DISCOURAGING RACIAL PREFERENCES IN ADOPTIONS

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For many years, child welfare advocates in the United States have lamented the large number of African-American children available for adoption in the public foster care system and how they wait longer than children of other races to be adopted.1 Although not the subject of nearly as much debate, African-American infants2 in the private adoption system are also apparently less desirable than their white counterparts. African-American families adopt only a small number of the African-American children available.3 At the same time, there are many more white families seeking to adopt than there are white infants available. For years, legal barriers to transracial adoption4 of African-American children effectively barred whites from adopting them. However, now that those barriers have been removed, one might expect many more white families to adopt African-American children. Yet, very few do, choosing instead to adopt internationally despite the high financial costs, extensive delays, and dual bureaucracies.5 Since 2000, Americans have adopted more than 100,000 children

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3Although African-Americans adopt at twice the rate of whites, there are fewer African-Americans in the population. GAIL STEINBERG & BETH HALL, INSIDE TRANSRACIAL ADOPTION 140 (2000).

4Although transracial adoption includes families where the parents and children are of different races and ethnicities other than Caucasian and African-American (such as Caucasian and Chinese or Caucasian and Guatemalan), in the U.S., the literature and debates on transracial adoption have focused on whites’ adoption of African-American children and, until the enactment of the Indian Child Welfare Act in 1978, on whites’ adoption of Native-American children.

from countries such as China, South Korea, Russia, and Guatemala, making the United States the largest “importer” of foreign born children.

Americans cite many reasons for adopting internationally: there are few healthy infants available in the United States, international adoptions are faster, cheaper, more humanitarian, and less likely to fall through than domestic adoptions. I argue that there is another reason many Americans opt to adopt internationally: race. Although the majority of children available for international adoption are not white, they are not Black either. Most come from Asia and Latin America. In contrast, many of the infants available for adoption in the United States are African-American or biracial--children whom, for various historical and social reasons, the majority of white Americans have expressed little interest in adopting. In other words, although whites may be willing to adopt nonwhite children, most prefer that they not be Black.

Many Americans are not aware that their preferences for foreign born children over African-American children are based on race. Most of us subscribe to an anti-discrimination norm. Consequently, we try to find non-race based explanations for our beliefs and behaviors. However, studies have repeatedly shown that most of us have unconscious biases against certain racial groups even when we honestly believe otherwise. In other words, we may honestly self-report that we think highly of a certain group (e.g. Asian-Americans or homosexuals), but implicit bias tests may reveal that we hold negative attitudes towards that group. Studies have shown that whites’ (and other groups’) implicit biases against African-Americans influence employment decisions, criminal convictions, teaching evaluations, the perception that a person is holding a gun as opposed to a cell home or other harmless object, the perception that a person is engaging in hostile behavior, views on the death penalty, and even the type of information we recall. Thus, it should come as no surprise that unconscious biases might influence prospective parents to prefer non-African-American children to African-American children.

This Article proceeds in three parts. Part I examines the role race plays in both domestic and international adoptions. It then analyzes Americans’ stated reasons for adopting internationally and debunks the myths that international adoptions are faster, cheaper, safer, and more humanitarian than domestic adoptions.

Part II explores the difficulties historically faced by whites who adopted or sought to adopt African-American children and the law’s current approach to transracial adoptions. It then explores the continuing socio-cultural barriers to whites’ adoption of African-American children and the cognitive biases that lead
Americans to prefer foreign born non-white children to African-American children.

Part III builds on the work of scholars who argue that the law must discourage white adoptive parents from exercising racial preferences for white children. I argue that adoptive parents may have valid, nondiscriminatory reasons for preferring children of the same race, but that once they decide to adopt transracially, the law should discourage them from selecting children on the basis of race.  

I.  RACE AND ADOPTION

A.  RACIAL HIERARCHY

There is a rich literature demonstrating that most Americans have explicit or implicit biases against minority groups. Studies have found bias against African-Americans, Latinos, and Asian-Americans. Notably, it is not only whites who harbor negative attitudes towards certain groups—minorities themselves hold negative attitudes against other minority groups and even members of their own group. To illustrate, Asian Americans’ biases against African-Americans are almost as strong as whites’ biases against African-Americans\(^9\) and studies have shown that Latinos and Asian-Americans favor whites over members of their own group.\(^11\)

Although whites favor members of their own group above nonwhites, there is evidence that biases against some racial minorities is greater than that against others. Many scholars have argued that a racial hierarchy exists in American society where “whites are at the top, African-Americans are at the bottom, and Asians and Latinos are in between.”\(^12\) Although all nonwhite persons

\(^9\)Although there are 126,000 children in the U.S. foster care system waiting to be adopted, see AFCARS REPORT, this Article focuses primarily on children available through private agencies. Most Americans want to adopt healthy infants, but only three percent of the children available through the foster care system are under the age of one, and a substantial percentage of those children have special needs or are at risk of developing a significant medical condition. Id. As a result, most Americans seeking healthy infants turn to the private system. Although one-third to one-half of all private adoptions of domestic infants are “independent”—the newborn is placed by the birth parents directly with an adoptive family with the help of facilitator (often an attorney, doctor, or clergy official), rather than through a licensed agency—almost all of the healthy African-American infants available are placed through private agencies. Thus, when discussing African-American infants, this Article focuses on private agency placements.

\(^10\)Kang, supra note ___, at 1538.

\(^11\)Kang, supra note ___, at 1533 & nn 224 & 225. Discuss how some Latinos want their children to marry up by marrying a white person.

rank below whites, some nonwhites are perceived as preferable to others.\textsuperscript{13} For example, Asian-Americans are perceived as “smart, hardworking, [and] law abiding.”\textsuperscript{14} Thus, whites might more openly welcome an Asian-American family to their neighborhood than an African-American family.\textsuperscript{15} Similarly, the stereotypes attributed to certain minority groups, although offensive, are more conflicting than the exclusively negative stereotypes reserved for African-Americans. To illustrate, the stereotypes about Asians is that they are “intelligent, gifted in math and science, polite, hard-working, family oriented, law abiding, and successfully entrepreneurial.”\textsuperscript{16} The stereotypes about Latinos are mixed: they are perceived as lazy, hot-blooded, and disposed to criminal behavior, but they are also perceived as devout Catholics with strong family values.\textsuperscript{17} In contrast, the only “positive” stereotype about African-Americans is that they are good athletes and entertainers.\textsuperscript{18} Otherwise, they are generally perceived as lazy, unintelligent, and likely to engage in criminal behavior.\textsuperscript{19}

“If you are white, you’re alright. If you’re brown, stick around. If you’re black, stay back.”

\textsuperscript{13}Elizabeth Martinez, Beyond Black/White, in THE LATINO/A CONDITION 466, 471 (Richard Delgado & Jean Stefancic eds. 1998) (“racism is experienced differently by Native Americans, African-Americans, Latinos, and Asian/Pacific Americans”); Id. (“the relatively light skin and “Caucasian” features of many Latinos mean they are less threatening in the eyes of white racism . . . than African-American.”); see Dalton, supra note 183, at 1131 (“Blacks believe that Latinos are more “acceptable” to White society by virtue of their lighter color (on average)”); Twila Perry, Thoughts on Identity, Choice and Coalition, 20 B.C. THIRD WORLD L.J. 111, 113-14 (2000) [hereinafter Identity] (arguing that although all non-white women “have been victims of racism” and none have the status “that is accorded to white women,” “there is a hierarchy among women of color” in which “Black women are ranked at the bottom”); Id. at 114 (arguing that the oppression of Blacks is different than that of other people of color”).

\textsuperscript{14}FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 40 (2002); Cynthia Kwei Yun Lee, Race and Self-Defense, 81 MINN L. REV. 367, 424 (1996). This is known as the Asian-as-model-minority stereotype.” Id.

\textsuperscript{15}Cf. Identity, supra note 184, at 115 (arguing that although “White America also has stereotypes of non-white men of different ethnicities . . . Black men conjure up in the white mind unique images in terms of physical strength, sexuality, and menace.”); Id. (“racism in this society does not simply focus on minority status–instead there is a unique and powerful stigma, that is specifically attached to African ancestry.”)

\textsuperscript{16}Wu, supra note 185, at 40.

\textsuperscript{17}See Lee, supra note 185, at 441-43 & n.302 (discussing stereotypes of Latinos as lazy, law breaking, and hot-tempered); Steven Bender, Will the Wolf Survive?, 78 DENV. U.L. Rev. 719, 736-37 (2001) (discussing negative stereotype of Latinos as lazy and hot-blooded along with positive perceptions of Latino culture—“spiritual influences, and the importance of family.”) Further, not all Latinos are perceived in the same manner; those who are lighter skinned are perceived differently (more positively) than darker-skinned Latinos. See Lee, supra note 185, at 441.

\textsuperscript{18}See Lee, supra note 185, at 424 n.202.

\textsuperscript{19}Id. at 401-23 (discussing the Black-as-criminal stereotype); Wu, supra note 185, at 204 (telling story of white police officers who shot African-American police officers believing they were criminals); Lee, supra, at 424 n.202 (stereotype of African-Americans as “mentally inferior, lazy and sub-human”).
“positive” stereotypes about women of Asian and Latin-American descent, African-American women are generally perceived as welfare mothers whose high rate of nonmarital births reflect weak family values.

The world of adoption reflects the same racial hierarchy that exists in larger society. Although most white Americans would prefer to adopt white children, many are willing to accept an Asian or Latin-American child before they would adopt an African-American child. In the same way that it might be easier for some parents to accept their child’s interracial marriage to a person of Asian or Latin-American descent than their marriage to an African-American, friends, family members, and neighbors might be more tolerant of a white family’s adoption of a child from China or Guatemala than their adoption of an African-American child. Indeed, in major cities such as New York, Los Angeles, and their neighboring suburbs where relatively large numbers of professional white families have adopted Asian or Latin-American children, these families are immediately welcomed. In contrast, white parents of African-American children

20Asian women and Latin-American women are often portrayed as good mothers and obedient wives.

21Identity, supra note 184, at 113 (discussing stereotypes of African-American women as “promiscuous welfare mother”); Id. (arguing that “the most degrading and vicious stereotypes are reserved for Black women.”); Lee, supra note 185, at 401 (discussing stereotype of African-American women as dangerous).

22Glaser, supra note ___ (“Blond blue-eyed girls are at the top and African-American boys are at the bottom.” (citing Margaret Fleming, Director of Adoption-Link); Appleton, supra note ___, at 425 (“present adoption practices seem to reflect a racial ranking with white infants at the top of the hierarchy”); see also Interview with Beth Hall, supra note 29 (“There is a racial hierarchy. People prefer Chinese girls to African-American boys”).

23Cf. Jim Chen, Unloving, 80 IOWA L. REV. 145, 153-54 (1994) (noting that intermarriage rates between Mexican Americans and whites “have long been as high as those for European immigrant groups earlier this century”); Id. (noting that since 1981, more children have been born to a Japanese-American and a white parent than to two Japanese American parents); Identity, supra note 184, at 113 (noting that “Black women have the lowest rates of exogamy of any women of color”); Id. at 113-14 n.2 (noting that only 6% of African-Americans married interracially as opposed to 40-60% of Native-Americans and 30% of Latinos). Latino and Asian families are also less likely to object to their children marrying a person of another race so long as that person is not African-American. See Tanya Hernandez, Afro-Mexicans and the Chicano Movement, 92 CAL. L. REV. 1537, 1542 (2004) (“Most Mexicans disfavor darker-skinned marriage partners because of their desire for lighter-skinned children who ‘improve the race.’”).

24Christopher Bagley, INTERNATIONAL AND TRANSRACIAL ADOPTIONS 78 (1993); Cf. Michelle Van Leeuwen, The Politics of Adoptions Across Borders: Whose Interests Are Served?, 8 PAC. RIM L. & POL’Y 189, 198 (1999) (noting that in 1987, only 1,169 African-American children were placed in white homes as compared to 5,850 Hispanic and Asian children adopted by white families); see also Hall & Steinberg, supra note 203 (noting that white adoptive parents believe they can successfully raise a child of another race so long as the child’s race or ethnicity is accepted by their community and thus assume that race is not an issue for Latino or Asian children). Id. (citing story of a white couple of Italian descent who were encouraged to adopt a Salvadorean baby because as Italians, they have dark hair and eyes and race would not be an issue). Id. (citing white couple who requested “an Asian or Latino child [because] she or he will fit into our community with no problem”).
have not found their neighbors and relatives to be so tolerant.\footnote{Bagley, supra note 208, at 78.} What explains the different reactions? Race might be a factor.

When Americans first started adopting transracially in the 1960s, African-American children were rarely their first choice. They preferred Native-American, Hispanic, or Asian-American children to African-American or biracial children.\footnote{Richard Banks, The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action, 107 Yale L.J. 875, 888 (1998). Before the enactment of the ICWA (which has made it very difficult for non-Native American families to adopt Native-American children), whites routinely preferred to adopt Native American children over African-American children. Lovelock, supra note 37, at*2, 6.} This preference continues in both domestic and international adoptions today.\footnote{Fogg-Davis, supra note 154, at 12; see also Telephone Interview with Gina Brockmeyer, supra note 29 (stating that most white adoptive families are not willing to take an African-American infant even though the wait is much shorter than for a white infant).} White Americans adopting a child of another race are five times more likely to adopt a non-African-American child than an African-American child.\footnote{Banks, supra note 210, at 964 n.20. One study found that whites were less willing to adopt an African-American child than a drug-exposed child. Id.; Rush, supra note 67, at 119 (although 8% of adoptions in the U.S. involve a parent and child of a different race, only 1.2% involve a white parent and an African-American child).} Indeed, some whites unwilling to adopt an African-American child express willingness to adopt a Hispanic,\footnote{There is high demand for Hispanic infants. See Santiago, supra note 31 (“White babies, including Hispanic infants [are] in highest demand among American couples.”).} Native-American, or Asian-American child—“anything but black.”\footnote{Lewin, supra note 65, at A1 (“We have families who say I’ll take Hispanic, American Indian, anything but black.”) (quoting adoption recruiter); Id. (noting that whites can “imagine themselves the parents of a little Chinese girl, but not of Shaniqua with the kinky hair) (quoting Professor Randall Kennedy, Harvard Law School).} Further, some white families unwilling to adopt an African-American child express interest in adopting a biracial child, a child who is only part African-American.\footnote{Telephone Interview with Deborah Fox, Esq., supra note 29 (explaining that some white families are willing to adopt a biracial child, but not an African-American child).}

The lower fees many agencies charge for African-American children illustrate this racial hierarchy in domestic adoptions. Some agencies charge lower fees for African-American children, higher fees for biracial children (who are in higher demand than African-American children), and even higher fees for all other (non-African-American) children.\footnote{Dean Schabner, Why It Costs More to Adopt a White Baby, March 12, 2002, ABC News, available at http://abcnews.go.com/US/story?id=91834&page=1 (noting that some adoption agencies set fees depending on how difficult the child is to place and thus, charge lower fees for the children in least demand (African-American) and higher fees for those in high demand); Tamar Lewin, New Families Redraw Racial Boundaries, NY Times, Oct. 27, 1998, at A1 (“white children usually cost more than black children”).} For example, one facilitator charges families seeking an African-American child $6,900, families seeking a biracial...
child (which is defined by adoption agencies as “one who is at least part African-American”), $7,200, and families interested in adopting Caucasian, Asian-American, or Hispanic (any race or ethnicity other than African-American or any combination thereof), $9,700. The same fee applies to adoptions of Caucasian, Hispanic, Asian-American, or Native-American children, or any combination thereof. Thus, the fee to adopt a half Hispanic, half Asian child (a nonwhite child) is the same as that to adopt a white (Caucasian) child. However, the fee to adopt a child who is half African-American and half Asian is the lower fee for biracial children. Clearly, the distinction is not between white and non-white children, but between African-American children (or children who are half African-American) and children who have little or no discernable African-American ancestry. These fee structures show that whites are more willing to adopt and pay more for full-blooded Hispanic, Native-American, and Asian-American children (children who are not even partly white) than for children who are half white, but who are also half African-American.

This preference for non-African-American and lighter skinned children is present in international adoptions as well. Many white Americans want to adopt children from the former Soviet countries despite numerous obstacles and evidence that these children have greater health risks than children born in the United States. Adoption experts agree that Americans’ high interest in adopting

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33 See Adoption-Link, Inc., http://www.adoptionlinkillinois.com/faqs.php; see also Telephone Interview with Beca, Adoption Facilitator, Lifetime Adoption Facilitation Center (Feb. 8, 2005) (explaining that in the adoption world, biracial means “African-American with any other race”).

34 Telephone Interview with Beca, supra note 66; Sharon Elizabeth Rush, Domestic and International Adoptions: Heroes? Villains? Or Loving Parents?, in MORAL IMPERIALISM 116, 117, n.14 (Berta Esperanza Hernandez-Truyol ed., 2002) (noting that the fee for adopting her daughter was reduced by half because she is biracial); Schabner, supra note 65 (discussing an agency that charges $19,000-$35,000 to place a “non-African-American [child] (i.e. Caucasian, Hispanic, Native-American, etc. or any non-African-American combination of races) healthy newborns and infants,” but charges only $8,000 to $15,000 to place an African-American child).

35 Cf. Schabner, supra note 65 (describing agency that lists “non-African American [child] (i.e. Caucasian, Hispanic, Native American, etc. or any non-African Americans combination of races) healthy newborns and infants” in their “Traditional Program” which charges fees ranging from $19,000 to $35,000 but lists African-American children in their “Minority Program” and charges lower fees ranging from $8,000 to $15,000).

36 Americans are not the only ones exhibiting these racial preferences. Although, as noted above, Canadians and Europeans come to the U.S. to adopt African-American babies, given the choice between lighter and darker skinned babies, they may chose the former. Swedes adopting children from Colombia, whose children range from those with a predominantly European phenotype and light skin color to those with African or indigenous features, generally chose the lighter skinned children. According to one estimate, less than five percent of individuals seeking to adopt in Colombia were willing to adopt Afro-Colombian children (who were locally perceived as the least desirable adoptees), even though such adoptions “go really fast” because the demand for Afro-Colombian children is so low. See Barbara Yngvesson, “Un Nino de Cualquier Color”: Race and Nation in Inter-country Adoption, GLOBALIZING INSTITUTIONS 169, 194.

37 See infra notes ___, and accompanying text.
these children is largely explained by the fact that they are white. 38 It is understandable why whites may prefer to adopt white children as it avoids the obvious disclosure that accompanies adoption of a child of a different race—that the child is adopted. 39 However, most of the children available for international adoption are not white. Thus, most Americans adopting overseas have decided that it is not important or possible to find a child who might resemble them physically. Consequently, the child’s race should not matter. But it does.

As Professor Bartholet has noted, racial thinking dominates the world of international adoptions. 40 Whites are more likely to adopt a child from Asia or Latin America than they are to adopt an African-American child. 41 Further, adoptive parents prefer light skinned foreign born children to darker skinned children. For example, even though the fee to adopt a child from a “darker” country such as Peru, Colombia, or Brazil was lower than that to adopt a child from Chile, many Americans preferred to adopt Chilean children who tend to be light skinned and have Caucasian features. 42 Further, the “darker” countries tend to be less selective in their criteria for adoptive parents because they know that Westerners find their children less desirable. To borrow Professor Bartholet’s illustration, until Brazil shut down its international adoption program in 199__, it allowed single and older persons to adopt and allowed newborns to be placed in foreign adoptive homes immediately after birth. 43 In contrast, countries such as China and Korea, whose children were more desirable to Westerners, allowed only married couples under 40 years of age to adopt 44 and did not place children in foreign adoptive homes until they were nine to eighteen months old. Foreigners adopting a Brazilian child could expect to have a baby in their home within a few months of completing their home study as compared to the year-long wait (or longer) in other countries. They would also have to spend only seven to ten days in Brazil to complete the necessary paperwork as compared to the six week or longer stay required by other countries. 45 Why did Brazil make it so much easier than other countries for foreigners to adopt its children? According

38 See Alessandra Stanley, Nationalism Slows Foreign Adoptions in Russia, NY TIMES, Dec. 8, 1994 (“Russia is particularly attractive to [Americans] who want white babies.”)

39 The reasons parents may not want others to know that their child is adopted is beyond the scope of this article. For an excellent analysis of society’s obsession with biological children, see FAMILY BONDS, supra note 11.

40 Where Do Black Children Belong?, supra note 23, at 1249.

41 See FOGG-DAVIS, supra note 154, at 12, 43 (“most whites prefer healthy white infants and when they learn that such babies are in short supply, they are more likely to adopt children of Colombian, Korean and American Indian ancestry than to adopt African American children”).

42 Serrill, supra note 14, at 86; Where do Black Children Belong?, supra note 23, at 1167.

43 Id.

44 FAMILY BONDS, supra note 11, at 87.

45 Id.

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to Professor Bartholet, the answer is “race.” The children available for adoption in Brazil were primarily of African descent, which made them less desirable. The sending countries, which are well aware of the racial hierarchy, can make it easier or harder for foreigners to adopt their children based on their desirability.

It is undeniable that race plays a role in both domestic and international adoptions. However, most prospective adoptive parents are not consciously thinking about race when deciding to adopt a child. Most likely, their thoughts are focused on finding a child they can love and bring into their family. Thus, they might find the prior discussion academic and irrelevant to them, and possibly offensive. However, even if adoptive parents have honestly never considered race and adoption in the same thought, it is quite likely than implicit biases against certain minority groups have influences their decisions with regard to whether to adopt domestically or internationally, whether to adopt a child of another race, and what that race will be.

In recent years, legal scholars have shown that racial preferences are “frequently unconscious” and deeply rooted. Cognitive bias studies have

46Id.

47FAMILY BONDS, supra note 11, at 87.

48Nadine Taub, Keeping Women in Their Place: Stereotyping as a Form of Employment Discrimination, 21 B.C. L. REV. 345, 355 (1980). In recent years, there has been an explosion in legal scholarship exploring unconscious biases. Although the phenomenon had been studied since at least the 1970’s, see, e.g. Taub, supra, recent research has revealed both how deep-rooted attitudes regarding race and gender may be in cognitive structures and how pervasively such influences can operate. Scholos such as Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1164 (1995), in her groundbreaking work, although foreshadowed by Charles Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987); Tristin K. Green, Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003) (“both conscious and unconscious bias operate at multiple levels of social interaction, often resulting in decreased opportunity for disfavored groups without producing a single, identifiable discriminatory decision or a perceptibly hostile work environment.”); Tristin K. Green, Work Culture and Discrimination, 93 CAL. L. REV. ____ (forthcoming 2005) (examining how “particular work cultures can develop and persist along gender and/or racial lines” and exposing the harms that those cultures can impose on women and minorities); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458 (2001); Michael Selmi, Subtle Discrimination: A Matter of Perspective Rather than Intent, 34 COLUM. HUM. RTS. L. REV. 657, 668 (2003); Gary Blasi, Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology, 49 U.C.L.A. L. REV. 1241 (2002); Martha Chamallas, Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes, 74 S. CAL. L. REV. 747 (2001); Ann C. McGinley, ¡Viva La Evolucion!: Recognizing Unconscious Motive In Title VII, 9 CORNELL J. L. & PUB. POL’Y 415 (2000); Katherine V. W. Stone, The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law, 48 U.C.L.A. Rev. 519 (2001); Jody Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, 83 CAL. L. REV. 733 (1995); Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489 (2005), argue that discrimination now is both more pervasive and less conscious than the phenomenon that Title VII originally targeted in 1964. This insight, although labeled differently, see Marc R. Poirier, Is Cognitive Bias at Work a Dangerous Condition on Land?, 7
revealed a much larger unconscious preference among whites for whites than their explicit preferences. It is possible that these unconscious preferences for whites extend to groups who are lighter-skinned and appear to be “closer” to white (such as Asians or Latinos) than African-Americans. As shown above, there is some evidence that bias against Latinos and Asians is different, and possibly less virulent, than that against African-Americans.

Given our egalitarian norm, and belief in racial equality, Americans attempt to find neutral non-race based reasons for attitudes and behaviors that would otherwise reflect racial biases. Quite possibly, the myths about international adoption discussed below have gone unchallenged for so long because unconscious biases against African-Americans made it easy to believe that foreign born children are healthier and more readily available than African-American children. Unconscious biases against African-American children may have also led whites to exaggerate (1) the opposition to their adoption of African-American children and (2) the challenges of raising African-American children as compared other nonwhite children.

B. DEBUNKING THE MYTHS

Many myths surround international and domestic adoption. Prospective adoptive parents say that they pursue international adoptions because foreign children are healthier than the available children in the United States and international adoptions are cheaper, faster, and more humanitarian than domestic adoptions. In this section, I show that these beliefs are based on inaccurate information driven by implicit biases against African-American children.

1. **Myth: There Are no Healthy Infants in the United States**
   a. **Supply**

   The primary reason expressed by many Americans for adopting from abroad is the alleged scarcity of infants available in the United States. Most prospective adoptive parents are white and would prefer to adopt healthy white

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49See Brian A. Nosek, Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site, 6 GROUP DYNAMICS 101 (2002)(reporting results from some 600,000 tests which confirm a much larger implicit preference among whites for whites than their explicit preferences); Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=422902 (showing that identical resumes received more favorable treatment by employers when non-African American sounding names were used). The Implicit Association Test hosted at Harvard offers an opportunity to test one’s own cognitive biases. See https://implicit.harvard.edu/implicit.
However, the demand for healthy white infants in the United States and other Western nations surpasses their supply. Birth rates in the United States and other Western countries have declined significantly since the 1960s as abortion and reliable methods of contraception have become readily available. Further, as the stigma of raising children outside of marriage has declined, fewer women in the United States surrender their babies for adoption. At the same time, an increasing number of women in the U.S. experience difficulties conceiving, leading to an increased interest in adoption. As a result, there may be approximately 100 applicants for every healthy white infant available in the United States, resulting in a wait as long as seven years.

In contrast, for many years, poverty, gender discrimination, and social norms in non-Western countries have led hundreds of thousands of mothers to abandon their children or put them up for adoption. For example, poverty in countries such as Guatemala, India, Cambodia, and Colombia has led thousands of families to give up children they cannot support. Extreme poverty and social upheaval in the former Soviet countries have similarly led many parents to abandon their children in hospitals and orphanages. The devaluation of female children in India and China has led parents to abandon their infant daughters.

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50 Elizabeth Bartholet, Family Bonds: Adoption, Infertility, and the New World of Child Production 87 (1993) [hereinafter FAMILY BONDS] (“the majority of Americans seeking to adopt are white and for the most part, are seeking white children, at least initially”).


52 Howard Altstein and Rita Simon, Intercountry Adoption: A Multinational Perspective 1 (1991) [hereinafter INTERCOUNTRY ADOPTION].

53 Id.; Twila Perry, Mothers, Hierarchy, Race, and Feminist Legal Theory, in Families by Law: An Adoption Reader 265, 267 (Naomi Cahn & Joan Hollinger eds., 2004) [hereinafter Mothers, Hierarchy]. While 65% of white babies born to single mothers in 1966 were placed for adoption, see Michael Serrill, Going Abroad to Find a Baby, TIME, Oct. 21, 1991, at 86, by 1995, only 1% of single women relinquished their babies for adoption. See Paula Span, Parallel Lives, WASH. POST MAGAZINE, June 18, 2000, at W12.

54 INTERCOUNTRY ADOPTION, supra note 13, at 1. In addition, an increasing number of nontraditional families such as single women and gay and lesbian couples are seeking to adopt.

55 Davenport, supra note 9, at 11; Span, supra note 14, at W14.

56 See ADOPTION LAW, supra note 12, at 10.02[2] (less developed countries have many orphans due to the stigma of out of wedlock children, absence of contraception and abortion services, and governmental instability and wars).


58 The One Child Policy in China places a limit of one child per family, forcing parents to give up a female child if they want to have another (male) child. Indian families prefer male
and social stigma and discrimination against single mothers and nonmarital children has forced single mothers in South Korea to relinquish their newborns for adoption.59

However, the scarcity of white infants in the United States does not explain why Americans go abroad to adopt. First, two-thirds of the children Americans adopted from other countries in recent years came from Asia or Latin America, countries with nonwhite populations.60 Second, Americans claim to want infants, preferably newborns, but unlike U.S. born children who are placed in their adoptive homes when they are only a few days old, the majority of foreign born adoptees are toddlers by the time they arrive in the United States and few are newborns.61 For example, Chinese and Russian children, who comprise almost half of the foreign children adopted by Americans in recent years, are generally older than one and many are older than two years of age by the time they arrive in the United States.62 Further, because the majority of births worldwide are not registered,63 adoptive parents often do not know their child’s actual age and must rely on the representations of agencies or facilitators who sometimes lie in order to increase the likelihood of adoption. Individuals who choose to adopt internationally, in part, because they want an infant, may be devastated to learn that their “one year old” child is actually a three year old with the physical and mental development of a one year old.64

Americans interested in adopting infants need not look abroad. Although there are relatively few available white infants in the United States, African-


60Davenport, *supra* note 9; see also http://travel.state.gov/family/adoption/stats/stats_451.html (Feb. 21, 2005) (showing that approximately sixty percent of the children Americans adopted from abroad in 2004 came from Asia or Latin America).

61The Evan B. Donaldson Institute, *International Adoption Facts*, http://www.adoptioninstitute.org/FactOverview/international.html (last modified Jan. 2002) (showing that only 46% of children are younger than one year old).

62Spence & Chapin, *Adoption Programs at a Glance*, http://www.spence-chapin.org/048.html (last modified Jan. 24, 2005) (Children available for adoption from China and Russia are one year of age and older); Id. (children adopted from Guatemala are at least 4-8 months old by the time they arrive in the U.S.).


64Clark & Shute, *supra* note 39, at 60 (discussing an American couple who adopted a child they believed to be 10 years old from the Republic of Georgia only to later learn he was 14 years old and mentally ill).
American infants are available. Many agencies express “an ongoing need for families wishing to adopt African-American infants and toddlers” and although private agencies eventually find permanent homes for all of their healthy African-American infants, these children are often placed four weeks later than white infants. African-American boys, wait even longer. Adoption agencies in New York, California, Illinois, Pennsylvania, and New Jersey, the states where the largest number of Americans adopting internationally reside, all need adoptive families for African-American and biracial infants.

While Americans point to the small number of healthy infants available in the United States, agencies regularly place African-American newborns with white families in other countries such as Canada, France, and Germany. One Illinois agency places one-third of its African-American and biracial children in other countries and an agency in Florida places ninety percent of its African-

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67Roni Rabin, Can Black Children Raised by White Parents Develop a Positive Sense of Self and a Strong Racial Identity?, NEWSDAY, July 13, 1995, at B4; Davenport, supra note 9, at 11 (noting that African-American boys are at the bottom of adoptive parents’ preference list).


69Telephone Interview with Gina Brockmeyer, International Programs Director, Adoption Services (Feb. 4, 2005); Telephone Interview with Noreen Davidson, LCSW, Associate Director, Adoption-Link, Inc. (Feb. 4, 2005); Telephone Interview with Kelly Reinhold, Adoption Coordinator, Adoption Star (Feb. 3, 2005); Telephone Interview with Deborah Fox, Esq., AAA Transitions Adoption Agency (Feb. 4, 2004); Telephone Interview with Beth Hall, Director, Pact, An Adoption Alliance (Feb. 9, 2005); Telephone Interview with Anonymous Adoption Coordinator, Adoption Associates (Feb. 7, 2005) (stating that her agency has 84 families waiting for a newborn, but only seven of those are interested in adopting an African-American child although the agency is working with approximately 90 birth mothers, 20% of whom will be giving birth to African-American or biracial children).

70See Davenport, supra note 9, at 11; Smolowe, supra note 25, at 64. The U.S. government does not keep records of how many U.S. born children are adopted by foreign families, but experts estimate that upwards of 500 children each year, primarily African-American, are placed in other countries. Smolowe, supra; see also Glaser, supra note 25, at L1. The U.S. also does not maintain national statistics on the number of available infants or their race and ethnicity. Id. at L1.
American infants in Canada.\textsuperscript{71} Indeed, the U.S. is the fourth largest supplier of African-American newborns to Canada.\textsuperscript{72} Most of these foreign adoptive families “cite the availability of newborns as the primary reason they choose to adopt in the U.S.”\textsuperscript{73} Ironically, although Americans adopt more foreign born nonwhite children than all other countries combined, the United States is one of the largest suppliers of Black infants to other countries.

b. \textit{Health}

Some Americans adopting internationally believe that foreign born children are healthier than available American children who they believe are more likely to have physical or mental disabilities or to have been exposed to drugs or alcohol \textit{in utero}. Many Americans also assume that most African-American babies available for adoption are “crack babies.”\textsuperscript{74} This is a myth. Over ninety percent of American infants placed through private agencies, including African-American infants, are healthy at the time of placement.\textsuperscript{75} Indeed, foreigners say that they come to the U.S. to adopt, in large part, because its infants are healthy.\textsuperscript{76} The same is not true of children adopted from other countries. Most foreign born adoptees have “at least one important medical condition.”\textsuperscript{77} One


\textsuperscript{72}See Davenport, supra note 9, at 11; Glaser, supra note 25, at L1.

\textsuperscript{73}See Davenport, supra note 9, at 11.

\textsuperscript{74}Glaser, supra note 25, at L1 (media reports on babies born to African-American women who smoked crack fueled fears that African-American babies were crack babies); see also http://republicoft.typepad.com/republic_of_t/2004/07/adoption_africa.html (discussing the first time that someone assumed that his adopted African-American son must be a crack baby); \textit{Id.} (Sept. 24, 2004 post from white adoptive mother reporting that she was asked if her African-American son was a crack baby); \textit{Id.} (Jan. 23, 2005 post from woman adopting an African-American child through New Jersey’s Fost-Adopt program stating that almost everyone mentions the “crack baby” issue).

\textsuperscript{75}Telephone Interview with Noreen Davidson, supra note 29; Telephone Interview with Kelly Reinhold, supra note 29 (reporting that less than eight percent of the children it placed had special needs); Telephone Interview with Adoption Associates, \textit{supra} note 29 (reporting that three to five percent of their placements had special needs). Because the U.S. does not keep records of how many children are through private agencies, \textit{supra} note 30, there are no statistics on the health of the children placed by private agencies.

\textsuperscript{76}Davenport, supra note 9, at 11.

\textsuperscript{77}Elizabeth Vonk, et al., \textit{Political and Personal Aspects of Intercountry Adoption of Chinese Children in the United States}, 80 FAM. IN SOCIETY: J. CONTEMP. HUM. SERV. 496, 500 (1999) (conditions include “gross motor, fine motor, language, cognitive and global developmental delays.”); see also Kirsten Lovelock, \textit{Intercountry Adoption a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada and New Zealand}, 34 INT’L MIGRATION REV. 19 (2000) (“many (if not all) children adopted from abroad, irrespective of age, have special needs”).
study found that over eighty percent of children adopted from former Soviet countries suffered delays in fine motor skills, seventy percent had delays in gross motor skills, and many others had rickets, anemia, fetal alcohol syndrome, and parasites. They are also significantly more likely than children born in the United States to have tuberculosis, hepatitis B or C, and syphilis and to have birth mothers who abused drugs and/or alcohol while pregnant. Seventy-five percent of Chinese adoptees have similar medical conditions.

This should come as no surprise. The birth mothers of foreign born adoptees generally do not receive prenatal care and are unlikely to be adequately nourished during pregnancy, placing their children at risk for significant developmental delays. Even children who are healthy at birth deteriorate while in an orphanage (where most available foreign infants live until they are adopted) due to the lack of adequate food and individual attention. Many are also neglected and/or abused. Further, because most foreign born children are no longer infants by the time they arrive in the U.S., many have difficulties bonding with their adoptive families.

c. Medical Records

Adoption agencies and facilitators in the United States have a legal duty to disclose to prospective adoptive parents all of the available information about their child’s health and medical history and, if available, the birth parents’ social and medical history. Indeed, Canadians and other foreigners who adopt U.S.

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79Alberts, et al., supra note 38, at 925; Robert Gordon, The New Chinese Export: Orphaned Children–An Overview of Adopting Children from China, 10 TRANSNAT’L L. 121, 128 (1997) (children adopted abroad are 1,000 times more likely to carry tuberculosis than children born in the United States and children from Romania are forty to fifty times more likely to carry hepatitis B); Kim Clark & Nancy Shute, The Adoption Maze, U.S. NEWS & WORLD REP., March 12, 2001, at 60 (foreign born adoptees often have medical conditions that most American physicians do not expect in children such as syphilis, parasites, tuberculosis and hepatitis B and C).

80Ryiah Lilith, Buying a Wife But Saving a Child, 9 BUFF. WOMEN’S L.J. 225, n.86 (2000) (noting that seventy-five percent of adopted Chinese girls have developmental delays and often suffer from “malnutrition, growth retardation, nutritional deficiencies, including rickets, anemia, lead poisoning and hypothyroidism” and “undiagnosed congenital defects . . . such as cerebral palsy.”); see also Clark & Shute, supra note 39, at 60.

81Clark & Shute, supra note 39, at 60.
82Id.
83Vonk, et al., supra note 37, at 500.
84See supra note __, and accompanying text.
85Lilith, supra note 40, at n.86 (discussing attachment disorders).
86See ARIZ REV. STAT. ANN. § 8-129 (West 2003); CAL. FAM. CODE § 8706 (West Supp.
born infants, point to the availability of medical records and family histories as another reason for preferring U.S. born children to children from other countries.\(^{87}\)

In contrast, adoptive parents of foreign born children generally receive little or no medical history on their child, often because it is unavailable. Commentators have noted that “the most daunting and potentially devastating hurdle in international adoptions is assessing a child’s health in the face of incomplete or faulty medical information.”\(^{88}\) Further, agencies placing children internationally generally require that parents sign waivers of their right to sue if they later discover that the child has a serious physical or mental condition.\(^{89}\) Some adoptive parents have attempted to “return” their foreign born children after discovering significant health needs. During the height of Romanian adoptions in the 1990s, one California agency received weekly telephone calls from adoptive parents seeking to place their Romanian child for re-adoption after discovering a significant medical condition.\(^{90}\)

Foreign adoptees “are high risk.”\(^{91}\) Nevertheless, we should not discourage Americans from adopting foreign born children based on their health status. There would be fewer children in foster care or orphanages if more families were willing to care for children with special needs (both U.S. born and foreign born). However, many U.S. born children considered high risk because they were exposed to drugs or alcohol, for example, are no more at risk than many of the children adopted from other countries. Thus, health concerns are not a valid reason for preferring foreign born children to African-American children.

2. **Myth: International Adoptions are Faster, Easier, and Cheaper**

For all the publicity about the ‘impossibility’ of white people adopting black American children, doing so is still in most instances far easier than

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\(^{87}\)Davenport, supra note 9, at 11.

\(^{88}\)Clark & Shute, supra note 39, at 60.

\(^{89}\)Id.; Opdyke, supra note 8, at D1.

\(^{90}\)Telephone Interview with Director, Holy Family Services (Feb. 9, 2005). Most private adoption agencies in the U.S. refused to even attempt to place those children, so some entered the public foster care system and others were abused by their American parents. Id.; see also James Rupert, *Kiev Bars Westerners’ Adoptions*, WASH. POST, Feb. 2, 1996, at A21 (discussing American couple seeking to annul adoption and return three year old child to an Ukrainian orphanage after discovering he had severe physical and mental problems).

\(^{91}\)Id.
Some Americans choose to adopt internationally because they do not want to wait years for a U.S. born child. Some families do wait years for a white infant. However, the wait for an African-American infant is significantly shorter. Many families adopting an African-American child have a newborn in their home within a few months of completing their home study, and almost all have a child within one year. Families seeking to adopt an African-American boy will often have one even sooner. In contrast, adoptions from the countries from which Americans adopted the most children in recent years–China, Russia, Korea, Guatemala, Kazakhstan, Ukraine, India and Romania–usually take longer than one year. For example, adoptions from China usually take upwards of fifteen months. Canadians and other foreigners cite the short wait for a child, as compared to other countries, as another reason for adopting African-American children.

International adoptions are incredibly complicated. Applicants must satisfy the sending country’s laws, United States’ immigration laws, and their own state’s laws. It can take months to obtain approval to bring a foreign born

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93Telephone Interview with Director, Holy Family Services (Feb. 9, 2005) (stating that some families have waited as long as five years).

94See Santiago, *supra* note 31 (the wait for an African-American baby can be only a few months); Lifetime Adoptions, Grass Valley, CA, http://www.lifetimeadoption.com/for_adoptive_families/faq/faq12.html (families seeking to adopt a biracial or African-American child often get a child within a few weeks to four months) (last visited Feb. 26, 2005); Adoption Services, http://www.adoptionservices.org/adopting_families_Adoption_Waiting_period.htm (last visited Feb. 22, 2005) (the wait for an African-American or biracial infant is only two to five months); Telephone Interview with Maria Ramirez, Co-Executive Director, Adoptions Unlimited (Feb. 5, 2005) (parents adopting an African-American infant will usually have one within three months).

95There is a higher demand for girls, especially biracial girls. Davenport, *supra* note 9, at 11; Telephone Interview with Deborah Fox, *supra* note 29 (stating that African-American boys are hardest to place and biracial girls are the easiest because more birth mothers place African-American boys, but adoptive parents prefer girls).

96http://adoptionservices.org/adopting_families_international_programs_china.htm (last visited Feb. 22, 2005) (fifteen to eighteen months or longer to adopt a child from China); see also http://travel.state.gov/family/adoption/country/country_365.html (explaining time frame and process to adopt from China); www.adoptkorea.com/choosing_korea/choosing_korea.htm (the wait for a Korean child is approximately 12-14 months); http://adoptionservices.org/adopting_families_international_programs_guatemala.htm (last visited Feb. 22, 2005) (nine to eighteen months to adopt a child from Guatemala); see also http://travel.state.gov/family/adoption/country/country_389.html (explaining time frame and process to adopt from Guatemala); http://www.spence-chapin.org/048.html (estimated waiting period of twelve months for referral after file is submitted to Kazakhstan).

97Davenport, *supra* note 9, at 11.

98See RITA SIMON & HOWARD ALTSTEIN, ADOPTION ACROSS BORDERS 30 (2000)
adoptive parents travel to and remain in the sending country anywhere from a few days to a month or longer to complete the adoption. Some require two trips, thereby increasing the burden and costs for many families.

Many Americans claim to adopt internationally because it is less expensive than adopting domestically. This too is a myth. International adoptions are often more costly, especially as compared to adoptions of African-American or biracial children. Although costs vary widely depending on the agency and the country or origin, adoptive parents can expect to pay $18,000 to $35,000 to adopt a child from China, Korea, Russia, or Guatemala as compared to $10,000-$12,000 to adopt an African-American child. As stated above, some agencies charge lower fees for African-American or biracial children.

International adoptions are about to become even more complicated and expensive once the U.S. ratifies the Hague Convention on Intercountry Adoption in 2006, as expected. See Opdyke, supra note 8, at D1.

99 See Bartholet, International Adoption: Propriety, Prospects and Pragmatics, 13 J. AM. ACAD. MATRIM. LAW. 181, 186 (1996) (hereinafter International Adoption); see e.g., Opdyke, supra note 8, at D1 (noting that the stay in Colombia is three to six weeks, and the stay in the Ukraine is three weeks); http://travel.state.gov/family/adoption/country/country_408.html (stating that Americans adopting from Kazakhstan should expect to spend 23-40 days there). However, a few countries such as South Korea allow parents to adopt through a third party so they do not have to travel to the foreign country.

100 See Opdyke, supra note 8, at D1 (noting that Russia, Bulgaria, and Vietnam require two trips).

101 See Clark & Shute, supra note 39, at 60 (foreign adoptions start at $15,000 for China and well over $20,000 for Guatemala, and once travel costs such as travel, food, and lodging are included, most foreign adoptions cost between $25,000 and $30,000); Opdyke, supra note 8, at D1 (cost for a Guatemalan adoption, excluding travel costs and costs of obtaining necessary documents, is $20,500 to $24,000); Telephone Interview with Maria Ramirez, supra note 55 (Russian or Mexican adoption costs $25,000 and $22,000, respectively, not including travel costs); http://www.usembassy-kazakhstan.freenet.kz/consular/adoptions.html (last visited Feb. 22, 2005) (adoptions from Kazakhstan cost $18,000 to $25,000); http://americanadoptions.com/adopt/domestic_international (last visited Feb. 22, 2005) (average cost to adopt a child from China and Russia is $22,000 and $35,000, respectively); www.adoptkorea.com/choosing_korea/choosing_korea.htm (Korean adoption costs $18,000-$24,000).

102 Davenport, supra note 9, at 11 (the costs of adopting an African American newborn is $10,000-$12,000, and $18,000 for a biracial baby as compared to $30,000 to adopt internationally); Santiago, supra note 31 (adopting an African-American baby costs between $8,500 and $18,000). As a result of the $10,390 adoption tax credit for allowable adoption expenses, adoptions of African-American children may cost little or nothing. See Tax Topics, Topic 607-Adoption Credit, http://www.irs.gov/taxtopics/tc607.html.

These policies, although offensive, further reduce the cost of adopting African-American children as compared to adopting internationally.

In addition to travel and accommodation costs and “donations” required by foreign orphanages, parents who adopt internationally depend on contacts in the sending country who demand a fee for locating a child. Occasionally, Americans pay fees to corrupt foreign agencies or facilitators, but never get a child. In addition, in many sending countries, officials expect “tips” at every step of the adoption before they will process the necessary documents. These amounts can be significant. Apparently, few Americans know what Canadians know—that adopting an African-American child is faster, easier, and cheaper than adopting a child from another country.

3. **Myth: International Adoptions Are Safer**

Some Americans choose to adopt internationally because it seems “safer” than adopting domestically. They believe there is less risk that the adoption will fall through or that a biological parent will reappear years later to reclaim his or her child. As shown below, there are risks involved in both domestic and international adoptions. Unfortunately, many prospective adoptive parents are either not aware of, or disregard, the risks associated with international adoptions while exaggerating the risks of domestic adoptions.

A number of Americans chose not to adopt domestically because they fear that the birth parents will change their minds and take the child away from them. Although very few birth parents revoke their consent to an adoption, and those who do rarely get their children back, the media and the agencies that place foreign born children have greatly exaggerated the risk of a birth parent


105 Clark & Shute, *supra* note 39, at 60.

106 *Id.* (describing woman carrying $12,000 in cash on her trip to adopt a Russian child, some of which would be used to bribe officials, as customary).


108 Less than 1% of birth mothers change their minds after placement. Christina Field, *Adoption Gone Awry*, http://library.adoption.com/print.php?articleid=2579 (last visited Feb. 26, 2005); see also Telephone Interviews with Noreen Davidson, *supra* note 29 (out of 700 adoptions, only two were challenged, and both were unsuccessful); Telephone Interview with Maria Ramirez *supra* note 55 (stating that in her fifteen years at the agency, only one birth mother revoked her consent and she did it within the statutory period allowed); Telephone Interview with Kelly Reinhold, *supra* note 29 (no birth parents had challenged any adoptions in the five years since her agency was founded). Furthermore, it is rare for a birth father to challenge an adoption, and even rarer that he will succeed. See Sophronia Scott Gregory, *Can Adoptions Be Undone?*, TIME, Jul. 19, 1993, at 50.
reclaiming his or her child. As a result, Americans have focused on those extremely rare cases where a biological parent successfully reclams a child after years of litigation.\textsuperscript{109}

The risk that a birth parent will attempt to reclaim a child, however small, may be sufficient to drive many prospective adoptive parents to adopt internationally which they perceive as less risky. However, the risks that an international adoption will fall through clearly exist. Birth mothers in foreign countries sometimes change their minds after relinquishing the child\textsuperscript{110} and family members (or strangers in the child’s country) sometimes come forward at the last minute to adopt the child. Because most countries give preference to domestic adoptions,\textsuperscript{111} in such cases, Americans will usually lose the children they were promised.\textsuperscript{112}

There are other risks associated with international adoption. Orphanages frequently offer the same child to various agencies. As a result, adoptive parents who have been assured that a particular child is theirs might not get that child.\textsuperscript{113} Countries frequently shut down or significantly restrict their international programs without making provisions for families who are in the process of adopting.\textsuperscript{114} For example, China, Korea, India, and Peru have significantly reduced the number of children they allow to be adopted by foreigners,\textsuperscript{115} or only

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\textsuperscript{109}See, e.g. In re Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993), and In re Kirchner, 649 N.E.2d 324 (Ill. 1995), cert. denied, 515 U.S. 1152 (1995), known as the "Baby Jessica" and "Baby Richard" cases, respectively; see also Adoptive Parents ‘Numb’ After Loss in Custody Battle, MSNBC.com, Jan. 18, 2005, available at \url{http://www.msnbc.msc.com/id/6834940/}.\textsuperscript{110}

\textsuperscript{110}See Michael Riley, Deceit Takes Babies Away in Honduras, BALT. SUN, July 2, 1998, at 2A (discussing a U.S. who learned, after they had flown to Guatemala and met the child, that the birth mother had changed her mind).

\textsuperscript{111}See, e.g. Gita Ramaswamy, The Baby Harvest: Scandals Over Westerners’ ‘Shopping’ For Children in India, NEW INTERNATIONALIST 359 (Aug. 2003), available at \url{http://www.newint.org/issue359/currents.htm}, (discussing U.S. citizen who lost the Indian child she was in the process of adopting after an Indian family expressed interest in adopting her).


\textsuperscript{113}See ADOPTION ACROSS BORDERS, supra note 59, at 8-9, 20 (discussing Korea and
allow intercountry adoption of disabled or racially mixed children, children considered less desirable.\textsuperscript{116} Even when the sending countries do not change the rules midstream, the United States may ban adoptions from certain countries if it suspects unethical adoption practices. For example, it recently banned adoptions from Cambodia after learning that children were sold to scouts and adoption agencies.\textsuperscript{117} Americans in the process of adopting a Cambodian child, and even those who had been matched with a particular child, were not allowed to continue with the adoption.

In other cases, Americans have completed an adoption in the foreign country only to learn that the child will not be allowed entry into the United States because he or she does not satisfy the definition of an orphan under our immigration laws.\textsuperscript{118} Because the U.S. Department of Immigration [Homeland Security] will not issue a decision as to whether a particular child will be admitted into the United States until after the child has been adopted, Americans adopting internationally cannot be assured that they will be able to bring their child home until after the adoption is completed.\textsuperscript{119}


Most Americans see adoption of a foreign born child as a noble, humanitarian act, more so than the adoption of a U.S. born child.\textsuperscript{120} The history of international adoption contributes to this belief. Americans first adopted children from other countries at the end of World War II when they brought European war orphans into their homes.\textsuperscript{121} Soon after, Americans adopted

\begin{itemize}
  \item Guatemala); Ethan Kapstein, The Baby Trade, FOREIGN AFFAIRS, Nov/Dec 2000, at 115 (noting that India is now only allowing Hindus to adopt Indian children). Peru also decreased its international adoptions from 620 in FY 1992 to 170 in FY 1993.
  \item Gordon, supra note 39, at 128, \textsuperscript{n}58 (until recently Russia allowed foreigners to adopt only children who were handicapped, had a history of family illness, or were of mixed race, and the Philippines allows foreigners to adopt children with physical or mental disabilities only); ADAM PERTMAN, ADOPTION NATION 82 (2000) (many countries do not allow healthy children to be adopted by foreigners).\textsuperscript{116}
  \item http://travel.state.gov/family/adoption/country/country_361.html (last visited Feb. 27, 2005).\textsuperscript{117}
  \item Siskin, supra note 6 at Summary; see 8 U.S.C. § 1101(b)(1)(F) (defining “orphan” for purposes of foreign adoptions).\textsuperscript{118}
  \item The U.S. is starting a pilot program in five countries (Haiti, Honduras, the Philippines, Poland, and Sierra Leone) which will allow immigration officials to render an opinion, before the adoption is completed, as to whether a particular child meets the U.S. definition of an orphan and will be allowed entry into the U.S. See Adjudicate Orphan Status First Pilot Program, http://uscis.gov/graphics/services/orphan_pilot.htm (last modified Mar. 10, 2004).\textsuperscript{119}
  \item Twila Perry, Transracial Adoption and International Adoption, 10 YALE J.L. & FEMINISM 101, 105 (1998) (hereinafter Transracial & International) (noting that “Western adoptive parents view international adoptions as simple acts of humanitarianism and altruism”).\textsuperscript{120}
  \item INTERCOUNTRY ADOPTION, supra note 13, at 3.\textsuperscript{121}
\end{itemize}
 orphaned and abandoned children after the Korean and Vietnam wars.\textsuperscript{122} Thus, international adoption has its roots in humanitarian aid.

In addition, Americans believe that foreign born children are worse off than the available children in the U.S. Unlike the United States, where most orphaned or abandoned children are raised in foster homes, in most countries, such children are housed in orphanages, many with deplorable conditions.\textsuperscript{123} Adoption by families in their own country is highly unlikely because most families have more children than they can afford and adoption is stigmatized. Consequently, Americans may view rescuing a little girl from an orphanage in China or saving an orphaned boy from the streets of Peru as more humanitarian than adopting a U.S. born child.\textsuperscript{124}

However, many of the foreign born children Americans are adopting are neither orphaned nor abandoned.\textsuperscript{125} The most serious risk of international adoption is the possibility that the child was stolen or sold. Forty percent of the largest sending nations in the last fifteen years have shut down their international adoption programs because of allegations of “corruption, child trafficking or abduction.”\textsuperscript{126} Although some adoptive parents may not care that their child was sold,\textsuperscript{127} most do.\textsuperscript{128} Unfortunately, there is evidence that the sale of children is

\begin{enumerate}
\item \textsuperscript{122}Id. Many of these children were the offspring of American servicemen stationed in Korea. \textit{Id.}
\item \textsuperscript{123}International Adoption, supra note 60, at 196 n.39 (noting that institutionalization is far more common than foster care); Elizabeth Bartholet, Beyond Biology: The Politics of Adoption and Reproduction, 2 DUKA J. GENDER. L. & POL.’Y 5, 12 (hereinafter \textit{Beyond Biology}) (describing conditions in Romanian orphanages).
\item \textsuperscript{124}Rush, supra note 67, at 116-17; see also Joan Hollinger, Intercountry Adoption: A Frontier Without Boundaries, in FAMILIES BY LAW: AN ADOPTION READER 215 (Naomi Cahn & Joan Hollinger eds. 2004) (arguing many Americans who adopt internationally are motivated, in part, “by a desire to raise children whose lives would otherwise be profoundly marred by poverty, disease, war, homelessness, or discrimination in their countries of origin”); Beyond Biology, supra note 118, at 12 (Americans feel particularly compelled to adopt Chinese girls because, as a result of the One Child Per Family Policy, many will be killed or placed in orphanages).
\item \textsuperscript{125}See Hunt, supra note 107, at 24 (“the majority of adoptive parents are coming back to America with infants and newborns, and about half of them are not from institutions.”).
\item \textsuperscript{126}Smolin, supra note 50, at 8.
\item \textsuperscript{127}Cf. Rupert, supra note 49, at A21 (reporting that some Americans paid $100,000 to adopt a child in Kiev); 60 Minutes: Children Are Hot Items on the Black Market in Romania (CBS television broadcast, Apr. 14, 1991, Leslie Stahl, anchor) (showing that Americans went to the homes of Romanian families and offered them cash or gifts for their children).
\item \textsuperscript{128}Purchasing or selling a child violates international law. The United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3, and the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, have condemned the practice of babyselling and one main purpose of the Hague Convention on Intercountry Adoption, which the U.S. is expected to ratify shortly is to prevent babyselling. \textit{See} Hague Convention on Intercountry Adoption May 29, 1993, 32 I.L.M. 134, 1145 (prohibiting babyselling by banning “improper financial or other gain” from adoptions and activities related thereto); \textit{see also} Adele Blackett, Whiter Social Clause,? Human Rights, Trade Theory and Treaty
common in Eastern Europe, Asia, and Latin America. For example, in the 1990s, so many women in Guatemala falsely posed as mothers and relinquished for adoption infants that were not their own,\textsuperscript{129} that the United States and the United Kingdom now require DNA testing of infants adopted from Guatemala to ensure that the woman relinquishing the child is the biological mother.\textsuperscript{130} Even so, babyselling continues. As recently as 2001, several countries\textsuperscript{131} suspended adoptions from Guatemala after the United Nations Human Rights Commission discovered that large scale trafficking of infants for international adoption continued.\textsuperscript{132}

Even well-intentioned adoptive parents may inadvertently adopt a child whose birth parents did not voluntary consent to its adoption. For example, scouts frequently contact doctors and orphanages to learn when a baby was (or will be) born. They then approach poor, uneducated mothers or pregnant women directly and often befriend them before pressuring them to give up their children in exchange for a small gift or payment, or by promising them that their child will have a much better life the United States.\textsuperscript{133} In addition, adoption agencies and scouts often lie to birth mothers, telling them that they will be able to maintain contact with their children after the adoption.\textsuperscript{134}


\textsuperscript{130}BLAIR & WEINER, supra note 78, at 925.

\textsuperscript{131}The Netherlands, Iceland, Spain, and the Canadian provinces of British Columbia and Ontario. \textit{Id}.

\textsuperscript{132}\textit{Report of the Special Rapporteur}, supra note 87, at 21 (“between 1000 and 1500 [Guatemalan] babies are trafficked each year”).

\textsuperscript{133}Carroll Bogert, \textit{Bringing Back Baby}, \textit{NEWSWEEK}, Nov. 21, 1994, at 78; Riley, \textit{supra} note 74, at 2A; Wilken, \textit{supra} note 68, at 86; William Pierce, \textit{Independent Adoptions and the “Baby Market,” in ADOPTION: INTERNATIONAL PERSPECTIVES} 131, 139 (Euthymia Hibbs ed., 1991); Jini Roby & Stephanie Matsumura, \textit{If I Give You My Child, Aren’t We Family?}, at 22 (manuscript on file with author) (reporting that 60 out of 73 birth mothers in one study learned about international adoption through adoption agency personnel who contacted birth mothers directly or through relatives). Over 41% felt pressure from the agencies to relinquish their children. \textit{Id.} at 22-23.

\textsuperscript{134}\textit{Id.} at 21. Adoption agents promised 33.7% of mothers that their children would return to them when they turned eighteen with a good education and material wealth. \textit{Id}. Almost 69% of the birth mothers believed that they would receive financial compensation for relinquishing the child. \textit{Id.} at 15, and 69.9% believed their child would be returned to them if the adoption did not work out. \textit{Id.} at 23. \textit{Cf.} Rupert, \textit{supra} note 49, at A21 (Ukrainian doctors encouraged women to give up their newborns by telling them they could reclaim them later).
In many countries, as in the United States, children are placed not only by adoption agencies, but also by independent agents, usually lawyers, who facilitate the placement and complete the necessary documents. In Guatemala, for example, private attorneys, who pay birth parents to dissuade them from relinquishing their children to an agency or orphanage, arrange most adoptions.\(^{135}\) They prefer to place children with foreign families who pay as much as $25,000 per child, as compared to placement with a Guatemalan family which costs the equivalent of $300.\(^{136}\) Not surprisingly, 95% of adopted Guatemalan children are placed in other countries.\(^{137}\) Further, unlike the United States, where many birth parents and prospective adoptive parents meet, in most international adoptions, the adoptive parents never meet or learn the identity of the birth parents, making it impossible for them to verify that the child was voluntarily placed.\(^{138}\) Indeed, the United Nations Human Rights Commission found that Guatemalan parents were told they could leave their children in an orphanage temporarily, but when they returned, they learned that their children had been placed abroad without their consent.

Although the United Nations’ recent focus has been on Guatemala, many other Latin American countries, including Peru, Bolivia, Colombia, Ecuador, Honduras, Mexico, and El Salvador, have also been sites of babyselling and kidnapping scandals.\(^{139}\) In some cases, stolen and purchased babies were placed in “fattening houses” where they were “fattened up” to look healthy, well-fed, and more attractive to foreign adoptive parents.\(^{140}\)

After the collapse of the Soviet Union, Russia, Romania, and Ukraine, among others, began allowing Westerners to adopt their orphaned and abandoned children. As in Latin America, these countries were immediately plagued by

\(^{135}\) Almost ninety-nine percent of adoptions in Guatemala are private, requiring only that the mother go to a notary public and sign a document relinquishing her child. Report of the Special Rapporteur, supra note, 87, at 18.

\(^{136}\) Id. at 19.

\(^{137}\) Id. at 21.

\(^{138}\) See Smolin, supra note 50, at 16 (stating that “intercountry adoption has been plagued by claims of illegality, including . . . the forging of various documents related to the relinquishment, abandonment, or original origin of the child”).

\(^{139}\) See, e.g., Opdyke, supra note 8, at D1 (discussing Colombia and Ecuador); William R. Long, Adopting a Tougher Policy, L.A. TIMES, Apr. 16, 1994, at A1 (reporting arrest in Peru and charges of child trafficking against New Jersey attorney who arranged U.S. citizens’ adoptions of Peruvian children); id. (reporting that bribes were paid to Peruvian mothers, judges and other court officials, government attorneys and police in connection with international adoptions); Sheila Rule, Couples Taking Unusual Paths for Adoption, N.Y. TIMES, Jul. 16, 1984, at A1 (reporting that adoption brokers kidnapped children in Colombia, El Salvador, Mexico, and other Latin American countries and sold them to adoptive parents in the U.S.).

\(^{140}\) Long, supra note 99, at A1 (discussing police raid of fattening houses in Honduras); see also Kapstein, supra note 79, at 115 (discussing government officials in Honduras who were involved in a kidnapping ring that took children from poor families and sold them to Westerners).
abusive adoption practices.\textsuperscript{141} Following extensive publicity of the horrible conditions in Romanian orphanages, thousands of Americans flew to Romania in the late 1980s and early 1990s to adopt these children.\textsuperscript{142} Unfortunately, many of the children they adopted were neither orphaned nor abandoned; they were sold.\textsuperscript{143} Some Romanian parents voluntarily sold their children, even naming the price or specific “gift”\textsuperscript{144} they wanted in exchange, while others were coerced into relinquishing their children.\textsuperscript{145} For example, Romanian nuns coerced unmarried mothers to relinquish their children and then sold each child for up to $15,000.\textsuperscript{146} When Romania sought to join the European Union in 2001, the EU found that “Romania is selling its children” and criticized its “persistent abandonment of children . . . international adoption and child trafficking.”\textsuperscript{147} Romania has since banned foreign adoptions of Romanian children.\textsuperscript{148} After numerous unsuccessful attempts to stop illegal adoption practices, Russia similarly banned foreign adoption of its children in 2000.\textsuperscript{149}

International adoptions of Chinese and Southeast Asian children have also been clouded by widespread corruption. The Chinese government, concerned about baby trafficking, now requires that orphanages post notices in local newspapers with the child’s photograph and caption “Is this your baby?” for three

\textsuperscript{141}Kunstel & Albright, supra note 78, at A9.
\textsuperscript{142}Sergiu Verona, Romanian Policy Regarding Adoptions, CRS REPORT FOR CONG., Jan. 6, 1994, at CRS-3.
\textsuperscript{143}Id. (many of the 3000 Romanian children adopted by Americans “before July 1991 came not from orphanages but from their biological families” and “were the result of a baby market where large sums of money were paid to baby brokers, resulting in the separation of poor children from their poor, illiterate, unsophisticated and often exploited parents.”) (citing cable from U.S. Embassy in Bucharest).
\textsuperscript{144}Kimberly Chadwick, The Politics and Economic of Intercountry Adoption in Eastern Europe, 5 J. INT’L LEGAL STUD. 113, 125 (1999) (describing case where the adoptive parents gave the birth mother a necklace and matching earrings in exchange for her child and another case where the adoptive parents offered the mother her choice of a new car.).
\textsuperscript{145}ADOPTION ACROSS BORDERS, supra note 59, at 17; see Kathleen Hunt, The Romanian Baby Bazaar, N.Y. TIMES, Mar. 24, 1991, at 6-24 (discussing Americans’ experiences with Romanian birth parents seeking $2,800 and a car in exchange for their toddler and eventually settling on $1,100).
\textsuperscript{148}See http://travel.state.gov/family/adooption_romania_update.html (last visited Feb. 27, 2005) (stating that “Romanian children are no longer available for international adoption”). However, grandparents living abroad can adopt their Romanian grandchildren. Id.
\textsuperscript{149}Kunstel & Albright, supra note 78, at A9. Russia recently lifted the moratorium.
months before the child can be adopted. As noted above, the United States has suspended adoptions from Cambodia, and India recently shut down several orphanages after learning that agencies had paid scouts to offer the families of poor women the equivalent of $3-$10 for their newborn daughters.

While many Americans adopting internationally adopt older children or children with special needs, most prefer infants for whom demand is so high that there is now a shortage in some sending countries. Commentators have suggested that, rather than placing true orphans, the largest sending countries are producing children to satisfy Western adoptive parents’ demands for infants. Thus, humanitarian motives may no longer be a primary reason Americans adopt so many foreign born children. Indeed, eighty percent of Americans adopting through the private system (both domestically and internationally) cite infertility as the reason they decided to adopt. As noted by one scholar, “when infertile couples adopt, they forthrightly acknowledge that they are satisfying their own needs to parent, not attempting to rescue a child.” Thus, for at least some adoptive parents, international adoption may be less about finding homes for parentless children and more about “finding children for childless couples.”

151 http://travel.state.gov/family/adooption_cambodia.html; see also BLAIR & WEINER, supra note 78 at 925 (Canadian province of Ontario suspended adoptions from Vietnam following reports of child trafficking and fraud, and shortly thereafter, Vietnam suspended all foreign adoptions).
152 BLAIR & WEINER, supra note 78 at 925; Ramaswamy, supra note 76, at 359. These children were later adopted by Westerners who paid upwards of $22,000 per infant. Id. In June 2003, the Canadian province of Quebec suspended all adoptions from India. BLAIR & WEINER, supra, at 925.
153 Riley, supra note 74, at 2A (the money that Westerners are willing to pay has created a shortage of healthy infants in Guatemala).
154 Hunt, supra note 107, at 24. The fattening houses mentioned earlier might be evidence that the children adopted internationally are not the neediest children in orphanages but rather those “who are being produced for that purpose.” Report of the Special Rapporteur, supra note 87, at 21.
155 Kapstein, supra note 79, at 115 (“The [international] baby trade is likely to continue to grow, partly because it is no longer simply a response to wars and humanitarian crises. For better or worse, it now behaves much like a commodities market, with demand informing supply.”).
158 INTERCOUNTRY ADOPTION, supra note 13, at 1 (Western interest in international adoption in the 1980s was sparked primarily by the needs of childless couples); Lovelock, supra note, 37 at *2 (characterizing international adoptions after WWII and the Korean War as “finding families for children” as opposed to international adoptions today which “find[] children for families.”); Ramaswamy, supra note 76, at 359 (“Adoption really is about finding children for families rather than finding families for children.”).
Even if Americans are motivated to adopt internationally for humanitarian reasons, it is no less humanitarian to adopt one of the 126,000 available children in the United States foster care system. Given that only fifty percent of Americans adopting from the foster care system adopt because of infertility, as compared to eighty percent of persons adopting through the private system, it is evident that the former are often motivated by humanitarian reasons—they want to give a child a home. Further, although foster care in the United States may seem preferable to a foreign orphanage, foster care is not a home, as Americans adopting children from foster care in South Korea seem to recognize. Foster children in the United States are moved from home to home and are often rejected and abused by their foster families, the people who are paid to care for them. More than 50,000 children in the foster care system waiting to be adopted are African-American, older, and have special needs—the children few people want to adopt. Americans adopting internationally have expressed that nothing “could be more humane . . . than to remove seemingly unwanted, even discarded children from what appear to be lives of misery.” That same sentiment applies to foster children in the United States. What could be more humane than to adopt older African-American children with special needs, who, unlike the foreign born infants many Westerners want to adopt, truly are discarded?

Adoptive parents need not be motivated by humanitarian motives. Indeed, self-interest may benefit children because it motivates individuals to adopt when mere selflessness might not. However, when parents’ reasons for adopting internationally are influenced by racial preferences (conscious or unconscious), the law should discourage such preferences.

II. BARRIERS TO TRANSRACIAL ADOPTION OF AFRICAN-AMERICAN CHILDREN

Despite the obstacles and difficulties associated with international adoption, more Americans each year go abroad to adopt. Why do so many Americans prefer foreign born children whose health needs are equal to or greater than that of African-American children, whose adoptions cost more, and who quite possibly were obtained unethically or illegally? Undoubtedly, many

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159 The Evan B. Donaldson Institute, supra note 123.
160 See AFCARS Report, supra note 2.
161INTERCOUNTRY ADOPTION, supra note 13, at 2.
162Some Americans who may have wanted to adopt domestically may have been discouraged because of their age, marital status, or sexual orientation. However, U.S. agencies’ restrictions with regard to marital status, sexual orientation, and age are generally applied only to adoptions of healthy white infants. Most U.S. agencies allow homosexuals, single persons, and older persons to adopt. See generally Adoption by Gays and Lesbians at 4, available at The Evan B. Donaldson Institute, http://www.adoptioninstitute.org/FactOverview.html#head (60% of adoption agencies, including 46% of agencies placing primarily domestic infants, and 85.3% of
prospective adoptive parents believe the myths discussed above even though they are easy to disprove. Implicit bias against African-Americans makes these myths easy to accept. However, even adoptive parents who are aware that the myths are just that—myths—may prefer to adopt internationally. In this section, I explore the various historical, legal, and societal reasons whites may prefer nonwhite children from Asia or Latin America to African-American children.

A. LEGAL BARRIERS

Relatively few white families in the United States express interest in adopting African-American children. However, some who might have considered doing so may have been deterred by the politics of domestic transracial adoptions. Although the law currently prohibits consideration of race in adoptive placements, for years the law favored race-matching policies. The effect of those policies can still be felt today.

Soon after whites began adopting African-American children in significant numbers in the 1960s and early 1970s, the National Association of Black Social Workers (NABSW) expressed strong opposition, arguing that African-American children must be raised by African-American parents in order to develop a positive racial identity and the skills to cope with racism in our society. The NABSW described the adoption of African-American children by white families as “a form of race and cultural genocide” because African-American children raised in white homes would associate and identify with the dominant white culture, and be thereby removed from the African-American community, not only physically, but also psychologically.

Although most African-Americans disagreed with the views expressed by the NABSW, transracial adoptions decreased dramatically after the NABSW’s agencies placing special needs children, accept applications from homosexuals). In contrast, many sending countries do not allow unmarried persons, homosexuals, or older persons to adopt. For example, China and Guatemala, two of the five largest sending countries, see id. at 8, do not allow gays and lesbians to adopt, and Korea, another top sending country, does not allow unmarried persons to adopt.


166ADOPTION ACROSS BORDERS, supra note 59, at 38 (quoting William T. Merritt, president of the NABSW).

A number of states enacted race matching laws requiring “consideration of the child’s race or ethnic heritage in adoption placements” and giving preference to “a family with the same racial or ethnic heritage as the child.”

In states without race matching statutes, public agencies informally adopted race matching policies. Some private agencies also practiced race matching, believing it was in African-American and biracial children’s best interests to be raised by African-American families.

The supply of African-American children available for adoption surpassed the demand from African-American families. As a result, African-American children generally waited longer than white children for a same race adoptive family. Some African-American children remained in foster care indefinitely even though there were white families willing to adopt them. It similarly took private agencies longer to place African-American or biracial children than white children. Scholars have speculated that the NABSW’s opposition to transracial adoption, along with agencies’ race matching policies deterred prospective adoptive white parents from seeking African-American children and turned them to international adoption. Indeed, in the years following the NABSW’s statement in 1971, the number of Americans adopting internationally increased almost 200 percent.

In 1994, the NABSW issued its current position on transracial adoption: “Transracial adoption of an African-American child should only be considered after documented evidence of unsuccessful same-race placement has been reviewed by appropriate representatives of the African-American community.”

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169 MINN STAT ANN. § 259.28(2) (West 1993); see also Timothy Glynn, Note, The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute, 77 MINN. L. Rev. 925 (1993) (critiquing race matching policies); CAL. FAM. CODE § 8708 (Deering 1993); ARK. CODE ANN. § 9-9-102 (Michie 1993). Arizona, Nevada and Missouri had race matching policies that required that a child be available for adoption for a certain period of time (i.e. 3-6 months) before he or she could be adopted by a family of a different race. Amanda T. Perez, Note, Transracial Adoption and the Federal Adoption Subsidy 17 YALE POL’Y & L. Rev. 201, 211 (1998).

170 Statutory Preference, supra note 136, at 140 n.9 (noting that some states adopted race preferences in their department practice manuals).

171 See Private Race Preferences, supra note 132, at 2352.

172 Lovelock, supra note 37, at *11.


174 ADOPTION ACROSS BORDERS, supra note 59, at 46-47.
Thus, although no longer completely opposed to transracial adoption, the NABSW still demands that agencies attempt a same race placement before placing an African-American child with a white family. That same year, Congress passed the Multi-Ethnic Placement Act ("MEPA"), which prohibited agencies receiving federal funds from "denying to any person an opportunity to become an adoptive or foster parent, solely on the basis of race." However, MEPA allowed agencies to continue considering race "as one of a number of factors" in the placement decision, so long as it did not delay or deny an application solely on the basis of race. White families complained that agencies rejected their applications to adopt African-American children and continued to race match even where there were no African-American families seeking to adopt those children. Child advocates throughout the country filed suit against many state agencies, alleging that adoptive placements had been delayed because agencies continued race matching.

In 1996, Congress amended MEPA, prohibiting agencies receiving federal funding from "deny[ing] to any person the opportunity to become an adoptive or foster care parent on the basis of race, color, or national origin of the person or of the child involved." In contrast to MEPA’s original language which prohibited agencies from rejecting a placement “solely on the basis of race,” MEPA now prohibits agencies from rejecting a prospective family “on the basis of . . . race.” The amendments also repealed the provisions that had allowed states to consider a child’s “cultural, ethnic or racial background” and the capacity of the prospective adoptive parents to meet such needs in making placement decisions. Thus, MEPA now prohibits not only race matching, but also no longer expressly allows agencies to consider the race, color, or national origin of the adoptive parents or child as a factor in the placement decision. Placements must be color blind.

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176 42 U.S.C. § 5115a (repealed).
177 Id.
178 Id.
179 Rabin, supra note 27, at B4.
184 42 U.S.C. § 1996b(2) (creating a private federal cause of action against public agencies considering race in placement decisions).
185 Private Race Preferences, supra note 132, at 2354 (“federal funded agencies are not
The legal barriers to transracial adoptions have apparently been removed. Although MEPA, as amended, does not apply to private agencies, most private agencies have encouraged transracial adoptions of African-American children since MEPA’s enactment. Many even provide cultural competence training for nonwhite families seeking to adopt African-American or biracial children. Given the change in the law and agencies’ practices, one might expect many more white families to be seeking African-American children. Yet, although an increasing number of whites do, a much greater number still turn to international adoption. In the next section, I explore some of the societal reasons many whites still prefer to adopt foreign born nonwhite children over African-American children.

B. Concern About Society’s Racism

Although there are no longer any formal barriers to transracial adoption of African-American children, there are still societal and cultural reasons why whites in the United States may prefer not to adopt African-American children even as Canadians and Europeans do. The NABSW and many well meaning child welfare advocates (of all races) still oppose whites’ adoption of African-American children, reasoning that they are not competent to raise African-American

allowed to use race at all in making foster and adoptive placement decisions.”); Karen Spar, Adoption: Interethnic Placements Legislation in the 104th Congress, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, Oct. 14, 1996, at CRS -3. However, because the amended MEPA does not explicitly prohibit consideration of these factors unless it delays the child’s placement, some scholars have argued that agencies can consider race in exceptional cases. They point to the administrative guidelines issued by the Department of Health & Human Services, defining good social work practice as the “individualized assessment of a prospective parents’ ability to serve as a foster or adoptive parents’ as evidence that race is a legitimate consideration in evaluating the ability of a prospective parent to “meet the child’s needs.” Thus, they claim that MEPA, as amended, may allow race to be considered if there are two families that want to adopt a child and one is of the same race. See Hawley Fogg-Davis The Ethics of Transracial Adoption 50 (2002) (the guidelines draw a fine line between routinely using race as a matter of general policy and using race as a factor in particular placements). Some commentators argue that caseworkers have used this exceptional cases exception to continue race matching. Campbell, supra note 136, at 1619.

186But see Adoption Across Borders, supra note 59, at 144 (concluding that most agencies are not willing to support transracial adoptions and might try to get around MEPA as amended “with the (mis)use of family preservation programs and kinship care”); Private Race Preferences, supra note 132, at 2354 (“race matching by the state is alive and well” even after MEPA’s amendments because they are rarely enforced).

187See Adoption-Link in Illinois; Holy Family Child Services in CA; Building Black Adoptive Families (cite websites); David Crary, Interracial Adoption: The Color of Conflict, L.A. TIMES, July 9, 2000, at 18 (discussing North American Council on Adoptable Children in MN); Telephone Interview with Laurie Morgan, Domestic Adoption Coordinator, Building Black Adoptive Families (Feb. 15, 2004) (explaining that her agency requires that adoptive parents pass a three hour class which consists of questions and answers. The agency must be satisfied that whites seeking to adopt an African-American or biracial child will culturally enrich the child. One relevant consideration is whether they have any friends of color).
children with a healthy self-image or able to teach them the skills to cope with racism. Indeed, some social workers have questioned the emotional stability of whites seeking African-American children. Further, some individuals who claim to support transracial adoption believe that African-American children should be placed with white parents only as a last resort.

Most Americans are well aware of the continued opposition to transracial adoption of African-American children. Countless books, articles, and at least one major film have explored the issue of whether whites can and should raise African-American children. Despite studies concluding that the majority of African-American children who are adopted by white families develop a healthy self-identity, some African-American transracial adoptees have publicly

188 Private Race Preferences, supra note 132, at 2352 (“there is enormous support among whites, especially those in the child welfare system for race matching); Crary, supra note 157, at 18 (“the NABSW, backed by many white colleagues, opposes interracial adoption except as a last resort”). But many African-Americans do not agree with the NABSW’s position. See Private Race Preferences, supra note 132, at 2352-53 (“polls demonstrate very little support among blacks in the general population for the [NABSW]’s position supporting race matching . . .[a]nd many black intellectuals have joined with whites in challenging race matching policies.”); Randall Kennedy, Orphans of Separatism: The Painful Politics of Transracial Adoption, 17 AMERICAN PROSPECT 40 (1994) (African-American law professor arguing that “there is no rationale sufficiently compelling to justify preferring same race child placements over transracial placements” and that “there is no evidence that black foster or adoptive parents, on average, do better than white foster or adoptive parents in raising black children.”); Id. (asserting that it is possible that transracial placements could benefit African-American children because “white adults, as insiders to the dominant racial group in America, will know more than racial minorities about the inner world of whites and how best to maneuver with and around them in order to advance one’s interests in a white-dominated society.”); see also Forde-Mazrui, supra note 134, at 926 (same).

189 Private Race Preferences, supra note 132, at 2356.

190 Lewin, supra note 65, at A1 (“Many, perhaps most, social workers of all races still believe that, when possible, racial matching is in the child’s best interest.”). Even whites who have adopted African-American children sometimes believe that, ideally, African-American children should be adopted by African-American families. See Crary, supra note 157, at 18 (quoting white adoptive mother). Some private agencies also prefer to place African-American children with African-American families. For example, Evangelical Child and Family Agency in Illinois has a Healthy Newborn Adoption Program which includes “Caucasian, Hispanic, Asian or any combined mix of [these] children.” It has a separate program for African-American infants which seeks “African-American adoptive couples or individuals or couples where one spouse is African-American.” Similarly, Building Black Adoptive Families “strives for same-race placements of children” although they will facilitate transracial placements.

191 See Rabin, supra note 27, at B4; LOSING ISAIAH (Paramount Pictures 1995) (portraying an African-American crack addicted mother who abandons her infant son and later returns to reclaim him from his white adoptive family. Her attorney successfully argued that African-American children belong in African-American homes).

192 See RITA SIMON, THE CASE FOR TRANSRACIAL ADOPTION (1994) (discussing long-term studies); Statutory Preference, supra note 136, at 149 (citing studies showing that transracial
expressed opposition to transracial adoption. They claim that notwithstanding good intentions, white adoptive parents are unable to adequately prepare African-American children to cope with racial prejudice.\textsuperscript{193} Some have expressed loving their white adoptive parents, while at the same time wishing they had been adopted by an African-American family. These sentiments may deter whites from adopting African-American children.

Many white prospective adoptive parents themselves are concerned that they are unable to raise an African-American child with a healthy self-image or teach a child how to deal with racial prejudice. They worry that their child will grow up alienated from the African-American community because they (the white parents) have few African-American friends and know little about African-American history and culture.\textsuperscript{194} They also worry that it might not be in an African-American child’s best interests to be raised in a predominantly white neighborhood, forcing the family to relocate to a more integrated area.\textsuperscript{195} They express concern that they do not know how to care for African-American hair or will be unable to explain to a young child why his or her skin is a different color.\textsuperscript{196} In short, many whites are afraid that opponents of transracial adoption might be right—white parents are not competent to raise African-American children.

Although eight percent of adoptions in the United States are transracial, fewer than two percent are comprised of white parents and African-American or biracial children.\textsuperscript{197} Thus, many communities have not yet been exposed to these families and are still resistant to them.\textsuperscript{198} For example, neighbors and relatives sometimes make offensive or ignorant comments and expect parents to explain

\begin{itemize}
  \item adoptees do no worse than intra-race adoptees, and sometimes, do even better. \textit{But see} William Feigelman & Arnold Silverman, \textit{The Long-Term Effects of Transracial Adoption}, 58 SOC. SERV. REV. 588 (1984) \textit{(suggesting that African-American (but not Korean or Colombian) transracial adoptees have more adjustment problems than intra-racial adoptees).}

  \item Lena Williams, \textit{Parent and Child: Beyond Losing Isaiah: Truth In Shades of Gray}. \textit{N.Y. TIMES}, Mar. 23, 1995, Sec. C p. 1. col. 1 \textit{(citing evidence that some African-American transracial adoptees “experience a kind of racial neutering in which they feel no sense of belonging to any racial group.”)}; \textit{Id.} \textit{(quoting David Watts, an African-American man who was adopted by a white family, “I didn’t know what being black meant in terms of culture.”)}; Rachel H. Hoerdlinger, \textit{A Look at... Interracial Adoption: A Last Resort: The Identity My White Parents Couldn’t Give Me}, \textit{WASHINGTON POST}, June 30, 1996, at C03.

  \item Davenport, \textit{supra} note 9, at 11.

  \item \textit{Id.}

  \item \textit{Cf.} Crary, \textit{supra} note 157, at 18 \textit{(describing how a white couple learned how to care for their African-American daughter’s hair).} A surprisingly large number of white adoptive parents mention hair as a concern.

  \item RITA J. SIMON AND RHONDA M. ROORDA, \textit{IN THEIR OWN VOICES: TRANSRACIAL ADOPTEES TELL THEIR STORIES} (2000) \textit{(only 1.2% of adoptions in 1999 involved white parents and African-American children).}

  \item Rush, \textit{supra} note 67, at 116-17 \textit{(arguing that many Americans still view whites’ adoption of African-American children with suspicion).}
\end{itemize}
why they chose to adopt an African-American child.\textsuperscript{199} African-Americans sometimes express disapproval of such families by sneering at them while others approach the parents in public spaces to offer unsolicited advice on how to raise and groom their children.\textsuperscript{200} Curious strangers may stare as the family walks down the street or dines in a restaurant because these families are still rare.

Given these reactions, it is not surprising that whites considering adopting an African-American child express concern about how relatives, friends, neighbors, and even strangers might react.\textsuperscript{201} Would other children ostracize their child? Would their neighbors ostracize them, the parents? How often will they be asked why they adopted an African-American child? How often will they have to explain that their child is not a crack baby?\textsuperscript{202}

Whites’ concerns that they might not be competent to raise African-American children or that their communities might not welcome multiracial families are understandable. Some African-American transracial adoptees whose parents pretended that race did not matter grew up feeling alienated from the African-American community.\textsuperscript{203} Child development experts now advise parents not to ignore race and some agencies require that parents seeking to adopt African-American and biracial children take cultural competence classes where they discuss the impact of race in America, helping a child cope with racism, and the importance of exposing their child to African-American culture and other African-American and multiracial families.\textsuperscript{204} Thus, adoptive parents should be concerned about the issues raised by transracial adoptions.

However, these issues are present to some degree in all multiracial

\textsuperscript{199} Crary, supra note 157, at 18 (describing transracial family who received an anonymous letter stating “you’re making our neighborhood a ghetto.”); \textit{id.} (describing white adoptive father whose own father did not approve of his adoption of an African-American child); Rush, supra note 67, at 122 (stating that some whites who are surprised to learn that her adopted daughter is African-American have proceeded to “assure her that ‘you’d never know it,’” “she looks Asian, Hawaiian, even white with a really deep tan”).

\textsuperscript{200} See Adoption and African-American Children, July 4, 2004 http://republicoft.typepad.com/republic_of_t/2004/07/adoption_africa.html (posting from white couple stating that before they adopted an African-American child, they were “warned . . . that the greatest disapproval they’d get would be from the African-American community,” that an African-American woman came up to a white woman in a café “screaming at her about how could she dare think she could raise a black child,” and that while at a grocery store, an African-American man had loudly asked his friends “What is a black baby doing with a white man . . . that's what I'd like to know!”); \textit{id.} (describing elderly African-American woman who sneered at a white woman and her African-American daughters, while muttering “Damn white people” as they strolled down the street.”).

\textsuperscript{201} Davenport, supra note 9, at 11; Lewin, supra note 65, at A1 (whites “worry that given the debate over transracial adoption, they’d be looked at coldly by African-Americans if they adopted a black child.”) (quoting Harvard Law Professor Randall Kennedy).

\textsuperscript{202} See supra note 34 and accompanying text (discussing perception that African-American adoptees are crack babies).

\textsuperscript{203} SIMON, supra note 164, at 109-11.

\textsuperscript{204} See Telephone Interview with Laurie Morgan, supra note 157.
families, not just families comprised of white parents and African-American children. For example, Koreans adopted by white Americans have documented the difficulties of growing up with parents who did not understand racism or pretended that it did not exist. They have also described the pain of losing their country and culture, and their experiences with discrimination in white communities. Similarly, Chinese adoptees have discussed their experiences with racism and discrimination in predominantly white communities and have struggled with similar identity issues as African-American and Korean transracial adoptees. Critics oppose international adoption, in part, because it separates children from their racial, cultural, and national communities, and places them at risk of discrimination in white communities. Thus, some of the concerns that deter whites from adopting African-American children should lead them to question whether they can adequately raise other nonwhite children.

To illustrate, whites concerned that they might not be competent to raise an African-American child with a healthy identity should also be concerned that they might not be competent to raise a Chinese or Mexican child with a healthy identity. Whites families concerned (1) that they will not be able to help their African-American child cope with racism, (2) that it might not be in an African-American child’s best interests to grow up in a predominantly white neighborhood, or (3) that their neighbors or family members might not welcome an African-American child, should have the same concerns about adopting a Latin-American or Asian child. As noted above, Korean adoptees have described their experiences with racism in a town and school where almost everyone was white. Finally, if whites are deterred from adopting African-American children, in part, because they do not have African-American friends or do not believe that they can adequately expose them to African-American culture, they should also be concerned that they will not be able to expose a Guatemalan or Cambodian child to their respective cultures or interact with other Guatemalans or Cambodians. African-American culture is much more readily accessible through television, theater, churches, history books, etc. than Guatemalan or Cambodian culture and there are many more African-Americans in the United States than

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206 Id. at 24.


208 FAMILY BONDS, supra note 11, at 156-57 (summarizing arguments); Mothers, Hierarchy, supra note 14, at 268 (same); Leslie Doty Hollingsworth, International Adoption Among Families in the U.S.: Considerations of Social Justice, 48 SOC. WORK 209, 209 (international adoption interferes with children’s rights to national, cultural, ethnic, and family of origin knowledge and access).
there are Guatemalans or Cambodians.

Clearly, transracial adoptions of Asian or Latin-American children raise many of the same issues as transracial adoptions of African-American children. Yet, whites seeking to adopt internationally are either oblivious to the similarities or choose to ignore them. One reason may be that many Americans believe that race is not an issue or is less of an issue for persons of Asian or Latin-American ancestry than for African-Americans. Some believe that Asian Americans and Latinos (at least the lighter skinned) do not experience discrimination. These perceptions notwithstanding, bias against persons of Asian and Latin-American descent does exist and scholars tracing the history of discrimination against Latinos and Asian-Americans argue that discrimination against these groups is no less virulent than that against African-Americans. Further, as noted above, nonwhite foreign adoptees have experienced racism and discrimination. Thus, whites adopting children from Latin-America or Asia should expect that issues of racial identity and racism will arise.

Another reason Americans may have greater concerns about adopting an African-American child than they do about adopting a Chinese, Indian, or Guatemalan child, for example, is the strong opposition of the NABSW to whites’ adoption of African-American children. However, many sending countries have expressed opposition to international adoption, arguing that it is another form of imperialism, where Westerners rob them of their children. Fear that they

209One scholar has noted the irony of not placing African-American children in transracial homes because it might harm them, and apparently driving prospective adoptive parents to adopt nonwhite foreign born children even though they “will be subjected to the same potential risks the domestic children were being shielded from.” Transracial Adoption, supra note 143, at 149.

210Beth Brophy, The Unhappy Politics of Interracial Adoption, U.S. NEWS & WORLD REPORT Nov. 13, 1989, at 72. (noting that not all adoptions between the races are as controversial as the ones involving African-American children and that concern for the preservation of cultural identity is far less often heard in the case of foreign-born babies).


212Transracial & International, supra note 113, at 105.

213INTERCOUNTRY ADOPTION, supra note 13, at 2, 5 (“what the West has generally viewed as charitable, humane and even noble behavior, developing countries have come to define as imperialistic, self-serving and a return to a form of colonialism in which whites exploit and steal natural resources.”); Mothers, Hierarchy, supra note 14, at 268 (wealthy adopters come to poor countries in the wake of wars, earthquakes, and famines and take many healthy children leaving behind older and disabled children for institutional care); FAMILY BONDS, supra note 11,
might be losing their future human resources—their children—to wealthier nations.\(^{214}\) has led the sending nations to prefer domestic adoptions. For example, Russia has stated that it would prefer that Russians adopt its children. Indeed, all of the sending countries give preference to domestic adoptions and many countries, including India, Korea, and China, have reduced the number of children they make available for international adoption. Many of the sending nations that participated in the conference leading to the Hague Convention on Intercountry Adoption expressed opposition to international adoption and favored making the process more burdensome for adoptive parents.\(^{215}\) Similarly, various human rights’ and children’s rights organizations have advocated for elimination of international adoption.\(^{216}\) Citizens in the sending nations have also expressed disapproval of international adoption. For example, Americans in Peru to adopt a child have been scorned in the same manner as whites in the U.S. who have adopted African-American children.\(^{217}\)

Interestingly, whites deterred from adopting African-American children, in part, because of opposition from the NABSW and its sympathizers, have not been similarly dissuaded from adopting internationally despite opposition from the sending countries. Even though the media has publicized the concerns of the sending nations,\(^{218}\) the concerns of the sending nations may be easier to disregard

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\(^{214}\)ADAM PERTMAN, ADOPTION NATION 87 (2000).

\(^{215}\)Beyond Biology, supra note 118, at 12.

\(^{216}\)Id (child advocates argue that international adoption leads to child trafficking and harms orphaned and abandoned children who are left behind—the ones who did not adopt.); Transracial Adoption supra note 143, at 142-43 (sending countries are “concerned that the financial rewards and incentives for facilitating intercountry adoption tend to corrupt the social service infrastructure.”); Vonk et al., supra note 37, at 496 (intercountry adoption slows down the changes necessary to improve conditions for the majority of abandoned children); Mothers, Hierarchy, supra note 14, at 268 (intercountry adoption may retard the growth of child welfare services in the sending countries); Rowe, supra note 197, at 12 (citing the “danger that adoption can be used as an easier or cheaper alternative to providing services to children in their own homes.”).

\(^{217}\)http://americanadoptions.com/adopt/domestic_international (warning persons considering adopting internationally that American citizens are not well received in many countries); Bogert, supra note 91, at 78 (discussing American woman beaten in Peru because villagers thought she was looking for children to steal and sell).

\(^{218}\)See 60 Minutes: Children Are Hot Items on the Black Market in Romania, supra note 85; Many scholars are aware of the arguments that international adoptions are a potential form of imperialism. Cf. Ann Hornaday, The Baby Chase: Women on the Verge in a Foreign Land, Wash Post Oct. 3, 2003 (discussing film about American women in a Latin American country to adopt). Yet, most legal articles quickly dismiss charges of imperialism and focus primarily on improving
because they are so far away geographically. However, some Latinos and Asian-Americans in the United States, although not as vocal as the NABSW, have opposed whites’ adoption of children of Asian or Latin-American descent (foreign or U.S. born) in the same manner that some African-Americans (and whites) have opposed transracial adoption of African-American children.219

C.  IMPLICIT PREFERENCES

There is another reason Americans continue to adopt Asian and Latin-American children even when such adoptions raise many of the same issues as transracial adoptions of African-American children: implicit preferences for non-African-American children. Although some whites admit to having explicit preferences for non-African American children,220 even those who do not express such preference are likely to prefer non-African-American children. As noted above, studies have repeatedly shown that most whites hold negative attitudes towards African-Americans even when self-reports indicate zero bias. Studies have also shown that most Americans have a strong automatic preference for lighter-skinned persons over darker-skinned persons.221 Thus, it is likely that Americans have implicit preferences for children from Asia and Latin-America, who tend to be lighter-skinned than African-American children, over African-American children. Americans’ preferences for biracial children, who are often lighter-skinned, over African-American children, as shown by their willingness to pay more to adopt a biracial child than an African-American child, is further evidence of their implicit preferences for lighter-skinned children.

Racial preferences, whether conscious or unconscious, do play a role in the decision to adopt. As shown above, such preferences might be, to some degree, the result of race matching policies that effectively prohibited whites from the process and access for white Americans. See Lilith, supra note 40, at 258-59. Similarly, U.S. scholars have dismissed or downplayed the problem of child trafficking, arguing that children should not be stolen nor bought or sold but we must see “these evils in perspective” as these “are by no means the worst things that are happening to these children and their birth parents” FAMILY BONDS, supra note 11, at 153, 155; International Adoption, supra note 60, at 196 (the problems that should be seen as central to the international adoption debate are the misery and deprivation that characterize the lives of the huge numbers of children in the world); But see Transracial & International, supra note 113, at 105 (urging advocates of international adoption to address history of colonialism, cultural imperialism, and economic exploitation that lead poor women in poor countries to give their children to privileged women in Western nations).


220Lewin, supra note 65, at A1 (noting that some whites unwilling to adopt an African-American child express willingness to adopt a Hispanic, Native-American, or Asian-American child—“anything but black.”); Id. (noting that whites can “imagine themselves the parents of a little Chinese girl, but not of Shaniqua with the kinky hair) (quoting Professor Randall Kennedy, Harvard Law School).

221https://implicit.harvard.edu/implicit/demo/selectatest.html
adopting African-American children. These legal barriers contributed to social opposition and disapproval of such adoptions even as approval of international adoptions of Asian and Latin-American children grew. The historical legal barriers to transracial adoptions of African-American children, and the lack of such barriers in international adoptions of Asian and Latin-American children have signaled that the latter are encouraged while the former are tolerated only as a last resort. The legacy of these legal barriers is still felt today, nine years after Congress prohibited federally funded agencies from considering race in adoptive and foster care placements. The law must take proactive measures to support transracial adoptions of African-American children. In the next Part, I address how, after years of creating and encouraging racial preferences in adoption, the law should now discourage them.

III. DISCOURAGING PREFERENCES FOR NON-AFRICAN-AMERICAN CHILDREN

Adopting a child is one of the most personal decisions an individual can make. The U.S. Supreme Court has repeatedly recognized the fundamental rights of parents to raise their children as they see fit without interference from the state. However, although individuals have a fundamental right to procreate, courts have never recognized a fundamental right to adopt. As a creation of the state, adoption is subject to regulation. Adoptive parents are carefully screened and must meet stringent statutory requirements, and in many cases, additional criteria set forth by adoption agencies, all in the interests of ensuring that applicants are fit to parent. One criterion should be that prospective adoptive parents not discriminate on the basis of race when selecting their children.

Americans subscribe to an anti-discrimination norm. We have laws prohibiting discrimination based on gender, age, disability, and sexual orientation. But the strongest norm is against discrimination on the basis of race. Society’s interest in protecting against race discrimination is so important that it frequently

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

223 See Mullins v. Oregon, 57 F.3d 789, 794 (9th Cir. 1995) (“Whatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest”); see also Lindley for Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989) (“[W]e are constrained to conclude that there is no fundamental right to adopt.”).

224 In re Robert Paul P., 63 N.Y.2d 233 (1984) (adoption is “solely the creature of, and regulated by, statute law”); cf. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977) (finding that, unlike a natural family, a “foster family ... has its source in state law and contractual arrangements”).

225 For examples, some private agencies work only with prospective adoptive parents who are under 40 years of age or with married couples even if these are not state requirements.
trumps other societal interests. For example, in the family law context, courts have held that race is not a permissible consideration in a custody dispute between parents of different races even if it is in the child’s best interest to reside with a parent of a particular race.226

The state has a duty to protect its children’s best interests.227 Adoptive parents’ preferences for non-African-American children harm African-American children. As Professor Banks has argued in the context of public agency adoptions, because most persons seeking to adopt are white, preferences for non-African-American children significantly reduce the number of potential adoptive parents available to African-American children.228 In the private adoption context, birth mothers of African-American and biracial children have fewer families to choose from and thus, are forced to be less selective when placing their children than birth mothers of white children who have a large pool of applicants seeking to adopt their babies.229

In an article published shortly after MEPA was amended, Professor Banks attacked, under the Equal Protection Clause, public agencies’ practice of allowing and encouraging prospective adoptive parents to indicate their preference for a child of a particular race,229 thereby excluding entire groups of children from consideration based on race. Banks proposed prohibiting state agencies from considering applicants’ racial preferences and instead assigning children without regard to race.230 Prospective adoptive parents could still select or reject a

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226See Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (“The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”); see also In re Marriage of Brown, 480 N.E.2d 246, 248 (In App. 3 Dist., 1985) (upholding “on equal protection grounds that race is not a permissible consideration to be employed by the courts in this context in determining custody”); Farmer v. Farmer, 109 Misc.2d 137, 140 (N.Y Sup. 1981) (rejecting African-American father’s argument “that the best interests [of a biracial child] compel award of custody to him because society will perceive [the child] to be black.”).

227Palmore, 466 U.S. at 433 (“The State, of course, has a duty of the highest order to protect the interests of minor children”); Goodridge v. Dept of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003) (“Protecting the welfare of children is a paramount State policy.”).

228Banks, supra note 210, at 881.

229Id. Most adoption agencies ask prospective adoptive parents to select the race of the children they would consider adopting and parents can be quite specific when selecting the racial and ethnic breakdown of their child. See Williams, supra note 53, at 916 (noting that the forms allow applicants to choose many combinations—for example, a child that is half African-American and half Vietnamese or a mix of three or four particular ethnicities or races). Applicants also indicate other preferences such as age, sex, health status, color of eyes, a birth mother who did not smoke, etc. See id. at 915. Some public agencies have lists of available children classified by race and thus applicants who have indicated interest in adopting white children only would never view listings or photos of African-American children. In private agencies, if applicants indicate that they will only adopt a white child, their profiles would never be shown to women who will be giving birth to African-American or biracial children.

230Banks, supra note 210, at 943-62. Other scholars have made similar arguments. See Twila Perry, The Transracial Adoption Controversy, 21 N.Y.U. REV. L & SOC. CHANGE 33, 104 (1993-94) (arguing that the only true color blind system of adoption would be one in which all
particular child based on race, or any other criteria, but they would have to consider each child individually rather than exclude an entire racial category of children.\textsuperscript{231} Thus, the state would no longer facilitate adoptive parents’ exercise of racial preferences.

Many individuals seeking to adopt want a child of the same race as they or of the same race of at least one adoptive parent. Although some adoption experts believe racial biases are at the root of these preferences, there might be non-race-based reasons for this preference. Many prospective adoptive parents want children of their same race because they do not want others (or the child) to know that the child is adopted.\textsuperscript{232} Although this may be evidence of society’s obsession with biological children, this preference does not imply that children of certain races are valued more than others, nor does it reinforce racial hierarchy in adoption.

However, many families adopting internationally are also adopting transracially. Sixty-three percent of the children Americans adopted from other countries in 2003 were not white.\textsuperscript{233} In those cases, it is evident to everyone, including the child, that the family is not biologically related. Although a family adopting transracially may have non-race based reasons for choosing to adopt a child from China as opposed to an African-American child, for example, the evidence suggests that race plays a role in at least some, if not many, cases. The law’s and society’s interest in discouraging adoptive parents from choosing or rejecting children based on race requires that the burden of showing non-race-based reasons for preferring some nonwhite children over others be placed on the individuals making these choices. Thus, I propose that individuals seeking to adopt a foreign born child \textit{of a different race} (than they or their partners) be required to show that (1) they have sought to adopt an African-American or biracial child\textsuperscript{234} who meets their non-race based preferences (such as age, health status, sex), but have been unsuccessful or (2) they have non-race-based reasons for preferring a non-African-American child.

An unsuccessful attempt to adopt an African-American child would be one

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\textsuperscript{231}Banks, supra note 210, at 958.

\textsuperscript{232}Gabrielle Glaser, \textit{Adoption: The Geopolitics, The Choices}, \textit{The Oregonian}, July 4, 2004 (“the natural tendency is to want a child who looks like you so you don’t get obvious stares when you walk down the street.”)

\textsuperscript{233}Davenport, supra note 9, at 11.

\textsuperscript{234}Because allowing adoptive parents to state their preference for a biracial child over an African-American child would reinforce the existing racial hierarchy that values lighter skinned children, I propose that parents not be allowed to specify a preference for a biracial child over an African-American child. See Adoption-Link, \textit{http://www.adoptionlinkillinois.com/faqs.php} (not allowing “families to specify the racial heritage of a child [because] [i]n our society even part-African-American persons are considered African-American and this heritage needs to be acknowledged and celebrated.”
in which a family has been waiting for a child for one year or longer and has not received one. Thus, if a white family seeking to adopt a child from China shows that they applied thirteen months ago to adopt a healthy African-American or biracial infant, but have not received one nor have they been selected by a birth mother for her soon-to-be-born child, they would be allowed to immediately pursue an adoption of a child from China or any other country. In contrast, a white family who has not first sought to adopt an African-American child and who has not shown non-race-based reasons (as illustrated below) for its failure to do so, would be forced to wait one year before pursuing an international adoption. Of course, if a white family was seeking to adopt a white child from Russia, they could do so immediately because, presumably, they are seeking to adopt a child who could resemble them physically, a legitimate consideration.

Non-race-based reasons for seeking to adopt a foreign-born child of a different race over an African-American child would include ties to a particular country or region. For example, a white couple seeking to adopt a child from Guatemala who has not sought first to adopt an African-American child might be able to immediately pursue the Guatemalan adoption if, for example, one of the prospective parents lived in Guatemala or a neighboring country for some time and still has some ties to that country or region. Evidence that, as a result of her background (she majored in Latin American studies in college and has maintained an interest in the culture), a prospective adoptive parent might be better able or suited to parent a child from a certain country as opposed to an African-American child might also suffice. There would be no exhaustive list of non-race-based reasons. However, Americans seeking to adopt a foreign born child of another race would have the burden of showing that their reasons are not based on race and that they are not impermissibly valuing certain nonwhite children over others.

By signaling to prospective adoptive parents that racial preferences are not appropriate considerations, and by requiring them to show that their preference for a transracial adoption of a non-African-American child is not motivated by racial biases, the law may decrease the likelihood that adoptive parents will allow

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235 One year is a reasonable period of time because most families seeking to adopt African-American children receive one within one year, usually less. Thus, a family who has not received a child after such time, should be able to go abroad. A person who has not applied to adopt an African-American child would have to wait 12 months from the time they first sought to adopt a foreign born child before the agency could even look at their application. To illustrate, if an adoption of a child from China generally takes 15 months, it would take at 27 months (12 month wait plus 15 month regular processing time) for a person who did not first apply to adopt an African-American child to receive a child.

236 Initially, the one year period may encourage more whites to adopt white children from Eastern Europe because they would not have to wait one year to pursue such adoptions. However, the pool of (apparently) healthy, young children in these countries is small and shrinking. Further, many countries supplying white children such as Russia, Ukraine, Romania, and Bulgaria, have shut down their international programs or limited the number of children they allow to be adopted internationally. Thus, Americans wanting to adopt internationally may have to turn to Asia and Latin-America.
such biases to inject themselves into their decision to adopt. It forces whites seeking to adopt Korean or Indian children, when there are available African-American children, to question their preferences and whether they reflect unconscious racial biases. Many Americans who adamantly oppose race discrimination are unaware of the racial biases and assumptions they have internalized about different groups. Having to reflect for twelve months on their reasons for preferring a nonwhite, non-African-American child over an African-American child might reveal to them their hidden racial biases. Once they are aware of their biases, they can work to change them.

My proposal would not require anyone to adopt or apply to adopt an African-American child. Individuals opposed to parenting African-American children would simply wait one year after submitting their application for an international adoption before it could be processed. However, some families will at least consider adopting an African-American child because the implication of not doing so—that they would rather wait an entire year to proceed with a transracial adoption of a non-African-American child from a country or region with which they have no ties merely because they do not want an African-American child—is likely to trigger embarrassment, shame, and guilt. Most Americans have internalized the antidiscrimination norm and believe that racial discrimination is wrong. Many would agree that discriminating against an innocent child is even downright immoral. Thus, it is unlikely adoptive parents would want to perceive themselves as racists. Further, some individuals might be embarrassed to say “I’ll wait” when the agency informs them that they have to wait one year to pursue an international adoption, but can start the paperwork to adopt an African-American child immediately. Concern that the agency staff would assume their reasons for refusing to consider adopting an African-American child are race-based might motivate some individuals to at least give it some thought. Further, individuals who want a child as soon as possible are unlikely to wait one year before submitting their application when they could get an African-American child much sooner.

Some Americans considering international adoption have never

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237 See notes 229-230 and accompanying text (discussing unconscious biases).
238 Lawrence, supra note 229, at 321 (arguing that “most of us are unaware of our racism.”)
239 Although initially the number of international adoptions would decrease significantly since most Americans would have to wait one year before they could pursue an international adoption, this is a positive consequence of the waiting period. A decrease in Americans’ demand for foreign born children will likely ameliorate the trafficking of children as agents and scouts would no longer feel the need to pressure women into relinquishing their children to satisfy a much greater demand for infants than the available supply.
240 Persons who are guilted into parenting African-American children might not make good parents. However, requiring that persons adopting transracially (either domestically or internationally) satisfy a cultural competence class as some agencies now require is likely to weed out those persons who are not capable of parenting a child of a different race.
considered adopting an African-American child simply because they did not know it was possible. Given the historical opposition, some whites might still believe that they cannot easily adopt an African-American child or simply do not know anyone who has done so. Because transracial adoptions of non-African-American children are five times more common than transracial adoptions of African-American children, many people know someone who has adopted a foreign born child. Knowing someone who has adopted internationally makes the process less daunting and provides a support system for the parents and the adopted child. To illustrate, Americans who adopt children from China, Korea, and Guatemala, among others, find themselves part of a supportive community. There are numerous culture camps, mentoring programs, language programs, and support groups for foreign adoptees and their parents. In contrast, fewer people know a white family who has adopted an African-American child, and there is no similar support system for families who have adopted African-American children or the transracial adoptees themselves.

Some commentators have speculated that whites in the U.S. are not adopting African-American infants because they are not aware that such children are available. This could be true. The media has highlighted the positive aspects of international adoptions while highlighting primarily the objections to domestic transracial adoptions. Even after a 60 Minutes segment showing that hundreds of African-American infants are adopted by foreign white families each year, most Americans are not aware that African-American infants are ending up in foreign homes. Requiring Americans to wait one year before pursuing an

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242 Davenport, supra note 9, at 11.

243 Id.; see also Vonk et al., supra note 37, at 496 (the U.S. media has focused on happy families giving their adopted infants a wonderful life while highlighting the deplorable conditions of foreign orphanages). For example, one advertisement for Kodak features a white couple on an airplane plane holding as Asian baby. The caption reads: “The flight takes 12 hours; taking the picture takes 2.5 seconds.” Similarly, in an American Express’ commercial, a couple gets a call informing them that there is a child waiting for them in China. And they use the American Express card. In a television commercial for Weight Watchers, people are eating, laughing, and enjoying life. Periodically, the camera focuses on a white woman feeding her Asian baby. These advertisements feature adoptions of Asian children positively, but there are no similar advertisements featuring happy white parents with African-American children. See Abby Ellin, Adoptive Families Get a Starring Role in Several Television and Print Marketing Campaigns, N.Y. TIMES, Mar. 19, 2003.

244 60 Minutes: Born in USA; Adopted in Canada (CBS television broadcast, Feb. 13, 2005, Leslie Stahl, anchor).
international adoption, and providing them with accurate information about international and domestic adoptions might debunk the myths about international adoption and might persuade some whites who never considered adopting an African-American child to do so.

My proposal might also eliminate some of the remaining opposition to whites’ adoption of African-American children. When whites first started adopting children from Korea, they were exposed to rude stares, ignorant comments, and some opposition from neighbors and family members. However, as international adoptions of Asian, and more recently, Latin-American children, have become more common, especially in certain parts of the country, more individuals approve of, or are almost oblivious to, families comprised of white parents and Asian or Latin-American children because such families are no longer rare. Similarly, as transracial adoptions of African-American children become more common, more individuals will accept and even approve of such adoptions. In time, few people will give such families a second look. Furthermore, the law’s statement that race is not an appropriate consideration in the adoption decision might decrease the remaining opposition to whites’ adoption of African-American children. As noted above, over seventy percent of Americans support transracial adoption of African-American children. However, because opponents of transracial adoption are much more vocal than its supporters, many people believe that the majority opposes such adoptions. By formally expressing a preference for adoption of African-American children over international transracial adoptions, the law would signal that many Americans support whites’ adoption of African-American children. Thus, Americans might finally realize that most people support such adoptions.

Americans adopt children from numerous countries and work with hundreds, possibly thousands, of agencies and independent facilitators both in the U.S. and abroad. Thus, it may appear difficult logistically to enforce a waiting period before pursuing an international adoption. However, Congress’ plenary power over immigration gives it the authority to regulate international adoptions by determining who is eligible to enter the United States.245 Thus, Congress can simply enact a statute providing that the U.S. shall only admit foreign born adoptees whose parents complied with the one year waiting period or showed non-race-based reasons for adopting internationally.246

Racial preferences are present in domestic adoptions as well. Thus, the States have an interest in discouraging not only preferences for foreign born nonwhite children, but also preferences for Native American, Hispanic, and Asian American children over African-American children. State law governs domestic

245 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 22.2 (3d ed. 1999) (“the power of Congress over the admission of aliens to this country is absolute.”).

246 Although this may penalize the child who is denied entry into the United States as a result of the adoptive parents’ acts, it is no different from the current policy of denying entry to adoptees who do not satisfy the U.S. definition of an orphan, even after they have been adopted by a U.S. citizen.
adoptions. Thus, Congress lacks the authority to regulate domestic adoptions. However, the States which license all of the adoption agencies (both public and private) in their jurisdiction can condition licensing on compliance with a one year waiting period before placing Asian-American or Hispanic children, for example, with white families while there are African-American children available, thereby mirroring the proposed federal law discouraging Americans from adopting internationally for race-based reasons.

CONCLUSION

Although many Americans do not yet applaud whites’ adoption of African-American children as readily as they do adoptions of Asian or Latin American children, this is changing. Most whites who have adopted African-American children in recent years report that race is not an issue most of the time and that, aside from a few isolated incidents, most people are supportive of their multiracial family. Further, there is evidence that an increasing number of whites are interested in adopting African-American children. Indeed, fifteen percent of adoptions of African-American children from the foster care system in FY 1998 involved white parents, an increase from past years. Given that children in the foster care system have traditionally been perceived as less desirable than children in the private system, the percentage of whites seeking African-American children through the private system might be significantly higher.

All children need permanent homes and all should be valued equally, regardless of race. The law has a responsibility to make this happen. By discouraging adoptive parents from basing decisions to adopt on racial preferences and by supporting all multiracial families, the law can help ensure that African-American children have the same opportunities as children of other races to be raised in permanent homes. If the law is successful in changing racial preferences, this Article’s proposal will have achieved its purpose and become obsolete. Americans should look forward to the day when the demand for an

\[247\] Crary, *supra* note 157, at 18 (citing white adoptive parents of African-American child who feel that most of their neighbors have been supportive and most of their relatives approve of their decision to adopt transracially).

\[248\] *Id.*

\[249\] Just as white families in Canada who have adopted African-American children hold seminars to educate themselves about race issues, formed support groups for transracial families, and send their children to African-American summer camps, the U.S. can provide and fund similar programs. *See 60 Minutes: Born in USA; Adopted in Canada* (CBS television broadcast, Feb. 13, 2005, Leslie Stahl, anchor); *see also* Glaser, *supra* note 25, at L1 (noting that Canadian whites who have adopted African-American children have sought out Blacks in Canada to mentor their children).

\[250\] For example, if a white couple seeking an African-American child were told that the wait list is two years, they would be able to pursue an international adoption immediately.
African-American child is the same as that for other children.