensitive and insightful discussion of these challenges, see MAUREEN T. REDDY, CROSSING THE COLOR LINE: RACE, PARENTING, AND CULTURE (1994) (autobiographical narrative of white feminist raising two children in an interracial marriage). In her preface, Reddy describes her book: “[I]t is about whiteness, about trying to cross the color line at many places, . . . about the politics of feminism and antiracism, about loving blackness, . . . about mothering black children in a society that does not value children, and particularly does not value black children.” Id. at xiii-iv.

15. See Perry, supra note 1, at 62 (discussing differing views about “love conquers all” philosophy); Memorandum from Randall Kennedy, Professor of Law, Harvard Law School, to Colleagues (Nov. 3, 1993) (on file with author) (requesting an immediate response from persons willing to join him in opposing the Multiethnic Placement Act of 1993 (S.1224)). Professor Kennedy wrote:
family and Black community that is as dangerous as some recent Supreme Court decisions\(^6\) that seem to herald an end to the gains of the Civil Rights Movement of the 1960s.\(^7\)

In her article analyzing the nature of the discourse about transracial adoption, Professor Twila L. Perry states that her intent is to contribute to a constructive dialogue about transracial adoption.\(^8\) She invites not only continued discussion and examination of the sensitive and complex issues surrounding transracial adoption, but a broader consideration of the needs and interests of all Black children.\(^9\)

This Essay is a response to Perry's call. The following key questions are considered. Whose interests would be served if consideration of race were completely eliminated from adoptive placement decision-making? What really drives the growing momentum to eliminate race considerations from all adoptive placement decisions? What would be the consequences of eliminating same-race placement preferences for a particular Black adoptee,\(^10\) for the

There is simply no compelling reason to delay even briefly, for the purpose of racial matching, placing a parentless child in a permanent home. What parentless children need most are not "white" parents or "black" parents or "yellow" parents but loving parents who will provide them with a nurturing environment.

*Id.* at 2.

Contrary to the view held by Kennedy, one adoption consultant, discussing how decisions are made about what child to adopt, bluntly declares:

> Most infertile people aren't adopting out of any political motivation. They are adopting in order to become parents! It is easy for couples desperate to adopt a child to make an idealistic leap of faith. "A child is a child. Kids grow better in families, and these are kids without families. Give me this child to love."

The reality of transracial or transethnic adoption is really much different. Love does not conquer all. The problems inherent in interracial dating or interracial marriage are also a part of interracial adoption. In either case, the result is a multiracial or biracial family.


16. See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816, 2820 (1993) (holding that North Carolina majority-minority voting district of "dramatically irregular" shape, absent sufficient race-neutral explanation for its boundaries, may be unconstitutional and violate rights of white voters); *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993) (setting out requirements that make it more difficult to prove job discrimination due to race, gender, or religious prejudice); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding state and local programs designed to benefit minority groups subject to strict constitutional scrutiny and constitutionally justifiable only if designed to remedy prior discrimination). These decisions represent what one court observer, writing at the end of the 1992-93 term, described as a trend that "emerged slowly . . . but [which leaves] little doubt today that the nation's highest court has virtually abandoned the idea of giving minorities preferential treatment to help end racial inequality."


17. *See infra* note 115.


19. *Id.* at 108.

20. In my opinion, the true costs or consequences of being a transracial adoptee cannot be assessed until an individual attains adulthood. The studies that have been done over the past two and a half decades only report on adoptees through late adolescence and into their early twenties. Most studies conclude "that children are not detrimentally affected by being raised by parents of a different race." *Id.* at 37. However, Perry notes the contradiction that "virtually all of the researchers conclude that children should be placed for adoption with
status and integrity of the Black family and Black community, and for American society generally.

Part II of this Essay summarizes Perry's article in which she poses the question: Is the transracial adoption debate about the needs of Black children or "the right of white people to parent whichever children they choose?" In Part III, I assert that the transracial adoption debate is more about adults seeking to establish a right to parent than about meeting the needs of Black children. Various factors currently fueling efforts to eliminate race considerations from all adoptions are identified. Part IV recognizes two important paradigm shifts in the field of adoption: a shift in the focus of the adoption process and a change in the dominance among adoption professionals. The new challenges for social work and legal professionals posed by these paradigm shifts are also discussed.

This Essay concludes with a summary consideration of the meaning of these changes for Black children, the Black family, and the Black community. Professional practitioners and policy makers are urged to shift from analyzing the discourse about transracial adoption to developing culturally sensi-
tive services and strategies to meet the needs of the growing number of Black children in foster care.

II. AN OVERVIEW OF PERRY’S ARTICLE ABOUT THE TRANSRACIAL ADOPTION CONTROVERSY

Perry analyzes the discourse about transracial adoption in a scholarly manner, providing a timely, valuable addition to the legal literature. Writing with candor, clarity, and authority, Perry demonstrates an awareness that some may not be readily disposed to accept her analysis.24 Her focus on how the transracial adoption controversy may affect the adopted children and the communities from which they come leaves at least two important tasks for others: answering the question of where Black children belong25 and assessing the constitutionality of same-race placement.26

Perry offers scholars a useful framework for understanding differing positions and views about transracial adoption. Her conceptual paradigm posits two distinctly different perspectives—liberal colorblind individualism27 and color and community consciousness.28 “These two perspectives go far beyond transracial adoption; they represent different approaches to the basic analysis of race and racism in America.”29 Perry argues that aspects of the

24. Perry noted:
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.

id. at 38.

25. See Bartholet, supra note 4, at 1163.

26. See Rosettenstein, supra note 5, at 137.

27. According to Perry, the dominant features of liberal colorblind individualism are: (1) a belief that racism in this country can be completely eradicated; (2) acceptance of colorblindness as the ideal societal goal—“race should not be an important factor in evaluating individuals;” and yet, (3) the individual is considered to be “the primary unit for the analysis of rights and interests.” Perry, supra note 1, at 43.

28. In contrast, the salient features of the color and community consciousness perspective are: (1) a view that racism is pervasive and a permanent part of American society; (2) recognition that race profoundly influences the lives of individuals—both in terms of the choices they make and the choices they believe they have; (3) a multicultural society, requiring the continued existence of diverse cultures, is valued; and (4) an emphasis on “the rights and interests of the group with which the individual is identified . . . [reflecting] a strong belief in the interrelationship between the subordination of a group as a whole and the oppression of the individuals within that group.” Id.

29. Id. at 38. Perry attributes the two differing perspectives on transracial adoption that she identifies to people in our society having very different racial histories or narratives. Id. “Racial narratives” are shaped by a combination of factors: (1) the actual history of the racial group to which a person belongs; (2) an individual’s perception of that history which may or may not comport with reality; and (3) an individual’s perception of the extent to which race affects one’s life on a day-to-day basis. See id. at 47-53.
perspective of liberal colorblind individualism, “however well-intentioned, . . . may actually reinforce the subordination of Black people in general and Black children in particular . . . . Moreover, the discourse of colorblind individualism, ostensibly about individual rights and interests, often reflects the exercise of power by whites as a dominant group.”

Language can be powerful; it can evoke negative images and stereotypes that harm those who are discussed. Perry strongly chides scholars “from the colorblind perspective [who] 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.” Perry draws an interesting comparison between the colorblind liberal perspective on transracial adoption and the school desegregation process of the 1950s and 1960s; “[I]n both situations, Black children [are] removed from Black communities and placed into white communities allegedly to benefit both the individual children and the society.” Clearly, de jure segregation—an official wrong predicated on a belief in Black inferiority—affronted “the dignity and humanity of Black people . . . [however, forty years later,] desegregation of the public schools [has yet to] lead to racial equality.” Some scholars have recognized that school desegregation resulted in losses and negative side effects for Black children and the Black community, such as the closing of many Black educational institutions and the decline in the number of teaching and administrative positions held by Blacks.

While Perry seems to concede that school desegregation was “a necessary step for practical or symbolic social progress for Blacks,” she is unwilling to view transracial adoption in the same light. She states instead that “[T]he emphasis on placing Black children in white homes raises the concern that less emphasis is being placed on strengthening Black homes . . . . [T]he .

30. Id. at 40. I wonder how Perry’s thesis will be received by people whose perspectives and racial narrative histories differ. Some readers may be so arrogant and possess such a sense of superiority or entitlement to be, in the words of Johnston, like “[m]ost well educated North Americans of European heritage . . . completely unaware of the extent of racism in this culture.” JOHNSTON, supra note 15, at 128. They might be considered “unconsciously incompetent” within an adult learning model used to address racial issues. Id. The model posits progressive movement “from unconscious incompetence to conscious incompetence to conscious competence to unconscious competence.” Id.

31. For instance, “conceptualiz[ing] transracial adoption as a one-way street where whites adopt Black children, but Blacks do not adopt white children,” Perry, supra note 1, at 41, implicitly “promotes a view that the Black community is invisible, powerless, and irrelevant to the determination of policies that affect Black children.” Id. at 79-80.

32. Id. at 106. “Integration ideally involves people of different ethnic groups, living, learning, or working together in an environment in which no group exercises disproportionate power.” Id. at 106 n.324.

33. Id. at 105.

34. Id.


36. Perry, supra note 1, at 105.
key to changing the conditions of Black people lies in strengthening Black communities and families, as opposed to token desegregation into the white world."

Perry concludes her discourse analysis by noting sadly that it is in the context of transracial adoption that a significant debate over the welfare of Black children is occurring:

[If only such energy could be spent] 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."

In the next section, the transracial adoption controversy is redefined as being about the right of white adults to adopt whichever children they select, and not about the needs of Black children.

III. THE TRANSRACIAL ADOPTION CONTROVERSY REDEFINED

A. What is the Real Issue: The Interests of Black Children or the Rights of White Adults to Adopt Whichever Children They Choose?

From my perspective, the transracial adoption debate is about establishing a new right or entitlement for certain white adults who wish to become parents by any means they select. Proponents of transracial adoption who claim that same-race placement preferences are victimizing the increasing numbers of Black children in foster care are employing a diversionary "smokescreen" strategy. This smokescreen obfuscates important systemic problems and creates additional barriers to meeting the needs of Black children, Black families, and the Black community. The focus of attention.

37. Id. at 105 n.324. Desegregation does not create integration, see supra note 32, if it is merely a one-way street process in which Blacks seek acceptance by whites, but not vice-versa. In that instance, the result is mere tokenism rather than whites acquiring any increased level of comfort with the diverse, multicultural society that this nation is becoming.

38. Perry, supra note 1, at 107.
39. For experiences influencing my perspective, see supra note 11.
40. Others have also concluded that "transracial adoption primarily serves the interests of white families, not the interests of ... black children." Howard, supra note 10, at 510.
41. Howard states that:

Transracial adoption was defined originally not as a program to salvage black children from the effects of foster placement or institutionalization, but as a way of fulfilling the needs of childless white couples, given the dwindling availability of white children. Thus[,] it was seen as a white enterprise instituted for the advantage of the white community.

Id. at 510 n.29 (quoting Rita J. Simon & Howard Altstein, Transracial Adoption 46 (1977)). Howard also states that "[a]t first, the main criticism [of transracial adoption] was that it primarily benefited white families and only served to divert attention from the needs of the larger number of black children who would not be adopted by whites in any event."

Id. (quoting Jacqueline Macaulay & Stewart Macaulay, Adoption for Black Children: A Case Study of Expert Discretion, in 1 Research in Law and Sociology 265, 286 (Rita J. Simon ed., 1978)).
41. See supra note 21. Arguably, there is something very disingenuous about the way proponents of transracial adoption constantly refer to the plight of Black children in foster
should be shifted from the illusory debate about the merits of transracial adoption to the real issue: whether it is appropriate to establish new rights for adults seeking to adopt children.

In this Essay, no attempt is made to assess the outcomes of transracial adoption. Rather, given the racial realities of the mid-1990s, this Essay analyzes how eliminating same-race placement preferences in order to establish a new right for white adults affects Black children, Black families, and the Black community generally. In this regard, perceptions may be as important as reality. For example, what are the consequences when proponents of transracial adoption cast those who oppose it—such as the National Association of Black Social Workers (NABSW)—as the “bad guy” or “heavy” in the drama? Has the NABSW, in reaffirming its 1972 policy opposing transracial adoption, been merely “political” and “group serving”? I think not. Indeed, I believe that they are astutely aware of what Black children care when, in fact, most whites who seek to adopt look for healthy infants, not older children with a range of “special needs,” and most of the growing number of transracial placements being made today involve newborns or babies. See Judith K. McKenzie, Adoption of Children with Special Needs, THE FUTURE OF CHILDREN, Spring 1993, at 62 (adoption issue) (discussing past history and current placement issues); infra text accompanying notes 62-76.

42. At its first national convention in 1972, NABSW passed a resolution strongly opposing transracial adoption. Subsequently, NABSW issued a Position Paper, declaring in part:

[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.

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.

Position Paper from the National Ass’n of Black Social Workers (Apr. 1972), reprinted in Simon & Altstein, supra note 40, at 50. For further discussion regarding NABSW’s steadfast opposition to transracial adoption, see Perry, supra note 1, at 42, 46-48.

It should be noted that in professional groups, many Black Caucuses first met during the late 1960s and 1970s. Some groups established new incorporated bodies; others remained within their parent groups but asserted the right to meet as a special interest subgroup. Shortly after the first NABSW convening session in 1972, a National Conference on Black Sociologists was held on May 5-6, 1972, at the University of Chicago. This conference was held in the belief that the increasing polarization, evident at the 1969 and 1970 American Sociology Association annual meetings in San Francisco and Washington, D.C., could be checked if a way were found to bridge the knowledge gap between Black and white sociologists about each other. See BLACK SOCIOLOGISTS: HISTORICAL AND CONTEMPORARY PERSPECTIVES vii-ix (James E. Blackwell & Morris Janowitz eds., 1974).

One can only speculate where the field of adoption might be today, if the intense feelings of alienation and disregard felt by Black social workers had been acknowledged and addressed within the professional organization of the National Association of Social Workers, Inc.

43. See, e.g., Bartholet, supra note 4, at 1248 (characterizing NABSW position in support of racial matching policies as “promoting an inappropriate separatist agenda”). But cf. Perry, supra note 1, at 46 (describing NABSW position as “the most vivid expression of the color and community consciousness perspective”).
need in order to grow up to be successful, contributing adults in American society.

The realization that the focus of the transracial adoption controversy is not the needs and interests of Black children, but instead the interests of prospective adoptive parents, has an important implication. The needs of Black children will not be better served until our society honestly and publically acknowledges race and color as defining influences. Stated another way, Black children will not benefit until we reverse the current "retreat from race" and commit ourselves to addressing and redressing past and present inequities. Action is needed, not just at the level of individual morality, but rather at the institutional, community, and societal levels. We must commit ourselves to developing, implementing, and supporting policies and programs that enhance successful continuation of a democratic society in which all citizens enjoy equal opportunities to reap the rewards of "life, liberty and the pursuit of happiness."4

B. Discussion

The basis for my position that the transracial adoption controversy is not about the needs and interests of Black children requires further explanation. I have based this position on data and on inferences drawn from various materials reviewed: available statistics on adoption,44 reported developments and trends in the adoption field,45 demographic data and sur-

44. See, e.g., DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS (1992). In this book, one finds a chilling forecast for what seems to be unfolding with respect to discrediting same-race placement preferences in adoption. Takagi’s discussion of the December, 1990 move against race-exclusive scholarships by Department of Education staffer Michael Williams, is most telling:

Williams’s blundered solo attempt to nix race-exclusive scholarships was a stunning example of...what I call the retreat from race. In terms of social policy, the defining characteristic of this trend has been an increasing reluctance—by both liberals and conservatives—to address contemporary racial problems with explicitly racial solutions. ... A similar shift has occurred in political discussions of welfare and civil rights policy. Liberals and conservatives alike propose that race-based policies be abandoned in favor of class-based or race-neutral policies.

id. at 173-74; see also supra note 16.

45. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Instead of spouting empty rhetoric about a return to "family values," we must find a way to create a truly level playing field for all. This means providing sound, affordable housing for all groups in communities where children have the opportunity to acquire the skills that prepare them to hold jobs paying enough to permit them, in turn, to house and educate their own children. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (systematic study of racial and ethnic segregation based on 1980 census).


47. See generally NCFA FACTBOOK, supra note 46; NATIONAL LEGAL RESOURCE CTR. FOR CHILD ADVOCACY & PROTECTION, AMERICAN BAR ASS’N, ADOPTION OF CHILDREN WITH SPECIAL NEEDS: ISSUES IN LAW AND POLICY (Ellen C. Segal ed., 1985); Symposium, Adoption, 72 CHILD
veys,\textsuperscript{18} including statistics compiled by the U.S. Bureau of the Census.\textsuperscript{19} Since 1972, statistics demonstrate that the total pool of American children readily available for adoption has changed significantly, both in size and composition.\textsuperscript{20} Furthermore, if one looks back over four decades of adoption practices to the early 1950s, one discovers that there have been notable changes in how adoptions are arranged. These changes raise interesting questions about how best to allocate roles and responsibilities between child welfare and legal professionals.\textsuperscript{21}

1. Adoption Statistics. Although exact numbers are not known,\textsuperscript{22} it is generally agreed that annual finalized adoptions in the United States—in contrast to “informal” arrangements that are never legalized—peaked at about 175,000 in 1970, dropped to about 104,088 in 1986, and rose to a reported 118,529 in 1990.\textsuperscript{23} Formal adoptions include both related adoptions and unrelated adoptions. Related adoptions refer to stepparent adoptions and adoptions by a nonparent relative. In an unrelated adoption, a nonrelative adopts the child.\textsuperscript{24}

Related adoptions totaled 91,141 in 1982, but were down to 52,931 by 1986.\textsuperscript{25} This drop probably reflects a decrease in the number of stepparent adoptions following remarriage, which in turn simply may mean that fewer

\textsuperscript{18} WELFARE 195 (1993); Symposium, Adoption, THE FUTURE OF CHILDREN, Spring 1993, at 4.

\textsuperscript{19} See generally Martha F. Riche, We’re All Minorities Now, AM. DEMOGRAPHICS, Oct. 1991, at 26 (reporting on increase in numbers of interracial marriages and multiracial births); Gabrielle Sándor, The “Other” Americans, AM. DEMOGRAPHICS, June 1994, at 36 (describing increase in number of Americans that do not fit into government’s four racial categories).

\textsuperscript{20} See BUREAU OF THE CENSUS (1994).

\textsuperscript{21} These changes, however, are more a consequence of various social phenomena than a reaction to the NABSW’s strong opposition to transracial placements. See supra note 42. These social phenomena include changes in the choices women tend to make about childbearing and childrearing, shifts in attitudes about social behavior (such as the waning of the stigma traditionally attached to birth out of wedlock and single parenting), and increases in state intervention into family affairs due to the growing public awareness of child abuse and neglect. See, e.g., Howard, supra note 10, at 505-16. Stolley notes that today, fewer premarital conceptions are legitimated by marriage before birth. Additionally, with the continuing high rate of divorce, single-parent families are so common today that “[i]t is estimated that at least one-half of all children will spend part of their childhood in a single-parent family.” Stolley, supra note 46, at 32-33.

\textsuperscript{22} See infra Part IV.

\textsuperscript{23} Since 1975, the federal government has not collected any comprehensive, annual data on adoptions. The American Public Welfare Association, with federal funding, has collected national data on adoption and substitute care through the Voluntary Cooperative Information System (VCIS) since 1983. This system, however, only covers those children who are in or have passed through the public child welfare system. Stolley states a strong case for instituting a comprehensive, nationwide, data-collection system, as well as a standardized reporting system. Until these are in place, both policy makers and practitioners are handicapped in their ability to deliver proper services. Stolley, supra note 46, at 38-40; see also NCFA FACTBOOK, supra note 46, at iii-iv.

\textsuperscript{24} NCFA FACTBOOK, supra note 46, at 69; Stolley, supra note 46, at 29.

\textsuperscript{25} Stolley, supra note 46, at 29. Adoption statistics can also be categorized according to the arrangement or means of placement, whether via a public or private agency, or a private independent intermediary. See id. at 30-31; text infra accompanying notes 77-80.

\textsuperscript{26} Stolley, supra note 46, at 29.
stepparent families chose to formalize their parenting arrangements through legal adoption. Unrelated adoptions, after reaching a high of 89,200 in 1971 and dropping to about 49,700 in 1974, have remained at or near 50,000 a year. Since 1971, unrelated adoptions have comprised less than half of all adoptions.

2. Factors Affecting Unrelated Adoptions. Children become available for adoption in one of two ways. Generally, newborns and infants are available because birth parents voluntarily relinquish them to an adoption agency for placement or specifically consent to another person's petition to adopt their child. Other children, mostly older, become available for adoption because the parental rights of their parents are involuntarily terminated by a court on grounds of abandonment or parental unfitness.

The most dramatic development affecting the size and composition of the domestic pool of children available for adoption, and hence the total number of annual domestic adoptions, is the drastic decline in recent years in the rate of unmarried mothers' voluntary relinquishments of their infants. Before 1973, nine percent (approximately 36,000 annually) of all children born to never-married women were relinquished for adoption; however, during 1982-1988, voluntary relinquishments had dropped to two percent (approximately 16,500 annually) of all non-marital births. Most of this decline is the result of a drastic drop in the rate of relinquishments by white, unmarried women.

Before 1973, 19% of children born to never-married white women [approximately 33,269 each year] were placed for adoption, compared with 8% [roughly 25,600 annually] in 1973-1981 and 3% [or approximately 13,000] in 1982-1988. Among never-married black women, fewer than 2% of children were relinquished before 1973, and the rates do not appear to have changed much since then.

Moreover, the National Council for Adoption (NCFA), formerly the National Committee for Adoption, indicates that nearly all infants born to unmarried women are not relinquished. As a result of the lack of available infants,

56. Id.
57. Id. at 29-30; NCFA FACTBOOK, supra note 46, at 69.
58. NCFA FACTBOOK, supra note 46, at 69.
60. Id. § 21.5.
61. Id. § 21.7.
62. Bachrach et al., supra note 46, at 29 (reporting on analysis of data drawn from the 1982 and 1988 cycles of the National Survey of Family Growth (NSFG), which collects data on the fertility and fertility-related behavior of U.S. women ages 15-44); see infra table 1 at p. 143.
63. Bachrach et al., supra note 46, at 29.
64. Id.
65. The NCFA Factbook states that:
   Infants comprised 48.1 percent of all unrelated domestic adoptions in 1986. The 24,589 infant adoptions represented only 0.7 percent of all U.S. live births and only 2.8 percent of all U.S. live births to unmarried women in that year. Since most
foreign adoptions have become more attractive to many prospective adoptive parents.66

The impact of the decline in the rate of relinquishments of white babies is emphasized when two other phenomena are noted. First, the overall birth-rate for unmarried mothers rose through the 1970s and most of the 1980s.67 Although there were more premarital births, "fewer children were placed for adoption annually during the 1980s than in the 1970s."68 Second, in the mid-1990s with few healthy, white newborns being voluntarily relinquished, the children legally free for adoption through public and many private agencies are often either older youngsters with "special needs,"69 or infants who

---

66. Stolley, supra note 46, at 34 (stating that more than 60% of foreign adoptions in 1986 involved infants under one year of age). The NCFA Factbook reports 10,097 foreign adoptions in 1987, representing 16.4% of all unrelated adoptions. NCFA FACTBOOK, supra note 46, at 4-5.

67. Bachrach et al., supra note 46, at 29 ("Between 1970 and 1988, the birthrate for unmarried women rose from 26.4 to 38.6 births per 1,000 women, while the overall birthrate for women aged 15-44 fell from 87.9 to 67.2 births per 1,000 women.").

68. Id.

69. For purposes of the federal adoption assistance program, a child is not deemed to be a "child with special needs" unless:

---

### TABLE 1. Among Children Born to Never-married Women, Percentage Who Were Relinquished for Adoption, by Race, According to Year of Birth

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>1.5</td>
<td>0.2</td>
<td>1.1</td>
</tr>
<tr>
<td>White</td>
<td>19.3</td>
<td>7.6</td>
<td>3.2</td>
</tr>
</tbody>
</table>

Source: Christine A. Bachrach et al., *Relinquishment of Premarital Births: Evidence from National Survey Data*, 24 Fam. Plan. Persp. 27, 29 tbl. 1 (1992) (percentages based upon combined data from 1982 and 1988 National Surveys of Family Growth and refer to premarital births that had occurred to women who were 15-44 years of age at either survey). Reproduced with the permission of The Alan Guttmacher Institute.
are born HIV positive or drug exposed. In all parts of the country, the total population of Black children in foster care continues to grow at an alarming rate. Not all of these children, however, are legally free for adoption. In some instances, the case plan may not call for adoption, but rather a reunion with the birth family. Many of those who are legally free are both older and disabled.

Not only is the size of the adoption pool smaller because of fewer relinquishments, the characteristics of the children now waiting for adoption has changed. As one commentator has noted, "[m]ost of them have experienced some significant trauma in their young lives, including deprivation, physical and sexual abuse, abandonment, loss, and many moves in foster care. As a result, they are prone to emotional, behavioral, and learning problems." Perhaps because these children may be challenging to parent, special needs adoptions constituted just over a quarter of all unrelated domestic adoptions during most of the 1980s. "[T]here is a desperate shortage of homes for children with severe disabilities, older minority children, especially boys, and..."

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and
(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance...and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under [this section]...


Almost 60% of the children in the care of agencies who had finalized adoptions 'had one or more 'special needs'...which could result in their being more difficult to place for adoption." Stolley, supra note 46, at 27, 34.

70. See supra note 8.
71. According to McKenzie:

In 1980, Public Law 96-272, the Adoption Assistance and Child Welfare Act was passed. . . . Underlying Public Law 96-272 is the premise that children develop best in their own families and that most families can be preserved. State child welfare agencies are required to make "reasonable efforts" (a term undefined in the original statute) to prevent a child's placement and, if foster care becomes necessary, to make efforts to reunite the family in a timely manner.

McKenzie, supra note 41, at 65.

72. See NCFA FACTBOOK, supra note 46, at 126 (stating that in 1986 at least 36,000 Black children of an average age of nine years old who were legally free and waiting for adoption were in foster care); id. at 176 (citing OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., MINORITY ADOPTIONS (July 1988) (detailing barriers to placement of Black, adoptable children, as identified through contacts with substantial number of adoption agencies in five states)).

73. McKenzie, supra note 41, at 62; see also infra note 126.
74. In 1982, there were 14,005 special needs unrelated adoptions; in 1986, there were 13,568. See NCFA FACTBOOK, supra note 46, at 62.
large sibling groups." Unfortunately, the families waiting to adopt "do not match up" with these children.

3. Changing Placement Arrangements. Finally, if one looks back to the 1950s and compares adoptive placements then and now, one discovers some important structural changes, as illustrated by Figure 1. In 1951, more than half of all unrelated adoptions were arranged privately. These independent arrangements were either brokered by a third party—doctor, attorney, member of the clergy, or other person—or involved a direct placement by the birth mother with the adopters. Only eighteen percent of unrelated adoptions were through public agencies; private agencies handled less than a third of all adoptions.

After 1951, public agency placements slowly increased from eighteen percent until they stabilized at about thirty-eight percent in 1972; private agency unrelated adoptions peaked at forty percent in 1973. The type of placement arrangement that shifted most dramatically is the independent private adoption. These dropped to a low of twenty-one percent in the early 1970s, reflecting "actions undertaken by states to clarify placement regulations after groups such as the Child Welfare League of America expressed concern over problems with independent adoptions." By 1986, private independent adoptions accounted for 31.4% of all domestic unrelated adoptions (approximately 16,040), whereas thirty-nine percent of unrelated adoptions (about 20,064) were through public agencies, and private agencies handled just under thirty percent (or 15,063).

Given the changes in relinquishment patterns and the characteristics of children waiting for adoption in the foster care system, it should not be a surprise that more newborns are placed each year through independent adoptions than through agencies, either private or public. Because there is no current comprehensive collection of annual adoption data at the national level, the number of independent private adoptions may be significantly undercounted. Despite the lack of comprehensive data, three trends stand

75. McKenzie, supra note 41, at 72 (citing WESTAT, INC., DEPARTMENT OF HEALTH & HUMAN SERVS., THE STUDY OF ADOPTION SERVICES FOR WAITING MINORITY AND NONMINORITY CHILDREN (1986)).
76. Id. at 73.
77. Stolley, supra note 46, at 30.
78. Id.
80. NCFA FACTBOOK, supra note 46, at 3-4; Stolley, supra note 46, at 31.
81. See supra part III.B.2.
83. In addition, there are no current estimates on transracial adoption available. "Federally
FIGURE 1: Placement Arrangements of Unrelated Adoptions, 1951-1986 by Percentage


out. First, newborns and infants are the strong preference of first time adoptive parents, especially the infertile, leading many to pursue an international adoption. Second, there is no strong demand for the growing numbers of older children with special needs. Whether these children are white or Black, it is difficult to find appropriate homes for them because of

published estimates on transracial adoption were last available in 1975. Yet, in that year, fewer than half the states even reported data on transracial adoptions. Stolley, *supra* note 46, at 34. Furthermore, in reporting on data from the 1987 National Health Interview Survey (NHIS), Stolley stated:

In only 8% of all adoptions are the parents and children of different races... White women adopting black children accounted for 1% of all adoptions, and white adoption of children of races other than white or black accounted for 5% of all adoptions... Because these estimates no doubt include foreign-born children, the actual incidence of transracial adoption among children born in the United States may be very low indeed.

84. See McKenzie, *supra* note 41, at 72 ("Many of these [infertile] couples are seeking to adopt a normal, healthy infant, but will 'settle' for a preschooler or possibly drug-exposed infant.").
85. See *supra* note 66 and accompanying text.
86. See *supra* note 69.
the challenges they pose for any prospective parent. Third, the decline in voluntary relinquishments since 1973 is almost exclusively the result of a drastic drop in relinquishments among white, never-married women.77

4. A New Phenomenon: Rise in Biracial Births. In addition to the above data, other recent demographic trends provide a different backdrop for understanding the current drive to eliminate the factor of race from all adoptive placement considerations. There is a growing potential new source of infants,88 if the racial designation of “Black” is not attached to biracial infants.89 Many Americans are refusing to fit themselves into one of the Census Bureau’s four official racial categories.90 In the 1990 census, almost ten million people refused to classify themselves as white, Black, Asian, or American Indian.91 Commentators suggest that America may be poised to experience some new patterns of interracial mixing, especially among young people.92 This argument contradicts Perry’s conclusion that, based on a review of past reported “low rates of interracial marriage in this country, it appears that the vast majority of Americans, Black and white, have no burning desire to live in racially integrated families.”93 Instead, “[i]n 1991, 74 percent of Americans said that interracial marriage was acceptable for themselves or others, according to the Roper Organization, up from 70 percent who found it acceptable in 1986.”94

87. See supra table 1 at p. 143 (rate among white, never-married women dropped from 19.3% to 3.2% between 1973 and 1988; rate among Black, never-married women remained constant during same period at just over one percent).

88. See Sándor, supra note 48, at 38 (“[M]ixed-race children are . . . increasingly common, because the penalties once attached to interracial dating and marriage are slowly fading away.”).

89. As the number of interracial marriages and mixed births continues to rise, “[m]ore and more Americans are of mixed parentage, and they are demanding to be recognized as multiracial.” Riche, supra note 48, 32. In the first book ever to explore the lives of adult children of Black/white unions, journalist Lise Funderburg states: “What numbers are available only hint at how many of us are out there. Some population experts and multiracial support networks estimate that there are currently at least one million mixed-race people in this country (of all mixes, not just black and white).” LISE FUNDE RBURG, BLACK, WHITE, OTHER: BIRA CIAL AMERICANS TALK ABOUT RACE AND IDENTITY 11 (1994).

90. Sándor, supra note 48, at 38. Currently, the categories are (1) white, (2) Black, (3) Asian or Pacific Islander, and (4) American Indian, Eskimo, or Aleut, with the “catchall designator [of] ‘Other.’” Tom Morganthau, What Color is Black?, NEWSWEEK, Feb. 13, 1995, at 63, 65. As part of its review of federal racial and ethnic classifications, the Office of Management and Budget recently held in New York City the first of four public hearings to be conducted around the country. Possible changes under consideration include addition of a classification of “multiracial.” See Steven A. Holmes, U.S. Urged to Reflect Wider Diversity in Racial and Ethnic Classifications, N.Y. TIMES, July 8, 1994, at A18.

91. Sándor, supra note 48, at 36.

92. “Interracial dating has become a fact of life, according to a Times Orange County [California] Poll of 500 unmarried people conducted in late June [of 1994]. Nearly 60% of respondents 18 to 34 years old say they have dated someone from another racial or ethnic group.” Susan Christian, Young Don’t Feel as Bound by Racial Lines, L.A. TIMES (Orange County ed.), Sept. 12, 1994, at A1; see also Sándor, supra note 48, at 36.

93. Perry, supra note 1, at 35-36.

94. Sándor, supra note 48, at 38.
Between 1970 and 1993, the number of interracial married couples almost quadrupled, growing from 310,000 in 1970 to almost 1.2 million in 1993. This represented an increase from less than one percent to more than two percent of all reported married couples. Among interracial married couples, the largest number, 920,000, were white/other race couples; Black/white couples were only 242,000, or less than one out of five interracial couples. In contrast to the incidence of Black/white married couples, forty percent of all multiracial births in 1990 (excluding births for which the race of mother or father was unknown) were mixed Black and white, up from thirty-two percent in 1970. According to the National Center for Health Statistics (NCHS), which has tracked mixed race births since 1968, "birthrates of children with one black and one white parent have been climbing. In 1991, 52,232 such births were recorded, compared to 26,968 in 1981, and 8,758 in 1968."  

In short, as Table 2 illustrates, the rate of Black/white births far exceeds the number of Black/white marriages. Given the reported increase in the adoption of mixed-race babies, it is reasonable to infer that many of these babies are children born to unmarried couples who might be relinquished for adoption. Until such time as the Census Bureau amends its rules and adds new racial categories, many of this growing group of mixed babies will be deemed to be "Black." Thus, I view the push to eliminate race

---

95. See BUREAU OF THE CENSUS, supra note 49, at 56 tbl. 62.
96. See id.
97. Id.
98. Sándor, supra note 48, at 39.
99. FUNDERBURG, supra note 89, at 11.
100. McKenzie, supra note 41, at 72.
101. In a recent column discussing RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994), a controversial book on
from placement considerations as a maneuver to enable whites who seek to
adopt infants to gain access to the growing number of nonmarital, mixed-
race children who may be relinquished for adoption, free of the constraints
imposed by same-race or same-culture placement preferences. Hence, I assert
that the transracial adoption controversy is not about addressing the needs of
the many older Black children who enter the foster care system; rather, it is
about giving preferences to certain white adults who seek to adopt infants.
Considering the fact that “African-American families throughout the country
are waiting to adopt infants and that African-American families adopt at a
rate of 4.5 times greater than European-American or Hispanic families,” this
trend could be characterized as an attempt to garner the market in in-
fants.102

IV. ADOPTION PARADIGM SHIFTS: A NEW FOCUS
AND NEW KEY PROFESSIONALS

As noted at the beginning of this Essay, Perry not only invites more
discussion about transracial adoption, but also urges broader consideration of
the needs and interests of all Black children. This section focuses on impor-
tant paradigm shifts in the field of adoption that pose challenges for legal
and social work professionals and also have important ramifications for
Black children, the Black family, and the Black community.

A. Adoption: Then and Now

Two crucial paradigm shifts have occurred in the field of adoption.
First, the adoption process formerly focused on the interests of children, serv-
ing as a specialized welfare service for the child in need of a permanent
home. Today, the focus has shifted to serving adults who seek to parent.
Second, adoption professionals are no longer predominantly social workers.

the relationship between race, class, genes, and intelligence, Carl Rowan noted:

My home state, Tennessee, had a constitution forbidding “the intermarriage of white
persons with Negroes, mulattoes, or persons of mixed blood, descended from a Ne-
gro to the third generation.” The penalty for such miscegenation was up to five
years in prison.

The wording of that old Tennessee law reminds us that in most of America a
person can have 87.5 percent “white blood” but society still considers and treats
them as “blacks,” and even as pariahs.

Carl T. Rowan, That Powerful 'Black Blood,' BALTIMORE SUN, Oct. 28, 1994, at 19A. But see supra
notes 92-94 and accompanying text.

It has been noted that once again, “more very young babies of African-American and
mixed-race heritage [are being] adopted by white couples.” McKenzie, supra note 41, at 72.
McKenzie further notes:

According to NACAC's [North American Council on Adoptable Children] study on
"Barriers to Same Race Placements," of the 47 traditional agencies that do not spe-
cialize in special needs adoption, 49% of placements of African-American children
and 70% of placements of Hispanic children were transracial adoptions. This was in
contrast to a 6% transracial adoption rate in specialized agencies and a 9% rate in
public agencies.

Id. (footnotes omitted).

102. McKenzie, supra note 41, at 72.
Now lawyers are often the key players, asserting that their clients have a legal right to adopt.

1. Historical Review of Adoption Practices. For nearly 150 years, adoption in the United States has been governed by state statutes. Before 1851, adoption was “a private legal act, like a conveyance of real estate or a commercial contractual transaction.” A guardian might be named in a will, or petitions of adoption and name changes were filed as special state legislative bills. In 1851, Massachusetts enacted the first “modern” state adoption statute, rendering public what had been a private arrangement by requiring judicial supervision and approval of adoptions.

From 1851 until the 1950s, adoption evolved both as a statutory process and as a child welfare service. By 1929, all states had enacted some form of adoption legislation. Typically, these statutes required: (1) consent of the birth parent or guardian (and of the child, over age twelve to fourteen); (2) an investigation (or social study) conducted by the placing agency to determine the suitability of the prospective home; (3) a probationary trial period in the adoptive home under appropriate supervision; (4) issuance of a final decree, withheld until a court received evidence of satisfactory adjustment of adoptive parents and child to each other; and (5) secrecy of the legal proceedings and provision for alteration of the child’s birth certificate. This adoption process was thought to protect “children against being adopted by unsuitable persons, being casually removed from their natural parents, or being improvidently transferred by their parents into the custody of others.”

The dominant professionals in the adoption process were social workers—the staffs of public and private licensed child welfare agencies, many of which were church-related. As trained child welfare specialists, they conducted investigatory home studies and supervised probationary trial placements.

By the mid-1950s, intake policies of many agencies effectively limited adoption to the “perfect” or “near perfect” baby. The perfect baby typically was a healthy white infant, born out-of-wedlock, and relinquished at birth or shortly thereafter by a mother reluctant to face the disapproval of family and community by attempting to rear the child as a single parent. Agencies placed great emphasis on matching an infant with an adoptive family in terms of appearance, religion, ethnicity, and presumed IQ potential. The typical, “perfect” prospective adoptive couple was infertile, well-adjusted, well-established in their community and careers, and financially stable; in

103. Sanford N. Katz, Rewriting the Adoption Story, FAM. ADVOC., Summer 1982, at 9, 9.
105. Id. at 178.
106. Id.
107. Id.
108. Law and practice tried to mirror biology. The traditional “notion [was] that the adopted child, by physical appearance alone, could have been the birth child of the adoptive parents. The adoptive parents were supposed to be people who, by physical appearance and ages could have conceived the infant.” Katz, supra note 103, at 9.
other words, they were solid, middle-class, and white. These agency practices, coupled with a decline in births during and immediately after World War II, led to the development of very high-priced "black markets" in independent or private adoption—the focus of 1955 Senate hearings chaired by Senator Kefauver.109

2. The Pendulum Swings Back. For decades now, the demand for healthy, white infants has consistently exceeded the numbers available for adoption. As the shortage of infants increased, some infertile couples turned to nontraditional sources, such as transracial and international adoptions. Others entered into surrogate parenting arrangements or attempted to use some form of alternative means of reproduction, such as artificial insemination, embryo transfer, or ovum donation.110

Now, in the mid-1990s, a new generation of private services and networks has sprung up to help bring together a relinquishing parent or willing surrogate with a prospective adopter.111 Often these placements are deemed to be "open" rather than "closed" because the parties know each other and many expect to maintain ongoing relationships.112 The key professionals involved are typically lawyers, doctors, or other intermediaries, who seek to help an adult client achieve the goal of becoming a parent. The primary task of these new services is to find adoptable babies for childless adults, rather than to find homes for dependent, mistreated, and abused children. Less "desirable" children remain the charges of public agencies and private agencies servicing children in publicly-financed foster care.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) Uniform Adoption Act,113 finalized at the Conference’s August

109. See supra note 79 and accompanying text.

110. For a summary review of the new reproductive technology, see NCFA FACTBOOK, supra note 46, at 152-59. It may appear that the incidence of infertility is on the rise, but it is more likely that the number of couples with fertility impairments has not grown. Instead, growth has occurred in the number of couples who seek medical solutions to this problem. See id. at 152.

111. According to William L. Pierce, President of the National Committee for Adoption (NCFA), in some parts of the country, such as California, persons calling themselves adoption consultants operate without any professional oversight and have developed new strategies for bringing parties together, including franchising their services. One such person is Bruce M. Rappaport, Ph.D., founder and Executive Director of the Independent Adoption Center in Pleasant Hill, California, and founder of the National Federation for Open Adoption Education. See infra note 131. Mr. Pierce also stated that “if one looks closely at new adoption agencies, one sees that a large percentage are headed by lawyers and receive a large number of referrals from lawyers in private practice.” Telephone Interview with William L. Pierce, President, NCFA (Dec. 1, 1994).

112. See LINCOLN CAPLAN, AN OPEN ADOPTION (1990) (true story illuminating psychological challenges and rewards of open adoption arranged through a lawyer); Annette Baran & Reuben Pannor, Perspectives on Open Adoption, THE FUTURE OF CHILDREN, Spring 1993, at 119 (adoption issue).

113. UNIF. ADOPTION ACT (1994). For text of the Act, see 20 Fam. L. Rep. (BNA) 2033 (Sept. 20, 1994). Full text, with Prefatory Note and Comments, may be obtained from the National Conference of Commissioners on Uniform State Laws. See also Susan Chira, Law Proposed to End Adoption Horror Stories, N.Y. TIMES, Aug. 24, 1994, at A12 (summarizing major features of the UAA and presenting contrasting opinions).
1994 Annual Meeting, is viewed by some as a triumph for the assertive private adoption bar. In my opinion, adoption lawyers have been relentlessly attempting to establish dominance in the adoption field for more than a decade in order to meet the desires of adult clients seeking to adopt healthy infants.

B. Challenges Posed by Paradigm Shifts

1. New Questions Regarding a Constitutional Right to Adopt. What does this paradigm shift in focus from meeting a child's need for an adoptive home to an adult's desire to parent mean for legal practitioners and theorists? Advocates of transracial adoption question the constitutionality of statutory same-race preference schemes and agency practices. But do adult

114. In contrast, there is almost unanimous concern among child welfare professionals that the philosophical orientation of the approved Uniform Adoption Act focuses exclusively on the rights of adults to adopt children, rather than on adoption as a service for children delivered with attention to according fairness to all three parties in the adoption triad. Ann Sullivan, Adoption Program Director of Child Welfare League of America (CWLA), stated:

As many of you know, the proposed uniform adoption act was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) at their annual meeting in early August. This was done in spite of the thousands of letters of opposition sent to NCCUSL by CWLA member agencies and others. The national organizations on record as opposing this act include: Child Welfare League of America, National Association of Social Workers, Adoptive Families of America, Catholic Charities USA, American Adoption Congress, Concerned United Birthparents, National Adoption Center, Adoption Exchange Association, Children Awaiting Parents, and the Joint Council on International Children's Services. To our knowledge, it is the first time in history that major national organizations representing all members of the adoption triad have joined together in such a manner.

Memorandum from Ann Sullivan to Individuals Requesting Information about the Uniform Adoption Act 1 (Sept. 27, 1994) (on file with author).

115. See Bartholet, supra note 4, at 1226-45; Rosettenstein, supra note 5, at 167-97; cf. supra note 16. But cf. A. Leon Higginbotham, Jr. et al., Shaw v. Reno: A Mirage Of Good Intentions With Devastating Racial Consequences, 62 FORDHAM L. REV. 1593 (1994) (arguing that Shaw is fundamentally flawed and asserting the North Carolina majority-minority voting district will meet the burdens of strict scrutiny). Judge Higginbotham and his co-authors state: "The Supreme Court's majority opinion in Shaw v. Reno, applying the Equal Protection Clause to preclude African-Americans from attaining significant political power in this nation, turns the intent and meaning of the Fourteenth Amendment on its head." Id. at 1645.

From my perspective, claiming that same-race preference statutory schemes or agency practices violate the Equal Protection rights of prospective white adopters is a similar perversion of the Fourteenth Amendment. Such claims completely ignore the historical context and purpose to which these authors refer so eloquently:

In the 1873 case first construing the Fourteenth Amendment, the Slaughter-house Cases, the Supreme Court declared:

We repeat, . . . no one can fail to be impressed with the one pervading purpose found in [the Thirteenth, Fourteenth, and Fifteenth Amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made Freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would
prospective adopters have a constitutional "right to adopt" any child—including a child whose racial and ethnic heritage is different from their own?

Currently, no such constitutional right to adopt exists. Although the U.S. Constitution does not explicitly mention parents or families, courts have expansively interpreted substantive rights protected by the Due Process Clause of the Fourteenth Amendment. For more than seventy years, the Supreme Court has defined "liberty" to include the right "to marry, establish a home and bring up children." The Court has described the custody rights of parents to be "far more precious... than property rights." In its 1972 landmark Stanley decision, the Court stated: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Nevertheless, under the common-law concept of parens patriae, parents' substantive rights to the custody and control of their child may be subordinated to the state's interest in the child's welfare. In resolving conflicts be-

be necessary for its application to any other.

Now, 120 years after the Slaughter-house Cases, the Fourteenth Amendment may be used to thwart rather than to assure effective use of the ballot by African-Americans. Now, ninety years after George White [the last Reconstruction Era African-American to serve from North Carolina] was driven from Congress, the Fourteenth Amendment may be used to undermine rather than to guarantee the racial pluralism that has been occurring in the Congress.

Id. at 1645-46 (footnotes omitted).

I strongly concur that "[t]he Supreme Court's voting rights law should not be based on a politically appealing dream that denies all of American history. The law should not distort that history such that the concept of 'colorblindness' is used—like a surgeon's scalpel—to excise African-Americans from significant political power." Id. at 1630. Preserving and protecting strong Black families and Black communities is as important to me as promoting maximum political participation and racial pluralism in Congress. For further discussion, see infra part IV.C.

116. These include two distinct due process rights: a substantive right protecting an individual's liberty or property interests and a procedural right requiring that notice and a hearing be held before the government can take away a protected interest.

The Equal Protection Clause requires that legislation must operate equally upon all similarly-situated members of a group that is defined reasonably and according to a proper legislative purpose. For further discussion, see Ruth-Arlene W. Howe, Legal Rights and Obligations: An Uneven Evolution, in YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES 141, 145-49 (Robert I. Lerman & Theodora J. Ooms eds., 1993).

117. See, e.g., Griffith v. Johnston, 899 F.2d 1427 (5th Cir. 1990). The court noted that:

The Supreme Court has expanded the definition of "liberty" beyond the core textual meaning of that term to include interests arising from the specific privileges enumerated by the Bill of Rights, and from the "fundamental rights implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition" under the Due Process Clause.

Id. at 1435 (citations omitted).


120. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (alteration in original) (citation omitted).
tween parental rights and the state’s interest in the welfare of a child, courts apply a “best interest of the child” standard.121

With respect to proceedings concerning a parent-child relationship, the procedural aspect of the Due Process Clause of the Fourteenth Amendment, at a bare minimum, has been held to prohibit a state from denying notice and an opportunity to be heard to someone who has a liberty interest in the relationship. With respect to procedural matters, the Supreme Court applies the balancing approach articulated in Mathews v. Eldridge.122 The Court, depending on the time, place, and circumstances of the particular case before it, has reached seemingly conflicting conclusions.123

Due to its reluctance to expand the category of liberty interest, the Supreme Court has never declared a fundamental right to adopt. In fact, lower courts have concluded that “[a]lthough the Supreme Court has rendered decisions defining various elements of family relationships as ‘fundamental interests,’ none of those cases announced a ‘fundamental interest’ in adopting children.”124 In Griffith v. Johnston, after raising a number of questions about the consequences that would flow from recognizing a “fundamental interest” in adopting children, the Fifth Circuit concluded:

To assert that such an individualized “fundamental right” exists is sloganistic and oxymoronic, since society must balance the interests of at

---

121. “Nearly all judicial discussion of custody cases begins with the statement that custody must be so awarded as to promote the child’s best interests . . . . [W]hen the child’s welfare seems to conflict with the claims of one or both parents, the child’s welfare must prevail.” Clark, supra note 59, § 19.1.

122. To determine what procedural due process is required in a particular case, the Supreme Court, since Mathews v. Eldridge, has weighed and considered three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.


123. Compare Lassiter v. Department of Social Servs. of Durham County, 452 U.S. 18 (1981) (concluding that lack of appointed counsel for incarcerated mother during proceedings to terminate her parental rights did not render proceedings fundamentally unfair) with Little v. Streater, 452 U.S. 1, 13 (1981) (holding denial of free blood tests to indigent defendants in paternity actions would abridge due process, as parent-child relationship is at issue) and Rivera v. Minnich, 483 U.S. 574, 580 (1987) (affirming Supreme Court of Pennsylvania’s ruling that preponderance standard was constitutionally permissible in paternity proceedings because “the putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations . . . . validly imposed by state law”) with Santosky v. Kramer, 455 U.S. 745 (1982) (concluding that established legal parent-child relationship was entitled to due process protection and requiring state to show by clear and convincing evidence that grounds existed to justify termination).

least three parties—birth parents, child, adoptive parents—when legitimating adoptions. The Griffith parents do not pose these questions, but they seem to be the inevitable result of a determination that adoption is a "fundamental right." Bearing in mind Justice White’s admonition against the creation of novel fundamental rights, we cannot recognize a "fundamental right" to adopt a child.125

The parents’ complaints against the Texas Department of Human Services in Griffith involved allegations that they had been denied information that might have helped them make more informed decisions about adopting their children.126 They further complained that the department had not provided them with enough training or services. According to the Fifth Circuit, the Griffiths’ constitutional claims:

[Si]lently raise[d] the distinction between governmental interference and governmental assistance as a basis for Due Process relief... “The [Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security... [It]s language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means...”127

Not only was the Fifth Circuit unwilling to recognize adoption as a fundamental right in Griffith v. Johnston, but the court also refused to impose any new obligations on the state to provide post-adoption assistance to those who adopt children with special needs.128

2. Practice Ethics and Knowledge-Based Skills. In my opinion, there are also professional and ethical challenges for an attorney who elects to aid an adult client seeking to become a parent. The adult may be the paying client, but does the attorney, as an officer of the court and as a public citizen, have any obligation to promote and protect the “best interests” of the adoptee? These questions require close consideration, as a new network of private services and agencies springs up, one in which lawyers play dominant roles in bringing together relinquishing parents and prospective adopters. Given the importance of the “best interests of the child” standard in adoption, are there not potential conflicts of interest or professional malpractice problems lurking in the background? Also, does the lawyer possess the requisite skills to counsel and advise his or her client competently? What does the lawyer need to know in order to help the client make an informed decision that appropriately recognizes and balances the unique individual needs of a pro-

125. Griffith, 899 F.2d at 1437.
126. Id. at 1432. The Griffiths, adoptive parents of special-needs children, filed a civil rights action against the Texas Department of Human Services (TDHS), alleging violation of their constitutional rights to due process and equal protection. The district court dismissed the constitutional claims without prejudice. The Fifth Circuit, affirming the lower court dismissal, held that appellants had failed to establish a cognizable “liberty or property interest” within the purview of the Fourteenth Amendment. Id. at 1441.
127. Id. at 1438 (quoting DeShaney v. Winnebago County DSS, 489 U.S. 189, 195-96 (1989) (citations omitted)).
128. Id. at 1437, 1439-40.
spective adoptee and the client’s desires to parent? Should the attorney be concerned about whether the adult client possesses the appropriate skills to meet the needs of the individual child?

One must also ask what the paradigm shift means for the profession of social work, especially child welfare specialists. Mark T. McDermott, former president of the American Academy of Adoption Attorneys, asserts that social work agencies need to recognize that their practices have contributed to why so many birth mothers today choose independent adoption over a voluntary relinquishment to an agency. He stresses that “it is not the adoptive parents, but the birthparents, who have the practical ability to make independent adoption exist. If all birthparents were to choose agency adoption, there would be no independent adoption.” However, birth parents consistently report choosing independent adoption because they have:

(1) a perception . . . that agencies are profit oriented and bureaucratic in their treatment of birthparents, (2) a desire . . . to play an active role in the selection of the adoptive parents, and (3) a desire . . . for the child to go directly into the physical custody of the adoptive parents rather than into temporary foster care.129

From this, one could conclude that social work has become irrelevant—outmaneuvered by new, more effective marketing strategies that result in the placement of healthy infants with adults who are able to pay whatever fees and costs are demanded.130

However, L. Jean Emery, former director of the Child Welfare League of America’s Adoption Program, argues the case for agency adoption. She asserts that agency practices have changed and are still evolving “[a]s all of society has become less punitive toward young unmarried pregnant women, agencies have . . . become more sensitive to their probable vacillations and better listeners to their expressed needs.” To illustrate this evolution, Emery notes:

Many of those who choose adoption now show an interest in openness in the adoption process, and agencies make every effort to offer open or semiopen adoptive service. Agencies can help ensure that the degree of openness is arrived at by mutual consent, based on a thoughtful, informed decision-making process by the birthparents, the prospective parents, and the child when appropriate.131

Some public and traditional private social work agencies may have developed protocols for working with unmarried mothers as described by Emery. However, most public and traditional private social work agencies today serve a growing population of youngsters who come into care, not as

129. McDermott, supra 82, at 146.
130. Id. at 147.
131. But cf. id. at 146-47; see also BRUCE M. RAPPAPORT, THE OPEN ADOPTION BOOK: A GUIDE TO ADOPTION WITHOUT TEARS (1992) (arguing that open adoption is healthiest, most humane, and fastest method available).
133. Id.
voluntarily relinquished, healthy newborns, but as older children, permanently separated from their birth families as a result of state intervention that may end in an involuntary termination of parental rights. Increasingly, the majority of these youngsters are classified as having special needs. According to Judith K. McKenzie, Executive Director of Spaulding For Children, Inc., National Resource Center for Special Needs Adoption, “[c]hildren of color are overrepresented in these statistics, and are known to wait longer than Caucasian children for adoption, if and when they are targeted for this service.”

Some social work specialists, like McKenzie, forthrightly acknowledge the historical difficulty of finding appropriate homes for the increasing numbers of children of color, in the field of special needs, who wait for adoption. She observes that not just recruitment, but the active development of “families for these children who cannot be adopted by relatives or foster parents is becoming increasingly difficult and is an important challenge to be faced.” McKenzie further concedes:

Despite very significant changes in racial demographics and needs of children and families, most agencies are doing very little to train current staff in cultural competence or to recruit new minority staff to respond to these changes. Throughout the country, the adoption workforce continues to be primarily white and female in both public and private adoption programs.

Social work agencies have not responded to demographic changes. This is in sharp contrast to what is occurring in business circles. Businesses that target Blacks as a market are advised that if they want their products to move, they must understand that “African Americans are not like white consumers with darker skin. Blacks and whites display profound differences in language use, tastes, and product preferences.” Eugene Morris, president of E. Morris Ltd. in Chicago, Illinois, cautions business leaders against assuming that Blacks who see their advertising messages perceive them “in the same way as whites. Advertisers who want to maintain or strengthen sales in black markets must make a special effort to reach this market.”

---

134. See supra text accompanying note 59-61.
135. McKenzie claims that “[t]hese children [become] labeled as ‘special needs’ not because of a physical or mental disability, although some of the children do have developmental disabilities, but because, through default of parents and bureaucracies, they have become wards of the system.” McKenzie, supra note 41, at 62.
136. Id. at 63. “Factors contributing to the delays include: inadequate legal resources for child welfare cases; crowded court dockets; continuances and nonappearance hearings without procedural documentation; [and] judicial biases or inaction.” Id. at 68 (citing U.S. DEP’T OF HEALTH & HUMAN SERVS., BARRIERS TO FREEING CHILDREN FOR ADOPTION 1 (1991)).
137. Id. at 73.
138. Id. at 69 (citing James Rosenthal et al., Race, Social Class and Special Needs Adoption, 35 SOC. WORK 532 (1990)).
140. Id. at 49.
Morris tells businesses that they "will be rewarded if they allow blacks to express their own identity and treat black concerns with respect." 141

In summary, social work agencies—public and private—have not responded well to the increasing number of Black children in foster care. They largely have failed to employ Black professionals to help address the special problems that Black children confront in our society. At the same time, as the private sector moved into making transracial placements, most private agencies have ignored the needs of the Black community and have not worked in concert with it. Not only has the private sector ignored the Black community, private agencies and independent professionals have ignored other important issues as well, such as properly identifying who their clients are and to whom they owe their loyalties.

C. What Is Needed to Meet These Challenges?

These paradigm shifts do not bode well for the Black family or the Black community. The trends identified in Part III, (1) disproportionately large numbers of Black, older children entering the public foster care system, and (2) more Black and biracial infants being placed through private independent adoptions, are especially disconcerting. 142 The messages transmitted by these developments are very demeaning. If a group is denied the opportunity to rear its own, then it has no future.

1. Repudiating the Myth of a "Shortage of Black Adoptive Families." African-Americans adopt at a higher rate than European Americans or Hispanic families. 143 Moreover, "the National Urban League's Black Pulse Survey revealed that three million (or one-third of) black household heads were interested in formally adopting a black child," 144 this number far exceeds the total number of Black children legally free for adoption. Given these facts, I find it very difficult to accept as reality the frequently stated conclusions about the nonexistence of Black homes. 145

What seems more reasonable is the following explanation provided by McKenzie:

Advocates of same-race/same-culture placements have concluded that this development (i.e., transracial adoption) stems from culturally insensitive and/or adoption-fee-driven practices. Many traditional adoption agencies, which are staffed primarily by Caucasian administrators and workers and which place mostly infants for fees, find themselves in the positions where they have accepted custody of a minority child, even though they have no waiting families of the child's race or culture. Because the main funding

141. Id. at 44.
142. See supra notes 69-72, 101 and accompanying text.
143. See supra note 102 and accompanying text.
144. Hill et al., supra note 10.
source for services to the mother and baby is ultimately the paying adoptive
parent, the agency places the child with a family that has already been
screened and is willing to pay the fee. It has been well documented that fee
practices are a disincentive to adopt for lower income and minority fam-
ilies.\footnote{146}

Therefore, other factors block Black prospective parents from adopting; no
lack of interest in adopting exists on the part of Black adults.

To address these issues of cultural insensitivity and fee-driven practices,
social work agencies should recognize and remove the barriers that exist
between them and the Black community. Agencies should employ different
strategies and methods to increase the identification and processing of appro-
priate same-race homes for children of color. For example, state and private
agencies could forge more partnerships with minority agencies, churches,
and other community-based organizations. Definitions of family may need to
be enlarged to accommodate the Black family kinship structure which recog-
nizes both blood and nonblood relatives. Financial obstacles to grandparent,
kinship care, guardianship, and adoption may need to be removed or
eased.\footnote{147} No appropriate individual should be excluded from adopting be-
cause of an inability to pay a private agency fee if a church or civic group
were willing and able to cover the fee on behalf of the individual.

2. \textit{Just Love Is Not Enough}. As previously stated, the true outcomes of
transracial adoptive placements made during the 1960s have yet to be identi-
fied.\footnote{148} An emerging body of clinical literature, to some extent drawing on

\begin{itemize}
\item \footnote{146} McKenzie, \textit{supra} note 41, at 72 (citations omitted); \textit{see also} Fenton, \textit{supra} note 145, at
46 (arguing that agency practices reflect white middle-class values and exclude otherwise
viable Black families).
\item \footnote{147} \textit{See generally} Fenton, \textit{supra} note 145, at 39 (describing origins of child welfare 'system
not originally created to meet needs of Black children and urging current administrators to
employ selection criteria more consistent with Black cultural patterns).
\item \footnote{148} \textit{See supra} note 20. Some therapists working with adult transracial adoptees today, such
as Rick Pinderhughes of The Pre/Post Adoption Consulting Team (PACT) of Center for
Family Connections (formerly The Family Center, Inc.), in Cambridge, Massachusetts, recognize
that "[t]he issue of dislocation and the sensitive matters of identity involved in any adoption,
acquire an added spin when the parents are of one race and the adopted children are of
another." Mopsy S. Kennedy, \textit{Trans-racial Adoptions: an Interview with Rick Pinderhughes}, 2
\textit{PEPsi}'. (The Family Ctr., Inc., Somerville, Mass.), 1994, at 4, 4. Mr. Pinderhughes, a doctoral can-
didate at the Massachusetts School of Professional Psychology, is conducting a study of African-
American and biracial individuals of African-American descent, 26 years or older, who were
adopted before the age of 2 into a white family. Through interviews and an anonymous
questionnaire, he is discovering that "[t]here's a tremendous struggle, well into their twenties,
and sometimes at the border of turning thirty, for these adoptees. Along with the adoption
issues, there's the racial piece . . . . This is an aspect of their life which may have been quite
buried, or at least not highlighted." \textit{Id.}
\item Dr. Robert T. Carter, a professor of sociology and education at Teachers College of
Columbia University, also is conducting a study on transracial and biracial identity develop-
ment. He is finding that "some adoptees who seem well-adjusted and productive feel racially
incomplete and struggle to find a nexus to make them whole . . . . [T]hey still wrestle in
their 20's and 30's with prejudice and other race-related experiences that many other blacks
began dealing with in their adolescence and teens." Lena Williams, \textit{Beyond 'Losing Isaiah':
\end{itemize}
the study of biracial adults and teens, is beginning to recognize and address the additional problems and pain these individuals encounter as they move into adulthood.\textsuperscript{149} It would appear that “a loving home” and “loving parents” may not be enough within a society such as ours where diversity and difference are not honored, but denigrated. More care, not less, needs to be given to assessing the appropriateness of placing a Black child with parents of another race. The way a child is reared and socialized can ensure that the child, as an adult, is either in or out of touch with his or her social and racial reality. To ignore this fact is irresponsible. Much more needs to be understood about challenges or dilemmas encountered by the person who, because of physical appearance, is deemed by others to be Black, but who, if reared by whites without any close or intimate affiliations with Blacks, is socialized to be white.

The poignancy of this dilemma was brought home to me last year while reading law school applications. A young man in his personal statement identified himself as having been adopted and reared by white parents, with white siblings and mostly all white friends. He described himself as a Black man in a white middle class world, reared in it and by it, yet not truly a part of it. His skin told those whom he encountered that he was Black at first glance, before his personality—shaped by his upbringing and experiences—came into play. For him, the dilemma was: “how can I be Black when Black culture and relations have forged so little of my persona? How can I be white when my skin dictates otherwise? How in truth am I to envision myself? Do I consider myself white or Black?”

Interracial marriages are increasing and attitudes among the younger generations are changing.\textsuperscript{150} Yet, it is one thing for an adult to choose to enter into an interracial or interreligious marriage or relationship, or even to elect deliberately not to identify with one’s racial or ethnic group. Those are adult decisions. The biracial child of an intact family has the opportunity to be connected through each parent to her mixed heritage without any cloud of uncertainty or feelings of abandonment so frequently a part of the adoptive experience. The question I find most troubling is whether it is appropriate, fair, and equitable virtually to eliminate a full range of future choices and to create difficult obstacles for the Black child adoptee who, as an adult, may have to cope with a social experience and psychic\textsuperscript{151} incongruity similar to that described by the law school applicant?

Some transracial adoption advocates sharply criticize the Multiethnic Placement Act of 1994 because it does not absolutely eliminate race from placement considerations.\textsuperscript{152} Senator Metzenbaum, the Act’s major sponsor, reportedly now favors its repeal, predicting that instead of rescuing children


\textsuperscript{150} See supra text accompanying notes 89-99.

\textsuperscript{151} I use the word “psychic” to refer to a full spectrum of both mystical beliefs as well as cognitive understandings.

from years in the foster care system, it may ultimately do more harm than good. From agencies and courts may still consider cultural or racial identity needs of a child and a prospective foster or adoptive parent's ability to meet those needs. The Act provides no guidance for determining what weight race should be given. In my opinion, its major drawback is the lack of any financial resources to ensure implementation of the mandate for "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."

What is sorely needed to meet the challenges posed by the paradigm shifts in the field of adoption? In the words of McKenzie:

A new breed of leaders... in child welfare who will carry their mission and commitment to family preservation into their everyday work with birthfamilies, kinship families, foster families, and adoptive families. They will value diversity and work toward developing culturally competent organizations to better serve those families and children who most need them. Many of the new leaders should be persons of color.

In my opinion, the most critical need is for professionals, in either social work or law, whether they be Black or white, to commit to serve the Black communities and families with which they work. Professionals must respect and enhance existing strengths and empower individuals and groups to address and overcome problems.

V. Conclusion

The transracial adoption controversy needs to be redefined. I urge others to reexamine the discourse about transracial adoption and to consider closely what is currently happening as a consequence of the general shift in focus from meeting the needs of children for permanent homes to satisfying the desires of adults to become parents. The needs and interests of Black children, Black families, and Black communities are being ignored. The stage cannot truly be set to meet and advance these needs or interests if a constitutional "right to adopt" were to be recognized. Nor would these be met if the House Welfare Reform Bill passed and forwarded to the Senate in late March 1995, containing a blanket prohibition against all consideration of race in placement, were enacted into law and the size and composition of the country's foster care population remained the same. To set the stage for meeting the needs of Black children and advancing the interests of Black families and communities, the problem must be accurately assessed. A range of possible responses must be identified and considered, followed by the

154. MPA, supra note 152, § 553.
155. Id. § 554.
156. McKenzie, supra note 41, at 75.
158. See Marilyn Elias, Interracial Adoption Policy Colored by Controversy, USA TODAY, Mar. 28, 1995, at 8D.
selection and implementation of an agreed strategy which can be evaluated and modified as necessary. Transracial adoption, as a response to the disproportionate numbers of Black children who enter and remain in the foster care system longer than white children, is a classic example of embracing and promoting a solution without accurately defining the problem. The true history of adoption in the United States, as a specialized child welfare service, includes the development of agencies and private intermediaries who primarily placed white infants with white, infertile parents. The standards and protocols adopted were meant to be exclusive—to screen more applicants out than in. The aim was to match the “perfect” infant with the “perfect” white, infertile couple.

During the 1960s and 1970s, public and private agencies moved incrementally into Black adoptions when various social phenomena created changes in the pool of children available for adoption. Often, these placements were made without the benefit of any changes in staff, policies, or protocols for recruiting and approving applicants. Generally, no meaningful use was made of existing organizational resources in Black communities. In my opinion, it is deceitful to assert that not enough appropriate Black homes exist. This myth covers up the incompetence or disinterest of the child welfare community which initially accepted transracial adoption as the appropriate solution, given the large numbers of approved white applicants for whom no infants existed.

Regrettably, there was and has been little aggressive movement to fashion culturally sensitive services and strategies to meet the needs of the growing number of Black children in foster care. Public and private agencies have

---

159. For description of a six stage rational problem-solving process, involving: (1) problem identification; (2) a diagnostic phase; (3) generation of alternatives; (4) selecting solutions; (5) implementation; and (6) evaluation and adjustment, see RODNEY W. NAPIER & MATTI K. GERSHENFELD, GROUPS: THEORY AND EXPERIENCE 338-42 (5th ed. 1993).

160. For discussion about the importance of accurate and comprehensive problem definition, see LUTHER H. GULICK, THE METROPOLITAN PROBLEM AND AMERICAN IDEAS 24 (1966) (“Once an indivisible problem is divided, nothing effective can be done about it.”).

161. See Fenton, supra note 145, at 39-42; supra note 40.

162. See supra notes 108-09 and accompanying text.

163. See supra part III; see also supra note 50.

164. One student commentator notes:

Unfortunately, the system of social services has not been redesigned to accommodate the special needs of Black children. . . . The short supply of services available must be more focused for efficiency and effectiveness by at least re-evaluating the current formal adoption system to encompass the needs of Black children.

Fenton, supra note 145, at 39-40.

165. See supra text accompanying notes 144-46; see also Fenton, supra note 145, at 44-46. It should be noted that during the 1970s, traditional, private child welfare agencies began to undergo a transformation. As donations from private fundraising dropped, but overhead operating expenses climbed, they began to enter into contracts for service with state social service departments and/or sought to receive federal grant money. As the federal Children's Bureau focused attention on meeting the needs of children with special needs through the promotion of subsidized adoption and permanency planning, many agencies started to compete for federal grants or state service contracts as a way to cover their budgets and stay in business.
formed few working partnerships with organizations and institutions within the Black community. Such partnerships, predicated on respect for the expertise of Black child development professionals and the overall integrity and dignity of the Black community, would accord opportunities for participation in a thoughtful process of problem definition, identification, and brainstorming to generate viable alternative strategies and selection of models to be trial-tested.

As we move into the latter half of the 1990s, it appears that a new source of infants may again be available, given the rising number of multiracial births—an especially high percentage of which are Black/white mixed children. I fear that these biracial children, not unlike my slave ancestors who suffered the indignities of being publicly auctioned, privately exchanged as part of a commercial transaction, or transferred under the terms of a deceased master's will, will become prized commodities, available to eager, desperate consumers for a fee, through emerging adoption networks and services.

Transracial adoption raises many issues that highlight the continuing American societal dilemma of unresolved problems of race and inequality. The differing perspectives identified by Perry of colorblind individualism and color and community consciousness are like responses to an "indivisible problem" that mask the full complexity of the situation and prevent any meaningful solution from being achieved. If race were completely eliminated from all adoptive decision-making, the critical question would then be how to assure all approved applicants—Black, white, or "other"—equal access to all children—Black, white, or "other." At this time, however, there is a crucial need to find ways to provide Black children generally, and those in foster care particularly, with the kind of rearing and nurturing that will enable them, when grown, to participate in and contribute to our democratic society as productive adults. This is the challenge for Black families, the Black community, and American society at large. Community groups and organizations of all types within the Black community must become better informed about the need to seek inclusion in the planning and delivery of services for children and families.

During the height of the Civil Rights movement, much attention was given to issues of voting, education, jobs, and housing. These were all areas in which Blacks suffered grievous discrimination. But denial of opportunities in these areas did not threaten the continued integrity of the Black community as directly as does a policy endorsing wholesale, unregulated, transracial placements. Such a policy today is an assault that disempowers Black families, undermines the future viability of Blacks to participate in our pluralistic democracy, and runs the further risk of creating effete individuals.

166. See Gulick, supra note 160.
167. See supra notes 88-99 and accompanying text.
168. In my opinion, groups and group affiliations are important not only in American politics, but in the workplace as well. The person who is perceived as not having a strong persona or group affiliation often suffers ridicule.
I acknowledge that in some instances a transracial adoption may be an appropriate placement for a specific child. Also, I do not argue that a family of another race could never successfully rear a Black child. Instead, it is my hope that from continued open dialogue and discussion, new understandings can be achieved. Efforts must be undertaken to develop mechanisms for identifying and selecting the most appropriate adults to parent Black children in need of families.

Prospective adopters of a Black child, if nonblack, should be willing and prepared to provide the child with a real day-to-day living experience within a community setting that allows the child to have affiliations and associations with other children and adults of African-American descent. To avert the dilemma of the law school applicant, nonblack, adoptive parents who step forward to rear a Black child should have the courage to live in a Black community or a truly diverse community, not a homogenized, "lily-white" enclave of privilege and exclusion or in an area unpopulated by Blacks. In order to grow to productive adulthood, the Black child will need more than a storybook adventure or periodic museum excursion to acquire knowledge of and a positive feeling for his or her genetic inheritance, reference group affiliation, and social and cultural history.

To feel comfortable with one's racial heritage and at peace with one's adopted family, a person should be positively socialized and supported by family members who were consciously "culturally competent" about the racial realities of life in the United States at the end of the twentieth century. The child should have opportunities for institutional affiliations within the Black community. A successful transracial adoption should permit the adoptee an array of choices as an adult regarding the identifications and affiliations he or she elects to pursue. This will only be possible if the child is reared in a supportive environment, has positive, accepting experiences with both Black and diverse persons and groups, and truly feels comfortable with all.

---

Dr. Carter has stated that "many transracial adoptees are psychologically marginal in that they don't have an identity that is grounded in the experience, values or perceptions of a particular group. They grow up denying they are a member of any particular racial group, and there is a consequence." Williams, supra note 148, at C4.

169. Johnston notes that:

Developing cultural competence means being sensitive to the issues surrounding moving an Asian child to a rural American community. It means understanding the problems inherent in sending an African-American child to an all white private school. It means developing a willingness—no, an excited interest—in living in an integrated community, eating ethnic foods, extending one's circle of support and friendship to include people of color, and more. For most middle and upper middle class people of European heritage, developing cultural competence will not be easy, because the fact is that most of us are much more racist than we care to believe.

JOHNSON, supra note 15, at 130.