

**THE MULTIETHNIC PLACEMENT ACT AND THE  
TROUBLING PERSISTENCE OF RACE MATCHING**  
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I. INTRODUCTION

Prior to the passage of the Multiethnic Placement Act (MEPA) in 1994,<sup>1</sup> no federal statute restricted state officials' reliance on race in the placement of children for adoption or foster care.<sup>2</sup> Nor had federal courts interpreted the equal protection clause to prohibit social workers' consideration of race.<sup>3</sup>

Social work policy and practice was animated by the sense that children belonged with parents from their own racial group.<sup>4</sup> Some jurisdictions created a formal presumption in favor of same race placement.<sup>5</sup> Others simply accorded social workers the discretion to take

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<sup>1</sup> Pub. L. No. 103-382, 108 Stat. 4056 (codified as amended at 42 U.S.C. § 622 (2006)). See generally JOAN HEIFETZ HOLLINGER & THE AM. BAR ASS'N CTR. ON CHILDREN & THE LAW, NAT'L RES. CTR. ON LEGAL & COURT ISSUES, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996 (1998), available at <http://www.acf.hhs.gov/programs/cb/pubs/mepa94/index.htm> [hereinafter A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994].

<sup>2</sup> See SUSAN LIVINGSTON SMITH ET AL., THE EVAN B. DONALDSON ADOPTION INSTITUTE, FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE 12–14 (2008), available at <http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf> [hereinafter FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN].

<sup>3</sup> See, e.g., Douglas R. Esten, Comment, *Transracial Adoption and The Multiethnic Placement Act of 1994*, 68 TEMP. L. REV. 1941, 1960 n.136 (1995) (noting that adoption placements based on race would seem to violate the Equal Protection Clause, but listing federal cases where the constitutional provision was not violated).

<sup>4</sup> See FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN, *supra* note 2, at 13.

<sup>5</sup> *Id.* at 13–14; see Mary E. Hansen & Daniel Pollack, *Transracial Adoption of Black Children: An Economic Analysis* 5 (Berkeley Elec. Press, Working Paper No. 1942, 2007), available at <http://law.bepress.com/expresso/eps/1942> (“In the early 1980s at least six states [Arizona, Colorado, Oklahoma, Pennsylvania, South Dakota, and Washington] still permitted race to be a relevant factor in adoption . . . . These states believed that race was

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account of race, which many did.<sup>6</sup> The emphasis on racial commonality was one expression of the more general assumption that children should be placed in a family as similar as possible to the biological family into which the child was born.<sup>7</sup>

MEPA was Congress' response to criticism that the widespread preference for placing black children with black parents—a practice known as race matching—had exacerbated the disproportionate representation of black children among those awaiting adoption from foster care.<sup>8</sup> Critics of race matching contended that social workers committed to the practice would decline to place a child across racial lines even if it meant the child would remain in foster care without a permanent family.<sup>9</sup> In some cases, white foster parents with whom a black child had lived were denied the opportunity to adopt the child.<sup>10</sup>

As originally enacted, MEPA prohibited officials from delaying or denying the placement of a child “solely on the basis of race.”<sup>11</sup> This

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important enough in adoptive placement that the race of at least one part of the adoption triad (child, birth parents, and adoptive parents) *must* be included in the petition for adoption or reported as part of the finding in a court-ordered or statute-mandated investigation.”) (emphasis added) (citations omitted).

<sup>6</sup> See Hansen & Pollack, *supra* note 5, at 5.

<sup>7</sup> See, e.g., ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 93 (1993); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1187 (1991). It is important to recognize that at this point in history, not all states even allowed persons of different races to marry. See *Loving v. Virginia*, 388 U.S. 1, 6 (1967). Not until the *Loving* decision were anti-miscegenation laws struck down. See *id.* at 12. Therefore, a policy of placing minority children with white parents would have been progressive at best, and shockingly radical in some parts of the country.

<sup>8</sup> See, e.g., MADELYN FREUNDLICH, THE EVAN B. DONALDSON ADOPTION INSTITUTE, THE FUTURE OF ADOPTION FOR CHILDREN IN FOSTER CARE: DEMOGRAPHICS IN A CHANGING SOCIO-POLITICAL ENVIRONMENT (1998) (stating that by 1994, there were nearly half a million children in foster care), available at <http://www.adoptioninstitute.org/policy/polfos.html>. Black children waited longer than children of other races awaiting adoption. See Hansen & Pollack, *supra* note 5, at 17–18. See Bartholet, *supra* note 7, at 1186–87, for a discussion about how race matching works.

<sup>9</sup> See, e.g., Bartholet, *supra* note 7, at 1193–94.

<sup>10</sup> See, e.g., Cindi Andrews, *Race Obstructed Adoptions: U.S. Civil Rights Report Savages County, State Practices*, CINCINNATI ENQUIRER, October 26, 2003, at A1, A18.

<sup>11</sup> Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (1994) (codified at 42 U.S.C. § 5115a(a)(1)(A)–(B) (1994), *repealed by* Removal of Barriers to  
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language permitted child placement decisions in which race was one factor among many, ironically making MEPA the first federal statute to condone race matching. After a public outcry, Congress amended MEPA in 1996, deleting the “solely” language.<sup>12</sup>

Although MEPA has been in effect for more than a decade, it remains controversial.<sup>13</sup> Some commentators think the law goes too far and that the

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Interethnic Adoption Act of 1996, Pub. L. No. 104-188, 110 Stat. 1904 (codified at 42 U.S.C. § 622 (2006)). As originally enacted, MEPA stated:

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

*Id.*

The statute also stated that an agency “may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of a child.” Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (1994) (codified at 42 U.S.C. § 5115a(a)(2) (1994)), *repealed by* Removal of Barriers to Interethnic Adoption Act of 1996, Pub. L. No. 104-188, 110 Stat. 1904 (codified at 42 U.S.C. § 622 (2006)).

<sup>12</sup> *Compare id.* As amended, the relevant portion of the statute provides that no agency receiving federal funds may “(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.” Removal of Barriers to Interethnic Adoption Act of 1996, 42 U.S.C. § 622 (2006).

<sup>13</sup> *See, e.g.,* Elizabeth Bartholet, *Cultural Stereotypes Can and Do Die: It’s Time to Move on with Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY L. 315, 315 (2006). The law has clearly had some effect on the outcomes of adoptive placements from foster care: the number of racial minority children adopted transracially has increased. Hansen & Pollack, *supra* note at 5, at 15. Still, children of color constitute a disproportionate share of those children awaiting adoption from foster care and on average wait longer to be adopted than do white children. *Id.* at 17. However, one 2007 study found that the proportion of African American children who were adopted transracially increased between 2001 and 2003. *Id.* at 26.

1996 Amendment should be repealed, leaving social workers the leeway to consider race in their placement decisions.<sup>14</sup> Others, citing a lack of federal enforcement, think the law has not been pushed far enough, and that more vigorous enforcement is needed to ferret out covert forms of race matching.<sup>15</sup>

In this article, I argue for an expansive interpretation of MEPA's prohibition of race matching. I examine two race-related practices that even some opponents of race matching might regard as justifiable: social workers' consideration of a family's preference to adopt a child of a particular race and social workers' assessments of the cultural competency of families seeking to adopt racial minority children. These practices figured prominently in enforcement actions undertaken by the Office of Civil Rights of the Department of Health and Human Services (the federal agency charged with enforcing MEPA) in South Carolina and Ohio. The South Carolina case focused on social workers' consideration of the racial preferences of prospective adoptive parents.<sup>16</sup> The Ohio case involved social workers' assessments of prospective parents' cultural competency—in other words, the parents' willingness and ability to meet the “special needs” of black children.<sup>17</sup> In both cases, state adoption agencies were

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<sup>14</sup> See FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN, *supra* note 2, at 44. In May 2008, the Evan B. Donaldson Adoption Institute issued a controversial report in which it reviewed a number of research studies and concluded that children in transracial adoptions face special challenges and might be better served by same-race matching in adoptions. See *generally id.* The Donaldson report stated that MEPA has gone too far and that “[f]ederal law must strike an appropriate balance between the prevention of discriminatory conduct and the rational consideration of a child's racial/ethnic identity needs.” *Id.* at 44.

<sup>15</sup> See Randall Kennedy, *Interracial Adoption: Is the Multiethnic Placement Act Flawed?*, 81 A.B.A. J. 44 (April 1995). After the initial passage of MEPA in 1994, Kennedy wrote “our government should reject any policy that engages in racial steering on the basis of a hunch that certain people, because of their race, will know better than others how to raise a child.” *Id.* Two other researchers concluded after comparing transracial adoptions pre-MEPA and post-MEPA that “greater emphasis on transracial placement is warranted and more vigorous enforcement of the anti-discrimination law in child welfare would result in gains for Black children.” Hansen & Pollack, *supra* note 5, at 4.

<sup>16</sup> Letter from Wade F. Horn, Assistant Sec'y for Children & Families, Dep't of Health & Human Servs., to Kim S. Aydlette, State Dir., S.C. Dep't of Soc. Servs. (Feb. 24, 2006), at 2, *available at* <http://www.law.harvard.edu/faculty/bartholet/mepaSCsignedpenaltyletter.pdf>.

<sup>17</sup> See Letter from Lisa M. Simeone, Reg'l Manager, Office for Civil Rights, Dep't of Health & Human Servs., to Suzanne A. Burke, Dir., Hamilton County of Job & Family  
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assessed significant financial penalties for violating MEPA.<sup>18</sup> This article explains why these practices, which might seem innocuous or even desirable, are in many cases unjustifiable and should be viewed as violations of MEPA.

Parts II and III discuss the South Carolina and Ohio cases, respectively, and explain why both practices should be sharply curtailed. Part IV examines some of the underlying intuitions that animate support for race matching, sometimes even among its critics.

## II. THE SOUTH CAROLINA CASE AND PARENTAL PREFERENCES

### A. *The Preference Policy*

In South Carolina, state adoption agency officials typically asked prospective adoptive parents about their preferences with respect to the child they hoped to adopt.<sup>19</sup> Among the many preferences elicited by state adoption agencies were preferences related to race.<sup>20</sup> Parents were asked to fill out a “Child Factor Checklist,” identifying seventy-eight child traits—such as depression, asthma, AIDS, and race—and indicate which traits they would accept in an adopted child.<sup>21</sup> Under race, parents were asked whether they would “accept children who are Black, White, Black/White, or Other.”<sup>22</sup> As the Department of Health and Human Services stated in its enforcement letter, the “classification of racial preference is required by the state through state-created intake forms.”<sup>23</sup> The data from the checklist was then entered into a statewide database for use by social workers and

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Servs. and Tom Hayes, Dir., Ohio Dep’t of Job & Family Servs. (Oct. 20, 2003), at 7–8, 10, 20, 39, *available at* [http://www.law.harvard.edu/faculty/bartholet/HHS\\_OCR.pdf](http://www.law.harvard.edu/faculty/bartholet/HHS_OCR.pdf).

<sup>18</sup> THE EVAN B. DONALDSON ADOPTION INSTITUTE, FINDING PERMANENCY FOR AFRICAN AMERICAN CHILDREN IN THE CHILD WELFARE SYSTEM: IMPLICATIONS OF MEPA/IEPA 35 (2008), *available at* <http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf> (imposing \$1.8 million in penalties in the Ohio case and \$107,000 in the South Carolina case).

<sup>19</sup> Letter from Roosevelt Freeman, Reg’l Manager, Office for Civil Rights, Dep’t of Health & Human Servs. to Kim S. Aydlette, State Dir., S.C. Dep’t of Soc. Servs. (Oct. 31, 2005), at 10, *available at* <http://www.hhs.gov/ocr/civilrights/activities/examples/Adoption%20Foster%20Care/0100438lof.pdf>.

<sup>20</sup> See Letter from Wade F. Horn to Kim S. Aydlette, *supra* note 16, at 2 (South Carolina); Letter from Lisa M. Simeone to Suzanne A. Burke & Tom Hayes, *supra* note 17, at 43 (Ohio).

<sup>21</sup> Letter from Roosevelt Freeman to Kim S. Aydlette, *supra* note 19, at 10.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

adoption specialists.<sup>24</sup> When adoption specialists are charged with finding a home for a new child, they would use the computer program to match the child with the preferences of the prospective parents.<sup>25</sup> One of the child traits that could have caused a potential parent to not be listed as a match was the race of the child.

Frequently, specialists would tweak potential parents' stated criteria to enlarge the pool of potential matches.<sup>26</sup> For example, if a twenty-eight month-old child came into the system, the social worker might also run a search for parents willing to adopt a child between twelve and twenty-four months old, and then ask the potential parents whether they would consider a child who was four months older than the listed preferred age.<sup>27</sup> This was a common practice.<sup>28</sup> However, "[n]early all [a]doption [s]pecialists said they would not check multiple races of a child or change the child's race in order to generate more prospective adoptive parents."<sup>29</sup> Some social workers said they believed that parents' attitudes toward race were "less likely to change."<sup>30</sup> The social workers reasoned that although a couple who expressed a preference for an infant might have been willing to accept a toddler, a couple who said they wanted a white child would never accept a black one.<sup>31</sup>

### *B. Justifications*

It is easy to see how the state's preference policy might be justified as distinguishable from the sort of race matching MEPA was intended to eliminate. MEPA requires that the state not "delay or deny the placement of a child . . . on the basis of race."<sup>32</sup> South Carolina agency officials could reasonably argue that by deferring to parental preferences, they were not delaying or denying placement of children on the basis of race; they were attempting to expedite the placement of children.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 11.

<sup>26</sup> *Id.* at 12.

<sup>27</sup> *See id.* (providing a similar example of altering the ages of the child). Searching for parents who stated a preference for a twelve to twenty-four month-old child would substantially enlarge the pool because most prospective adoptive parents preferred younger children.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

<sup>32</sup> 42 U.S.C. § 1996b(1)(B) (2006).

One might think a big part of the problem with race matching is that the judgment of the state trumps the desires of parents.<sup>33</sup> A stringent race matching policy, for example, could preclude prospective parents from adopting across racial lines, no matter how much they wanted to, and no matter how much a child would have benefited had the prospective parents been permitted to do so. South Carolina's policy, in contrast, did not override parental preferences. Rather, it was ostensibly intended to facilitate them. Not only did the policy help to give parents what they wanted, but also it aimed to give children what they needed. In defending the policy, social workers noted the obvious point that it "may not be in the child's best interest to remain with or be placed with a family that has stated their preference is another race."<sup>34</sup> South Carolina's preference policy might be justified as a means of avoiding such an unfortunate outcome.

### C. Race Matching by Proxy

Although deferring to adoptive parents' racial preferences should not be flatly prohibited,<sup>35</sup> South Carolina's practices should be viewed as a violation of MEPA. There are at least two problems with the procedures in South Carolina. First, there is reason to conclude the state social workers intentionally used the preference policy as a covert form of race matching. They accorded racial preferences deference precisely because they knew that doing so would result in monoracial families, which the social workers wanted to create.<sup>36</sup> Additionally, they did so notwithstanding the fact that according weight to racial preferences dramatically limited the pool of parents available to black children in particular.<sup>37</sup>

The conclusion that South Carolina intended the preference policy to be a covert form of race matching is bolstered by the fact that in its investigation, HHS also found evidence of more straightforward forms of race matching. Consider the case of Baby Joseph. George and Theola M. were a black couple, married for more than thirty years, who had raised three children of their own and fostered nearly twenty other children.<sup>38</sup>

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<sup>33</sup> See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences through Discriminatory State Action*, 107 YALE L.J. 875, 916–18 (1998).

<sup>34</sup> Letter from Roosevelt Freeman to Kim S. Aydlette, *supra* note 19, at 14.

<sup>35</sup> See, e.g., Bartholet, *supra* note 7, at 1184 (arguing that, although policy-makers seem to agree, actual adoption policy varies greatly from agency to agency).

<sup>36</sup> See Letter from Roosevelt Freeman to Kim S. Aydlette, *supra* note 19, at 13–16.

<sup>37</sup> *Id.* at 15.

<sup>38</sup> *Id.* at 33.

They “also adopted two daughters in 1999.”<sup>39</sup> In November 2000, South Carolina adoption specialists placed a newborn Hispanic boy, Joseph, with the M’s.<sup>40</sup> In December, soon after accepting the infant, the M’s informed the state that they wanted to permanently adopt Joseph.<sup>41</sup> The state adoption specialist submitted Joseph’s case to the state database, which returned twenty-nine possible parental matches.<sup>42</sup> However, “[n]one of the matches . . . [had] historically Hispanic surnames.”<sup>43</sup> The adoption specialist then sent a notice to other regions within the state specifying that the specialist was “seeking appropriate adoptive parents who closely match the following: Hispanic/Latin background or willingness to allow [Joseph] to pursue his cultural heritage.”<sup>44</sup> Meanwhile, the M’s submitted the required application to adopt Joseph.<sup>45</sup> Records of foster care meetings in 2001 reveal that the foster care worker noted, “Mr. and Mrs. M and their family [have] become very attached to [Joseph] and hope to adopt him” and noted a “strong bond between the baby and the M family.”<sup>46</sup> Around the same time, state adoption officials met to determine a permanent placement for Joseph and selected a family with a “historically Hispanic surname.”<sup>47</sup> The record noted “that the father was ‘born and raised in Mexico.’”<sup>48</sup> The M’s threatened legal action and appealed the state agency’s decision.<sup>49</sup> On appeal, a committee found that “Mr. and Mrs. M ‘must be given first consideration as adoptive parents.’”<sup>50</sup> Nearly two years after he was placed with the M’s, the M’s were allowed to adopt baby Joseph.<sup>51</sup> Upon review, the Office of Civil Rights found that South Carolina delayed the M’s adoption of Joseph on the basis of race.<sup>52</sup>

The second problem with the South Carolina approach is that even if state officials were not intentionally attempting to race match, their

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 34.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 35.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 36.

<sup>49</sup> *Id.* at 38–39.

<sup>50</sup> *Id.* at 39.

<sup>51</sup> *Id.* at 40.

<sup>52</sup> *Id.* at 41.

treatment of parental preferences unquestionably reflected the view that the desire for a child of one's own race is natural and normal, whereas a desire for a child of a different race is suspect.<sup>53</sup> The assumption that parents' racial preferences are always more deeply held and less malleable than other preferences is almost certainly incorrect.<sup>54</sup> Some couples may have adamantly opposed adopting a child of a different race and would not have agreed to a transracial placement under any circumstances. But were there not other likely parents who said they would prefer to adopt a child of their own race who in fact did not have very strong views about the matter or perhaps had not given the issue much thought and would not have expressed any preference had the social workers not asked? Some prospective parents might have expressed a preference for a same race child because they suspected, correctly, that the adoption process would become a lot more cumbersome had they expressed an openness to a transracial placement.<sup>55</sup> Others may have answered that they would prefer to adopt a child of their own race because that seemed to be the "right" answer, what friends, family, and the social worker would expect one to say.

South Carolina's practice of deferring to racial preferences, as it deferred to no other type of preference,+ completely ignored the possibility that some people who state preferences for a same race child may have weak or malleable preferences that need not be met for them to accept a child. Social workers would regularly query parents who wanted a healthy young child; for example, whether they would agree to adopt a child with

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<sup>53</sup> See, e.g., Banks, *supra* note 33, at 954 ("However rational one deems adoptive parents' preferences, the racial conditions to which they respond are a matter of social policy, not individual choice . . ."); see also ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS 251 (Sally Haslanger & Charlotte Witt eds., 2005) (employing anecdotal evidence "to confront some of the race-based expectations we [society] collectively hold about which people belong together in a family").

<sup>54</sup> See Banks, *supra* note 33, at 954.

<sup>55</sup> See Letter from Roosevelt Freeman to Kim S. Aydlette, *supra* note 19, at 22 ("[T]he extra level of scrutiny in the transracial assessment process deterred families from adopting transracially."). South Carolina "policy directs persons conducting a family assessment to scrutinize families that wish to adopt transracially." *Id.* "The agency's manual requires a discussion of 'issues related to cultural background, acceptance of child in community and by other family members.'" *Id.* (quoting S.C. DEPT. OF SOC. SERV. CHILDREN, FAMILY & ADULT SERV. POL. & PROCEDURE MANUAL 495 (1990)).

some physical health issues or who was slightly older.<sup>56</sup> Indeed, many social workers no doubt saw it as part of their mission to help prospective adoptive families broaden their understanding of the type of child they could parent, so that as many of the available children as possible could be placed with an adoptive family. Yet, many social workers would not dare ask anyone to reconsider their racial preference.<sup>57</sup> They assumed that racial preferences were paramount and unchanging.<sup>58</sup>

From this perspective, the South Carolina practice seems less a passive means of deferring to parents' racial preferences than a policy that actively rigidifies them, creating barriers to the adoption of minority children that might not otherwise have existed. Once preferences were stated, state officials assumed no one would change their racial preferences, even as social workers assumed that the other preferences—age and sex, for example—might be subject to change, as couples reconsidered their options in light of the available children.<sup>59</sup> The Office of Civil Rights was correct to be troubled that the state agency upheld only racial preferences so stringently, and was correct to think that the agency was using parental preferences as a pretext for race matching.<sup>60</sup>

What sort of policy could the state have implemented regarding racial preferences? The state need not go to the extreme of never deferring to a parent's racial preference or completely ignoring such preferences in their intake process. However, it would have been sensible for the state to treat racial preferences similar to the dozens of other preferences that are elicited from parents but are not relied on very much in the actual matching process. Social workers could have assumed race is no more important than, for example, eye or hair color, and left it to the parents to determine if it was. This approach may have sacrificed some administrative ease. Perhaps many parents would insist, contrary to social workers' assumptions and after rejecting many proposed placements, that race really was a paramount concern for them. But that loss of administrative

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<sup>56</sup> See *id.* at 18 (pointing out that, with respect to nonracial factors, SCDSS workers often called prospective parents and asked if they would adopt a child who had characteristics or problems that the parent did not mark as acceptable or desirable on the initial application).

<sup>57</sup> See *id.* at 17 (discussing the fact that SCDSS workers did not treat parental racial preferences "in the same flexible manner" as they did nonracial preferences).

<sup>58</sup> See *id.* (explaining that regional supervisors operated under the assumption that parents who preferred to adopt a white child would never agree to adopt a black child).

<sup>59</sup> See *id.* at 18.

<sup>60</sup> See Letter from Wade F. Horn to Kim S. Aydlette, *supra* note 16, at 2.

efficiency would have been worthwhile if there were even a few transracial placements that would otherwise not have occurred.

The state could also have actively encouraged potential parents to be more open about the race of their potential adoptive child and to consider a transracial adoption if the parents' other preferences were met. This would have aligned the state's approach to racial preferences with its approach to other sorts of preferences.<sup>61</sup> As it was, the state's extraordinary deference to prospective parents' racial preferences, even as it encouraged parents to reconsider other sorts of preferences that might limit the pool of potential matches, made it seem as though the state affirmatively endorsed same race preferences in a way that it did not embrace other types of preferences.

### III. THE OHIO CASE AND CULTURAL COMPETENCY

#### A. *The Cultural Competency Policy*

Confronted with a potential transracial placement, officials in Ohio typically investigated prospective adoptive parents' racial views, whether the parents lived in a racially-diverse neighborhood, how they felt about various issues in black history, and what they would do to raise the child with an awareness of his or her cultural heritage.<sup>62</sup> In all these ways, Ohio officials sought to assess the cultural competency of prospective adoptive parents. Typically, questions of cultural competency arise when a white prospective parent attempts to adopt an African American child.<sup>63</sup> State adoption officials assume that black parents are culturally competent to raise black children.

From December 1995 through January 1999, Ohio maintained a rule that state adoption agencies could consider the race of prospective adoptive parents who were "not of the same cultural heritage" as the child they

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<sup>61</sup> See Letter from Roosevelt Freeman to Kim S. Aydlette, *supra* note 19, at 18 (stating that South Carolina "often ignores non-race parental preferences").

<sup>62</sup> Letter from Lisa M. Simeone to Suzanne A. Burke & Tom Hayes, *supra* note 17, at 3.

<sup>63</sup> See, e.g., Ruth-Arlene W. Howe, *Race Matters in Adoption*, 42 FAM. L.Q. 465, 469 n.20 (2008) (explaining the concept of cultural competence). A simple example, which arises often, involves hair. There is an assumption that white parents will be unprepared and unable to deal with the particulars of African American children's hair. See, e.g., Letter from Lisa M. Simeone to Suzanne A. Burke & Tom Hayes, *supra* note 17, at 55 (requiring that a plan be approved to assure that a child's cultural identity is preserved in transracial adoptions, which includes understanding the "differences in the child's skin, hair and health care needs").

sought to adopt, so long as the parents developed a plan to maintain “the child’s cultural identity.”<sup>64</sup> The Ohio Revised Code did not require parents of the same race to develop a plan to maintain the child’s culture. In addition, Ohio maintained administrative rules requiring adoption specialists facilitating transracial adoptions to determine whether the prospective parents were able to “value, respect, appreciate and educate a child regarding a child’s racial, ethnic and cultural heritage, background and language and the applicant’s ability to integrate the child’s culture into normal daily living patterns.”<sup>65</sup> These practices led the Office of Civil Rights to determine that prospective parents were subject to “different treatment and standards based upon their race and the race of the children in which they expresse[d] an interest in adopting.”<sup>66</sup>

### *B. Justification*

Many would view the Ohio adoption officials’ sensibilities as reasonable. After all, officials were simply looking out for the best interests of the children for whom they were responsible by trying to find parents who were able to address that child’s “best interests and special needs.”<sup>67</sup> Maintaining a child’s cultural heritage, developing a healthy racial identity, and acquiring the tools to deal with discrimination—these aspects of cultural competency are means of promoting the child’s best interests.<sup>68</sup>

In contrast to the South Carolina case, there was less evidence that the social workers in Ohio intended to use cultural competency as a pretext for race matching. There were some instances in which social workers engaged in race matching,<sup>69</sup> but there were also other cases where the

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<sup>64</sup> OHIO ADMIN. CODE 5101:2-48-02(E) (repealed 1999).

<sup>65</sup> OHIO ADMIN. CODE 5101:2-48-07(C)(6) (repealed 1999).

<sup>66</sup> Letter from Lisa M. Simeone to Suzanne A. Burke & Tom Hayes, *supra* note 17, at 55–56.

<sup>67</sup> *Id.* at 10 (citing to OHIO ADMIN. CODE 5101:2-48-07(C)).

<sup>68</sup> *See* Howe, *supra* note 63, at 469 n.20.

<sup>69</sup> *See* Letter from Lisa M. Simeone to Suzanne A. Burke & Tom Hayes, *supra* note 17, at 15–53 (providing overviews of individual cases). Consider, for example, the case of baby Ramona, an African American child who was “2 months old when she was placed in foster care of Donald and Janet Shea, a Caucasian couple, in November 1994.” *Id.* at 21. During her stay, Ramona “bonded with the Sheas and the family’s two African American adopted daughters.” *Id.* Records show Ramona “bonded to the foster family and is very responsive and happy.” *Id.* at 21 n.15. In early 1995, the Sheas told officials they would like to adopt Ramona. *Id.* at 21. In October 1995, Ohio officials instead matched Ramona

(continued)

social workers were clearly more concerned with a child's race-related needs than the race of the parents per se.

Consider, for example, the case of Leah, a two year-old African American child who was placed in the Ohio foster care system in March 1994.<sup>70</sup> Leah "was born with Fetal Alcohol Syndrome and . . . a form of dwarfism."<sup>71</sup> The Ohio state adoption department received an inquiry about Leah from the Atkinsons, a white family in Fairbanks, Alaska.<sup>72</sup> The Atkinsons had three biological children with special needs and were long-term foster parents of an Alaskan native with cerebral palsy and dwarfism.<sup>73</sup> They were active in an advocacy group for people with dwarfism and had learned of Leah through that organization.<sup>74</sup> The Atkinsons applied to adopt Leah, but Ohio officials were concerned and began investigating the number of African Americans who lived in Alaska, specifically in the district where Leah would attend school.<sup>75</sup> The adoption specialist said that the Atkinsons' situation would not reflect "Leah's cultural needs."<sup>76</sup> Leah was eventually placed with a single white woman in Cleveland because her "neighborhood was integrated, and some of her family members were biracial."<sup>77</sup> In this case, the social workers did not choose the adoptive parents on the basis of the parents' race because both prospective families were white. The social workers chose the adoptive parent because her neighborhood and family were racially integrated.<sup>78</sup>

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with the Blackwells, an African American couple, after the adoption selection committee determined that placement with an African American family would be in her best interest. *Id.* at 22. Ohio officials disregarded the fact that the Sheas had cared for more than thirty African American foster children. *Id.* at 24. Ohio officials eventually allowed the Sheas to adopt Ramona "only after being ordered to do so by the Juvenile Court." *Id.* The Office of Civil Rights found that Ohio officials had violated MEPA by denying Ramona's adoptive placement with the Sheas "solely on the basis of race." *Id.*

<sup>70</sup> Letter from Lisa M. Simeone to Suzanne A. Burke & Tom Hayes, *supra* note 17, at 15.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 16.

<sup>77</sup> *Id.* at 18.

<sup>78</sup> *Id.*

The social workers thought that setting would better serve the child than being raised in Alaska<sup>79</sup> where there are few African Americans.<sup>80</sup>

*C. Cultural Competency as Race Matching*

But why should the racial diversity of the Cleveland neighborhood or of the adoptive parent's family matter more than the Atkinsons' expertise with special needs children? The logic of the social workers in Ohio seemed to reflect the same judgment that animated the matching process in South Carolina: that race should be accorded primacy. Just as the South Carolina social workers treated racial preferences as more important than other sorts of preferences,<sup>81</sup> so too did the Ohio social workers regard the child's "racial needs" as more important than any needs arising from the child's medical condition.<sup>82</sup> The Office of Civil Rights was right to view that practice as a violation of MEPA.<sup>83</sup>

Even if the social workers' assessment was genuinely animated by a desire to meet the "cultural needs" of the child, it is easy to see how, in practice, such an approach could become tantamount to race matching. If the white prospective parent gained an advantage because she lived in a diverse area and had a racially mixed family, then would it not have been even better had she herself been African American? The same logic that would have caused the adoption officials to prefer a racially integrated setting would have made an African American family seem better still. Simply by virtue of their race, a black family would have met the "cultural needs" consideration that the white adoptive parent fulfilled by her choice of an integrated neighborhood.

Indeed, it is difficult to conceive how a cultural competency assessment could be applied evenhandedly as between white and black prospective adoptive parents. The white parents would have to prove they could meet needs whose fulfillment would be presumed in the case of black parents. This is precisely what happened in Ohio, where adoption officials often forced white parents to face an additional hurdle of proving

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<sup>79</sup> *See id.*

<sup>80</sup> *Id.* at 16.

<sup>81</sup> *See* Letter from Roosevelt Freeman to Kim S. Aydlette, *supra* note 19, at 18 (stating that South Carolina "often ignores non-race parental preferences").

<sup>82</sup> *See* Letter from Lisa M. Simeone to Suzanne A. Burke & Tom Hayes, *supra* note 17, at 15–21 (providing an overview of the placement of Leah Michelle Hann, who was born with Fetal Alcohol Syndrome and suffered from dwarfism, but was denied placement with a family experienced with special needs children because of race).

<sup>83</sup> *Id.* at 3.

they had the cultural competency to care for a black child.<sup>84</sup> Ohio officials “urged parents interested in transracial placements to consider moving to integrated neighborhoods, to attend integrated churches, to obtain African American artwork, and to become familiar with what workers perceived as African American culture.”<sup>85</sup> One could scarcely imagine black adoptive parents being given similar directives. And if they were, most people would recoil from that degree of state interference with personal tastes and lifestyle preferences. The differential application of cultural competency considerations would reflect the stereotype that black people are culturally competent to raise a black child, but that white parents may not be.

The differential application of cultural competency standards in Ohio resulted in longer waiting times for white parents seeking to adopt. The Office of Civil Rights found that from January 1995 to June 2000, African American potential parents willing to adopt African American children waited an average of 89.8 days to be matched with a child, while white parents who were open to adopting African American or biracial children waited an average of 201.5 days—more than twice as long.<sup>86</sup> Children, too, may have waited longer for families to adopt them due to officials’ desire to find a family with appropriate cultural competency. These sorts of practices should be prohibited as a violation of MEPA.

#### IV. THE CASE AGAINST CULTURAL COMPETENCY

In this Part, I examine the issue of cultural competency and cultural needs more generally, intuitions about which underlie much of the support for race matching.

##### A. Background

When MEPA was originally enacted it included a provision that explicitly encouraged social workers to “consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of a child.”<sup>87</sup> This

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<sup>84</sup> *Id.* at 3.

<sup>85</sup> *Id.* at 54.

<sup>86</sup> *Id.* at 14.

<sup>87</sup> Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (1994) (codified at 42 U.S.C. § 5115a(a)(2) (1994), *repealed by* Removal of Barriers to Interethnic Adoption Act of 1996, Pub. L. No. 104-188, 110 Stat. 1904 (codified at 42 U.S.C. § 622 (2006)).

provision represented one expression of a longstanding and widely held intuition.

In 1972, the National Association of Black Social Workers (NABSW) released a statement in which they strongly opposed transracial adoption as a form of cultural genocide.<sup>88</sup> The statement read in part:

Only a black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a black child's survival in a racist society . . . . We stand firmly, though, on conviction that a white home is not a suitable placement for black children and contend it is totally unnecessary.<sup>89</sup>

Though the NABSW has softened its stance in recent years, the group still strongly lobbies against MEPA, having criticized the law because it “does not take into consideration the cultural differences of people of African ancestry and the experiences that they face daily due to the racial divide in America.”<sup>90</sup>

Proponents of race matching often offer two arguments in support. One is that a black child is more likely to develop a healthy racial identity if raised by a black family than if raised by a white family.<sup>91</sup> A second argument is that a black child can better develop coping skills—the ability to navigate successfully in American society—if raised by a black family than by a white family.<sup>92</sup> Both of these arguments reflect a notion of racial difference that is embodied in the position of the NABSW, which contended, “People of African ancestry have distinct traits and

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<sup>88</sup> National Association of Black Social Workers, Position Statement on Trans-Racial Adoption (Sep. 1972), available at <http://www.uoregon.edu/~adoption/archive/NabswTRA.htm>.

<sup>89</sup> *Id.*

<sup>90</sup> Preserving Families of African Ancestry, Policy Statement and Recommendations, National Association of Black Social Workers (1994), available at <http://www.nabsw.org/mserver/PreservingFamilies.aspx>.

<sup>91</sup> See, e.g., LINDA JUCOVY, PUBLIC/PRIVATE VENTURES, SAME-RACE AND CROSS-RACE MATCHING 4 (2008), available at [www.ppv.org/ppv/publications/assets/26\\_publication.pdf](http://www.ppv.org/ppv/publications/assets/26_publication.pdf) (“A mentor who is not representative of a youth’s racial background will subconsciously and inevitably impose his or her cultural values on that youth, and thus, potentially undercut the mentee’s cultural identity.”).

<sup>92</sup> See *id.* at 3 (“An adult of a different race cannot help a youth learn how to cope in society—that adult cannot understand what it feels like to be a minority in America.”).

characteristics that are important to raising healthy children of African ancestry.”<sup>93</sup>

*B. Underlying Support for Race Matching*

My sense is that these intuitions are so much a part of how we have understood and constructed race in American society that they influence even the views of some people who would say they oppose race matching. In other words, even some ostensible opponents of race matching probably do not believe that there is *no reason* to favor same race placements. Instead, they are likely to have concluded that the harms of race matching—precluding adoptive placement or consigning some children to prolonged stays in foster care—outweigh its benefits. Race matching opponents might oppose the policy, not because they believe that race matching lacks justification, but because they think its costs are too great.

The structure of the anti-race matching argument has generally been that race matching is a bad policy because it results in children waiting longer to be adopted or, even worse, spending their entire childhood in foster care.<sup>94</sup> What is unaddressed in this form of the argument is whether race matching would be justifiable even if the policy did not result in any delay or denial of placement for any children. In other words, should race matching be illegal even if there were more than enough black families to adopt all the available black children? I suspect that many opponents of race matching would become conflicted if this were the case.

I often raise this issue in my family law class by asking the students to imagine that there are black children and white children available for adoption, and that there are so many prospective parents of each race that all the children could be placed with suitable families even if none were placed across racial lines. It is striking to see how opposition to race matching diminishes once its effect is no longer to delay or preclude the adoption of some children. Many students are all too happy to race match, so long as there are enough families of each race for all the available children.

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<sup>93</sup> Preserving Families of African Ancestry, Policy Statement and Recommendations, National Association of Black Social Workers, <http://www.nabsw.org/mserver/PreservingFamilies.aspx>.

<sup>94</sup> See, e.g., Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 347 (1997) (“If adoption agencies and the courts were to rely less on race in determining what is in the ‘best interest of the child,’ the adoption process would be significantly faster for many children.”); Bartholet, *supra* note 7, at 1186 n. 59.

*C. The Error of Cultural Competency and Race Matching*

Even this milder form of race matching is misguided. Children may well develop different identities, depending on the race of the family into which agencies place them.<sup>95</sup> However, there is no reason to prefer any particular form of racial identity. Suppose that black children placed in white families tend to believe that “people are people, and that race doesn’t really matter,” and that black children adopted into black families are more likely to think “race should be a crucial component of one’s identity.” Is there any reason to prefer one form of identity over another? Is it better to understand race as a fundamental part of one’s self or as a trivial part of one’s self? On what basis can we decide that one identity is better than another?

Consider the case of a young white child adopted by an African American family in an affluent suburb of Baltimore in 2003.<sup>96</sup> The black family exposed the girl to her Irish heritage and sent her to mixed-race schools and summer camps.<sup>97</sup> Whatever the typical “white experience,” this girl will not have it. She will have much more, and much more intimate interaction with black people as a child than many white people do their entire lives. Her identity could not but be shaped, in some way, by her unusual upbringing. But will that identity be a boon or a drawback?

There is no non-ideological way to answer that question. Identities are different. As one moves through life, one’s identity will yield a complicated set of possibilities and constraints; it may open some opportunities even as it forecloses others, or lead one to value particular ways of being and to shun others. Given the impossibility of any non-ideological way of resolving this issue, social workers should refrain from preferring one racial identity to another in their adoptive placements. For them to promote any particular sort of racial identity constitutes the sort of governmental imposition of values against which our Constitution guards.<sup>98</sup>

The coping skills argument seems to avoid the problem of governmental value imposition, but on examination, it does not justify any

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<sup>95</sup> See Ruth G. McRoy et al., *Self-Esteem and Racial Identity in Transracial and Inracial Adoptions*, 27 SOC. WORK 522, 526 (1982).

<sup>96</sup> Tony Dokoupil, *Raising Katie: What Adopting a White Girl Taught a Black Family About Race in the Obama Era*, NEWSWEEK, April 23, 2009, <http://www.newsweek.com/id/194886>.

<sup>97</sup> *Id.*

<sup>98</sup> U.S. CONST. amend. XIV, § 1.

form of race matching. Available empirical evidence does not support the intuition that black parents are uniquely qualified to teach black children how to survive and function in American society. There are consistent findings that “transracial adoptees do as well as other children on standard measures of self-esteem, educational achievement, behavioral difficulties, and relations to peers and other family members.”<sup>99</sup>

Moreover, there is no reason to expect that black parents would be better able to teach black children how to succeed in American society. Certainly, black parents would have experienced racism and discrimination. But why would one conclude that they have been ennobled rather than damaged by such experiences? And why would white parents not have benefited from all their years spent on the white side of the racial divide? Who better than a white parent to explain to a black child how white people are likely to view and respond to him? It is as plausible that white parents might have useful knowledge about race that black people lack, as it is that black people may have developed unique and beneficial insights as a result of their experiences. In sum, any family will try to teach their child how to “make it” and there is no reason to assume that a black child will be better equipped by black parents than by white parents.

It is often argued that this sort of agnosticism reflects a misplaced faith in colorblindness, and denies the continuing significance of race.<sup>100</sup> But the belief that race is not a proper basis for choosing parents does not in any way imply that race has ceased to matter in American society. Of course race matters, and the day when it will be no more important than eye or hair color is a long way off. But recognition of that fact does not provide any basis for concluding that black children belong with black parents. Supporting transracial adoption should not be interpreted as a denial, either overtly or implicitly, of the continuing significance of race. One can support colorblind adoption without believing that society has become colorblind.

## V. CONCLUSION

As should be clear by now, I think it would be a mistake to repeal the 1996 amendment to MEPA. If anything, the enforcement of MEPA should become more vigorous, so that undue deference to adoptive parents’ racial

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<sup>99</sup> A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994, *supra* note 1. See also RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 158 (1977).

<sup>100</sup> See Robert L. Hayman, Jr., *Re-cognizing “Race”: An Essay in Defense of Race-Consciousness*, 6 WIDENER L. SYMP. J. 37, 38 (2000).

preferences and assessments of cultural competency for very young children would be eliminated.

I end with a brief discussion of the person whose biography most dramatically refutes the premises of race matching: President Barack Obama. Barack Obama was not raised by black people.<sup>101</sup> He was raised by a white mother who had had little exposure to black people during her upbringing and by white grandparents who seemingly were no less racist than others of their generation.<sup>102</sup> Obama did not encounter any sizeable number of black people until he left Hawaii for college.<sup>103</sup>

Yet by most measures he did well for himself. As his first memoir, *Dreams From My Father*,<sup>104</sup> attests, race was an issue.<sup>105</sup> He struggled to fashion an identity as a black man in an immediate environment in which there were few.<sup>106</sup> But he seems to have worked out the issues better than most. His racial isolation—in Indonesia, then in Hawaii<sup>107</sup>—may have posed some challenges, but it also may have helped him. It may well be that Barack Obama was able to glimpse the political possibilities that culminated in his election precisely because he was raised among white people, outside of the normal settings and taken for granted understandings of African American life. He developed a unique ability to navigate our increasingly integrated society and to connect with people of all races. He did not absorb the sort of orthodoxies that had convinced so many African Americans in particular that whites would not vote for a black candidate, especially not a Democrat with a Muslim-sounding name.

During a childhood in which African American role models were rare, Barack Obama learned his lessons well. Perhaps we will too.

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<sup>101</sup> See David Maraniss, *Though Obama Had to Leave to Find Himself, It Is Hawaii That Made His Rise Possible*, WASH. POST, August 24, 2008, at A23.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* at A22.

<sup>104</sup> BARACK OBAMA, *DREAMS FROM MY FATHER* (1995).

<sup>105</sup> See generally *id.*

<sup>106</sup> See Maraniss, *supra* note 101, at A27.

<sup>107</sup> See *id.* at A26.