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# RACE IN ADOPTION PROCEEDINGS: THE PERNICIOUS FACTOR

Shari O'Brien\*

*Many of the things we need can wait. The child cannot. Right now is the time his bones are being formed, his blood is being made and his senses being developed. To him we cannot answer 'Tomorrow.' His name is today.*

—Gabriel Mistral\*\*

## I. INTRODUCTION

The primary purpose of adoption, as it is legislatively and judicially conceptualized today, is to advance the well-being of the child by placing him in a stable, loving family unit. It is not disputed that placement with a suitable adopting family is preferable to the alternatives of institutionalization or short-term foster care. To ensure that the child's lot will be improved by adoption, criteria have been established to determine the suitability of the adoptive parents. Race as one of these criteria is widely sanctioned by statute and case law. The purpose of this Essay is (1) to validate the hypothesis that the use of race as a factor in adoption proceedings tends to defeat rather than promote the well-being of the adoptee-child, (2) to urge the application of ameliorative guidelines, and (3) to analyze the implications for interracial adoption proceedings of the Supreme Court's recent resolution of a custody dispute involving racially diverse households.<sup>1</sup>

The pernicious effect of the widespread use of race as a criterion in adoption dispositions is the product of several elements. These include the distorted and standardless application of the factor of race by some

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\*\* Gabriel Mistral, Nobel Prize-winning poet from Chile (quoted in A. WEEMS, REACHING FOR RAINBOWS 126 (1980)).

1. *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984).

courts; the dim-sightedness of decisionmakers to the fact that frequently the only alternatives to what is perceived as a less than ideal placement are indefinite, injurious institutionalization or foster care; and entrenched, stereotypical attitudes towards the interracial family and its prospects for success.

## II. HISTORICAL PERSPECTIVE

As recently as twenty years ago, statutes in some southern states expressly prohibited interracial adoption.<sup>2</sup> These restrictions were a by-product of antimiscegenation statutes, emanating from bigoted opposition to the creation of racially heterogeneous households, rather than from a concern for the welfare of the child.<sup>3</sup> In fact, South Carolina's antimiscegenation statute was indirectly fortified by another statute barring adoption, by members of either race, of the nonmarital offspring of parents whose interracial marriage was proscribed.<sup>4</sup>

While statutes absolutely prohibiting interracial adoption have, along with antimiscegenation and other statutes separating people on the basis of race, been struck down as unconstitutional,<sup>5</sup> statutory schemes permitting the consideration of race as a factor affecting the adoptable child's best interests persist. Current statutes, which require that either the adoption petition or an investigatory report prepared for the court disclose pertinent information about the parties to an adoption, overtly or covertly invite the court to consider race as a factor bearing on the child's best interests without furnishing guidelines on how to weigh that factor.<sup>6</sup> Accordingly, courts have had broad discretion in evaluating the

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2. Typical was LA. REV. STAT. ANN. § 9:422 (West 1965) (amended 1975) ("A single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race."); see also TEX. STAT. ANN. art. 46a § 8 (Vernon 1969) (repealed 1973) ("No white child can be adopted by a negro person, nor can a negro child be adopted by a white person.").

3. It has not gone without judicial notice that "opposition to cross-racial adoption . . . has been part of a much broader history of segregation in this country, mandating separation of the races . . ." *In re R.M.G. & E.M.G.*, 454 A.2d 776, 789 n.27 (D.C. 1982).

4. S.C. CODE ANN. § 10-2585 (Law. Co-op. 1962) (repealed 1964).

5. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (declared unconstitutional a state antimiscegenation law); *Anderson v. Martin*, 375 U.S. 399 (1964) (struck down a Louisiana election law requiring designation of each candidate's race on nomination papers and ballots); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (invalidated West Virginia statute allowing only white males to serve as jurors); *Compos v. McKeithen*, 341 F. Supp. 264 (E.D. La. 1972) (invalidated Louisiana statute prohibiting interracial adoption).

6. See, e.g., D.C. CODE ANN. § 16-305(4), (5) (1973) (mandating disclosure of race and religion of both petitioners and prospective adoptees on adoption petitions); see also Simon, *Adoption of Black Children by White Parents in the U.S.A.*, in *ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY* 230 (P. Bean ed. 1984); Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. L. 333, 342 (1979) (discussing racial disclosure requirements).

relevance of race in adoption proceedings. Moreover, in exercising this discretion, the judiciary has relied heavily on the determinations of agencies, who have even greater latitude in formulating their recommendations. Too often the "weight of law" has been accorded to nebulous agency policies, including those of racial matching.<sup>7</sup>

In principle, the sole factor of race cannot be used to automatically disqualify petitioners as adoptive parents of a prospective adoptee, and all recent decisions are facially consistent on this score.<sup>8</sup> But in practice, race alone can be dispositive when a court chooses to downplay or ignore other germane considerations, indulge in generalizations, or otherwise cover its tracks beneath an innocuous facade.

### III. JUDICIAL PRACTICE

Some courts have fairly weighed all pertinent considerations when confronted with a proposed interracial adoption,<sup>9</sup> and a few have held that a statute which takes race into account is constitutionally suspect and must survive strict scrutiny upon an equal protection challenge.<sup>10</sup> Ambiguously articulated decisions have appeared, however, which in fact use race as the one and only basis for denying an adoption.

One of the most disturbing of these cases is *Drummond v. Fulton County Department of Family and Children's Services*,<sup>11</sup> on which this study will focus for the purposes of exposing the jurisprudential inadequacies extant in interracial adoption dispositions. (To facilitate this discussion, the initial panel opinion and the opinion on rehearing *en banc* will be referred to as *Drummond I* and *Drummond II* respectively.) In this case, a white couple, the Drummonds, had been the state-designated foster parents and the exclusive psychological parents<sup>12</sup> of Timmy, a biracial child, for more than the first two years of his life. The Drum-

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Although adoption statutes in a majority of jurisdictions are silent as to race, all states require an agency report to be prepared pursuant to every adoption petition. Hence, racial classifications invade adoption proceedings via agency investigative and recommendational reports, even if the state statutory scheme does not require solicitation of racial data.

7. See Note, *supra* note 6, at 352-54.

8. See *infra* notes 9-10 and accompanying text.

9. E.g., *In re Adoption of a Minor*, 228 F.2d 446 (D.C. Cir. 1955); *State ex rel. Portage County Welfare Dep't v. Summers*, 38 Ohio St. 2d 144, 311 N.E.2d 6 (1974).

10. E.g., *In re R.M.G. & E.M.G.*, 454 A.2d 776 (D.C. 1982).

11. 408 F. Supp. 382 (N.D. Ga. 1976), *rev'd*, 547 F.2d 835, *rev'd on reh'g en banc*, 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

12. "A psychological parent is one who, on a continuing, day-to-day basis . . . fulfills the child's psychological needs for a parent, as well as the child's physical needs." J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (new ed. 1979).

A recent decision of the West Virginia Supreme Court of Appeals is illustrative of the increasing

monds, who never signed a standard agency agreement that they would not seek to adopt their foster child, requested permission to adopt Timmy a year after he had been placed with them, a request they renewed when he was legally freed for adoption the following year. Some time thereafter, at an informal agency "staffing" at which the Drummonds were not given the opportunity to present witnesses and evidence in support of their position, be represented by counsel, nor even be present,<sup>13</sup> the fate of this indisputably stable, happy family was decided.<sup>14</sup> Although no other home, black or white, was actually available for Timmy, and the prospects for finding one wanting to adopt a biracial child were recognized as dim, the nineteen staffers, only four of whom had ever seen Timmy and the Drummonds, voted to remove the child from his foster home and to deny the adoption application. The agency recommended Timmy's displacement from a home where he was thriving. He was to be deprived of his status as a wanted child as a result of generalized agency assumptions about the long-term best interests of a minority child.

It is probable that the factor of race was used automatically to exclude Robert and Mildred Drummond from the pool of prospective parents and consequently to sentence Timmy to a precarious future as a hard-to-place child. At the very least, it was, as Judge Tuttle observed in *Drummond I*, impossible for the trial court to determine, given the paucity of the record, whether proper criteria were used in denying the petition. The "actual ingredients" that "went into the decision that was finally made to deny the Drummonds the right to adopt the child" could not be discerned, because no agency worker or supervisor ever gave or recorded actual reasons.<sup>15</sup> Rather, the "one recurring theme that more than arguably runs throughout the record is . . . race."<sup>16</sup>

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general reliance placed on the psychological parenthood concept in custody disputes. In *J.E.I. v. L.M.I.*, 314 S.E.2d 67 (W. Va. 1984), the court noted that:

[I]n cases where temporary custody extends for a period of several years it would be unwise and detrimental to the *child's* best interests to transfer custody unless there is a change of circumstance that makes it in the child's best interest to effect a change. . . . Both psychological studies and common sense inform us that continuity gives children a sense of security and warmth. Therefore, we hold that in cases where the court is unable to determine that one parent is more fit than the other, custody should be left with the parent who had temporary custody. In this way we at least foster stability.

*Id.* at 72-73 (citation omitted).

13. At the least, due process requires the "right to be heard before being condemned to suffer grievous loss of any kind . . . ." *Joint Anti-fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

14. *See* 547 F.2d at 846-49.

15. *Id.* at 854-55.

16. *Id.* at 854.

Sitting *en banc*, the Fifth Circuit reversed the panel opinion and indicated that race can "be taken into account, perhaps decisively if it . . . tips the balance between two potential families . . . [.]"<sup>17</sup> It is remarkable that Judge Roney, writing for the majority, eschewed the evidence that there were not two actual potential families vying for Timmy. Caseworker testimony at trial made clear that the agency knew of no suitable available home as an alternative to the Drummonds'. Instead the "balance was tipped" in favor of a hypothetical family, surmised by the agency to be better for Timmy, but the materialization of which was uncertain.<sup>18</sup>

Purporting to rely on *Compos v. McKeithen*,<sup>19</sup> a still creditable decision, the court in *Drummond II* observed that the consideration of race as a factor is justified by the inherent difficulties of interracial adoption, but underplayed that portion of the *Compos* opinion which emphasized that those difficulties do not justify the consideration of race as a determinative factor. Also ignored was the view advanced in *Compos* that the avoidance of an interracial adoption, even with its attendant disadvantages, does not serve the best interests of a child "whose only alternatives are institutional life or foster care."<sup>20</sup>

Astonishingly, the *Drummond II* majority rejected the earlier conclusion of the panel that the Drummonds and Timmy had protectable liberty interests in preserving the psychological family unit, which entitled them to due process prior to termination of that relationship. In quashing the family's due process claims, the court erred in two respects. First, it misconstrued a recent Supreme Court decision, *Smith v. Organi-*

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17. *Drummond II*, 563 F.2d at 1205. Judge Roney observed that "[i]t is a natural thing for children to be raised by parents of their same ethnic background." *Id.* The observation betrays a firmly entrenched enmity towards racial amalgamation. It can only remain "a natural thing" for children to be reared in a racially or ethnically uniform environment if no interracial or interethnic marriages occur. Perhaps it should come as no surprise that Judge Roney's remark has been approvingly quoted and relied on to justify still another placement decision in which race was a major factor. See *In re Davis*, 502 Pa. 110, —, 465 A.2d 614, 625 (1983) (court concluded that it would be remiss to ignore the relevance of race in placement proceedings).

18. What is known of the aftermath of this case is discussed in Palmer, *Adoption: A Plea for Realistic Constitutional Decisionmaking*, 11 COLUM. HUM. RIGHTS L. REV. 1, 7 (1979). Timmy "was apparently placed in the home of a couple of 'mixed racial ancestry' for the purposes of adoption. This placement seemed to be unsuccessful. Timmy was later placed in a third foster home for the purpose of adoption." *Id.*

19. 341 F. Supp. 264 (E.D. La. 1972). *Compos* addressed the validity of a Louisiana statute which precluded interracial adoption. Although the court found race to be a relevant factor in adoption proceedings, the statute's use of race as the determinative factor was held unconstitutional as violative of the equal protection clause of the fourteenth amendment. *Id.* at 266.

20. *Id.* at 267.

zation of Foster Families for Equality and Reform,<sup>21</sup> by quoting and paraphrasing passages which, taken out of context, misleadingly suggest that the highest court has foreclosed the possibility of protectable liberty interests held by members of a foster family.<sup>22</sup> Second, the *Drummond II* opinion gave short shrift to recent studies,<sup>23</sup> the reliability of which is widely acknowledged,<sup>24</sup> indicating that in order to protect the best interests of the child, psychological parent-child relationships developing within the confines of a common law or foster family must be given legal cognizance.

*Drummond II* is illustrative of the abuse to which the permissibility of the use of the factor of race in adoption proceedings is susceptible. By artful dodging, a court that is so inclined can easily sustain automatic denial of an interracial adoption petition, whether by burying the factor of race among pretextual considerations or by simply asserting that perfunctory treatment is not being rendered. In the *Drummond* case, both methods were employed to achieve the desired result of thwarting an interracial adoption. Makeweight additional factors were contrived and raised on appeal to lend credence to the agency's protestations that race was not the sole basis for their actions.<sup>25</sup> Furthermore, the court in *Drummond II* merely parroted the holding of the trial court that race was not used in an automatic manner, without demonstrating non-automatic use through any specific reference to the record.

#### IV. RECOMMENDED SUBSTANTIVE AND PROCEDURAL MODIFICATIONS

While commentators have decried holdings like those of *Drummond II* and its forerunners, most hesitate to advocate the complete elimination of the factor of race in adoption proceedings.<sup>26</sup> Decidedly, a well-defined

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21. 431 U.S. 816 (1977).

22. 563 F.2d at 1206 (quoting 431 U.S. at 864).

23. The most influential of these is J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 12.

24. Goldstein's work has been cited as authoritative by several courts. *See, e.g., In re B.G.*, 11 Cal. 3d 679, 693, 523 P.2d 244, 253, 114 Cal. Rptr. 444, 453 (1974) (giving legal cognizance to *de facto* parent-child relationship in holding that foster parents have standing to appear as parties in custody proceedings); *In re Adoption of Michelle Lee T.*, 44 Cal. App. 3d 699, 708, 117 Cal. Rptr. 856, 860-61 (1975) (applying the least detrimental alternative standard to reach determination that no substantial evidence had been offered to support the finding that the advancing age of the petitioners would outweigh the disadvantages of removing the child from their warm, stable home); *J.E.I v. L.M.I.*, 314 S.E.2d 67, 73 n.2 (W. Va. 1984).

25. As the *Drummond I* opinion makes clear, these other factors (age and health) could not possibly have contributed to the agency's decision to reject the Drummonds as general prospective adopters because they never even surfaced before trial. *See* 547 F.2d at 849.

26. *See* Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody*

formula for averting the propagation of inequitable denials of adoption petitions on the basis of race is needed. A starting point might be the revision of two standards, one substantive and one procedural.

#### A. *The Least Detrimental Alternative Standard*

One of the sources of counterproductive application of racial criteria in adoption dispositions is the substantive best interests of the child standard. This standard is so amorphous that it is nearly impossible to attack an opinion which adopts it. Professor Goldstein and his co-authors have ably exposed the shortcomings of this standard and have proposed the least detrimental alternative standard as an effective replacement:

Even though we agree with the manifest purpose of the in-the-best-interests-of the child' standard, we adopt a new guideline for several reasons. First, the traditional standard does not, as does the phrase 'least detrimental,' convey to the decisionmaker that the child in question is already a victim of his environmental circumstances . . . . Moreover, . . . many decisions are 'in name only' for the best interests of the specific child who is being placed. They are fashioned primarily to meet the needs and wishes of competing adult claimants or to protect the general policies of a child care or other administrative agency.<sup>27</sup>

The authors underscore the dichotomy between the ostensible meaning of the best interests standard and its judicial and legislative construction. This tension between denotation and interpretation would be reduced by implementing the least detrimental among available alternatives guideline. Adherence to the proposed standard should lessen the likelihood of decisionmakers "becoming enmeshed in the hope and magic associated with the 'best,' which often mistakenly leads them into believing they have greater power for doing 'good' than 'bad.'"<sup>28</sup> By pressing into focus the limited capacity of decisionmakers to make valid predictions, the standard should facilitate the weighing of the advantages and disadvantages of the actual options.

Implementation of the least detrimental alternative standard<sup>29</sup> would have the general effect of eliminating even non-automatic use of

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*Proceedings*, 17 BUFFALO L. REV. 303, 341 (1968); Note, *supra* note 6, at 351; Comment, *The Interracial Adoption Implications of Drummond v. Fulton County Department Of Family And Children Services*, 17 J. FAM. L. 117, 151 (1979).

27. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 12, at 54.

28. *Id.* at 63. A sensitive application of the least detrimental alternative standard in an adoption proceeding is found in *In re Adoption of Michelle Lee T.*, 44 Cal. App. 3d 699, —, 117 Cal. Rptr. 856, 861 (1975).

29. The standard was recently applied by the Supreme Court of California in a termination of parental custody proceeding, *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 218 Cal. Rptr. 39, 705 P.2d 362 (1985).



the factor of race in adoption proceedings. The realities of the adoption situation as it exists today compel this conclusion.<sup>30</sup> The use of the least detrimental alternative standard would also ensure that a hard-to-place<sup>31</sup> child would not be divested of a permanent home with a qualified, albeit racially diverse, family, when the other option is assignment to an indefinite, perhaps interminable, period of waiting for a racially analogous family to come along. The revised standard would facilitate concession to the patent truth that an interracial adoption, even with its potential attendant problems, is preferable to lengthy interim institutionalization or a string of foster home placements. This is so because the deleterious effects of parental deprivation are virtually certain, while the deleterious effects of interracial adoption are not at all certain.

The ravaging consequences of both institutionalization and successive foster care placements are well documented.<sup>32</sup> A child deprived of an ongoing, stable relationship with a psychological parent is likely to lack the capacity to form deep emotional attachments or warm social relationships, and may well encounter difficulties functioning intellectually and maintaining physical stamina.<sup>33</sup> Moreover, even episodic institutionalization or foster care placement may be damaging to the child. Children are much less tolerant of delay than adults. The withholding from a child of a stable home life for what adults experience as a brief span of time will result in the same emotional, intellectual, and physical deficits as those just described.<sup>34</sup>

For the prospective adoptee, then, expeditious permanent placement is crucial. It is questionable whether this can be accomplished for the non-white child if the factor of race is permitted to decrease the pool of prospective adopters. The inevitable passage of time waiting for the

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30. Recent statistics reveal that although black children comprise only 14% of the child population, they comprise 25% of the foster care population and 37% of the children free for adoption who are not in an adoption placement. See AD. FOR CHILDREN, YOUTH AND FAMILIES, OFF. HUMAN DEV. SERVICES, DEP'T HEALTH AND HUMAN SERVICES, REPORT TO CONGRESS ON P.L. 96-272: THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980, CHILD RESEARCH NOTES #2, 2, 4 (1984). Although the ratio of prospective adopters to adoptees stands about 35:1, there remains a glut of adoptable black infants. See Wilson & Hitching, *Adoption: It's Not Impossible*, BUS. WK., July 8, 1985, at 112.

31. A hard-to-place child is one who is (1) past infancy; or (2) physically, mentally, or emotionally handicapped; or (3) a member of a racial or ethnic minority. The National Committee for Adoption has encouraged the use of the less pejorative term "special needs children" to describe these youngsters. See ADOPTION FACTBOOK (prepared by the National Committee for Adoption) 41 (1985).

32. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 12, at 32-34.

33. *Id.* But cf. *Champagne v. Welfare Division*, — Nev. —, —, 691 P.2d 849, 856 n.6 (1984) (criticizing Goldstein's theory as "diminishing the value of parental autonomy").

34. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 12, at 41.

emergence of the adopting family whose race matches his is destructive for the child. Furthermore, the dilatory effect of considering the factor of race is magnified by the time-consuming process of agency report preparation and subsequent judicial evaluation.

The placement delays, multiple removals from foster homes, or institutionalization typically confronting the hard-to-place child must be contrasted with the alternative of interracial adoption when presented. To determine whether children adopted by people of a different race are worse off than children reared or protractedly detained in foster homes or institutions, the alleged hardships encountered by a non-white child in a white home must be examined.<sup>35</sup>

An extensive corpus of literature has evolved on the subject of the viability of interracial adoption.<sup>36</sup> A collective reading of these studies reveals that there is no consensus as to the difficulties ensuing from interracial adoption.

Some commentators stress the problems an adolescent member of an interracial household may encounter in dating and, later, in marrying.<sup>37</sup> It is argued that the disapproval of other parents (particularly white parents) and of peers and onlookers to interracial teenage opposite sex relationships could create anxiety and insecurity for the interracial adoptee. But improving relations between blacks and whites promise the abatement of the censoring stares of the public and the hysteria of the family of the adoptee's companion.<sup>38</sup> Moreover, it should be noted that nearly every teenager, regardless of family racial composition, is confronted with myriad crises that courts are powerless to predict or avert. Finally, even if difficulties in adolescence developed, the offsetting benefits of a family life during early and middle childhood are enormous.<sup>39</sup>

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35. The adoption of a hard-to-place white child by a black family would be rare, given the supply and demand of today's adoptive market. But, the arguments advanced in this essay to expel racial identity as an impediment to expeditious, permanent placements apply with equal force to situations where the racial roles are reversed.

36. See, e.g., D. DAY, *THE ADOPTION OF BLACK CHILDREN* (1979); L. GROW & D. SHAPIRO, *BLACK CHILDREN, WHITE PARENTS: A STUDY OF TRANSRACIAL ADOPTION* (1974); R. MCROY & L. ZURCHER, *TRANSRACIAL AND INRACIAL ADOPTEES* (1983); R. SIMON & H. ALSTEIN, *TRANSRACIAL ADOPTION: A FOLLOW-UP* (1981); C. ZASTROW, *OUTCOME OF BLACK CHILDREN—WHITE PARENTS & TRANSRACIAL ADOPTIONS* (1977); Simon, *supra* note 6.

37. This has been termed the "puberty argument." C. LARSON, *MARRIAGE ACROSS THE COLOR LINE 72-73* (1965).

38. See Note, *supra* note 6, at 362.

39. Many authorities agree that the earliest experiences of childhood form the basis of all that develops in later life. See, e.g., M. WOOD, *CHILDREN: THE DEVELOPMENT OF PERSONALITY AND BEHAVIOR 75* (1973). The Supreme Court of Pennsylvania has espoused the view that "[a] predominantly different race environment tends to take on greater significance as the child approaches and

Some critics of interracial adoption have suggested that the motives of those seeking to adopt outside their race are suspect. Specifically, it is claimed that adopters of minority children are white liberals attempting to prove their commitment to the civil rights movement or "to atone for their past white sins."<sup>40</sup> But, it is more feasible that some couples consider color irrelevant. In addition, most prospective adopters want a child as soon as possible, and some may realize that one way to expedite the process is to accept a child for whom there is less demand. It is also noteworthy that any adopting couple may be motivated to adopt for reasons that others could view and have viewed suspiciously. Motivations may range from "the mere fact of being childless . . . to the wish to replace a dead child, to acquire a companion for an only child, to rescue an orphaned . . . child, to have an heir, to stabilize a marriage, or to fulfill a conscious or unconscious fantasy."<sup>41</sup> If all prospective adopters underwent psychoanalysis to ascertain motivations, and then were eliminated on the basis of possible latent insalubrious desires, our orphanages would be full.

The remaining argument advanced by some opponents of interracial adoption has even less substance. It is contended that a black child raised in a white home will be deprived of the opportunity to develop "ethnic pride" and the "survival skills" he or she needs to defend against the hostile white majority.<sup>42</sup> As to the development of ethnic identification however, a number of studies have reported that interracial adoptive families typically make successful efforts to nurture in their adopted children a positive self-image and a clear sense of racial identity.<sup>43</sup> A more fitting response is that our system does not and must not give legal impetus to desires, from any quarter, to preserve any variety of racial separatism.<sup>44</sup> A child who must forego parents, whatever their color, is

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reaches dating age, that trying time of youth when peer pressure can be so relentless and intense." *In re Davis*, 502 Pa. 110, 119, 465 A.2d 614, 623 (1983).

40. R. LASNIK, *A PARENT'S GUIDE TO ADOPTION* 30 (1979).

41. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 12, at 22.

42. Ironically, this position is taken by the National Association of Black Social Workers. This group, who it might seem would be the natural allies of any movement to accelerate permanent placement of homeless black children, contends that transracial adoption is not a viable alternative to foster care or institutionalization. See Nat'l Ass'n Black Soc. Workers News, Jan. 1973, at 1, col. 1.

43. For a particularly compelling, recent example of such a study, see R. MCROY & L. ZURCHER, *TRANSRACIAL AND INRACIAL ADOPTEES, THE ADOLESCENT YEARS* 122 (1984).

44. In *Loving v. Virginia*, 388 U.S. 1, 11 (1967), the Supreme Court concluded that attempts by a state to proscribe conduct otherwise acceptable when engaged in by members of the same race were repugnant to the Constitution when the state's asserted purpose for the classification was the preservation of racial integrity. *But cf.* The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963

victimized, not benefitted, by well-intentioned but misdirected attempts to promote racial pride.<sup>45</sup>

There is a dearth, then, of conclusive empirical evidence regarding the negative psychological impact of interracial adoption. Many of its critics offer hypotheses based on fear, intolerance, speculation, or suspicion, rather than findings based on actual observation. From the foregoing analysis, a deduction remains to be drawn: it is certain that the sterile and sometimes turbulent inner life befalling a child ward of the state is accompanied by devastating long-term effects; therefore, interracial adoption presents a less detrimental alternative to foster care placement or institutionalization.

### B. *Strict Scrutiny To Protect Prospective Adoptees*

The overhaul of the substantive best-interests-of-the-child standard is one means of forestalling the pernicious use of race as a factor in adoption proceedings. But a procedural expedient must be coupled with the substantive one to fully insulate the prospective adoptee from the possibility of a decision contravening his needs and rights. The procedural expedient is accomplished through insistence upon active judicial review in all adoption proceedings in which race is made a factor.

It is axiomatic that racial classifications are quintessentially suspect and to be valid they must be found to be scrupulously adapted to the promotion of a compelling state interest, the accomplishment of which is not possible through less drastic means than the classification.<sup>46</sup> Unfortunately, in the context of custody and adoption proceedings, this standard of review has not been faithfully implemented.<sup>47</sup>

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(1978) (preferring adoption of Indian children by Indian families in order to preserve the Indian tribes).

45. The charge that interracial adoption should be discouraged because a minority child cannot cultivate "survival skills" in a white household is equally feeble. It is certainly not to the advantage of any child to train him to assume a defensive posture toward other people. Rather, his caretakers should instill in him an abiding sense of his own worth, which will equip him to thrive in a multiracial society. This healthier attitude has been endorsed by courts adjudicating custody disputes. See *Lucas v. Kreischer*, 450 Pa. 352, 356, 299 A.2d 243, 246 (1973) (a child raised in a happy and stable home will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such); *accord* *Beazley v. Davis*, 92 Nev. 81, \_\_\_, 545 P.2d 206, 208 (1976).

46. See *Palmore*, 104 S. Ct. at 1882; *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

47. See, e.g., *Drummond v. Fulton County*, 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978); *Petition of D.I.S.*, 494 A.2d 1316, 1327 (D.C. 1985) (since foster parents enjoy no constitutionally protected interest in continued custody of foster child equal protection clause does not require strict scrutiny of trial judge's findings in interracial adoption case); *Farmer v. Farmer*, 109 Misc. 2d 137, \_\_\_, 439 N.Y.S.2d 584, 590 (N.Y. Sup. Ct. 1981) (race is one of several factors to consider but is not controlling).

It has been argued that the use of race in adoption proceedings does not justify strict scrutiny because the earmarks of racial benignancy are present.<sup>48</sup> However, in cases where race-conscious state actions have been upheld as benign, the purpose has been to remedy past discrimination. Moreover, the class disadvantaged by classification is necessarily one not burdened with the traditional, salient features of suspectness.<sup>49</sup> In the context of adoption dispositions, however, the consideration of racial criteria is not remedial, nor are all disadvantaged parties members of an historically non-victimized class. In fact, the intended beneficiary of the race-conscious action may well be the recipient of an additional burden rather than of preferential treatment.

Because racial classifications traditionally resulted in especially invidious discrimination in the area of family law<sup>50</sup> and because the consideration of race is so susceptible to abuse in adoption proceedings even today, the use of the strict scrutiny standard of review is most appropriate. The party invoking the use of race would bear the burden of demonstrating that an overriding state interest—i.e., the individual adoptee's welfare defined in terms of the least detrimental alternative—could only be advanced by attention to racial factors. In other words, the inadvisability of interracial placement relative to the other actual options would have to be demonstrated.

As a practical matter, when the other available alternative to interracial adoption is anything less than intraracial adoption, the use of the substantive least detrimental alternative standard without more should have the general effect of rendering race an irrelevancy. But when two families, one black and one white, are vying for a child, adherence to strict scrutiny may afford an essential safeguard. Passive review permits routine favoring of petitioners of the child's race, without requiring the court to articulate a comparative analysis of the abilities of the two families to accommodate the needs of the child.<sup>51</sup>

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48. See *In re R.M.G. & E.M.G.*, 454 A.2d 776, 800 (D.C. 1982) (Newman, C.J., dissenting).

49. See *Fullilove v. Klutznick*, 448 U.S. 448, 478-84 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265, 361-74 (1978) (Brennan, Marshall, White, & Blackmun, JJ., concurring in part and dissenting in part).

50. See *McLaughlin v. Florida*, 379 U.S. 184 (1964) (questioning *Pace v. Alabama*, 106 U.S. 583 (1882) and striking down a statute which more heavily penalized interracial cohabitation than cohabitation by persons of the same race).

51. In *In re R.M.G. & E.M.G.*, the court established an analytical framework for weighing the factor of race in a proceeding in which two actual families seek to adopt the same child. The court set out a three-step evaluation: (1) how each family's race is likely to affect the child's development of a sense of identity (including racial identity); (2) how the families compare in this regard; and (3)

1. *Palmore v. Sidoti*<sup>52</sup>

A custody contest decided in 1984 by the Supreme Court perhaps foretokens the curtailment of even circumscribed use of the factor of race in adoption cases. In *Palmore v. Sidoti*, a white father sought (and the lower court granted) custody of his young daughter because his ex-wife, also white, married a black man. The Court, applying strict scrutiny, did not linger over the benefits and shortcomings posed by the two households. Rather, it concluded that, absent a negative finding as to the quality of care rendered by the mother or the respectability of the new spouse, the mother should remain the custodian. In a paragraph that would seem to preclude the use—either automatic or assessed—of the factor of race in placement disputes, the unanimous Court concluded:

Whatever problems racially-mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.<sup>53</sup>

While *Palmore* involved a custody dispute between two natural parents, its reasoning seems equally applicable to adoption proceedings. If a purported attempt to protect a child against acknowledged community prejudice is insufficient to justify a racial classification in a custody battle,<sup>54</sup> there is no basis for maintaining that such an attempt suffices to justify a racial classification in an adoption disposition.

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how significant the racial differences between the families are when all the factors relevant to adoption are considered together. 454 A.2d at 791.

The District of Columbia Court of Appeals recently disavowed the three-step approach as “unwise” since it “effectuate[d] a sharp departure from the flexible framework developed in . . . [prior] decisions for determining the best interests of the child.” The court preferred the “flexible approach” because it “requires the trial judge to carefully weigh all the factors bearing on the child’s best interests, enjoys virtually unanimous acceptance and represents the current wisdom on making this critical determination.” *In re* D.I.S., 494 A.2d 1316, 1327 (D.C. 1985).

52. 104 S. Ct. 1879 (1984).

53. *Id.* at 1882.

54. A state court antecedent to *Palmore*, *In re* Custody of Temos, 304 Pa. Super. 82, 450 A.2d 111 (1982), had, on analogous facts, concluded that race is an entirely inappropriate factor in a custody action. Writing for a unanimous three-judge panel, Judge Spaeth eloquently observed:

A court may not assume that because children will encounter prejudice in one parent’s custody, their best interests will be served by giving them to the other parent. If the children are taunted and hurt because they live with a black man, with love and help they may surmount their hurt and grow up strong and decent . . . . [A] court must never *yield* to prejudice because it cannot *prevent* prejudice. . . . The fundamental principle of our law is that all persons are created equal. A court’s decree should always exemplify that principle.

*Id.* at 120 (emphasis in original).

*Palmore* does not imply that children whose placements are in dispute should become the sacrificial lambs in the ongoing endeavor to execute the objectives of the equal protection clause. *Palmore* stands for the implicit proposition that the child's best interests would overcome constitutional antagonism toward this most acutely suspect of classifications if that classification were found to be an indispensable means of protecting the child. In the vast majority of cases, however, race as a consideration only protects against hypothetical risks and thus is not well-tailored to the objective of promoting the child's well-being.<sup>55</sup>

## V. CONCLUSION

Hopefully, *Palmore v. Sidoti* will inaugurate needed reforms in the child placement system. While the holding is narrowly confined to the facts of the case—removal of an infant child from the custody of its natural mother—the aggregate opinion is broad enough to accommodate other placement dilemmas. The Court's position that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"<sup>56</sup> may appear, upon a cursory reading, to immolate the happiness of the individual child to the mandates of the fourteenth amendment. But behind the Court's doctrinal pronouncement is the practical, inescapable reality that the happiness of the individual child is simply not promoted by use of a factor which necessarily requires conjecture and generalized assumptions on the part of the decisionmaker regarding the future behavior of all parties.

Retention of racial criteria in adoption proceedings will serve only to perpetuate racial separatism without benefitting non-white prospective adoptees who must in any event cope with some societal prejudice no matter where they are placed. Retrenchment of the superannuated factor of race will make less remote for every hard-to-place child the possibility of attaining his birthright: membership in a loving family.

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55. The Court did not overtly utilize the least detrimental alternative standard.

56. *Palmore*, 104 S. Ct. at 1882.