

PERMANENCY V. BIOLOGY: MAKING THE CASE FOR POST-ADOPTION CONTACT

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The law presumes that natural parents act in their children's best interests.¹ This presumption, however, does not apply in cases where child protective services has removed a child from the home or determined that a parent is unfit or neglectful.² To the contrary, child welfare laws presume that children's best interests are rarely aligned with that of their parents once the state determines that their parents are unable or unwilling to raise them. This assumption is reflected in the Adoption and Safe Families Act,³ which imposes swift timetables for commencement of termination proceedings⁴ and provides states with financial incentives to place children in adoptive homes.⁵ It is also reflected in state statutes authorizing termination of parental rights based on a parent's failure to visit the child for a relatively short period,⁶ failure to contribute to the child's financial

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¹ *Troxel v. Granville*, 530 U.S. 57, 68 (2000); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on the presumption that . . . natural bonds of affection lead parents to act in the best interests of their children.").

² *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (stating that the law presumes that parents' interests are the same as their children's best interests until the parents, through their conduct, demonstrate otherwise); *Parham*, 442 U.S. at 604 (noting that the "traditional presumption that the parents act in the best interests of their child" applies "absent a finding of neglect or abuse").

³ Pub. L. No. 108-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.). AFSA requires that states commence termination proceedings if a child has been in foster care for fifteen of the previous twenty-two months, unless the child was in kinship care. 42 U.S.C. § 675(5)(e) (2000).

⁴ *See* 42 U.S.C. § 675(5).

⁵ *See id.* § 673b.

⁶ For example, under Tennessee law, a parent's willful failure to visit his or her child for four consecutive months is grounds for termination of parental rights. TENN. CODE ANN. §§ 36-1-102(1)(A)(i), -113(g)(1) (2005).

support,⁷ neglect related to poverty,⁸ or the child's length of time in foster care.⁹

The assumption that parents' interests and children's interests diverge once a parent no longer lives with the child is faulty. A child's best interests may be inextricably linked to the interests of a biological parent, even if the parent cannot adequately care for him. For example, a parent may wish to maintain contact with a child that she cannot properly raise, and the child may have a similar interest in not severing ties with the birth family.¹⁰ This is the case for millions of children of divorce who do not live with both parents. Most states recognize noncustodial parents' rights to maintain contact with their children, even when they fail to support them.¹¹ Further, children repeatedly express their wishes to maintain contact with nonresident parents.

Similarly, many children in foster care want to maintain a relationship with their birth families even when their parents cannot adequately care for

⁷ N.C. GEN. STAT. § 7B-1111(a)(3) (2007) (failure to contribute to the support of a child in state care for six months).

⁸ See Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of the Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 118 (1999) (stating that "[m]ost children in foster care were removed . . . because of parental neglect related to poverty" and thus, their parents' parental rights may be terminated not because they were abusive or unfit but because AFSA requires that states commence termination proceedings); see also DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 174-75, 178 (2d ed. 2004) (reviewing studies and concluding that poverty, not child abuse, is the main reason children are removed from their homes in the majority of cases).

⁹ See N.C. GEN. STAT. § 7B-1111(a)(2) (willfully leaving a child in foster care for more than twelve months); Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1278 n.146 (1996) (listing state statutes).

¹⁰ See Roberts, *supra* note 8, at 117 (arguing that "[c]hildren have an interest in maintaining a bond with their parents and other family members and are terribly injured when this bond is disrupted").

¹¹ The legal obligation to pay child support is separate from the right to visitation. A custodial parent cannot deny a noncustodial parent visitation because he has failed to pay child support. See, e.g., *Camacho v. Camacho*, 218 Cal. Rptr. 810, 812-13 (Ct. App. 1985); *Olson v. Olson*, 398 So. 2d 491, 491 (Fla. Dist. Ct. App. 1981); *Block v. Block*, 112 N.W.2d 923, 927 (Wis. 1961).

them.¹² Even young children who cannot express their wishes may desire contact when they are older¹³ and, as shown below, may benefit from such contact.¹⁴ However, despite evidence suggesting that post-adoption contact is in children's best interests,¹⁵ adopted children have no legal right to maintain contact with their birth families.¹⁶

While post-adoption contact may benefit all adopted children, it may be particularly beneficial for transracially adopted children. Transracial adoptions have become increasingly common in the past decade. In fact, approximately twenty-six percent of black children adopted from foster care in 2004 were adopted by a family of a different race or ethnicity.¹⁷ Although arguably transracial adoptions are not inherently detrimental to children's best interests, studies have found that transracially adopted children face significant challenges not faced by children adopted by same race families.¹⁸ Federal law, however, prohibits agencies from taking steps that many child development experts believe would help transracial adoptive families cope with these challenges.¹⁹ This article argues that post-adoption contact may provide a solution.

This article proceeds in three parts. Part I discusses the benefits of post-termination contact and asserts that many children would benefit from continued, albeit limited, contact with their birth families. Part II discusses the challenges faced by transracial adoptees and their adoptive families and shows how federal law has hindered states' abilities to help these children and their adoptive families address these challenges. Part III looks at states' approaches to post-termination and post-adoption contact and highlights the shortcomings of these approaches.

¹² MICHAEL S. WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN 138 (1988).

¹³ PETER BENSON ET AL., GROWING UP ADOPTED 26–27 (1994).

¹⁴ See *infra* Part I.

¹⁵ HAROLD D. GROTEVANT & RUTH G. MCROY, OPENNESS IN ADOPTION 15 (1998).

¹⁶ 2 AM. JUR. 2D *Adoption* § 166 (2004).

¹⁷ Lynette Clemetson & Ron Nixon, *Breaking Through Adoption's Racial Barriers*, N.Y. TIMES, Aug. 17, 2006, at A1.

¹⁸ RUTH G. MCROY & LOUIS A. ZURCHER, JR., TRANSRACIAL AND INRACIAL ADOPTEES: THE ADOLESCENT YEARS 12–13 (1983).

¹⁹ See *infra* notes 126–30 and accompanying text.

I. BENEFITS OF POST-TERMINATION CONTACT

For most of the twentieth century, parents who voluntarily relinquished a child for adoption or whose parental rights were involuntarily terminated had no right to contact or information about their children.²⁰ Birth parents and adoptive parents generally did not know each other's identifying information and children often did not learn that they were adopted until they became adults.²¹ The reasons for secrecy were based on the belief that adoptive parents needed to bond with their adopted children without the interference or reminder of the birth parent and that contact with the birth parents would confuse the child.²² Experts also believed that contact with the child or information about the child's whereabouts and upbringing would hinder the birth mother's ability to mourn the loss of the child and then quickly move on.²³

The secrecy surrounding adoption began to lessen in the 1970s for several reasons. First, the availability of reliable birth-control methods, decriminalization of abortion, and increasing acceptance of single motherhood led to a decrease in the number of healthy infants available for adoption.²⁴ At the same time, the number of families seeking to adopt healthy infants increased.²⁵ As the demand for healthy infants began to exceed their supply, birth mothers gained greater power to negotiate the

²⁰ See GROTEVANT & MCROY, *supra* note 15, at 3; Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1680 (1995).

²¹ See GROTEVANT & MCROY, *supra* note 15, at 3–4.

²² Adrienne D. Kraft et al., *Some Theoretical Considerations on Confidential Adoptions, Part III: The Adopted Child*, 2 CHILD & ADOLESCENT SOC. WORK J. 139, 145 (1985).

²³ Adrienne D. Kraft et al., *Some Theoretical Considerations on Confidential Adoptions, Part I: The Birth Mother*, 2 CHILD & ADOLESCENT SOC. WORK J. 13, 20 (1985).

²⁴ See MCROY & ZURCHER, *supra* note 18, at 6; Marriane Berry et al., *The Roles of Open Adoption in the Adjustment of Adopted Children and Their Families*, 20 CHILD. & YOUTH SERVICES REV. 151, 151 (1998); see also Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1431 n.71 (2006) (explaining that while sixty-five percent of white babies born to single mothers in 1966 were placed for adoption; by 1995, only one percent of single women relinquished their babies for adoption).

²⁵ Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consent to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 521 (2005).

terms of the adoption. Some birth mothers insisted on meeting and selecting the adoptive parents, periodic updates about their children, and ongoing contact with the adoptive family and the child.²⁶ Their requests were supported by the social science literature suggesting that openness in adoption might be in children's best interests.²⁷

All adopted children have questions about their background.²⁸ Interviews with adopted children have shown that, regardless of whether they were adopted at birth and never knew their birth parents, or were older when adopted, adoptees wonder about their birth families.²⁹ Adoptees want to know why their parents "gave them away" and some believe that there must have been something wrong with them or their birth parents.³⁰ Others fantasize that they were never placed for adoption but rather were kidnapped by their adoptive parents.³¹ Researchers have noted that ongoing contact with the birth family may help children understand why their birth parents could not take care of them.³² This understanding may help decrease their feelings of rejection.³³ As scholars have noted: "The continuing link with the birthparent dispels the notion that children were abandoned and forgotten."³⁴

These questions do not subside with time; adoptees grapple with questions surrounding their adoption at different stages in their development. Older children are more curious about their birth families

²⁶ Susan Henney et al., *Changing Agency Practices Toward Openness in Adoption*, ADOPTION Q., Volume 1, Number 3 1998, at 45, 47.

²⁷ See GROTEVANT & MCROY, *supra* note 15, at 15 (discussing the literature).

²⁸ RUTH G. MCROY ET AL., *CHANGING PRACTICES IN ADOPTION* 20 (1994) (noting that in one study, "[v]irtually all of the children . . . wanted to know more about their birth parents").

²⁹ *Id.* at 20–22; MIRIAM REITZ & KENNETH W. WATSON, *ADOPTION AND THE FAMILY SYSTEM* 8–9 (1992).

³⁰ REITZ & WATSON, *supra* note 29, at 8–9.

³¹ *Id.* at 9.

³² See Kirsten Widner, Comment, *Continuing the Evolution: Why California Should Amend Family Code Section 8616.5 to Allow Visitation in All Postadoption Contact Agreements*, 44 SAN DIEGO L. REV. 355, 367 (2007).

³³ *See id.*

³⁴ Annette Baran & Reuben Pannor, *Perspectives on Open Adoption*, in *FAMILIES BY LAW: AN ADOPTION READER* 163, 166 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

than younger adoptees and tend to desire more information and openness.³⁵ For example, a toddler may not understand what it means to be adopted. However, by age five, he (or she) may want to know why he does not live with his birth family. As he grows older, he may wonder about his birth relatives' physical appearance, personalities, intelligence, and where his own traits came from. Contact with the birth family can provide children with answers to these questions.

Contact may also help adoptees develop a healthy identity.³⁶ Although most children experience some identity issues during adolescence, adoptees tend to experience greater identity conflicts than non-adopted persons.³⁷ These conflicts can lead to feelings of shame, rejection, and low self-esteem, which can lead to behavioral problems.³⁸ The lack of information about their background contributes to adoptees' confusion about their identity and where they belong. Further, genetic differences in appearance, personality, and intelligence make identifying with their adoptive parents difficult.³⁹ Some adoptees have expressed that they feel alone;⁴⁰ others "experience a deep fear of loss and separation."⁴¹

Post-adoption contact may help adoptees resolve these identity conflicts by enabling them to incorporate their birth families into their

³⁵ Gretchen Miller Wrobel et al., *Openness in Adoption and the Level of Child Participation*, 67 CHILD DEV. 2358, 2366–67 (1996).

³⁶ See Harold D. Grotevant, *Coming to Terms with Adoption: The Construction of Identity from Adolescence into Adulthood*, ADOPTION Q., Volume 1, Number 1 1997, at 3, 7; see also Annette R. Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption with Contact Statute*, CHILD. LEGAL RTS. J., Fall 1998, at 24, 24 (noting that open adoptions "may assist in identity formation by allowing adoptees to integrate birth relationships or knowledge of those relationships into their developmental process").

³⁷ DAVID M. BRODZINSKY ET AL., BEING ADOPTED: THE LIFELONG SEARCH FOR SELF 13 (1992); Baran & Pannor, *supra* note 34, at 164; Grotevant, *supra* note 36, at 19 (stating that "identity development presents unique challenges for adoptive persons").

³⁸ See Appell, *supra* note 36, at 24; Baran & Pannor, *supra* note 34, at 164.

³⁹ Grotevant, *supra* note 36, at 8–9; Widner, *supra* note 32, at 367 (citing H. J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133, 133 (1964)).

⁴⁰ Widner, *supra* note 32, at 368 (citing BETTY JEAN LIFTON, *JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS* 46–47 (1994)).

⁴¹ Baran & Pannor, *supra* note 34, at 164.

identity.⁴² Further, the majority of adoptees want to have some contact with their birth parents⁴³ and there is evidence suggesting that such contact contributes to their well-being.⁴⁴ For example, one longitudinal study of children adopted as infants concluded “that ongoing contact with a birth parent contributes to [children’s] overall well-being as they grow up.”⁴⁵ A recent study based on interviews with adolescent adoptees found that those who had contact with their birth mothers were more satisfied with the contact status than adolescents who had no contact.⁴⁶ This study indicated that: “having contact is generally associated with satisfaction with that contact; not having contact is generally associated with dissatisfaction about not having contact.”⁴⁷ Another longitudinal study found that all of

⁴² Appell, *supra* note 36, at 24.

⁴³ BENSON ET AL., *supra* note 13, at 26 (finding that seventy percent of adopted adolescent girls and fifty-seven percent of boys wanted to meet their birth parents); Janette Logan, *Exchanging Information and Post Adoption: Views of Adoptive Parents and Birth Parents*, ADOPTION & FOSTERING, Autumn 1999, at 27, 27; Murray Ryburn, *Adopted Children’s Identity and Information Needs*, CHILD. & SOC’Y, Volume 9 Number 3 1995, at 41, 53; *cf.* PAUL SACHDEV, UNLOCKING THE ADOPTION FILES 2–3 (1989) (discussing the increasing numbers of adult adoptees who seek to find their birth families).

⁴⁴ Joan Heifetz Hollinger, *Overview of Legal Status of Post-Adoption Contact Agreements*, in FAMILIES BY LAW: AN ADOPTION READER 159, 159 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004); *see also* Logan, *supra* note 43, at 27; Margaret Sykes, *Adoption with Contact: A Study of Adoptive Parents and the Impact of Continuing Contact with the Family of Origin*, ADOPTION & FOSTERING, Summer 2000, at 20, 20.

⁴⁵ *See* Hollinger, *supra* note 44, at 159.

⁴⁶ Tai J. Mendenhall et al., *Adolescents’ Satisfaction with Contact in Adoption*, 21 CHILD & ADOLESCENT SOC. WORK J. 175, 186 (2004) (“The most noteworthy implications of this investigation for adoption professionals and agencies relate to the fact that adopted adolescents are more satisfied with the degree of contact in their adoptions when contact with their birth parents is occurring.”). Adoptees that had contact with their birth fathers were particularly satisfied, but only fifteen percent of the participants had such contact. *Id.* at 182.

⁴⁷ *Id.* at 187. These were group trends; there were some adolescents who had no contact and expressed satisfaction with no contact. *Id.* There were also some adolescents who had contact but were dissatisfied. *Id.*

the adolescents in the study who had continuing contact with their birth families wanted contact to continue.⁴⁸

Post-termination contact may be even more important to children adopted from foster care (as compared to children adopted as infants). Children adopted from foster care usually lived with or had some contact with their birth families before they were adopted and, as a result, are likely to feel a connection to their birth families even after adoption.⁴⁹ The U.S. Children's Bureau Guidelines for Public Policy and State Legislation Governing Permanence for Children found that "[m]any foster children have psychological connections to their birth families, siblings, and other significant persons, such as foster parents, so that it would be in the child's interest to maintain some sort of contact even after adoption." The Guidelines further provide that "[a] connection with a biological parent may be a positive, yet limited, influence" on the child.⁵⁰

This position is supported by numerous studies and children's own voices.⁵¹ Many foster children express a desire for continuing contact with their biological parents and do not understand why the contact ends once they are adopted. Some resist the adoption "out of loyalty to birth parents or siblings"⁵² or fear of losing contact with their biological families.⁵³ As a result, some commentators believe that contact with the birth family might actually increase the likelihood of adoption and stable placement because children would no longer feel that they have to choose between their birth families and adoptive families.⁵⁴

⁴⁸ See Maggie Jones, *Looking for Their Children's Birth Mothers*, N.Y. TIMES MAG., Oct. 28, 2007, at 46, 48 (citing Harold Grotevant and Ruth McRoy's twenty year longitudinal study).

⁴⁹ See Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1014 (1995).

⁵⁰ U.S. Children's Bureau, *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, in FAMILIES BY LAW: AN ADOPTION READER 172, 172-73 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004) [hereinafter U.S. Children's Bureau].

⁵¹ WALD ET AL., *supra* note 12, at 138 (finding that "for most [foster] children contact with their biological parents was an important—or desirable—aspect of their lives"). However, some children reported that the visits were painful or confusing. *Id.*

⁵² Appell, *supra* note 36, at 24.

⁵³ Appell, *supra* note 49, at 1017.

⁵⁴ Appell, *supra* note 36, at 24.

Children who entered foster care after having lived with their birth families often experience conflicting emotions—they love and want to see their birth parents, but they are also angry at them for neglecting or abusing them.⁵⁵ Children often blame themselves (at least partially) for their parents' inability to care for them.⁵⁶ Experts have suggested that post-adoption contact may help children develop a more accurate assessment of their birth parents which might help decrease the self-blame and anger.⁵⁷

In a minority of cases, post-adoption contact may not be in a child's best interests. Contact may be harmful where the child fears the birth parents (i.e., where there has been abuse) or is afraid that the adoptive placement is not permanent.⁵⁸ Further, although most adopted children who have contact with their birth families understand that their adoptive parents, not the birth parents, are responsible for their upbringing,⁵⁹ contact may not be appropriate where the child is confused about the birth families' role, experiences significant loyalty conflicts as a result of ongoing contact, or where the birth family is unable or unwilling to respect the adoptive parents' authority or rules regarding contact.⁶⁰ Contact would also not be appropriate where the birth parent does not desire contact or fails to exercise contact, thereby causing the child to feel rejected and abandoned by the birth family once again.⁶¹

⁵⁵ See Appell, *supra* note 49, at 1017.

⁵⁶ See *id.*

⁵⁷ *Id.*; see also U.S. Children's Bureau, *supra* note 50, at 172 ("Continued contact may relieve an older child's guilt or concerns about the birth parent [and] may help the child come to terms with his or her past.").

⁵⁸ Appell, *supra* note 36, at 24. For example, children who have lived in numerous foster homes before they were adopted sometimes have this fear.

⁵⁹ Cf. Robert Borgman, *The Consequences of Open and Closed Adoption for Older Children*, 61 CHILD WELFARE 217, 218 (1982).

⁶⁰ See Appell, *supra* note 36; Appell, *supra* note 49, at 1019–20.

⁶¹ I thank Professor Catherine J. Ross for this observation. As Professor Ross pointed out, the experience with noncustodial parents who fail to exercise visitation is reason for caution. Many children are repeatedly disappointed by a noncustodial parent who schedules visitation but cancels at the last minute or simply does not show up. Birth parents may be just as likely as noncustodial parents to disappear from their children's lives. Some adoptive parents with post-adoption contact agreements have reported that birth parents have failed to maintain contact even though the adoptive parents and children want contact. Conversation with Catherine J. Ross, Professor of Law, The George Washington University

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Despite these concerns, many child development experts agree that, in most cases, post-adoption contact, albeit limited, benefits adoptees.⁶² Many adoptive parents agree and, as a result, they allow and even encourage such contact.⁶³ As many as forty-one percent of children adopted from foster care have contact with their birth families.⁶⁴

While the potential benefits of post-adoption contact are many, they may be even greater for transracial adoptees. The next section examines the challenges some transracial adoptees face and the law's failure to adequately address these challenges.

II. TRANSRACIAL ADOPTION, SELF-IDENTITY, AND SELF-ESTEEM

Transracial adoptions have become more prevalent in recent years. For example, in 2001, thirty-eight percent of adoptions involving Hispanic children were transracial.⁶⁵ While the majority of transracial adoptions are international,⁶⁶ domestic transracial adoptions are also increasingly

Law School, in Columbus, Ohio, at the Capital University Law School's Fourth Annual Wells Conference on Adoption Law & Policy (Mar. 13, 2008).

⁶² Appell, *supra* note 49, at 1016; Borgman, *supra* note 59, at 220 (citing study finding that attachments to birth parents were a problem in only five percent of adoptions). *But see* Berry et al., *supra* note 24, at 234 (adoptive parents who adopted older children reported that fourteen percent of adoptions were disrupted as a result of the child's relationship with birth parents). However, as Professor Appell has suggested, "the child's actual or perceived need to choose between families" could cause a disrupted adoption. Appell, *supra* note 49, at 1019 n.116.

⁶³ Borgman, *supra* note 59, at 220; *see also* WILLIAM MEEZAN & JOAN F. SHIREMAN, CARE AND COMMITMENT 220 (1985).

⁶⁴ KATHERINE A. NELSON, ON THE FRONTIER OF ADOPTION: A STUDY OF SPECIAL-NEEDS ADOPTIVE FAMILIES 103 (1985); Borgman, *supra* note 59, at 220 (Twenty-eight percent of families adopting older children permit post-adoption contact with birth family.); *see also* MEEZAN & SHIREMAN, *supra* note 63, at 220 (noting that some parents who adopted children from foster care took "great effort to help their children remain in contact with their siblings").

⁶⁵ Mary Eschelbach Hansen & Rita J. Simon, *Transracial Placement in Adoptions with Public Agency Involvement: What Can We Learn from the AFCARS Data?*, ADOPTION Q., Volume 8, Number 2 2004, at 45, 51.

⁶⁶ Richard M. Lee, *The Transracial Adoption Paradox: History, Research, and Counseling Implications of Cultural Socialization*, 31 COUNSELING PSYCHOLOGIST 711, 714 (2003) ("International adoptions . . . account for approximately [eighty-five percent] of all transracial adoptions . . .").

common.⁶⁷ Twenty-six percent of black children adopted from foster care in 2004 were adopted by a family of a different race.⁶⁸

Although most studies have found that transracial adoptees do as well as same-race adoptees in terms of well-being and psychological and social adjustment,⁶⁹ the majority of child advocates acknowledge that transracially adopted children face challenges not faced by children adopted by same race families.⁷⁰ Studies have found that, while most transracial adoptees are well-adjusted and have a healthy self-identity,⁷¹ many “struggl[ed] to fit in with peers, the community in general and, sometimes, their own families” while growing up.⁷² Interestingly, many

⁶⁷ This article focuses on domestic adoptions since post-adoption contact in an inter-country adoption is difficult logistically and requires the cooperation of many actors in foreign countries. Further, children in countries such as China are often relinquished anonymously, rendering post-adoption contact virtually impossible.

⁶⁸ Clemetson & Nixon, *supra* note 17.

⁶⁹ RITA SIMON ET AL., THE CASE FOR TRANSRACIAL ADOPTION 48, 51 (1994); David D. Meyer, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL’Y 183, 202 (2007) (citing studies).

⁷⁰ See, e.g., MCROY & ZURCHER, *supra* note 18, at 12–13.

⁷¹ See SIMON ET AL., *supra* note 69, at 51–105 (discussing empirical research and long-term studies); David S. Rosettenstein, *Trans-Racial Adoption and the Statutory Preference Schemes: Before the “Best Interests” and After the “Melting Pot”*, 68 ST. JOHN’S L REV. 137, 149 (1994) (citing studies showing that transracial adoptees do no worse than intra-race adoptees and sometimes do even better). *But see* William Feigelman & Arnold Silverman, *The Long-Term Effects of Transracial Adoption*, 58 SOC. SERV. REV. 588, 600–01 (1984) (suggesting that African-American, but not Korean or Colombian, transracial adoptees have more adjustment problems than intra-racial adoptees).

⁷² EVAN B. DONALDSON ADOPTION INST., FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE AND LAW IN ADOPTION FROM FOSTER CARE 23 (2008), available at <http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf> (citing MADELYN FREUNDLICH & JOY KIM LIEBERTHAL, EVAN B. DONALDSON ADOPTION INST., THE GATHERING OF THE FIRST GENERATION OF ADULT KOREAN ADOPTEES: ADOPTEES’ PERCEPTIONS OF INTERNATIONAL ADOPTION (2000), available at <http://www.holtintl.org/pdfs/Survey2.pdf>; JAIYA JOHN, BLACK BABY WHITE HANDS: A VIEW FROM THE CRIB (2002); OUTSIDERS WITHIN: WRITING ON TRANSRACIAL ADOPTION (Jane Jeong Trenka et al. eds., 2006); RITA J. SIMON & HOWARD ALSTEIN, ADOPTION, RACE AND IDENTITY: FROM INFANCY TO YOUNG ADULTHOOD (2002); M. Devon Brooks, *A Study of the Experiences and Psychosocial Developmental Outcomes of African American Adult Transracial Adoptees*, 62 DISSERTATION ABSTRACTS INT’L 327 (2001)).

felt that they did not fit in with either whites or with persons of their same racial or ethnic background.⁷³

As noted above, adopted children often experience greater identity conflicts than children raised by their birth families.⁷⁴ These identity conflicts are often greater for transracially adopted children. Some studies have found that transracially adopted children experience more difficulties accepting their physical appearance than do children adopted by same race families.⁷⁵ Many transracially adopted children in one study, especially those with dark skin, expressed a desire to be white, going as far as rubbing themselves with white body lotion or chalk, trying to wipe off their dark skin, or requesting white skin as a holiday present.⁷⁶ Another study of young adults found that approximately half of African-American male and Asian male and female transracial adoptees reported feeling uncomfortable or dissatisfied with their ethnic or racial appearance.⁷⁷ These findings are especially disturbing because discomfort with appearance is associated with higher levels of adjustment difficulties in transracially adopted young adults.⁷⁸

Race and ethnicity are salient aspects of minorities' self-identities, especially for those groups that have experienced discrimination.⁷⁹ Children as young as pre-school age recognize physical racial differences

⁷³ *Id.*

⁷⁴ See *supra* notes 36–41 and accompanying text.

⁷⁵ Estela Andujo, *Ethnic Identity of Transracially Adopted Hispanic Adolescents*, 33 SOC. WORK 531, 534 (1988); Wun Jung Kim, *International Adoption: A Case Review of Korean Children*, 25 CHILD PSYCHIATRY & HUMAN DEV. 141, 147–48 (1995).

⁷⁶ Femmie Juffer, *Children's Awareness of Adoption and Their Problem Behavior in Families with 7-Year-Old Internationally Adopted Children*, ADOPTION Q., Volume 9, Number 2/3 2006, at 1, 10–11. The Juffer study was conducted in the Netherlands and focused on intercountry transracial adoptions of children from Sri Lanka, Korea, and Colombia. *Id.* at 1.

⁷⁷ Devon Brooks & Richard P. Barth, *Adult Transracial and Inracial Adoptees: Effects of Race, Gender, Adoptive Family Structure, and Placement History on Adjustment Outcomes*, 69 AM. J. ORTHOPSYCHIATRY 87, 93–94 (1999).

⁷⁸ William Feigelman, *Adjustments of Transracially and Inracially Adopted Young Adults*, 17 CHILD & ADOLESCENT SOC. WORK J. 165, 180 (2000).

⁷⁹ EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 19.

between themselves and others⁸⁰ and those in elementary school are aware of how others perceive them and what it means to be a member of a particular racial group, including racial prejudice.⁸¹ Studies have found a positive correlation between racial or ethnic pride and higher self-esteem.⁸² In contrast, confusion over ethnic identity is associated with psychological distress and behavioral problems.⁸³ Transracial adoptees tend to be ambivalent about their racial identity.⁸⁴ For example, one child in a study of transracially adopted children ages eight to fourteen reported that she pretends that she is white so that she can be like all the other children at her school.⁸⁵ Another study of young adult and adolescent transracial adoptees found that the majority identified with their adoptive parents' racial or ethnic identity.⁸⁶ Individuals should be able to choose their racial and ethnic identity. However, doing so does not come without a cost. Children of African-American birth parents who identify as white, for example, are likely to be rejected by African Americans who perceive their identification with their adoptive parents' racial identity as a rejection of African Americans.

Some African-American adults who were adopted by white families as children have reported that they grew up feeling alienated from the African-American community and did not have opportunities to establish and nurture relationships with other African Americans until they went to

⁸⁰ David C. Lee & Stephen S. Quintana, *Benefits of Cultural Exposure and Development of Korean Perspective-Taking Ability for Transracially Adopted Korean Children*, 11 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 130, 132 (2005).

⁸¹ *Id.*

⁸² Marianne Cederblad et al., *Mental Health in International Adoptees as Teenagers and Young Adults. An Empidemiological Study*, 40 J. CHILD PSYCHOL. & PSYCHIATRY 1239, 1246 (1999); Dong Pil Yoon, *Causal Modeling Predicting Pyschological Adjustment of Korean-Born Adolescent Adoptees*, 3 J. HUMAN BEHAV. SOC. ENV'T 65, 65 (2001).

⁸³ See Yoon, *supra* note 82, at 67.

⁸⁴ Andujo, *supra* note 75, at 533–34; Amanda L. Baden, *The Psychological Adjustment of Transracial Adoptees: An Application of the Cultural-Racial Identity Model*, 11 J. SOC. DISTRESS & HOMELESS 167, 182 (2002); Ruth G. McRoy et al., *Self-Esteem and Racial Identity in Transracial and Inracial Adoptees*, 27 SOC. WORK 522, 526 (1982).

⁸⁵ Maria Vidal de Haymes & Shirley Simon, *Transracial Adoption: Families Identify Issues and Needed Support Services*, 82 CHILD WELFARE 251, 261–62 (2003).

⁸⁶ Baden, *supra* note 84, at 186.

college.⁸⁷ As young adults, they felt “awkward around other blacks” because, having grown up in predominantly white communities, they “did not understand black [culture, like] trends in fashion and music.”⁸⁸ One African-American transracial adoptee recalls having black friends for the first time when he began college and feeling “nervous and anxious around [his] new black friends and peers,” and “self-conscious about sounding or acting ‘too white.’”⁸⁹

Transracial adoptees’ discomfort with other African Americans might not be cause for concern if they felt that they fit in elsewhere. However, some transracial adoptees have reported feeling they did not fit in anywhere and feeling “different” from other children and members of their adoptive families.⁹⁰ As one man put it, transracial adoptees “experience a kind of racial neutering in which they feel no sense of belonging to any racial group.”⁹¹

Although some studies suggest that Korean transracial adoptees have experienced fewer difficulties than their darker skinned counterparts,⁹² Korean adult transracial adoptees have reported similar identity issues as African-Americans. Participants in one large study reported that growing up they did not “fit in” with neither whites nor Koreans.⁹³ One woman

⁸⁷ Rachel Noerdlinger, *A Last Resort: The Identity My White Parents Couldn't Give Me*, WASH. POST, June 30, 1996, at C3; John Raible, *The Significance of Racial Identity in Transracially Adopted Young Adults* (1990), available at <http://www.nysccc.org/T-Rarts/Articles/Raible/RacialSignificance.html>; see also EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 25; Lena Williams, *Beyond 'Losing Isaiah': Truth in Shades of Gray*, N.Y. TIMES, Mar. 23, 1995, at C1 (stating that transracial adoptees growing up do not have the same experiences and values that others of their race have).

⁸⁸ Clemetson & Nixon, *supra* note 17; see also Noerdlinger, *supra* note 87; Williams, *supra* note 87.

⁸⁹ Raible, *supra* note 87.

⁹⁰ EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 23.

⁹¹ Maldonado, *supra* note 24, at 1460 n.221 (quoting Williams, *supra* note 87).

⁹² See Feigelman & Silverman, *supra* note 71, at 600–01 (suggesting that African-American, but not Korean or Colombian, transracial adoptees have more adjustment problems than intra-racial adoptees); Juffer, *supra* note 76, at 12–16 (finding that transracially adopted children from Sri Lanka and Colombia who wanted to be white experienced more behavior problems than Korean transracial adoptees who tended to have lighter complexions).

⁹³ See FREUNDLICH & LIEBERTHAL, *supra* note 72, at 7.

remarked that growing up she felt like “a white person in an Asian body.”⁹⁴ Many other Korean transracial adoptees have voiced similar sentiments. Interestingly, for some, racial identities changed as they grew older. As children or adolescents, thirty-six percent considered themselves Caucasian; but as adults, only eleven percent identified as such.⁹⁵

Native-American children adopted by white families have reported similar identity issues. In the 1970s, Congress found that some Indian children raised in white homes developed “white” identities with no understanding of Indian culture or identity and, as a result, experienced social and psychological adjustment problems during adolescence.⁹⁶ A recent, albeit small, study similarly found that Native-American transracial adoptees reported lamenting the loss of their “Indian identity,” “family, culture, and heritage”⁹⁷

Although a causal relationship between adoptees’ identity conflicts and behavioral problems has not been established, studies have found that transracial adoptees have higher rates of behavioral problems than same race adoptees. The Minnesota Transracial Adoption Study found that while thirty-three percent of white children adopted by white families experienced behavior problems, forty-four percent of Asian/American

⁹⁴ *Id.*

⁹⁵ *Id.* at 7–8.

⁹⁶ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 & n.1 (1989). As a result, Congress enacted the Indian Child Welfare Act of 1978, which requires that “in the absence of good cause to the contrary,” state courts must give preference to a placement with (1) a member of the child’s extended family, (2) other members of the tribe, or (3) other Indian families. 25 U.S.C. § 1915(a) (2006).

⁹⁷ Carol Locust, *Split Feathers . . . Adult American Indians Who Were Placed in Non-Indian Families as Children*, ONTARIO ASS’N CHILD. SOCIETIES J., Oct. 2000, at 11, 11 (studying twenty Indian adults who had been adopted by non-Indian families as children). They reported growing up feeling “different” and experiencing discrimination at school, church, or even at home. *Id.* at 12–14. *But see* Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights For the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 543, 548–49 (1996) (stating that the emotional development of Native-American children adopted by non-Indian families is similar to that of those adopted by Indian families and that those who have relationships with other Native-American children develop secure Native-American cultural identities (citing Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1209 (1991))).

Indian transracial adoptees, forty-five percent of biracial transracial adoptees (defined as children who are at least one-half African-American), and sixty-seven percent of African-American transracial adoptees did so.⁹⁸ The few studies of transracial adoptions of children from foster care have similarly found that transracial adoptees experience higher rates of difficulties than children adopted by families of the same race.⁹⁹

Given the challenges encountered by non-white children adopted by families of a different race, one might be tempted to conclude that transracial adoptions are not in children's best interests. However, adoptive parents can and do raise children of different races with healthy self-identities and high self-esteem.¹⁰⁰ Adoptive parents' attitudes about race and racial identity—including recognition of the importance of race and ethnicity to children's development,¹⁰¹ awareness of and sensitivity to racism, even when subtle,¹⁰² willingness to expose their children to people of their own racial, ethnic, or cultural background and teach them how to cope with racial discrimination—play a significant role in transracial adoptees' development of a healthy self-identity.¹⁰³ For example, one study found that when adoptive parents of African-American transracial adoptees acknowledged their children's racial identities, lived in racially and culturally diverse neighborhoods, and exposed them to African-American role models, children felt a greater sense of pride about their racial heritage.¹⁰⁴ Other studies have similarly found that transracially

⁹⁸ EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 24 (citing Richard A. Weinberg et al., *The Minnesota Transracial Study: Parent Reports of Psychosocial Adjustment at Late Adolescence*, ADOPTION Q., Volume 8, Number 2 2004, at 27).

⁹⁹ *Id.* at 28.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (Transracial adoptive parents must have “self-awareness of one’s own experiences and attitudes regarding race and difference; awareness of the roles that race, ethnicity and culture play in children’s development; and understanding of the importance of these issues in fostering a child’s positive identity development.”).

¹⁰² *Id.* at 37 (providing that parents should be aware that racism is sometimes subtle and be attuned to the pressures that minority children experience (citing Vidal de Haymes & Simon, *supra* note 85, at 268)).

¹⁰³ *Id.*; see also Lee, *supra* note 66, at 721–22; Ruth G. McRoy et al., *The Identity of Transracial Adoptees*, 65 SOC. CASEWORK 34, 39 (1984).

¹⁰⁴ EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 25 (citing McRoy et al., *supra* note 84).

adopted children who were exposed to their racial, ethnic and cultural background experienced lower levels of emotional distress, better psychological adjustment, higher self-esteem, and a stronger sense of belonging with the adoptive family.¹⁰⁵

Although some families adopting transracially recognize the salience of race and ethnicity to their children's self-identities and make efforts to expose the children to their birth culture or people of their own race, not all do. One study found that some parents adopting transracially "tended to minimize the importance of race and downplay incidents of racial slurs or discrimination."¹⁰⁶ Some parents do not believe it is important to expose their children to their racial, ethnic or cultural heritage.¹⁰⁷ According to one such parent:

People say, "Stay in touch with his racial heritage." I don't even know what that is. What is his racial heritage? Some people say we are "denying him his culture," but from what I can see, if we hadn't come along, he would be dead. He was malnourished. He was neglected. What really is his culture?¹⁰⁸

¹⁰⁵ See *id.* at 6 (citing Kimberly M. DeBerry et al., *Family Racial Socialization and Ecological Competence: Longitudinal Assessments of African-American Transracial Adoptees*, 67 *CHILD DEV.* 2375 (1996); Kristen E. Johnson et al., *Mothers' Racial, Ethnic, and Cultural Socialization of Transracially Adopted Asian Children*, 56 *FAM. REL.* 390 (2007); Lee & Quintana, *supra* note 80; Jayashree Mohanty et al., *Family Cultural Socialization, Ethnic Identity, and Self-Esteem: Web-Based Survey of International Adult Adoptees*, 15 *J. ETHNIC & CULTURAL DIVERSITY SOC. WORK* 153, 169 (2006); Yoon, *supra* note 82).

¹⁰⁶ Vidal de Haymes & Simon, *supra* note 85, at 252. The study included reports from transracially adopted children stating that their white adoptive parents did not recognize racism in schools, tended to minimize their children's experiences with racism, or avoided discussions of race altogether. *Id.* at 263. For example, one white adoptive parent whose child was called a "nigger" rationalized that it was only one incident and that because he is athletic, other children think he is like Michael Jordan. *Id.*

¹⁰⁷ *Id.* at 252, 253-64.

¹⁰⁸ *Id.* at 264.

These parents believe that race plays (or should play) no role in their children's upbringing.¹⁰⁹ As a result, some transracial adoptees grow up afraid to identify with individuals of their own racial group and believe that they are somehow different (and better) than them.¹¹⁰ For example, in one study an African-American transracial adoptee reported feeling "different from black people" and having "different feelings" than them.¹¹¹ Another child reported feeling more connected to whites because the African-Americans she knew "act ghetto" and dress differently from her.¹¹² Other transracially adopted children grew up fearing people of their own race and tried to avoid them.¹¹³

While some adoptive parents make efforts to expose their children to their birth cultures, they often focus primarily on books and cultural events, but have little, if any, contact with persons of their child's racial or ethnic background.¹¹⁴ Further, adoptive parents' efforts to expose their children to their birth parents' culture decreases as children grow older.¹¹⁵ For example, one study of African-American transracial adoptees found that when the children were seven years old, forty-two percent of families emphasized bicultural socialization.¹¹⁶ However, by the time the children were seventeen, only twenty percent of families did so.¹¹⁷

In sum, adoptive families can and do raise children of other races with high self-esteem and a strong self-identity and sense of belonging.

¹⁰⁹ See McROY & ZURCHER, *supra* note 18, at 130; Andujo, *supra* note 75, at 533; DeBerry et al., *supra* note 105, at 2379; Lee, *supra* note 66, at 733.

¹¹⁰ See McRoy et al., *supra* note 103, at 38; McRoy et al., *supra* note 84, at 525.

¹¹¹ Vidal de Haymes & Simon, *supra* note 85, at 261–62.

¹¹² *Id.* at 261. Other African-American transracial adoptees said that blacks trigger images of "of teenage pregnancy, baggy pants, and being in a gang." *Id.* at 262.

¹¹³ See generally RITA J. SIMON & RHONDA M. ROORDA, *IN THE OWN VOICES: TRANSRACIAL ADOPTEES TELL THEIR STORIES* (2000). For example, one African-American transracial adoptee grew up fearing African-American men and would deliberately avoid walking through blocks where African Americans resided. *Id.* at 200. The first time a black man greeted her while she was on her newspaper delivery route, she was so scared that she dropped the newspapers and ran home.

¹¹⁴ See EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 27 (citing Mohanty et al., *supra* note 105, at 156).

¹¹⁵ DeBerry et al., *supra* note 105, at 2382.

¹¹⁶ *Id.* at 2378, 2380.

¹¹⁷ *Id.*

However, studies suggest that in order to do so, parents must be sensitive to society's racial biases and ensure that children are exposed to their racial and ethnic background and communities. The next section examines the efforts children's advocates have undertaken to facilitate transracial adoptees' development of a healthy self-identity and exposure to their birth culture and communities.

A. Applicant Screening

Child advocates have proposed a number of different approaches to ensure that adoptive parents have the necessary skills to raise children of different races, including measuring their abilities and willingness to teach their children about their racial and cultural background.¹¹⁸ One way of ascertaining this information is by considering whether the applicants have friends of the same race as the child they seek to adopt; whether they reside in racially diverse neighborhoods;¹¹⁹ their beliefs about the role that racial, ethnic, and cultural identity play in children's development; and their likely reaction to racial prejudice directed at their child.

Some private adoption agencies have sought to ascertain prospective adoptive parents' abilities and willingness to raise children of a different race by offering or requiring participation in cultural competence training sessions.¹²⁰ All families adopting internationally must do the same. The

¹¹⁸ See, e.g., EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 44–46 (offering six recommendations “[t]o ensure that children of color are placed with families who can meet their comprehensive and long-term needs”).

¹¹⁹ Transracially adopted children raised in predominantly white communities are twice as likely as those living in racially diverse communities to feel discomfort with their racial appearance, and are also more likely to experience racial discrimination. Feigelman, *supra* note 78, at 178–79.

¹²⁰ Maldonado, *supra* note 24, at 1462 n.234 (explaining how one “agency requires that adoptive parents participate in three-hour class which consists of questions and answers so that agency is satisfied that whites seeking to adopt African American or biracial child will culturally enrich child” (citing Telephone Interview with Laurie Morgan, Domestic Adoption Coordinator, Bldg. Black Adoptive Families, in Silver Spring, Md. (Feb. 15, 2005))); Adoption-Link, African-American Adoption Program, <http://www.adoption-link.org/african-american-program.aspx> (last visited Jan. 13, 2008) (requiring participation in “a racial sensitivity course entitled ‘Being a Multiracial Family’”); North American Council on Adoptable Children, Transracial Parenting Training, <http://www.nacac.org/training/transracial.html> (last visited Jan. 13, 2009) (offering “a
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Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (“Hague Convention”),¹²¹ which regulates intercountry adoptions, requires that a child’s country of origin “give due consideration to the child’s upbringing and to his or her ethnic, religious and cultural background.”¹²² The administrative regulations to the Intercountry Adoption Act of 2000, which implements the Hague Convention in the United States,¹²³ requires that persons adopting internationally receive ten hours of pre-adoption training, which must address the “long-term implications for families who become multicultural through inter-country adoption.”¹²⁴ The Act also requires adoption service providers to counsel parents about the child’s history, including his or her “cultural, racial, religious, ethnic, and linguistic background.”¹²⁵

While these approaches may help agencies place minority children with families that can best meet their needs, the Howard M. Metzenbaum Multiethnic Placement Act of 1994,¹²⁶ as amended in 1996 (MEPA),¹²⁷ and Title VI of the Civil Rights Act of 1964,¹²⁸ prohibit agencies receiving federal funds from asking the questions discussed above.¹²⁹ They also

vareity [sic] of training sessions on how to present [their] *Transracial Training Curriculum*[, which] can be used by agencies or parent groups to provide step-by-step training on important issues related to transracial or transcultural adoption or foster care.”).

¹²¹ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51, 1870 U.N.T.S. 167.

¹²² *Id.* art. 16(1)(b). The Hague has been ratified by seventy-eight countries, including the United States. HCCH, Status Table: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69 (last visited Jan. 14, 2009) (providing a list of current member states, the date of their membership, and the agreements each has adopted).

¹²³ 42 U.S.C. §§ 14901–14954 (2000).

¹²⁴ 22 C.F.R. § 96.48(a), (b)(7) (2008).

¹²⁵ *Id.* § 96.48(c)(1).

¹²⁶ Pub. L. No. 103-382, § 553(a)(1), 108 Stat. 3518, 4056 (repealed 1996).

¹²⁷ Small Business Job Protection Act of 1996, Pub. L. 104-188, § 1808, 110 Stat. 1755, 1904 (codified as amended at 42 U.S.C. § 1996b (2000)).

¹²⁸ 42 U.S.C. § 2000d (2000) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

¹²⁹ See EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 38–40.

prohibit agencies from requiring that persons adopting transracially participate in seminars or trainings not required of applicants adopting same race children.¹³⁰

B. MEPA

In order to understand federal law's restrictions on agencies' consideration of adoptive parents' abilities to raise children of a different race, it is necessary to briefly discuss MEPA's history and the reasons for its enactment.

For most of the twentieth century, with the exception of Native-American children,¹³¹ children in need of homes were placed with families of the same race.¹³² Indeed, when agencies began placing substantial numbers of African-American children with white families in the late 1960s and early 1970s,¹³³ the National Association of Black Social Workers (NABSW) objected, stating that only black families had the ability to raise black children with a positive racial identity and the necessary skills to cope with racism.¹³⁴ Soon after, some states adopted

¹³⁰ *See id.* at 38.

¹³¹ Until the enactment of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2006) (ICWA), Native-American children were routinely placed in white homes. For example, in Minnesota, ninety percent of Native-American children adopted in 1971 to 1972 were placed with non-Native-American families. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989). Congress adopted ICWA after Senate hearings revealed that thousands of Native-American children had been removed from their homes in the 1960s and 1970s, often based on unjustified allegations of abuse and neglect, and had been placed with non-Native-American families. *Id.* at 32, 35 & n.4. ICWA reflects “[f]ederal policy that, where possible, an Indian child should remain in the Indian community.” *Id.* at 37. ICWA requires that “absent good cause to the contrary,” state courts must give preference to “(1) a member of the child’s extended family, (2) other members of the Indian child’s tribe, or (3) other Indian families.” 25 U.S.C. § 1915(a). MEPA expressly provides that it has no effect on adoptions of Native-American children. 42 U.S.C. § 1996b(3). Thus, agencies must place Native-American children in adoptive homes that “reflect the unique values of Indian culture.” 25 U.S.C. § 1902.

¹³² *See* MCROY & ZURCHER, *supra* note 18, at 4.

¹³³ *Id.* at 6–8.

¹³⁴ *Id.* at 8; Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 926–27 (1994) (citing NAT’L ASS’N OF BLACK SOC. WORKERS, POSITION PAPER (Summer 1973)). The NABSW was also concerned that African-American children raised in white homes would lose their

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race-matching statutes requiring “consideration of the child’s race or ethnic heritage in adoption placements” and giving preference to “a family with the same racial or ethnic heritage as the child.”¹³⁵ In addition, many agencies in states without race-matching laws adopted informal race-matching policies.¹³⁶

In the early 1990s, as now, African-American children generally waited longer than children of other races for an adoptive family.¹³⁷ Many commentators argued that race-matching policies were to blame.¹³⁸ In 1994, Congress passed MEPA,¹³⁹ which prohibited agencies receiving federal funds from “deny[ing] to any person the opportunity to become an adoptive or foster parent, *solely on the basis of race*.”¹⁴⁰ The 1994 MEPA did not prohibit agencies from considering race as a factor in adoptive placements so long as they did not delay or deny an application *solely* on the basis of race.¹⁴¹ However, critics of MEPA argued that agencies continued to reject white applicants seeking to adopt transracially.¹⁴²

In 1996, Congress amended MEPA by enacting the Small Business Job Protection Act of 1996, which included Section 1808, the Removal of Barriers to Interethnic Adoption Provisions (IEP).¹⁴³ As amended, MEPA prohibits agencies receiving federal funding from “deny[ing] to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved.”¹⁴⁴ In contrast to the original 1994 language which prohibited agencies from rejecting a placement “*solely on the basis of race*,”¹⁴⁵

cultural heritage and “end up with white psyches.” RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION ACROSS BORDERS* 38–39 (2000).

¹³⁵ Maldonado, *supra* note 24, at 1455 & n.197 (quoting statutes).

¹³⁶ *Id.* at 1455.

¹³⁷ See Bartholet, *supra* note 97, at 1187 n.62.

¹³⁸ *Id.* at 1187–88.

¹³⁹ Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553(a)(1), 108 Stat. 3518, 4056 (repealed 1996).

¹⁴⁰ 42 U.S.C. § 5115a(a)(1)(A) (1994) (repealed 1996) (emphasis added).

¹⁴¹ *Id.* § 1551a(a)(1)(A)–(B), (a)(2).

¹⁴² Maldonado, *supra* note 24, at 1456.

¹⁴³ Small Business Job Protection Act of 1996, Pub. L. 104-188, § 1808, 110 Stat. 1755, 1904 (codified as amended at 42 U.S.C. § 1996b (2000)).

¹⁴⁴ 42 U.S.C. § 1996b(1)(A) (2000).

¹⁴⁵ 42 U.S.C. § 5115a(a)(1)(A) (1994) (repealed 1996).

MEPA, as amended, prohibits agencies from rejecting applicants “on the basis of race.”¹⁴⁶ The 1996 amendments also repealed the 1994 provisions expressly authorizing agencies to consider a child’s “cultural, ethnic or racial background” and the capacity of the prospective adoptive parents to meet such needs.¹⁴⁷ Commentators have interpreted the 1996 amendments to prohibit all considerations of race,¹⁴⁸ absent exceptional circumstances—for example, where an older child who cannot legally be adopted without his consent refuses to agree to a transracial placement.¹⁴⁹

A number of agencies have sought to enforce MEPA.¹⁵⁰ In 1999, Children’s Rights Incorporated brought a class action suit against the State of New Jersey alleging, *inter alia*, race matching in adoptive placements in violation of MEPA.¹⁵¹ Although that suit settled in 2003, that same year, the United States Department of Health and Human Services (USDHHS) fined the State of Ohio one million dollars after the Office of Civil Rights (OCR) determined that Hamilton County, Ohio had required persons seeking to adopt transracially to (1) prepare a plan discussing how they would address the child’s cultural identity and (2) evaluate the racial composition of their neighborhood, in violation of MEPA, as amended,

¹⁴⁶ 42 U.S.C. § 1996b(1)(A) (2000).

¹⁴⁷ 42 U.S.C. § 5115a(a)(2) (1994) (repealed 1996). In addition, MEPA requires that state agencies make diligent efforts to recruit foster and adoptive parents who represent the racial and ethnic backgrounds of children in foster care. *Id.* § 622(b)(9).

¹⁴⁸ See Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2354 (1998) (“[F]ederally funded agencies are not allowed to use race at all in making foster and adoptive placement decisions.”). *But see* Karen Sgar, *Adoption: Interethnic Placement Legislation in the 104th Congress*, in ADOPTION UPDATE 99, 102 (Victor Little ed., 2003) (“[T]he law does not explicitly prohibit consideration of [race], unless such consideration resulted in denying or delaying the child’s placement.”).

¹⁴⁹ Cf. Joan Heifetz Hollinger, *Overview of the Multiethnic Placement Act (MEPA)*, A.B.A., Mar. 30, 2007, <http://www.abanet.org/child/adoption-6.pdf> (discussing subsequent federal guidance prohibiting consideration of race or ethnicity absent “a compelling government interest”).

¹⁵⁰ MEPA, as amended, creates a private federal cause of action for violation of its provisions. 42 U.S.C. § 1996b(2) (2000).

¹⁵¹ See Susan K. Livio & Mary Jo Patterson, *The Colors of Love: Outside Walls and Warmth of a Happy Home, Debate Swirls About Crossing the Racial Divide*, STAR-LEDGER, Dec. 27, 2005, at 1.

and Title VI of the Civil Rights of 1964.¹⁵² Title VI prohibits agencies receiving federal funds from discriminating on the basis of race.¹⁵³ As such, OCR determined, state agencies cannot require additional efforts from persons seeking to adopt transracially if those efforts were not required of persons seeking to adopt same race children.¹⁵⁴ OCR further found that by placing an African-American child with a single white woman over a white couple because the single woman lived “in an integrated neighborhood and had bi-racial brothers,” Hamilton County had impermissibly “sought out information about how much contact the [white couple] had with the African[-]American community and whether there were African[-]American teachers or students in the local school system.”¹⁵⁵

Similarly, in 2005, USDHHS fined the South Carolina Department of Social Services \$107,481 for considering race in adoptive placement decisions.¹⁵⁶ These enforcement actions have hindered agencies’ abilities to ascertain which applicants understand both the role that racial identity will play in the child’s development and the child’s needs to be exposed to persons who share his racial, ethnic, and cultural background. While some adoptive parents possess the necessary skills to raise children of different races with healthy self-identities, federal law prohibits agencies from asking the questions that will enable them to determine which adoptive parents are likely to do so.

Many child advocates argue that color-blind adoptions are counter to children’s best interests and thus, Congress should repeal the 1996 amendments and return to the 1994 MEPA, which allowed agencies to

¹⁵² Letter of Findings from U.S. Dep’t of Health & Human Servs. to Suzanne A. Burke, Director, Hamilton County Job & Family Servs. et al. 20 (Oct. 20, 2003), *available at* <http://www.hhs.gov/ocr/civilrights/activities/examples/Adoption%20Foster%20Care/05997026lof.pdf> [hereinafter ODCR Letter]; EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 35–36.

¹⁵³ 42 U.S.C. § 2000d.

¹⁵⁴ ODCR Letter, *supra* note 152.

¹⁵⁵ *Id.*

¹⁵⁶ Letter of Findings from Roosevelt Freeman, Regional Manager, Office of Civil Rights, U.S. Dep’t of Health & Hum. Servs., to Kim S. Aydlette, State Director, S.C. Dep’t of Soc. Servs. 25 (Oct. 31, 2005), *available at* <http://www.hhs.gov/ocr/civilrights/activities/examples/Adoption%20Foster%20Care/0100438lof.pdf>.

consider race as one factor when placing children in adoptive homes.¹⁵⁷ In September 2007, the U.S. Commission on Civil Rights heard testimony from adoption professionals on both sides—those seeking a return to the 1994 MEPA and those who favor the current law.¹⁵⁸ As this article went to press, the U.S. Commission had not issued its report.¹⁵⁹ However, even if Congress repeals the 1996 amendments, any statute that allows agencies to consider race will likely be challenged as discriminating against adoptive parents and minority children in violation of the Equal Protection Clause.¹⁶⁰ Given the Supreme Court's recent decision in *Parents Involved v. Seattle School District No. 1*,¹⁶¹ any challenge to a race-conscious MEPA might be successful.

However, even if federal law were to allow consideration of race as a factor in adoptive placements, such an outcome would raise its own set of challenges. Some children might conceivably be placed in homes that are not in their best interests when factors other than race are considered. In other words, race might become the determinative factor—an outcome that children's advocates would caution against.¹⁶²

Further, even if agencies could consider race when placing children in adoptive homes, some adoptive parents might still not effectively facilitate

¹⁵⁷ EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 4–5 (listing child advocacy organizations supporting reinstatement of the original MEPA).

¹⁵⁸ U.S. COMM'N OF CIVIL RIGHTS, COMMISSION BRIEFING: MULTIETHNIC PLACEMENT ACT, MINORITIES IN FOSTER CARE AND ADOPTION 4–5 (Sept. 21, 2007), *available at* <http://www.usccr.gov/calendar/trnsrpt/092107brief.pdf>.

¹⁵⁹ The report should be ready in mid-2009. *See* E-mail from Margaret Butler, U.S. Comm'n on Civil Rights, to Lindsay Baretz (Mar. 9, 2009) (on file with author).

¹⁶⁰ *See* Bartholet, *supra* note 97, at 1229–32 (arguing that race matching policies by agencies receiving federal funds constitutes race-based state action in violation of the Fourteenth Amendment's Equal Protection Clause and also Title VI of the Civil Rights Act of 1964).

¹⁶¹ *See* 127 S. Ct. 2738 (2007) (holding that diversity in education could not justify the school districts' use of racial classifications in allocating slots in oversubscribed high schools).

¹⁶² *See* Meyer, *supra* note 69, at 207 (arguing that agencies should be able to consider “the readiness of transracial adoptive parents to anticipate and address issues relating to race” but “[b]eyond that, considerations of race in child placement must depend upon empirical proof that, for a particular child, the benefits of preferring a same-race placement would be sufficiently significant to justify the social costs of race-conscious decision-making”).

their children's development of a positive racial identity for several reasons. First, many Americans (including adoptive parents) firmly believe that society should strive for color-blindness and that talking about race or focusing on racial differences hinders that goal.¹⁶³ Second, as noted, even parents who are committed to exposing their children to their heritage tend to make efforts when the children are younger, but stop as their children grow older.¹⁶⁴ Moreover, their efforts focus primarily on books and participation in cultural events,¹⁶⁵ not on interaction with persons of their children's racial or ethnic background.¹⁶⁶ Third, transracially adopted children sometimes resent and resist their adoptive parents' obvious efforts to expose them to their birth cultures. Children want to fit in with their adoptive family and friends and being forced to learn Chinese or study African-American literature, for example, simply because of the child's background is unlikely to engender feelings of racial or ethnic pride. Fourth, adoptive parents who participated in cultural competence/racial sensitivity classes did not find them very helpful.¹⁶⁷ They complained that the sessions were taught by agency staff that did not have much contact with the family after the adoption was final and the sessions focused on what adoptive parents perceived to be superficial issues, such as grooming African-American hair, rather than how to deal with subtle racism.¹⁶⁸

Although overt racism has decreased significantly in the last twenty-five years, racial and ethnic minorities in the United States continue to experience prejudice and discrimination.¹⁶⁹ "Perceived discrimination is

¹⁶³ One study found that the majority of women considering adopting transracially embraced a colorblind approach. Patricia K. Jennings, *The Trouble with the Multiethnic Placement Act: An Empirical Look at Transracial Adoption*, 49 SOC. PERSP. 559, 573 (2006).

¹⁶⁴ DeBerry et al., *supra* note 105, at 2380, 2382.

¹⁶⁵ Mohanty et al., *supra* note 105, at 156.

¹⁶⁶ See Vidal de Haymes & Simon, *supra* note 85, at 252.

¹⁶⁷ *Id.* at 266.

¹⁶⁸ *Id.* at 266–68 (finding that many parents wanted to be more sensitive to their children's needs but did not know how to deal with subtle racism).

¹⁶⁹ See Maldonado, *supra* note 24, at 1428–29. Studies have found that African Americans, and in particular, African-American males, experience the highest level of discrimination. Brooks & Barth, *supra* note 77, at 95. Indeed, black boys are at the bottom of the hierarchy in the adoption market. Dawn Davenport, *Born in America, Adopted* (continued)

significantly associated with behavior problems and psychological distress” among transracial adoptees.¹⁷⁰ Thus, in order to develop a healthy identity and self-esteem, minority children and adolescents must learn how to cope with racial prejudice.¹⁷¹ Minority children raised by families of the same race learn these skills from parents and relatives who have already experienced many of the indignities and microaggressions¹⁷² they might face. Transracial adoptees, who often reside in predominantly white neighborhoods,¹⁷³ may have limited opportunities to develop relationships with persons of their own racial or ethnic background. While some white adoptive parents may be able to teach their children how to cope with racism, even if they never experienced racial prejudice themselves, other parents may lack those skills. For example, they may tell their transracially adopted child that he is being “too sensitive” when he raises the topic of racial prejudice or perceives an incident as racially motivated.¹⁷⁴ Further, transracially adopted children may not feel comfortable discussing race with their adoptive parents because they fear it might be perceived as disloyal.¹⁷⁵

Conversations about race between people of different races are often tense, even between academics who might not share close familial relationships and who possess the vocabulary and historical knowledge to help them to express their positions firmly, but respectfully. One can imagine how difficult these conversations must be for children who fear hurting their adoptive parents’ feelings or who feel that their parents do not understand their daily experiences as racial minorities in a predominantly white environment. As one transracial adoptee has written: “It was painful because while I perceived racism all around me, I didn’t have people

Abroad, CHRISTIAN SCI. MONITOR, Oct. 27, 2004, at 11 (noting that African-American boys are at the bottom of adoptive parents’ preference list).

¹⁷⁰ EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 7 (citing Cederblad et al., *supra* note 82; Feigelman, *supra* note 78).

¹⁷¹ *See id.*

¹⁷² *See generally* Peggy C. Davis, *Law As Microaggression*, 98 YALE L.J. 1559 (1989).

¹⁷³ *See* Feigelman, *supra* note 78, at 178; Vidal de Haymes & Simon, *supra* note 85, at 253.

¹⁷⁴ Raible, *supra* note 87.

¹⁷⁵ EVAN B. DONALDSON ADOPTION INST., *supra* note 72, at 26 (citing Raible, *supra* note 87).

around me to talk to who had experienced what I was experiencing, and who could therefore validate and share my perceptions.”¹⁷⁶

Transracially adopted children need relationships with people who not only look like them but have shared similar experiences with racism and can explain how they cope with racial prejudice. Adoptive parents have expressed interest in finding mentors who share their child’s race and ethnicity,¹⁷⁷ but have found it difficult to make contacts with people from their child’s birth community.¹⁷⁸ Thus, even if federal law were to allow consideration of race in adoptive placements, child advocates should explore other mechanisms to increase the likelihood that transracial adoptees will have contact with persons of their same racial and ethnic background and acquire the necessary skills to cope with discrimination. Post-adoption contact may facilitate these efforts by providing adoptive parents with a rich source of information about their child’s community and the resources they need to help their children cope with discrimination. It also provides transracially adopted children with automatic exposure to their racial and ethnic communities.

III. POST-ADOPTION CONTACT IN TRANSRACIAL ADOPTIONS

Despite the benefits of post-adoption contact, neither birth parents nor children have any right to contact after the parent-child relationship is legally terminated.¹⁷⁹ However, increasing numbers of birth parents and adoptive parents enter into post-adoption contact agreements.¹⁸⁰ Most states’ adoption statutes are silent on post-adoption contact and thus, birth parents have no assurance that these agreements will be enforced if the

¹⁷⁶ Raible, *supra* note 87.

¹⁷⁷ See Vidal de Haymes & Simon, *supra* note 85, at 259. One transracial adoptive mother relied on African-American foster mothers to help her address racial issues. *Id.* at 268.

¹⁷⁸ *Id.* at 259–60 (discussing parents’ reports on the difficulties of finding black friends and providing the child with access to his or her culture, heritage, and people).

¹⁷⁹ 2 AM. JUR. 2D *Adoption* § 166 (2004).

¹⁸⁰ CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH & ADOPTIVE FAMILIES 1 (2005), http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf. These agreements are also known as post-adoption visitation agreements or cooperative adoption agreements. *Id.*

adoptive parents decide to terminate contact.¹⁸¹ However, at least twenty states have statutes addressing post-adoption contact agreements and, in the majority of those states, the agreements are enforceable so long as the court finds that contact is in the child's best interests.¹⁸² In no state, however, is the adoptive parents' refusal to allow contact grounds for vacating the adoption.¹⁸³

Although the enforceability of post-adoption contact agreements is an open question in many states, many birth parents in the United States who voluntarily relinquish healthy, white infants for adoption can negotiate an agreement for contact. Given the high demand for healthy, white infants,¹⁸⁴ adoptive parents who refuse to agree to post-adoption contact are unlikely to be selected by the birth parents. However, the majority of non-stepparent domestic adoptions in the United States do not involve healthy infants, but rather older children in foster care, many with special

¹⁸¹ Some state statutes expressly prohibit enforcement of post-adoption contact agreements. N.H. REV. STAT. ANN. § 170-B:14(I) (LexisNexis Supp. 2008); OHIO REV. CODE ANN. §§ 3107.62, .63(B), .65(A)(5) (LexisNexis 2003); TENN CODE ANN. § 36-1-121(f) (2005). Some courts in states without statutory prohibitions have refused to enforce post-adoption contact agreements. *See, e.g.*, *People ex rel. M.M.*, 726 P.2d 1108, 1124–25 (Colo. 1986); *In re M.M.*, 619 N.E.2d 702, 713–14 (Ill. 1993); *In re Guardianship of K.H.O.*, 736 A.2d 1246, 1259 (N.J. 1999).

¹⁸² *See, e.g.*, ALASKA STAT. § 25.23.180(j), (l) (2006); CONN. GEN. STAT. ANN. §§ 17a-112(b)–(c), 45a-715(h)–(i) (West 2006); MD. CODE ANN., FAM. LAW § 5-308(a), (f) (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 210, § 6C(a)–(b) (West 2007); MINN. STAT. ANN. § 259.58(a) (West 2007); N.M. STAT. ANN. § 32A-5-35(A) (LexisNexis Supp. 2003); N.Y. DOM. REL. LAW § 112-b(2), (4) (McKinney Supp. 2008); OR. REV. STAT. § 109.305(2), (8)(b) (2007); S.D. CODIFIED LAWS § 25-6-17 (2004); WASH. REV. CODE ANN. § 26.33.295(2), (4) (West 2005); *see also* EVAN B. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTH PARENTS IN THE ADOPTION PROCESS 6 (2007), <http://www.adoptioninstitute.org/publications/2006BirthparentStudyrevised07.pdf> (stating that twenty states permit legally enforceable post-adoption contact agreements). A number of these states, however, will not enforce agreements where the child was placed as an infant. *See, e.g.*, CAL. FAM. CODE § 8616.5(d) (West Supp. 2008); IND. CODE ANN. §§ 31-19-16-1(2), -9 (West 2008); LA. CHILD. CODE ANN. art. 1269.1(A) (2004); R.I. GEN. LAWS § 15-7-14.1(b)(2) (2003).

¹⁸³ *See, e.g.*, MD. CODE ANN., FAM. LAW § 5-308(d) (LexisNexis 2006); MINN. STAT. ANN. § 259.58(b) (West 2007); N.Y. DOM. REL. LAW § 112-b(3) (McKinney Supp. 2008); OR. REV. STAT. § 109.305(7) (2007); WASH. REV. CODE ANN. § 26.33.295(3) (West 2005).

¹⁸⁴ MCCOY & ZURCHER, *supra* note 18, at 6.

needs, and disproportionately non-white.¹⁸⁵ When children are adopted from foster care, the birth parents often lack the opportunity to enter into agreements for post-adoption contact for several reasons. First, in some states, post-adoption contact agreements are enforceable only where the parents voluntarily surrendered the child for adoption or agreed to termination of their parental rights, not where their rights were terminated involuntarily. For example, New York courts have held that “[w]hile post-adoption contact is permitted in the context of a surrender agreement . . . ‘open adoption’ is not a dispositional option in the context of [an involuntary] termination proceeding.”¹⁸⁶ Adoption statutes in other states similarly provide that post-adoption contact is an option only in cases where a parent “(1) consented to the adoption; or (2) *voluntarily* terminated the parent-child relationship.”¹⁸⁷ Thus, a parent whose rights were terminated involuntarily has no standing to seek post-adoption contact.

Second, even in states where neither statutes nor case law expressly prohibit birth parents whose parental rights have been involuntarily

¹⁸⁵ In 2006, approximately fifty thousand children were adopted from foster care. ADMIN. FOR CHILDREN, YOUTH & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., AFCARS REPORT: PRELIMINARY FY 2006 ESTIMATES AS OF JANUARY 2008 (14), at 4 (2008), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.pdf. Less than three percent of those children were under the age of one and a substantial percentage of those children have special needs or are at risk of developing a significant medical condition. *Id.* at 7; Press Release, Univ. of Rochester Med. Ctr., Chronic Conditions More Likely in Young Children in Foster Care (May 26, 2006), <http://www.urmc.rochester.edu/pr/news/story.cfm?id=1128>.

¹⁸⁶ *In re Cheyanne M.*, 753 N.Y.S.2d 360, 361 (App. Div. 2002); *see also* N.Y. SOC. SERV. LAW § 383-c(2), (5)(b)(ii), (McKinney 2003) (allowing a parent to condition the voluntary surrender of a child for adoption upon continuing contact with the child); *In re April S.*, 762 N.Y.S.2d 380, 381 (App. Div. 2003) (quoting *In re Cheyanne M.*, 753 N.Y.S.2d at 361); *Shane J. v. Cortland County Dep’t of Soc. Servs.*, 757 N.Y.S.2d 912, 912 (App. Div. 2003).

¹⁸⁷ IND. CODE § 31-19-16-1(1)-(2) (West 1998) (emphasis added); *see also* S.D. CODIFIED LAWS § 25-6-17 (2005) (“The natural parents of an adopted child shall retain no rights or privileges to have visitation or other post-adoption contact with the child, except . . . in cases of voluntary termination where there is a written pre-adoption agreement between the natural parent or parents and the adoptive parents.”).

terminated from entering into an agreement for contact, birth parents are often unable to enter into such agreements. As Professor Appell has asserted: “Cooperative adoptions in particular may be difficult or impossible to plan in child protection cases when parental rights are terminated in one proceeding to which the adoptive parents are not parties and adoption occurs in another proceeding to which the birth parents are not parties.”¹⁸⁸ As noted above, post-adoption contact might be even more important for children adopted from foster care (as compared to children adopted at birth) because these children tend to be older and have established relationships with their birth relatives.¹⁸⁹ Yet, in these cases, legally enforceable post-adoption contact agreements are often not possible.

Some courts have recognized the importance of post-adoption contact and held that judges have the power to order such contact when it is in the child’s best interest, even if the parties have not executed a post-termination or post-adoption contact agreement.¹⁹⁰ However, these courts have interpreted the child’s best interests narrowly and failed to take into account all of the factors that may impact the child’s interests. For example, some courts require that the child have resided with the birth

¹⁸⁸ Appell, *supra* note 36, at 24.

¹⁸⁹ See *supra* text accompanying notes 49–57.

¹⁹⁰ See *In re Adoption of A.F.M.*, 960 P.2d 602, 606 (Alaska 1998) (stating that the court has “the power to fashion an open adoption with visitation to the biological parent despite the parties’ failure to agree to such an arrangement”); *In re Corinthian Marie S.*, 746 N.Y.S.2d 606, 607 (App. Div. 2002) (affirming trial court’s order for post-adoption visitation after the mother’s rights had been terminated on the grounds of mental retardation). In *In re Corinthian Marie S.*, the adoptive parents and the children’s law guardian agreed that visitation would be in the children’s best interests. *In re Corinthian Marie S.*, 746 N.Y.S.2d at 607. Presumably, the reason the parties never executed a post-adoption visitation agreement was the mother’s lack of capacity to enter into legal contracts. In contrast, other states have held that courts lack the authority to order post-adoption visitation absent a post-adoption agreement, even if contact with the birth family would be in the child’s best interests. See S.D. CODIFIED LAWS § 25-6-17 (2005) (“The South Dakota Supreme Court decision, *People in Interest of S.A.H.*, 537 N.W.2d 1 (S.D. 1995), is abrogated by the South Dakota Legislature in so far as the case gave circuit courts the option to order an open adoption or post-termination visitation. Post-adoption visitation is an extraordinary remedy and may be exercised only by the adoptive parents when in the child’s best interests.”).

family at some point and others require evidence of an existing significant bond or familial relationship before ordering post-adoption contact with birth relatives, including siblings.¹⁹¹ The Massachusetts Supreme Court's decision in *In re Adoption of Vito*¹⁹² illustrates how its standard for post-adoption contact in the absence of an agreement fails to truly protect children's best interests.

Vito, an African-American child, tested positive for cocaine at birth and was placed with a Latino foster family upon his release from the hospital.¹⁹³ Four years later, the Department of Social Services filed a petition to terminate his birth mother's parental rights.¹⁹⁴ Although Vito's birth mother had visited him only once during the first three years of his life, in the year preceding the termination hearing, she had exercised monthly visits.¹⁹⁵ Initially, her ability to communicate with her son was hindered by his inability to speak English, and her inability to speak Spanish, his foster family's primary language.¹⁹⁶ However, social workers

¹⁹¹ See *Sherman v. Hughes*, 821 N.Y.S.2d 628, 629 (App. Div. 2006) (denying post-sibling visitation where the adopted child never had the opportunity to develop a familial relationship with her brother before she was adopted); *Keenan R. v. Julie L.*, 775 N.Y.S.2d 468, 469 (Fam. Ct. 2004) [hereinafter *Keenan R. I.*], *rev'd*, 831 N.Y.S.2d 320 (App. Div. 2007) [hereinafter *Keenan R. II.*] (denying fourteen-year-old foster child's request for post-adoption contact with his sisters because he did not have significant contact with his sisters before they were adopted and thus, there was no "ongoing and affectionate relationship between Petitioner" and his sisters). In *Keenan R.*, the court added that "the existence of such a relationship [is] the essential predicate" to court-ordered post-adoption visitation. *Keenan R. I.*, 775 N.Y.S.2d at 469. On appeal, the Appellate Division held that the trial court erred because it failed to consider whether the petitioner's efforts to establish a relationship with his sisters had been thwarted by the adoptive parents and ordered a hearing to determine whether visitation would be in their best interests. *Keenan II.*, 831 N.Y.S.2d at 320.

¹⁹² 728 N.E.2d 292 (Mass. 2000).

¹⁹³ *Id.* at 295, 298, 305.

¹⁹⁴ Although the department obtained permanent custody of Vito within weeks of his birth, the foster care review panels expressed concern about the cultural and ethnic "inappropriateness" of Vito's foster care placement. *Id.* at 295 n.4. This, along with the department's desire to place Vito with a family member and the foster mother's diagnosis with leukemia, later successfully treated, resulted in the lengthy delay before the termination petition was filed. *Id.*

¹⁹⁵ *Id.* at 297.

¹⁹⁶ *Id.* at 297 n.11.

testified that as Vito learned English, he began to relate better to his birth mother and referred to her as his “other mother.”¹⁹⁷ The guardian ad litem reported that Vito told her he liked visiting with his birth mother.¹⁹⁸

The trial court found that although Vito was not emotionally attached to his birth mother, they shared “a positive relationship.”¹⁹⁹ It further found that Vito was “fully integrated into his foster family both emotionally and ethnically,” but that “racial issues *may* at sometime in the future’ become a problem.”²⁰⁰ Noting that Vito’s Latino pre-adoptive family had no significant contacts with the African-American community,²⁰¹ the trial court held that “Vito’s relationship with his biological mother is ‘crucial’ for his ‘racial and cultural development and adjustment.’”²⁰² It rejected the proposed adoption plan, finding it counter to Vito’s best interests because it failed to provide for significant post-adoption contact with his birth mother and siblings.²⁰³

On appeal, the Massachusetts Supreme Court vacated the trial court’s decision and remanded the case with an order to grant the petition.²⁰⁴ Most states that have addressed the issue of post-adoption contact will order contact only where the adoptive parents and the birth parents (or child protective agency) have entered into an agreement for contact.²⁰⁵ The Massachusetts Supreme Court, however, has held that courts, as *parens patriae*, have the authority to order post-adoption contact in the absence of an agreement “where the evidence readily points to significant, existing bonds between the child and a biological parent, such that a court order abruptly disrupting that relationship would run counter to the child’s best interests.”²⁰⁶ In Vito’s case, the court found that “there [was] little or no evidence of a significant, existing bond between Vito and his biological

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 297.

²⁰⁰ *Id.* at 297–98 (emphasis in original).

²⁰¹ *Id.* at 298 n.13.

²⁰² *Id.* at 298.

²⁰³ *Id.*

²⁰⁴ *Id.* at 307.

²⁰⁵ EVAN B. DONALDSON ADOPTION INST., *supra* note 182, at 6.

²⁰⁶ *In re Adoption of Vito*, 728 N.E.2d at 303 (citing *Youmans v. Ramos*, 711 N.E.2d 165, 171, 173 (Mass. 1999)).

mother”²⁰⁷ and that Vito “did not show any genuine interest in his biological siblings.”²⁰⁸

The Massachusetts Supreme Court’s willingness to order post-adoption contact, even in the absence of an agreement, when necessary to protect a child’s best interests is possibly the most child-oriented of all the states’ approaches. The court has recognized its duty as *parens patriae* to protect children’s best interests. However, *In re Adoption of Vito* highlights the limits of even the most child-oriented approaches to post-adoption contact. It also demonstrates the court’s failure to grasp the literature on child development and the important role that racial and ethnic identity play in adoptees’ identities.

The Massachusetts Supreme Court in *In re Adoption of Vito* acknowledged that “generally, adolescence *may* be a time when a transracial adoptee *may* experience adjustment problems, and that Vito would have little connection to an African-American family or culture living with his adoptive family.”²⁰⁹ However, because “Vito strongly identified with his preadoptive [Latino] family, emotionally and ethnically,” the court found that there was no evidence that a relationship with his birth mother or siblings was “crucial” to his “racial and cultural development and adjustment” or would become important to his identity in the future.²¹⁰ In making this determination, the court relied on the trial court’s finding that:

Vito “is a typical Latino child growing up in a Latino family . . . [and who] describe[s] himself as Latino,” who was “fully integrated into his foster family both emotionally and ethnically,” and whose physical appearance was not strikingly different from his foster parents. His primary language is that of his foster family, not his biological mother.²¹¹

²⁰⁷ *Id.* at 296.

²⁰⁸ *Id.* at 297.

²⁰⁹ *Id.* at 305 (emphasis in original).

²¹⁰ *Id.* at 304–05.

²¹¹ *Id.* at 305.

The court assumed that because, as a young child, Vito identified as Latino (the ethnic identity of his pre-adoptive family) his racial identity would not change.²¹² However, as noted, many transracial adoptees identify with their adoptive parents' racial or ethnic identity when they are young, but identify with the race of their birth parents as they grow older.²¹³ Interestingly, in other contexts, such as custody disputes, courts are loath to rely on a young child's impressions or preferences.²¹⁴ The court's reliance on Vito's choice of identity seems at odds with courts' determinations that children lack the ability to make informed decisions. The Massachusetts Supreme Court seemed to place some significance on the fact that Vito's physical appearance was not "strikingly different" from that of his foster family.²¹⁵ The court never explained why this matters, but presumably the court believed that Vito could "blend in" better with his foster family, and thus, his need for contact with other African Americans was diminished. Would his need for contact with other African Americans have been greater had he been placed with a white family whose appearance was "strikingly different" from his? Would this case have been decided differently had the adoptive parents been white, Korean, or light-skinned Cuban?²¹⁶ The opinion makes no mention of the racial tensions that have existed and continue to exist between African Americans and

²¹² *Id.* at 304–05.

²¹³ See *supra* text accompanying notes 93–95.

²¹⁴ See, e.g., *In re Marriage of Riess*, 632 N.E.2d 635, 641 (Ill. App. Ct. 1994) (“[T]he desires of immature children are not controlling.”); *Barstad v. Barstad*, 499 N.W.2d 584, 588 (N.D. 1993) (stating that “preference is only one factor to consider in a custody decision and ‘is not usually determinative’” and “[a]lthough age is not the exclusive indicator of a child’s maturity and capacity to make an intelligent choice, generally, a child’s preference is entitled to more weight as he or she grows older”).

²¹⁵ *In re Adoption of Vito*, 728 N.E.2d at 305.

²¹⁶ Latinos can identify with many races. Some Latinos identify as white, while a small percentage identify as black, and others identify as mixed or Asian. See KAISER FAMILY FOUND. & PEW HISPANIC CTR., 2002 NATIONAL SURVEY OF LATINOS 31 (2002), <http://www.kff.org/kaiserpolls/upload/2002-National-Survey-of-Latinos-Summary-of-Findings.pdf>.

Latinos.²¹⁷ Many Latinos, including those from the Dominican Republic (where Vito's foster parents' were originally from) do not identify as black even if they are dark-skinned and "look black." They also subscribe to negative stereotypes about African-Americans and often go to great lengths to distance themselves from African Americans.²¹⁸ In the same way that Korean and Native-American transracial adoptees discovered that whites did not really accept them despite their white identity, Vito may eventually find that Latinos do not see him as one of them, despite his Latino self-identify.

IV. CONCLUSION

While there might be reasons for concluding that post-adoption contact was not in Vito's best interests, the court's failure to seriously consider his interest in maintaining contact with other African-Americans is problematic.²¹⁹ Further, even if Vito had been adopted by a same-race family, there are many reasons to encourage and facilitate post-adoption contact.²²⁰ Yet, despite the potential benefits, there are also clear costs associated with requiring adoptive parents to allow post-adoption contact so long as it is in the child's best interests. As noted, the majority of children available for adoption are not healthy infants, but are often older, foster care children for whom demand is low. The risk of court-ordered post-adoption contact might dissuade families from adopting domestically, especially when they can adopt a child internationally where the likelihood of court-ordered post-adoption contact is non-existent.

²¹⁷ Tanya K. Hernandez, *Roots of Anger: Longtime Prejudices, Not Economic Rivalry, Fuel Latino-Black Tensions*, L.A. TIMES, Jan. 7, 2007, at M1 (showing that racial tensions between Latinos and African Americans are quite strong).

²¹⁸ *Id.*; see also Paula D. McClain et al., *Racial Distancing in a Southern City: Latino Immigrants' Views of Black Americans*, 68 J. POL. 571, 578–81 (2006).

²¹⁹ The court's failure to consider whether Vito would benefit from contact with his birth siblings is also disturbing given the evidence that "[c]hildren generally benefit from contact with siblings," U.S. Children's Bureau, *supra* note 50, at 173; see also N.J. Div. of Youth & Family Servs. v. S.S., 902 A.2d 215, 218 (N.J. 2006) ("Case law and the literature make clear that we cannot underestimate the value of nurturing and sustaining sibling relationships."), and that, in this case, sibling contact might be Vito's only opportunity for contact with other African Americans.

²²⁰ See *supra* Part I (discussing benefits of post-adoption contact).

There are other challenges raised by post-adoption contact. For example, court-ordered contact could potentially trample on the rights of the adoptive family. The United States Supreme Court has repeatedly recognized parents' constitutional rights to direct their children's upbringing without state interference.²²¹ In *Troxel v. Granville*, the Supreme Court held that parents have the right to decide who shall have access to their children and that courts must give special weight or deference to parents' decisions to deny or curtail the child's visits with non-parents.²²²

Adoptive parents have this same constitutional right to raise their adopted children as they see fit without state interference.²²³ Accordingly, orders for post-adoption contact over the adoptive parents' objection may arguably violate their rights to determine who shall have access to their children. However, the issue is unclear. Although adoptive parents have the same rights as biological parents, they do not acquire those rights until the adoption is final.²²⁴ Further, while courts have recognized a fundamental right to procreate, they have not recognized a fundamental right to adopt.²²⁵ Courts must protect biological parents' fundamental

²²¹ See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing fundamental rights of parents to control custody and care of their children); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that parents have fundamental right to "establish a home and bring up children").

²²² See *Troxel*, 530 U.S. at 70.

²²³ *In re Adoption of Vito*, 728 N.E.2d 292, 302 (Mass. 2000); *In re Nelson*, 825 A.2d 501, 504 (N.H. 2003) (holding "that it would violate the fit natural or adoptive parent's State constitutional rights to grant custodial rights to an unrelated third person over the express objection of that parent"); *Simmons v. Simmons*, 900 S.W.2d 682, 684 (Tenn. 1995) (stating that "[t]he relationship between an adoptive parent and child is no less sacred than the relationship between a natural parent and child, and that relationship is entitled to the same legal protection").

²²⁴ UNIF. ADOPTION ACT § 1-104 (1994), 9 U.L.A. 23 (1999).

²²⁵ See *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995) ("[W]hatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest."); *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) ("[W]e are constrained to conclude that there is no fundamental right to adopt."); Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131, 154 (1995) ("[T]he Supreme Court has never declared a fundamental right to adopt. In fact, lower courts have concluded that '[a]lthough the

(continued)

rights to raise their children and may not remove a child from the care of his birth parents or terminate parental rights merely because another set of parents would do a better job of raising the child. Absent evidence of neglect or abuse or evidence that the child is in imminent risk of neglect or abuse, the state cannot terminate a parent's rights simply because it believes it would be in the child's best interests to be raised by another family. In contrast, when placing a child for adoption, courts must be guided exclusively by the child's best interests without regard for the interests of the adoptive parents.

Adoption is a creation of the state;²²⁶ as such, individuals who wish to adopt must agree to the state's requirements. In its power as *parens patriae*,²²⁷ a court may place restrictions on the prospective adoptive parents or condition the adoption on their agreement to allow post-adoption contact.²²⁸ However, if after the adoption, when adoptive parents acquire the same rights as birth parents to raise their children without state interference, the adoptive parents terminate contact in breach of the agreement, they might have a strong argument that enforcement of the post-adoption agreement violates their constitutional right to determine who shall have access to their child. On the other hand, a court could find that the enforcement action is simply a breach of contract action and the adoptive parents are merely being held to the terms of the contract they agreed to. These are just a few of the difficult issues raised by post-adoption contact. For these reasons, agencies should educate adoptive parents about the benefits of post-adoption contact and encourage them to enter into and comply with agreements for post-adoption contact.

Supreme Court has rendered decisions defining various elements of family relationships as fundamental interests, none of those cases announced a fundamental interest in adopting children.”) (footnote omitted).

²²⁶ *In re Adoption of Robert Paul P.*, 471 N.E.2d 424, 426 (N.Y. 1984) (stating that adoption is “solely the creature of, and regulated by, statute law”) (citation omitted); *cf.* *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (finding that, unlike natural family, “foster family . . . has its source in state law and contractual arrangements”).

²²⁷ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“The State, of course, has a duty of the highest order to protect the interests of minor children”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (“Protecting the welfare of children is a paramount State policy.”).

²²⁸ *See In re Adoption of Vito*, 728 N.E.2d at 295, 306.

However, given post-adoption contact's potential benefits to all children and transracially adopted children in particular, lawmakers must explore whether courts, in their role as *parens patriae*, have a duty to order post-adoption contact, even in the absence of an agreement, where contact is in the child's best interests.