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COMMENT

THE BEST INTEREST OF THE CHILD: ELIMINATING DISCRIMINATION IN THE SCREENING OF ADOPTIVE PARENTS

I. INTRODUCTION

Adoption creates the legal relationship of parent and child and bestows on the adoptive parents all the rights and responsibilities of that role.¹ Adoptive parents play the same role as biological parents in the life of their child.² Yet current law allows courts and adoption agencies to treat adoptive parents very differently from biological parents, often to the detriment of the children they seek to adopt. While biological parents are presumed fit to raise their children,³ adoptive parents are screened for fitness because of an "assumed risk that adoptive parenting won't work out."⁴ Many of the standards for screen-

1. JACK C. WESTMAN, *CHILD ADVOCACY: NEW PROFESSIONAL ROLES FOR HELPING FAMILIES* 318 (1979), calling adoption an "ancient legal process creating the parent-child relationship." See also CAL. FAM. CODE § 8616 (West 1994), which provides, "After adoption, the adopted child and the adoptive parents shall sustain towards each other the legal relationship of parent and child and have all the rights and are subject to all the duties of that relationship."

2. This comment will refer to parents who are raising their own biological children as "biological parents" and to parents whose biological children have been adopted by other parents as "birth parents." The role played by both adoptive and biological parents is that of nurturing, protecting and supervising their children. See, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983), *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Stanley v. Illinois*, 405 U.S. 246 (1972), where biological fathers' involvement in caring for their children was a decisive factor in determining their parental rights.

3. Joan Heifitz Hollinger, *Adoption Law*, in 3 *THE FUTURE OF CHILDREN* 43, 47 (Richard E. Behrman, M.D., ed., 1993).

4. ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF*

ing adoptive parents are arbitrary and do little more than discourage potential parents from trying to adopt.⁵

Some of these standards are more than arbitrary; they are discriminatory.⁶ Until recently, states not only allowed but required agencies to screen out parents who were not the same race as the children they wished to adopt.⁷ Most states still allow similar discrimination on the basis of the age or marital status of potential adoptive parents.⁸ Often, denials of adop-

PARENTING 34 (1993).

5. Hollinger, *supra* note 3, at 48. Such standards include race, religion, ethnicity, appearance, income level, age, marital status, and residence address of the adopting parents. *See infra* part V, The Screening of Adoptive Parents.

6. The United States Constitution, state constitutions, and many federal, state, and local laws prohibit discrimination on the basis of race. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1226 (1991). These prohibitions have been interpreted to preclude the use of race as a decision-making factor by government agencies "not only in housing, employment, and public accommodations, but in virtually every area of our community life." *Id.* at 1226, 1229. Supporting anti-discrimination laws is a "near-absolute presumption . . . that race is irrelevant to qualifications." *Id.* at 1237-1238. Increasingly, state and federal laws are extending this protection to prohibit discrimination based on other factors which are "irrelevant to qualifications" - factors such as age, disability, religion, and marital status, which are still used to screen adoptive parents. BARTHOLET, FAMILY BONDS, *supra* note 4, at 72. *See infra* part V, The Screening of Adoptive Parents, for a discussion of the failure of race, age, and marital status to relate to qualification to parent. This comment will therefore refer to adoption screening criteria which would be illegal discrimination in other areas of the law and which do not relate to parental qualifications as discriminatory factors.

7. Hollinger, *supra* note 3, at 48. *See also* former CAL. FAM. CODE §§ 8708, 8710 (West 1994), *infra* part V.A., Recent Reforms. Some states still require preference for same-race adoptions. *See, e.g.*, MINN. STATS. ANN. § 259.29 (West Supp. 1997), which, in relevant part provides:

The authorized child-placing agency shall give preference, in the absence of good cause to the contrary, to placing the child with (a) a relative . . . , (b) an important friend with whom the child has resided or has significant contact, (c) a family with the same racial or ethnic heritage as the child, or . . . (d) a family of different racial or ethnic heritage from the child which is knowledgeable and appreciative of the child's racial or ethnic heritage . . .

If the child's birth parent or parents explicitly request that the preferences in (a), (b) or (c) not be followed, the authorized child-placing agency shall honor that request.

Id.

8. Generally adoption statutes do not explicitly prohibit single parent adoptions or prescribe a maximum age for adopting parents. In fact, many statutes

tive placements on these grounds result in separating a child from the foster parent or parents who have cared for the child for many years.⁹ In many other instances, children spend years in temporary foster homes before finding a permanent race-matched family.¹⁰ Some children never find a family.¹¹ Adoption laws focus on the "best interest of the child,"¹² yet denying and delaying adoptive placements based on discriminatory factors which have little if anything to do with parenting ability is, in reality, in nobody's best interests.

expressly provide that any single adult or married couple may adopt. *See, e.g.*, WIS. STATS. ANN. § 48.82(1)(b) (West 1995). As to the age of the adopting parents, CAL. FAM. CODE § 8601(a) (West 1994) merely requires the adoptive parents be at least ten years older than the child. MASS. GEN. LAWS ANN. c. 210 § 1 (West 1987) provides that any adult may petition to adopt anyone younger than himself. Nevertheless, such discrimination occurs. A Wisconsin court pointed out that "Many adoption agencies have 'rules of thumb' as to the age for disqualifying adoptive parents." *In re Tachick*, 210 N.W.2d 865, 870 (Wis. 1973). The same court denied the petition of a lesbian woman to adopt her lover's child in spite of a trial court finding that the adoption would be in the child's best interest, and in spite of the fact that the two women were in fact already raising the child together. *In re Angel Lace M.*, 516 N.W.2d 678, 680-681 (Wis. 1994).

9. *See, e.g.*, *Drummond v. Fulton County Dep't of Family and Children's Services*, 563 F. Supp. 1200 (5th Cir. 1977); *McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988).

10. *See infra* notes 147-148.

11. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1188.

12. The term "best interests of the child" is the standard by which courts and agencies are to determine decisions regarding adoption and child custody generally. *See, e.g.* WIS. STAT. ANN. § 48.01(2) (West 1987) stating "the best interests of the child shall always be of paramount consideration;" WASH. REV. CODE ANN. § 26.33.045 (West Supp. 1997), discussing factors to consider in determining "whether a placement option is in a child's best interests"; ME. REV. STAT. ANN. tit. 19 § 1129(1) (West Supp. 1997), which provides in relevant part:

The court shall grant a final decree of adoption if: ***

(E) The petitioner is a suitable adopting parent and desires to establish a parent and child relationship between the petitioner and the adoptee.

(F) The best interests of the child are served by the adoption.

Id.

What is in the best interest of a child is often hard to define and open to differing interpretations. One court noted, for example, "nowhere in the Children's Code is there a definition of 'best interests of the child.'" Likewise, the case law of this state is quite barren of definite guidelines or factors which constitute the concept of 'best interests.'" *In re Tachick*, 210 N.W.2d 865, 867 (Wis. 1973). That court defined the best interests of the child this way: "The sole issue is whether the grandparents [who had petitioned to adopt their grandson] can provide food, shelter, clothing, love and affection, education and training which will aid the child to develop his full potential as a human being." *Id.* at 869.

Eliminating such standards in favor of individual assessment of parental fitness would benefit children in two important ways. First, it would allow them to be adopted more quickly into permanent, stable homes. Second, it would prevent the unnecessary break-up of nurturing foster families.¹³ Such a change would also be more consistent with the traditional protection afforded families under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁴

One difficulty in reforming the system is that most of the rules denying or delaying adoptions due to factors such as age, race, and marital status, are not the law. Rather, they are unwritten rules and practices of adoption agencies, which enjoy great discretion in making adoption placement decisions.¹⁵ The problem with the current state of adoption law is that it allows agencies to use race as "one among many factors," which, in practice, means it is often the deciding factor.¹⁶

This comment will propose eliminating race and all factors that would be discriminatory in any other area of the law from consideration in adoption placement decisions, focusing instead on assessments of the parenting skills of individual prospective adoptive parents, and giving preference to foster parents or others who are already providing care to the child. Part II will discuss the historical precedents of today's adoption laws and show how the misperception of the adoptive family as inferior to the biological family helped to shape the current law.¹⁷

13. See *supra* note 9.

14. U.S. CONST. amend. XIV, § 1 in relevant part provides:

"No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

Some cases challenging denials of adoptions focus on a substantive due process liberty interest in continuing the family bonds that have formed between children and the foster parents seeking to adopt them. See, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 815 (1977), *infra* Section IV A 1. Other cases focus instead on the Equal Protection Clause, which is implicated when adoption denials are premised solely on the races of the prospective adoptive parents and children. In such cases, children are harmed by delays in permanent placement based on their race. See, e.g., *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996), *infra* part IV.B.2.

15. See *infra* note 269 and accompanying text.

16. See *infra* note 268 and accompanying text.

17. See *infra* notes 24-69 and accompanying text.

Part III will describe the process of adopting a child¹⁸ to demonstrate that adoption agencies need not look to factors such as the age, race, or marital status of parents. Part IV will show how the current adoption screening system violates constitutionally protected family rights.¹⁹ Part V rejects practices of adoptions based on improper factors.²⁰

Part VI²¹ examines recent legislation in three states which make strides toward achieving these goals.²² Part VII will recommend that states change their adoption laws to forbid courts and adoption agencies from considering discriminatory factors in placement decisions, and to offer a remedy for violations of these standards.²³ This part will also recommend giving a preference to prospective adoptive parents who are already caring for the child.

II. HISTORICAL PRECEDENTS FOR MODERN ADOPTION LAW

The notion that adoption is an inferior way to create a family has negatively influenced the development of adoption law. The earliest adoption laws and practices were designed to imitate the biological family through rituals to simulate childbirth, and, in one early system, through a form of ethnic matching.²⁴ The British common law system, from which most of United States law evolved, also favored the biological family, so much so that it did not provide for legal adoptions at all.²⁵ The misperception of the adoptive family as a second-best imitation of the "real family" continues today and forms the basis for much of the restrictive screening system.²⁶ Changing societal views of race relations have shaped modern laws and

18. *See infra* notes 70-85 and accompanying text.

19. *See infra* notes 86-152 and accompanying text.

20. *See infra* notes 153-245 and accompanying text.

21. *See infra* notes 246-294 and accompanying text.

22. CAL. FAM. CODE §§ 8708-8710 (West Supp. 1996); MICH. COMP. LAWS ANN. § 722.957 (West 1996); ME. REV. STAT. ANN., tit. 19 § 1129 (West Supp. 1997).

23. *See infra* notes 295-314 and accompanying text.

24. *See infra* notes 30-38 and accompanying text.

25. *See infra* notes 41-42 and accompanying text.

26. *See infra* notes 161-169 and accompanying text.

practices in the area of interracial adoptions, one of the most restrictive areas of the screening system.²⁷

This general overview helps to put current practices in context by outlining the roots of adoption law. Part A discusses the ancient adoption practices which tried to imitate the biological family.²⁸ Part B traces the development of United States adoption law from the informal adoptions in England and in the colonial period to the enactment of adoption statutes in each state. Part C traces the history of interracial adoption in the United States.

A. ANCIENT ADOPTIONS

Adoption is an "ancient legal process" which creates a parent-child relationship.²⁹ Four thousand years ago, this process included rituals designed to "make the adopted child the same as if it had been born to" the adopting parents.³⁰ For example, adopting mothers held their new babies under their robes and allowed them to drop to the ground in an imitation of childbirth.³¹ Most adoptions, however, did not involve infants; in fact, adoption of adults was common,³² since the purpose of ancient adoption laws was to provide an heir for the adopting parents.³³ Such adoptions were accomplished by ceremonies in which the adoptee pledged loyalty to his new family and severed all ties to the old family.³⁴

27. See *infra* notes 62-68 and accompanying text.

28. This comment uses the term "ancient adoptions" to refer to the Roman, Hindu, and Mesopotamian adoption systems of two to four thousand years ago.

29. WESTMAN, *supra* note 1, at 318.

30. ARTHUR D. SOROSKY, ET AL., THE ADOPTION TRIANGLE 25 (1978).

31. *Id.*

32. Burton Z. Sokoloff, *Antecedents of American Adoption*, in 3 THE FUTURE OF CHILDREN 17 (Richard E. Behrman, M.D., ed., 1993).

33. SOROSKY, *supra* note 30, at 26-27.

34. *Id.* at 26. The modern equivalent of this practice was found in the practice, common in the middle part of this century, of sealing adoption records and placing children in "a home unknown to the natural parents so that the relationship of the adoptive parents to the child may become one of love, affection, and loyalty based upon the acceptance by the child of the adoptive parents as his parents . . ." *In re Tachick*, 210 N.W.2d 865, 871 (Wis. 1973). See *infra* notes 60-61 and accompanying text on the problems of sealed adoption records and the adopted child's need to know his history.

The purpose of these rituals was to transform the new heirs to be "artificially blood relatives."³⁵ Although adopted children were entitled to inherit from their adoptive parents,³⁶ blood relationships were central in defining "family." Adoptees hid the fact that they were not related to their families by blood. They could not tell anyone they were adopted or seek out their birth parents under penalty of law.³⁷ Ancient Hindu adoptions involved careful matching of caste and clan to be sure the adoptive parents and child were as similar as possible.³⁸ Despite the care with which ancient adoptions simulated biological relationships, Hammurabi's Code allowed an adoptive father to "send back" an adopted child who "transgressed."³⁹ These notions of the adoptive family as an inferior imitation of the biological family continue to shape adoption law, in spite of evidence that the emotional bonds within families, rather than blood ties, are crucial to children's best interests.⁴⁰

B. THE DEVELOPMENT OF UNITED STATES ADOPTION LAW

United States adoption law, loosely based on ancient Roman adoption law, is one of the few areas of American law not derived from British common law.⁴¹ Bloodlines were so important in Britain that even distant relatives were preferred over adoptive children in inheritance, and legal adoption was not available there until 1926.⁴² An apprenticeship system provided homes and surrogate families for orphaned children.⁴³ In

35. SOROSKY, *supra* note 30, at 26. The goal of the adopting parents was continuity in their family lines. *Id.*

36. *Id.* at 27.

37. *Id.* at 25. The penalty for revealing an adoptee's background was draconian - his tongue would be cut out. *Id.*

38. SOROSKY, *supra* note 30, at 28. Modern adoption agencies have sometimes followed this practice so rigidly that they have attempted to place children only with adoptive parents whose hair and eye color and facial features were similar to those of the children's birth parents. *Drummond v. Fulton County Dep't of Family*, 563 F.2d 1200, 1205 (5th Cir. 1977).

39. SOROSKY, *supra* note 30, at 25.

40. See JOSEPH GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 17 (1993), noting that children form emotional attachments to adults based upon the nurturing and care they provide, not upon their biological or legal relationship.

41. SOROSKY, *supra* note 30, at 28.

42. *Id.*

43. *Id.* at 30.

an apprenticeship, a child trained for a profession in the home of an artisan.⁴⁴ The artisan's family provided emotional support to the child and became, in essence, the child's "second family," though not legally recognized as such.⁴⁵

This system of artisans and their families "adopting" apprentices continued in the United States in its early years.⁴⁶ "Almshouses" provided care for orphaned babies and children who were too young to be apprenticed.⁴⁷ During this period, neighbors and relatives were also taking in orphaned children and "emotionally adopting" them.⁴⁸ These families wanted laws that would give their children rights to inherit from them.⁴⁹ Meanwhile, the system of almshouses and apprenticeships, which had once alleviated the need for adoption laws by providing homes and surrogate families for children, was becoming overwhelmed by the growing number of orphaned and abandoned children.⁵⁰ Prior to 1851, however, there were still no formal adoption laws.⁵¹

Massachusetts passed the first adoption statute in the United States in 1851 in response to these needs.⁵² This statute was patterned after the adoption laws of ancient Rome, since there was no British common law precedent for legal adoption.⁵³ The Massachusetts statute added one very important innovation: it emphasized the needs of the adopted child.⁵⁴ By 1929, all states had enacted similar laws, empha-

44. *Id.* at 29.

45. SOROSKY, *supra* note 30, at 29.

46. *Id.* at 30.

47. Sokoloff, *supra* note 32, at 18.

48. SOROSKY, *supra* note 30, at 31.

49. Sokoloff, *supra* note 32, at 18. At the same time, social reformers demanded protection for children caught in an often abusive system of orphan labor which had become a part of the apprentice system. SOROSKY, *supra* note 30, at 32.

50. Sokoloff, *supra* note 32, at 17-18. Factors that contributed to the rapid growth of homeless children were the industrial revolution, urbanization, and immigration. *Id.* at 19.

51. *Id.* at 17.

52. Mass. Stat. 1851, ch. 324 §§ 1-4 (enacted 1851), now at MASS. GEN. LAWS ANN. c. 210 § 1 et seq. (West 1987).

53. SOROSKY, *supra* note 30, at 32.

54. *Id.* The statute protected the interests of adopted children by providing that an adoption must be approved by a judge, and that the judge could only approve an adoption if he were satisfied that the prospective adoptive parents "were of 'sufficient ability to bring up the child' and that it was 'fit and proper

sizing the best interests of the child.⁵⁵

Until the 1920's, adoption of newborn babies was extremely rare.⁵⁶ Because infant formula did not yet exist, feeding a newborn was impossible without the help of a wetnurse.⁵⁷ Babies needing milk vastly outnumbered women able to provide this service, so the infant mortality rate was extraordinarily high.⁵⁸ Once the invention of formula removed this obstacle, childless couples began to see adoption as a viable way to have the baby they had been unable to conceive.⁵⁹

The practice of sealing adoption records and keeping the identities of birth parents and adoptive parents hidden from each other began around the same time as the increase in infant adoptions as a way to quickly integrate the child into the adoptive family.⁶⁰ This practice was later criticized for ignoring the adopted child's need to know about her heritage and have a complete sense of identity. The system, however, recognized children's important needs to be part of the adoptive family, to have not only roofs over their heads, but "homes in families."⁶¹

that such adoption should take effect.' " Sokoloff, *supra* note 32, at 18.

55. Sokoloff, *supra* note 32, at 21.

56. *Id.* at 22.

57. *Id.* at 21.

58. *Id.*

59. *Id.* at 22.

60. Sokoloff, *supra* note 32, at 21-22. This practice was designed to help the child fully and quickly integrate into his adoptive family. *Id.* at 25. In part it was to protect against any possibility of interference in the child's life by his birth parents. *In re Tachick*, 210 N.W.2d 865, 870-871 (Wis. 1973). In part it was based on the idea that the only way for an adopted child to become a part of the adoptive family was, in essence, to pretend the child was not adopted by completely breaking any and all ties to the birth parents. See, e.g., Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1173, noting that "the laws and policies surrounding adoption in this country have generally structured adoption in imitation of biology, giving the adopted child a new birth certificate as if the child had been born to the adoptive parents, sealing off the birth parents as if they had never existed . . ." In fact, the prevailing view in the mid-twentieth century was that the child should not be told he was adopted. *In re Tachick*, 210 N.W.2d at 871. Both the sealed adoption records controversy and the possibility of maintaining ties between birth families and adoptive families through open adoption are beyond the scope of this article.

61. Sokoloff, *supra* note 32, at 25.

C. THE HISTORY OF INTERRACIAL ADOPTIONS IN THE UNITED STATES

Interracial adoptions were virtually unheard of until the late 1940's.⁶² Almost any interracial association was virtually unheard of at this time.⁶³ After World War II and the Korean and Vietnam Wars, many American families adopted Asian children who were left orphaned and homeless by those wars.⁶⁴ Also beginning in the 1950's and 1960's, adoptions of children from Latin American countries by white couples became popular.⁶⁵ In the late 1960's and early 1970's, 10,000 black children were adopted by white parents.⁶⁶ At that time, adoption agencies approved of interracial adoptions as a way of finding homes for the large number of minority children waiting to be adopted.⁶⁷

The practice of allowing interracial adoptions changed in 1972 after the National Association of Black Social Workers (NABSW) objected to the practice, concerned that African-American children were not able to develop a positive self-image or awareness of their heritage in white families.⁶⁸ The

62. Arnold R. Silverman, *Outcomes of Transracial Adoption*, in 3 *THE FUTURE OF CHILDREN* 104 (Richard E. Behrman, M.D., ed., 1993).

63. As late as the 1960's the insult used by supporters of segregation against civil rights activists was "race-mixer." Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1176. These people "saw the mixing of the races in the intimate context of the family as the ultimate symbol of [what they saw as] the outrage and degradation threatened by moves towards a more integrated society." *Id.* At the time, interracial marriage was still illegal in many states. *See infra* note 178 and accompanying text. The segregationist origins of adoption race-matching are discussed in detail by Julie C. Lythcott-Haims in *Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 *HARV. C.R.-C.L.L. REV.* 531 (1994).

64. Silverman, *supra* note 62, at 104-105.

65. *Id.* at 105. Interracial adoptions usually involve white parents or interracial couples with one white parent. *See infra* note 197.

66. Silverman, *supra* note 62, at 105.

67. *Id.* Among the factors leading to this trend included an increasing need for homes for minority children and a growing acceptance of racial integration in general. Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 *MICH. L. REV.* 925, n. 3 (1994).

68. Silverman, *supra* note 62, at 105-106. Ways of dealing with these valid concerns other than denying interracial adoptions will be discussed in Section V.B., Screening on the Basis of Race, and Section VII, Recommendations to Improve the Screening System. Opposition to interracial adoption is not based entirely on con-

NABSW has not changed its position, but the laws that once stood in the way of interracial adoptions have recently begun to change.⁶⁹

III. THE CURRENT ADOPTION PROCESS IN THE UNITED STATES

There are two basic types of adoptions. In agency adoptions, a state agency or department or a private, state-licensed adoption agency matches children with prospective adoptive parents.⁷⁰ An independent adoption, on the other hand, is arranged directly between the birth parents and adoptive parents.⁷¹ Significantly, the screening criteria used in agency adoptions generally do not apply in independent adoptions.⁷² For this reason, many birth parents who voluntarily give up their babies for adoption choose independent adoption.⁷³ Private adoption agencies are also less likely than public state agencies to focus on race and other discriminatory screening

cern for the welfare of interracial adopted children. The NABSW, for example, calls interracial adoption "cultural genocide," and opposes it fearing interracial adoption *might* have adverse effects on preservation of culture for the African-American community as a whole. Preservation of minority cultures is a laudable goal, but when the NABSW and other opponents of interracial adoption advocate leaving minority children in foster care with no permanent home, they advance this goal at the expense of those children. Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L.L. REV. 531, 551 (1994). Interestingly, there is far less opposition to interracial adoption of children from foreign countries. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1175. For a discussion of the race-matching scheme's failure to enhance and protect African-American culture, see Kim Forde-Mazrui, Note, *Black Identity and Child Placement: the Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994).

69. See *infra* note 246.

70. Mark McDermott, *The Case for Independent Adoption*, in 3 THE FUTURE OF CHILDREN 147, 150 (Richard E. Behrman, M.D., ed., 1993).

71. Bryce J. Christensen, *Two Cheers for Independent Adoption*, WALL ST. J., Dec. 3, 1987, available in WESTLAW, WSJ Database. Often a lawyer or other intermediary introduces the two sets of parents. *Id.*

72. See BARTHOLET, FAMILY BONDS, *supra* note 4, noting that prospective adoptive parents can avoid the screening system through independent adoption. *Id.*

73. Bryce J. Christensen, *Two Cheers for Independent Adoption*, WALL ST. J., Dec. 3, 1987, available in WESTLAW, WSJ Database. Birth parents choose independent adoption to avoid temporary foster care placement of their babies while agencies wait for adoptive families who meet the screening criteria. *Id.* Another reason birth parents choose independent adoption is to avoid procedural delays often involved in agency adoptions. *Id.*

factors; as a result, many minority birth parents choose private rather than public agencies.⁷⁴ Of course, not all children placed for adoption are newborn babies voluntarily relinquished by their birth parents; many children are placed for adoption after a court has terminated the parental rights of their abusive or neglectful parents.⁷⁵ These birth parents do not have any say in what kind of screening process determines who will adopt their children.⁷⁶ Their children are the ones most adversely affected by the current agency screening system.⁷⁷

Once prospective parents find a child to adopt, they must file a petition for adoption with a court.⁷⁸ All states require some form of home study to determine the prospective adoptive parents' fitness as parents and whether they are the best parents to raise the individual child they want to adopt.⁷⁹ The qualities adoption agency workers look for in potential adoptive parents are maturity, sensitivity to human needs, and tolerance towards the unmarried birth parents of their adoptive children.⁸⁰ The ways in which the parents deal with cri-

74. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1234, noting that many African-American birth parents choose private adoption agencies over public agencies because many such agencies place a higher priority on immediately finding adoptive homes than on race-matching, unlike public agencies.

75. Hollinger, *supra* note 3, at 45. Additionally, some birth parents relinquish custody of their children to state agencies when threatened with involuntary termination proceedings. *Id.*

76. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1234, n. 203.

77. Most healthy black babies available for adoption do find homes, while older minority children do not. *Id.* at 1203. In part, this is because many agencies that race-match also actively recruit black families. *Id.* Such agencies are able to find homes for these babies. *Id.* Minority children free for adoption after termination of parental rights, however, wait for years for permanent families. *Id.* at 1203-04.

This comment will focus on agency adoptions because that is where the screening factors cause the most harm. Independent adoption is mentioned only as a basis for comparison, to show that the screening factors are unnecessary.

78. *See, e.g.*, CAL. FAM. CODE § 8802 (West 1994) provides in relevant part: [A] person with whom a child has been placed for adoption, who desires to adopt a child may, for that purpose, file a petition in the county in which the petitioner resides. *Id.*

79. McDermott, *supra* note 70, at 150. Generally, in independent adoption, the home study serves only to determine parental fitness. *See, e.g.*, CAL. FAM. CODE § 8807 (West 1994) (adoption agency or county department must investigate the prospective adoptive parents within 180 days of birth parents giving their consent and report findings to the court).

80. LINDA CANNON BURGESS, *THE ART OF ADOPTION* 3, 11, 15 (1977). Burgess

ses, the stability of their marriage, and their relationships with friends and family are also important.⁸¹ Agencies consider the prospective adoptive parents' finances to be an important consideration, but find that ability to manage money is more significant than income level.⁸² One of the most important considerations is the prospective parents' motivation to adopt.⁸³ If the parents want a child to solve problems that having a child simply will not solve, they may not be suitable parents.⁸⁴ Similarly, if the parents are committed to their decision to adopt they will be better parents to an adopted child than parents who are not completely sure this is the way they want to add a child to their family.⁸⁵ In spite of birth parents' preference for an adoption process which does not focus on discriminatory factors, and in spite of the elaborate process already in place to assess parental ability on an individual basis, agencies continue to deny adoptions based on these factors.

IV. CONSTITUTIONAL PROTECTION OF THE FAMILY

Not only are screening criteria based on race, age, marital status, and similar factors unnecessary and harmful to children by delaying and denying adoptions, they are constitutionally suspect. United States Supreme Court decisions have interpreted the Due Process Clause of the Fourteenth Amendment to provide constitutional protection for family relationships.⁸⁶ Although the biological link between parents and chil-

is a former adoption agency director.

81. *Id.* at 3, 12.

82. *Id.* at 12. *See also In re B.L.S.*, 901 S.W.2d 38 (Ark. Ct. App. 1995). The trial court found an adoption by the child's aunt, who had cared for her since she was a newborn baby, was not in the child's best interest, in large part because the aunt was on disability and received Aid to Families with Dependent Children benefits. *Id.* at 39-40. The appellate court reversed, noting that the aunt's income, low as it was, was enough to meet her expenses. *Id.* at 40.

83. BURGESS, *supra* note 80, at 12-13.

84. *Id.* at 12.

85. *Id.* at 13, 15.

86. Such protection stems from the Supreme Court's decision that family relationships are "within the zone of privacy created by several fundamental constitutional guarantees." *Griswold v. Connecticut* 381 U.S. 479, 485 (1965). *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage is a fundamental right); *Loving v. Virginia* 388 U.S. 1 (1967) (right to choose marriage partner); *Griswold v. Connecticut* 381 U.S. 479 (1965) (right of married couple to decide to use contraceptives so they would not have children); *Skinner v. Oklahoma* 316 U.S. 535 (1942)

dren is often the focus of cases which deal with the protection of their relationships, it is not the only basis for such protection.⁸⁷ Because of the many non-biological bases for constitutional protection of family relationships, the author will demonstrate how the same constitutional protection may be extended to the relationships between children and the potential adoptive parents who have already cared for them. Furthermore, children may also have fundamental liberty interests in a stable home and in preserving their emotional bonds with the people who take care of them.⁸⁸

A. PARENTAL RIGHTS ARE BASED ONLY IN PART ON THE BIOLOGICAL LINK

Many cases dealing with the protection of the family deal with families related biologically.⁸⁹ Biology alone, however, is not the only basis for constitutional protection of families in general, and the relationship of parents and children, in particular.⁹⁰ Other bases include the emotional bonds between family members and the assumption that parents will act in their children's best interests.

(procreation is a fundamental right); *Pierce v. Society of Sisters* 268 U.S. 510 (1925) and *Meyer v. Nebraska* 262 U.S. 390 (1923) (right to make decisions regarding children's education).

The Equal Protection Clause of the Fourteenth Amendment is also relevant in cases involving race-matching, because in such cases, agencies treat prospective adoptive parents and children waiting for homes differently on the basis of their race. *See supra* note 14. *See infra* notes 136-150 and accompanying text, discussing *In re Bridget R.* 49 Cal. Rptr. 507 (Cal. Ct. App. 1996), an Equal Protection challenge to a race-matching scheme.

87. These include the emotional bonds between family members, and the importance of parents in protecting their children's interests. *See infra* Section IV.A. for a discussion of cases focusing on these bases.

88. Although the United States Supreme Court has not decided whether children have a constitutionally-protected interest in their relationships with their parents, *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1988), California courts do recognize that children have rights to a stable family and to protection and care. *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994).

89. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 843 (1977) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), which called the rights to "conceive and raise one's children" essential).

90. *Smith*, 431 U.S. at 843-844.

1. Emotional Bonds as a Reason to Protect Family Relationships

The family is important enough in society to merit constitutional protection in part because of the importance to individuals of the emotional bonds that develop in "the intimacy of daily association, and from the role [the family] plays in 'promoting a way of life' through the instruction of children."⁹¹ In *Smith v. Organization of Foster Families*, the United States Supreme Court considered whether foster families should be afforded the same type of protection to which biological families are entitled.⁹² Although the Court ultimately did not decide this issue,⁹³ Justice Brennan, writing the plurality opinion of the Court, indicated that foster families may indeed be entitled to some constitutional protection, at least in the case of long-term placements where the foster family is the child's de facto family.⁹⁴ Justice Brennan reasoned that the emotional attachments that develop in such families are just as strong

91. *Id.* at 844 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972)).

92. *Id.* at 818-820. In *Smith*, foster parents challenged the state's power to remove children from their homes. Some of the children involved were being moved to other foster homes, others were to be reunited with their biological parents. *Id.* at 818-819, n. 1. These foster parents were not seeking to adopt the children in their care, whose biological parents still had parental rights. *Id.* *Smith* is nevertheless relevant to the issue of the adoption screening system since adoption agencies often ignore the relationships that develop within long-term foster families, focusing instead on the races of the parents and child and on other discriminatory factors.

93. *Id.* at 847. The Court did not need to decide this issue, instead holding that a New York law allowing social services departments to remove children from foster homes at its discretion did not violate any liberty interest the foster families may have because it afforded them a fair opportunity to contest the planned removals - in other words, it afforded them due process of law before the children were removed from their homes. *Id.* at 856. Despite this narrow ground for upholding the foster care laws, Justice Brennan "took great pains to analyze the assertion of the foster parents and foster children that they had a constitutionally-protected liberty interest. A careful reading of the opinion indicates . . . that but for the narrower ground . . . the Court would readily have determined that such [a] constitutionally protected liberty interest did exist." *Drummond v. Fulton County Dep't of Family and Children's Services*, 563 F.2d 1200, 1213 (5th Cir. 1977) (Tuttle, J., dissenting). The *Drummond* majority, however, held that children do not have a liberty interest in their relationships with potential adoptive/foster parents, relying primarily on *Meachum v. Fano*, 427 U.S. 215 (1976), which held that an adult prisoner had no liberty interest in a stable environment which would preclude transfer to another prison. *Drummond*, 536 F.2d at 1208-1209.

94. *Smith*, 431 U.S. at 844-45. "We cannot dismiss the foster family as a mere collection of unrelated individuals." *Id.*

as those that develop in families related by blood.⁹⁵

Nevertheless, Justice Brennan found reasons for any parental rights for foster parents to be weaker than those of biological parents. For one thing, foster care is meant to be temporary.⁹⁶ Furthermore, foster parents provide care to children over whom a state agency has legal custody through a contractual relationship with that agency.⁹⁷ The foster family relationship is one in which "the State has been a partner from the outset."⁹⁸ Finally, placement of the child in foster care, unlike adoption, does not terminate all the rights of the biological parent to the child.⁹⁹ Thus, the biological parents still have a constitutionally protected liberty interest in protecting their relationship with the child, which conflicts with the foster parents' interests.¹⁰⁰

The reasons Justice Brennan found for limiting the parental rights of foster parents only make sense, however, when foster parents seek to block the return of foster children to their biological parents. When foster parents seek to adopt a child who has been in their care for a long time, the foster care arrangement, while intended to be temporary, has, in reality, become indefinite.¹⁰¹ The relationships within a such a foster family is thus more like the relationships within biological families which are protected. If the biological parents' rights have been terminated, there is no longer a competing interest to protect. The reasoning of the plurality opinion indicates that given a proper case, the Supreme Court might very well hold that a child and her foster parents have a constitutionally

95. Before analyzing the legal issues involved, Justice Brennan described in detail the realities of New York's foster care system, pointing out that although foster care is meant to be a temporary substitute for care by biological parents who are unable to care for the child, children often stay in foster care for many years. *Id.* at 833, 836. Many foster children have little or no contact with their biological parents. *Id.* at 836, n. 39. Where a child remains in one foster family for a long time and has no contact with his biological parents, "it is natural," as Justice Brennan pointed out, "that the foster family should hold the same place in the emotional life of the child . . . as the natural family." *Id.* at 844.

96. *Smith*, 431 U.S. at 834.

97. *Id.* at 826-27.

98. *Id.* at 845.

99. *Id.* at 827.

100. *Id.* at 846.

101. *See supra* note 95.

protected interest in protecting their “family-like association,” free from “arbitrary government interference.”¹⁰²

2. Parental Responsibility for the Child's Well-Being as a Basis for Parental Rights

Parental rights are protected, both constitutionally and by state statutes, based in part on the assumption that parents will act to protect their children's best interests. The California Court of Appeals for the Second District discussed this basis for familial rights in *In re Bridget R.*¹⁰³ The United States Supreme Court discussed this basis in *Quilloin v. Walcott*.¹⁰⁴ These two decisions demonstrate that the responsibility parents assume in caring for their children can play a central role in the protection of parental rights.

The *Bridget R.* court noted that under California law, “children are not merely chattels belonging to their parents, but have fundamental interests of their own. Such fundamental interests are of constitutional dimension.”¹⁰⁵ The court noted that United States Supreme Court cases recognizing constitutional protection for parental rights have done so at least in part based on the notion that “children's needs generally are best met by helping parents achieve their interests.”¹⁰⁶ In *Lehr v. Robertson*, for instance, the Supreme Court noted that “the rights of parents are a counterpart of the responsibilities they have assumed.”¹⁰⁷

102. *Smith*, 431 U.S. at 846. See also *Drummond*, 563 F.2d at 1212-1214 (Tuttle, J., dissenting), noting that Justice Brennan could have chosen to uphold the New York law based on the adequate opportunity it provided foster parents to challenge the removals of children without analyzing the potential rights of foster families. Judge Tuttle suggested that Justice Brennan intentionally devoted several pages of dicta to discussing the possible familial rights of foster families. *Id.*

103. *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996).

104. *Quilloin v. Walcott*, 434 U.S. 246 (1977).

105. *In re Bridget R.*, 49 Cal. Rptr. 507, 514 (Cal. Ct. App. 1996) (citing *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994)). These rights include the right to be protected from abuse and neglect and a right to a secure and stable home (*Id.* at 524, citing *In re Jasmon O.*, 878 P.2d at 1307), and will be discussed in more detail in the next section.

106. *Bridget R.*, 49 Cal. Rptr. at 524 (citing *Santosky v. Kramer*, 455 U.S. 745, 759-761 (1982) and *Stanley v. Illinois*, 405 U.S. 645, 649 (1972)).

107. *Id.* (citing *Lehr v. Robertson*, 463 U.S. 248, 257 (1983)).

In *Quilloin v. Walcott*, the United States Supreme Court demonstrated this principle when it considered the responsibility an unwed biological father had taken for his child's care in determining his parental rights.¹⁰⁸ The father, Leon Quilloin, who had established a relationship with his son, wanted to block the adoption of the eleven-year-old boy by his step-father.¹⁰⁹ Georgia law required the consent of both parents of a child born during a marriage to the child's adoption, but required only the consent of the mother if the parents were not wed when the child was conceived.¹¹⁰ Mr. Quilloin challenged this distinction on equal protection grounds.¹¹¹ Georgia's statutes, he claimed, denied to him a right they granted to married or divorced fathers with no adequate basis for the distinction.¹¹² The Court, however, found adequate grounds for the distinction in the fact that Mr. Quilloin, unlike a married or divorced father, had "never exercised actual or legal custody over his child, and thus [had] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."¹¹³ Thus, the individual father's role in protecting his child's interest was significant enough to affect his rights regarding his child.

Since the responsibility parents have for protecting their children's interests does not depend upon a biological relationship, neither should the rights that go with it.¹¹⁴ Foster parents seeking to adopt assume this same responsibility as soon as they begin to care for the child. Other prospective adoptive parents actively seek this responsibility when they submit themselves to the adoption screening process. In doing so, these parents demonstrate their commitment to fulfilling the parental responsibilities emphasized by the courts as a basis for parental rights.¹¹⁵ This basis for parental rights should

108. *Quilloin v. Walcott*, 434 U.S. 246 (1977).

109. *Id.* at 247.

110. *Id.* at 248.

111. *Id.* at 252.

112. *Id.*

113. *Quilloin*, 434 U.S. at 256.

114. *Id.* at 525. This principle was recognized by the California Supreme Court in *In re Michael H.*, 898 P.2d 891, 899 (Cal. 1995), and by the United States Supreme Court in *Lehr v. Robertson*, 463 U.S. at 261.

115. In seeking to adopt, prospective adoptive parents demonstrate not only a desire to parent, but a strong commitment to do so. Adoptive parents must find a

thus apply to potential adoptive parents in exactly the same way it applies to biological parents.

B. THE RIGHT OF CHILDREN TO STABLE FAMILY RELATIONSHIPS

California courts recognize that children have their own fundamental rights in family relationships. The California Supreme Court discussed and applied this principle in *In re Jasmon O.*¹¹⁶ Two years later, the California Court of Appeals for the Second District discussed the possible constitutional foundations for familial rights for children in *In re Bridget R.*¹¹⁷ These cases show that California courts consider the importance of stable, permanent relationships for children in determining familial rights.

1. *In re Jasmon O.*

In *In re Jasmon O.*, the California Supreme Court discussed the familial rights of children when it decided that a family court had not violated a father's constitutional rights by terminating his parental rights to his seven-and-a-half-year-old daughter.¹¹⁸ The child, Jasmon, had been placed in foster care at the age of six months because neither parent was able to care for her.¹¹⁹ The mother's rights were terminated earlier, but the father made a major transformation in his life,

child to adopt, and must be approved as adoptive parents both by a social worker conducting a home study and by a court. *See supra* notes 72-87 and accompanying text. Finding a child can take three to seven years, at least for parents looking for an infant. *Review and Outlook (Editorial): The Adoption Option*, WALL ST. J., July 7, 1989, available in WESTLAW, WSJ Database. The home study process can be very intrusive on the privacy of the prospective adoptive parents, and also very time-consuming. BARTHOLET, FAMILY BONDS, *supra* note 4, at 33-34. Elizabeth Bartholet, a leading adoption expert, states: "I would be prepared to assume that those who push forward to pursue adoption under these circumstances will, as a general matter, be at least as committed and fit a parent group as non-adoptive parents, many of whom fall into parenting without any conscious choice whatsoever. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1207.

116. *In re Jasmon O.*, 878 P.2d 1297 (Cal. 1994).

117. *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996).

118. *In re Jasmon O.*, 878 P.2d 1297 (Cal. 1994).

119. *Id.* at 1300. The baby's father had a drug problem. *Id.* The mother was a sixteen-year-old girl living in a halfway house for mentally ill patients. *Id.* at 1314. The young birth mother voluntarily placed Jasmon in foster care and did not contest termination of her parental rights. *Id.* at 1300.

recovering from drug addiction and maintaining visitation with Jasmon.¹²⁰ The trial court did not find that the father was unfit to parent any child,¹²¹ but nevertheless found that it was in Jasmon's best interests to allow her foster parents to adopt her rather than to disrupt her bond with them.¹²² Her father was not able to establish a close relationship with his child or to understand her anxiety at the prospect of losing her relationship with the foster parents who had cared for her since infancy.¹²³ The court found that he was therefore unable to meet Jasmon's needs.¹²⁴

In deciding that termination of Jasmon's father's parental rights did not violate his constitutional interest in preserving their relationship, the court discussed Jasmon's rights. The court noted that children, like their parents, have fundamental rights, including the right to be protected from neglect and the right to a stable and permanent home.¹²⁵ These interests sometimes conflict with the interests of parents.¹²⁶ When that happens, the child's rights and the parents' must be balanced.¹²⁷ Thus, at least according to California courts, protecting a child's family relationships is not only in that child's best interests, it is within the child's fundamental rights.¹²⁸

120. *Id.* at 1300.

121. *Jasmon O.*, 878 P.2d at 1310. Justice Mosk, however, writing for the California Supreme Court, pointed out that the trial court "discounted the evidence that the father was incapable of acting as an adequate parent to any child" *Id.*

122. *Id.* at 1304.

123. *Jasmon O.*, 878 P.2d at 1300.

124. *Id.* at 1310.

125. *Id.* at 1307.

126. *Id.*

127. *Id.*

128. Although both *Jasmon O.* and *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996), *infra* notes 129-146 and accompanying text, deal with protecting the bonds a child has already formed with adoptive parents or potential adoptive foster parents, allowing children to form bonds with a permanent family as early as possible is just as much a requirement of a right to a stable and permanent home as protecting such bonds once they are formed. *See infra* notes 148, 185.

2. *In re Bridget R.*

More recently, in *In re Bridget R.*, a California appellate court examined the holdings of some United States Supreme Court cases and concluded that these fundamental rights of children are protected not only by California courts, but also by the United States Constitution.¹²⁹ The *Bridget R.* court noted that the United States Supreme Court has referred to the relationship *between parent and child* as being constitutionally protected.¹³⁰ Supreme Court decisions have based a parent's fundamental rights in part on the parent's role in protecting the child's fundamental rights.¹³¹ The *Bridget R.* court reasoned that children's familial rights may be even more fundamental than the rights of their parents.¹³² Children's interests include not only preservation of an emotional bond, but also the "elementary . . . needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next . . . court appearance may bring."¹³³ The current screening system violates this right to the extent that it removes children from stable placements with potential adoptive parents who are fit parents but do not meet the screening criteria.

C. THE IMPACT OF THE CURRENT SCREENING SYSTEM ON FAMILIAL RIGHTS

The rights of children to stable family relationships is undermined by a system which delays and denies adoptions based on factors having nothing to do with parental fitness.¹³⁴ The factual setting of *In re Bridget R.* demonstrates how one screening factor, race, can operate to deny children

129. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 514, 524 (Cal. Ct. App. 1996).

130. *Id.* at 524 (citing *Quilloin v. Walcott*, 434 U.S. at 255) (emphasis added in *Bridget R.*).

131. *Bridget R.*, 49 Cal. Rptr. 2d at 524 (citing *Santosky v. Kramer*, 455 U.S. at 759-61, *Stanley v. Illinois*, 405 U.S. at 649, and *Lehr v. Robertson*, 463 U.S. at 257).

132. *Bridget R.*, 49 Cal. Rptr. 2d at 524.

133. *Id.*

134. See *infra* notes 145-150 and accompanying text.

their right to stable family relationships. Other screening factors can have a similar effect.¹³⁵

In *Bridget R.*, the California Court of Appeals for the Second District considered the effects on these fundamental rights of children when the Indian Child Welfare Act is applied to Native American children adopted by non-Indian parents.¹³⁶ Birth parents who were both partially of Native American descent consented to the adoption of their twin baby girls because they were unable to support them financially.¹³⁷ Later the birth father attempted to withdraw his consent to the adoption.¹³⁸ His consent to the adoption was valid under California Family Code Section 8700, but not under the ICWA.¹³⁹ The court held that the ICWA is only constitutional if limited to the "existing Indian family" doctrine.¹⁴⁰ The otherwise compelling governmental interest in preserving Native American culture¹⁴¹ is simply not served by blocking an adoption if the birth parents have no significant contacts with a tribe and its culture.¹⁴² Thus, applying the ICWA to children like Bridget and Lucy, the twins in this case, whose parents have no significant contact with any Indian tribe, treats them differ-

135. See *infra* notes 226-227 and accompanying text.

136. The Indian Child Welfare Act (ICWA) is codified at 25 U.S.C.A. §§ 1901-23 and 1931-63. *Bridget R.*, 49 Cal. Rptr. 2d at 519. It gives Indian tribes the jurisdiction and funding to handle most of the child custody cases involving children who are members of a tribe. *Id.* The ICWA provides that for a consent by the birth parents to the adoption of a Native American child to be valid, it must be: 1) executed in writing, and 2) recorded in front of a judge 3) more than 10 days after the child is born. *Id.* at 515. The ICWA is unique in adoption law because it is based in part on a desire to preserve Native American culture and in part on the sovereignty of Indian tribes. *Id.* at 528.

The requirements for birth parent consent to an adoption under California state law are less stringent. The California Family Code provides that the birth parent or parents may effectively consent to adoption "by a written statement signed before two subscribing witnesses and acknowledged by an authorized official of the department or agency." CAL. FAM. CODE § 8700(a) (West 1994).

137. *Bridget R.*, 49 Cal. Rptr. 2d at 517.

138. *Id.* at 507.

139. *Id.* at 515.

140. *Id.* at 529. The "existing Indian family doctrine" limits application of the ICWA to cases where the child's birth parents are involved in a tribe and its culture and applies state adoption laws to children of Native American descent who would not have this kind of contact if raised by their assimilated birth parents. *Id.* at 520.

141. *Bridget R.*, 49 Cal. Rptr. 2d at 526.

142. *Id.* at 529.

ently from other children waiting to be adopted based only on their "genetic heritage - in other words, race."¹⁴³ This difference in treatment is in fewer available adoptive homes and a greater risk that their placement with adoptive families may be disrupted, as happened to Bridget and Lucy.¹⁴⁴ Such different treatment, based only on their race, violated both the twins' right to equal protection of the laws,¹⁴⁵ and their due process interest in their relationship with their adoptive parents.¹⁴⁶

Like the twin girls in *In re Bridget R.*, many minority children wait far longer for homes than white children do.¹⁴⁷ This has two detrimental effects. Some children bounce around in foster care never finding a stable family.¹⁴⁸ Other children do find a stable foster family placement, only to have the bonds they form with such families severed when adoption agencies

143. *Id.* at 527.

144. *Id.*

145. *Bridget R.*, 49 Cal. Rptr. 2d at 529.

The ICWA requires Indian children who cannot be cared for by their natural parents to be treated differently from non-Indian children in the same situation. As a result of this disparate treatment, the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children, and an Indian child who has been placed in an adoptive or potential adoptive home has a greater risk than do non-Indian children of being taken from that home and placed with strangers.

Id. at 528.

146. *Id.* at 529.

147. The average wait for all children in foster care to be adopted is two and one-half years, but for minority children the average wait is five years. Albert R. Hunt, *Politics and People: Metzenbaum Breaches the Adoption Color Barrier*, WALL ST. J., July 14, 1994, available in WESTLAW, WSJ Database. This is in spite of the fact that many parents seeking to adopt do not specify a racial preference for their child. *Review and Outlook (Editorial): The Adoption Option*, WALL ST. J., July 7, 1989, available in WESTLAW, WSJ Database.

148. One study in Missouri showed that one third of the children in that state's foster care system had been in four or more foster homes in less than five years. Bryce J. Christensen, *Two Cheers for Independent Adoption*, WALL ST. J., Dec. 3, 1987, available in WESTLAW, WSJ Database. See also the discussion of New York's foster care system in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 833-38 (1977), *supra* note 95. Approximately 60% of the children in foster care in New York City at that time had experienced more than one foster care placement. Approximately 28% of these children had been in three or more foster homes. *Id.* at 837.

choose instead to place them with strangers who are the same race as the children or who more nearly match the agency's profile of what an adoptive parent should look like in other ways.¹⁴⁹ Preventing these detrimental effects is so essential to the well-being of children that the *Bridget R.* court held that parental screening procedures which contribute to these harms violate children's fundamental rights.¹⁵⁰ If, as the *Bridget R.* opinion indicates, children have a constitutional right to stability and continuity of familial relationships, the current adoption screening system violates that right.¹⁵¹ Similarly, if potential adoptive foster families have a constitutionally protected interest in maintaining their family bonds, as the plurality opinion in *Smith v. Organization of Foster Families* and the Supreme Court's analysis of parental rights in *Quilloin v. Walcott* indicate they do, the current screening system is unconstitutional.¹⁵²

149. The emotional impact on children can be devastating. Bryce J. Christensen, *Two Cheers for Independent Adoption*, WALL ST. J., Dec. 3, 1987, available in WESTLAW, WSJ Database. In *In re Jasmon O.*, 878 P.2d 1297, 1305 (Cal. 1994), for example, the child developed a psychological separation anxiety disorder when faced with the prospect of being separated from the foster parents who had raised her since she was a baby. In *McLaughlin v. Pernesley*, 693 F. Supp. 318, 327 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989), a child became severely depressed as a result of being separated from the family who had cared for him since he was an infant.

150. In *In re Bridget R.*, the court held that race-matching violated the twins' constitutional rights unless there was a compelling interest to justify it. See *supra* notes 140-146 and accompanying text. The court remanded the case to determine whether the twins' birth father did have significant contacts with a tribe which would further the compelling interest in preserving Native American culture. In *re Bridget R.*, 49 Cal. Rptr. 2d 507, 530 (Cal. Ct. App. 1996). The appeals court instructed the trial court that even if it finds the birth father does have such contacts, it must then determine whether returning the girls to their birth father is in their best interests. *Id.* at 533. The reach of the ICWA, even where its application may promote a compelling interest in preserving Native American culture, "is limited by the twins' interest in having a stable and secure home." *Id.* The appeals court considered the twins' interests in stability and continuity at least as compelling as any interest that might support race-matching, if not more so. The court stated, "we believe it would constitute a violation of the Due Process Clause of the Fifth and Fourteenth Amendments to remove a child from a stable placement . . . without a hearing to determine whether the child would suffer harm if removed from that placement." *Id.*

151. See *supra* notes 129-133 and accompanying text.

152. See *supra* notes 91-115 and accompanying text.

V. THE SCREENING OF ADOPTIVE PARENTS USING DISCRIMINATORY CRITERIA

The primary problem with the screening process is that it does not simply ensure the adoptive parents' basic fitness as parents, but instead imposes arbitrary standards that fail to protect the child.¹⁵³ For example, agencies screen potential adoptive parents on the basis of race, religion, age, marital status,¹⁵⁴ and even place of residence.¹⁵⁵ The screening system tries to emulate the biological family through racial matching and a preference for married couples in their twenties or early thirties.¹⁵⁶ These criteria fail to serve the best interests of the children they are intended to protect, and in fact harm those children by delaying adoptions and removing them from stable families.¹⁵⁷ Recent changes in the laws governing screening of parents on the basis of race may point the way to a better way of screening in all areas.¹⁵⁸

Part A will discuss the screening system as an attempt to duplicate the physical appearance of biological families in adoption. Part B will discuss and reject the reasons for screening on the basis of race. One reason for race-matching is past segregation.¹⁵⁹ Other reasons are mistaken assumptions that only same-race parents can give minority children a positive

153. McDermott, *supra* note 70, at 147. *See also*, BARTHOLET, FAMILY BONDS, *supra* note 4, at 70, noting "the absence of any evidence that screening succeeds in identifying superior parents." *Accord*, Hollinger, *supra* note 3, at 48.

154. Such distinctions in any other area of the law would be impermissible discrimination. BARTHOLET, FAMILY BONDS, *supra* note 4, at 72. *See supra* note 6.

155. McDermott, *supra* note 70, at 147.

156. BARTHOLET, FAMILY BONDS, *supra* note 4, at 72. "Older parents are often precluded from adopting children more than thirty-five or forty years younger than themselves on the ground that they would not have been likely to produce such children themselves." *Id.*

157. The disparate impact this has on minority children was discussed *supra* part IV.B., Children's Right to a Stable Home, as was the devastating impact the instability can have on individual children. Examples of the emotional damage to children cause by race-based removals from foster parents or other care-givers can be found in the cases discussed throughout this comment. For this reason, Part V will not deal with the harms of the screening system in detail, but will instead focus on the flaws in the reasoning which supports the system.

158. *See infra* Part VI, Recent Reforms.

159. *See infra* notes 176-185 and accompanying text.

image of themselves and their race, and teach them how to cope with the racism they will encounter in society.¹⁶⁰ Part B will then explore the unique problems faced by multiracial children in the adoption placement context and by mixed-race couples seeking to adopt. Part C will examine at screening on the basis of age, marital status, and other discriminatory factors.

A. SCREENING TO EMULATE THE BIOLOGICAL FAMILY

The screening system is, in many ways, little more than an attempt to make the adoptive family physically resemble the biological family.¹⁶¹ Until the late 1950's, adoption agencies matched parents with children who were physically and intellectually "as close a match as possible to the biological children they might have produced."¹⁶² The ideal was for adopted children to look enough like their adoptive parents that no one would realize they were adopted.¹⁶³ These practices were based on a belief that physical similarities would allow the child to bond more easily with her adoptive family.¹⁶⁴ The reality of bonding within families that look quite unlike biological families proves this old assumption wrong.¹⁶⁵

Nevertheless, the goal of physically replicating the biological family continues to influence the screening system, particu-

160. See *infra* notes 188-212 and accompanying text.

161. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1173, stating that the "implicit goal has been to create an adoptive family which will resemble as much as possible 'the real thing' - the 'natural' or biological family that it is not."

162. *Id.* at 1176.

163. BURGESS, *supra* note 80, at 14. During this period, the prevailing notion was that the children themselves should not know they were adopted. *In re Adoption of Tachick*, 210 N.W.2d 865, 871 (Wis. 1973).

164. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1176.

165. See, e.g., Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1171, where Bartholet, the single adoptive mother of two Peruvian Indian children, says of her older son, "This child is as inside my skin as any child could be." See also, *Drummond v. Fulton County Dep't of Family and Children's Services*, 563 F.2d 1200 5th Cir. 1977), and *McLaughlin v. Pernesley*, 693 F. Supp. 318 (E.D. Pa. 1988), where interracial foster families shared parent-child bonds; and *In re M.D., Jr.*, 653 A.2d 873 (D.C. Ct. App. 1995), where a single foster mother shared parent-child bonds with the foster son she sought to adopt.

larly through the use of screening factors such as the race and age of adopting parents.¹⁶⁶ The National Association of Black Social Workers, in its position paper against interracial adoption, considered the physical differences between an African-American adopted child and his family a crucial deterrent to the child's sense of identity.¹⁶⁷ Where multiracial children are placed for adoption, social workers typically choose the race of the family with which they will place such a child based on the child's appearance.¹⁶⁸ Similarly, in cases where the adopting parents' age is a factor, courts explicitly compare the age of the adopting parents to the age of typical biological parents.¹⁶⁹ Such factors have nothing to do with parenting ability; the myth that adoptive families cannot form bonds unless they look like biological families is simply not true. Children form deep emotional bonds based on their parents' efforts to satisfy their physical needs and their needs for attention and affection.¹⁷⁰ Parents need not look like biological parents to fulfill this function in their child's life.¹⁷¹

B. SCREENING ON THE BASIS OF RACE

Until recently, all states allowed racial matching; some states even required it.¹⁷² In California, a child could only be

166. See *supra* note 156 and accompanying text.

167. Forde-Mazrui, *supra* note 67, at 956 (citing NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION ON TRANSRACIAL ADOPTION (1973)). "There is no chance of his resembling any relative. One's physical identity . . . is significant." *Id.*

168. See Lythcott-Haims, *supra* note 68, at 553 (citing Ellen Hopkins, *The Color Line*, in MIRABELLA, May, 1990), noting that social workers decide which race to label a multiracial child based on the child's skin tone and other physical characteristics. If the child *looks* multiracial, the social workers will most likely label her as her minority race. *Id.* See *infra* Section VI.B.1. for a discussion of the racist origins of this method of labelling. See also *Drummond v. Fulton County Dep't of Family and Children's Services*, 563 F.2d 1200, 1204 (5th Cir. 1977), where the petition of white foster parents to adopt their biracial foster child (whose birth mother was white) was denied because "agency employees were also aware that as Timmy grew he would retain the characteristics of his black father."

169. See, e.g., *In re Tachick*, 210 N.W.2d 865, 870 (Wis. 1973) ("larger age difference than the normal age difference between the natural parents and their children"); and *Child v. Stangler*, No. 92-0850-CV-W-6, 1992 WL 396318, *2 (W.D. Mo. Dec. 28, 1992) ("age . . . similar to that of a biological grandparent").

170. GOLDSTEIN, *supra* note 40, at 17.

171. See *supra* note 165 and accompanying text.

172. Hollinger, *supra* note 3, at 48.

placed in an interracial family after the agency showed that it had made a "diligent search" for a family the same race as the child, but that after ninety days (three months) that search proved futile.¹⁷³ This preference for racially homogenous families often resulted in separating the child from a foster parent or parents who had successfully raised that child for more than a year.¹⁷⁴ In recent years, however, many states have amended their laws to eliminate racial matching altogether or to prohibit agencies from categorically denying adoptions based on the race of the parents or child.¹⁷⁵

1. The Segregationist Origin of Race-Matching

At one time, this society was predominantly racially segregated.¹⁷⁶ When the United States Supreme Court decided in 1967 that laws banning interracial marriages were unconstitutional,¹⁷⁷ sixteen states still had such laws on their books.¹⁷⁸ This desire to keep families segregated has had two major effects on the adoption race-matching scheme. One effect is a belief that integrated families are simply not "natural," and thus not in children's best interests.¹⁷⁹ For example, in ruling that it was appropriate to remove a multiracial child from his white foster parents, one court said that "it is a natural thing for children to be raised by parents of their own ethnic background."¹⁸⁰ An earlier and more blatantly racist example of the use of race in child placement decisions was *Ward v. Ward*, in which the Washington Supreme Court upheld a trial court

173. CAL. FAM. CODE § 8708(b) & (c) (West 1994). The "diligent search" was to include appeals in the media for same race parents. CAL. FAM. CODE § 8710 (West 1994). These sections were repealed in 1995. A.B. 1743, Cal. Leg., 1995-1996 Sess. (1995).

174. See, e.g., *Drummond v. Fulton County Dep't of Family and Children's Services*, 563 F. Supp. 1200 (5th Cir. 1977); *McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd* 876 F.2d 308 (3d Cir. 1989); *Child v. Stangler*, 1992 WL 396318 (W.D. Mo. 1992). See generally Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1191-93.

175. See *infra* note 246.

176. See *supra* note 63.

177. *Loving v. Virginia*, 388 U.S. 1 (1967).

178. Lythcott-Haims, *supra* note 68, at 536, n. 34.

179. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1241.

180. *Drummond v. Fulton County Dep't of Family & Children's Services*, 563 F.2d 1200, 1205 (5th Cir. 1977).

order awarding custody of the daughters of a divorcing black father and white mother to their father because it was best if the girls stayed "among their own people."¹⁸¹

Ward also illustrated the other impact of segregation on the adoption screening system: the practice of defining the children of interracial unions as black and only black.¹⁸² In fact, children with any trace of African ancestry are considered black, and must wait for a "same-race" family to adopt them even if white or interracial couples are available immediately.¹⁸³ These children are classified in this manner because of an old racist notion that even "one drop" of non-white blood "contaminates" a multiracial person's "pure" white blood so that the person cannot possibly be labelled white.¹⁸⁴ While the agency waits to find a "same-race" home, the child may be bounced around from one foster home to another.¹⁸⁵ These old

181. *Ward v. Ward*, 216 P.2d 755, 756 (Wash. 1950). The court considered the girls, who were both black and white, to be only black. This custody dispute between biological parents is relevant as an illustration of the way race plays an often illogical role in decisions that are supposed to be based on the individual child's best interests.

182. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1175 and n. 14. The same method decides how adoption agencies will label multiracial children who are partially white and partially Asian or Hispanic.

183. *Id.* See, e.g., *Compos v. McKeithen*, 341 F. Supp. 264 (E.D. La. 1972), in which an interracial couple seeking to adopt and a white couple who wished to adopt a black child successfully challenged Louisiana's absolute prohibition on interracial adoption. The interracial couple, the Normans, could not adopt any child since the law provided that "A single person over the age of twenty-one years, or a married couple jointly, may petition to adopt a child of his or their race." *Id.* The adoption agency told them that as an interracial couple they simply could not adopt. *Id.* at 265.

184. Lythcott-Haims, *supra* note 68, at 538 (citing Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 34 (1991)). The extreme distastefulness of this form of racism is one of the reasons that the author proposes to remove such a notion from the adoption screening process.

185. See *supra* note 148. Even if the four or five foster families all provide excellent care, this means repeatedly forming bonds only to have them torn apart by the next transfer. As a result, children who are not placed early for adoption have difficulty ever forming permanent family bonds. Studies show that early permanent placement is *the* most important factor in the healthy emotional development of adopted children. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1224 (citing W. FEIGELMAN & A. SILVERMAN, *CHOSEN CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS* 93 (1983)). This study specifically compared the effects of interracial adoptions with the effects of delaying placement and found the latter to be more harmful. Multiracial children face the additional problems of classification, which will be discussed in part B.4.

notions of racially homogenized families harm minority and multiracial children who need permanent homes as soon as possible.

Were remnants of segregationist institutions the only reason the restrictive race-matching scheme is still in place, it would be far easier to reject this system. Adoption professionals, however, express concerns over the ability of white parents to meet the needs of minority and multiracial children.¹⁸⁶ These needs include the child's sense of racial identity and self-esteem and the ability to cope with racism, including negative reactions to the child's interracial family.¹⁸⁷

2. The Child's Racial Identity and Self-Esteem

One reason for the opposition to interracial adoption is a concern that minority children raised in white or mixed-race homes will lose their cultural identity.¹⁸⁸ Studies show, however, that most adopted children in interracial families have a sense of identity and cultural heritage.¹⁸⁹ The strength of this sense of identity depends on the adoptive parents' efforts to foster it.¹⁹⁰ Such efforts might include buying books, toys, and records that teach about the child's ethnic culture, and spending time with other people of the child's background or backgrounds.¹⁹¹ Living in an integrated neighborhood and making

186. Arguments in favor of race-matching lose whatever force they otherwise might have when one considers the unwillingness of agencies to place multiracial children with parents of one of that child's races or any multiracial or minority children with interracial couples. See *infra* part IV.B.4. for some outrageous results of race-matching in action in this context.

187. See *infra* notes 188-212 and accompanying text.

188. Forde-Mazrui, *supra* note 67, at 926 (citing NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION ON TRANSRACIAL ADOPTION (1973)). "Black children in white homes are cut off from the healthy development of themselves as black people" *Id.*

189. Silverman, *supra* note 62, at 104. One study, by the Institute of Mental Health, found that teenagers who had been adopted as young children were just as mentally healthy as teenagers who had been raised by their biological parents, and that interracially-adopted teens were equally well-adjusted, and had a strong sense of racial identity. Albert R. Hunt, *Politics and People: Metzenbaum Breaches the Adoption Color Barrier*, WALL ST. J., July 14, 1994, available in WESTLAW, WSJ Database.

190. Silverman, *supra* note 62, at 104. Accord Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1220.

191. Forde-Mazrui, *supra* note 67, at 948, n. 141 (citing Margaret Howard,

sure the child attends a racially-diverse school also help to give the child a sense of racial identity.¹⁹² Studies show that seventy-five percent of interracial adopted children adjust well in their adoptive families and have the same levels of self-esteem as other children.¹⁹³ For about half of the children who do not do well in interracial adoptions, factors other than the mixed-race family are to blame, such as delays in permanent placement or traumatic experiences early in life.¹⁹⁴

The only significant difference between interracial and same-race adoptions is a difference in how the children perceive themselves racially as they grow up.¹⁹⁵ Most minority children adopted by white families identify with both the white community and the minority community.¹⁹⁶ As a result, many black children adopted by white parents¹⁹⁷ see themselves as white, mixed-race, or simply "human."¹⁹⁸ Only thirty percent identified themselves as black.¹⁹⁹ One analysis of interracial adoptions distinguished between two aspects of racial identity: having a positive image of one's race, and strongly identifying with its cultural heritage and no other cultures.²⁰⁰ The former, but not the latter, is crucial to the child's self-esteem.²⁰¹ While interracial adopted black children tend to identify less

Transracial Adoption: Analysis of the Best Interests Standard, 59 NOTRE DAME L. REV. 503, 539 (1984)).

192. Silverman, *supra* note 62, at 110, noting that children in interracial adoptive families who live in integrated neighborhoods and attend racially integrated schools and churches have a stronger sense of racial identity than those who do not.

193. *Id.* at 109-110.

194. *Id.* at 108. One study found age at the time of placement in the adoptive family to be the most crucial factor in the success of interracial adoptions. *Id.* at 115. Accord Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1224.

195. Silverman, *supra* note 62, at 110.

196. *Id.* at 117.

197. Interracial adoptions involve white and interracial married parents almost exclusively. One study found only four placements of white children with black parents. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1175, n.12 (citing DAWN DAY, *THE ADOPTION OF BLACK CHILDREN: COUNTERACTING INSTITUTIONAL DISCRIMINATION* (1979)).

198. Silverman, *supra* note 62, at 110.

199. *Id.* It should be noted that the majority of "interracially" adopted children in fact are biracial or multiracial children with one white birth parent who are adopted by white parents. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1175, n.14.

200. Forde-Mazrui, *supra* note 67, at 947.

201. *Id.*

strongly with their race and no other than do black children adopted by black parents, their image of their "blackness" is just as positive.²⁰² Parents' attitudes towards their child's racial heritage and identity have a strong impact on how the child sees herself, regardless of the color of the parents' skin.²⁰³

Living in a multiracial family can provide unique advantages such as a sense of belonging in more than one culture, and more tolerance towards differences than might be gained growing up in a racially homogenous family.²⁰⁴ The interracial-adopted child may enjoy the richness of more than one culture, just as many interracial adopting parents take joy in learning about and participating in their children's cultural heritage.²⁰⁵ Given the different levels of success among parents of all races in instilling in their children a positive racial identity, it simply makes more sense to assess all parents, regardless of race, based on their individual willingness and ability to do so.²⁰⁶

202. *Id.* Although the article focused on the problems of black and biracial (black/white) children in the adoption system, there is no reason to assume the results would be different in any other interracial adoptions.

203. Silverman, *supra* note 62, at 108, noting that for the small number of interracial adopted children who do have identity problems, the failure of their parents to acknowledge their racial background was a factor in causing their confusion.

204. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1221-1222. Bartholet refers to an informal study conducted by Dr. Alvin Poussaint. *Id.* at 1221, n.158. Dr. Poussaint, hoping to disprove the once-prevailing attitude that interracial marriages had a negative impact on the children of such marriages, interviewed adult children of one white and one black parent. *Id.* He asked about what they perceived to be the advantages and disadvantages of growing up in an interracial family. *Id.* They usually emphasized the positive aspects. *Id.* They saw being a part of two cultures as an advantage, and said that they felt less intimidated by racism than other black or biracial people who had not grown up with parents of both races. *Id.* They claimed that they stood out as different in social situations in ways that were both positive and negative. *Id.* Bartholet did not cite to a published study; she received this information in a telephone interview with Dr. Poussaint. *Id.* at n. 158

205. See, e.g., Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 U.M.K.C. L. REV. 487, 500 (1991). After discussing her plans to give her multiracial baby daughter a sense of the baby's black cultural heritage, Mahoney states that the whole family will benefit from these cultural experiences as much as the baby will.

206. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1220, noting that not all minority parents successfully foster a sense of racial identity in their children. See also Mahoney, *supra* note 205, at 498, noting that many black fami-

3. The Child's Ability to Cope with Racism

Proponents of race-matching further contend that only minority parents can teach minority children the skills they need to cope with the racism they are likely to encounter sometime during their lives.²⁰⁷ This argument initially seems to make sense, since minority adoptive parents have experienced racism themselves while white adoptive parents have not. For the reasons that follow, however, white parents should be able to give their minority and multiracial children the skills they need to overcome racism.

For one thing, the argument that only racial minorities have experienced any form of prejudice simply is not true. White parents are themselves members of various ethnic groups. One does not have to think too hard to recall ethnic slurs and stereotypes for each of the European immigrant groups that make up the white "majority." Although this sort of prejudice hardly compares to the institutionalized discrimination encountered by many racial minorities,²⁰⁸ encountering it can be no less hurtful than the kind of racist attitudes minority children are likely to encounter nowadays.²⁰⁹ Furthermore, as members of mixed-race families, white adoptive parents may themselves become the objects of racial prejudice, and must learn how to cope along with their children.²¹⁰

lies live in predominantly white neighborhoods and send their children to nearly all-white schools. In *McLaughlin v. Pernsley*, 693 F. Supp. 318, 324 (E.D. 1988), the court heard evidence that many black couples were not able to provide adequate foster care to black children. In *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996), the appellate court directed the trial court to consider on remand whether the children's birth father would instill in them a sense of Native American culture and identity. See *supra* note 150.

207. Forde-Mazrui, *supra* note 67, at 926 (citing NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION ON TRANSRACIAL ADOPTION (1973)). "Black children are taught, from a very early age, highly sophisticated coping techniques to deal with racist practices . . . Only a Black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a Black child's survival in a racist society." *Id.*

208. Simple insults pale in comparison to the slavery and segregation endured by African-Americans or the internment camps endured by Japanese Americans.

209. One writer suggests that white parents in interracial families teach their children to cope with racial insults with the techniques they themselves learned to use to cope with any other insults, ethnically or racially motivated or not. Forde-Mazrui, *supra* note 67, at 954.

210. *Id.* See also Bartholet, *Where Do Black Children Belong?* *supra* note 6, at

Most importantly, white parents are as able as any other parents to give their children a positive sense of themselves racially and individually.²¹¹ This ability, coupled with their own condemnation of racist views, is one of the strongest tools for fighting racism parents can impart to their children.²¹²

4. The Unique Problems of Multiracial Children and Interracial Couples

The policy of race-matching makes even less sense now, when multiracial children make up a significant percentage of the children waiting for adoptive families, and interracial marriages are becoming more and more common.²¹³ The screening system ignores this reality.²¹⁴ For multiracial children, the common practice of classifying them (and waiting families)

1170-71. Bartholet discusses her heightened understanding of racism after adopting a brown-skinned Peruvian Indian baby boy. "I listen with new ears to a familiar discussion of affirmative action . . . I . . . learn something of the problems that children of color face as they advance into the older grades at the local school that my biological child had attended." *Id.*

211. See *supra* notes 188-206 and accompanying text.

212. Forde-Mazrui, *supra* note 67, at 954-955.

213. Minority children make up 46% of the children in foster care waiting for adoptive homes. Lythcott-Haims, *supra* note 68, at 552, n.111. Of these children, many are in fact multiracial children classified as only one of their races. Statistics show that children born to parents of different races increased from 1% of the total number of babies born in 1968 to 3.4% of the total in 1989. *Id.* at 531, n. 4. These statistics probably underestimate the true number since the parents themselves tend to be classified as only one race, for example on census surveys. *Id.* (citing to statistics of the Population Reference Bureau). In fact, the majority of people classified as African-American, Latino, Filipino, and Native American are really multiracial, as are a significant, though smaller, percentage of people identified as white. Lythcott-Haims, *supra* note 68, at 544 (citing Maria P.P. Root, *Within, Between, and Beyond Race*, in *RACIALLY MIXED PEOPLE IN AMERICA* 3, 9 (Maria P.P. Root ed., 1992)).

In 1991, there were over 200,000 black/white interracially-married couples in the United States. Lythcott-Haims, *supra* note 68, at 536-537 (citing Lynell Beorge, *Cross Colors*, L.A. TIMES, March 27, 1994). There are no accurate statistics that show how many of these couples seek to adopt. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1166, n. 4. The documented cases of those who try to adopt demonstrate the difficulties they face in an adoption system which favors racially-homogenous families. See, e.g., *Compos v. McKeithen* 341 F. Supp. 264 (E.D. La. 1972), *supra* note 183.

214. Agencies typically classify children as members of one and only one race. See *supra* notes 182-184 and accompanying text. They use the same method for classifying potential adoptive families. See *infra* notes 219-221 and accompanying text.

as one race and only one race leads to further difficulties in finding a match.²¹⁵ Furthermore, this failure to take into account their complete racial heritage denies them the benefits of cultural preservation and racial identity that proponents say justify the race-matching system.²¹⁶

The logical inconsistency of classifying multiracial children as belonging to a single race and trying to match them with a family of that race is demonstrated by the following hypothetical suggested by one writer on the placement of multiracial children:

Where should the child of an Asian woman and a Latino man be placed? Can she go to either a Latino family or an Asian family because she shares [racial characteristics] with both? Can she go to any multiracial family because she is multiracial? Or can she find no home unless a family with her exact racial lineage is located?²¹⁷

Such a child most likely would be labelled either as Latino or Asian and would wait for a home until the agency finds a racially homogenous family of whichever race the adoption workers choose for the child.²¹⁸ What this child really needs, of course, is a family that will love and nurture her as soon as possible, a need which is jeopardized by the existing adoption system.

Making race-based placement decisions becomes even more complicated when adoption agencies classify multiracial families the same way they classify children: by choosing one and only one race. For example, a brown-skinned child whose birth mother is white and whose birth father is unknown was classified as black, while his foster family, a white mother and African-American father, were classified as white.²¹⁹ Consequent-

215. This unrealistic classification approach adds to the placement delays minority children endure. See *infra* notes 219-221 and accompanying text.

216. See *infra* notes 222-225 and accompanying text.

217. Lythcott-Haims, *supra* note 68, at 532.

218. See *infra* notes 219-221 and accompanying text.

219. Lythcott-Haims, *supra* note 68, at 555 (citing Thorwald Esbeusen, *Children Need Homes, Not Ethnic Politics*, in *CRISIS*, Nov.-Dec. 1992, at 21).

ly, the child was “a candidate for removal” from his foster home in favor of a “same-race” placement.²²⁰ An African-American woman and her white husband were surprised to discover that an adoption agency would give them “very low priority” to adopt a multiracial child because, according to the agency, they were not a close enough racial match to such a child.²²¹ It is difficult to imagine a closer racial match to a multiracial child than an interracial couple representing two of the child’s races. This demonstrates the logical inconsistency of applying single-race labels to children and families who are of many races and trying to match them based on inaccurate labels.

Another problem with applying single-race labels to multiracial children and families in race-matching is that it hampers the multiracial child’s ability to develop a sense of his true and complete racial identity.²²² A biracial child, for example, who identifies himself as both black and white does so because he *is* both.²²³ Forcing a single-race label upon a child who is in fact multiracial can actually cause the child to suffer low self-esteem because the single-race label only represents half of who the child is.²²⁴ If cultural preservation is in the child’s best interests, then preserving both or all a multiracial child’s cultural heritages is in that child’s best interests.²²⁵ After all, such a child really is a member of more than one race.

C. SCREENING ON THE BASIS OF AGE, MARITAL STATUS, AND OTHER DISCRIMINATORY FACTORS

Race-matching, while the primary factor responsible for delaying adoptions and undermining the stable placements of

220. *Id.*

221. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1187, n. 60.

222. *See generally*, Lythcott-Haims, *supra* note 68.

223. Forde-Mazrui, *supra* note 69, at 956 (citing Philip M. Brown, *Biracial Identity and Social Marginality*, in 7 CHILD AND ADOLESCENT SOCIAL WORK 319, 325 (1990)).

224. Lythcott-Haims, *supra* note 68, at 555, n.127 (citing PAUL R. SPICKARD, *MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA* 339 (1989)). *Accord*, Forde-Mazrui, *supra* note 67, at 956-57.

225. Forde-Mazrui, *supra* note 67, at 956.

children in potential adoptive families, is not the only factor having that effect. For example, available same-race parents may be denied the opportunity to adopt a waiting child because they are single.²²⁶ Screening factors, such as marital status and age, like race, do little to predict the adoptive parent's ability to raise a child.²²⁷ Yet adoption agencies regularly apply these factors as they strive for a preconceived image of what a family should be.²²⁸ In doing so, the agencies actually deprive many children of early placement in good homes.

Although it is common for children to be raised by only one biological parent, "as late as 1969 a respected adoption expert found it necessary to defend single parent adoption as 'not inherently or necessarily pathogenic.'"²²⁹ Most single adoptive parents are women,²³⁰ although single men adopt children as well.²³¹ These parents are more willing than most adoptive parents to adopt older children, who are harder to place than babies.²³² Their marital status has little if any impact on the successful development of their adopted chil-

226. One little boy in Philadelphia waited six years for a permanent home while the agency responsible for placing him rejected first two potential adoptive parents who were single and then several couples who were not the same race as the child. After six years, the agency took him off its list of children available for adoption because he was unable to bond with a permanent family after years of moving from foster home to foster home. Lythcott-Haims, *supra* note 68, at 553-54 (citing William Raspberry, *Hurdles Slow Adoption of Black Children*, TIMES-HERALD RECORD, December 29, 1990, at 36).

227. Although this comment focuses on race, age, and marital status as parental screening factors, these are by no means the only discriminatory factors used to prevent fit parents from adopting. See, e.g., *In re B.L.S.*, 901 S.W.2d 38 (Ark. Ct. App. 1995), *supra* note 82 (income and marital status were factors in denial of adoption), and *In re Carney*, 157 Cal. Rptr. 383 (Cal. Ct. App. 1979) (father's physical disability was an important factor in trial court awarding custody to the mother).

228. See *supra* notes 161-171 and accompanying text.

229. BARTHOLET, *FAMILY BONDS*, *supra* note 4, at 71.

230. Kathy S. Stolley, *Statistics on Adoption in the United States*, in 3 THE FUTURE OF CHILDREN 26, 37 (Richard E. Behrman, M.D., ed., 1993).

231. BURGESS, *supra* note 80, at 125.

232. Stolley, *supra* note 230, at 37. "Older" hard-to-place children are those over two years old. BURGESS, *supra* note 80, at 125. It should be noted, however, that one reason single parents are so open to adopting older children is that because agencies prefer married couples, single parents realize that babies will go to married adoptive parents first. *Id.*

dren.²³³ The single adoptive parent's extended family is very important for the adopted child, for "it is there that the child will find his surrogate father or mother."²³⁴ Agencies placing children with single parents can and do consider the single adoptive parent's extended family relationships to decide whether placing a child in a particular family is in the child's best interest.²³⁵

Adoption agencies prefer parents in their twenties or early thirties, in part because this is the age at which they believe most biological parents are likely to have children.²³⁶ In *In re Adoption of Tachick*, the Wisconsin Supreme Court considered the argument that the adoption of a three-year-old child by his biological grandparents was not in his best interests because of their age.²³⁷ Mrs. Shehow, the child's grandmother, was fifty-three years old and Mr. Shehow, the grandfather, was fifty-nine years old.²³⁸ Both had possible health problems.²³⁹ The county agency opposing the adoption argued that, due to their age, the Shehows would be likely to die while the little boy was still young, which would be traumatic for him.²⁴⁰ The Wisconsin Supreme Court considered this argument unpersuasive, pointing out, "we have no assurance that if the child were to be adopted by younger people that they would live to a ripe old age."²⁴¹

Furthermore, concerns over the longevity of "older" par-

233. Stolley, *supra* note 230, at 37.

234. BURGESS, *supra* note 80, at 125.

235. *Id.*

236. See *supra* note 156 and accompanying text and note 169 and accompanying text.

237. *In re Tachick* 210 N.W.2d 865, 870 (Wis. 1973). Other issues in the case included the fact that only one of the grandparents' eight biological children had finished high school, a concern that the birth father of the child would become the child's legal brother if the grandparents were allowed to adopt, and concerns over the grandparents' health. *Id.* at 869, 870.

238. *Id.* at 869-870.

239. *Id.* Doctors suspected Mrs. Shehow suffered from high blood pressure and that Mr. Shehow was diabetic, but they had not yet been diagnosed as such at the time of trial. *Id.*

240. *Id.* at 871. The Shehows would be ages 74 and 68 when the child reached the age of 18. One might question whether, in the absence of their possible health problems, there would be any justification for the agency's concern about their longevity.

241. *Id.*

ents make even less sense in the context of adoptive parents in their late thirties or early forties, who also rank lower in the adoption screening system.²⁴² Ironically, the added maturity and the financial and emotional security of these "older" parents are the very characteristics that give them the ability to provide for their children and to develop an exceptionally good relationship with them.²⁴³

The use of discriminatory factors in the screening of adoptive parents does little to advance the best interests of children. Such factors do not tell adoption agencies or courts much, if anything, about the individual parent's ability to raise a child.²⁴⁴ More importantly, the use of these factors often causes delays in permanent placement, particularly for minority children, or results in separating children from prospective adoptive parents who are already raising them.²⁴⁵ The only way to adequately protect children's best interests is to completely eliminate these screening factors and focus instead on the individual parents' ability to nurture and support the child.

VI. RECENT REFORMS

Recent reforms in some states address these problems, but do not go far enough. For example, reforms in many states make interracial adoptions easier.²⁴⁶ These reforms are bene-

242. BARTHOLET, *FAMILY BONDS*, *supra* note 4, at 70.

243. Paul R. Ackerman, *Creating a Family: The Adoption Option*, in 1B CURRENT PERSPECTIVES IN PSYCHOLOGICAL, LEGAL AND ETHICAL ISSUES: CHILDREN AND FAMILIES: CREATION AND CONFLICT 81, 85 (Sandra Anderson Garcia and Robert Batey eds., 1991).

244. *See supra* parts V.B.2. and V.B.3., for a discussion of the failure of race as a factor to predict parental ability, for example.

245. *See supra* notes 147-149 and note 174 and accompanying text.

246. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-105.01(A) (West Supp. 1996) (enacted 1995) (an adoption agency or court "shall not deny or delay a placement or an adoption certification based on the race, the color, or the national origin of the adoptive parent or child"); ME. REV. STAT. ANN. § 1129 (West Supp. 1997), (amended 1995) (adoption may not be denied solely because the parents and child do not share the same race or national origin); MICH. COMP. LAWS ANN. § 722.957 (West Supp. 1996), (enacted 1994), prohibits discrimination against prospective adoptive parents on the basis of race, age, religion, disability or income level. Minnesota still has a preferences-in-adoptive-placement scheme similar to the one California recently abandoned (relatives are considered first, then same-race families, then other families), but MINN. STAT. ANN. § 259.29 (West Supp. 1997)

ficial in that they may shorten the waiting period for minority children awaiting adoptions.²⁴⁷ Thus the laws serve to advance the "best interests of the child" and protect the possible constitutional familial rights of children waiting to be adopted. The reforms, however, with few exceptions, do not address discriminatory screening factors other than race, nor do they completely eliminate any of these factors from consideration.²⁴⁸ The unfortunate effect is to leave open the possibility that adoptions will continue to be delayed and denied based primarily, if not entirely, on factors that have nothing to do with parenting ability.²⁴⁹

This section examines recent reforms in California,²⁵⁰ Michigan,²⁵¹ and Maine.²⁵² The new laws in Maine and California prohibit discrimination against prospective adoptive parents on the basis of race and national origin, and also require that courts and adoption agencies take into account any emotional bonds the child has formed with a foster family in making placement decisions.²⁵³ The new Michigan statute prohibits discrimination on the basis of disability, income level,

(amended 1993) was amended to require "due, not sole, consideration" be given to a child's race in choosing an adoptive home. The words "not sole" were added. *Id.* California now prohibits discrimination on the basis of race or national origin in adoptions. *See*, CAL. FAM. CODE §§ 8708-8710 (West Supp. 1996) (enacted 1995).

247. California repealed its mandatory waiting period of three months before adoption agencies could even consider available non-same-race families. *See infra* note 256. The adoption reform statutes in many states prohibit delaying adoptions on the basis of race. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-105.01(A) (West Supp. 1996), *supra* note 246; WASH. REV. CODE ANN. § 26.33.045 (West Supp. 1997) (adoption shall not be delayed or denied on the basis of race). Maine law directly recognizes the importance of providing "the adoptee a permanent home at the earliest possible date" in meeting the standard of the child's best interests. ME. REV. STAT. ANN. tit. 19 § 1129(2) (West Supp. 1997).

248. *See infra* notes 261-275 and accompanying text and notes 290-294 and accompanying text.

249. *See infra* note 268 and accompanying text.

250. CAL. FAM. CODE §§ 8708, 8709, & 8710 (West Supp. 1996).

251. MICH. COMP. LAWS ANN. § 722.957 (West Supp. 1996).

252. ME. REV. STAT. ANN. tit. 19 § 1129(1) & (2) (West Supp. 1997).

253. ME. REV. STAT. ANN. tit. 19 § 1129(1)(E) & (F), and § 1129(2), CAL. FAM. CODE §§ 8708, 8790, and 8710 (West Supp. 1996). The Maine statute, while not expressly mentioning foster parents, mandates consideration of the child's bonds with various adults in her life in deciding whether the adoption is in the "best interests of the child." The California law requires that foster parents be considered along with other prospective adoptive parents in certain circumstances.

and age, as well as race.²⁵⁴ This section concludes that while these reforms are an improvement over a scheme which requires preferences for same-race families, they leave open the possibility that race and other discriminatory factors will still be used to deny and delay adoptions.

A. CALIFORNIA: ASSESSING THE INDIVIDUAL PARENT'S ABILITY TO MEET THE CHILD'S NEEDS AND CONSIDERING EXISTING PARENT-CHILD RELATIONSHIPS

1. Assessing the Individual Parent's Ability to Meet the Needs of a Child for Cultural Identity

California made a dramatic change in the Family Code in 1995.²⁵⁵ Prior to this amendment, California Family Code Section 8708 required that a diligent effort be made to place the child with either a relative or with adoptive parents the same race as the child before an interracial family could even be considered.²⁵⁶ The new California Family Code Section

254. MICH. COMP. LAWS ANN. § 722.957 (West Supp. 1996).

255. A.B. 1743, Cal. Leg., 1995-1996 Sess. (1995).

256. Prior to the reforms, CAL. FAM. CODE § 8708 (West 1994) (repealed 1995) provided in part:

[T]he following order of placement preferences . . . shall be used . . . in determining the placement of the child:

(a) In the home of a relative.

(b) If a relative is not available, or if placement with a relative is not in the child's best interest, with an adoptive family with the same racial background or ethnic identification as the child. If the child is of mixed racial or ethnic background, placement shall be made with a family of the racial or ethnic group with which the child has the more significant contacts.

(c) If placement cannot be made under the rules set forth in this section within 90 days of the time the child is relinquished for adoption . . . the child is free for adoption with a family of a different racial background or ethnic identification where there is evidence of sensitivity to the child's race, ethnicity, and culture. The child's religious background shall also be considered in determining an appropriate placement. Unless it can be documented that a diligent search . . . for a family meeting the placement criteria has been made, a child *may not be placed* for adoption with a family of a different racial background or ethnic identification pursuant to this subdivision.

Id. (emphasis added).

8708 forbids discrimination against either adoptive parents or children on the basis of race or national origin.²⁵⁷ Family Code Section 8709, enacted with the new Section 8708, provides that courts *may* consider the *child's* race and religion and the adopting parents' ability to "meet the needs of a child of this background" in determining whether the adoption is in the child's best interest.²⁵⁸ The statute does not say whether courts should, or even may, consider the race of the adoptive parents in determining their capacity to meet the child's cultural needs.²⁵⁹

The "diligent search" was to be carefully documented and include efforts to recruit same-race families in the media. CAL. FAM. CODE § 8710 (West 1994) (repealed 1995). Section 8709 did, however, allow adoption agencies to place a child without following the placement preference scheme of Section 8708 if they could show "good cause" to do so. CAL. FAM. CODE § 8709 (West 1994) (repealed 1995).

257. CAL. FAM. CODE § 8708 (West Supp. 1996) provides:

Neither the department nor a licensed adoption agency to which a child has been freed for adoption by either relinquishment or termination of parental rights may do either of the following:

(a) Categorically deny to any person the opportunity to become an adoptive parent, solely on the basis of the race, color, or national origin of the adoptive parent or child involved.

(b) Delay or deny the placement of a child for adoption, or otherwise discriminate in making an adoption placement decision, solely on the basis of the race, color, or national origin of the adoptive parent or child involved.

Id.

258. CAL. FAM. CODE § 8709 (West Supp. 1996) (emphasis added).

259. *Id.* Maine has a similar statute which, like the California statute, does not tell whether courts and agencies may consider the parents' race as well as the child's. ME. REV. STAT. ANN. tit. 19 § 1129(2) provides in part:

In determining the best interests of the adoptee, the court shall consider and evaluate the following factors to give the adoptee a permanent home at the earliest possible date:

*** (B) The capacity and disposition of the adopting person or persons, the birth parent or birth parents or the putative father to educate and give the adoptee love, affection, and guidance and to meet the needs of the adoptee, taking into account the adoptee's cultural, ethnic, or racial background. An adoption may not be delayed or denied solely because the adoptive parent and the child do not share the same race, color, or national origin.

Id. The last sentence was added in 1995. *Id.*

Because these laws are so new, there are no appellate cases yet that interpret the statute's mandate to consider the parents' ability to meet the child's cultural needs. See *infra* part VII.B., discussing how such an assessment might be made without regard to the adoptive parents' race.

The new statutes are an improvement over California's previous preference scheme in that they do not require a waiting period before a multiracial family may even be considered.²⁶⁰ The new laws, however, may not go far enough because they do not explicitly prohibit racial matching in adoption placement decisions.²⁶¹ The statutes no longer require race to be a factor in decisions, but neither do they prohibit it. The problem with this is that it allows agencies to continue their current practices.²⁶²

That is exactly what happened when Connecticut made a similar change in its adoption laws.²⁶³ Connecticut amended its adoption laws in 1986 to prohibit denials of adoptions for foster children "solely on the basis of a difference in race" between the child and potential adoptive parents.²⁶⁴ The task

260. A three-month waiting period was actually *required* under former CAL. FAM. CODE § 8708(c) (West 1994) (repealed 1995), *supra* note 256.

261. CAL. FAM. CODE § 8709 (West Supp. 1996) provides in relevant part:

The department or licensed adoption agency . . . may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective adoptive parent to meet the needs of a child of this background as one of a number of factors used to determine the best interests of the child.

Id. The statute does not say whether the parents' race may enter into such a determination. See *infra* part VII.B for a discussion of how such an assessment might be made without regard to the race of the adopting parent or parents.

262. A Senate bill sponsored by Senators Howard Metzenbaum and Carol Mosely-Braun would deny federal funding to any adoption agency which delays or denies adoptions based solely on race. Some adoption experts criticize the bill saying it does not go far enough and will allow race-matching to continue as long as race is not the only factor in denying an adoption. Albert R. Hunt, *People and Politics: Metzenbaum Breaches the Adoption Color Barrier*, WALL ST. J., July 14, 1994, available in WESTLAW, WSJ Database. See *infra* Section VII, which recommends strengthening statutes such as these by expressly prohibiting consideration of the adoptive parents' race in making placement decisions.

263. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1185, n. 56.

264. CONN. GEN. STAT. ANN. § 45a-726 (West, 1996), previously at CONN. GEN. STAT. ANN. § 45-611, provides:

If the commissioner of children and youth services is appointed as statutory parent for any child free for adoption . . . said commissioner shall not refuse to place such child with any prospective adoptive parent solely on the basis of a difference in race.

Id.

CONN. GEN. STAT. ANN. § 45a-727(c)(3) (West 1996) provides that courts may not disapprove any other adoption solely because of a difference in race, color, or religion. *Id.*

force appointed to implement the new law, however, proposed practices promoting a preference for same-race placement.²⁶⁵ California's new law is very similar to Connecticut's in that it prohibits consideration of race as the sole factor in adoption placement decisions, without explicitly prohibiting an agency preference for race-matched families.²⁶⁶ If anything, the California statute does more than the Connecticut statute to encourage consideration of race as a factor, since it expressly permits the child's race to be a factor in making a determination of the child's best interests.²⁶⁷ When the law allows race to be a factor in adoption placement decisions at all, it is often the decisive factor.²⁶⁸

Even where the law does not require race-matching preference schemes, the "unwritten rules" and practices of adoption agencies do require such schemes.²⁶⁹ Too often, courts are unwilling or unable to second-guess the agencies' decisions. In *Drummond v. Fulton County Dep't of Family and Children's Services*,²⁷⁰ for example, the Fifth Circuit Court of Appeals recognized that race was "given substantial weight" in an agency's decision to remove a biracial foster child from the home of white foster parents who wanted to adopt him.²⁷¹ The court held that such consideration was proper as long as it "was not an automatic-type of thing . . . that is, that all blacks go to black families, all whites go to white families, and all mixed children go to black families, which would be prohibited."²⁷² The *Drummond* court accepted the trial court's finding that race was not the only factor in the agency's decision.²⁷³

265. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1185, n. 56 (citing TASK FORCE ON TRANSRACIAL ADOPTION, OFFICE OF POLICY AND MANAGEMENT, COMPREHENSIVE PLANNING DIVISION, A STUDY OF TRANSRACIAL ADOPTION IN THE STATE OF CONNECTICUT 7, 27 (1988)).

266. CAL. FAM. CODE § 8708(a) (West Supp. 1996), *supra* note 257.

267. CAL. FAM. CODE § 8709 (West Supp. 1996), *supra* note 261. The Connecticut statute does not contain such a provision. *See supra* note 260.

268. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1239.

269. *Id.* at 1184-1185.

270. *Drummond v. Fulton County Dep't of Family and Children's Services*, 563 F.2d 1200 (5th Cir. 1977).

271. *Id.* at 1201, 1203, 1204. They had raised him since he was one month old and had been excellent parents to him during the three years he was in their care.

272. *Id.* at 1204, quoting and approving the trial court's ruling.

273. *Id.* at 1204.

Yet, nowhere does the opinion suggest what factors, other than race, played a role in the agency's decision.²⁷⁴ Allowing agencies and courts to consider race as one of many factors in determining the best interests of the child thus allows the status quo to continue.

One problem courts face in reviewing adoption and foster care placement decisions is that it is very difficult if not impossible to know for certain which factors were crucial to a placement decision.²⁷⁵ Eliminating the use of race as a permissible factor would eliminate the possibility that race could remain a decisive factor in practice. Race cannot be the decisive factor if it cannot be a factor at all.

2. Considering the Child's Existing Bonds With Foster Parents

While failing to adequately protect against the harms of race-matching, California's new law more effectively addresses the problems that inhere in a system which removes children from foster parents or other care-givers by requiring that foster parents be considered as adoptive parents for the children in their care.²⁷⁶ The statute does not require that the foster parents be given preference in placement, only that they be con-

274. *Id.* at 1219 (Tuttle, J., dissenting). "In any event, there was no record, there was no transcript of testimony, there is no indication that any word about other reasons than Timmy's race went into any decision-making . . ." *Id.*

275. *Drummond*, 563 F.2d at 1219 (Tuttle, J., dissenting).

276. CAL. FAM. CODE § 8710 (West Supp. 1996), enacted with §§ 8708 & 8709, provides in part:

[T]he foster parent or parents shall be considered with respect to (placement of) the child along with all other prospective adoptive parents where all of the following are true:

- (a) The child has been in foster care with the foster parent or parents for a period of more than four months.
- (b) The child has substantial emotional ties to the foster parent or parents.
- (c) The child's removal from the foster home would be seriously detrimental to the child's well-being.
- (d) The foster parent or parents have made a written request to be considered to adopt the child.

Id.

sidered.²⁷⁷ It does, however, require an assessment of the effect of removal from the foster home on the child in requiring agencies to consider whether removal will be "seriously detrimental to the child."²⁷⁸ It also requires courts to look at the emotional bonds between the child and the foster parents.²⁷⁹ It is difficult to see how, after finding that a child has emotional bonds with her foster parents and that removal from the foster home would be detrimental, an agency could find that adoption by prospective parents other than the foster parents would be in the child's best interest.

B. MAINE: EVALUATING EXISTING EMOTIONAL BONDS IN DETERMINING THE CHILD'S BEST INTEREST

Maine has similarly addressed these problems by requiring that courts consider the child's bonds with potential adoptive parents in determining the best interests of the child.²⁸⁰ Emphasizing these bonds in decisions about adoptive placement would prevent needless trauma to children separated from loving foster parents in favor of strangers who more nearly match an adoption agency's profile of a proper parent for that child.²⁸¹ Because of the importance of stable relation-

277. *Id.*

278. CAL. FAM. CODE § 8710(d) (West Supp. 1996), *supra* note 276.

279. CAL. FAM. CODE § 8710(c) (West Supp. 1996), *supra* note 276.

280. ME. REV. STAT. ANN. tit. 19 § 1129(2) (West Supp. 1997) provides in part:

In determining the best interests of the adoptee, the court shall consider and evaluate the following factors to give the adoptee a permanent home at the earliest possible date:

(A) The love, affection and other emotional ties existing between the adoptee and the adopting person or persons, the birth parent or birth parents or the putative father.

Id.

Foster parents and the children in their care often share emotional bonds. *See supra* notes 94-102 and accompanying text.

281. *See e.g., In re Jasmon O.*, 878 P.2d 1297, 1305 (Cal. 1994), *supra* notes 118-128 and accompanying text, where the child was so traumatized at the prospect of being separated from her foster parents that she developed a mental illness, called separation anxiety disorder. This case, while illustrative of the problems children face when separated from loving care-givers, dealt with a failed attempt to reunite the child with her birth father rather than a decision to allow someone other than her foster parents to adopt her. *See also McLaughlin v. Pernsley*, 693 F. Supp. 318, 327 (E.D. Pa. 1988), where a child developed a severe depression of childhood as a result of being removed from his foster home; and *In*

ships in the lives of children, the focus should be on this factor, rather than on factors which have nothing to do with parenting ability.

C. MICHIGAN: PROTECTING AGAINST MORE THAN RACIAL DISCRIMINATION

Michigan amended its adoption laws in 1994 to prohibit adoption agencies from discriminating against potential adoptive parents on the grounds of age, race, religion, disability, or income level.²⁸² The benefit of such a scheme is that it opens more potential adoptive homes for waiting children. By providing more placement options, the new law better safeguards the rights of children to a stable and permanent home.

There are two important reasons to extend adoption reforms beyond race discrimination, as Michigan has done. First of all, factors such as age, religion, ethnicity, and marital status have little to do with parental fitness.²⁸³ It is equally dev-

re M.D., Jr., 653 A.2d 873, 876-877 (D.C. Ct. App. 1995), where the relationship that had developed between a foster mother and her 3-year-old foster son was a factor in the decision to allow her to adopt the child.

282. MICH. COMP. LAWS ANN. § 722.957(1) (West Supp. 1996) provides:

[A]n adoption facilitator shall not refuse to provide services to a potential adoptive parent based solely on age, race, religious affiliation, disability, or income level. A child placing agency shall not make placement decisions based solely on age, race, religious affiliation, disability, or income level.

Id.

MICH. COMP. LAWS ANN. § 722.957(3) (West Supp. 1996) provides:

In an adoption in which a [birth] parent or guardian selects or participates in the selection of the adoptive parent, an adoption facilitator shall allow the [birth] parent or guardian the option of selecting from the . . . entire pool of potential adoptive parents who have been determined suitable to be adoptive parents.

Id.

MICH. COMP. LAWS ANN. § 722.957 (West Supp. 1996). *See also* WIS. STAT. ANN. § 48.82(5) (West Supp. 1997) (providing that “[a]lthough otherwise qualified, no person shall be denied the benefits of this section because the person is deaf, blind or has other physical handicaps.”); and CONN. GEN. STAT. ANN. § 45a-727(c)(3) (West 1996) (prohibiting courts from denying adoptions “solely because of an adopting parent’s marital status or because of a difference in race, color or religion . . . or because the adoption may be subsidized . . .”).

283. *See* Hollinger, *supra* note 3, at 48, pointing out that such factors “may

astating for children to be removed from a foster home for permanent placement elsewhere when the reason for the removal is the foster parent's age or marital status.²⁸⁴

A second reason to prohibit the use of discriminatory criteria in adoption placement decisions is the effect of combining such factors with race-matching. The current law is that race may be a factor as long as it is not the only factor.²⁸⁵ In cases where, for example, both race and age are factors, courts may have no grounds on which to overturn a decision based entirely on discriminatory factors. In *Child v. Stangler*, for instance, a single foster mother challenged a denial of her petition to adopt her foster daughter.²⁸⁶ Factors in the denial were the foster mother's race, age, and marital status.²⁸⁷ The United States District Court for the Western District of Missouri held that it did not have jurisdiction to hear the case since there were clearly grounds for the agency decision other than race.²⁸⁸ According to the court, the consideration of the foster

have only questionable relevance to . . . parenting skills." See *supra* part V.C. for a discussion of the limits of any benefit to screening on the basis of age and marital status. See generally BARTHOLET, FAMILY BONDS, *supra* note 4.

284. See, e.g., *In re Tachick*, 210 N.W.2d 865 (Wis. 1973), where the biological grandparents of a three-year-old boy sought to adopt him. They had cared for him since birth at the request of the child's birth mother (the birth father was their son). *Id.* at 866. The trial court denied the adoption primarily because of the grandparents' age, although their failure to make sure their eight grown children finished high school and some possible health problems were also factors. *Id.* at 869. The Supreme Court of Wisconsin reversed, giving decisive weight to the trauma the child would likely suffer if separated from his grandparents, whom he saw as his parents. *Id.* at 872.

285. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1239. See also *McLaughlin v. Pernsley*, 693 F. Supp. 318, 321 (E.D. Pa. 1988), where, explaining its decision to overturn a foster care placement decision, the court noted that "defendants were unable to show that the Department's decision to remove Raymond Bullard from the McLaughlins was based upon any reason other than that of race." The *McLaughlin* court found race was the sole factor, but it is often difficult to so find. Cf. *Drummond v. Fulton County Dep't of Family and Children's Services*, 563 F.2d 1200 (5th Cir. 1977).

286. *Child v. Stangler*, No. 92-0850-CV-W-6, 1992 WL 396318 (W.D. Mo. Dec. 28, 1992). The case was an equal protection challenge to a state court ruling. *Id.* at *1.

287. *Id.* at *2. The brief opinion did not discuss any evidence of the foster mother's parenting skills or her relationship with the child. There was also no mention of how long the child had been in her care.

288. *Id.* The court explained, however, that she would be able to appeal to the Missouri state courts. *Id.* In a footnote which cited *McLaughlin v. Pernsley*, 693 F. Supp. 318, (E.D. Pa. 1988), *aff'd* 867 F.2d 308 (3d Cir. 1989), *infra* notes 300-303

mother's age and single status were enough to defeat her equal protection claim, which could be sustained only if race were the *only* factor in the denial.²⁸⁹ Thus, consideration of factors such as age and marital status can defeat a challenge to an essentially race-based adoption decision.

The Michigan law has two weaknesses, however. First, the law does not prohibit consideration of these factors; it merely says they may not be the "sole" reason for a placement decision.²⁹⁰ This leaves open the possibility that agencies will continue to use these factors to deny adoptions.²⁹¹ In spite of laws on the books giving single adults the right to adopt, agencies regularly deny adoptions based on marital status.²⁹² Similarly, in spite of adoption laws with no maximum age limit for adoptive parents, agencies routinely deny adoptions on the basis of age.²⁹³ As with race, then, an outright prohibition on considering these criteria is necessary to prevent agencies from using these discriminatory factors as decisive factors in denying adoptions.

The second weakness in the Michigan law is that it gives only a finite list of factors which cannot be used to deny an adoption, rather than eliminating any standards which would be discriminatory in any area of the law other than adoption. The law does not address instances where agencies screen out potential parents because of their marital status or ethnicity, for example. Such standards can needlessly delay adoption placements just as much as the factors addressed by the Michigan law.²⁹⁴ For these reasons, this comment will recommend

and accompanying text, the court suggested the foster mother might be able to challenge the state court's factual findings that she would be unable to "help the child learn about her ethnic heritage and culture and give her cultural support" in a state appeals court. *Child*, 1992 WL 396318. at *2 and n.3. With the foster mother's age and marital status remaining as permissible factors, however, it would be quite possible for such a challenge to result in reversing the trial court's factual finding on her ability to meet her foster daughter's cultural needs without reversing the denial of adoption. Her age and marital status would be enough to support the denial. *Id.* at *2.

289. *Child*, 1992 WL 396318 at *2.

290. MICH. COMP. LAWS ANN. § 722.957(1) (West Supp. 1996), *supra* note 282.

291. See *supra* part VI.A. for a discussion of the ineffectiveness of similar language in statutes meant to limit race-matching.

292. See *supra* note 8.

293. *Id.*

294. One agency refused for three years to place Haitian twin babies for adop-

completely eliminating any discriminatory factors from adoption decisions, and require that courts and agencies focus instead on prospective adoptive parents as individuals.

VII. RECOMMENDATIONS TO IMPROVE THE SCREENING SYSTEM

Children suffer when agencies delay adoptive placements in the hopes of finding married parents young enough to have biological children, both of whom are the same race as the child. They suffer when their emotional bonds with foster parents are severed so agencies can instead place them with young, married, same-race strangers.²⁹⁵ They suffer when they are moved from one foster home to another for many years and deprived of an opportunity to form parent-child bonds at all.²⁹⁶ The current trend towards eliminating the use of race as the "sole factor" in denying adoptive placements is a step in the right direction, but it does not adequately protect the interests of children waiting for adoptive homes. Adoption reform laws must completely eliminate any factors which would be discriminatory in other areas of the law from consideration in adoption placement decisions; otherwise, such factors will continue to be decisive.

This comment recommends that adoption placement decisions be based solely on assessment of the personal qualities which make for excellent parenting, qualities such as patience, affection, maturity, and motivation to parent.²⁹⁷ The focus should be on the prospective adoptive parents' bonds with the child they seek to adopt, where possible, both because of the critical importance of these relationships to the child and because of the opportunity such a focus affords adoption agency workers to assess the parents' ability to raise the individual child they seek to adopt. This comment therefore recommends

tion while it searched for Haitian parents who spoke French. Only after three years did the agency allow an African-American couple who did not speak French to adopt the twins. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1187, n. 60.

295. See *supra* note 281.

296. See *supra* notes 148-149.

297. See *supra* notes 78-85 and accompanying text.

giving preference to a child's actual care-givers in placement decisions. This comment further recommends providing a remedy for violations of these standards, which would make the proposed reforms more effective.

A. A PREFERENCE FOR ACTUAL CARE-GIVERS

A requirement that courts and agencies give priority to requests by potential adoptive parents who are actual care-givers of the children they seek to adopt would vastly improve the screening system.²⁹⁸ The Maine adoption law discussed in part VI.B. would serve as a model because it specifically mandates consideration of the emotional bonds between children and potential adoptive parents in determining the ability of those parents to care for the child.²⁹⁹ Stability in early childhood is *the* most significant factor in the success of adoptions.³⁰⁰ Furthermore, the United States Supreme Court has repeatedly emphasized the importance of these parent-child bonds when extending constitutional protection for family relationships.³⁰¹

Another advantage of priority consideration for actual care-givers' adoption petitions is that such a practice would

298. This comment refers to actual care-givers as any parents who are already raising the child they seek to adopt, including foster parents or grandparents or other relatives. The idea of giving priority to such potential adoptive parents would be to require agencies to first consider their petitions to adopt before moving on to consider other potential parents.

299. ME. REV. STAT. ANN. tit. 19 § 1129(2)(A) (West Supp. 1997), *supra* note 280.

300. Bartholet, *Where Do Black Children Belong?* *supra* note 6, at 1224, n. 164 (citing W. FEIGELMAN & A. SILVERMAN, *CHOSEN CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS* 92-93 (1983)), pointing out that the disruption and discontinuity in the lives of children before they are placed in a permanent adoptive home are the reason early placement is so important for children's well-being.

301. *See, e.g.*, *Lehr v. Robertson* 463 U.S. 248 (1983) and *Quilloin v. Walcott* 434 U.S. 246 (1978) (holding that unwed biological fathers did not have a constitutionally protected interest in maintaining their relationships with children for whom they took no responsibility); *Smith v. Organization of Foster Families for Equality and Reform* 431 U.S. 816 (1977) (discussing in dicta the importance of emotional bonds within families to the constitutional protection of family relationships); *Stanley v. Illinois* 405 U.S. 645 (1972) (holding it unconstitutional to remove children from an unwed father who had established parent-child bonds with his children and taken responsibility for their care). *See supra* Part IV, Constitutional Protection of the Family, for a discussion of this issue.

give agencies and courts ample evidence with which to assess parental fitness on an individual basis. When considering the adoption petition of potential parents who are already caring for the child they seek to adopt, courts or agencies have before them evidence of those parents' ability to raise that child. That is, they have before them evidence of how the child and parents interact, what their relationship is like, and how the child is developing under their care. Such evidence is not available in considerations of other potential adoptive parents. Thus, giving priority consideration to potential adoptive parents already caring for a child serves the best interest of the child both by preserving the child's emotional bonds and by allowing courts and adoption agencies the opportunity to base their decision on the information most likely to help them accurately predict successful parenting.

B. ASSESSING PARENTS ONLY AS INDIVIDUALS

Although it is not possible to base an assessment of potential adoptive parents who are not already caring for a child on their relationship with that child, they too should be assessed as individuals without regard to discriminatory factors. Some of these potential adoptive parents may already have children, in which case adoption agency workers can assess their parenting ability based on their relationships with these children.³⁰² Such an inquiry is, of course, not possible for prospective parents seeking to adopt their first child. Many such prospective parents may, however, have significant contacts with the children of friends or relatives. Asking about interactions with such children might also give adoption agency workers a picture of the prospective parents' ability to care for a child of their own. Moreover, personality traits such as warmth and affection, maturity, and stability are far more important to a meaningful parent-child relationship than are factors such as race, marital status or age.³⁰³

302. See, e.g., BURGESS, *supra* note 80, at 3, telling the story of one adoptive family with whom she placed a baby boy. Burgess began her investigation of their parental fitness by visiting the family's home and observing the parents' interactions with their daughter. *Id.*

303. "Personal qualities of the adoptive parents are of paramount importance; the age, income and social class are far less important." *In re Tachick*, 210

Race need not be a factor in deciding whether adoptive parents will be able to meet a child's needs for cultural awareness and positive racial identity. In *McLaughlin v. Pernsley*, for example, the Federal District Court for the Eastern District of Pennsylvania made an individual assessment of this ability while hearing a challenge to an agency's decision to remove a black foster child from the home of a white foster family.³⁰⁴ The *McLaughlin* court recognized that while the child's severe depression after being removed from the only home he had known was a more pressing concern than his racial and cultural needs, an inquiry into the McLaughlins' ability to meet those needs was nonetheless proper and relevant to the decision.³⁰⁵ In making such an inquiry, the court determined that the McLaughlins lived in a racially-integrated neighborhood, planned to send Raymond to a racially-integrated school, and would encourage him to learn about his racial heritage and play with both black children and white children.³⁰⁶ The court implied that such an inquiry was to be made regardless of the race of the foster parents involved.³⁰⁷ This case demonstrates that courts and agencies can, and sometimes do, assess potential adoptive parents as individuals.³⁰⁸ An appropriate

N.W.2d 865, 870, n.7 (Wis. 1973) (citing PRINGLE, ADOPTION FACTS AND FALLACIES: A REVIEW OF RESEARCH IN THE UNITED STATES, CANADA, AND GREAT BRITAIN (1968)). See also BURGESS, *supra* note 80, at 14, noting that the only value of factors such as age and race to adoption agencies is to "limit the number of applicants."

304. *McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd*, 867 F.2d 308 (3d Cir. 1989). The McLaughlins, a white couple, had cared for a black foster son, Raymond, since he was five months old. *Id.* at 319. After the McLaughlins had cared for Raymond for two years, the agency transferred him to an African-American foster family. *Id.* at 321. Raymond had thrived in the McLaughlins' care and had developed deep emotional bonds with them. The agency removal was contrary to the recommendations of Raymond's case worker. *Id.* at 323. The McLaughlins challenged the agency's decision on due process and equal protection grounds. *Id.* at 319-20.

305. *McLaughlin*, 693 F. Supp., at 324, 330.

306. *Id.* at 330.

307. *Id.* at 324. "This Court, however, does recognize that it must determine whether foster parents, such as the McLaughlins, can adequately provide for a foster child's racial and cultural needs." *Id.* The court gave no indication that such inquiry need only be made when the foster parents are white. The court cited evidence that some black parents were not able to provide adequate care to a child such as Raymond. *Id.*

308. *McLaughlin*, at 324. "[T]he use of race as a factor . . . is not . . . 'necessary' where a governmental entity such as this Court can make placement decisions on an individualized basis. [Placement] decisions made under these cir-

reform statute would limit agencies to consideration of the personal qualities of individual parents by explicitly prohibiting consideration of race and all other factors which do not relate to parenting ability. Such a statute might also include an illustrative list of permissible factors.³⁰⁹

C. A REMEDY FOR VIOLATIONS

California Assemblyman Goldsmith, who proposed the amendments to California's adoption law discussed in the previous section, also proposed providing a remedy for violations of the new Family Code section prohibiting categorically denying adoptions based solely on race.³¹⁰ One benefit is that a remedy would recognize that the current screening system does indeed cause harm, and would focus courts' attention on this harm. As such, the availability of a remedy might change the result in a case such as *Drummond v. Fulton County Dep't of Family and Children's Services*.³¹¹ The *Drummond* court

cumstances should not be decided by use of pernicious generalizations but rather should be decided on individual merit." *Id.* at 324.

In *In re Tachick*, 210 N.W.2d 865 (Wis. 1973), the Wisconsin Supreme Court made a similar assessment without regard to the age of the adopting parents. *Id.* at 870. The court considered the fact that the child's growth and development under their care were "beyond average for [his] age." *Id.* at 872. See also *In re M.D., Jr.*, 653 A.2d 873 (D.C. Ct. App. 1995), where the court reversed a decision to deny the petition of a single foster mother to adopt her foster son after reviewing evidence that she had been an excellent mother to the child for the three years he had been in her care.

309. It would be too rigid to limit agencies to a finite list of characteristics to consider. "Putting families together in adoption is not a science. It is an art." BURGESS, *supra* note 80, at 14. So long as the statute is clear that only factors which relate directly to parenting ability of the parent as an individual rather than as a member of a particular group, the law would serve its purpose.

310. A.B. 1743 § 4, Cal. Leg., 1995-1996 Sess. (1995). The proposed version of CAL. FAM. CODE § 8708(c) would have provided:

"Any person injured by the violation of subdivision (a) by a public or private adoption agency may bring a civil action against that agency or entity for injunctive relief or damages." A.B. 1743 § 4, Cal. Leg., 1995-1996 Sess. (1995). Subdivision (a) contains the provisions against using race as a sole reason for denying or delaying an adoption. *Id.*

This proposed statute only would have provided a remedy where race was the sole factor in denying an adoption. The California reform law it was meant to enforce only prohibits the use of race as the sole factor in denying adoptions. See CAL. FAM. CODE § 8708 (West Supp. 1996), *supra* note 257, and CAL. FAM. CODE § 8709 (West Supp. 1996), *supra* note 261.

311. *Drummond v. Fulton County Dep't of Family and Children's Services*, 563

ignored not only the emotional bonds that had developed between the child and the foster parents who wished to adopt him, but also the possibility that the child might be adversely affected psychologically by the separation from the Drummonds.³¹² Had emotional injury to the child been an element of the Drummonds' claim, it would have been more difficult for the court to ignore this possibility.³¹³

Another benefit of such a remedy is that it would give these laws more bite. An example of the difficulty in implementing reforms of the adoption screening system is the experience of Connecticut. There, an effort at reform was undermined when those charged with implementing a law prohibiting race-based adoption denials proposed a plan for race-matching.³¹⁴ If a remedy is available, agencies may be more reluctant to continue using improper criteria in adoptive placement decisions, while courts would be more aware of the issue. Thus, a remedy would help to effectuate the recommended reforms.

VIII. CONCLUSION

Families enjoy strong constitutional protection for reasons other than biological links. Among the reasons for this protection is the importance of the emotional bonds that connect family members. Preserving such bonds is critical to the emotional well-being of young children. The California courts have recognized a fundamental right for children to a stable and secure family where these emotional bonds may be preserved and have suggested that such a right may be constitutionally mandated. The current system of screening adoptive parents is

F.2d 1200 (5th Cir. 1977), *supra* notes 270-275 and accompanying text.

312. *Id.* at 1208. There was no discussion in the opinion of possible harm to Timmy, although the independent attorney for the child submitted evidence of psychological literature proving the "traumatic effect of such moves on young children." *Id.*

313. The *Drummond* court did, however, manage to ignore the overwhelming evidence that race was in fact the sole factor in the decision to deny the Drummonds' request to adopt, which, even under existing law, was grounds for reversal. *Id.* at 1219 (Tuttle, J., dissenting). Therefore, it is far from certain that stronger laws would prevent any and all *Drummond*-like rulings.

314. *See supra* notes 264-265 and accompanying text.

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inconsistent with this protection and with the standard of “the best interests of the child,” which is supposed to be central to all child placement decisions. Adoption laws which prohibit consideration of any factors other than the capacity of individual parents to love, nurture, and take care of a child, give preference to potential adoptive parents who are already taking care of the child, and provide a remedy for violations of these standards would more adequately protect the interests of children waiting for adoptive homes.

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