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Adopting a Compromise in the Transracial Adoption Battle: A Proposed Model Statute

Allen C. Platt III

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Platt: Adopting a Compromise in the Transracial Adoption Battle: A Propo
**ADOPTING A COMPROMISE IN THE
TRANSRACIAL ADOPTION BATTLE:
A PROPOSED MODEL STATUTE**

I. INTRODUCTION

Since the early 1970s, a maelstrom of controversy has surrounded the practice of transracial adoption (TRA), specifically, the placement of African-American children with white adoptive parents.¹ The central question in the debate is whether agencies should consider the race of the child and the races of potential adoptive parents when making placement decisions.² The opponents of TRA contend that placing an African-American child in a white family is harmful to the child and denies the child the opportunity to know his or her heritage.³ Further, they believe that white adoptive parents are unable to teach an African-American child the requisite social skills, as well as the racial pride

1. Although transracial adoption (TRA) is technically defined as a family from one race adopting a child from a different race, in practice, it usually describes the adoption of non-white children by a white family. This note will often focus on the adoption of African-American children specifically, since white adoption of black children is the only form of TRA that continually causes controversy. RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 9 (1977). See also Beth Brophy, *The Unhappy Politics of Interracial Adoption*, U.S. NEWS & WORLD REP., Nov. 13, 1989, at 72 (pointing out that not all adoptions between races are as politically controversial as those involving African-American children; inter-country adoptions from Columbia, India, and the Philippines are cited as causing little controversy).

2. See generally JOYCE A. LADNER, *MIXED FAMILIES* (1977); SIMON & ALTSTEIN, *supra* note 1; RUTH G. MCROY & MYRON L. MCROY, *BLACK HOMES FOR BLACK CHILDREN* (1974); JAN DE HARTOG, *THE CHILDREN* (1969); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991). See also Michael Precker, *The Battle For Christopher*, DALLAS MORNING NEWS, June 6, 1993, at 1F. The story of Christopher Jenkins captures the essence of the TRA debate. Christopher Jenkins was born premature, addicted to cocaine, and placed in foster care with a white family. The child remained with the family for more than two years. Over that time, the family became emotionally attached to Christopher and petitioned to adopt him. Christopher had siblings in another adoptive home, so Texas caseworkers periodically took Christopher to visit them. The African-American family who adopted Christopher's siblings also wanted to adopt Christopher. One of the "hand-overs" was captured on video as Christopher screamed, kicked, and resisted being taken by the caseworker. The tape was soon shown on news broadcasts across the country and enraged many. Due to the state policy at that time against TRAs, the family's petition for adoption was rejected by the state of Texas. Eventually, exposure of the case forced the state to approve the permanent adoption of Christopher by his white foster family. A new Texas law, the passage of which, in part, was a result of the controversy caused by Christopher's case, prohibits the use of race as a consideration in adoption. See Tex. H.B. 196, 73d Leg., RS (1993).

3. James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interest of the Child*, 26 J. FAM. L. 487, 509-11 (1988).

and identity needed to survive in a racist society.⁴ The proponents of TRAs argue that children need to be placed in permanent, loving homes, regardless of the color of the parents.⁵

This issue must be considered within the context of the current situation surrounding adoption and adoptable children. In 1989, the Child Welfare League of America found that minority children constituted fifty-one percent of those children waiting more than two years for adoption.⁶ Many of these children will wait in foster homes until they are adopted; however, the longer they wait, the less likely their chance for adoption.⁷ In 1987, there were 275,000 children in the foster care system in the United States.⁸ Today, studies indicate that there are 500,000 children in foster care waiting for adoption.⁹ Half of the children in the foster care system are minorities.¹⁰ Over a third of the total number are African-American children, which is highly disproportional to the African-American population in the United States.¹¹

There are very few white adoptable children as compared to the number of white parents wishing to adopt a white child.¹² Many white would-be adoptive parents, frustrated by the long wait to adopt a white child, are willing to adopt transracially.¹³ Criticism and concern about the effects of TRA have made agencies hesitant to make such placements.¹⁴ Most agencies follow strict, though often unwritten, race-matching policies.¹⁵ Agency policymakers generally are TRA opponents and believe that TRA is only appropriate as a last

4. *Id.* at 488, 510-12.

5. See *infra* notes 56-61 and accompanying text. See generally Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994) (arguing that the use of racial matching is unjustified because the benefits of TRA are far greater than any speculative harm that may result from such a placement).

6. *Adoption in America: Child Welfare League of America Study*, CHILDREN TODAY, May-June 1989, at 3. The statistics are even more dramatic in some areas. In New York City, as of June 1993, 75% of the children awaiting adoption were African-American. Charisse Jones, *Role of Race in Adoptions: Old Debate is Being Reformed*, N.Y. TIMES, Oct. 24, 1993, at Y1.

7. Jones, *supra* note 6, at Y1.

8. Bowen, *supra* note 3, at 491.

9. Lise Funderburg, *Why Can't Adoption be Multicultural?*, NEWSDAY, May 25, 1993, at 75.

10. *Id.*

11. *Id.*

12. Bartholet, *supra* note 2, at 1166. See Funderburg, *supra* note 9, at 75 (indicating that while 90% of the parents waiting to adopt are white, only half of the adoptable children in the United States are white).

13. Sonia L. Nazario, *Identity Crisis, When White Parents Adopt Black Babies, Race Often Divides*, WALL ST. J., Sept. 12, 1990, at 1.

14. Clarence Page, *Adoption Myths, Mistakes About Blacks*, PHOENIX GAZETTE, Nov. 30, 1993, at B13. See generally *supra* notes 1-2 and accompanying text.

15. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 95 (1993) [hereinafter FAMILY BONDS].

resort.¹⁶ In Massachusetts, for example, if an African-American family is not found to adopt an African-American baby, the child is, on the average, four years old before a white adoptive family is even considered.¹⁷ Many of the racial matching policies used by agencies are in conflict with the basic law against racial discrimination in this country by making race not merely a factor, but the central factor in placement.¹⁸

These opposing positions have caused a bitter debate over the past twenty-two years.¹⁹ Since the debate began in the early 1970s, the number of TRAs has drastically reduced.²⁰ As the statistics dealing with foster care indicate,²¹ the victims of this battle are the minority children who are forced to wait for a same-race family to adopt them.²² Because the best interest of the child is the paramount concern in adoption,²³ some balance must be established between the opposing positions to increase the number of minority-children placements.

A well constructed, specific statute could help balance these opposing positions. Unfortunately, the statutes that exist today are often ambiguous as to the weight that agencies should give to race as a factor in considering competing adoption petitions.²⁴ The problem created by this ambiguity is that the adoption agency workers often lack sufficient guidance on how to weigh race as a factor in determining the placement of a child.²⁵ A more troublesome

16. *Id.* See also Barholet, *supra* note 2, at 1166. These policies of making only same-race placements often cause would-be adopting parents to be told there are no children available. The reality in these situations is that there are no same-race children available, and the agency does not want to make a TRA. *Id.*

17. Charles A. Radin, *Waiting For a Home: Opposition to Transracial Adoption Slows Black Placements*, BOSTON GLOBE, Nov. 30, 1989, at 1p. These children will most likely spend the first four years of their lives in several different foster families. *Id.*

18. FAMILY BONDS, *supra* note 15, at 106-07. The author points out that over the past 25 years, the body of law has grown that prohibits the use, by state and private actors, of race as a classification. This prohibition has reached nearly every other area of life. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (prohibiting segregation by race in public schools); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that states may not prohibit marriage between persons solely because they are of different races); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that a court cannot deny custody by a natural parent because that parent has remarried a person of a different race).

19. Brophy, *supra* note 1, at 72. TRA was not considered controversial until the National Association of Black Social Workers attacked the practice in 1972, labelling it cultural genocide. See *infra* notes 31-63 and accompanying text.

20. See Jones, *supra* note 6; Jeff Meer, *Adopting the Melting Pot*, PSYCH. TODAY, Apr. 1986, at 16; see also *infra* note 63 and accompanying text.

21. See *supra* text accompanying notes 6-11.

22. *Id.* See also FAMILY BONDS, *supra* note 15, at 99 (stating that the impact of current TRA policies is the delay and denial of permanent placement for minority children).

23. See *infra* note 153-54.

24. See *infra* notes 128-50 and accompanying text.

25. See *infra* note 173 and accompanying text.

problem also emerges from this lack of guidance: social workers, due to personal bias on the issue, may feel free to use race as the sole factor in placements since the law is so ambiguous and because courts pay great deference to agency decisions.²⁶ Furthermore, it is apparent from the literature on the issue and from adoption statistics that the agencies are not always staying within the constitutional boundaries on race considerations established by the courts.²⁷

This Note proposes a statute to effectuate a compromise between the diffuse positions in the battle over TRA. Section II of this Note outlines the controversial history of TRA and the positions taken by groups on both sides of the issue.²⁸ Section III analyzes the history of case law from courts considering the role of race in TRAs, and shows that the courts have merely set broad parameters for the role of race in these considerations.²⁹ Section IV discusses the few state statutes that give guidance on how agencies and courts should weigh race as a factor in adoption.³⁰

Finally, in Section V, this Note proposes a model state statute that consolidates and adjusts many meritorious ideas on TRA by proponents and

26. A recent article noted that all states have same-race preference policies, but only a few have put those policies into law. *Same-Race Adoption Law Ignites Deep Emotions*, CHI. TRIB., Jan. 4, 1993, at N11. The fact that same-race preference is an unwritten policy may encourage placement workers to elevate race to the determining factor, which falls outside of the accepted weight as established by the courts. See also Bartholet, *supra* note 2, at 1191 (contending that the unwritten policies of agencies are far more extreme in promoting racial matching than the written policies suggest).

This concern becomes more important when one considers that when race becomes the overriding or sole factor in a placement, it is a violation of Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000d (1988). The Act prohibits programs from receiving federal funds if they discriminate on the basis of race, nationality, or religion. Lynn Duke, *Couples Challenging Same-Race Adoption Policies*, WASH. POST, April 5, 1992, at A1 (discussing the use of Title VI in TRA cases).

27. One commentator has stated that race is "a central organizing principle for the agencies which have been delegated authority to construct adoptive families." Bartholet, *supra* note 2, at 1165. See also SIMON & ALTSTEIN, *supra* note 1, at 22 (pointing out the inconsistency between the laws and policies dealing with TRA and the actual use of race in adoption placements); *infra* notes 182-83 and accompanying text.

28. See *infra* notes 31-68 and accompanying text.

29. See *infra* notes 69-127 and accompanying text. Equal protection and due process challenges, largely by white families, have evoked the majority position that it is unconstitutional to allow race to be the sole determining factor in the placement of a child with a family. However, the majority, in a case following the above position, held that the race or ethnic heritage of the child and the prospective parents can be one of many factors considered in placing children. *In re Adoption of a Minor*, 228 F.2d 446, 448 (D.C. Cir. 1955). See Angela T. McCormick, Note, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303 (1990) (arguing that the general rule applied by the courts is ineffective and inconsistent and, as applied, courts have had difficulty showing that race is or is not actually being used as a decisive factor).

30. See *infra* notes 128-50.

opponents of the practice, from state statutes, and from scholarly writings. The proposed statute's goal is to create a balance between all these sources and thus will allow those on both sides of the issue to accept the statute as the best possible compromise. The need for a compromise is clear: as long as the battle rages, placement of children will be slowed; consequently, the best interests of the children will not be served.

II. HISTORICAL BACKGROUND OF THE TRA CONTROVERSY

Throughout history, white families have adopted children of color, though not in any systematic manner.³¹ The organized beginning of TRA has been traced to two groups: Minority Adoption Recruitment of Children's Homes (MARCH) formed in the United States in 1955, and the Open Door Society formed in Canada in 1960.³² These and similar groups pushed for a change of direction from the traditional policy of adoption agencies matching children with adoptive parents based upon their common race.³³ By 1972, the number of TRAs had increased dramatically because of the activities of these groups and other proponents of TRA.³⁴ The lack of availability of white adoptable children, the increasing acceptance of TRAs, and the fact that some white families adopted transracially as a commitment to racial integration, may have contributed to the increase in TRAs.³⁵ With this rise in TRAs, however, came a growing opposition against the practice.³⁶

Opposition to the practice of TRA gained its foundation and strength within the "black power" movement in the late 1960s.³⁷ The main voice for black

31. The National Association of Black Social Workers, *Preserving Black Families: Research and Action Beyond the Rhetoric* 31-32 (Feb. 1986) (unpublished report available from the National Association of Black Social Workers (NABSW)) [hereinafter *Research and Action*].

32. These groups addressed the problem of adoptable African-American children languishing in institutions or foster care in need of permanent homes. By 1969, 47 organizations similar to MARCH and the Open Door Society existed in the United States. *Id.*

33. Agencies maintain that the best interest of the child is served by placing him or her with a family of similar physical appearance to the child. The reason for the policy is to make the adoption easier to deal with and allow the child to be considered an important part of the central family unit. Jay M. Zitter, Annotation, *Race as Factor in Adoption Proceedings*, 34 A.L.R. 4th 167, 169 (1984).

34. A survey in 1970 indicated that the number of reported TRAs rose nationally from 587 in 1968 to 1743 in 1970 in agencies reporting. OPPORTUNITY: DIVISION OF BOYS AND GIRLS AID SOCIETY OF OREGON (1970), reprinted in SIMON & ALTSTEIN, *supra* note 1, at 32.

35. Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487, 488-89 (1991).

36. LADNER, *supra* note 2, at 72.

37. The "black power" movement developed as many African-Americans became frustrated with the progress of the civil rights movement and gravitated toward a more militant movement based upon a desire for autonomy, as opposed to assimilation. *Id.* at 73.

autonomy within the sphere of child welfare and adoption was the National Association of Black Social Workers (NABSW), which rejected the practice of TRA.³⁸ The general objections to TRA are not based upon a belief that a white family cannot meet a child's desire for love or his/her material needs, but rather upon the concern that white families are unable to equip the child with certain social survival skills.³⁹ These survival skills are needed to help the child understand and cope with racism in society.⁴⁰

The NABSW reaffirmed its position against TRA in 1978, stating that the organization's position was based upon two basic principles. First, African-American children should not be deprived of their racial and cultural identity by being reared in white homes.⁴¹ Second, African-American families should be allowed to adopt African-American children free from discrimination.⁴² The NABSW's position caused adoption agencies to reconsider their use of TRAs.⁴³ Agencies began to weigh the social, political, and cultural effects that a

38. NABSW first stated its opposition to the practice of TRA at its annual meeting in 1972, which set off a nationwide debate over the continued use of the practice and its social and cultural ramifications. *Id.* at 75. The resolution states in relevant part:

Black children should be placed only with Black families whether in foster care or for adoption. Black children belong physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are 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.

Id.

39. S. Peter Kim, M.D., Ph.D., *Transracial and Transcultural Adoption*, AREA II Bulletin 5 (Sept./Oct. 1984) (on file with the *Valparaiso University Law Review*). The NABSW believes that even the most sensitive, loving, and skilled white parent cannot avoid doing irreparable harm to a black child. *Id.* See also Brophy, *supra* note 1, at 72.

40. Kim, *supra* note 39, at 5.

41. The provision stated in pertinent part:

1. That Black children not lose their cultural identity by being reared in a white home . . . that Black children learn that there are cultural differences between Black and White and that the Black culture provides a viable positive way of life. This can only be learned by experiencing Black culture through Black family life and not simply by reading books, Black history or watching television shows about Black people . . . These survival techniques or coping mechanisms cannot be imparted by White parents who have not had the experience of growing up Black.

New York Chapter—National Association of Black Social Workers: *Transracial Adoption Update 1978*, at 1-2 [hereinafter *NABSW Update*] (unpublished report available from the NABSW or the New York Chapter—ABSW Child Adoption Counseling and Referral Service).

42. The provision states in pertinent part, "[T]hat Black families [should] be allowed to adopt Black children . . . [Black families] are often discriminated against and/or discouraged when they try to adopt." *Id.* See also Research and Action, *supra* note 31 (reaffirming the previously stated position of the NABSW).

43. LADNER, *supra* note 2, at 75.

transracial placement might cause.⁴⁴

The NABSW is still the most vocal opponent to TRAs, mainly because of its members' close contact with African-American children's welfare concerns.⁴⁵ The NABSW argues that agencies are not forced to make TRAs because of a lack of potential African-American adoptive parents.⁴⁶ Instead, it argues that agency application standards often eliminate middle- and lower-middle-class families, and that those families who do try to adopt through agencies encounter discrimination and discouragement.⁴⁷ The NABSW advocates programs that recruit potential African-American adoptive parents.⁴⁸ The NABSW cites its own adoption service as an example of a program successful in matching adoptable African-American children with African-American adoptive families.⁴⁹

A research project conducted by the North American Council on Adoptable Children (NACAC) supports, to an extent, the NABSW's arguments.⁵⁰ The report found that eighty-three percent of the responding agencies identified organizational and/or institutional barriers that prevented or discouraged minority families from adopting.⁵¹ Much of the criticism pointed to agency practices that dissuaded minorities from adopting.⁵² Minority communities have a historical tendency toward "informal" adoption which may also account

44. *Id.*

45. *Id.* at 76.

46. NABSW Update, *supra* note 41, at 6.

47. *Id.*

48. *Id.*

49. The New York Chapter of the American Black Social Workers Child Adoption Counseling and Referral Service was started in 1975 to recruit, evaluate, and refer prospective African-American adoptive families, educate the African-American community about adoption, and to work to change child care agency policies and state laws that make it difficult for African-Americans to adopt. *Id.* The Service also sponsors a training course for social workers, supervisors, and directors of child care agencies to enable these workers to become more culturally sensitive in working with African-American families and children. *Adoption Program Fights Barriers*, ABSW—N.Y. CITY CHAPTER NEWS, Summer/Fall 1993, at 1.

50. See generally TOM GILLES & JOE KROLL, BARRIERS TO SAME RACE PLACEMENT: RESEARCH BRIEF #2 (1991) (available from the North American Council on Adoptable Children). The report surveyed 64 private and 23 public child placing agencies located in 25 states, focusing on placement of minority children legally freed for adoption. The goal was to shed light on placement practices, policies, and procedures that most directly affect minority adoption. *Id.* at 7.

51. *Id.*

52. *Id.* at 7-8. Some of the practices cited are: institutional and systemic racism, high adoption fees, inflexible standards of agencies for potential adoptive parents, lack of minority staff, lack of minorities in managerial positions within agencies, and general lack of recruitment activity and poor recruitment techniques.

for minorities' negative perceptions of agencies and their practices.⁵³ There is also a lack of knowledge in minority communities about the need for adoptive parents for minority children.⁵⁴ Finally, the study's statistics indicate that education about adoption and recruitment of minority adoptive parents can greatly increase the number of same-race adoptions.⁵⁵

Several groups that support the practice of TRA have developed to counter the position of the NABSW.⁵⁶ These groups argue that there is no evidence that TRA is detrimental to the child.⁵⁷ An example of such a group is the National Coalition to End Racism in America's Child Care System.⁵⁸ The Coalition is made up of nearly 1000 members including adoptive parents and government agencies.⁵⁹ The Coalition's Statement of Purpose takes the position that children should be placed in the earliest available home most qualified to meet the individual child's needs, regardless of the race of the adoptive family.⁶⁰ Although there are well organized groups such as the

53. "Informal" adoption occurs when a family member or friend takes parental responsibility for the child of another without a formal adoption. This practice is extensive in minority communities and some members of those communities are therefore "put off" by the formal process of legal adoption. *Id.* at 7, 14.

54. *Id.* at 8.

55. Whereas traditional agencies placed children in same-race homes at a 47% rate, minority placement specialists did so at a rate of 91%. These minority placement specialists are successful, in part, because they consider and encourage the following in their programs: recruitment, retention, informative homestudy process, reduced fees (the average minority placement specialist charged \$1439 for an adoption versus an average of \$5780 in a traditional agency), and state involvement in funding and support of such a placement program. *Id.* at 8-9.

56. See generally Maureen McCauley Evans, *Transracial Adoption: Questions and Challenges for Children & Parents Alike*, WASH. POST, Nov. 8, 1993, at b5 (listing several of the groups that offer support and resources to transracial adoptive families, such as the Interracial Family Circle and Adoptive Families of America).

57. For a good summary of the research in this area, see Mahoney, *supra* note 35, at 491-93.

58. Hereinafter called the "Coalition."

59. Barbara Bisantz Raymond & Judy Turner, *The Color of Love*, REDBOOK, Aug. 1992, at 144.

60. The Statement in part states:

To assure that all children needing out of home placement . . . [are] placed in the earliest available home most qualified to meet the individual child's needs. There should be no delay to recruit at this time and in foster care the child should not be moved at a later date to match color or culture. There should be continuing recruitment of foster and adoptive homes of all races and cultures, and race and culture should be one of the factors to be considered in placements.

The [Coalition] will work to this end by coordinating efforts of individuals and groups, so that we may work together throughout the country, educating the public as well as our political and legal systems. We will use the media and other legal procedures available to assure that no child is denied services on the basis of race.

National Coalition to End Racism in America's Child Care System, Statement of Purpose (unpublished statement, available from the Coalition). See also Raymond & Turner, *supra* note 59 (discussing the Coalition's assistance in bringing a discrimination suit on behalf of white foster

Coalition that support the practice of TRA, the pressure and the arguments of the NABSW have been effective.⁶¹ The number of TRAs has fallen since the NABSW's rejection of TRAs in 1972.⁶² One article stated that by 1986, TRAs made up fewer than one percent of all adoptions, a dramatic change from the late 1960s and early 1970s.⁶³

The NABSW's and the Coalition's arguments are fairly representative of the arguments taken by other groups that take a position on the issue of TRA. Such positions are interesting to contrast because they are identified as opposing views of the issue of TRA; however, a closer look seems to indicate some common ground. This common ground can act as a starting point for a compromise to help rectify the TRA debate.

Both sides stress the need for the development of recruitment of potential minority adoptive families so children do not have to wait in foster care for same-race placements.⁶⁴ Both sides also encourage educating the public and the political policymakers about adoption and the issues that surround TRA.⁶⁵ Although they disagree as to the weight, both sides agree that any placement equation must consider race and culture.⁶⁶ Further, both would agree that if a child is adopted transracially, the adopting family must expose the child to his or her race, ethnic heritage, and culture.⁶⁷ Finally, and most importantly,

parents who wished to adopt their African-American foster child).

61. LADNER, *supra* note 2, at 75.

62. See SIMON & ALTSTEIN, *supra* note 1; see *supra* note 34. The NABSW's provocative statements, such as comparing TRA to cultural genocide, caused concern in many agencies that they may cause harm to African-American children placed in white homes. This concern and the fear of a public backlash against TRAs caused agencies to begin following an unwritten rule of making only same-race placements. Jones, *supra* note 6, at Y1.

63. Meer, *supra* note 20, at 17. This adoption rate is dramatically low considering the high percentage of minority children who are awaiting adoption. Jones, *supra* note 6, at Y1. In 1975, the United States government stopped collecting national adoption statistics, with the dissolution of the National Center for Social Statistics. Since that time there have been a few surveys done by other organizations that have attempted to record adoption statistical data, but these efforts have been limited. NATIONAL COMMITTEE FOR ADOPTION, 1989 ADOPTION FACTBOOK 56 (1989) [hereinafter FACTBOOK]. Therefore, although it is generally agreed that the number of TRAs has dramatically decreased, actual data for all adoptions nationally are not available and any number given is simply a deductive estimate.

64. Cf. *supra* note 60 (discussing the Coalition's Statement of Purpose that encourages the continuing use of recruitment). See also *supra* notes 52, 55 and accompanying text (showing that recruitment is a necessary procedure to increase same-race adoptions).

65. *Id.*

66. *Id.*

67. This idea was best put by one author, stating in pertinent part:

White parents who adopt black youngsters must also be willing and able to identify not only with their black children but also with blacks generally To adopt a black child means that these parents have forfeited their rights to be regarded as a "white" family. They cannot try to continue to fit the role of the idealized white middle-class

although the groups on both sides of the issue disagree about the role that race should play in placement, both are obviously committed to achieve what they believe is in the best interest of the child. This common ground between the two sides is the best starting point for any statute that attempts to pull together the concerns and agendas on both sides of the issue.⁶⁸

III. CASE LAW CONSIDERING RACE AS A FACTOR IN ADOPTION PLACEMENT

The case law on TRA is limited.⁶⁹ It must first be noted that a complete ban on TRAs would be violative of the Fourteenth Amendment of the United States Constitution and facially invalid.⁷⁰ The last state statute that prohibited TRAs was struck down in 1972, in *Compos v. McKeithen*.⁷¹ The United States Supreme Court has avoided specifically deciding any TRA cases to date.⁷² However, in *Palmore v. Sidoti*,⁷³ the Court did consider the use of race in the

nuclear family who happen to have a black adopted child.

LADNER, *supra* note 2, at 254. See also Leora Neal & Al Stumph, *Transracial Parenting: If It Happens, How White Parents and the Black Community Can Work Together*, ADOPTALK, Winter 1993, at 6. The two authors of this article included the Executive Director of the Association of Black Social Workers Child Adoption, Counseling, and Referral Service, and the Director of Foster Care and Adoption Training Programs at the Center for Development of Human Services, who is also a white adoptive father of mixed race children. *Id.*

68. These common concerns will be further developed later in *infra* section V, within the proposed statute. See also *infra* notes 151-202 and accompanying text.

69. For a review of the few cases that deal with race considerations in adoption placements, see Zitter, *supra* note 33.

70. *In re Gomez*, 424 S.W.2d 656, 659 (Tex. Civ. App. 1967). The appellate court reversed a Texas trial court which refused to allow the Petitioner, an African-American man, to adopt his wife's two minor Caucasian daughters. *Id.* The trial court acknowledged that the Petitioner and his wife's home met all the requirements under the Texas adoption statute; however, adoption of a white child by an African-American adult was prohibited by Texas law. *Id.* The appellate court struck down the law as violative of the Fourteenth Amendment, which provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. See generally D. Michael Reilly, *District of Columbia Survey: Constitutional Law: Race as a Factor in Interracial Adoptions*, 32 CATH. U. L. REV. 1022 (1983).

71. 341 F. Supp. 264 (E.D. La. 1972). The Louisiana statute (LA. REV. STAT. ANN. § 9:422) provided in pertinent part: "A single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race." *Compos*, 341 F. Supp. at 264.

72. Timothy P. Glynn, Note, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925, 932 (1993).

73. 466 U.S. 429 (1984).

similar question of child-custody.⁷⁴ The Court held that a state cannot use race as a factor in a decision to remove a child from the custody of a parent found to be an appropriate person to have such custody.⁷⁵ The courts have limited this rule to custody cases and have not extended it into the areas of adoption or foster care.⁷⁶ The distinction between custody and adoption does not, on its face, appear vast. However, taking a child away from his or her biological parent because of race⁷⁷ is vastly different from trying to place a child in a new same-race adoptive home.⁷⁸

The courts have held that it is unconstitutional to allow race to act as the

74. In this case, a Caucasian father was seeking to obtain custody of his daughter after the daughter's biological mother, who was also Caucasian, had married an African-American. The trial court had granted custody to the father because of the concern that the child may suffer some social stigma by living with her mother and her mother's new African-American husband. The Supreme Court agreed that some prejudice and stigma may be encountered, but concluded that this was not enough to justify the use of race as the sole determining factor in custody cases. *Id.* at 430-433.

But cf. *Ward v. Ward*, 216 P.2d 755, 756 (Wash. 1950) (awarding custody of an African-American father's daughters to him because they looked like him rather than their Caucasian mother). The court stated,

We do not question the mother's love for her children. But we have always stated . . . that our primary concern is the welfare of the children These unfortunate girls, through no fault of their own, are the victims of a mixed marriage and a broken home. They will have a much better opportunity to take their rightful place in society if they are brought up among their own people.

Id. at 756. The court in *Tucker v. Tucker*, 542 P.2d 789, 791 (Wash. App. 1975), stated that *Ward* would probably be overruled if it came before the court today.

75. 466 U.S. at 434.

76. *Glynn*, *supra* note 72 (citing *J.H.H. v. O'Hara*, 878 F.2d 240, 245 (8th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990)). *See also In re Custody of Temos*, 450 A.2d 111, 120 (Pa. Super. Ct. 1982) (following *Palmore* forcefully, stating that the lower court was "fundamentally mistaken" to hold that race is or should be a factor, concern, or consideration in a child custody case).

77. Usually, the race of the biological parent's new spouse is different from the child and is the reason the other biological parent is preferred. *See Palmore v. Sidoti*, 466 U.S. 429 (1984); *see also supra* notes 73-75 and accompanying text.

78. The former situation is a denial of parental rights based upon race, regardless of the parent's abilities to parent. The latter situation is merely an attempt to place the child in an environment conducive to proper emotional, racial, and cultural development of the child, and also to assure that the state's compelling interest, the best interest of the child, is served. The right to parent and raise children has long been a highly protected practice. *See Trimble v. Gordon*, 430 U.S. 762, 769 (1977) ("No one disputes the appropriateness of [a state's] concern with the family unit, perhaps the most fundamental social institution of our society."); *Lehr v. Robertson*, 463 U.S. 248, 256 (1983):

The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.

Id.

sole determining factor in the placement of a child with a family.⁷⁹ The majority in the first major case to so hold also held that the race or ethnic heritage of the child and the prospective parents *may* act as one of many factors considered in placing children.⁸⁰ The court held that the prohibition against parents adopting across racial lines would often serve a harsh and unjust end.⁸¹

*In re Adoption of a Minor*⁸² first established that race could act as a relevant factor in an adoption placement. However, the court in *Minor* did not specify the circumstances that would justify such consideration. This ambiguity was resolved in *In re Moorehead*.⁸³ In *Moorehead*, a white couple appealed from the state trial court's denial of their motion for permanent custody of their foster child, an African-American girl, of whom they had custody since she was nine days old.⁸⁴ When the child was ten months old, the couple notified the County's Child Services Board (CSB) that they desired to adopt the child.⁸⁵ The CSB denied the couple's adoption.⁸⁶ Although the CSB stated that there were other reasons for its denial, there was no evidence to substantiate that the denial was based upon anything other than the CSB's desire to place the child with an African-American family.⁸⁷ A hearing was held before a referee, who denied the couple's motion for permanent custody and recommended that the child stay in the permanent custody of the CSB and that the CSB should determine which family was best suited to adopt the child.⁸⁸ The trial court

79. *In re Adoption of a Minor*, 228 F.2d 446, 448 (D.C. Cir. 1955). In this case, the biological mother, who was white, had a child born out of wedlock. The natural father's whereabouts were unknown. The mother subsequently married an African-American and consented to his adoption of the child. Since the Plaintiff's application was quite adequate to allow adoption, the District Court stated that "[o]rdinarily such an adoption should be not only approved but encouraged"; however, it denied the adoption, largely because the adoptive father was African-American, while the mother and child were white. *Id.* at 447. The D.C. Circuit reversed, stating that the controlling consideration was to ensure the "best interests of the infant" and:

There may be reasons why a difference in race, or religion, may have relevance in adoption proceedings. But that factor alone cannot be decisive in determining the child's welfare. It does not permit a court to ignore all other relevant considerations. Here we think those other considerations have controlling weight.

Id. at 447-48. See also *Drummond v. Fulton County Dep't of Family & Children's Serv.*, 563 F.2d 1200, 1206 (1977) (discussed *infra* notes 93, 95-99 and accompanying text); *In re DeF*, 307 A.2d 737 (D.C. 1973).

80. *Minor*, 228 F.2d at 448.

81. *Id.* See also *In re Adoption of Gomez*, 424 S.W.2d 656 (Tex. Civ. App. 1967).

82. 228 F.2d 446 (D.C. Cir. 1955).

83. 600 N.E.2d 778 (Ohio Ct. App. 1991).

84. *Id.* at 779-80.

85. *Id.* at 780.

86. *Id.*

87. *Id.*

88. *In re Moorehead*, 600 N.E.2d 778, 780 (Ohio Ct. App. 1991).

subsequently rejected the couple's objections to the referee's determinations.⁸⁹

The Court of Appeals in *Moorehead* held that the trial judge improperly adopted the referee's determination without considering the evidence and wrongly deferred to the agency that chose an adoptive home for the child involved solely on the basis of race.⁹⁰ This case reaffirmed that the use of race as the sole or dominant factor at any level of the adoption process violates the Equal Protection Clause.⁹¹ The court held that when it appears an agency used race as the sole or dominant factor, the court must pay no deference to the agency's finding and shall make its own determination in the child's best interest.⁹²

The constitutionality of the use of race as a factor in an adoption usually follows the tests established in two cases, *Drummond v. Fulton County Department of Family & Children's Services*⁹³ and *In re R.M.G.*⁹⁴ In *Drummond*, the court considered whether a state agency, charged with placing a child in its custody for adoption, may consider the race of the child and prospective adoptive parents without violating the Equal Protection Clause of the United States Constitution.⁹⁵ The court upheld the trial court's determination that the consideration of race was properly directed to the best interest of the child and was not used as a factor that automatically disqualified the plaintiffs' petition.⁹⁶ The court concluded that because of the difficult nature of TRAs, race can act as a decisive factor which tips the balance between two otherwise equal potential adoptive families, absent proof of discriminatory intent.⁹⁷ The Fifth Circuit applied the United States Supreme Court's plurality rule from *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,⁹⁸ that when race

89. *Id.*

90. *Id.* at 788.

91. Glynn, *supra* note 72, at 935. See also *Compos v. McKeithen*, 341 F. Supp. 264, 267 (E.D. La. 1972); *Fontaine v. Fontaine*, 133 N.E.2d 532, 534-35 (Ill. App. Ct. 1956) ("In passing upon the question of how the interests and welfare of the children will be best served, the court can and should take into consideration all relevant considerations which might properly bear upon the problem. However, we do not believe that the question of race alone can outweigh all other considerations and be decisive of the question."); *In re Adoption of Baker*, 185 N.E.2d 51, 52-53 (Ohio Ct. App. 1962).

92. *In re Moorehead*, 600 N.E.2d at 788. The court stated that the reviewing court should only uphold the placement if the determination passes strict scrutiny. *Id.*

93. 563 F.2d 1200 (5th Cir. 1977).

94. 454 A.2d 776 (D.C. 1982).

95. *Drummond*, 563 F.2d at 1205. The action was brought by a white couple who acted as state-designated foster parents of a mixed-race child for over two years and whose application for permanent custody was denied by the defendant. *Id.* at 1203.

96. *Id.* at 1204-05.

97. *Id.* at 1205.

98. 430 U.S. 144 (1977) (holding that when dealing with voting apportionment, consideration of race is not impermissible).

is considered in a nondiscriminatory fashion and no racial slur or stigma with respect to any race is created, there is no discrimination violative of the Fourteenth Amendment.⁹⁹

A more demanding analysis is used in *In re R.M.G.*¹⁰⁰ In this case, a child was born to an African-American mother, and the child's African-American father was unaware of the birth.¹⁰¹ The mother, without the knowledge of the father, placed the child up for adoption,¹⁰² and the Department of Human Services later placed the child with white foster parents.¹⁰³ The foster parents subsequently filed a petition for adoption.¹⁰⁴ However, the natural father objected to the adoption when notified by the Department of Human Services,¹⁰⁵ and the child's paternal grandmother and her husband then filed to adopt the child.¹⁰⁶

Although the trial court found that the families were otherwise equal, it granted the biological grandmother and her husband's petition for adoption based upon the possibility that the child may question her racial and cultural identity as she grows older.¹⁰⁷ On appeal, the court stated that neither the statute involved¹⁰⁸ nor the cases interpreting it provided guidance as to whether agencies may consider race in such a placement and still remain within the constitutional boundaries.¹⁰⁹ Therefore, the issue presented was whether the Constitution prohibits the use of race as a relevant factor in an adoption, and if so, what level of scrutiny the court must apply.¹¹⁰ The court noted that the United States Supreme Court endorsed an intermediate scrutiny for benign racial classification, but was not convinced that the use of race in adoption was a benign use.¹¹¹

The *R.M.G.* court instructed that since the controlling statute on its face takes race into account, it is constitutionally suspect and must receive strict

99. *Id.* at 165.

100. 454 A.2d 776 (D.C. 1982).

101. *Id.* at 780.

102. *Id.*

103. *Id.*

104. *Id.*

105. *In re R.M.G.*, 454 A.2d 776, 780 (D.C. 1982).

106. *Id.*

107. *Id.* at 782.

108. 1973 D.C. STAT. 16-305 required information about the race of the petitioner and the prospective adoptees. The provision did not indicate the proper or intended use of this information.

109. 454 A.2d at 784.

110. *In re R.M.G.*, 454 A.2d 776, 784 (D.C. 1982).

111. *Id.* at 785-86.

scrutiny.¹¹² Strict scrutiny, the court noted, allows that the racial classification can only be constitutional if shown to advance a compelling or overriding governmental interest. Further, the use of race must be necessary to accomplish the governmental interest.¹¹³ The court held that the advancement of a child's best interest is a compelling governmental interest, thereby satisfying the first prong of the strict scrutiny test.¹¹⁴ The court also held that as to the second prong of the strict scrutiny test, the consideration of race was necessary to achieve the governmental interest of assuring the child's best interest.¹¹⁵ Therefore, the use of race in this case survived the strict scrutiny analysis. However, the court recognized that agencies might, in the actual application of the statute, consider race in a discriminatory way, and therefore, the court must analyze the agencies' use in each case.¹¹⁶

The court in *R.M.G.* listed three analytical steps that the trial court should address: (1) how the race of each family will affect the child's development of a sense of self and racial identity; (2) how the competing families compare in that regard; and (3) how significant the racial differences between the families are when considering all relevant factors together.¹¹⁷ The court held that although the trial court properly considered the race factor as far as the first step concerning the child's sense of identity, the trial court did not articulate the

112. *Id.* at 784-85 (citing *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 290-91 (1978)). The strict scrutiny test is used to determine if there has been a denial of equal protection. The government is required to show that it has a compelling interest to justify the measure, and that the measure is necessary to secure the governmental interest. *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

113. *In re R.M.G.*, 454 A.2d at 785 (citing *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972)); *Graham v. Richardson*, 403 U.S. 365, 375 (1971); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). The court refused to employ the intermediate scrutiny that is used when the racial classification is "benign," as in affirmative action cases. The court did not believe that such a standard was applicable in a family law context. *In re R.M.G.*, 454 A.2d at 786.

114. *Id.* at 786.

115. *In re R.M.G.*, 454 A.2d 776, 787-88 (D.C. 1982). The court listed three components of a child's identity: (1) a sense of belonging in a stable family and community; (2) a feeling of self-esteem and confidence; and (3) survival skills that allow the child to cope with the world outside the family. The court concluded that this sense of identity will be developed through the child's interrelationship with both his or her parents and society. Therefore, the parents' attitude about race will significantly affect the development of that child's sense of identity and is a "necessary" consideration. *Id.* at 787. See also *In re Moorehead*, 600 N.E.2d 778, 786 (Ohio Ct. App. 1991). The *Moorehead* court recognized the need to place a child with a family to which the child can feel he or she naturally belongs. The duplication of the child's natural biological family is an important method to accomplish this goal. Therefore, consideration of race or ethnicity is necessary to accomplish this goal. *Id.*

116. *In re R.M.G.*, 454 A.2d at 790. "Thus, where race is a factor for the trial court to consider, appellate review of judicial discretion under the statute must be as exacting as our scrutiny of the statute itself." *Id.*

117. *Id.* at 791.

comparative analysis that is required by steps two and three.¹¹⁸

The trial court found the parties equal after weighing all other factors, and thus, the race factor was determinative.¹¹⁹ Therefore, the appellate court was compelled to reverse and remand because the trial court did not provide a detailed explanation of its reasoning to assure the reviewing court that the evaluation of race was precisely tailored to the best interest of the child.¹²⁰ The court stated that for effective review when race is a critical factor, the reviewing court needs to understand exactly how the trial court made the judgment as to race.¹²¹ If the trial court's rationale is unclear, the risk of misuse of race is too high.¹²² Accordingly, such an unclear decision will not survive strict scrutiny.¹²³

The foregoing cases demonstrate that agencies may use race in making adoption placement decisions. Agencies may weigh race as one factor among others¹²⁴ and can tip the balance between two families when all other considerations are equal.¹²⁵ As for the constitutionality of the use of race as a factor, either the court will find that when race is used in a nondiscriminatory fashion, and no racial group is stigmatized, there is no discrimination violative of the Fourteenth Amendment as in *Drummond*;¹²⁶ or the court will require the use of race to pass the strict scrutiny analysis as applied in *R.M.G.*¹²⁷

IV. EXISTING STATE STATUTES DEALING WITH RACE IN ADOPTION

At one end of the statutory spectrum, several states have enacted statutes which mandate placements with a same-race family if possible.¹²⁸ The

118. *Id.* at 793.

119. *Id.* at 779-80.

120. *In re R.M.G.*, 454 A.2d 776, 785, 788 (D.C. 1982).

121. *Id.* at 794. This articulation is necessary to determine whether the decision was a "precisely analyzed determination, based on carefully thought through comparisons of the parties drawn from record evidence, or as a more generalized conclusion that race always favors petitioners of the same race . . . a judgment reflecting an impermissible intellectual shortcut." *Id.*

122. *Id.* at 794.

123. *Id.*

124. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977); *In re Adoption of a Minor*, 228 F.2d 446, 448 (D.C. 1955).

125. *Drummond*, 563 F.2d at 1205.

126. *Id.*

127. 454 A.2d 776 (D.C. 1982).

128. MINN. STAT. ANN. § 259.255 (West 1992); ARK. CODE ANN. § 9-9-102 (Michie 1992); CAL. FAM. CODE § 8708 (West Supp. 1994); S.C. CODE ANN. § 114-4980(H)(2) (Law. Co-op. 1976). See also Elizabeth Coady, *Wanted: Parents For Black Children Conference Held to Seek Solutions*, ATLANTA J. & CONST., Aug. 21, 1992, at A-3 (indicating that many of these states have unwritten same-race policies).

National Council for Adoption in Washington, D. C., reports that at least thirteen states require same-race adoptions.¹²⁹ Minnesota's statute, entitled the "Minnesota Heritage Preservation Act," is representative of the order of preference that is established in this type of statute.¹³⁰ The usual order of placement is: (1) with a relative(s) of the child; (2) with a same-race family; and finally, (3) with a family from a different race than the child.¹³¹ California has a similar mandate for a same-race preference.¹³² California, however, includes a prohibition against TRA for a period of ninety days after the child is first relinquished for adoption.¹³³ This time is to allow recruitment of a family member or a same-race family. California also prohibits a TRA before the ninety-day period unless there is a showing that a diligent search for a relative of the child or a same-race family has been made.¹³⁴

129. Coady, *supra* note 128.

130. The "Minnesota Heritage Preservation Act" provides in relevant part:

The policy of the state . . . is to ensure that the best interests of the child are met by requiring due consideration of the child's race or ethnic heritage in adoption placements The authorized child placing agency shall give preference . . . in the absence of good cause to the contrary, to (a) a relative or relatives of the child, or, if that would be detrimental to the child, or a relative is not available, to (b) a family with the same racial or ethnic heritage as the child, or, if that is not feasible, (c) a family of different racial or ethnic heritage from the child which is knowledgeable and appreciative of the child's racial or ethnic heritage.

MINN. STAT. ANN. § 259.225 (West 1994). See also ARK. CODE ANN. § 9-9-102 (Michie 1992) (incorporating nearly the exact language as the Minnesota statute). The Minnesota statute was originally found unconstitutional as violative of the Fourteenth Amendment because its stated purpose was to ensure preferences and protection of heritage only for minorities. MINN. STAT. ANN. § 259.28 (West 1991). The Minnesota Court of Appeals held this classification failed because "[t]he heritage of minority children can be protected without the classification by making the preferences . . . [established in the Act] . . . applicable to *all* children, as the legislature has directed in related statutes." *In re Matter of D.L.*, 479 N.W.2d 408, 413 (Minn. Ct. App. 1991). The legislature remedied this problem by removing specific references to minorities from the statute.

131. See MINN. STAT. ANN. § 259.28 (West 1992); ARK. CODE ANN. § 9-9-102 (Michie 1992).

132. CAL. FAM. CODE § 8708 (West Supp. 1994).

133. *Id.* The Code states in pertinent part:

Where a child is being considered for adoption, the following order of placement preferences regarding racial background and ethnic identification shall be used . . . in determining the placement of the child:

- (a) In the home of a relative.
- (b) . . . with an adoptive family with the same racial background or ethnic identification as the child
- (c) If placement cannot be made under the rules set forth in this section within 90 days from the time the child is relinquished for adoption or has been declared free from parental custody or control, the child is free for adoption with a family of a different racial background or ethnic identification where there is evidence of sensitivity to the child's race, ethnicity, and culture

Id.

134. *Id.*

Other states use written or unwritten policies that provide essentially the same preference as established in the statutes of Minnesota, Arkansas, and California.¹³⁵ Various other state statutes require that petitioning adoptive parents list their race or ethnic background and/or the race and ethnic background of the child on the adoption application. However, these statutes do not enunciate how agencies and courts must consider and weigh this information.¹³⁶

Some state statutes address the situation in which a foster family decides to petition to adopt a foster child in their care.¹³⁷ California simply places the foster family in the same position as other petitioning families.¹³⁸ This offers no assistance to a foster family whose foster child is from a different race, because California, for instance, which has such a policy, also has a same-race preference statute.¹³⁹ Florida deals with this contingency by removing its

135. FAMILY BONDS, *supra* note 15, at 95. Though same-race preference is the law in these three states, it is arguably the policy in forty-five other states. Desda Moss, *Race is Often Adoption Issue*, USA TODAY, June 29, 1994, at 4A.

136. ARIZ. REV. STAT. ANN. § 8-105 (1987); COLO. REV. STAT. § 19-5-208 (West 1990); OKLA. STAT. ANN. tit. 10, § 60.12 (West 1987); PA. STAT. ANN. tit. 1, § 1 (1983); S.D. CODIFIED LAWS ANN. § 25-6-15.2 (1992); WASH. REV. CODE ANN. § 26.32.060 (West 1989). Indiana also requires an adoption petition to include the color of the child to be adopted. IND. CODE ANN. § 31-3-1-2 (Burns 1987).

Indiana Senate Bill No. 000011 (1993), recently introduced by State Senator Antich, attempted to remove the inclusion of the child's color from adoption petitions. The bill failed to receive a hearing. See generally D. Michael Reilly, Note, *District of Columbia Survey: Constitutional Law: Race as a Factor in Interracial Adoptions*, 32 CATH. U. L. REV. 1022, 1023 (1984) (discussing state statutes that require a statement indicating the race of the child, natural parents, and/or the petitioners).

137. N.Y. SOC. SERV. LAW § 383 (McKinney 1992) states in relevant part:

Any adult . . . person[s], who, as foster parent or parents, have cared for a child continuously for a period of twelve months or more, may apply . . . for the placement of said child with them for the purpose of adoption, . . . the agency shall give preference and first consideration to their application over all other applications for adoption placements.

Id.

CAL. FAM. CODE § 8704(c) (West 1994) states in relevant part:

[I]f the child has been in foster care for a period of more than four months, the child has substantial emotional ties to the foster parent[s], . . . the child's removal from the foster parent[s] . . . would be seriously detrimental to the child's well-being, and the foster parent[s] . . . make a written request to be considered to adopt the child, the foster parent[s] . . . shall be considered with respect to the child along with all other prospective adoptive parents. The department or licensed adoption agency shall take into consideration any relevant factors that it deems necessary in determining which adoptive placement is in the child's best interest.

Id.

138. *Id.*

139. See *supra* note 133.

placement preference criteria in this situation as it applies to the foster family.¹⁴⁰ This creates a predilection for the foster family and indicates that a preference exists for established stability and bonding instead of race.¹⁴¹

At the other end of the spectrum, Kentucky and Connecticut have statutes that completely prohibit the use of race as a factor in considering a petition for adoption of a child.¹⁴² Texas recently passed a similar law.¹⁴³ The law prohibits the court, when determining the best interest of the child, from denying or delaying the adoption, or otherwise discriminating on the basis of race or ethnicity of either the child or the prospective adoptive parents.¹⁴⁴

The inconsistency and ambiguity in the state statutes and the case law, as well as concern that race is used as the determinative factor in many adoptions, led Senator Metzenbaum¹⁴⁵ and Senator Moseley-Braun¹⁴⁶ to propose the Multiethnic Placement Act of 1993.¹⁴⁷ The bill would prohibit agencies that receive federal funds from delaying or denying placement of a child based on the race, color, or ethnic heritage of either the child or the adoptive parents or

140. FLA. ADMIN. CODE ANN. r 10M-8.0051 (1991). The Code states:

(7)(a) Foster Parents. When a child has established significant emotional bonds to foster parents who are of a different racial or ethnic background than the child, the order of placement criteria need not be applied to his case if the foster parents are interested in adopting him. Categorical denial of adoption of a child by his foster parent based solely on race is prohibited.

Id.

141. *Id.*

142. KY. REV. STAT. ANN. § 199.471 (Baldwin 1982); CONN. GEN. STAT. ANN. §§ 45a-726 & 45(a)-727 (West 1981). Kentucky's statute prohibits denial of an adoption based upon "religious, ethnic, racial, or interfaith background of the adoptive applicant," while the Connecticut law prohibits rejections of adoption applications solely "because of a difference in race, color or religion" between the child and the prospective adoptive parents. See also Reilly, *supra* note 70, at 1023-24 (discussing statutes that prohibit the use of race in adoption placements).

143. Tex. H.B. 196, 73d Leg., R.S. (1993).

144. *Id.* See also Precker, *supra* note 2 (discussing one of the cases that provoked the passage of the Texas law). For a specific discussion about the events that led to the change in the Texas TRA law, see Jo Beth Eubanks, Comment, *Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind?*, 24 ST. MARY'S L.J. 1225 (1993).

145. Senator Metzenbaum is a Democrat and the senior U.S. Senator from the state of Ohio.

146. Senator Moseley-Braun is a Democrat and a first term U.S. Senator from Illinois.

147. S. 1224, 103d Cong., 1st Sess. (1993). The bill was passed by the Senate in March of 1994, while a similar bill was introduced in the House. Desda Moss, *Race is Often Adoption Issue*, USA TODAY, June 29, 1994, at 4A. Senator Metzenbaum finally won approval of this bill by adding it as an amendment to the enormous Elementary and Secondary Education Act, that was passed in October 1994. President Clinton signed the act into law on October 20, 1994, in Boston. John A. Farrell, *The Paths of Politics Clinton, In Mass. Today, Hopes Successes Abroad Can Stem Slide*, BOST. GLOBE, Oct. 20, 1994, at 1. See generally Tom Diemer, *Metzenbaum Wins on Adoption Bill; Benefits Minority Children*, PLAIN DEALER (Cleveland, OH), Oct. 6, 1994, at 19A.

foster parents.¹⁴⁸ The bill does little more than restate the parameters established in the case law on the issue. However, it does indicate that there is a concern with the application of the laws and the way placement decisions are *actually* made. The bill adds a safeguard to insure proper application of the proposed law, providing for equitable relief to anyone aggrieved by an agency in violation of the bill's provisions.¹⁴⁹

A survey of state statutes and regulations indicates that no consensus exists among the states as to the role that race should play in adoption placements. The statutes generally fail to enunciate the weight that agencies may constitutionally give race.¹⁵⁰ Obviously, a statute cannot ensure proper use of race as a factor. However, more specificity about the role that race may play would help encourage proper application. Further, most of the states' statutes do not deal with many of the peripheral problems that arise in these cases, such as the rights of foster parents when applying for adoption of their foster child, the need for actual recruitment, and the level of review that the courts should use in reviewing the use of race in the adoption considerations.

V. PROPOSAL

The goal of this Note is to provide states with a specific model statute that effectively deals with the issues that surround TRA. The statute establishes a preference for same-race placement, but values immediate placement when a same-race placement is not available. The statute emphasizes: recruitment of minority families; the education of agencies, courts, and the public about the role of race in adoption placements; and the value of permanency and bonding by requiring immediate placements and protecting transracially adopting foster families. Finally, the statute attempts to assure constitutional use of race in placement decisions by: specifically enunciating the role race may play; providing potential adoptive parents with a cause of action when race is used in contravention of the statute; and requiring that a reviewing court strictly scrutinize the agency's consideration of race in a challenged adoption where race may have been used as the sole deciding factor or was given improper weight.

148. Moss, *supra* note 147, at 4A. It must be noted that this provision does not prohibit the use of race as a factor, it simply prohibits the use of race as the sole or dominant factor.

149. S. 1224, 103d Cong., 1st Sess. at sec. 3(c). Although passage of the amendment indicates the need for non-discriminatory placements on the part of agencies, it fails to detail the way in which this shall be accomplished. This development only furthers the need for comprehensive, specific guidance from state statutes.

150. This vagueness furthers the possibility of misapplication of the statutes in an unconstitutional manner. Chief Justice Taft once stated that "a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law." *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926).

*A. Model Transracial Adoption Statute***1.1 Definitions**

As used in this statute—

- (a) The term “adoption” shall refer to the judicial act of creating the relationship of parent and child where it did not exist previously.
- (b) The term “agency” shall refer to any adoption agency or facility which is properly licensed and authorized by the State to effectuate adoption placements.
- (c) The term “culture” shall refer to the totality of behavior patterns, arts, beliefs, institutions, and thoughts characteristically transmitted by and through a distinct community.
- (d) The term “Department” shall refer to the state department that is authorized to oversee the licensing and operation of adoption agencies in the state.
- (e) The term “ethnic heritage” shall refer to a group sharing similar race or nationality, who share similar values, customs, language, and traits.
- (f) The term “petition” shall refer to the formal written application by the person(s) requesting to adopt a child.
- (g) The term “preference group” shall refer to the group of prospective adoptive parents who are preferred for placement of a child as established in section 1.2 of this statute.
- (h) The term “racial background” shall refer to closeness of kinship based strictly on biological ties; a group of people who share similar physical and biological traits, such as skin color and other similar traits, which make the group identifiable.

1.2 Appropriate Consideration of Race

- (a) The policy of this State is to ensure that the best interest of the child is met by requiring due consideration, in accordance with this statute, of the child’s racial background or ethnic heritage in adoption placements.
- (b) The agency shall consider the racial background and ethnic heritage of

a child in arriving at an adoptive placement decision; however, the agency shall weigh racial background and ethnic heritage equally with all other appropriate factors that are used in such placement decisions.

- (c) The racial background or ethnic heritage factor may act as the deciding factor between competing adoption petitions if all other factors indicate that the competing petitions are equal. In such placement decisions, the agency shall make placements in accordance with the placement preferences established herein.
- (d) The agency, and the court in reviewing such placement, shall give preference, in the absence of good cause to the contrary, and upon reviewing all petitions for adoption of the child, to placing the child:
 - (1) with a relative or relatives of the child; if a relative or relatives of the child are not available, or if such placement is not in the best interest of the child,
 - (2) with a family of the same racial background or ethnic heritage as the child. If the child has a mixed racial background or ethnic heritage, the agency shall place the child with a family of the racial or ethnic group with which the child has more significant contacts.
 - (3) If a family meeting the criteria as established in Subsection (1) or (2) of this Section is not available to adopt, or if such placement is not in the best interest of the child, the agency shall place the child with a family of a different racial background or ethnic heritage than the child. Such a family shall be qualified to adopt in this situation only if there is reasonable evidence of sensitivity to the child's race, ethnicity, and culture, as well as reasonable evidence of a good faith intent on the part of the prospective parents to assist and encourage the furtherance of the child's contact with his or her race, ethnicity, and culture, in accordance with Section 1.3 of this statute.

1.3 Requirement of Racial and Ethnic Sensitivity for Transracial Adoption

- (a) Any person or persons who wish to adopt a child of a different racial background or ethnic heritage shall complete a Cultural Sensitivity Training Course.
- (b) The Department, or any agency, shall administer the Cultural Sensitivity Training Courses. The courses shall also be made available

as a self-taught, home study if the prospective family demonstrates a good faith reason for being unable to attend the taught sessions.

- (c) The agency shall use the participation in the course sessions as part of the evaluation to determine whether there is reasonable evidence of the prospective adoptive parents' sensitivity to the child's race, ethnicity, and culture, as well as evidence of a good faith intent on the part of the prospective parents to assist and encourage the furtherance of the child's contact with his or her race, ethnicity, and culture.
- (d) The Department or agency may terminate any placement for adoption with a family of different racial background or ethnic heritage before the granting of an order for adoption upon a finding that the family is not attending, or making a good faith effort to attend, the sessions, or is failing to utilize the self-taught material, of the Cultural Sensitivity Training Course.
 - (1) The Department or agency may remove the child from the custody of the prospective adoptive parents and place the child in another adoptive home, in accordance with the preference of placement in Section 1.2, or other appropriate temporary care.
 - (2) Such removal shall occur only with the approval of the court, upon motion by the Department or agency after notice to the prospective parents, supported by an affidavit stating the grounds on which removal is sought. The court, in its discretion, may reject the motion and order the adoption if it finds that the removal of the child is not in the best interest of the child.

1.4 Placement

- (a) Once the child is relinquished for adoption or is declared free from parental custody or control, the agency must, without delay, place the child within the highest preference group where a family, which is deemed qualified to adopt, is available.
- (b) Before a placement with a family of a different racial background or ethnic heritage is made, the agency shall develop documented evidence of a diligent search for either a qualified relative of the child or a qualified family with the same racial background or ethnic heritage as the child, before the child has been relinquished for adoption. In conducting a diligent search, each agency shall use all appropriate resources, as necessary, in a directed effort to recruit a family that meets the placement preference criteria through:

- (1) the use of all appropriate intra-agency, inter-agency, state, regional, and national exchanges and listing books;
- (2) child specific recruitment in electronic and printed media coverage; and
- (3) the use of agency contacts with parent, civic, and other groups to advocate the adoption of specific waiting children.

1.5 Protection for Transracially Adopting Foster Parents

- (a) If a child has resided in foster care with one family for a period of four months, or less when deemed appropriate, has developed substantial emotional ties to the foster parents, and the foster parents petition to adopt the child, the agency shall consider the foster parents' petition with respect to the child along with all other prospective adoptive parents.
- (b) The agency, in considering the foster parents' petition to adopt, shall not use racial background or ethnic heritage as a factor in its consideration comparing the foster parents' and other prospective adoptive parents' petitions, but shall use all other appropriate factors to assure a placement in the best interest of the child.
- (c) The development of substantial emotional ties between a foster child and petitioning foster parents may act as the deciding factor between competing adoption petitions if all other factors indicate that the competing petitions are equal.

1.6 Recruitment

- (a) The Department and agencies shall develop and maintain a Minority Family Recruitment Program that shall seek out qualified minority prospective adoptive parents and, when feasible, maintain a pool of such parents.
- (b) The names and adoption preferences of prospective adoptive parents shall be circulated among all appropriate intra-agency, inter-agency, state, regional, and national exchanges and listing books.
- (c) The agency shall utilize, as a resource in accomplishing such recruitment, the resources and networks available through interested groups and citizens, as well as the media in the communities to attract prospective adoptive parents.

1.7 Cause of Action

- (a) Any individual aggrieved by any agency's improper use of racial background or ethnic heritage as a factor in consideration of an adoptive placement shall have the right to bring an action seeking relief before the state court of appropriate jurisdiction. The court shall have the authority to approve a temporary restraining order, maintaining the existing placement of the child, until a court of proper jurisdiction has reviewed the agency's use of racial background or ethnic heritage.
- (b) The court shall strictly scrutinize an agency's evaluation of racial background and ethnic heritage of a child when an agency has placed a child to ensure that the agency used these factors only as allowed in section 1.2 in making a final determination of placement within the preference group matrix established by this statute.

1.8 Commentary

- (a) The Department shall compile and publish a commentary delineating and explaining the statutory provisions herein, distribute the commentary to all authorized agencies and courts, which shall review agency placement decisions, and make the commentary available to potential adoptive parents, as well as the general public.
- (b) The commentary shall only be used for reference and is not a controlling authority.

B. *Explanation and Application of the Proposed Statute*

Much controversy surrounds the implementation of race preference statutes.¹⁵¹ However, nearly everyone agrees that when possible, a family from a child's same racial background or ethnic heritage should adopt the child.¹⁵² Since this is the case, and since the best interest of the child is the

151. See *supra* notes 31-68 and accompanying text.

152. The following indicates the general consensus on this proposition. The NABSW position is that African-American children must be placed with African-American families to ensure the development of their racial and cultural identity, as well as social "coping" skills. See *supra* note 38. As Dr. Morris Jeff, president of the NABSW, said in 1987, "[a]lthough there is evidence that seems to indicate transracial adoption can work . . . Black children must be placed into a situation that will allow their maximum development, and transracial adoption . . . doesn't even come close to doing so." Walter Leavy, *Should Whites Adopt Black Children?*, EBONY, Sept. 1987, at 78.

The Child Welfare League, which establishes adoption standards for agencies nationwide, states: "Children in need of adoption have a right to be placed in a family that reflects their

goal and the compelling state interest in all adoption proceedings,¹⁵³ it follows that a placement with a qualified family of the same race or ethnic heritage is preferable if possible.¹⁵⁴ To that end, the statute uses as a starting point an

ethnicity or race." Child Welfare League of America, Standards For Adoption Service (1988), reprinted in Bartholet, *supra* note 2, at 1190. The National Committee For Adoption, a national clearinghouse for adoption information concerning not-for-profit adoption agencies, provides: "Usually, placement of the child should be with a family of a similar racial or ethnic background." FACTBOOK, *supra* note 63, at 124.

Rita Simon, along with Howard Alstein, who has been studying TRA since 1972 by interviewing a group of TRA families and has found that many of the concerns about the dangers to transracially adopted children's identities and feelings about race are unfounded, agrees that adoption by a same-race family is preferable to TRA. Meer, *supra* note 20, at 17. Judith Ashton, a TRA parent of two African-American children, feels that they have adapted well to being part of a white family, but states:

[W]hile there is evidence that transracial adoption can work, this is not to say this [placing Blacks into White homes] is what we should be doing. I absolutely believe that children should be placed in similar ethnic or racial settings, and our first commitment should be to find same-race families for the children who need homes.

Leavy, *supra*, at 82.

Rep. Karyne Conley, the sponsor of the law recently passed in Texas that prohibits the use of race as a consideration in adoptions in Texas acknowledged that "children do better in their own same race and ethnic situations," adding that her bill was designed to help the children who are not being adopted by families of their own race. Clay Robison, *Interracial Adoption Ban Is Targeted; Reversal Measure Wins Tentative OK*, HOUS. CHRON., Apr. 20, 1993, at A22. Senator Howard M. Metzenbaum, D-Ohio, co-author of the proposed "Multiethnic Placement Act of 1993," during his opening statement in a Senate hearing on barriers to adoption on July 15, 1993, stated, "I believe that same race placement is always desirable, if possible and if the prospective parents are appropriate." 139 CONG. REC. S8712 (daily ed. July 14, 1993) (statement of Sen. Metzenbaum). See *supra* notes 145-49 and accompanying text.

The NAACP's statement on the issue was quoted in a recent article: "If there are Black families available and suitable under the criteria of advancing the best interest of the child, Black children should be placed with such Black families [However], if Black families are not available for placement . . . transracial adoption ought to be pursued [sic] as a viable and preferred alternative to keeping such children in foster homes." Thorwald Esbeusen, *Children Need Homes, Not Ethnic Politics*, CRISIS, Nov./Dec. 1992, at 24. Anne Hill, Director of Programs for the National Urban League Inc. stated: "It's in the best interests of all children to be raised in families of their same racial origin . . . African-American children raised by white parents will never really be a part of white culture, yet their own heritage and culture have been denied them. That causes tremendous insecurity and confusion." Raymond & Turner, *supra* note 59, at 144.

153. See *In re R.M.G.*, 454 A.2d 776, 786 (D.C. 1982) (finding that the advancement of a child's best interest is the compelling government interest in adoption considerations). The best interest standard is the traditional test applied in determining child placement. Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 54 (1990). See generally Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 N.D. L. REV. 503 (1984).

154. I believe this is less preferable than a placement with a relative(s) in the child's biological family, if such a family member is willing to adopt and is determined to be a qualified adoptive parent. The biological family preference is itself supported by a strong common law preference to strengthen and preserve the biological family. *In re the Welfare of D.L.*, 486 N.W.2d 375, 379-80 (Minn. 1992).

enunciated order of preference for placement¹⁵⁵ that the agency will use after the agency has fully reviewed all petitions for adoption of the child.¹⁵⁶

The complaints most often leveled against such preference statutes are: (1) that they cause minority children to remain waiting while agencies attempt to find a qualified, same-race family and that the children are often cycled through the foster care system and are denied the immediate permanency that children need;¹⁵⁷ (2) that these statutes are used to further racial division;¹⁵⁸ and (3) that the foster parents' petition to adopt their foster child, usually a white foster family of an African-American child, is thwarted by these statutes. The statutes, when misapplied, cause race to become the overriding factor and operate to destroy the developed bond between the child and the foster family.¹⁵⁹

155. The proposed statute follows the common order of preference used in states that establish a preference in their statutes: (1) member(s) of child's biological family; (2) same-race family; (3) family from a different race. See generally *supra* notes 128-36 (states with same-race preference). The proposed statute does qualify the preference order by requiring that the family from a different race demonstrate an understanding and sensitivity to the child's need for contact with his or her race and development of the child's understanding about his or her racial, ethnic, and cultural background, as well as suspending the same-race placement when foster parents of a different race are attempting to adopt their foster child.

The proposed statute also utilizes a provision from the California statute, CAL. FAM. CODE § 8708(b) (West Supp. 1994), that allows placement of a child of mixed racial background or ethnic heritage with the family that the child shares the most common traits and characteristics. This provision is included to allow placement with a family which the child would appear to be the biological child of the parents. It is important to duplicate the child's biological family so as to facilitate the child's development of a sense of belonging in the family. DOROTHY W. SMITH & LAURIE NEHL'S SHERWEN, *MOTHERS AND THEIR ADOPTED CHILDREN: THE BONDING PROCESS* 101-02 (2d ed. 1988).

156. This is to avoid the judicial shortcut taken by the court in *In re D.L.*, 486 N.W.2d 375, 381 (Minn. 1992). The Minnesota Supreme Court upheld the trial court's practice of reviewing only the petition of the family with the highest statutory preference under the Minnesota statute. The court stated that "[w]hen a presumption exists in favor of one petitioner over another, and there is no reason to believe that the favored petitioner will not prevail, judicial time and litigants' resources can be conserved by a single proceeding." *Id.*

157. See Barholet, *supra* note 2, at 1201; see also Rebecca L. Koch, Note, *Transracial Adoption in Light of the Foster Care Crisis: A Horse of a Different Color*, 10 N.Y.L. SCH. J. HUM. RTS. 147, 153 (1992) (arguing that race-matching policies cause African-American children to wait to be adopted while white families wait to adopt a child, regardless of color).

158. See generally Thomas Sowell, *Adoption Apartheid*, THE CHILDREN'S VOICE, Jan.-Mar. 1993, at 3, reprinted from WASH. TIMES, Nov. 21, 1992, at A15 (comparing same-race matching to apartheid and policies of the "Ku Klux Klan, neo-Nazis, or other such groups").

159. See generally 60 Minutes: *As Simple as Black and White* (CBS Television Broadcast), BURRELLE'S TRANSCRIPTS, vol. XXV, no. 6, Oct. 25, 1992, at 21. The program demonstrated that race as a factor may have become determinative after the implementation of the Minnesota statute. An example of its effect was pointed out, "[In the fall of 1992], under extreme pressure from [adoption placement advocates] . . . Hennepin County reviewed all 120 cases where black children had been placed in white foster homes [foster care also falls under the statute] . . . The majority were removed." *Id.* at 22; see also Raymond & Turner, *supra* note 59, at 140; Ilene Barth, *Another*

To facilitate the placement of children, the statute ensures that once a child's biological parents free him or her for adoption,¹⁶⁰ the agency cannot delay the placement of the child.¹⁶¹ The agency is required to place the child within the highest statutory preference group where a family is available for adoption.¹⁶² When a same-race family is not available, it is essential not to prolong the wait for adoption, since immediate placement serves the best interest of the child.¹⁶³ Early placement and parenting, preferably within the first weeks of life, is advantageous for the child.¹⁶⁴ It allows for continuity of care and reduces the number of traumatic changes that multiple placements cause.¹⁶⁵ Further, the effects on the child of repeated separations are minimized.¹⁶⁶ It has been suggested that any preference for same-race placement which causes delay in the placement of a child is unlawful racial discrimination, violative of the Fourteenth Amendment of the Constitution and

Child Torn From Those Who Love Her, NEWSDAY, Mar. 12, 1989, at 9.

160. A child is free to be adopted when the child's parent(s) relinquishes his or her parental rights over the child. CHRISTINE ADAMEC & WILLIAM L. PIERCE, *THE ENCYCLOPEDIA OF ADOPTION* 244 (1991).

161. If no family is immediately available, recruitment of a family shall continue in accordance with the order of preference. This emphasis on not delaying placement will remove some of the pressure that is currently on social workers in states or agencies with a same-race placement requirement. Radin, *supra* note 17, at 1p.

162. This immediate placement will, of course, have to incorporate a standard "trial period" before the petition for adoption is finalized to allow the placement agency to evaluate the placement during further home-studies. This immediate placement provision will actually increase the number of TRAs and placements in general. Further, it will successfully ensure the best interest of the child by making it preferable to have a same-race placement, without working against the child's best interest by causing the child to wait for placement. If a same-race placement is not available, the need for immediate permanency should trump the same-race preference. See Brophy, *supra* note 1, at 72 (indicating that although matching the racial and ethnic backgrounds of children to their adoptive families is preferable, the number of minority children available for adoption has soared in recent years, which may require a diversion from the preference for same-race placements when they are not available. To do otherwise will force many of these minority children into the already overcrowded foster care system.).

163. CHILD WELFARE LEAGUE OF AMERICA, *STANDARDS FOR ADOPTION SERVICE* 7, 37, 44 (1978).

164. *Id.* at 37. Janet Eustis, Deputy Commissioner of the Massachusetts Department of Social Services indicates that if a child is not placed quickly, the average wait for placement will be two years, though this may be longer for minorities. She indicated that two years is too long due to the developmental needs and vulnerability of children. Richard Jones, Director of the Boston Children's Service Organization added: "If we cannot find an African-American family in a reasonable period of time . . . it is appropriate to place that child in another caring, nurturing family . . ." Radin, *supra* note 17, at 1p (quoting Richard Jones). Rita Simon, Dean of the School of Justice at American University and long-time researcher on the subject of TRA has said that although same-race adoption is a better option than TRA; adoption, whether same-race or transracial, is almost always preferable to long-term placement in foster care or group homes. Evans, *supra* note 56, at b5.

165. See CHILD WELFARE LEAGUE OF AMERICA, *supra* note 163, at 37.

166. *Id.*

Title VI of the 1964 Civil Rights Act.¹⁶⁷ Professor Bartholet is one of the best known and well respected advocates for TRAs. Although she eventually dismissed the notion as unworkable, she has acknowledged some benefits of allowing what she terms a "truly mild preference" for same-race placements.¹⁶⁸

Professor Bartholet notes that white parents may, though unwittingly, harbor racial attitudes that could interfere with their ability to appreciate their African-American child's racial identity.¹⁶⁹ She further explains that such a mild same-race preference may shield children from unnecessary pain and stigma associated with being different, and at the same time, respect and serve the concerns and the interests of the African-American community.¹⁷⁰ Professor Bartholet ultimately dismisses the use of such a preference.¹⁷¹ She is concerned that agencies will misapply the preference, since adoption professionals are extraordinarily committed to making same-race placements and are allowed a high degree of discretion in their placement decisions.¹⁷²

The proposed model statute in this Note creates what can be called a mild or limited same-race preference that will not allow its same-race preference to create delays in placement, preferring instead immediate placement with any available and qualified family. Further, it deals with the possibility of misuse, whether intended or unintended, of the statutory preference. The statute enunciates the specific weight that race may play, and requires the courts to strictly scrutinize the agency's consideration of race when it places a child.¹⁷³ Finally, the statute creates a cause of action that petitioning parents can bring when the agency acts in contravention of the statute with respect to the use of racial background or ethnic heritage in adoption proceedings. The proposed statute requires documentation of the search for families in the various preference groups to supply the court with evidence as to whether the agency followed the mandate of the statute.¹⁷⁴

The establishment of a required Cultural Sensitivity Course will help TRA

167. FAMILY BONDS, *supra* note 15, at 112.

168. *Id.* at 112-15.

169. *Id.*

170. *Id.* at 114.

171. *Id.* at 115.

172. *Id.*

173. See *In re R.M.G.*, 454 A.2d 776, 784-85 (D.C. 1982) (stating that enabling the court to use a strict scrutiny analysis is necessary because any statute containing racial classifications is constitutionally suspect) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967).

174. The proposed statute uses CAL. FAM. CODE § 8708(c) (West Supp. 1994) as a model for this provision.

parents better prepare for the issues that will confront them and their children.¹⁷⁵ These classes will allow parents who are going through the same type of adoption at the same time to interact and to develop networks to assist each other in the future. Agencies should encourage parents who have previously gone through the classes to assist in the discussions in future classes. This would give new adoptive parents the ability to network with parents who have already dealt with many of the issues that they will have to confront in the future.

Such classes and a good faith effort will not change the lack of common racial background and ethnic heritage between the child and the parents. However, sensitizing parents to the needs, questions, and problems the child will face as he or she grows older can go a long way toward compensating for the differences.¹⁷⁶ The completion of these classes can help demonstrate the commitment of potential parents to adopt transracially and to foster racial and ethnic growth and understanding in their child. Moreover, the sensitivity courses may allow parents to realize that they are not ready to adopt transracially, thereby reducing the number of failed placements.¹⁷⁷

To increase the odds that the child will have a chance at adoption by a family of the same-race, the state should make a commitment, which is expressed within the model statute, to develop a minority family recruiting and adoption education project.¹⁷⁸ Although such a project will obviously require a financial commitment, if a same-race placement is indeed the option that is in

175. See Nazario, *supra* note 13. Nazario discusses the problems that five transracially adopted children and their adoptive parents faced as the children grew up. One of the TRA adoptees, now a college student stated, "I don't feel I'm me around black people—they aren't like us [referring to his white roommates]. I resigned myself to not being black. I'm not going to act something I don't want to be. Who is to say I have to be black? It's so trivial." *Id.* at 1. Many TRA children will face these confusing situations. A parent may be able to better understand these situations, or be able to foster better feelings in the child about their own race, if they are able to discuss these issues early in the adoption. *Id.* See *DeWees v. Stevenson*, 779 F. Supp. 25, 28-29 (E.D. Pa. 1991) (holding that the consideration of transracial adoptive parents' sensitivity and attitude about the racial issues and problems they will face is constitutionally permissible in determining the best interest of the child).

176. It has been shown that an adoptive family that is inadequately prepared for the child's behavior and needs has a higher level of stress surrounding the adoption, as well as more incidents of disruption of the adoption. More successful placements are found when there is group preparation that promotes networks among families who are or have experienced the same kind of placement. This network will often be available to assist and advise the parents long after the relationship with the social worker has terminated. RICHARD P. BARTH & MARIANNE BERRY, *ADOPTION AND DISRUPTION—RATES, RISKS, AND RESPONSES* 169 (1988).

177. *Id.*

178. This will answer the NABSW's complaint that agencies are not trying hard enough to find qualified same-race families, thereby causing an apparent necessity for TRAs. Donna Britt, *Transracial Adoption—A Special Way of Showing Love*, MIAMI HERALD, Nov. 7, 1993, at 3M.

the children's best interest, the states must make this commitment.¹⁷⁹ Pilot and privately run recruitment projects have shown that recruitment is an effective way to locate qualified adoptive parents.¹⁸⁰ If a state project can replicate the successes of the above mentioned projects, it will help alleviate the number of minority children waiting for placement. The ultimate goal, enunciated in the model statute, is to eventually develop a pool of qualified minority families to adopt same-race adoptable children. Agencies have been accused in the past of rejecting minority families at a much higher rate than white families.¹⁸¹ The basis for some of these decisions appears questionable.¹⁸² This problem is addressed within the proposed statute. Families that are rejected because of an agency's improper use of racial background or ethnic heritage as a factor in consideration of an adoptive

179. Such a program could eventually save the state money because it would help reduce the number of children who are waiting for placement in the foster care system, largely minority, who tend to languish within the system on average for a longer period of time than do white children. Noting that early experiences of multiple foster-home placements can severely effect a child's development of a sense of bonding and trust, Morris Jeff, President of the NABSW, states that "if this were a crisis in the white community [white children not being placed], all resources would be mobilized to make sure those children were placed. They wouldn't take the easy out of sending them to the black community." Radin, *supra* note 17, at 1p.

180. See generally Bartholet, *supra* note 2, at 1196-97. The One Church/One Child program was started in Chicago by Father George Clements and encourages each African-American church to recruit from its membership at least one family to adopt a child. The program has placed hundreds of children and is now active in 17 states. *Id.* See also Leavy, *supra* note 152, at 82. Homes For Black Children, a private Detroit agency, is able to place African-American children in African-American homes at such a higher and quicker rate than government agencies, that one writer questioned how hard the public agencies were trying. *Id.* See also William Raspberry, *Hurdles Slow Adoption of Black Children*, WASH. POST, Dec. 29, 1990, at 36. See generally NABSW Update, *supra* note 41, at 5-6; Gilles & Kroll, *supra* note 50; *supra* notes 50-55 and accompanying text.

181. A sampling of African-American families showed that between forty and fifty percent would consider adoption. One study indicated that of 800 African-American families that applied for adoption, only two were approved (representing a .0025 acceptance rate), as compared to the national average of one of ten families being approved. SIMON & ALTSTEIN, *supra* note 1, at 9.

182. See Page, *supra* note 14, at B13. In a recent case, a California advertisement requested African-American family applications for adoption. Of the 2000 responses to this advertisement by African-American families, only 15 made it through the application process. The reasons given by the social workers often were highly questionable: "No pictures on the wall . . . Home lacked stimulation . . . Woman got up too early to go to work . . . Family wasn't black enough . . . Man defended his wife too much." *Id.* See also Mary A. Jackson, *In Search of Home, Program Helps Get Black Boys Adopted*, CHI. SUN-TIMES, April 17, 1994, at 20 (discussing the rejection of an African-American school teacher's attempt to adopt a child; the caseworker noted in her report that the applicant's weight indicated an emotional problem and that the plastic covers on the applicants living-room furniture indicated that she was too rigid).

Critics complain that social workers are searching for the Huxtables from *The Cosby Show* when the realities of most families of any color tend to be less glamorous. Page, *supra* note 14, at B13. When all of the restrictive requirements are tempered, the fact, contrary to the myth, is that African-Americans adopt at a rate four and a half times the rate of whites. *Id.*

placement will have a cause of action against the agency for equitable relief.¹⁸³ This provision will place agencies on notice that they must fairly consider racial background and ethnic heritage in the evaluation of competing adoption petitions and must document their consideration appropriately.

Subsidy assistance programs that assist families who adopt hard-to-place children are ancillary provisions that are in place in most states and should be further utilized to help increase the pool of prospective adoptive parents.¹⁸⁴ There has been some abuse of this type of program.¹⁸⁵ However, subsidies can help potential families, often minority families, who would be deemed suitable adoptive families, based upon every other factor, if their financial position was slightly stronger.¹⁸⁶ Due to their wide use and broad focus, a subsidy provision does not need to be incorporated into this proposed statute; however, states can assist their recruitment process by increasing these subsidies

183. The relief available will be a temporary restraining order, maintaining the current placement of the child, and the right to an appeal of the decision made by the agency that will be examined under strict scrutiny.

184. See generally Barthelet, *supra* note 2, at 1198-99. Although the states differ in the amount of subsidy, the language of the statutes is very similar. Indiana's provision, for example, states in pertinent part:

31-3-3-1 Aid for Adoption of Children—Definition of "Hard to Place"

- (a) Aid under this chapter shall be known as Aid for Adoption of Children.
- (b) For the purpose of this chapter, a "hard to place" child is a child who is disadvantaged because of ethnic background, race, color, language, physical, mental, or medical handicaps, age or because he or she is a member of a sibling group which should be placed in the same home.

31-3-3-2 Payment and extent

- (a) When a petition for adoption has been filed seeking aid and the aid is ordered by the court, the county department of welfare . . . may be ordered to pay either or both of the following subsidies to the adoptive parents . . . :
 - (1) For the support of the child or children, not to exceed seventy-five percent (75%) of the monthly cost of care of the child
 - (2) For the medical [costs] . . . of the child which existed before the adoption.
- (b) The subsidies shall continue until the child reaches eighteen (18) years of age, becomes emancipated, or dies, or until further order of court, whichever occurs first As a condition for continuation of the subsidies, the court shall require the adopting parents to file a sworn report at least once each year as to the location, financial condition of the parents, and condition of the child On the basis of the report or information the subsidy may be continued, increased, reduced, or discontinued by the court.

IND. CODE ANN. §§ 31-3-3-1 & 31-3-3-2 (Burns 1987).

185. See Barthelet, *supra* note 2, at 1198-99.

186. *Id.* at 1198. The federal government encourages these subsidy programs by matching state funds. The author notes that this program began with the passage of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. §§ 670-79a (1988)). *Id.*

and making their availability known to prospective adoptive parents during recruitment.

As for the charge that same-race preferences further racial divisiveness, one must remember that the best interest of the child is the paramount issue.¹⁸⁷ It is often easier for a child to merge into a family that looks like the child and with whom the child shares a common heritage.¹⁸⁸ Further, parents of the same racial background or ethnic heritage are better equipped to teach a child the requisite social coping skills to understand and deal with society from the perspective of that racial or ethnic group. To accomplish these goals, the use of racial classifications is simply to further the interest of the child and not a "racist" or "divisive" agenda.¹⁸⁹

Well-meaning people, attempting to encourage TRAs, are often seeking to help break down racial lines. Perhaps they hope to create more families that are symbols that attest to the proposition that different races can live together in harmony. Unfortunately, their efforts may not only work against the best interest of these children, but may use these children to fight the social ill of racism, that the children had no role in creating.¹⁹⁰

To insure that a same-race preference does not thwart a foster family's attempt to adopt their foster child with whom they have bonded, the statute includes a provision that expressly allows for the consideration of these foster

187. See *supra* note 153 and accompanying text.

188. SMITH & SHERWEN, *supra* note 155, at 101-02. The authors note that although common-heritage placements are easier for the child, the issue of race is transcended in many cases in favor of the fundamental need for a family. *Id.* See also Nazario, *supra* note 13. An interview with a transracially adopted child demonstrates the pain that can be caused by looking different from his or her adoptive parents. Sarah, an African-American adopted transracially, said she felt like a black person stuck with a white person's ways. She felt alienated by her African-American classmates in school. She indicated that she became obsessed, believing something was wrong with her. "I felt like a big bright spotlight was on me all the time because I had white parents." *Id.* She only later found comfort by rebelling against her parents and moving in with her African-American boyfriend. She stated that she disliked seeing white parents with an African-American child. "I know they love the child to death But when I think of the kid I say: What a terrible thing." *Id.* Although this is an extreme example of problems that a TRA can cause, it demonstrates that emotional harm to children adopted transracially can be a reality.

189. See generally Evans, *supra* note 56, at b5 (dealing with many of the coping problems faced by transracially adopted children as they try to understand, explain, and live with the fact that they are from a different culture than their family).

190. This is not to say that we should not encourage TRA when a placement cannot be made with a qualified family member of the child or a same-race family, only that we should not bypass those placements that seem to be in the best interest of the child if they are available.

parents' application for adoption.¹⁹¹ Furthermore, the proposed statute removes the same-race preference order in these foster family situations.¹⁹² Permanency should be valued above same-race placement, especially in a situation where the child has bonded and the family is a qualified adoptive family.¹⁹³

Agencies should not use race to tear a child away from a happy and loving environment once those bonds are developed.¹⁹⁴ The ultimate adoption by a family other than a child's foster family is one factor shown to cause adoption disruption and dissolution.¹⁹⁵ The model statute's provision removes the same-race preference when a foster family is attempting to adopt their foster child transracially, recognizing the need for stability. The model statute further allows such bonding to act as a decisive factor among equivalent competing petitioning families. One of the most serious psychological and developmental hazards that children face within the child welfare system is the problem of

191. This provision uses aspects of the California provision. See *supra* notes 137-39 and accompanying text. See generally Anna Quindlen, *Love Has to Count in Complex Formula That Decides Adoption*, CHI. TRIB., July 27, 1994, at N21; Bill Mandel, *Foster Parents Persevere in Interracial Adoption*, HOUS. CHRON., May 1, 1994, at A7 (addressing the emotional and legal battles of white foster parents faced with the possibility of losing their African-American foster children after they decided to adopt the child largely, if not wholly, on the basis of race).

192. This part of the provision is framed after the Florida provision. See *supra* notes 140-41.

193. It may be contended that agencies, to avoid the possibility of white foster parents attempting to adopt an African-American or other minority foster child, will not place these children in white foster homes from the start. However, this would not be a realistic option because, at the present time, there obviously are not enough African-American and minority foster families to avoid placement in white homes. Furthermore, the number of foster families that eventually apply for the adoption of their foster child who is of a different race is quite low compared to the number of white foster families in the country. Finally, if agencies do not want to place minority children in foster homes, they may attempt to recruit minority foster parents. Ilene Barth, *Another Child Torn from Those Who Love Her*, NEWSDAY, Mar. 12, 1989, at 9.

194. *In re Adoption of a Minor*, 228 F.2d 446, 448 (D.C. 1955). Although the adoptive parent was the African-American husband of the white child's natural mother, the principle of maintaining a developed and loving atmosphere is the same. Courts have recognized that psychological bonding is an important interest to protect. See also *McLaughlin v. Pemsley*, 693 F. Supp. 318, 331-32 (E.D. Pa. 1988) (holding that an African-American child should be returned to its white foster family of two years, instead of being removed to be placed with another foster family that was African-American, because to do otherwise would cause irreparable harm to the child). Peter Forsythe, Director of the Edna McConnell Clark Foundation, argues that the separation-attachment literature and the TRA literature both clearly show that it is a dangerous practice to move children from foster families where they are emotionally established. Barth, *supra* note 159, at 9.

195. The term "adoption disruption" is used to describe the termination of an adoptive placement when the would-be adoptive parents return the child to the agency. "Dissolution" is used to indicate the termination of a finalized adoption. The detriment of removal from a foster family with which a child has bonded is further illustrated by a finding that a child who has had multiple placements is more likely to have his or her placement disrupted or dissolved. FACTBOOK, *supra* note 63, at 196.

attachment and separation.¹⁹⁶ To avoid the risk of severe and possibly permanent emotional damage and to ensure the child's developmental needs are met, agencies should not move a child from a known successful placement to an unknown one, even one that is potentially better.¹⁹⁷

Some people fear that the agencies will, upon learning of the foster parents' petition to adopt a child of a different race, use some other pretense for removing the child from the foster parents' home. As seen in *In re R.M.G.*, and required in the model statute, the agency must document and prove the other causes.¹⁹⁸ If the agency's removal is based solely or largely on the different race of the foster parents, the agency is using race as a factor beyond its constitutional limits.¹⁹⁹

Misunderstanding and institutional racism may cause misapplication of this proposed statute. Thus, the statute contains certain safeguards to insure proper and constitutional application. First, the statute mandates that, as in *In re R.M.G.*, a strict scrutiny standard applies.²⁰⁰ This will put agencies on further notice that the court will evaluate their decisions to deny TRAs to a far greater extent than in the past. It will also notify trial judges that they risk a higher court's reversal if they pay total deference to the agencies' decisions without examining the record and analyzing the weight the agency has given to race in making the placement decision.²⁰¹

Finally, the proposed statute also requires the creation of a statutory commentary. The commentary is to be distributed to state adoption agencies, to courts that deal with adoption, and to the public. The purpose is to explain in a detailed but simplified manner, the way in which the statute is to operate. The commentary will allow judges who do not deal with adoption on a regular basis to have a practical reference as to the role that race should play in the adoption equation. Most importantly, the commentary will further educate the public generally, and potential adoptive parents specifically, about the adoption

196. PAUL D. STEINHUER, *THE LEAST DETRIMENTAL ALTERNATIVE: A SYSTEMATIC GUIDE TO CASE PLANNING AND DECISION MAKING FOR CHILDREN IN CARE* 13 (1991).

197. *Id.* at 30-31. Research indicates that when a child has early experiences that prevent the opportunity to form a secure attachment-relationship with one or a very few caregivers, this experience leads to seriously impaired development. LAURA E. BERK, *CHILD DEVELOPMENT* 420 (2d ed. 1991).

198. *In re R.M.G.*, 454 A.2d 776, 794 (D.C. 1982).

199. See generally *supra* notes 69-127 and accompanying text.

200. *In re R.M.G.*, 454 A.2d at 784-94.

201. This analysis follows the analysis from *R.M.G.*, see *supra* note 120-123 and accompanying text.

process and the role of race as a factor.²⁰²

VII. CONCLUSION

Since the beginning of the battle over the practice of TRA, the proponents and opponents of TRA have been entrenched in their positions, and the result is that few TRAs are made today. Further, as a result of this battle, those written and unwritten laws and policies that deal with TRA lend little or no guidance to the agencies in such considerations. The result is a record number of minority children stuck in the foster care system of our country. The problem has been compounded because adoption agencies, in their desire to make same-race placements, have overlooked the availability of making transracial placements.

The lack of statutory guidance has allowed the agencies to continue to overlook transracial placements, and arguably allowed agencies to often use race as the sole determinative factor in contravention of the United States Constitution. The time has come for a statute to deal with the issue, specifically enunciating the role race may play and the ways in which we can reduce the number of children waiting for a permanent home and a family to care for them.

The model statute attempts to compromise the positions of the parties entrenched on both sides of the TRA issue. This compromise requires that the adoption agencies operate in the best interest of the children they serve. The statute is specific about the role that race may play in placement considerations. The statute recognizes that same-race placements are the best possible placement, yet refuses to raise race to the point where it causes a child to wait for placement. The history over the last twenty-two years shows that neither side in this battle can claim complete victory and probably will never be able to do so. Therefore, such a compromise must be adopted to serve the best interest of the minority children who await adoption. If a compromise is not reached, these children's futures will be the casualties of the continued battle.

Allen C. Platt III

202. See GILLES & KROLL, *supra* note 50; see also *supra* notes 50-55 and accompanying text (indicating that educating potential adoptive parents about the process increases adoptions).