TRANSRACIAL ADOPTION (TRA): OLD PREJUDICES AND DISCRIMINATION FLOAT UNDER A NEW HALO

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PROLOGUE

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The crowded ferry slowly pulls away from the wharf to make its way out into the harbor to the historic Ile de Gorée. Less than two miles from the mainland, Gorée is a small balsatic lump of rock, just 18 hectares. Between the establishment of the first Portuguese slave stations in 1536 and 1848, when France abolished its slave trade, Gorée was one of the final points of departure for millions[1] of Africans, sold and bartered into bondage.

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¹ BOUBACAR JOSEPH NDIAYE, THE SLAVE HOUSE OF GOREE-ISLAND, THE SLAVE TRADE AT GOREE-ISLAND AND ITS HISTORY 16 (Momar Khary Diague trans., Dakar, Senegal n.d.). *See also* BLACK VOYAGE: EYE WITNESS ACCOUNTS OF THE ATLANTIC SLAVE TRADE 3 (Thomas Howard ed., 1971) [hereinafter Black Voyage] (stating that although "[t]here is no accurate count of the number . . . it was in the millions[; . . .]historians believe that from 10 to 20 million slaves were brought westward across the Atlantic during the four centuries the trade prevailed.").

Some scholars who also refer to 10 to 20 million Africans being brought to the New World in bondage, estimate that between 30 and 60 million Africans were subjected to the horrors of the trade, but "approximately one third of them died on the torturous march to the ships and one third died in the holding stations on both sides of the Atlantic or on the ships." Dr. John Henrik Clarke, *Introduction* to TOM FEELINGS, MIDDLE PASSAGE: WHITE SHIPS/BLACK CARGO (1995) (a collection of sixty-four flawlessly researched and intensely personal narrative paintings by master artist Tom Feelings tell the story of the diaspora).

Though the day is clear and the temperature is in the eighties, I begin to shiver. I sense a degree of anxiety rising within me as I anticipate how I will react when confronted with the reality of my ancestral past.

During the crossing to Gorée-Island, the tour guide moves about the boat, stopping to spend a few minutes getting acquainted with each of the fifteen individuals in our party. When he introduces himself to me, he asks: "Why are you with us today?" Thinking that he is asking about my attending the Third African/African-American Summit Conference, being held in Dakar from May first through the sixth, I start telling him about receiving an invitation in February from the renowned civil rights activist, Rev. Leon H. Sullivan, and the presidents of two African countries.[2] The guide, however, raises his hand to stop me. He again asks: "Why are you going to Gorée this afternoon? What do you seek?" I then explain that having the good fortune and opportunity to come to Senegal, my top priority is to visit The Slave House of Gorée-Island to pay tribute to the millions of people whose last contact with their homeland was this or a similar "slave holding station."[3] The guide beams. He says that he is glad I am interested in history and in hearing the truth, and not merely setting out on a tourist outing. He promises to take our group out on the upper balcony to talk privately with us before leaving the museum. There is a need, he says, for Africans to acknowledge their past roles in the slave trade. He believes this must occur for Africans and African-Americans to forge strong and lasting bridges. This will be his contribution to that healing and building process.

The ferry pulls within sight of Gorée. Once the ferry docks and we disembark, the tour guide leads us to the left, across a small open plaza facing the water. Before starting down narrow Saint-Germain Street, which runs parallel to the shore, he stops and announces that although May first is a Muslim holiday

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[2] The announced objective of the Third African/African-American Summit: *Building a Bridge of Togetherness*—a third coming together of Africans, African-Americans, and friends of Africa, was "to plan and develop a program of Principles, Declarations and Actions to assist with the economic and human development needs of sub-Saharan Africa." Because of the efforts of Rev. Leon H. Sullivan, two prior summits had been held in Abidjan, Côte d'Ivoire in 1991 and in Libreville, Gabon in 1993. *See* George E. Curry, *A Call to Arms: Dialogue,* EMERGE, July/Aug. 1995, at 20.

[3] Gorée-Island and The Slave House Museum are very special tourist attractions, especially for African Americans who seek to know and understand their heritage.

> While other places in Africa witnessed the despatch of greater numbers of slaves to the Americas than Gorée, from which 60,000 African men, women and children were herded onto the nefarious slave vessels . . . very few places have preserved such an imprint of that shameful period. Not a single step can one take along the streets of Gorée without being reminded of that abominable trade. The Maison des Esclaves—Slave House—is a typical example of the buildings specially designed to "store" slaves awaiting shipment . . . . Nothing is missing, from the dank, dark cramped slave quarters on the ground floor to the abysmal cells for recalcitrants.

JEAN-CLAUDE BLARHERE & MICHEL RENAUDEAU, GORÉE 16-17 (Richer-Hoa-Qui ed., 1992) (hereinafter, GORÉE).

and The Slave House is closed, Boubacar Joseph Ndiaye, principal curator, has agreed to give our party a private tour.

In response to the tour guide's knock, Curator Ndiaye opens the door and quickly ushers us into the open ground level courtyard of the last slave station built on the island in 1776. Straight ahead, at the end of a central dark corridor, is an opening to the sea—a "Doorway of No Return"[4] through which thousands passed on their way to the Americas. Immediately in front of us, on either side of this corridor, two curved, pink cement-railed staircases sweep up to a balcony porch surrounding rooms with high ceilings that served as living quarters for the slave trader/merchants and their mulatto mistresses, known as "signarés."[5]

Ndiaye first shows us the ground level holding cells into which traders placed family members upon arrival. Men, women, and children were held in different rooms, seated with their backs to the wall, with shackles around their necks and arms. The largest room is the weighing room. Here young men were kept to be "fattened up" before they were weighed and auctioned off. For those reluctant to accept their plight, there were, under each horse-shoe shaped staircase, oubliette-cells for solitary crouched confinement, or a large, perpetually damp room on the far right side.

Sometimes as many as 150 to 200 persons would wait in these rooms for the arrival of the next ship. They were freed only once per day to relieve themselves. The despicable health conditions at this station led to a plague that ravaged the Island in 1779.[6] In amazement, I wonder how the trader merchants and their mulatto mistresses could have lived just one floor above this misery. How could they have been unaffected by the stench?

As our party moves about the ground level, stepping in and out of the rooms, crossing the corridor to peer out at the sea, I am engulfed by an unseen yet palpable source of energy, radiating up from the floor and out from the walls. Instead of revulsion or fear, I feel a surge of awe well up inside me. How magnificiently strong and resilient my ancestors were to have endured this!

This Slave House of Gorée-Island epitomizes, in the words of Curator Ndiaye, three hundred years of slave trafficking that removed millions of people from the African continent. The trader/merchants separated and dispersed whole families. Fathers might be purchased and sent to Louisiana, mothers to Brazil or Cuba, and children to Haiti or the West Indies, all stripped of their African names and assigned registration numbers. Yet, once in the Americas, during slavery and since emancipation, the descendants of these former slaves found ways to survive, to reconstitute families and communities, to become in Curator

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[4] *Id.* at 86-87; *see also* NDIAYE, *supra* note 1, at 7, 16.

[5] The term "signarés" (a corruption of the Portuguese word senhoras) was used to describe women of mixed blood whose slave mothers had been set free on the Island if made pregnant by a slave trader. *See* NDIAYE, *supra* note 1, at 15. "The 'signarés' became the mistresses of the island in more than one sense . . . . [They] enjoyed the protection of their French or British 'husbands' [legal marriage was not permitted], prospered and took command of many of the island's affairs." GOREE, *supra* note 3, at 12.

[6] *See* NDIAYE, *supra* note 1, at 15.

Nydiaye's eyes a "single people: the AFRO-AMERICANS."[7]

In closing, Curator Ndiaye reports that more African-Americans are believed to have come to Dakar for this Summit than ever before returned at the same time to the same place on the African continent.[8] He asks us, as we stand in the last slave station built on Gorée-Island in 1776, to remember that the entire history of the slave traffic through Gorée-Island spanned slightly more than 300 years. As I listen, I feel intense heat rush from the soles of my feet and up my spine. Like a thunderclap: "Never again! Never again!"—the oft repeated refrain of activist Jews[9] about the Holocaust, starts to reverberate in my brain. Most Americans know that approximately six million Jews died as a result of the Holocaust.[10] However, there is no such common awareness or acknowledgment of the horrors of the slave trade, so poignantly depicted by artist Tom Feelings.[11] Angrily, I think: how dare "folk"[12] forget, ignore, or deny the realities and legacy of this long history of slavery—the history of my ancestors whose unsung and long uncompensated labors subsidized not only the founding and development of the United States of America, but of all the modern economies of the Western World?[13]

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[7] *Id.*; *see generally*, HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925 (1976) (definitive study that "challenges the traditional view that slavery virtually destroyed the Afro-American family. Rich in detail and strongly documented, it argues persuasively that neither the barbarism of slavery nor the chaos of Reconstruction could sever the ties of wife and husband, parent and child.").

[8] On Saturday, April 29, 1995, two chartered 747 planes had departed from Philadelphia, carrying nearly 1000 sons and daughters of African descent. Some had attended prior summits; many, like myself, were visiting Africa for the first time.

[9] *See e.g.,* Carmen Carter, *The Liberation Exhibit Shows Concentration Camps Through the Eyes of GIs*, CIN. POST, Jan. 27, 1995, at B1 ("Elie Wiesel, Auschwitz survivor and Nobel Prize winner, 'Never shall I forget these things, even if I am condemned to live as long as God Himself. Never.' ").

[10] Israel Gutman & Robert Rozett, *Estimated Jewish Losses in the Holocaust, in* ENCYCLOPEDIA OF THE HOLOCAUST 1797-1802 (Israel Gutman ed., 1976).

[11] *See* CLARKE, *supra* note 1.

[12] The term "folk" is here used to mean everyone.

[13] Historian James A. Rawley states:

The wealth of the New World—especially sugar, tobacco, precious metals, coffee, indigo, and cotton—was extracted by black labor imported from Africa through the capitalistic enterprise of western Europe. Negro slavery was essential to the carrying on of this commerce which in turn was fundamental to the making of the modern world.

JAMES A. RAWLEY, THE TRANSATLANTIC SLAVE TRADE: A HISTORY 4 (1981) (citing D.A. Farnie, *Commercial Empire of the Atlantic, in* THE RISE OF THE ATLANTIC ECONOMICS (London, 1973)).

I. INTRODUCTION

Oblivion awaits a people denied the opportunity to rear its own children.

I tell the foregoing account of my visit to The Slave House of Gorée-Island to emphasize a harsh truth: once again the stage is set for African-American[14] children to be rudely separated from their families and communities. During the years of the slave trade through Gorée-Island, trader/merchants ruthlessly brokered procurement of Africans to meet the labor demands of New World plantations involved in producing raw materials for shipment to Europe. Since the 1980s, those associated with the growth industry of private adoptions[15]—like the trader/merchants of Gorée—have been attempting to meet a strong consumer demand for babies.

Just as there is no accurate count of those taken out of Africa during the slave trade,[16] there are no firm statistics on United States adoptions.[17] As the number of children in America's foster care system continues to rise, fast approaching 500,000, it is estimated that less than five percent of these children may at any time be legally available for adoption. Of this group, "44% are white and 43% are black [; b]ut 67% of all families waiting to adopt are white . . . ."[18] Most

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[14] I use the term "African-American" to refer to persons of African descent whose ancestors survived the horrors of the Middle Passage. In the spirit of inclusiveness, I consider all who willingly identify with and acknowledge their African heritage to be members of the African-American community. Such is also consistent with long-standing social and legal customs, whereby, despite the realities of several centuries of racial intermixing in the Americas, even a person with 87.5 percent "white blood" was still considered and treated as "black." *See* Carl T. Rowan, *That Powerful 'Black Blood,'* BALT. SUN, Oct. 28, 1994, at 19A; *see e.g.,* Plessy v. Ferguson, 163 U.S. 537, 538 (1896) (upholding the constitutionality of a Louisiana statute requiring railway companies to provide separate accommodations for white and colored persons and affirming conductor's eviction of petitioner Plessy from a "white" car, because he was "of mixed descent, in the proportion of seventh-eighths Caucasian and one-eighth African blood; [though] the mixture of coloured blood was not discernible in him.").

[15] *See e.g.,* Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy,* 2 DUKE J. GENDER L. & POL'Y 131, 151 & n.111 (1995) [hereinafter *"Redefining the TRA Controversy"*] (discussing the mid-1990s development of new private services and networks to bring together a relinquishing parent or willing surrogate with a prospective adopter; summarizing Dec. 1, 1994 Telephone Interview with William L. Pierce, President of the National Council For Adoption (NCFA) identifying Bruce M. Rappaport, Ph.D., founder and Executive Director of the Independent Adoption Center in Pleasant Hill, California, and founder of the National Federation for Open Adoption Education as someone franchising his services); and Maggie Jackson, *Aspiring Adoptive Parents Face Greed, Competition, Exploitation,* L.A. TIMES, Apr. 23, 1995, at A1 (describing adoption as: "[A] business, a rough and sometimes risky business . . . . Where church or public agencies once ruled, now independent adoptions via lawyers or consultants dominate.").

[16] *See* Black Voyage, *supra* note 1.

[17] "Since 1975, the federal government has not collected any comprehensive, annual data on adoption." *Redefining the TRA Controversy, supra* note 15, at 141, n.52.

[18] Jill Smolowe, *Adoption in Black and White: An Odd Coalition Takes Aim at the De-*

of the available white children are not relinquished infants, but older children whose parents' legal rights have been involuntarily terminated. As the pool of white applicants seeking to adopt far exceeds the number of available white infants, "as much as 100 to 1—more people, frustrated in their search to adopt infants from agencies, are turning to lawyers, doctors, the clergy and other sources to arrange what are known as independent adoptions."[19]

Transracial adoption (TRA)[20] is sometimes pushed as a more workable option for achieving parenthood than inter-country adoption (ICA),[21] surrogacy,[22] or further experimentation with new reproductive techniques.[23]

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cades-Old Prejudice Against Transracial Placements, TIME, Aug. 14, 1995, at 50.

[19] William R. Greer, *The Adoption Market: A Variety of Options,* N.Y. TIMES, June 26, 1986, at C1, C10. *See also* Tamar Frankel & Frances Miller, *The Inapplicability of Market Theory to Adoptions,* 67 B.U. L. REV. 99 (1987) ("More than 130,000 couples in this country want to adopt children, and plenty are available. But most couples want healthy, white infants, and those children are in short supply."); *see also infra,* Part II.B.1.

[20] Any adoption in which the parent and child are of different racial backgrounds may be considered a transracial adoption. The focus of this article, however, is upon African-American children placed with non-African-American adoptive parents.

[21] ICA involves the adoption of foreign-born children by American families. *See* Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects,* THE FUTURE OF CHILDREN, Spring 1993, at 89 (reviewing more than four decades of American citizens adopting foreign-born children; the increasing hostility of some "sending" countries; obstacles posed by United States immigration laws; and progress toward the completion of "Convention on Intercountry Adoption" by the Hague Conference on private international law); *see also infra* Part IV.B.2.

[22] "Contract surrogacy emerged around 1976 . . . [B]y the end of 1986 about 500 [children had been born of these arrangements]. Of these 500 contracts, 495 [were] fulfilled without incident." Martha A. Field, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 5, n.16 (Harv. Univ. Press paperback expanded ed., 1990) (referring to Charles Krauthammer, *The Ethics of Human Manufacture,* NEW REPUBLIC, May 4, 1987, 17-19).

Surrogacy raises many moral, practical and constitutional issues. There is no consensus regarding the enforceability of such contracts. The Uniform Status of Children of Assisted Conception Act (USCACA) that the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated in August, 1988, offers states a choice between two contrasting provisions: Alternative A permits limited, judicially regulated surrogacy for married infertile couples; Alternative B makes such contracts void and unenforceable. *See* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1989), 9B U.L.A. 135 (Supp. 1993). This act defines the legal status of children who are born via new reproductive techniques, i.e., "assisted conception." It was approved by the ABA on February 7, 1989.

[23] "[S]ome infertile couples . . . will go to almost any lengths—financially and physically—to have a biological child." Dolores Kong, *What Price Pregnancy? The Painful Quest for Fertility,* BOSTON GLOBE, Aug. 4, 1996, at A1, A34. The current menu of assisted, procreative technologies includes:

In vitro fertilization (IVF) - An egg and sperm are combined ina laboratory dish; fertilized eggs are transferred into the uterus.

Gamete intrafallopian transfer (GIFT) - Eggs and sperm are transformed directly into a fallopian tube; resulting embryos float into the uterus.

TRA also is considered by some to be an essential component of welfare reform.[24] Ardent TRA proponents applaud the 1996 federal legislation[25] that prohibits the use of race as a factor in child placement decision-making and repeals The Howard Metzenbaum MultiEthnic Placement Act of 1994. As of January 1, 1997, no State or other entity in a State receiving federal funds and involved in adoption or foster care may (1) deny any person the opportunity to become an adoptive or a foster parent, or (2) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved.[26] Noncompliance shall be a violation of Title VI of the Civil Rights Act of 1964; financial penalties[27] may

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Zygote intrafallopian transfer (ZIFT) - Eggs are fertilized in the laboratory, as in IVF; fertilized eggs (zygotes) are transferred directly into a fallopian tube.

Intrauterine insemination (IUI) - Frozen sperm is transferred by catheter directly into the uterus.

Intracytoplasmic sperm injection (ICSI) - A single sperm is injected directly into an egg; the fertilized egg is returned to the uterus.

See Dolores Kong, *What Price Pregnancy? Clinics Get Little Oversight,* BOSTON GLOBE, Aug. 5, 1996, at A1, A8 (highlighting many problematic consequences of treatment and low rates of success). *But cf.* JOHN A ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994) (a defense of according persons procreative liberty and choice to use the new reproductive technologies); Symposium, *John A. Robertson's Children of Choice,* 52 WASH. & LEE L. REV. 173 (1995); and Laura Pappano, *New Paths to Parenthood,* BOSTON GLOBE MAGAZINE, May 12, 1996, at 12, 24-34 (considering the many complex questions about the nature of family raised by egg-donation programs).

[24] *See e.g.,* Patrick F. Fagan, The Heritage Foundation, WHY SERIOUS WELFARE REFORM MUST INCLUDE SERIOUS ADOPTION REFORM, (July 27, 1995), *available in* LEXIS, News Library, Current Subfile (calling for privatization of all adoption and removal of obstacles to transracial adoption as integral parts of welfare reform).

[25] On May 10, 1996, by a vote of 393 to 15, the House passed and forwarded The Adoption Promotion and Stability Act of 1996, H.R. 3286, 104th Cong., 2d Sess. (1996) to the Senate. Without any formal vote by the Senate on The Adoption Anti-Discrimination Act of 1996—S.B.637 (parallel legislation), the language of H.R. 3286, in Joint Conference, was attached to the Small Business and Minimum Wage Bill, as reported in Conference Report No. 3448, which President Clinton signed on Tuesday, August 20, 1996. Section 1808. *Removal of Barriers to Interethnic Adoption,* amends §§ 471(a) and 474 of the Social Security Act (42 U.S.C. §§ 671(a) and 674) and repeals § 553 of The Howard Metzenbaum MultiEthnic Placement Act of 1994 (42 U.S.C. § 5115a) Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903.

[26] *See* § 1808(c)(1)(A), (B), 110 Stat. at 1904; and *supra* note 25.

[27] *See* § 1808(c)(2), 110 Stat. at 1904, and *supra* note 25. A state program found in violation shall have its funding reduced by two percent (three percent for a second violation and five percent for all subsequent violations) for that quarter and each subsequent quarter before the first quarter in which the State program is found not to be in violation. Any other entity, such as a private voluntary agency offering services under a purchase-of-service contract with the State must remit to the Secretary of the Department of Health

result. Additionally, any individual aggrieved by a State's or other entity's violation may seek relief in any United States District Court.[28]

National Council For Adoption president, William L. Pierce, and other NCFA staff lobbied aggressively for enactment of this legislation. The Washington, D.C.-based Institute for Justice,[29] also a proponent of TRA, has been active in challenging same-race placement preference practices in state courts.[30] At a press conference, on April 13, 1995, the Institute announced the launching of a nationwide challenge to "race-matching" by state agencies. To establish a rule of law that racial discrimination in adoption is unconstitutional, the Institute reported its filing of a Texas class action lawsuit,[31] its joining a Tennessee case[32] as co-counsel, and its investigation into the possibility of filing additional lawsuits in other states.

These developments assault and show disrespect for the African-American community as a whole. Preserving and protecting strong African-American families and communities is as important as promoting maximum political participation and racial pluralism in Congress.[33] Quite simply, the argument in the Institute for Justice's Brief in Support of Motion for Summary Judgment in the Texas *Matthew O.* case, that preservation of a group's racial identity is not a compelling state interest, assaults the interests of the African-American commu-

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and Human Services ("DHHS") all funds paid to it by the State that quarter. *See* § 1808(b), 110 Stat. at 1903; and *supra* note 25.

[28] *See* § 1808(b), 110 Stat. at 1903; and *supra* note 25.

[29] Founded in September 1991 by Chip Mellor and Clint Bolick, part of the Institute's mission, as described in their press materials, is "to challenge excesses of the Regulatory Welfare State [and to advance] a rule of law under which individuals control their destinies as free and responsible members of society."

[30] *See* Matthew O. & Joseph L. v. Texas Dep't of Protective & Regulatory Services (DPRS), No. 9504417 (Tx. filed April 13, 1995) (a class action seeking enforcement of the Texas Family Code § 162.308(a) which prohibits presumption that a same-race adoptive placement is in the best interests of a child and arguing that race matching violates the equal protection guarantees of the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the Texas Constitution). *See also* Reisman v. Tenn. Dep't of Human Services, No. 9303083 (W.D. Tenn. filed Dec. 17, 1993) (challenging use of racial classifications in adoptive placement process, under the Fourteenth Amendment of the United States Constitution, and to the constitutionality of the Multi-Ethnic Placement Act of 1994 under the equal protection guarantee of the Fifth Amendment of the United States Constitution.).

[31] *See* Matthew O. & Joseph L. v. Texas DPRS, No. 9504417.

[32] *See* Reisman v. Tennessee Dep't of Human Services, No. 9303083.

[33] I view these noted legislative and judicial developments with as much concern as that expressed by Judge Higginbotham, Jr. and his coauthors. *See* A Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions With Devastating Racial Consequences,* 62 FORDHAM L. REV. 1593, 1630 (1994) (stating "[t]he Supreme Court's voting rights law should not be based on a politically appealing dream that denies all of American history. The law should not distort that history such that the concept of 'colorblindness' is used—like a surgeon's scalpel—to excise African-Americans from significant political power.").

nity.[34] By according no legitimacy to the group interests of African-Americans and focusing just on the individual rights of African-American children, these legal champions assure a supply of children to meet the market demands of white adults seeking to parent whatever children they select. These actions rob African-Americans of the privilege and responsibility of caring for their own children.[35] No group can be assured continued existence and vitality if it does not bear and rear its own children.[36]

Today's children are the adults of the future.[37] The quality of care and nurture that a child receives, and the kinds of interactions the family unit has with individuals and groups, shapes not only the child's future adult self, but determines future group memberships and affiliations. The ability of "caring and loving" white adoptive parents within the private confines of their households to nurture an African-American child is not doubted. But, the family is not the only group that plays an important role in shaping one's perspectives of self and of the world. Personal identity is derived from the way in which one is perceived and treated by others.[38]

Thus, while I do not assert that white adoptive parents can never successfully rear an African-American child, I do maintain that they should strive to ensure that the child's reference groups,[39] such as the extended family and those created

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[34] *See* Brief for the Institute of Justice, Matthew O. & Joseph L. V. Texas DPRS No. 9504417.

[35] *See* Rayford W. Logan, *The Promise of Emancipation,* THE HOWARD U. MAG. April 1963, at 5, 5 ("The Emancipation . . . gave Negroes a right and a responsibility to do for themselves what they had long done for others.").

[36] Witness the demise and extinction of the celibate Shakers, a communal society, today merely "remembered for their arts and crafts, especially their beautiful furniture, and for the dance that was part of their worship." *Shakers,* 20 ENCYCLOPAEDIA BRITANNICA 316 (1969).

[37] *See e.g.,* Richard P. Barth, *Adoption, in* THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH 361 (Peter J. Pecora et al. eds., 1992) [hereinafter "Child Welfare Challenge"] ("The future of our larger society, and the communities that comprise it, depends upon our children. Our children's future requires an adequate family life."); Elizabeth S. Cole, *Adoption: History, Policy, and Program, in* A HANDBOOK OF CHILD WELFARE: CONTEXT, KNOWLEDGE, AND PRACTICE 640 (Joan Laird & Ann Hartman eds., 1985) [hereinafter "Handbook of Child Welfare"] ("As a society we believe that our future is inextricably linked to the well-being of our children.").

[38] *See* DAVID W. JOHNSON & FRANK P. JOHNSON, JOINING TOGETHER: GROUP THEORY AND GROUP SKILLS 6 (5th ed. 1994).

[39] The concept of reference group is:
commonly used to denote any group to which an individual relates his attitudes. A person whose attitudes are dependent upon, shaped by, or anchored in a particular group has a reference relation to that group . . . .
    It is important to observe that the reference relation and the membership relation are not necessarily identical . . . .
    Of the many groups known to an individual only a few ordinarily serve as reference groups . . . . [A] person is more likely to refer his attitudes to a particular group the more strongly he is oriented toward membership in that group. If this ori-

by interactions in school, the neighborhood, and at work, include positive relationships with African-Americans. Without these experiences, the following dilemma may arise for

> a person who, because of personal appearance, is deemed by others to be Black, but who, [having been] reared . . . without any close or intimate affiliations with Blacks . . . [wonders:] 'How can I be Black when Black culture and relations have forged so little of my persona? How can I be white when my skin dictates otherwise?'[40]

Rita J. Simon and her colleagues reported[41] on the types of neighborhoods in which their transracial adoptive families lived. Their study raised some troubling inferences that the majority of these TR families and adoptees did not develop or maintain strong affiliations with the African-American community.[42]

A disproportionately large number of African-American children enter and remain in the foster care system for longer periods than any other group of children.[43] They also enter at younger ages and are more likely than white children

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entation is positive, so that he desires membership in the group, he is likely to employ it as a positive reference and attempt to become similar to its members with respect to the characteristics that distinguish them as a group. But if the idea of membership is repulsive, the reference is likely to be negative, and he will try to maximize differences between himself and the group's members.

DORWIN CARTWRIGHT & ALVIN ZANDER, GROUP DYNAMICS: RESEARCH AND THEORY 53 (3rd ed. 1968). *See also Redefining the TRA Controversy, supra* note 15, at 133-34 (asserting promotion of an African-American child's well-being requires assessment of a prospective adopter's awareness of, and capacity and sensitivity to race, to prepare the child for the challenges he or she will encounter because of his or her race).

[40] *Redefining the TRA Controversy, supra* note 15, at 160.

[41] RITA J. SIMON ET AL., THE CASE FOR TRANSRACIAL ADOPTION 82-85 (1994).

[42] Namely:

In 1972, 78 percent of the survey families were living in all-white neighborhoods . . . Most of the parents saw no incongruity between their family composition and their choice of neighborhood. Little changed in that respect over the years. In 1979, 77 percent of the families were still living in all-white or predominately white neighborhoods.

Id. at 82-83. And, in 1990-91, "[s]ixty percent of the TRAs and 77 percent of the birth children lived in neighborhoods that were mostly white." *Id.* at 85.

[43] Although the total number of children in foster care has declined since the 1980 enactment of The Adoption Assistance and Child Welfare Act.

[T]he percentage of children of color in substitute care has steadily increased. Compared with white children four times as many African American children become wards of the state and are supervised by child welfare agencies. African American children constitute the largest minority group in most state foster care systems. African American children of all age groups, especially adolescents, are represented in the child welfare system.

Joyce E. Everett, *Introduction: Children in Crisis, in* CHILD WELFARE: AN AFROCENTRIC PERSPECTIVE 2-3 (Joyce E. Everett et al. eds., 1991) (footnote omitted). Dr. Everett also notes that:

to be denied a permanent family because appropriate services are often unavailable or in short supply.[44] TRA advocates claim adoption should be "colorblind"[45] and that same-race placement preferences actually victimize African-American children in foster care.[46] This, however, creates a diversionary "smokescreen"[47] that both obfuscates important systemic problems and creates additional barriers to meeting the needs of African-American children in a manner that does not affront the African-American community. Elimination of race from all placement decision-making sets the stage for anachronistic recommodification[48] of young

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African American and other children of color remain in foster care for longer periods of time, experience multiple placements, and are less likely to be adopted than white children. Labeled "hard to place" and "at risk," primarily because they are members of racial minority groups, these children are faced with many challenges to healthy development. Their membership in specific racial, cultural, and social-class groups constitutes a significant lens for viewing the self, the world, and future opportunities.

Id. at 3-4 (citing JEWELLE T. GIBBS ET AL., CHILDREN OF COLOR: PSYCHOLOGICAL INTERVENTIONS WITH MINORITY YOUTH (1989)).

[44] *See* THE BLACK COMMUNITY CRUSADE FOR CHILDREN, PROGRESS AND PERIL: BLACK CHILDREN IN AMERICA - A FACT BOOK AND ACTION PRIMER 42-43 (1993) (first publication of an initiative launched in 1990 by Black leaders presenting statistical data on the disproportionate representation of Black children in foster care).

[45] *See e.g.,* Steven A. Holmes, *Bitter Racial Dispute Rages Over Adoption: White Couple Seeks Custody of 2 Blacks,* N.Y. TIMES, Apr. 13, 1995, at A16 ("an unlikely coalition of liberals and conservatives is pressing for what they call color-blind adoption policies"). For a thorough exposition of the constitutional doctrine of "colorblindness" as expressed in United States Supreme Court opinions, see Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model,* 13 NAT'L BLACK L.J. 1 (1993-94).

[46] *See e.g.,* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption,* 139 U. PA. L. REV. 1163, 1248 (1991).

[47] The focus upon the plight of African-American children in foster care as disingenuous, given the fact that "most whites who seek to adopt look for healthy infants, not older children with a range of 'special needs,' and most of the growing number of transracial placements being made today involve newborns or babies." *Redefining the TRA Controversy, supra* note 15, at 139 n.41 (referring to Judith K. McKenzie, *Adoption of Children with Special Needs,* THE FUTURE OF CHILDREN, Spring 1993, at 62).

[48] Because the slave trade through Gorée-Island involved the "actual buying and selling" of African children, as well as men and women, it serves as an example of Professor Radin's narrowly construed definition of commodification. I use the term *"recommodification"* to denote a revival of commodification, construed broadly by Professor Radin to include: "market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions." Margaret Jane Radin, *Market-Inalienability,* 100 HARV. L. REV. 1849, 1859 (1987) (rejecting two archetypes—universal commodification and universal noncommodification; claiming both fail to recognize market-inalienability, i.e., that some things may be given away but not sold). *See also* BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 20-21 (1989). In discussing surrogacy, Rothman states:

The commodification process is not unique to surrogacy arrangement. It was there

African-American children and provides no strong assurance that the needs of older children, never the preferred choice of adoptive applicants, will be appropriately met. White adults who seek healthy infants now have an opportunity to "garner the market" on the only expanding "crop" of healthy newborns—biracial infants[49]—being relinquished by unwed white birth mothers, hesitant to be single parents rearing their children in today's society.

My primary aim in this article is to place the late twentieth century TRA of African-American children accurately within the context of the child welfare system milieu out of which it emerged. TRA is a "micro"[50] direct-service-oriented child welfare practice, one of two broad streams or tracks of social work "denoting the continuing major role of clinical competencies in direct practice with individuals and groups"[51] that takes a face-to-face, case by case approach. My other intent is to provide thoughtful scholars and child advocates a new lens with which to assess the past purpose, function, and efficacy of TRA. Perhaps then, future TRA placements will be more carefully regulated and monitored in ways that both protect the interests of the African-American adoptee and respect the African-American community.

TRA is a complex and controversial issue, intertwined with unresolved issues of economic and political power, and inequality.[52] Because consideration of this topic can be similar to peeling an onion—as one layer is stripped away, another appears, I make no attempt to address all possible issues or to refute the claimed merits of TRA based on outcome studies.[53]

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long ago when we first began to experience some shortage of babies for adoption. While babies are not for sale in the United States, at least not openly, we all know perfectly well that the availbility of a baby for adoption has a lot to do with the amount of money the potential adopters can spend. And we know that adoptable babies are themselves sorted as commodities, with the whiter, younger, and healthier carrying the highest price tags.

Id.

[49] *See Redefining the TRA Controversy, supra* note 15, at 147-49.

[50] *See* Thomas M. Meenaghan, *Macro Practice: Current Trends and Issues, in* 1 ENCY-CLOPEDIA OF SOCIAL WORK 83 (18th ed. 1990) for further definition; *see* text below accompanying note 61, *infra*, and Part IV.D., *infra*, regarding contrasting track of "macro" practice.

[51] *Id.*

[52] *See Redefining the TRA Controversy, supra* note 15, at 132 n.6 (citing A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UN-EQUAL (1992); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (20th Anniversary ed. 1962); CORNEL WEST, RACE MATTERS (1993)).

[53] The findings of outcome studies should be treated with caution for the following reasons:

First, the small sample sizes in nearly all studies cannot, generally rule out the possibility of undetectable differences. Second, most of the studies relied on convenience samples (e.g., "volunteers"), which may not accurately represent the overall popula-

Just as the Gorée-Island guide felt it important to give my group an accurate historical account of slave trafficking through Gorée, I firmly believe that certain historical facts and conditions which have broadly influenced and directly shaped the development of child welfare and adoption services in the United States must be acknowledged. Part II of this article traces the evolution of United States adoption from its roots in antiquity to the mid-twentieth century. Until Massachusetts enacted the first "modern" adoption statute[54] in 1851, the clear intent and purpose of adoption was to serve the interests of the adopter and his family.[55] Since then, however, the hallmark of United States adoption supposedly has been to promote the "best interests"[56] of the adopted child— whether adopted by third-party strangers or relatives.[57] To facilitate the "specialized child welfare"[58] service of non-relative adoption for children in need of permanent substitute homes, two different agency systems evolved: one private; the other public. Until the latter part of the twentieth century, private voluntary agencies operated primarily "to meet the needs of infertile white, upper- and middle-class couples."[59]

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tion of transracial adoptions. Third, the longitudinal studies suffered from significant sample attrition that may have resulted in biased samples at follow-up. Lastly, the studies typically relied on parental reports of children's internal states—a practice of questionable validity.

Mark E. Courtney et al., *Race and Child Welfare Services: Past Research and Future Directions*, 75 CHILD WELFARE 99, 123 (Mar./Apr. 1996). *See also* 22 J. BLACK PSYCH. 223-91 (May 1996) for a comprehensive critique of empirical research on TRA from an Afrocentric perspective.

[54] The Massachusetts Adoption of Children's Act of 1851; *see infra* notes 80-83 and accompanying text.

[55] *See e.g.*, Alfred Kadushin, *Child Welfare: Adoption and Foster Care, in* 1 ENCYCLOPEDIA OF SOCIAL WORK 114 (17th ed. 1977) ("Although adoption is an ancient practice, its purpose has generally been to provide children for the childless, the focus being on the needs of the would-be parents.").

[56] *See* note 83, *infra.*

[57] "Formal adoptions include both related adoptions and unrelated adoptions. Related adoptions refer to stepparent adoptions and adoptions by a nonparent relative. In an unrelated adoption a nonrelative adopts the child." *Redefining the TRA Controversy, supra* note 15, at 141.

[58] According to Alfred J. Kahn:

The term "child welfare" is used in the United States in four ways: to refer to (1) a field of service, (2) a specialized form of social work practice adapted to the needs of service programs for children, (3) the overall well-being of children, or (4) the policies and activities that contribute to the well-being of children.

Alfred J. Kahn, *Child Welfare, in* 1 ENCYCLOPEDIA OF SOCIAL WORK, *supra* note 55, at 100-01, "Specialized child welfare" services can be supportive, supplementary or provide substitute care. "Substitute care services [foster home care, adoption, institutional care and protective services] are the core child welfare service activities in the United States." *Id.* at 108.

[59] Zanita E. Fenton, *In A World Not Their Own: The Adoption Of Black Children*, 10 HARV. BLACKLETTER J. 39, 41 (1993); *see also* Jacqueline Macaulay & Stewart Macau-

As child welfare services developed, most private and public agencies system-
atically excluded African-American children from their programs.[60] In Part III
this article identifies and discusses several important historical events and social
conditions that account for this exclusion. It also notes late twentieth century ef-
forts to extend adoption services to African-American children.

Part IV specifically considers TRA of African-American children in the
United States as a "micro"[61] direct-service child welfare practice. First, this sec-
tion reviews the thirty year incidence of TRA placements from 1948, the year of
the earliest recorded placement, to 1978. Next, this section identifies and dis-
cusses the confluence of factors and conditions that shaped the milieu of the
child welfare system during the period of the late 1960s and early 1970s, when
annual TRA placements steadily increased. These placements sharply declined,
however, after the National Association of Black Social Workers (NABSW) ex-
pressed strong opposition to TRA.[62]

From this historical review, this article concludes that no concerted efforts
were made to use "macro"[63] social work practice skills of social policy plan-

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lay, *Adoption for Black Children: A Case Study of Expert Discretion, in* 1 RESEARCH IN
LAW AND SOCIOLOGY 265, 267 (Rita J. Simon ed., 1978) ("The adoption system was cre-
ated to deal with healthy, whole, white infants, and the white middle class couples
thought most likely to want to adopt. It has a history of offering poor care and few adop-
tion opportunities to black children."(footnotes omitted)).

[60] *See* JOYCE A. LADNER, MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES 67
(1977) ("It was well into the twentieth century that organized social welfare institutions,
including adoption services, moved from total exclusion to partial inclusion of black chil-
dren."). *See also* Sandra S. Chipungu, *A Value-Based Policy Framework, in* CHILD WEL-
FARE: AN AFRICENTRIC PERSPECTIVE 291, *supra* note 43, at 291 ("Historically, African-
Americans were excluded from child welfare services, served in separate institutions, or
offered forms of care developed for or by African-Americans.").

[61] *See supra* note 50 and Part IV.D., *infra*.

[62] At its Fourth Annual Conference, "Diversity: Cohesion or Chaos—Mobilization for
Survival," Nashville, Tennessee, in 1972, NABSW approved a policy statement on trans-
racial adoption, declaring in part:

 We fully recognize the phenomenon of transracial adoption . . . as an expedient for
 white folk, not as an altruistic humane concern for Black children. The supply of
 white children for adoption has all but vanished and adoption agencies, having al-
 ways catered to middle class whites, developed an answer to their desire for
 parenthood by motivating them to consider Black children. Those born of Black-
 white alliances are no longer Black as decreed by immutable law and social custom
 for centuries. They are now Black-white, interracial, bi-racial, emphasizing the
 whiteness as the adoptable quality; a further subtle, but vicious design to further di-
 minish Black and accentuate white. We resent this highhanded arrogance and are in-
 sulted by this further assignment of chattel status of Black people.

NABSW's Position on Transracial Adoption, J. NAT'L ASS'N OF BLACK SOC. WORKERS,
Summer 1973, at 9-10; *see* note 164, *infra,* for 1994 Position Statement.

[63] *See* THOMAS M. MEENAGHAN ET AL., MACRO PRACTICE IN THE HUMAN SERVICES: AN
INTRODUCTION IN PLANNING, ADMINISTRATION, EVALUATION, AND COMMUNITY ORGANIZING
COMPONENTS OF PRACTICE (1982) (baseline information geared to understanding macro

ning, administration, evaluation, and community organization to analyze and assess the efficacy of TRA as an appropriate way to meet the needs of African-American children. Also, apparently no one considered the need to change the demographic composition of agency staffs or to make any significant effort to involve the African-American community. Instead, TRA was launched as a financially expedient direct-service-oriented "micro" child welfare practice.[64]

Today, many professional proponents of TRA are not specialized child welfare practitioners, but rather are lawyers and others involved in the growth industry of private independent adoptions.[65] Like the slave trader/ merchants of Gorée Island who worked to meet a market demand for free slave labor,[66] these professional TRA proponents seek to secure a steady supply of infants to satisfy a demand.[67] The proponents, however, hide these intentions under a halo of professed concern for the well-being of African-American children in foster care and portray TRA as a means of promoting a "colorblind" society and achieving welfare reform. Virulent hatred toward African-Americans and other minorities continues to permeate our society. Because some feel entitled to express their hatred, unregulated TRA placements made on a "first come, first served" basis,[68] with no consideration given to race, cannot guarantee that the needs or "best interests" of individual African-American children will be met in ways that protect them. These TRA placements will do nothing to promote continued vitality and strength within the African-American community.

TRA proponents applaud the recent repeal of The Howard Metzenbaum MultiEthnic Placement Act of 1994. They consider the imposition of an absolute federal bar against considering race in placement decision-making as a vindication of the Fourteenth Amendment equal protection rights of both the adults who seek to adopt and the waiting children. This development reenforces old prejudices and encourages discrimination against African-Americans. Once again the law of the United States fails to recognize and protect the true interests of individual African-American children and the group interests of the African-American community.

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practice); *see also* Jack Rothman, *Macro Social Work in a Tightening Economy*, 24 SOCIAL WORK 274 (July 1979) (challenging the assumption that the current economic slowdown reduces the opportunity for macro social work).

[64] *See supra* notes 50-51, and accompanying text (defining "micro" practice).

[65] *See supra* note 15 and accompanying text.

[66] *See supra* notes 13, 15 and accompanying text.

[67] *See* Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUDIES 323 (1978). *See also* Richard Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987) (arguing provocatively in favor of a market for babies and privatizing adoptions). *But see* J. Robert S. Prichard, *A Market for Babies*, 34 U. TORONTO L.J. 341 (1984) and Frankel & Miller, *supra* note 19 for interesting and thorough critiques.

[68] Randall Kennedy, Harvard Law School professor, as a copanelist during a Black Law Student Association program, "Transracial Adoption: Is It in a Child's Best Interests?" on February 3, 1994, at Boston University School of Law, advocated simply placing each available child with the next approved applicant.

II. OVERVIEW OF ADOPTION IN THE UNITED STATES

No one can accurately assess the role, function, or efficacy of TRA in the United States without understanding the general history of adoption in the United States, as summarized in the following chronological review.

A. *Historical Roots*

Adoption is not a new phenomenon.[69] Legally regulated in Egypt, Greece, and Rome, its roots are traceable to antiquity.[70] In ancient Greece and Rome, the main purpose of adoption was to assure "continuity of a particular family's male line. Persons adopted were usually male and often adult, in contrast to modern-day adoption of infants and children of either sex."[71] Though various references to adoption can be found throughout ancient law, a useful and relatively full account of the evolution of adoption may be found within the highly organized institutions of the Roman Empire and Republic.[72]

For example, by the time of Justinian, nearly 500 years after Christ, an individual was considered to be a member of society, not exclusively a member of his family. With regard to adoption, Justinian's code[73] required a proceeding before a magistrate in which the adopter, the adoptee, and the head of the natural family all had to appear. Although the power of the larger society had begun to replace the strength of the nuclear family, under Justinian's code, the adoptee could, and usually did, retain the right to inherit from his birth father even after the adoption. Retention of this right of inheritance recognized the emotional importance of a person's origins and heredity. Today, this approach would be

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[69] It is "[p]erhaps the oldest of Child Welfare services, [for] adoptions are recorded in the Bible. Moses was adopted by Pharaoh's daughter." Cole, *supra* note 37, at 638 (citing *Romans* 8:14-7, *Galatians* 4:5-7, *Exodus* 3:10, *Esther* 2:7).

[70] One of the earliest recorded provisions for adoption appears in the 2285 B.C. Code of Hammurabi:

Section 185. If a man has taken a young child "from his waters" to sonship and has reared him up no one has any claim against the "nursling."

John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 333 (1922).

[71] Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L. Q. 173, 174 (1983) [hereinafter *"Adoption Practice, Issues and Laws"*].

[72] "Indeed, Roman laws offer an interesting parallel to U.S. adoption laws because their gradual changes reflect the changes in the social structure of that era, as ours mirror the societal needs of our increas-ingly complex nation." *Id.* at 174, (citing A. SOROSKY ET AL, THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON ADOPTEES, BIRTH PARENTS, AND ADOPTIVE PARENTS 26 (1978) [hereinafter "The Adoption Triangle"]). *See also* Mireille Corbier, *Divorce and Adoption as Roman Familial Strategies (Le Divorce et l'adoption 'en plus')* in MARRIAGE, DIVORCE AND CHILDREN IN ANCIENT ROME 46, 63-78 (Beryl Rawson ed., 1991) (categorizing adoption within the strategies and practices of kinship and affinity which characterized Roman society; showing adoption was not conceived as a humanitarian solution to abandonment or illegitimacy nor as a standard response to sterility).

[73] *See Adoption Practice, Issues, and Laws*, *supra* note 71, at 174-75.

called an "open adoption."[74]

B. *Prior to 1851*

Reportedly, the first known adoption case[75] in colonial times occurred in Massachusetts. The Massachusetts Governor, Sir William Phips, mentioned his adopted son in the will he executed in 1693. In 1716 the adopted son petitioned the General Court to have his name changed via a private act of the legislature.[76]

Thereafter, until 1851, "the Massachusetts General Court systematically recognized adoption as sufficient and valid grounds for a petition for change of name and passed numerous private acts in recognition thereof."[77] During both the colonial period and most of the first century after the United States's founding, adoption was accomplished via "a private legal act, like a conveyance of real estate or a commercial contractual transaction."[78]

C. *1851 to 1900*

Although most of our legal system is derived from English Common Law, adoption is a clear exception.[79] Adoption never was part of the English Common Law because of the English belief that only a blood heir could inherit property.[80] England did not even enact an adoption law until 1926;[81] and even then,

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[74] *See id. See generally* Annette Baran & Reuben Pannor, *Perspectives on Open Adoption*, THE FUTURE OF CHILDREN, Spring 1993, at 119 (asserting that open adoption minimizes emotional and psychological harm and allows all parties to meet their continuing responsibilities to each other); LINCOLN CAPLAN, AN OPEN ADOPTION (1990) (illuminating psychological challenges and rewards of an open private adoption arranged through a lawyer).

[75] *See* Joseph Ben-Or, *The Law of Adoption in the United States: Its Massachusetts Origins and the Statute of 1851*, 130 NEW ENGLAND HIST. & GENEALOGICAL REG. 259 (1976).

[76] According to Ben-Or:
the term "adoption" [is used] in the private document of the adoptive parent—his last will and testament and in the act of the legislature which not only ratified the adoption by approving the change of name of the adopted son, but also specifically added the words "as if . . . he had descended from the said Sir William Phips any Law usage or Custom to the contrary Notwithstanding."
Id. at 265.

[77] *Adoption Practice, Issues, and Laws, supra* note 71, at 176.

[78] Sanford N. Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC. 9, 9 (Summer 1982).

[79] *See Adoption Practice, Issues, and Laws, supra* note 71, at 175 (citing The Adoption Triangle, *supra* note 72, at 28).

[80] "As late as 1891, the Supreme Court of California held that adoption was 'unknown to the common law and repugnant to its principles.' " *Adoption Practice, Issues, and Laws, supra* note 71, at 175 & n.8 (citing Ex parte Clark, 25 P. 967 (1891)).

[81] Adoption Act, 1926, 16 & 17 Geo. 5, ch. 29. For further background, *see* IVY PINCHBECK & MARGARET HEWITT, CHILDREN IN ENGLISH SOCIETY, VOL. II 603-10 (1973).

adoptees could not inherit from their adoptive parents until 1950.[82] According to one legal scholar, early United States adoption laws "used Roman law as a guide, with one important and basic difference: Roman law was based upon the needs and rights of adoptive parents; whereas American law, from the beginning, protected the welfare of adopted children."[83]

The Massachusetts Adoption of Children's Act of 1851[84] was the first "modern" statute to render public what had until then been private by conferring jurisdiction over adoption to the probate court. The statute codified prior customary rules for various "legal procedures—indenture for the transfer of parental obligations, the last will and testament for the transfer of inheritance, [and] private acts for the change of name."[85] It became the model for legislative enactments in most other American jurisdictions. By granting power to the probate court to determine whether petitioner(s):

> are of sufficient ability to bring up the child, and furnish suitable nurture
> and education, having reference to the degree and condition of its parents,
> and that it is fit and proper that such adoption should take effect . . . .[86]

this 1851 act "established the 'best interest' formula as a hallmark of American adoption."[87] Indeed, some view the Massachusetts Adoption Act of 1851 and its

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[82] Adoption Act, 1950, §§ 13 & 14. *See* T. E. James, *The Illegitimate and Deprived Child: Legitimation and Adoption, in* A CENTURY OF FAMILY LAW 47 (R.H. Graveson & F.R. Crane eds., 1957).

[83] *Adoption Practice, Issues, and Laws, supra* note 71, at 175 (citing Henry H. Foster, *Adoption and Child Custody: Best Interests of the Child,* 22 BUFF. L. REV. 1 (1972). *But see,* ANDREW BILLINGSLEY & JEANNE GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 36 (1972)) (arguing that the intent of adoption "to benefit the adopting parents rather than the children had been a persistent characteristic of adoption as a child welfare service").

[84] Act of May 24, 1851, 1851 Mass. Acts, ch. 324.

[85] *Adoption Practices, Issues, and Laws, supra* note 71, at 176 (citing Ben-Or, *supra* note 75, at 268-69).

[86] Ch. 324 § 5, 1851 Mass. Acts; *see* discussion by T. Witmer, *The Purpose of American Adoption Laws, in* INDEPENDENT ADOPTIONS: A FOLLOW-UP STUDY 31 (H. Witmer, et al. eds., 1963).

[87] *Adoption Practice, Issues, and Laws, supra* note 71, at 177. The "best interests of the child" rule has been the guiding legal principle in child custody matters since the late nineteenth and early twentieth centuries. For a clear, early expression of the underlying rationale, see Finlay v. Finlay, 148 N.E. 624, 626 (1925) (stating "[t]he Chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as *parens patriae* to what is best for the interests of the child."). In applying the "best interests" rule, courts will consider all relevant factors mandated in the controlling statute. For example, § 402 of the UNIFORM MARRIAGE AND DIVORCE ACT requires consideration as follows, in part, of:

(1) the wishes of the child's parent or parents as to his custody

(2) the wishes of the child. . .;

(3) the interaction and interrelationship of the child with his parent or parents, his

progeny as "steps in the evolution of the doctrine of *parens patriae*—that the state is the parent of all children and has a right to intervene in matters concerning them."[88]

Between 1851 and the 1950s, "adoption evolved both as a statutory process and as a child welfare service. By 1929, all states had enacted some form of adoption legislation."[89] During the latter half of the nineteenth century and throughout the twentieth century, four key factors shaped the development and organization of child welfare services in the United States. Billingsley and Giovannoni identify these as: "conceptualizations of poverty; the sectarianism of autonomous religious groups; the domination of European American settlers, which led to ethnocentric child welfare policies; and slavery . . . ."[90] Until the mid-twentieth century, child welfare services in this country almost exclusively served white children and often had sectarian roots traceable to colonial times.[91]

D. *The Twentieth Century*

1. Development of specialized child welfare services

During the first half of the twentieth century, traditional private child welfare services continued to segregate rigidly along racial and religious lines.[92] Adop-

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siblings, and any other person who may significantly affect the child's best interest;
(4) the child's adjustment to his home, school, and community; and
(5) the mental and physical health of all individuals involved.

[88] Cole, *supra* note 37, at 640.

[89] *Redefining the TRA Controversy, supra* note 15, at 150. State statutes typically required:
(1) *consent* of the birth parent or guardian (and of the child over twelve or fourteen); (2) an *investigation* (or social study) conducted by the placing agency to determine the suitability of the prospective home; (3) a probationary *trial period* in the adoptive home under appropriate supervision; (4) issuance of a *final decree*, withheld until a court received evidence of satisfactory adjustment of adoptive parents and child to each other; and (5) *secrecy* of the legal proceedings and provision for alteration of the child's birth certificate.
Id.

[90] Chipungu, *supra* note 60, at 291 (citing BILLINGSLEY & GIOVANNONI, *supra* note 83, at 22-23).

[91] According to Chipungu:
The sectarian roots of many of the private voluntary child welfare agencies that currently offer services can be traced to the colonial period. The colonial desire for religious autonomy and the protection of religious beliefs resulted in the establishment of religiously affiliated, private agencies. The first orphanages were established by the Society of Friends, a religious group involved in the Abolitionist Movement. The Philadelphia Association for the Care of Colored Children was established in 1822. Similar organizations were also founded in other northern cities.
Id. at 293 (citations omitted).

[92] *See* JUSTINE WISE POLIER, JUVENILE JUSTICE IN DOUBLE JEOPARDY: THE DISTANCED COMMUNITY AND VENGEFUL RETRIBUTION 127-57 (1989). According to Judge Polier,

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tion services were provided either by private or public agencies or arranged by third-party professional or lay intermediaries.[93] Two organizations, both outgrowths of the first White House Conference on Children in 1909, played key roles in shaping child welfare adoption services in the United States. Since 1912 the United States Children's Bureau (CB)[94] has provided "investigation, research, advocacy, standard-setting, service-demonstration programs and coordination."[95] Since its founding in 1920, the Child Welfare League of American (CWLA), a privately supported national organization of affiliate member agencies, has been the leader among voluntary organizations, performing "coordinative standard-setting, accreditation and research functions."[96] It also has actively

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Religious separatism held special consequences for children in the Juvenile Court . . .

. . . Jews and Catholics, fearful of Protestant proselytizing, had organized federations to strengthen their faiths and to raise funds for sectarian services. Each developed a vigorous life of its own and political clout. The major sectarian groups established the doctrine that religious teaching under one roof was essential to adult adherence. None extended this concern to nonwhite children, and all engaged in racial discrimination.

Id. at 127-28. *See also* Wilma Peebles-Wilkins, *Janie Porter Barrett and the Virginia Industrial School for Colored Girls: Community Response to the Needs of African American Children,* 74 CHILD WELFARE 143, (Jan./ Feb. 1995) (historical account of voluntary association efforts by African-American women to confront the unmet needs of African American children and youths).

[93] *See* Kathy S. Stolley, *Statistics on Adoption in the United States,* THE FUTURE OF CHILDREN, Spring 1993, at 28-31; *see also Adoption Practice, Issues, and Laws, supra* note 71, at 177-80 & nn.17-23.

[94] First established within the Department of Commerce and Labor by Act of Apr. 9, 1912, ch. 73, §§ 1-4, 37 Stat. 79-80 (42 U.S.C. §§ 191-194), the United States Children's Bureau (CB) is now part of the Department of Health and Human Services (HHS), formerly the Department of Health, Education, and Welfare (HEW).

[95] Kahn, *supra* note 58, at 102. Until the late 1960s, the CB was the focal point for governmental concern for children. However:

In 1969 it began to share its functions with the Office of Child Development (OCD), a subunit of HEW's Office of Human Development (OHD). OCD was created when Head Start—the preschool program for the poor—was transferred from the Office of Economic Opportunity to HEW. Now CB administers directly only experimental programs to combat child abuse and some specific national projects; its other roles are standard-setting and guidance of programs. Although OCD now has the broader role, CB has not been eliminated because its existence is mandated by law. For purposes of coordination, the directorship of both CB and OCD is assigned to one person.
Id.

[96] *Id.* Kahn also notes that:

Although its activities focus on child welfare as a field of social work practice and as a category of specialized social services, its publications discuss all governmental programs that affect children, and its lobbying activities occasionally deal with programs and policies in such areas as public assistance, health, food programs, and child care.

lobbied for legislative changes and frequently, with federal grants, conducted demonstration projects.

Until the permanency movement[97] of the 1970s, traditional adoption agency practice was grounded in "the conviction that adoption should, in every way possible, be modeled after biological parenting. This position [was] embraced by adoptive workers and adoptive parents alike, and buttressed by the law."[98] By sealing adoption records and reissuing birth certificates, the law cut off "the child's past as if he or she were born the day of the adoptive placement."[99]

According to child welfare specialist Ann Hartman, the consequences of these traditional practices were far-reaching:

> First, until the 1970s, only young, healthy children were considered 'adoptable.' In fact, the process of delaying adoption while children remained in 'infant study homes' until they were old enough to be judged free of any mental or physical defect meant that adoption did not even hold the risk of biological parenting.
>
> Second, just as adoptable children . . . conformed to a norm, so [did] adoptive parents, and until the [late 1970s], home studies [were] for the most part, careful investigations which measured families against subjective, culturally biased norms . . . . In general . . . couples [were] required to be young, physically healthy, white, middle class, infertile, childless, active in church, financially stable, and in their first marriages . . . . The attempt to submerge the differences between adoption and birthing also led to careful matching of the child to the parents in terms of physical, intellectual, and even some social characteristics.[100]

Throughout most of the twentieth century, specialized child welfare adoption agencies did not service many African-American children and families.

Id. Other major voluntary agencies include the American Public Welfare Association (APWA), the Children's Defense Fund (CDF), and the National Committee For Adoption (NCFA).

[97] *See* note 104, *infra*, and accompanying text. The culmination of the permanency movement was the enactment of The Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272; *see also* Barth, *supra* note 37, at 45-46; 318-21 (summarizing goals and key features of permanency planning).

[98] Ann Hartman, *Practice in Adoption, in* HANDBOOK OF CHILD WELFARE, *supra* note 37, at 667; *see also* LADNER, *supra* note 60, at 56-59 (discussing adoption agencies philosophy involving matching of parents and children with respect to religion and physical, intellectual, social and other characteristics).

[99] Hartman, *supra* note 98, at 667. "Sealing records" was a service willingly offered by private agencies to hide the indiscretions of relinquishing middle- and upper-class women. Telephone interview with Laura B. Morris, Social Work Consultant and Researcher, in Brookline, Mass. (Aug. 20, 1996).

[100] Hartman, *supra* note 98, at 667-68; *see also* LADNER, *supra* note 60, at 56-59; Carol C. Williams, Expanding the Options in the Quest for Permanence, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE, *supra* note 43, at 270 (attributing emphasis on matching to fact adoption had little social acceptance and was viewed as a confidential matter).

Although African-American children were excluded from such traditional services, adoption was not unknown in African-American communities. In fact, patterns of informal adoption existed as far back as the time of slavery.[101] During periods of migration out of the rural south to northern and western urban areas, many parents arranged for their children to stay with relatives or close family friends while they sought better opportunities. If a youngster were later orphaned by the death, illness or imprisonment of the parents, a relative or close family friend would come forward to fill the void. Almost all African-American families have participated in this type of parenting.[102]

While informal adoption and child-sharing during the early twentieth century met most of the needs of African-American children, some children were placed by third party intermediaries, "such as black lawyers and other professionals, to help young middle class black women avoid the stigma of unwanted pregnancies."[103] Whether these adoptions were legalized or remained informal is unclear.

2. Practice since 1950

Following World War II, more changes occurred in adoption than in perhaps any other field of child welfare in the United States. According to Ann Hartman:

> Adoption [was] transformed from a program to find parents for healthy infants and infants for childless couples to one that seeks permanent homes for every child. As part of the permanency movement, which was sparked by many converging influences—the position was taken that *every* child is entitled to a permanent home. The first choice is with biological parents or other kin, and the second, if placement with family is impossible, is adoption.[104]

Child welfare specialist Elizabeth S. Cole asserts that "there is a wide agreement on a logical set of values and principles which underpin the state's interest in

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[101] *See* Williams, *supra* note 100, at 266. For further background, see Fenton, *supra* note 59, at 42-43, nn.22-27 and accompanying text; *see also* GUTMAN, *supra* note 7, at 101-84.

[102] Williams, *supra* note 100, at 267 (Among African-Americans, the concept of family is "inclusive, taking into its boundaries in-laws, kin, and nonrelatives.") African-American family scholars state that:

> Although most instances of informal adoption and informal foster care among black families involve the rearing of related children by grandparents, uncles, aunts, and other formal kin, thousands of black children are also informally reared by non-related godparents, grannies, and others who are as close as, or closer than, formal kin.

ROBERT B. HILL, ET AL., RESEARCH ON THE AFRICAN-AMERICAN FAMILY: A HOLISTIC PERSPECTIVE 105 (1993).

[103] Williams, *supra* note 100, at 270 (citation omitted).

[104] Hartman, *supra* note 98, at 667 (emphasis in original). *See* Child Welfare Challenge, *supra* note 37, at 43-46 (history of emergence of permanent planning "as a response to the abuses of the child welfare system . . . ").

adoption."[105] Clearly, society's future rests on the healthy successful development of its children. Thus, Cole views the main purpose of adoption today as "to provide children with nurturant environments in the care of legally recognized parents whose custody, control, responsibilities, and rights [are] assured."[106] Legal scholar Sanford N. Katz suggests:

> In any discussion of adoption . . . we must not lose sight of its primary goal: to provide a permanent, secure, and loving home for a child whose birth parents are unable or unwilling to meet the child's needs . . . . [W]e must never cease to ask the basic question: "Is it well with the child?"[107]

Such expressed concerns for the welfare of children ostensibly represent a modern development, a break from earlier conceptions of children as the property or "chattel" of their parents, or as wards of the state.[108]

Today, the policy commitment to seek permanency for *every* child—including those with special needs, older, and minority children in foster care and legally freed for adoption—seems to be eroding "the traditional guiding principle of practice . . . of making adoption as much as possible like building a family biologically . . . ."[109] Some, like Hartman, see adoption practice as in transition, "an amalgam of traditional adoptive practices and innovative approaches."[110] As the year 2000 nears, adoption workers must possess broad and varied knowledge and skills, covering a range of social work practice modalities and methods. To deliver direct services appropriately along "the adoptive continuum, from recruitment of adoptive homes to work with adult adoptees, [the worker] needs skills in working with communities, organizations, groups, families, and children."[111]

Elizabeth Cole perceives a close parallel between the modern Child Welfare League of America's adoption standards and the "wide agreement on a logical set of values and principles which underpin the state's interest in adoption."[112] Nevertheless, she believes: "[t]he first hundred years of modern adoption policy and practice show that these principles have often been ignored."[113] Indeed, some[114] view agency practices, such as TRA, as more responsive to meeting the

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[105] Cole, *supra* note 37, at 640.

[106] *Id.*

[107] Katz, *supra* note 78, at 10.

[108] For an interesting historical summary, see A. Derdeyn, *Child Custody Contests in Historical Perspective, in* ANNUAL PROGRESS OF CHILD PSYCHIATRY AND DEVELOPMENT 714 (S. Chess & A. Thomas eds., 1977).

[109] Hartman, *supra* note 98 at 668; *see also* LADNER, *supra* note 60, at 56-59.

[110] Hartman, *supra* note 98, at 669.

[111] *Id.; see infra* Part IV.D., notes 260-62, 270-74, and accompanying text regarding "macro" skills.

[112] Cole, *supra* note 37, at 641. *See supra* notes 99-103 and accompanying text.

[113] Cole, *supra* note 37, at 641.

[114] *See* DAWN DAY, ADOPTION OF BLACK CHILDREN: COUNTERACTING INSTITUTIONAL DISCRIMINATION 97 (1979) (discussing two contrasting views about TRA and social workers); *see also* Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Dis-*

demands of white adoptive applicants than to meeting the permanency needs of African-American children by working in partnership with the African-American community. The emphasis on serving the interest of the white potential adopters conforms to early Greek and Roman adoption practices. The rhetoric may have changed, but the actual practice and the underlying purposes of adoption have remained the same.

From the chronological overview in this section, the systematic exclusion of African-American children from specialized child welfare adoption services should be clear. The next section identifies and discusses important historical facts and social conditions[115] which explain this exclusion.

III. AFRICAN AMERICAN CHILDREN AND ADOPTION

A. *Excluded from Services*

From this writer's perspective, the following historical moments are of the utmost importance: (1) in 1851 most African-American children were held in bondage, (2) emancipation[116] and ratification of the Thirteenth Amendment[117] freed African-American children from slavery and abolished indentured servitude[118] for white children; but (3) after collapse of the Freedmen's Bureau and

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course and Subordination, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 107 (1993-94) (questioning whether the transracial adoption debate is really about the interests of Black children at all, or about the right of white people to parent whichever children they choose); *Redefining the TRA Controversy, supra* note 15, at 148-49 (asserting "the transracial adoption controversy is *not* about addressing the needs of the many older Black children who enter the foster care system; rather it *is* about giving preferences to certain white adults who seek to adopt infants."(emphasis in original)).

[115] According to Fenton, factors that must be considered "are the historical development of child welfare services, the context of discrimination and racism that have shaped society and attitudes and the cultural attributes of the Black community." Fenton, *supra* note 59, at 40-41.

[116] On January 1, 1863, President Abraham Lincoln signed the Emancipation Proclamation which decreed that the nation's slave population would henceforth be free. "[E]xcluded from its purview were the 450,000 slaves in Delaware, Kentucky, Maryland, and Missouri (border slave states that remained in the Union), 275,000 in Union-occupied Tennessee, and tens of thousands more in portions of Louisiana and Virginia under the control of federal armies." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 1 (1988).

[117] U.S. CONST. Amend XIII *(ratified* Dec. 18, 1865). For further background information, see generally, FONER, *supra* note 116, at 66-67; Alexander Bickel, *The Original Understanding and the Segregation Decision,* 60 HARV. L. REV. 1 (1955); William H. Wiecek, *Slavery and Abolition Before the U.S. Supreme Court 1820-1860,* 15 J. AMER. HIST. 34-59 (1978).

[118] During the early 1800s, indenture was one of two social care options for poor non-slave children. According to Chipungu:

Indenture was a plan for apprenticing children to households where they would be cared for and taught a trade, in return for which they owed loyalty, obedience and labor until the costs of their rearing had been worked off. . . . On a practical level,

the end of Reconstruction,[119] American laws and prevailing social customs drastically redefined the legal and social status of African-Americans.

In 1851, when Massachusetts, a northern free state with a minute African-American population, enacted the statute which launched adoption in the United States as a specialized child welfare service, most African-Americans were still slaves. Specifically, "Black children were cared for by the institution of slavery; poor white children were placed in Almshouses or into indentured servitude as a means for their care. The condition of Black children was the minimum standard above which white orphans were to be maintained."[120] According to Chipungu, "[t]he existence of slavery meant that child welfare services could develop with little concern for African American children; these children were simply not recognized by the larger society."[121] Slavery provided a justification for excluding African-Americans from child welfare services.

Second, emancipation and ratification of the Thirteenth Amendment held the potential for markedly improved conditions for both African-American and poor orphaned white children. Although slavery had ended, "African American children were excluded from any meaningful and structured governmental care aside from the in-home services offered to former slave families by a few pre-Civil War private orphanages, the orphanages established by the short-lived Freedman's Bureau, and almhouses."[122]

The Thirteenth Amendment abolished indentured servitude, yet the practice of "placing out,"[123] moving poor children and youths from East Coast cities and resettling them in the rural "west" via "orphan trains,"[124] began in the 1850s

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it provided a useful way to control and discipline children, reduce unemployment, provide skilled workers to meet the needs of the growing colonies, and relieve public officials from the responsibilities of directly caring for needy children.

Chipunga, *supra* note 60, at 292 (citations omitted). *See generally* Tim Hasci, *From Indenture to Family Foster Care: A Brief History of Child Placing*, 74 CHILD WELFARE 162-80 (Jan./Feb. 1995).

[119] *See* FONER, *supra* note 116, at 68-76 (regarding the Freedmen's Bureau) and 585-601 (regarding the end of Reconstruction); *see also infra* notes 143-45.

[120] Fenton, *supra* note 59, at 41 (citing BILLINGSLEY & GIOVANNONI, *supra* note 83, at 24, 25-27).

[121] Chipungu, *supra* note 60, at 293; *see also* BILLINGSLEY & GIOVANNONI, *supra* note 83, at 22-23.

[122] Peebles-Wilkins, *supra* note 92, at 145; *see also* Chipungu, *supra* note 60, at 292 (noting the exclusion of African-American children from "orphanages established before the Civil War as a matter of policy. Separate orphanages were established by certain religious groups or African-Americans themselves for African American children.").

[123] The term "placing out" refers to a strategy considered to be the forerunner of modern family foster care that relocated children and youths from Eastern cities to families in the Midwest. *See* Jeanne F. Cook, *A History of Placing-Out: The Orphan Trains*, 74 CHILD WELFARE 181-97 (Jan./Feb. 1995); *see also* Hacsi, *supra* note 118, at 163. For the British experience, see John M. Eekelaar, *'The Chief Glory:' The Export of Children from the United Kingdom*, 21 J.L. & SOC. 487 (1994).

[124] MARILYN IRVIN HOLT, THE ORPHAN TRAINS: PLACING OUT IN AMERICA (1992); *see*

and continued until 1930.[125] Charles Loring Brace, director of the New York Children's Aid Society (CAS), is credited with initiating "this system that removed at least two hundred thousand children, as well as men and women, from city to country."[126]

Brace and other mid-nineteenth century social reformers embraced placing out as the way to address two growing problems simultaneously. First, it attempted to alleviate the unfortunate plight of the growing numbers of poor, abandoned, or orphaned immigrant children on the streets of East Coast cities. Secondly, it satisfied the great unmet demand for labor to advance development of the rural West. "Farmers needed work hands, retailers and tradesmen needed shop help, and both farm and town women in . . . areas of new growth and settlement complained of the lack of 'help' [such] as washer-women and kitchen girls."[127]

One can draw an interesting parallel between the role of nineteenth century child care agencies and the trader/merchants of Gorée-Island. Both the Gorée-Island trader/merchants and reformers, such as Brace, played key roles in procuring and supplying needed labor to advance economic development of the day. What sets the two apart, however, is that "[p]lacing out was perceived as respectable in its intent and motivation and could be presented to the general public as an example of what good could be done for thousands of unfortunate children."[128] And although "based on an anti-urban, anti-immigrant ideology, . . . [it] gradually evolved into [our] modern family foster care system as government became increasingly involved in the welfare of children."[129]

One can also draw parallels between "placing out" and recent efforts to promote TRA as part of needed welfare reform. First, commentators have noted that nineteenth century middle class reformers and child-care activitists "expected to save both *souls and money* by placing poor children in good homes. Placing agencies were concerned less with the individual, personal problems of the children than they were with the social and moral problems they might eventually pose in the larger community."[130] Vocal social reformers used graphic examples of the conditions under which children attempted to survive to play on the collective mind of American society. "Advertised results of the placing-out system

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also Cook, *supra* note 123.

[125] *See* Cook, *supra* note 123, at 187 (citing P.J. YOUNG & P.E. MARKS, TEARS ON PA-PER: ORPHAN TRAIN HISTORY (1990)).

[126] HOLT, *supra* note 124, at 3; *see also* Burton Z. Sokoloff, *Antecedents of American Adoption*, THE FUTURE OF CHILDREN, Spring 1993, at 19-21 (describing the role these practices played in the development of American adoption).

[127] HOLT, *supra* note 124, at 3 (quoting PEORIA DAILY PRESS (Ill.), Feb. 6, 1855).

[128] *Id.* at 5. Of course, slavery too was rationalized. *See Genesis* 9:21-26 for the account of Noah's curse upon his son Ham that he forever be a servant to his brother. This, however, was not God's curse, but Noah's.

[129] Hacsi, *supra* note 118, at 163.

[130] Barth, *supra* note 37, at 366 (citing P.F. Clement, *Families and Foster Care: Philadelphia in the Late Nineteenth Century*, 53 SOC. SERV. REV. 409 (1979) (emphasis added)).

gave validity to American ideals of success . . . [and because g]rit and determination were championed . . . those who had been placed out became symbols for the ideals of the Protestant American work ethic."[131]

Some people who have promoted TRA today as an important tool of economic and welfare reform also expect to save money.[132] Others have urged that drastic constriction of welfare benefits not only will save American taxpayers real dollars, but that women will no longer bear children out-of-wedlock.[133] At a congressional hearing on welfare reform Charles Murray expressed the belief that women who have out-of-wedlock children, but who have no financial means to care for their children, either will voluntarily relinquish their infants at birth for adoption, or will face the proposition of having their parental rights involuntarily terminated on the grounds of neglect.[134]

Placing-out was promoted and accepted as a "good" solution by a nineteenth century public that defined its values and attitudes by rugged individualism, Social Darwinism, and reverence for the self-made man or woman.[135] These values are still dominant today. Those who promoted placing out worried about "the social and moral problems" that their communities might face if they did not act. Those who pushed for dismantling[136] our sixty-year-old federal safety net for the poor also appealed to similar, deeply held values, concerns and fears of mainstream Americans. They assiduously promoted development of "a widespread consensus that an overly generous American welfare state encourages an ever-rising rate of illegitimacy[, especially] among the black urban poor . . . [by sacrificing] both honesty and accuracy in order to manipulate the paranoid fantasies of white middle-class voters about being out-bred by a supposedly lazy, over-paid black underclass."[137] Michael Lund, however, claims that there is no illegitimacy crisis. "The consensus that welfare has caused an illegitimacy epi-

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[131] HOLT, *supra* note 124, at 5-6.

[132] *See supra* note 24.

[133] *See Hearing on Welfare Reform: Before the Subcomm. on Human Resources of the House Comm. on Ways and Means,* 103 Cong., 2d Sess. (1994) (statement of Charles Murray, Ph.D., Bradley Fellow, American Enterprise Institute, July 29, 1994) *available in* LEXIS, Legis Library, ALLNWS File.

[134] *See id.*

[135] HOLT, *supra* note 124, at 5.

[136] The government accomplished such dismantling by enactment of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. Law 104-193, signed by President Clinton on August 22, 1996. This legislation eliminates the guarantee of federal welfare as an entitlement and replaces the corner-stone program of Aid to Families with Dependent Children (AFDC) with a block-grant program to states, giving them the power to fashion their own plans, setting an even stricter cap than the five-year maximum lifetime limit imposed by this Act. *See* Scot Lehigh, *Farewell to Welfare: It is Gone (as we knew it) but Are We Prepared for the Problems to Come?,* BOSTON GLOBE, Aug. 4, 1996, at D1, 5.

[137] Michael Lund, *A 'Crisis' of Illegitimacy? Try Hoax Instead: Manipulated Statistics Are a Weapon in 'Values' War,* BOSTON GLOBE, Aug. 11, 1996, at D1-2.

demic . . . is a hoax . . . . "[138]

Second, it is noteworthy that while "today's foster care system is . . . usually intended to provide temporary care for children, with the hope that they can someday be returned to their parents[, . . .] a century ago placing-out advocates sought to break up families,"[139] and to provide youngsters with better living situations. Today, TRA supposedly "saves" youngsters by placing them in "loving" homes.

Third, just as the debate surrounding TRA has been heated and acrimonious, both "[t]he effectiveness and appropriateness of placing-out as a plan for orphaned, homeless, and dependent children were widely debated during the last half of the nineteenth century."[140]

> One of the earliest charges was the accusation from Catholics that the intent of the emigration program was the conversion of Catholic children to Protestantism. Critics alleged that this was being accomplished by placing Irish immigrant children with non-Catholic families. Other accusations were that children were being sold into slavery and that brothers and sisters, separated in placement and given the surnames of their foster parents, could meet as adults and marry without knowing they were related. Some critics charged that [Children's Aid Society] CAS was ridding New York City of its criminal-minded and otherwise undesirable children by sending them to unsuspecting midwestern families. Others argued that New York City was being deprived of future solid citizens because the *best* immigrant children were the ones who were being placed-out.[141]

Interestingly, some critics of TRA a century later express similar concerns that TRA robs the African-American community of future active members.[142]

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[138] *Id.* According to Lund:

[T]he rate of babies being born to unwed black teenagers—about 80 per 1,000 unmarried teenagers—[has] remained virtually the same from 1920 through 1990 . . . . [There has been no] long, steep climb in black illegitimacy . . . .

. . . The rise in the *proportion* of illegitimate births among black Americans (and white Americans, too) is almost exclusively a result of the decision of the majority of intact American families who are not poor to have fewer children (and thus, they hope, a higher standard of living).

Id.

[139] Hacsi, *supra* note 118, at 177.

[140] Cook, *supra* note 123, at 188.

[141] *Id.* (citations omitted).

[142] *See* Elizabeth Barthelot, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99, 102 (1995) (quoting *President's Message*, Nat'l Ass'n of Black Social Workers Newsletter (National Ass'n of Black Soc. Workers, Atlanta, Ga.), Spring 1988, at 1-2). The fear is that transracially placed African-American children, if reared and socialized to be white, at best may have no close affiliations with the African-American community, and at worst will be completely estranged because of having absorbed all the prevailing negative stereotypes about African-Americans that abound in this society. *See Redefining the TRA Controversy, supra* note 15, at 164.

Finally, an important historical fact is the manner in which the force of law and social custom in the wake of the end of Reconstruction redefined the entire social and legal status of African-Americans: specifically, the abrupt pull-out of Union troops from the South as part of the "Infamous Bargain of 1877"[143] marked this event. The deal struck between white representatives of the South and North, involving "Home Rule" for the South in exchange for the presidency of Republican Rutherford B. Hayes, resulted in a de facto suspension of constitutional safeguards for Blacks in the South.[144] By 1900, Jim Crow laws were well established; and segregation by custom and law had completely reconfigured the social landscape, locking African-Americans into the status of "second-class" citizens or "non-citizens."[145]

"Child-saving"[146] activities of the late nineteenth century, including establishment of the juvenile court system in 1899, focused primarily on the care of poor, dependent, abused, neglected, or delinquent white immigrant children. Most child welfare services excluded African-American children.

> As a response to exclusion, differential treatment, segregation, and other forms of racial oppression[, i]nternal social reform and selective services for African American children . . . resulted from mutual aid-oriented responses on the part of African American churches and voluntary associations, and benevolence originating from interracial cooperation, the work of Caucasian philanthropists, and governmental sponsorship . . . . As segregation customs and laws persisted, young dependent African American children were either jailed or sent to reform schools even when not delinquent because communities were slow to respond to the need for home finding and family foster care services for African American children.[147]

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[143] Lerone Bennett Jr., *The Second Time Around: Will history repeat itself and rob Blacks of the gains of the 1960s?* EBONY, Sept. 1995, at 90 (reviewing significant events marking the end of Reconstruction and drawing many parallels between 1895 and 1995); *see* FONER, *supra* note 116 for a comprehensive account of these turbulent years.

[144] *See* Bennett Jr., *supra* note 143, at 90. Bennett Jr. describes what then followed in the 1880s and 1890s as:

those indelible events that are etched in the collective psyche of Black America, the decades of lynching and Jim Crow and night-time assaults by the KKK and other vigilante groups. The White violence went on in America for decade after bloody decade, and nobody, neither the White Church nor the White Academy nor the White Supreme Court, opposed it.

Id. at 88.

[145] *See* Plessy v. Ferguson, 163 U.S. 537 (1896); *see also* Bennett Jr., *supra* note 143, at 127 (describing decades of white violence against blacks).

[146] *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969) for a chronicle of the child-saving movement and the juvenile court that revises many popular conceptions about the benign character of both. Platt depicts the movement not as an effort to liberate and dignify youth, but as a punitive effort to control the lives of lower-class urban adolescents and to maintain their dependent status.

[147] Peebles-Wilkins, *supra* note 92, at 144-45 (citations omitted); *see* Chipungu, *supra* note 60, at 293-94 (discussion of the forms of care African-Americans established both prior to and following the Civil War); *see also* P. G. Morisey, *Black Children in Foster*

When this history is fully acknowledged, it is not surprising that, in developing a formal system of adoption in America, traditional private voluntary social agencies acted "to meet the needs of infertile white, upper- and middle-class couples."[148]

B. *Late Twentieth Century Attempts to Include African-Americans*

During the post-World War II era, efforts to make adoption more readily available to African-Americans began to intensify, especially following the 1955 National Conference on Adoption and the release of a CWLA National Adoption Survey. The Survey established that African-American children: (1) "were less likely to be adopted than other youngsters," (2) "were more likely to be placed independently without court action;" and (3) when "accepted for placement were remaining under agency care about twice as long as other children."[149] Placement was not only difficult, but it could also be costly for agencies.

Children's Bureau data for the five year period 1958-62 reflects annual non-relative adoptions of white children ranging from over 19,000 to more than 23,000. Annual non-relative adoptions of nonwhite children during this period increased from 1,685 to 2,518, almost fifty percent. Between 1962 and 1964, approximately ten percent of all non-relative adoptions were of nonwhite children. Interestingly, in 1965, although "more than 57 percent of all children born out of wedlock were nonwhite, only 9 percent of the total number of unrelated adoptions were of nonwhite children."[150] Illegitimate births do not automatically translate into relinquished infants available for adoption.[151]

The number of African-American children entering the child welfare system, however, began to rise sharply in the 1960s because of state intervention in response to situations of poverty-related neglect.[152] For example, in Richmond,

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Care, in SOCIAL WORK PRACTICE WITH BLACK FAMILIES: A CULTURALLY SPECIFIC PERSPECTIVE 133-47 (S.M. Logan et al. eds., 1989) (describing care alternatives developed after the Civil War).

[148] Fenton, *supra* note 59, at 41.

[149] Bernice Q. Madison & Michael Shapiro, *Black Adoption — Issues and Policies: Review of the Literature*, 47 SOC. SERV. REV. 531, 532 (Dec. 1973) (citing MICHAEL SCHAPIRO, A STUDY OF ADOPTION PRACTICES. VOL. 3: ADOPTION OF CHILDREN WITH SPECIAL NEEDS 9-11 (Child Welfare League of America, 1957)).

[150] *Id.* (citing U.S. CHILDREN'S BUREAU, SUPPLEMENT TO CHILD WELFARE STATISTICS—1965: ADOPTIONS IN 1965 1 (1966)).

[151] *See* Christine A. Bachrach et al., *Relinquishment of Premarital Births: Evidence from National Survey Data*, 24 FAM. PLAN. PERSP. 29 (1992) ("Before 1973, 19% of children born to never-married white women were placed for adoption . . . . Among never-married black women, fewer than 2% of children were relinquished before 1973 . . . ."); *see also* NAT'L COMM. FOR ADOPTION, 1989 ADOPTION FACTBOOK: UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 4 (1989) (about 97% of babies born to unmarried women are not relinquished); *see generally, Redefining the TRA Controversy, supra* note 15, at 141-45.

[152] *See infra* notes 194-95 and accompanying text.

Virginia, alone, "the number of Negro children in foster care increased 164 percent in the eight years ending July 1, 1964, as compared with a 60 percent increase in white children in foster care."[153] By the end of the 1960s, the discrepancy in the adoptive placement rates of eligible white and nonwhite children was stark. In 1969, while seventy-one percent of eligible white children were placed in adoptive homes, the comparable percentage for nonwhite children was thirty-one percent.[154]

Throughout the 1960s and into the 1970s a variety of approaches, other than TRA, were undertaken by some child welfare agencies to improve adoptive services for African-American children. These included the Adoption Resource Exchange of North America (ARENA),[155] quasi adoption,[156] long-term or permanent foster family care,[157] subsidized adoption,[158] and single-parent adoption.[159]

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[153] *See* Madison & Shapiro, *supra* note 149, at 533 (citing Beatrice L, Garrett, *Meeting the Crisis in Foster Family Care*, 13 CHILDREN 3 (Jan.-Feb. 1966)).

[154] *See id.* (citing Edwin Riday, *Supply and Demand in Adoptions*, 48 CHILD WELFARE 489 (Oct. 1969)). Actually the number and percentage for African-American children was probably less because nonwhites would include Asians, Hispanic, and Native American children.

[155] *See* Madison & Shapiro, *supra* note 149, at 533; *see also* Clara Swan, *Adoption Resource Exchange*, 57 CHILD WELFARE 4-5 (Jan. 1968).

[156] *See* Madison & Shapiro, *supra* note 149, at 533-34, (citing ELIZABETH LAWDER ET AL., A STUDY OF BLACK ADOPTION FAMILIES: A COMPARISON OF A TRADITIONAL AND A QUASI-ADOPTION. PROGRAM 73-74 (1971) (reporting no statistically significant differences in the functioning of the two groups of parents, even though the quasi-adoptive parents were older, less secure economically and had less education and fewer job skills)).

[157] In 1962 Spence-Chapin Adoption Service in New York City initiated a special project that placed infant children in homes where they might remain permanently. Although adoption was not the Agency's primary goal, it was "assumed that adoption would be a probability for some. A study covering the first six years of the project showed that, of the 1,211 children accepted by September 1968, 21.6 percent had been adopted." *Id.* at 535 (citing Bernice Madison & Michael Schapiro, *Long-Term Foster Family Care: What Is Its Potential for Minority Group Children?* 27 PUB. WELFARE 167, 167, 170 (Apr. 1969)). At the time, these were impressive results, since according to Madison and Shapiro "in the country as a whole, less than 10 percent of the nonwhite children born out of wedlock were adopted." *Id.*

[158] Adoptive parents receive financial payments following finalization of a legal adoption. *See id.* at 536. During the early 1970s, the Children's Bureau commissioned the drafting of a Model State Subsidized Adoption Act and Regulations. For text of the act, see CHILDREN'S BUREAU, U.S. DEPT. OF HEALTH, EDUC. & WELF., SUBSIDIZED ADOPTION IN AMERICA, Updated August 1976, (DHEW Publication No. (OHD) 76-20087); [Reference File] Fam. L. Rep. (BNA) 201:0051-0054; Sanford N. Katz & Ursula Gallagher, *Subsidized Adoption in America*, 10 FAM. L.Q. 3 (1976); and *Adoption Practice, Issues, and Laws*, *supra* note 71, at 189 & n.55. Uniformity in state subsidy legislation was mandated by the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272.

[159] Because no laws in any state prohibited adoptions by single adults, some agencies began to move "from a stance of automatically rejecting the one-parent applicant to a highly qualified willingness to explore such applicants in specific instances." Madison &

According to Madison and Schapiro, "[a]doption of black children in the decade of the 1960s, was undoubtedly facilitated by changes in agency policies and practices that affected all adoptions."[160] Since the goal of adoption was urged for all children lacking safe, functioning families, permanency was secured for some African-American children. Progress was slow, however. Of the 21,000 nonwhite children of the 175,000 children adopted in 1970, 14,600, or less than 8.4%, were African-American.[161] The big challenge for the child welfare system was finding ways to make services responsive to the needs of African-American children and to deliver adoption services in a culturally appropriate manner.[162]

IV. TRA OF AFRICAN-AMERICAN CHILDREN IN THE UNITED STATES

I strongly reject the assertion of TRA proponents that not enough African-American homes exist to care for those children in need of substitute care.[163] Instead, the child welfare community is accountable for not delivering culturally competent services in ways that provide African-American children with needed homes.[164] The child welfare community has completely disregarded the National

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Shapiro, *supra* note 149, at 538 (quoting Alfred Kadushin, *Single-Parent Adoptions: An Overview and Some Relevant Research*, 44 SOC. SERV. REV. 264 (1970)).

[160] *Id.* at 545. Changes included the following: shortening the length of the adoption process; modifying requirements to permit flexibility with respect to ages of applicants, required length of applicants' marriages, and the amount of fee or method of payment; allowing placement with couples who have other adopted children or children of their own; and placement in homes in which the adoptive mother works or accepting her plan to work after an "adjustment period." *Id.*

[161] *See id.* at 549-50.

[162] *See* Williams, *supra* note 100, at 271; *see e.g.,* DAY, *supra* note 114, at 71-72 (offering white social workers explicit guidelines for working more effectively with Black clients); Ketayun H. Gould, *Limiting Damage Is Not Enough: A Minority Perspective on Child Welfare Issues in* CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE 58-78, *supra* note 43 ("a theoretical analysis of the minority and Africentric perspectives, examining the basic assumptions and values of the two frameworks to determine their applicability to child welfare policies and practices for African Americans.")

[163] *See e.g.,* Bartholet, *supra,* note 46, at 1188, 1235; Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard,* 59 NOTRE DAME L. REV. 503, 513-14 (1984). *But cf.* HILL ET AL., *supra* note 102, at 33 ("[T]he National Urban League's Black Pulse Survey revealed that three million (or one-third of) black household heads were interested in formally adopting a black child."); Marilyn Lovett-Tisdale & Bruce Anthony-Purnell, *It Takes an Entire Village,* 22 J. BLACK PSYCH. 266, 266-67 (May 1966) ("Since this translates into 100 African-American families for every African-American child in foster care, the major question should be why those children are not being placed in loving, African American homes."). Thus, basing the contention that not enough African-American homes exist for waiting children solely on the numbers of pre-screened approved African-American adoptive applicants, is yet another example of how statistics can be manipulated to distort a situation. *See* Lund, *supra* note 137 and accompanying text.

[164] In 1994, NABSW issued a second Position Statement, declaring in part:

Urban League's Black Pulse Survey's[165] finding that three million heads of black households are interested in formally adopting a black child. This number far exceeds the total number of Black children legally free for adoption so that it is simply unreasonable to presume that from such a large pool of potential adopters, appropriate same-race placements could not be made. Furthermore, no thorough surveys affirm or disprove the League results. The disregard of the Black Pulse Survey and the failure to question why agencies are not recruiting and approving more African-American applicants raises the specters of blatant prejudice and gross discrimination.

A. *Incidence*

The first recorded TRA of an African-American child by whites occurred in Minnesota in 1948.[166] Very few TRAs followed in the early 1950s.[167] During the 1960s, the number of TRAs of African-American children increased each year. "Sparked by citizen advocacy groups in Montreal, Canada (Parents to Adopt Minority Youngsters) and in rural Minnesota (the Open Door Society), interest in transracial placements spread throughout the country, as private voluntary agency placements rose steadily . . . and peaked in 1971"[168] with 468 agencies reporting 2,574 adoptions.[169] However, after the National Association of Black Social Workers (NABSW) announced their strong objection to TRA in April 1972,[170] the number of annual placements of African-American children with white adoptive parents began to decline; in 1972 only 1,569 TRAs occurred— more than 1,000 fewer than in 1971. By 1976, TRA placements had dropped to 1,076. More than 12,000 TRAs were recorded between 1960 and 1976.[171] A dec-

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With specialized agencies experiencing such tremendous successes with same race placements, many [wonder] why their methods and staffing patterns could not be expanded and adapted to the larger child adoption system . . . . [T]here is something seriously defective with the current adoption system as it relates to African-American children, particularly given that African-Americans adopt at a rate of four times faster than any other racial group given equal income. Not only are African-Americans willing to adopt, but when they or other appropriate minority specialists are in charge, the "same race" placement rates are remarkably high.

NATIONAL ASS'N OF BLACK SOC. WORKERS, POSITION STATEMENT: PRESERVING AFRICAN-AMERICAN FAMILIES 4 (April 1994).

[165] *See* HILL ET AL., *supra* note 102.

[166] *See* LADNER, *supra* note 60, at 59.

[167] *See* DAY, *supra* note 114, at 92.

[168] Arnold R. Silverman, *Outcomes of Transracial Adoption*, THE FUTURE OF CHILDREN, Spring 1993, at 105; *see also* Madison & Shapiro, *supra* note 149, at 538-40 (discussing placements during the 1960s).

[169] *See* DAY *supra* note 114, at 93, tbl. 6-1 "Black Children Adopted by Whites, as Reported in Opportunity Surveys, 1968-1976" (Source: Opportunity, Portland OR: Boys and Girls Aid Society of Oregon). Between 1969 and 1973, more than 1000 African-American children were placed transracially each year.

[170] See *supra* note 62.

[171] *See* Silverman, *supra* note 168, at 105-06; and DAY, *supra* note 114, at 93.

ade later in 1987, the estimated number of TRAs of African-American children was 1,169.[172] Today, because of a lack of any comprehensive statistical information on adoptions, "one cannot determine with certainty either the total number of adoptions in general or the total number of transracial placements in particular."[173]

B. *Social Realities*

The aforementioned[174] systematic exclusion of most African-American children from child welfare adoption services, coupled with some black children being included in services which were either inadequate or segregated, raises two questions. First, what set of factors and conditions account for the introduction of TRA and its rapid growth during the 1960s? Second, what combination of factors accounts for the subsequent decline of TRA in the mid- to late 1970s? To answer these questions, one must first address several historical facts: the shortage[175] of available white babies to meet the demand; intercountry adoption's ("ICA")[176] role in fostering acceptance of TRA; the Civil Rights Movement[177] of the 1960s; and the first significant inclusion[178] of African-American children in the child welfare system during the late 1950s and 1960s.

1. Shortage of white babies

Until the mid-1950s,[179] agency intake policies and procedures drastically limited the number of agency adoptions. They:

> had the effect of limiting adoption to the perfect or near-perfect baby by the perfect prospective adoptive parents— infertile, but well adjusted, and well enough established in their community and career to be considered financially stable . . . . [T]hese agency policies and procedures, coupled with fewer children being born or available during the Second World War years, contributed to a rise in independent adoptions with some high-priced 'black market' operations which took advantage of the desperation of childless couples . . . . [I]n 1955 the black market received notoriety when many sordid black-market incidents were divulged during U.S. Senate hearings led by Senator Kefauver.[180]

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[172] *See* Silverman, *supra* note 168, at 106.

[173] *Id.* According to a National Adoption Information Clearinghouse fact sheet on Adoption Statistics, citing Victor E. Flango and Carol R. Flango, *The Flow of Adoption Information from the States*, (National Ctr. for State Courts, (1994)) ("127,441 children of all races and nationalities were adopted in the United States in 1992 (the last year for which total adoption statistics are available)."). *See supra* note 17.

[174] *See supra* Part III.A.

[175] *See infra* Part IV.B.1.

[176] *See infra* Part IV.B.2.

[177] *See infra* Part IV.B.3.

[178] *See infra* Part IV.B.4.

[179] *See supra* text accompanying notes 97-99.

[180] *Adoption Practice, Issues, and Laws, supra* note 71, at 180 & n.25.

In the late 1950s and 1960s, independent adoptions declined as birth rates rose and many unwed mothers no longer relinquished their newborns to agencies for adoption.[181]

During the 1960s, emerging significant changes in social attitudes and lifestyles caused the stigma once attached to out-of-wedlock birth to wane. Many single white women who once would have relinquished their infants to voluntary agencies for adoption chose to raise them, and applied for AFDC assistance. A decline in birthrates in the 1970s, caused in part by the legalization of abortion[182] and the increased availability of contraceptives, reduced the number of infants available for adoption. The decrease in the number of healthy, desirable white infants available for adoption, combined with a steady increase in the demand for them, cause many middle- and upper-class applicants to begin seeking children from other countries.[183]

2. Role of ICA

Following World War II, many American families adopted children from war ravaged Asian countries.[184] After the Korean War (1950-1953), voluntary organizations began bringing thousands of abandoned Korean children, many fathered by American servicemen, to the United States for placement in American homes.[185] Later, American involvement in the Vietnam War and in relief efforts there fostered the placement of many refugee children in white American homes. More recently, "Hispanic children from parts of Central and South America have slowly and steadily contributed to the numbers of foreign-born, nonwhite children adopted by white Americans."[186] Some have noted that both intercountry and interracial adoptions reflect "tension between humanitarian and exploita-

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[181] *See supra* note 149.

[182] *See* Roe v. Wade, 410 U.S. 113, *reh'g denied* 410 U.S. 959 (1973).

[183] *See* discussion *infra* Part IV.B.2.

[184] *See* Silverman, *supra* note 168, at 104 (citing R.H. Weil, *International Adoption: The Quiet Migration,* 18 INT'L MIGRATION REV. (1984) at 280-81). "[N]early 3,000 Japanese children were adopted by Americans between 1948 and 1962, and . . . 840 Chinese children were adopted, mostly by white American families, during this same period." *Id.*

[185] The efforts of Harry Holt, an American farmer:

resulted in the creation of the largest international adoption program . . . More than 38,000 adoptions of Korean children in America took place between 1953 and 1981. Since 1974, Korea has introduced legislation to reduce the intercountry adoption of Korean children and to promote adoption within Korea. Nevertheless, between 1,000 and 2,000 Korean children are adopted in the United States each year, usually by white Americans.

Silverman, *supra* note 168, at 104-05. Also, "[b]etween 1958 and 1967 hundreds of American Indian children were placed in white homes through the Indian Adoption Project. Indian activist groups have since severely criticized findings by David Fanshel [*in* FAR FROM THE RESERVATION (1972)] that these Indian adoptions were positive for Indian children and their adopting parents." *Adoption Practice, Issues, and Laws, supra* note 71, at 182 (citing SOROSKY ET AL., *supra* note 72, at 202).

[186] Silverman, *supra* note 168, at 105.

tive motives" and illustrate "how the same action can be characterized as lauda-
ble or deplorable."[187] During El Salvador's twelve-year civil war, scores of
children were forcibly separated from their families and immersed into new
identities with English-speaking families in the United States.[188] This and many
other questionable practices that occurred during El Salvador's civil war are now
coming to light.[189]

3. Civil Rights Movement of the 1960s

The emergence of intercountry adoptions during the 1950s, particularly those
of Asian children who did not physically resemble their adoptive parents, con-
tributed to the agencies' abandonment of their strict adherence to race-
matching.[190] The first wave of TRAs of African-American children in the 1960s
can be viewed as a by-product of the 1960s Civil Rights Movement. One author
attributes these early placements to agency response to "the choice of . . .
whites . . . who saw the adoption of Black children as part of their commitment
to racial integration."[191] "[S]ome of the [white] families . . . believed that the

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[187] Cole, *supra* note 37, at 658.

[188] *See* Steve Fainaru, *El Salvador: Searching for a Stolen Past*, BOSTON GLOBE, July
14, 1996, at 1, 14-15 and Fainaru, *At US Embassy, Critics Say, a Failure to Safeguard
Adoptions*, BOSTON GLOBE, July 14, 1996, at 15.

For current issues and developments in intercountry adoption: see Bartholet, *supra* note
21; Dan Berger, *Improving the Safety and Efficiency of Foreign Adoptions: U.S. Domestic
Adoption Programs and Adoption Programs in Other Countries Provide Lessons for INS
Reform*, 5 CORNELL J.L. & PUB. POL'Y 33 (1995); Susann M. Bisignaro, *Intercountry
Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow*, 13
DICK. J. INT'L L. 123 (1994); William L. Pierce, *Accreditation Of Those Who Arrange
Adoptions Under The Hague Convention On Intercountry Adoption As A Means Of Pro-
tecting, Through Private International Law, The Rights Of Children*, 12 J. CONTEMP.
HEALTH L. & POL'Y 535 (1996); and Kristina Wilken, *Controlling Improper Financial
Gain in International Adoptions*, 2 DUKE J. GENDER L. & POL'Y 85 (1995).

[189] *See El Salvador: Searching for a Stolen Past*, *supra* note 188.

[190] *See* Fenton, *supra* note 59, at 53; *see also* DAY, *supra* note 114, at 96 (noting that
during the 1950s agencies were advised by the Child Welfare League of America to
"place children of interracial background who appeared to be white in white families.
Agencies were encouraged to consult geneticists or anthropologists in questionable
cases.")

[191] Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preserva-
tion*, 59 U. MO.-KAN. CITY L. REV. 489; *see also* Lanthan D. Camblin Jr. & Joel Milgram,
Reflections on Transracial Adoptions: Two Fathers' Perspectives, 27 SOC. WORK 535
(1982) ("Blackness became a factor dictated by the scarcity of white adoptable children
and by our deliberate decision not to exclude black children from consideration . . . .
We also had great hopes for the future . . . . We had been students in the 1960s and
. . . we had witnessed an emerging positive trend in this color-conscious society."). But
another commentator notes that during this period, African-American children often were
not a first choice of white parents considering TRA. "Non-white children who were not
Black, or Black children with white features were preferred first." Fenton, *supra* note 59,

way to conquer racism was to pretend that it did not exist. They treated their children as if they were white, sent them to white schools and made little, if any, effort to provide them with Black culture."[192]

NABSW's strenuous opposition to TRA in the early 1970s was a consequence of the Civil Rights and Black Power Movements. Both movements strengthened minority organizations and created advocacy networks, which helped to empower members of the black community, as the creation of NABSW demonstrates. Some time ago, Elizabeth Cole wrote: "Increased pride in one's race and roots is also contributing to strong efforts to keep children within their racial and ethnic communities."[193] She anticipated that TRA placements would likely decrease over time.

4. African-American children in the child welfare system

Beginning in the 1950s, significant numbers of African-American children began entering the child welfare system, mostly as a consequence of poverty. The caseloads of public agencies which traditionally serve the poor changed first. After the Korean War, many whites achieved relative economic security and fled the inner cities. The economic progress of Blacks and other minorities was much slower, however. As large numbers of African-Americans left the rural South to seek better opportunities in urban areas of the North, Midwest and West, social services for urban African-American communities became increasingly necessary.[194] Often parents who were unable to provide for their children, would approach an agency to request a "temporary" foster care placement until they could secure a job and set up a home, without relinquishing their rights.[195]

In the 1960s and 1970s, lawmakers passed mandatory reporting laws and implemented a system for investigating suspected child abuse and neglect.[196] This

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at 54 (citing Macaulay & Macaulay, *supra* note 59, at 280).

[192] Mahoney, *supra* note 191, at 499 (citing LADNER, *supra* note 60, at 109). *See e.g.,* Asher D. Isaacs, *Interracial Adoption: Permanent Placement and Racial Identity—An Adoptee's Perspective,* 14 NAT'L BLACK L. J. 126, 126-27 (1994-95) (describing being raised by parents who saw no need to expose him to Black culture, history, or role models) (expressing belief that Black children need a sense of community and to feel welcomed as a needed member of the African-American community in order to value themselves and not succumb to racism and prejudice); *see also supra* note 38 and accompanying text.

[193] Cole, *supra* note 37, at 659.

[194] *See* Fenton, *supra* note 59, at 43 & n.28 (citing BILLINGSELY & GIOVANNONI, *supra* note 83, at 86).

[195] *See* Telephone Interview with Laura B. Morris, *supra* note 99; *see also* HILL ET AL., *supra* note 102, at 33 (noting large number of voluntary requests by low-income parents unable to obtain affordable housing).

[196] For a comprehensive review of the reporting laws of the fifty states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands, as amended through August 31, 1974, see Sanford N. Katz et al., *Child Neglect Laws in America,* 9 FAM. L.Q. 1-6, 39-46, 63-66, and 75-362 (1975).

caused an increase in the number of African-American families that came to the attention of child welfare authorities.[197] Too frequently, the professional response was removal and placement in foster care instead of addressing the underlying cause of the problems—poverty. Professionals, "[i]n response to concerns about the insecurity and the psychosocial problems experienced by foster children," began to urge "permanence through adoption . . . for all children without safe and functioning families."[198] If, however, permanency planning is a "process of taking prompt, decisive action to maintain children in their own homes or place them permanently with other families,"[199] adoption is not the only available option. Utilization of grandparents or other extended family members to provide a child a permanent home would not only provide the child with a sense of permanence and stability, but would also serve the further goal of family preservation.

These four realities: a shortage of white babies; the precedent of ICA; the 1960s Civil Rights Movement; and the inclusion of African-American children in the child welfare system, forced agencies and prospective adopters to redefine the pool of children deemed "adoptable." These realities alone, however, do not completely explain the numbers of TRA placements made during the five year period from 1968 to 1973. To understand fully the initial appearance, rapid spread, and subsequent decline of TRA, one must recognize another influential factor: the economic and social welfare milieu of the 1960s and 1970s in which child welfare agencies operated.

C. *Child Welfare System Milieu of the 1960s and 1970s*

During the late 1960s and early 1970s, major changes occurred in the organization, delivery and funding of child welfare services in the United States.[200] A complete discussion of the milieu which spawned TRA requires consideration of three factors: the role and impact of federal legislation such as the Social Security Act of 1935[201] and certain subsequent amendments;[202] the increasing size and diversity of public agency caseloads;[203] and the serious funding crisis that private voluntary child welfare agencies experienced.[204] These developments set the stage for the child welfare system's initial use of the "micro" direct-service-oriented approach of TRA to address the social realities described in the foregoing subsection, rather than "macro" social work strategies.

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[197] *See* Williams, *supra* note 100, at 271.

[198] *Id.*

[199] Child Welfare Challenge, *supra* note 37, at 44 (citing A.N. MALUCCIO ET AL., PERMANENCY PLANNING FOR CHILDREN: CONCEPTS AND METHODS 195 (1986)).

[200] *See* discussion *infra* Part IV.C.1 through 3.

[201] The Social Security Act of 1935, ch. 531, § 401, 49 Stat. 620, 627-34 (1935) (codified as amended at 42 U.S.C. ch.7).

[202] *See infra* note 209.

[203] *See infra* Part IV.C.2.

[204] *See infra* Part IV.C.3.

1. Social Security Act of 1935

The economic and social upheaval of the Great Depression that led to enact-
ment of the Social Security Act of 1935 "demonstrated that all citizens of an in-
dustrial society are subject to economic risks and that the responsibility for
meeting social needs cannot be left entirely to voluntary agencies."[205] Before the
Depression of the 1930s, there had been a "drift to public relief"[206] as individ-
ual states initiated categorical assistance programs for disabled workers, wid-
owed mothers, the blind, the aged, and disabled war veterans. The role of the
federal government, however, had remained relatively insignificant. Passage of
the Social Security Act of 1935 marked the first time that the federal govern-
ment assumed "collective responsibility for the inadequacies of a badly function-
ing economic system."[207] Furthermore, "[the Act's] categorical assistance and
child welfare programs irrevocably expanded public agency activity into areas of
direct service to people. [Thereafter, t]he future of voluntary social service was
inseparably tied to the development of public social service."[208] The Act and
later amendments[209] not only changed the traditional division of responsibility
between public and private child welfare agencies, but also forced voluntary ser-
vices to redefine their functions and roles. According to social work educator
Herman Levin, pre-1935 voluntary social welfare in the United States evolved
from roots deeply embedded in our Constitutional guarantees of freedom from
religious and political tyranny.[210]

> Voluntary social welfare embodies the right of free people to assemble
> peaceably to express their will in regard to social problems. The separation
> of church and state represented a departure from the European tradition of
> church-state unity and therefore from church-state responsibility for social
> welfare. With this separation, voluntary bodies—both sectarian and nonsec-
> tarian—assumed this moral and religious responsibility.[211]

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[205] Herman Levin, *Voluntary Organizations in Social Welfare, in* 2 ENCYCLOPEDIA OF
SOCIAL WORK 1574 (17th ed., 1977) [hereinafter *"Voluntary Organizations"*]. *But see
supra* note 136.

[206] Herman Levin, *The Future of Voluntary Family and Children's Social Work: A His-
torical View*, 38 SOC. SERV. REV. 163, 164 (1964) (quoting Harry L. Lurie, *The Drift to
Public Relief, in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 212
(1931)).

[207] *Id.* (quoting Lurie, *supra* note 206, at 214).

[208] *Id.*

[209] Act of Aug. 1, 1956, ch. 836, § 401, 70 Stat. 807, 855-56 (codified as amended in
scattered sections of 42 U.S.C.); Act of Aug. 28, 1958, Pub. L. No. 85-840, § 601, 72
Stat. 1013, 1052-57 (codified as amended in scattered sections of 42 U.S.C.); Act of July
25, 1962, Pub. L. No. 87-543, 76 Stat. 185 (codified as amended in scattered sections of
42 U.S.C.).

[210] Most notably, those found in the First Amendment: "Congress shall make no law
respecting an establishment of religion, or prohibiting free exercise thereof; or abridging
. . . the right of the people peaceably to assemble . . . ."

[211] *Voluntary Organizations, supra* note 205, at 1573.

The hallmark of the pre-1935 voluntary agency was that it was "created in response to the evolution of American democracy and steeped in Judeo-Christian values, [and] derive[d] its strength from independence from government and the maintenance of programs developed as offerings of free will."[212] Child welfare practitioners generally expected private voluntary agencies to innovate, experiment, test, and verify new approaches, and deemed them free to change their focus.[213]

Until 1935, both public and voluntary social welfare had developed along two separate channels, children's services[214] and family services.[215] Early voluntary and public agency family services encompased a variety of programs whose purposes included assisting individuals and families under stress, improving the social functioning of family members both in and outside the family home, and acting as agents for change in areas of society that affect family life.[216] During the 1930s and 1940s, however, some voluntary children's and family services' agencies jointly began to seek new alignments with public agencies.

> [Mergers began occurring as] the similarity of programs of private family and children's agencies . . . [became] increasingly evident as public agencies moved into aspects of child welfare—especially foster care—and voluntary children's agencies increasingly emphasized services to children in their own homes. The essential similarity of programs of voluntary family and children's agencies was further demonstrated by the development of generic casework.[217]

By 1953, family casework[218] emerged as a treatment service distinguishable

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[212] *Id.* See also POLIER *supra* note 92 (providing examples of the major role "sectarianism of autonomous religious groups" played in shaping and developing a system of child welfare services, especially adoption and other out-of-home foster care and residential treatment services that long excluded African-American youngsters) (chronicling a shameful history of religious separatism among private voluntary agencies and blatant racial discrimination by both public and private agencies and the courts which left African-American and other youth of color grossly underserved).

[213] *See* Levin, *supra* note 206, at 164 (contrasting public and private agency responsibilities).

[214] *See supra* note 58 for description of core child welfare or "children's services;" *see also supra* Part II.D.1 for discussion of the key roles played by the Children's Bureau and Child Welfare League of America, Inc. in setting practice standards.

[215] *See* Salvatore Ambrosino, *Family Services: Family Service Agencies, in* 1 ENCYCLO-PEDIA OF SOCIAL WORK, *supra* note 55, at 429-35 (describing history of development of family services).

[216] *See id.*

[217] Levin, *supra* note 206, at 164.

[218] Family casework or family-centered casework, views the person and his family as the essential units of concern to be valued by society. To survive, people need "a sense of worth and dignity, a sense of self and an identity, and an opportunity to make choices . . . in order to achieve a sense of self-realization. Social casework is the instrumentality . . . through which such value commitments can be exercised and through which personal growth and fulfillment can be realized." Lydia Rapoport, *Social Casework: An*

"from such concrete services as financial assistance and foster care. For the moment, the difference between the voluntary and public welfare agency seemed obvious. This certainty was short-lived, however."[219]

Amendments to the Social Security Act passed in 1956 and 1958 soon challenged notions about the proper alignment between public and voluntary agencies. The 1956 amendment gave the category of assistance entitled "Aid to Dependent Children" a family orientation. This amendment encouraged states to grant assistance *and* "other services" to needy dependent children *and* the parents or relatives with whom they lived "to help maintain and strengthen family life."[220] The 1958 amendments eliminated the restriction of public child welfare services to predominantly rural areas making it possible to extend public child welfare services to urban areas.[221] In response to these changes, mergers increased among voluntary family and children's agencies.

The 1962 amendments to the Social Security Act represented "a further encroachment upon the traditional service realms of voluntary family and children's social agencies."[222] These amendments changed Aid to Dependent Children (ADC) to Aid and Services to Needy Families with Children (AFDC), ostensibly indicating a new public agency emphasis on providing social services to families.[223] Salient changes in the 1962 amendments included: (1) defining child welfare services as services which supplement or substitute for parental care and supervision; (2) calling for coordination between child welfare services and the services provided for dependent children; (3) requiring states to show that the plans for needy families with children make services available to maintain and strengthen family life for children; and (4) extending services to any relative with whom a child lived, if the relative had been or was likely to become an applicant for, or recipient of, aid to families with dependent children.[224]

Herman Levin accurately predicted that the 1962 amendments would have important consequences for public and private welfare. In 1964, he observed that the amendments seemed "to imply that granting of financial assistance is a function apart from 'services' required by families and children."[225] He noted that if

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Appraisal and an Affirmation, in CREATIVITY IN SOCIAL WORK: SELECTED WRITINGS OF LYDIA RAPOPORT 45 (Sanford N. Katz ed., 1975).

[219] Levin, *supra* note 206, at 165.

[220] *Id.; see also* Pub. L. No.84-880, (84th Cong., 2d sess.), approved August 1, 1956 (70 Stat. 806), Title IV, § 401 (emphasis added).

[221] *See* Pub. L. No. 85-840 (85th Cong., 1st sess.), approved August 28, 1958 (72 Stat. 551), Title VI, § 601 (authorizing appropriation of $17 million for child-welfare services "for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent" and payment "to each state with a plan for child-welfare services developed as provided in this part . . . for the encouragement and assistance of adequate methods of community child-welfare organization").

[222] Levin, *supra* note 206, at 163.

[223] *See id.* at 168.

[224] *See* The Public Welfare Amendments of 1962, Pub. L. No. 87-543, 76 Stat. 185 (codified as amended in scattered sections of 42 U.S.C.).

[225] Levin, *supra* note 206, at 169.

the giving of public relief was separated from other services, prior divisions between public and voluntary agency programs might become tenuous, causing family and children's services to come together in a single, main stream.[226]

Levin also expected that the 1962 requirement to offer " 'service' not only to those already in need of financial assistance but also to those who may need such help presage[d] a rapid shift to the public agency of all clients at the lower economic level."[227] Indeed, the 1962 amendments' call for coordination between public child welfare services and services provided for needy families with children did encourage some merger of public family and children's services. This was similar to the trend that occurred among voluntary agencies in the years following the Depression. Some commentators, however, assert that public agencies in the early 1960s did not offer any meaningful social services to enable AFDC recipients to keep their families intact. They also allege that there was no routine communication between workers assigned to different programs who might simultaneously be working with the same clients. The only service that public agencies readily offered was foster care.[228]

Both the 1962 and 1968 amendments[229] to the Social Security Act allowed public agencies to purchase a variety of child welfare services from voluntary agencies. This purchase option, however, did not become popular until 1969. Between 1969 and 1973, years when TRAs were at their highest, "purchase of services by welfare agencies skyrocketed, often accounting for more than half of all [federal] social service expenditures."[230] According to Levin, "purchase of care for public agency clients, particularly in child welfare, has been a familiar mechanism through which state and local governments have fostered the continuation of voluntary agencies."[231]

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[226] See id.

[227] Id. at 168. But one consequence of public services becoming more inclusive was that some of the social/religious group programs developed by African-Americans for African-American children, as described supra III.A. were phased out. School desegregation also resulted in losses with negative side effects such as the closing of some African American educational institutions and a drop in the total number of teaching and top administrative positions held by African Americans. See Perry, supra note 114, at 105 nn.319-24 (citing Derrick A. Bell, Neither Separate Schools Nor Mixed Schools: The Chronicle of the Sacrificed Black School Children, in AND WE ARE NOT SAVED 102 (1987)); and Drew S. Days, III, Brown Blues: Rethinking the Integrative Ideal, 34 WM. & MARY L. REV. 53, 55-56 (1992).

[228] See Telephone interview with Laura B. Morris, supra note 99.

[229] See supra note 224; [Act of Jan. 2, 1968, or Public Welfare Amendments], Pub. L. No. 90-248, § 201, 81 Stat. 877 (codified as amended in scattered sections of 42 U.S.C.).

[230] Edward T. Weaver, Public Assistance and Supplemental Security Income, in 1 ENCYCLOPEDIA OF SOC. WORK, supra note 55, at 1121, 1131. One can wonder whether there is any correlation between the decline in TRAs after 1973 and the fact that due to "congressional action in 1973 to limit spending for social services [by placing a $2.5 billion ceiling on expenditures] the growth in purchase of services . . . declined." Id.

[231] Voluntary Organizations, supra note 205, at 1577; see also Gordon Manser, Implications of Purchase of Service for Voluntary Agencies, 53 SOC. CASEWORK 335-40 (1972)

2. Public child welfare: Increasing caseloads

As previously noted,[232] a substantial number of African-American children began to appear in the caseloads of public agencies during the 1950s and 1960s. Furthermore, as all fifty states enacted mandatory abuse and neglect reporting laws during the 1960s, the number of reported cases increased annually. Most states required designated professionals to make reports to a state or county department of welfare, although a few states required reports to be made to law enforcement personnel.[233] Providing treatment services was the responsibility of public agencies. However, a 1967 national survey[234] indicated that nowhere in the country were child protective services adequate in volume or quality.

One of the goals of the Civil Rights Movement of the 1960s was to help the "victims of poverty and racial prejudice enter the 'mainstream of American life,' as the phrase went. [The movement] expressed a growing sense of a common life, an inclination toward equality, and an increasing confidence in the possibilities of governmental action."[235] A definitive illustration of this confidence was "the growth of the Department of Health, Education, and Welfare (HEW). Established in 1953, HEW increased its budget of general tax funds (excluding Social Security benefits) from under $2 billion to over $5 billion by 1963 and over $25 billion by 1973."[236]

Statistics regarding the number of children receiving child welfare services on March 31, 1971 affirm Levin's 1962 prediction that clients would rapidly shift to public agencies.[237] According to the National Center for Social Statistics, public agencies served ninety-four percent of the 3,115,129 children then receiving child welfare services.[238] "[O]nly 200,436 children [received] services from voluntary agencies [and] 61,996 [or this number] were children for whom voluntary services were [purchased] by public agencies."[239] These statistics also indicate that income sources for voluntary agencies were changing. The next section

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(predicting profound changes in traditional public and voluntary relationships as a result of purchase of service contracts).

[232] *See supra* Part III.B.2.

[233] "In 1967, 14 states designated law enforcement officials or district attorneys as the sole recipient of reports." Arthur Schwartz & Harold L. Hirsh, *Child Abuse and Neglect: A Survey of the Law*, 28 MED. TRIAL TECH. Q. 293, 306-308 (1981).

[234] *See* Robert M. Mulford, *Protective Services for Children, in* 2 ENCYCLOPEDIA OF SOCIAL WORK, *supra* note 55, at 1115, 1117 n.10 (citing VINCENT DE FRANCIS, CHILDREN'S PROTECTIVE SERVICES — NATIONAL SURVEY (1967)).

[235] James Leiby, *Social Welfare: History of Basic Ideas, in* 2 ENCYCLOPEDIA OF SOCIAL WORK, *supra* note 55, at 1512, 1527.

[236] *Id.* at 1528.

[237] See *supra* notes 225-27 and accompanying text.

[238] *See Voluntary Organizations, supra* note 205, at 1576.

[239] *Id.* Levin, in presenting these statistics wondered whether the service capacity discrepancy and "the availability of government funds in amounts clearly unattainable by voluntary sources [was] a major reason for questioning the continuing existence of voluntary agencies." *Id.*

more fully considers the exact nature of the financial situation that many voluntary child welfare agencies experienced in the 1960s.

3. Private voluntary agencies: Financial problems

As social welfare developed in the United States, two major characteristics typically defined the voluntary agency. First, a governing Board of Directors contributed its time and expertise without remuneration. Second, the budget was based on voluntary contributions from individuals, bequests, corporations, and foundations.[240] Voluntary contributions, however, have never been sufficient to support all needed social services adequately.[241] Social welfare organizations compete for capital and operating funds with millions of other non-profit organizations in the United States such as religious organizations, private libraries, secondary schools, institutions of higher learning, health and hospital services, museums, symphony orchestras, and other recreational and civic programs. Indeed, "the need for money has invariably led to the begging of philosophical questions."[242]

During the 1950s and 1960s, increased federal government participation in social welfare affected voluntary agencies, especially in the area of child welfare. Two other developments affected voluntary agencies as well: "the professionalization of social agency administration and, more importantly, the centralization of fundraising and fund allocations."[243] Professional administrators assumed dominant roles within individual agencies, effectively usurping the roles of the volunteers. In addition, "[d]emands for service, spurred by population explosion and the Civil Rights Movement, increased at the very time that the effects of inflation and unemployment brought about a money crunch."[244]

During the 1960s, organized citizen fund-raising bodies, such as the United Way, were forced to set priorities for allocating locally raised funds among competing programs and agencies. What had been a "volunteer versus social agency struggle for dominance [now] evolved into a United Ways versus service agency struggle."[245] Child welfare and adoption services did not fare well as United

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[240] See id. at 1574.

[241] See id.

[242] Id.; see generally, NELLY HARTOGS, IMPACT OF GOVERNMENT FUNDING ON THE MANAGEMENT OF VOLUNTARY AGENCIES (Greater New York Fund/United Way, ed., 1978) (report assessing key role government funding plays in helping voluntary agencies maintain or extend services and concern for survival of voluntary agencies); and Michael J. Murphy, Financing Social Welfare: Voluntary Organizations, in 1 ENCYCLOPEDIA OF SOCIAL WORK, supra note 55, at 478-84.

[243] Voluntary Organizations, supra note 205, at 1574.

[244] Id. at 1574-75; see also Cole, supra note 37 at 665 (noting the critical funding problems of voluntary agencies). "Donations fall off as the economy worsens and the United Way has steadily been cutting back their support of Child Welfare services in general and adoption services in particular." Id.

[245] Voluntary Organizations, supra note 205, at 1575. According to Levin, "[t]he need for the voluntary social welfare sector to work out alignments with the public sector and

Way steadily cut back on their support. According to Elizabeth Cole, "[c]ommunity funding sources see adoption as a service to adoptive parents and expect them to pay for it. As costs increase and available children become fewer or more difficult to place, fees cannot begin to cover the costs."[246]

Speaking at a dinner for the Family Service Association of America (FSAA) in November 1961, Arthur H. Kruse, then executive director of a family agency, asserted that an agency in 1960 needed to have 200% more funding than in 1940 just to maintain services at the same level.[247] Rising operating costs pose very difficult problems for human service programs which are very labor-intensive. "For example, personnel costs in social welfare average almost 65 percent of total costs; in manufacturing the comparable cost is 24 percent . . . . A voluntary organization can not offset increased costs through increased productivity or automation or by sloughing off unprofitable services."[248]

From the mid-1960s through 1974, when the incidence of TRA was at its height, annual giving to United Way campaigns increased.[249] However, the increase was not enough to keep pace with costs deemed to be beyond control "because of the labor-intensive character of the voluntary philanthropic field."[250] As agency operating costs steadily rose, the annual revenues from private philanthropic giving represented a declining percentage of agency income, thus signalling "a state of charitable crisis."[251] For the voluntary child welfare agency to survive, new sources of revenue had to be identified and new alignments needed to be worked out with the public sector as well as with the United Way. In order to survive, voluntary agencies gave up some of their traditional autonomy and freedom to experiment with innovative approaches. In turn, they began entering into purchase-of-service contracts with state and local public agencies to deliver a variety of publicly mandated services.[252] Thus, voluntary agencies increasingly were called upon to serve different populations.

A November 1978, CWLA Research Center Report contains interesting data on the amounts and sources of income received by voluntary child welfare agencies (members of CWLA and FSAA) between 1960 and 1978.[253] The Report

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for voluntary agencies to work out alignments with United Ways [had become] so acute as to be termed 'a state of charitable crisis.' " *Id.*

[246] Cole, *supra* note 37 at 665-66.

[247] *See* Levin, *supra* note 206, at 167.

[248] Gordon Manser, *Further Thoughts on Purchase of Service*, 55 SOC. CASEWORK 421, 421 (1974).

[249] According to Levin, the total amount raised by United Way "during 1965 was $635.6 million. In 1974 $1.04 billion was raised, for an average annual increase of less than 6 percent." *Voluntary Organizations, supra* note 205, at 1575. Nevertheless, this 1974 sum "represented only 22 percent of the year's total budget for all United Way Agencies." *Id.*

[250] Manser, *supra* note 248, at 421.

[251] *Voluntary Organizations, supra* note 205, at 1575.

[252] *See id.*

[253] *See* ANN. W. SHYNE, CHILD WELFARE LEAGUE OF AMERICA, INC., CWLA VOLUNTARY MEMBER AGENCY INCOME: 1977-78 (1978).

presents income received during the fiscal year of June 1, 1977 through May 31, 1978, contrasts the 1977-78 revenues with those received in 1974-75, and compares the 1977-78 revenue with amounts reported by Barbara L. Haring in the 1975 CWLA study, *Special Report on Funding of CWLA Voluntary Agency Members: 1960-1975*. Although differences in the composition of the reporting groups make for some difficulty in interpreting changes,[254] a clear trend and overall shift in income sources is very evident.

For example, CWLA member agency income increased from $29.5 million in 1960 to $119.4 million in 1977-78.[255] The proportion of income from federated funds, such as United Way and sectarian campaigns "dropped from 30.8% to 13.1% . . . , while the proportion from government funds rose from 28.2% to 60.0%."[256] FSAA member agencies experienced an even faster rate of increased income, going "from $10.1 million in 1960 to $50.3 [million] in 1977-78 [,]" whereby the percentage of income was much higher for federated funds than for child welfare agencies.[257] Federated funds, however, dropped from 67.8% of total revenues in 1960 to 41.8% in 1977-78.[258] "Government funds, consistently a lower proportion of child and family than of child welfare agency income, increased from only 8.5% in 1960 to 35.2% in 1977-78."[259]

In sum, three key developments defined and influenced the milieu of the child welfare system during TRAs's rapid growth years. First, due to amendments to the Social Security Act, the responsibility between family and children's services of public and private welfare agencies were unclear. Second, swelling caseloads that included large numbers of minority children began to swamp public agencies. Investigations of reported allegations of child neglect and abuse led to the removal of many children from their families and placement in foster care. Third, and perhaps most significantly, private sector voluntary child welfare agencies experienced serious funding problems. Private philanthropic giving to support social welfare services dropped substantially, although giving to other non-profit endeavors increased.[260] As annual operating costs rose steadily while United Way fund-allocations covered a decreasing percentage of agency budgets,[261] many CWLA member agencies made up for these losses with public

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[254] The 1977-78 data and contrasting 1974-75 figures included 215 U.S. agencies (118 child welfare and 97 childrens and family agencies). A family agency also offering foster care and adoption services is called a "children's and family service agency." However, only data from 133 agencies (77 child welfare and 56 children's and family agencies) for 1977-78 were tracked and compared with earlier reports from 1960, 1965, 1970 and 1975. *See id.* at 2, 4.

[255] *See id.* at 13-14 & tbls. 7 & 8.

[256] *Id.* " 'All other' income decreased steadily as a percentage of the total." *Id.*

[257] *Id.*

[258] *See id.*

[259] *Id.*

[260] *See* Alan R. Gruber, *The High Cost of Delivering Services*, Soc. WORK, July 1973, at 33, 34.

[261] *See id.; see also* ALAN PIFER, CARNEGIE CORPORATION OF NEW YORK, ANNUAL REPORT: THE NONGOVERNMENTAL ORGANIZATION AT BAY 13 (1966) (recognizing the enor-

funds received for purchase-of-service contracts. "The desperate need of voluntary agencies for additional resources" coincided with a tendency of government "to look to the voluntary sector to carry out public purposes."[262] Given the availability of federal matching money, many state social service departments responded to demands for increased services by shifting from directly providing services to purchasing foster care and adoptive services from voluntary agencies via purchase-of-service contracts.[263]

Given the nature of the child welfare system milieu, financial imperatives played a key role in the emergence of TRA in the United States. TRA generated needed revenues for those private agencies that first engaged in the practice, either in the form of fees received from adopting white parents, or as payments for entering into purchase-of-service contracts[264] to find adoptive homes for children on public agency caseloads.

Additionally, Rita J. Simon and her co-authors state at the beginning of *The Case For Transracial Adoption*:[265]

> Transracial adoption did not come about as a result of deliberate agency programming to serve populations in need; rather it was *an accommodation to reality*[;] . . . *in order to remain "in business,"* adoption agencies were forced by a combination of social conditions to reevaluate their ideology, traditionally geared toward the matching concept, in order to serve the joint

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mous increase in the cost of operating voluntary agencies and that the private sector had no new source of funds comparable to the kinds of Congressional appropriations available to federal agencies).

[262] Manser, *supra* note 248, at 335. Manser, in noting that "purchase of service [had] taken on a new urgency and a new significance, cited PETER DRUCKER'S THE AGE OF DISCONTINUITY (1969) as providing philosophical encouragement by emphasizing "the desirability of government contracting out many of its functions to voluntary organizations." *Id.*

[263] One writer, in a 1973 article asserted:

Voluntary foster care agencies have at times, in certain states, provided more child care services at public expense than public agencies themselves, and such private services as maternity home care and institutional care for children . . . have a long heritage of public support. Increasingly, many governmental units have seen themselves as purchasing agents for services, rather than producers themselves.

Robert M. Rice, *Impact of Government Contracts on Voluntary Social Agencies,* 56 SOC. CASEWORK 387, 393 (July 1975).

[264] Permanency planning in the 1970s, as promoted through the land-mark, federally funded, Oregon Project, "demonstrated that children who had been adrift in long-term care could be returned to their biological families or placed in adoption through intensive agency services emphasizing aggressive planning and casework techniques." The Child Welfare Challenge, *supra* note 37, at 44 (citing A. EMLEN ET AL., OVERCOMING BARRIERS TO PLANNING FOR CHILDREN IN FOSTER CARE, (1978); and Victor Pike, *Permanent Families for Foster Children: The Oregon Project,* CHILDREN TODAY, No.5 22-25 (1976)). *But see*, Rice, *supra* note 263, at 392-93 (explaining contracts based on the quantity of foster care or adoption services delivered, create strong economic incentives to place children; even if preventive counseling services are preferable, an agency directing staff to spend time on services preventing out-of-home placement faces a loss of income).

[265] SIMON ET AL., *supra* note 41.

needs of parentless children and couples seeking to adopt.[266]

Justice Justine Wise Polier, while forthrightly discussing a history of racism in the New York state courts and especially among residential child welfare agencies,[267] bluntly states that intake practices changed only because agencies found themselves in the situation of having either "to accept more non-white children of different faiths *or* close their facilities. Beds had to be filled *for economic reasons* and there were fewer and fewer white children to fill them in New York."[268]

D. *TRA: "Micro" Direct-Service Response to a "Macro" Systemic Problem*

In addition to the previously discussed key factors that shaped the child welfare milieu of the 1960s and early 1970s, it is also important to consider child welfare theory and practice during this period. An important function of child welfare services was "to reenforce, supplement, or substitute the care that parents [were] unable to provide" to their children.[269] The primary practice modality was individual casework.[270] However, among the major emerging trends in child welfare identified by David Fanshel in the 16th edition of the *Encyclopedia of Social Work,* two are worth noting:

> (1) shifting from a single method (casework) to multiple methods of intervention, including group work and community organization and action forms of intervention as well as individual social services; [and] (2) special concern with past and present neglect of children of minority ethnic and racial groups and a reexamination of services that might be affected by institutionalized racism.[271]

Various articles in the professional social work literature during the 1960s and 1970s recognized that if same-race adoptive parents were to be found for the increasing numbers of African-American children needing permanent homes, new and different aggressive approaches and strategies would have to be taken by child welfare agencies.[272] Unfortunately, few if any child welfare practitioners

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[266] *Id.* at 1 (emphasis added).

[267] *See* POLIER, *supra* note 92.

[268] *Id.* at 153 (emphasis added).

[269] David Fanshel, *Child Welfare, in* 1 ENCYCLOPEDIA OF SOCIAL WORK 99 (16th ed. 1971).

[270] At the time, social work practice was generally divided into three broad methodologies: casework, group work, and community organization. In child welfare, casework was the predominate methodology used to help parents better understand the needs of their children and how to organize family life to meet those needs. Services ranged from efforts to help parents maintain children in their own homes, to arranging for separation via placement in foster care or adoption. *See id.* at 99-100; *see also* Meenaghan, *supra* note 50, at 82.

[271] Fanshel, *supra* note 269, at 102-03.

[272] *See* Seaton W. Manning, *Cultural and Value Factors Affecting the Negro's Use of Agency Services*, SOC. WORK, Oct. 1960, at 3-13; *see also* Sister Frances Jerome Woods

then had, or routinely employed the macro social work practice skills[273] needed
to carry out the suggested approaches and strategies.

Only within the last fifteen years have social work practice responses to
problems been divided into two broad tracks. "One track, micro social work
practice, denotes the continuing major role of clinical competencies in direct
practice with individuals and groups. The other track, macro social work prac-
tice, denotes a range of interrelated competencies in designing and evaluating
services and in administering them in a community and interorganizational con-
text."[274] Most private and public agencies making TRA placements between
1968 and 1973 simply proceeded along the only widely practiced track of the
time: a micro direct-service approach involving foster care and adoption.
Predominantly white staffs delivered these services. The standards and criteria
by which these staffs assessed the need for protective service intervention, the
amenability of parents to use services, or approved prospective adoptive parents
reflected dominant white, middle-class values and norms.[275]

When agencies first began making TRA placements as a way to minimize
harms from "foster care drift," as Henry Miller suggested in a 1969 article, they
may have been "motivated by that most relentless of all propellants—good in-
tention."[276] Miller forcefully cautioned social welfare professionals against fall-
ing into the trap of "philanthropic colonialism," i.e., of assuming in social wel-
fare programs and policies a posture toward African-Americans characterized by
"the ideology of the white man's burden."[277] Instead, he called on agencies to
reject the ideology of the "melting pot" and encouraged them to embrace the
ideology of "cultural pluralism." Asserting that cultural pluralism was equally
compatible with the spirit of democracy, Miller maintained that it was time for
social workers to "opt for the desirability of ethnicity . . . [and] to construct in-

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and Alice Cunningham Lancaster, *Cultural Factors in Negro Adoptive Parenthood*, Soc.
Casework, Oct. 1960, 14-21 (reviewing fifty-seven Negro applicants to a Texas agency
between 1950 and 1960, concluding adoption standards regarding employment of the
mother and infertility may need to be relaxed); Irving W. Fellner, *Recruiting Adoptive
Applicants*, Soc. Work, Jan. 1968, 92-100 (concluding casework methods applicable to
whites might require modification in working with Negroes).

[273] *See* Meenaghan et al., *supra* note 63 (providing baseline information on a range
of macro practice competencies in designing and evaluating services and in administering
them in a community and interorganizational context); *see also* Rotham, *supra* note 63, at
279-80.

[274] Meenaghan, *supra* note 50, at 83. Or, stated another way, "[b]y convention the
terms "micro" and "macro" have come to represent the end points on a continuum of
social systems classified by size." *Id.*

[275] *See supra* notes 89-91 and accompanying text.

[276] Henry Miller, *Social Work in the Black Ghetto: The New Colonialism*, Soc. Work,
July 1969, at 66.

[277] Miller used "the white man's burden" (from Kipling's poem, *The White Man's Bur-
den*) to explain two aspects of philanthropic colonialsim: "*paternalism* predicated on the
assumption of cultural underdevelopment and *clinicalism* founded on a presumption of
psychological damage resulting from the Negro's history." *Id.* at 65.

stitutions and mechanisms that would allow for the flourishing of ethnic groups while at the same time allowing for a decent standard of living and the opportunity to enter the mainstream."[278]

In 1969, public and private child welfare services usually attributed the increasing presence of African-American children in their caseloads to individual parental psychological deficiencies and character weaknesses. According to Miller, when Daniel P. Moynihan called for "a new kind of national goal: the establishment of a stable Negro family structure" in his 1967 study for the Department of Labor, "he was [neither] arguing for a crash program in family therapy (much to the chagrin of many clinicians), [nor] for the abandonment of a push toward a massive program of employment and income redistribution."[279] Traditional child welfare case-work services, in focusing on individual children and their families, simply failed to recognize any need to address the root causes of poverty and discrimination, such as lack of education, equal employment opportunities, or safe housing. These causes both directly shaped and contributed to the "alleged matriarchal character of the Negro family."[280]

Today's "beginning emphasis on client outcomes as the most important criterion on which to judge child welfare agencies" was not, in the late 1960s, a fully operational principle.[281] A commitment to " 'permanency planning' . . . focused on family reunification, termination of parental rights and adoption, or long-term foster care with guardianship—in that order of priority" had not yet crystalized.[282] Child welfare services were not yet clearly family-centered, nor "built on the premise that 'human beings can be understood and helped only in the context of the intimate and powerful human systems of which they are a part,' of which the family is one of the most important."[283] The framework for today's family-centered child welfare services builds on four major components:

* an *ecological perspective*, which offers a broad conceptual lens for analyzing human behavior and social functioning within an environmental context;
* a *competence-centered perspective*, which highlights practice methods and strategies that promote the effective functioning of children, parents, and families;
* a *developmental perspective*, which provides a frame of reference for understanding the growth and functioning of human beings in the context of their families and their families' transactions with their environments;
* a *permanency planning orientation*, which embodies a mandate to maintain children in their own homes or, if necessary, place them permanently

[278] *Id.* at 76.

[279] *Id.* at 71 (citing DANIEL P. MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION, PREFACE, Dep't of Labor, (Mar. 1967)).

[280] *Id.*

[281] Child Welfare Challenge, *supra* note 37, at xiv.

[282] *Id.*

[283] *Id.* at 35 (quoting HARTMAN & LAIRD, FAMILY-CENTERED SOCIAL WORK PRACTICE 44 (1983)).

with other families.[284]

In the late 1960s, however, these four perspectives were not yet fully synthe-sized into the knowledge base of "theory, research and practice wisdom [that could] inform program design and practice."[285]

In the 1990s, graduate level child welfare educators instruct students to be aware of the larger social context in which they will interact with their clients.[286] This is facilitated by acknowledging that "services and client self-improvement are often hindered by oppression in its various forms: institutional racism, sex-ism, and discrimination against individuals according to their religious beliefs, sexual orientation, and handicapping conditions."[287] To achieve long-term suc-cess with clients, educators tell students that case planning must include strate-gies for helping clients cope with the oppressive and discriminatory realities of American society. "One of the requisites for developing such case plans is a knowledge of the cultural issues related to that family [or child], i.e., staff . . . must be 'culturally competent.' "[288]

While child welfare practice in the late 1960s and early 1970s largely ex-cluded these perspectives, it also did not reflect or incorporate any of the themes embodied in the Economic Opportunity Act of 1964.[289] The Act established the Office of Economic Opportunity (OEO) and a host of many new human service programs that mandated "maximum feasible participation"[290] by consumers of the services. "The belief that citizens should be involved directly in the organi-zation and social processes which affect them is the essence of the democratic tradition."[291]

Articles identifying practice deficiencies and calling for new approaches ap-peared in the professional literature of the 1960s and early 1970s.[292] Seaton W. Manning, executive director of the Bay Area Urban League in San Francisco,

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[284] *Id.* at 35-36.

[285] *Id.* at xv.

[286] *See id.* at xvi; *see also* Everett, *supra* note 43.

[287] Child Welfare Challenge, *supra* note 37, at xvi.

[288] *Id.*

[289] Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (88th Cong., 2d sess.), approved August 20, 1964 (codified as amended in scattered sections of 42 U.S.C.). Title II-Urban and Rural Community Action Programs, § 202(a) defines "com-munity action program" as a program "(3) which is developed, conducted, and adminis-tered with the maximum feasible participation of residents of the areas and membership of the groups referred to in section 204(a)." Section 204(a) specified "communication ac-tion organizations or other appropriate public agencies or private, nonprofit organizations."

[290] The concept of citizen participation may encompass "virtually all interactions be-tween citizens and government or private agencies" and serve two broad purposes: (1) "to influence policy decisions and the allocations of resources," and (2) "to share in the design, implementa-tion and monitoring of specific programs." Perry Wireman, *Citizen Participation, in* 1 ENCYCLOPEDIA OF SOCIAL WORK, *supra* note 55, at 175.

[291] *Id.*

[292] *See* Manning, *supra* note 272.

published an article in the October 1960 issue of *Social Work*[293] suggesting a new approach. Manning contended that the cultural patterns and values of the American Negro affected the Negro's use of social services. Manning challenged social service agencies to make their services more accessible by developing a keener appreciation of the unique position of the Negro in this country and engaging in more active outreach to the Negro community.

First, Manning asserted that professionals needed to keep in mind three important things: (1) Negro culture is basically American; (2) in the United States, the Negro lives in a society that permanently relegates him to a lower and inferior caste status; and (3) "within the confines of the rigid caste system in which they live, Negroes have developed class distinctions comparable to and, in their essential features, identical with similar class groups within the dominant white society."[294]

After identifying caste living and class status within the caste as the two most significant determinants of the cultural and behavior patterns of Negroes, Manning asserted the falsity of commonly held stereotypes which attributed Negro traits to racial origin.[295] He maintained instead that the important determinants of Negro behavior and institutions were "the current environment in which he lives, his slave background, the hostility he encounters, the low esteem in which he is held and in which, consequently he holds himself."[296]

Next, Manning discussed a number of frequently described "Negro characteristics," namely emotionalism and good humor, aggressiveness, criminality, color consciousness, and hostility.[297] He strongly rejected any notion that these "so-called racial characteristics" were innately racial in origin. Instead, he maintained that they were "culturally determined ways of adapting to, or retreating from, or getting even with, a world that considers and treats [the Negro] as an inferior."[298]

In the latter part of his article, Manning suggested the approach agencies should use in working with Negro clients. First, he cautioned agencies not to conclude that because "middle-and upper-class Negroes conform rather closely to the values of the white middle and upper classes," they present no special or unique problems.[299] He stated:

> Negroes share with whites the general attitude that social agency services are organized charity, in the worst sense of the word 'charity,' intended primarily for the dependent, the defective, and the delinquent. Since independence, self-help, self-reliance, and making one's own way are highly regarded values in the society, there are cultural and psychological resistances to using a service which has traditionally been associated in the pub-

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[293] *Id.*

[294] *Id.* at 4.

[295] *See id.* at 4-5.

[296] *Id.* at 5.

[297] *Id* at 10.

[298] *Id.*

[299] *Id.*

lic mind with the poverty-stricken and the chronically down-and-out.[300]

Manning realized that "Negroes of whatever class who use or try to use social agency services are likely to bring with them the suspicions, bred from their caste position."[301] He thus called for intake workers to be "skilled in making the applicant's first contact with the agency warm and welcoming and in interpreting procedures and standards in language and idiom keyed to the applicant's frame of reference."[302]

Secondly, Manning urged agencies to focus more on community relations and development of interpretative programs. Quoting from Michael Shapiro's 1959 San Francisco study, *Adoption of Minority Group Children,* he stated: "agencies need to strengthen their bonds of communication with the community by obtaining staff skilled in the concepts, methods and techniques of sound community relations."[303]

In a final concluding section on civil rights, Manning issued a third directive to social workers:

> to realize that the Negro looks upon his struggle for civil rights and equality of opportunity as the most serious and urgent of our national problems. This view . . . is particularly strong among the more articulate, sophisticated and race-conscious Negroes. In this struggle there are no neutrals . . . . The problem of race—that is, the problems of the present caste restrictions in which Negroes live—confront social workers and their agencies with opportunities for meaning social action unprecedented in scope since the far-reaching reforms initiated by the now almost forgotten charity organization society leaders and their confreres in the early settlement movement.[304]

In his final paragraph, Manning predicted that if social agencies played a more prominent role in advocating for housing, employment, and education, and it "became known in the Negro community—the utilization of agency services by [Negroes] might tend to increase, for the agencies would then be regarded as interested friends and protagonists rather than as ambivalent preservers of the *status quo.*"[305]

Most child welfare practitioners did not heed the directives laid out by Manning in 1960. Most agencies did not diversify their staffs to include more African-American workers, nor did they actively consult with, or enlist the help of, the African-American community. Instead, agencies simply used the micro direct-service approach of TRA. Even after NABSW's 1972 objection to TRA, when such placements declined and the public policy stance of many agencies shifted to seeking same-race adoptive resources for African-American children, most public and private agency staff continued to be homogeneous and cultur-

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[300] *Id.*
[301] *Id.*
[302] *Id.*
[303] *Id.* at 11 & n.17.
[304] *Id.*
[305] *Id.*

ally incompetent with respect to serving African-American children and their families. "Little attention was directed to the social and systemic factors that place [African Americans] at greater risk of family disruption than whites."[306] Aside from the efforts of a small group of agencies to recruit black parents during the 1950s,[307] only initiatives promoted by the National Black Child Development Institute (NBCDI)[308] succeeded in finding same-race homes for African-American children and in pioneering development of culturally appropriate criteria[309] to evaluate applicants.

A disproportionately large number of African-American children have continued to enter the foster care system, only to experience a "dramatically lower likelihood of leaving out-of-home care and, especially, of being adopted, than Caucasian and Latino children, whose outlooks do not differ markedly."[310] Carol C. Williams likens the effect of the child welfare system on African-American children to a funnel—"easy to get in and to stay in, but very difficult to get out."[311] She further states:

> The issue of permanency has been addressed as if it were exclusively an adoption problem and not the outcome of weaknesses in other parts of the service delivery system. The result of the simplistic approach has been to reenforce a deficit view of the African American family and the African American community.[312]

In her estimation, "the disproportionate number of African American children needing adoption is a *symptom of failed policy implementation*: failure to prevent unnecessary placement; failure to reunite families in a timely fashion; and failure

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[306] Williams, *supra* note 100, at 273. *see also* Samella B. Abdullah, *Transracial Adoption Is Not the Solution to America's Problems of Child Welfare*, 22 J. BLACK PSYCH. 254, 259 (1996) (describing how the insensitivity of child welfare workers to culture and subcultures and oblivion to power differentials when working with socioeconomically oppressed people results in failure to support biological families; asserting that biases perpetuate politics and policies that favor transracial adoptions).

[307] Ladner mentions the following: the National Urban League Foster Care and Adoption Project, established in 1953; a New York City Adopt-a-Child Program, started in 1955 to develop and implement methods of re-cruiting minority families for black, Puerto Rican and other mixed racial children, but terminated in 1959 for lack of funds; the Minority Adoption Recruitment of Children's Homes (MARCH), San Francisco project organized in 1955; *see* LADNER, *supra* note 60, at 225-26.

[308] Founded in Washington, D.C. in the 1960s, Ladner considered the NBCDI one of the most impressive organizations to work extensively with black adoptions, conduct regional black adoption conferences, facilitate the formation of local groups, distribute information, and formulate social policy. *See id.*, at 227.

[309] *See* Williams, *supra* note 100, at 271 (citing NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, GUIDELINES FOR ADOPTION SERVICES TO BLACK FAMILIES AND CHILDREN (1987)).

[310] Courtney et al., *supra* note 53, at 125.

[311] Williams, *supra* note 100, at 276.

[312] *Id.* at 273.

to stabilize the lives of children lacking the protection of families."[313]

Over the past twenty-five years, no one has used macro social work strategies[314] to understand why African-American children began to enter the foster care system in such large numbers and to stay for longer periods than other children. Instead, the micro-direct-service oriented efforts of child welfare practitioners to achieve permanency for African-American children via adoption reinforced negative stereotypes.[315] These stereotypes took hold as irrefutably presumed facts, i.e., the "myths"[316] that today are used by TRA proponents to

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[313] *Id.* at 278. *See also* Courtney et al., *supra* note 53, at 112 (noting a pattern of inequity in service delivery) (emphasis added).

[314]

Planning is the rational process that focuses on relating current practice conditions to desired states, typically referred to as goals . . . [S]teps include problem awareness . . . ; identification of logical goals, especially those that are feasible given the available resources; specification of objectives, using a time frame; design of programs . . . ; and the design and impliementation of an evaluation of programs.

Meenaghan, *supra* note 50, at 83 (citing R. PERLMAN & A. GURIN, COMMUNITY ORGANIZATION AND SOCIAL PLANNING (1972)). This planning model can be used in two major ways. At times the focus may be on the design and implementation of programs or strategies to meet policy goals. In other instances, "macro social workers [can] use the requisite skills and perspectives to focus on policy planning." *Id.* (citing A.J. KAHN, THEORY AND PRACTICE OF SOCIAL PLANNING (1969)). Here the process emphasis is upon the analysis, selection and design of policies and goals, rather than the specifics of a program.

[315] Williams discusses three interwoven assumptions: (1) elitist criteria and procedures for selecting families for white infants are not appropriate for identifying African-Americans because they screen out rather than in; (2) the African-American community is uninformed about the needs of its children in out-of-home care; and (3) African-Americans do not adopt. *See* Williams, *supra* note 100, at 271-72.

[316] *See id.* at 272-73. When the traditional elitist criteria and procedures are applied to African-American families without modification for economic or cultural differences, few families are deemed appropriate. This fuels the myth that African-American families do not function well enough to care for their own children. The fewer number of inquiries or approved families on waiting lists is deemed to show that the community is unwilling and unable to care for the many children needing susbstitute parents. And, given the already high rate of adoption among non-poor African-American families, "18 per 10,000 compared with 4 per 10,000 families for whites[, t]o secure the number of families needed to adopt the African American children awaiting, the rate would have to be 44 per 10,000 non-poor families." *Id.* at 272.

But cf. supra note 138 (pointing out the manner in which illegitimacy statistics are manipulated); *supra* notes 60-62 (regarding the potential numbers of African-American adopters). The sage comment of a community activist during the Model Cities Program era comes to mind: "Figures don't lie, but liars figure." For example, Rep. Jim Bunning, Kentucky Republican and a co-sponsor of the 1996 Adoption Promotion and Stability Act, *supra* note 25, was quoted as saying "because 40 percent of the children in foster care but only 12 percent of Americans are black, minority children languish in foster homes." Nancy E. Roman, *Interracial Adoption Part of Welfare Fight,* WASH. TIMES, Mar. 2, 1995, at A11. Use of percentages without any reference to the total size of the universe under consideration can be very misleading. THE BLACK COMMUNITY CRUSADE

justify it.

One should note that the full range of macro competencies— of problem defi-
nition, program planning and policy development, research and evaluation of
outcomes—have not been employed to assess the efficacy of TRA as a strategy
to meet the needs of African-American children in foster care. The case has not
yet been made that TRA is either the most appropriate or necessary option for
promoting the well-being of African-American children without negating the
group interests of the African American community.[317] A means of achieving de-
sired results for others, such as white adults seeking to adopt, placing agencies,
private adoption attorneys and other intermediaries, TRA has been, and promises
to be, a most effective strategy. As discussed earlier,[318] TRA helped financially
troubled agencies survive. White adoptive parents got children. Now the future
business prospects of private attorneys and other adoption referral services are
very promising.

V. CONCLUSION

To understand more fully the steady annual increase in TRA placements be-
tween 1968 and 1973, this article reviewed the historical evolution of child wel-
fare services and adoption in the United States, noting the long exclusion of Af-
rican-American children and families from such services, and identifying
important post-World War II social realities, federal legislation, and aspects of
the child welfare system milieu of the 1960s and 1970s. This first experience of
placing African-American children transracially did not result from any system-
atic or comprehensive macro social work planning.[319]

As the number of African-American children in the foster care system grew,
no one made any comprehensive preliminary attempts to identify, formulate, or
evaluate whether TRA was an appropriate strategy for achieving permanency for
them. Instead, private voluntary agencies, many offering services to African-
American children for the first time, applied standard micro direct-service proce-
dures and criteria in selecting adoptive parents for TRA placements. Agencies
made few efforts to change the demographic composition of their staffs to in-
clude workers sensitive to the needs of African-American children and comforta-
ble working with African-American clients and community members. Little or
no outreach to or involvement with the African-American community occurred.
Indeed, the concept of "maximum feasible participation"[320] did not seem to ap-

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FOR CHILDREN, *supra* note 44, reports the following statistics: Roughly 9.6 million Ameri-
can children younger than eighteen are Black, representing about one-third of the total
African-American population. Thus, the African-American adult population is something
in excess of 19 million. Even if the number of freed youngsters in foster care were as
high as 40,000, it is not unreasonable to posit a potential ratio of 75 to 100 applicants for
each waiting child. *Id.* at 37, 39, 42.

[317] *See Redefining the TRA Controversy, supra* note 15, at 133-34, 161-64.
[318] *See supra* Part IV.C.3.
[319] *See supra* notes 273-75 and 314 and accompanying text.
[320] *See supra* notes 289-90 and accompanying text.

ply to child welfare adoption and foster care programs.

Two realities fueled the rapid growth of TRA between 1968 and 1973. Private voluntary adoption agencies had long lists of approved white adopters, but few or no available white babies. In addition, there were few approved African-American applicants, but many available African-American and biracial children. Voluntary agencies had serious funding problems. Operating costs outstripped private philanthropic giving. Provisions in the 1962 and 1968 amendments[321] to the Social Security Act of 1935, however, enabled voluntary agencies to balance their budgets with revenues from governmental sources in the form of direct federal grants or payments from state and local social welfare departments for delivering social services, such as foster care and adoption. TRA was an expedient micro direct-service for which an agency operating at a deficit received a benefit—either fees collected from adoptive parents or vendor payments received for placing children under a purchase-of-service contract with a public agency.

Why, then, did annual TRA placements decline so sharply in the mid-1970s? Enactment in 1975 of the $2.5 billion Congressional spending cap on matching grants to the 50 states and the District of Columbia for social service programs was a possible contributing factor.[322] TRA proponents, however, routinely claim that child welfare agencies stopped making TRA placements to appease the NABSW.[323] In the acrimonious discourse about TRA, the NABSW is consistently depicted as "the Big Bad Wolf" whose huffing and puffing could blow down an agency's house.[324] In issuing its 1972 Position Paper in opposition to TRA, the NABSW acted upon an astute awareness of the significance of unresolved race and caste issues in American society.[325] To become successful adults, African-American children need substitute homes which can promote positive racial identities and affiliations with the African-American community. In addition, many professional child welfare practitioners, when challenged on the efficacy of TRA for meeting the needs of African-American children, concluded that a same-race placement preference was the most appropriate child welfare policy and practice strategy to promote the best interests of African-

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[321] *See supra* Part IV.C.1.

[322] Act of Jan. 4, 1975, Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended in scattered sections of 42 U.S.C.).

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> In 1972, the dramatic rise in the number of interracial adoptions abruptly reversed course. That year, the influential National Association of Black Social Workers (NABSW) released its infamous position statement on interracial adoption. . . .
> . . . The following year (1973), the influential Child Welfare League of American (CWLA), which publishes *Standards for Adoption Services* (SAS), revised its guidelines to conform to the NABSW postion [sic]. Where it formerly encouraged interracial placements, it now emphasized the advantages of same-race placements.

THE INSTITUTE FOR JUSTICE LITIGATION BACKGROUNDER: SEPARATE IS NOT EQUAL: STRIKING DOWN STATE-SANCTIONED BARRIERS TO INTERRACIAL ADOPTION (1995) (citation omitted).

[324] *See Redefining the TRA Controversy, supra* note 15, at 139.

[325] *See id.* at 139-40.

American children in need of permanent substitute care.[326]

Regrettably, most child welfare professionals did not aggressively implement any of the culturally sensitive services or strategies advocated by Seaton Manning in 1960.[327] Public and private agencies have been exceedingly slow to recognize the profoundly complex relationship between race, ethnicity and child welfare service outcomes. To render more effective and meaningful services, agencies should diversify their staff[328] and forge solid working partnerships with organizations and institutions within the African-American community. Recently reported findings from a study of the family preservation program, Families First, suggest that race plays a strong role in shaping the nature of the social worker-client relationship and the perceptions each holds regarding the other.[329] Indeed, "calls for cultural competence in the human services emphasize the fact that one size seldom fits all."[330]

It is both ironic and encouraging that while very intense efforts have been underway to prohibit any consideration of race in foster care and adoption deci-

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[326] *See e.g.,* Linda Katz, *Transracial Adoption: Some Guidelines,* 53 CHILD WELFARE 180 (March 1974) (expressing the view that the decline in TRA placements was "as it should be, since black adoption programs in many states have taken hold and been successful, and there are many fewer black infants available for adoption today . . . . [B]lack families can and will adopt . . . when agencies seek them out."). Katz, an adoption worker with Lutheran Child and Family Services, River Forest, Illinois concluded:

Transracial adoption can be an appropriate choice for a child given some stringent constraints. 1) The biological parents must concur with the agency that a transracial placement is appropriate, or indicate no preference. 2) The child must be hard to place, this having been demonstrated by diligent efforts to find a black family . . . . 3) The family must offer an experience of blackness as well as their own whiteness, in their life style currently as well as in the past. 4) The agency must prepare the family for all aspects of the child's problems, stand by them after placement, and continue to offer service in the years ahead.

Id.

[327] *See supra* text accompanying notes 292-305.

[328] Courtney et al., state:

Evidence of the importance of ethnic matching in effective service delivery is not definitive, yet it has been argued that for ethical or moral reasons, more providers of color are needed than are currently available . . . . Nevertheless, while out-of-home care is increasingly a system primarily for children of color in major urban areas, a study conducted at the National Child Welfare Training Center found tht 78% of the workers and 80% of the supervisors were Caucasian, and that the majority had not received training in service provision to African American families.

Courtney et al., *supra* note 53, at 110 (citations omitted).

[329] *See id.* at 115-16 (showing striking differences between the ratings of Caucasian and African-American workers about same-race clients as opposed to non-same-race clients; African-American workers reported 61% completion of treatment assignments for African-American clients, but only 37% for Caucasian clients. In contrast, Caucasian workers reported only 32% of African-American clients with completed assignments as opposed to 48% of their Caucasian clients.).

[330] *Id.* at 130.

sion-making as violative of conservative interpretations of the Fourteenth Amendment, a call for more and better acknowledgment of race and ethnicity in all future child welfare research has appeared in the professional child welfare literature.[331] Child welfare professionals finally recognize:

> a pattern of inequity, if not discrimination, based on race and ethnicity in the provision of child welfare services . . . . [R]elatively recent research also suggests that Caucasian families and children receive more services than families and children of color. These inequities may partly reflect historical differences associated with race in access to public versus private child welfare services.[332]

If child welfare professionals are ready to act on the directives and meet the challenges Seaton Manning issued more than three decades ago, I am encouraged. Perhaps this means that child welfare professionals will commit to offering services designed to affirmatively answer the question: "Is it well with the child?"[333] in a manner that does not replicate the primary purpose of old Greek and Roman adoptions.[334] Research is needed to identify, construct and refine profiles and criteria to use in selecting adopters who are motivated and able to provide positive, affirming individual interactions and group experiences for African-American children with other African-Americans. We also need research to replicate and evaluate guidelines such as those employed in the 1970s by Lutheran Child and Family Services of River Forest, Illinois.[335] This research must address and seek to rectify the underlying socioeconomic inequalities that are key contributing factors in bringing African-American youngsters into the foster care system. The research must focus more attention on ensuring that both kinship care[336] and family preservation become viable alternatives to both foster care and adoptive placements with strangers.

The recent recognition among child welfare professionals of the important roles race and ethnicity play notwithstanding, I am dismayed by recent legal developments, such as repeal of The Howard Metzenbaum MultiEthnic Placement Act of 1994.[337] Law and policy makers must find a way for our laws and legal system to recognize, balance and protect not just individual freedoms and liberties, but also the legitimate interests of the defining ethnic, racial and religious groups of which we are members.[338] There is a need to reassess, as Henry

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[331] *See id.*

[332] *Id.* at 112.

[333] *See supra* text accompanying note 107.

[334] *See supra* Part II.A.1-2.

[335] *See supra* note 326.

[336] For a comprehensive exploration of policy, research, practice, and kinship caregiver support/advocacy challenges presented by kinship care, (estimated to be the fastest growing child welfare service today, with nearly 30% of all children in out-of-home care living with relatives) see the articles in *Kinship Care,* 75 CHILD WELFARE, 387-662 (Sept./ Oct. 1996).

[337] *See supra* note 25.

[338] See AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995) for a critical review

Miller[339] urged, our continued adherence to the ideology of the "melting pot" instead of embracing that of "cultural pluralism."

We cannot ignore certain continuing social realities. Every day, African-Americans regularly experience a range of personal indignities and assaults, and encounter barriers to their full enjoyment of first class citizenship.[340] There is an alarming escalation of blatant, impersonal expressions of racial animosity, such as the 1995-96 church burnings.[341] To deny these stark indicators of continuing racial tensions and inequalities in our society by proclaiming that ours is now a "color-blind society,"[342] or to believe, as some TRA proponents[343] urge, that since "love is enough" placements should be made on a "first come, first served" basis, is dishonest, unethical and irresponsible. Despite their professed concern for the "best interests" of African-American children waiting in foster care, today's professional proponents of TRA parallel the Gorée-Island slave trader/merchants who engaged in the commercial activity of supplying a commodity to meet a market demand.[344]

Adoption today is not merely a specialized child welfare service, but also a business.[345] For private adoption attorneys and new referral, consultation, and placement services,[346] TRA is a potential growth industry—one whose primary purpose is to satisfy the demands of white adoptive applicants who seek and

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of the law American judges make based on a paradigm of relationships between the individual and the state that "appears unaware that people live their lives in multiple overlapping groups. Though these associations can sometimes function like little governments, suggesting a kind of private sovereignty, mainstream American constitutionalism has no room for substantive pluralism." *Id.* at 82. Soifer, instead, presents a "claim for an independent group right: a constitutional right to freedom of association. Although this right is not absolute, it is substantial" and Soifer via "discussion of specific contemporary controversies illustrates how such a right would and should make a practical legal difference." *Id.* at 2.

[339] *See supra* text accompanying notes 276-79.

[340] *See e.g.,* Hans J. Massaquoi, *The New Racism,* EBONY, Aug. 1996, at 56 (reporting "no matter how high they climb on the ladder of success, Black VIPs say they are far from immune to bigotry"); and CORNELL WEST, RACE MATTERS x-xi (1993) (recounting the difficulties of hailing a taxi cab in New York City).

[341] *See e.g.,* Kevin Chappell, *What's Behind the Burning of Black Churches?* EBONY, Sept. 1996, at 108, 114 ("Many are motivated by the same hate and intimidation tactics used by Whites responsible for church fires during the Civil Rights Movement and even the fire that destroyed the African Methodist Episcopal Church in Charleston in 1822, the site of the first Black church arson on record.").

[342] *See e.g.,* Mark August, *Black Gains Under Attack Once Again,* TAMPA TRIBUNE, May 16, 1996, at 6 (stating the "idea of a colorblind society is being cynically manipulated by conservatives to roll back gains blacks have made . . . . Conservatives . . . claim . . . that America is a colorblind society and any constitutional interpretation that promotes equality by making race a consideration violates this colorblind principle.").

[343] *See supra* note 65.

[344] *See* Jackson, *supra* note 15.

[345] *See supra* note 15; *see also supra* note 66.

[346] *See supra* note 15.

prefer healthy infants, not to find appropriate homes for the older African-American children, many with special needs, who wait in foster care for adoption. Recently enacted federal legislation,[347] judicial challenges to same-race preferences,[348] and efforts to promote state enactment of the Uniform Adoption Act,[349] represent a "full-court press" to ensure that race plays no role in adoption or foster care placement decision-making.

After January 1, 1997, if an adoption agency considers race, it may lose federal funds,[350] or be sued in federal court by applicants who think they have suffered discrimination.[351] I fail to see how this promotes appropriate placements of older African-American children. Instead, the new law may have a chilling effect on targeted recruitment of African-American adopters. It may also make it impossible for professional child welfare practitioners to conduct the type of race-sensitive and careful assessment of a prospective adopter's suitability to be entrusted with the upbringing of an African-American child.

Eliminating race as a factor in placement decision-making means that the increasing number[352] of biracial or "mixed" children, born and voluntarily relinquished today by their birth mothers, will be more readily available for adoption by waiting white applicants. Infants of African-American descent will no longer be deemed African-American under the customary "one-drop" rule[353] for deter-

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[347] *See supra* note 25.

[348] *See supra* note 30.

[349] Unif. Adoption Act (1994). For text of the Act *see* 20 FAM. L. REP. (BNA) 2033 (Sept. 20, 1994) and note especially § 2-104: *Preferences for Placement When Agency Places a Minor,* reiterating language from The Howard Metzenbaum MultiEthic Placement Act. *See also* Susan Chira, *Law Proposed to End Adoption Horror Stories,* N.Y. TIMES, Aug. 24, 1994, at A12 (summarizing major features of the UAA and presenting contrasting opinions); Ann Sullivan, *The Uniform Adoption Act: What Price Uniformity?* CWLA CHILDREN'S VOICE, Winter 1995, at 25-26 (stating CWLA's opposition to Act's focusing more on rights of adults to adopt than adoption as a service for children; making independent adoption practice the standard; giving short shrift to the rights of biological parents and devaluing other kin as prospective adopters; and ignoring trends toward more openness in adoption and access to adoption records).

Since promulgation of the UAA by the National Conference of Commissioners on Uniform State Laws, two states have revised and recodified their adoption laws. Michigan, in revising its Adoption Code in 1994, effective January 1, 1995, included most of the UAA provisions permitting direct placement adoptions. *See* MICH. COMP. LAWS ANN. §§ 710-710.68a (West 1994). On May 15, 1996, the governor of Vermont signed into law a modified version of the UAA that revised and recodified Vermont law relating to adoption. *See* VT. STAT. ANN. tit. 15A (1996). Thus far, efforts to enact the entire UAA or a modified version in Florida, Louisiana, Mississippi, Missouri, New Jersey, Oklahoma and Pennsylvania have not been successful.

[350] *See supra* note 25.

[351] *See id. See also* UNIF. ADOPTION ACT § 2-104(c) (permitting a minor's guardian ad litem and certain prospective adoptive parents to seek equitable relief against an agency that unlawfully denies or delays a placement).

[352] *See Redefining the TRA Controversy, supra* note 15, at 148-49 & nn.95-101.

[353] *See supra* note 15.

mining race. If one pushes the business/market analogy further and the social, attitudinal and behavioral changes sought by the Pro-Life Movement occurred, white babies once again might be relinquished at rates[354] similar to those before the legalization of abortion. Demands for both TRA and ICA would evaporate.

While considering the purpose, function and efficacy of TRA for African-American children, an analogy is drawn between current TRA proponents and the slave trader/merchants of Gorée. I believe this comparison is appropriate. It dramatizes two important paradigm shifts that have occurred in adoption: (1) a shift in focus from meeting the needs of a child for a home to satisfying the interests of adults; and (2) a heightened dominance of lawyers as the key professional players.[355] These developments are especially troubling for the African-American community.

The struggle to correct and overcome the residual flaws from slavery that remain in all our economic, educational, and political systems must continue. Group interests,[356] such as those of the African-American community, should not summarily be ignored and denied, as in recent voting redistricting cases[357] that have recognized the claims of individual white plaintiffs to challenge state plans. Given the representative nature of our elective government, the reality is that only members of the majority can enjoy the privilege of having solely an individual identity.

The immediate family is not the only group that plays an important role in shaping an African-American child's perspectives on self and the world.[358] Because of the noted continuing social realities, prejudices and biases that have prevented African-Americans from being fully accepted in this society as "equals," the need for strong, positive affiliations with other African-Americans is self-evident. Wholesale TRA of African-American babies[359] by business en-

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[354] *See Redefining the TRA Controversy, supra* note 15, at 142 (quoting Christine A. Bachrach et al., *Relinquishment of Premarital Births: Evidence from National Survey Data,* 24 FAM. PLAN. PERSP. 27, 29 (1992) ("Before 1973, 19% of children born to never-married white women were placed for adoption, compared with 8% in 1973-1981 and 3% in 1982-1988.")).

[355] *See Redefining the TRA Controversy, supra* note 15, at 149.

[356] *See* SOIFER, *supra* note 338; *see also* Bush v. Vera, 116 S. Ct. 1941, 2001 n.5 (1996) (Souter, J., dissenting) (recognizing the significant role of race and ethnicity in political life and called for "an acknowledgment of the reality that our concepts of common interest, geography, and personal allegiances are in many places too bound up with race to deny some room for a theory of representative democracy allowing for the consideration of racially conceived interests.").

[357] *See generally Bush,* 116 S. Ct. at 1941; *see also* Shaw v. Reno I 509 U.S. 630 (1993) (reversing and remanding for further review the North Carolina plan that resulted in African Americans being sent to Congress from that state for the first time since Reconstruction).

[358] *See supra* notes 37-39.

[359] *See* Madge Gill Willis, *The Real Issues in Transracial Adoption: A Response,* 22 J. BLACK PSYCH. 223, 250-51 (May 1996) (contrasting two groups of children awaiting adoption: healthy infants, many of whom are of mixed race or light skinned and other

trepeneurs poses the threat of placing these children only with those able to pay higher prices than prospective African-American applicants,[360] with no guarantee that the adopters are racially and culturally competent to help prepare the child for the challenges that he will encounter because of his appearance. The present status of the law opens up the possibility that prospective African-American applicants will be discriminated against, out-bid in the market place, or screened out by agency staff applying traditional criteria to find them unacceptable.

Over the years, many chided the NABSW for charging TRA was "cultural genocide."[361] I would like to reiterate how glad the Gorée-Island tour guide was when he learned that I was "interested in history and hearing the truth, and not merely setting out on a tourist outing." In this article I have tried to place TRA in its proper historical context. The three hundred year history of slave trafficking through Gorée forcibly removed and dispersed millions from the African continent. It was an attempt at cultural annihilation. The total loss of human life leads some, such as Dr. Clarke in his Introduction to Tom Feelings' *Middle Passage: White Ships/ Black Cargo* to refer to this, as "the heinous ordeal that many consider the greatest crime ever committed against a people in human history."[362] Yet, as Curator Nydiaye pointed out, the descendants of those removed from Africa found ways to survive, to reconstitute families and communities, and to become in his eyes a "single people: the AFRO-AMERICANS."[363]

What some scholars and policy makers seem to miss in their advocacy of TRA is that it is a form of "cultural genocide." Widespread, unregulated occurrences of private placements of infants of African-American descent with non-African-American adoptive parents place these children at risk of alienation from their natural reference group. It poses a threat to the future vitality and unity of

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older children placed in foster care by the courts, 60% of whom are older than 5, and two thirds with special needs (physical, mental, or emotional challenges), many male or part of sibling groups) (declaring "in actuality, Whites are competing with African American families for the children in the first group—the healthy infant girls. White families are not lining up to adopt children in the second group . . . that has . . . larger numbers of White children (44% of the pool) waiting to be adopted.).

[360] *See* Jackson, *supra* note 15 (quoting Ritch Hemstreet, chief of adoption policy for California: "We hear attorneys routinely charging $15,000 to $20,000, although . . . there's not much legal work involved;" and noting "Ballooning private fees, which can reach $40,000, eliminate good prospective parents who don't earn high salaries.").

[361] *See e.g.*, SIMON ET AL, *supra* note 41, at 40 (quoting from remarks made by NABSW president, William T. Merritt, at the organization's national conference in April of 1971 and from testimony before a Senate committee, June 25, 1985). *But cf.* Abdullah, *supra* note 306, at 260, for a defense of characterizing TRA as genocide. Abdullah, quoting in part from the 1948 U.N. Convention On the Prevention and Punishment of the Crime of Genocide 2,3, defines genocide as " 'the committing of certain acts with the intent to destroy—wholly or in part—a national, ethnic, racial or religious group as such,' including 'measures to prevent birth' and 'forcibly transferring children of one group to another. . . .' " Genocidial acts can include "loss of life and loss of culture."

[362] *See supra* note 1.

[363] *See supra* note 7.

African-Americans. The greatest harm one can inflict on any group is the obliv-ion that awaits a people denied the opportunity to rear its own children. Opposi-tion to TRA by NABSW or others should be accepted as legitimate, responsible action taken by those perhaps best positioned to decide what is best for African-American children.[364]

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[364] *See* John E. Coons, et al., *Deciding What's Best For Children,* 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465 (1993).