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A RACE-CONSCIOUS ARGUMENT FOR TRANSRACIAL ADOPTION

HAWLEY FOGG-DAVIS*

I. INTRODUCTION

The transracial adoption debate is a microcosm of larger theoretical disagreements over how African Americans should be treated in public policies.¹ At the same time, adoption policies prompt a unique set of philosophical dilemmas because they intervene directly in the lives of children. Intervention at this young age may be morally justified, as in the case of a teenage girl who is financially and emotionally unprepared for motherhood and decides to "give up" her baby for adoption.² Intervention may even be morally required, as in certain cases of child abuse or neglect, where a court terminates parental rights, thereby releasing a child for adoption. When such governmental intrusion occurs against background conditions of structural racism,³ the question of whether black children⁴

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¹ Although the term transracial adoption refers to any adoption involving adoptive parents whose racial classification differs from that of the adoptee, the political debate has focused on the most controversial scenario, that of white adoptive parents and black adoptees. Thus, while I expect my work to inform our understanding of other forms of transracial adoption, I focus here on United States domestic adoptions involving black children and white adults.

² We should take care not to equate automatically the signing of adoption release papers with "free consent." This ambiguity is an especial concern when the "birthmother" is a teenager, and under parental, as well as societal, pressures. In response to feeling duped by family members, social workers and medical professionals, a group of women who had placed their babies for adoption during the 1950s formed the activist group, Concerned United Birth Parents in 1976. Barbara Yngvesson addressed these issues in "Adopting Birthmothers' Choices: Voluntary Relinquishments and the Meaning of Consent," a paper given at the Institute for Law and Society conference, *The Culture of Choice in Law and Social Policy*, New York University Law School (April 26, 1996).

³ The term, structural racism, refers to the ways by which one's racial minority status,

should be placed in white adoptive homes emerges as an especially critical policy issue which, if examined, holds important implications for recent theoretical debates over multiculturalism.

One implication is for political theorists to consider the role of black cultural nationalism in American politics. Are African Americans justified in using cultural nationalism as a way of asserting the political value of their group? Are black adults morally justified in opposing the placement of black children in white homes on the grounds of cultural preservation? In this article, I argue that while opposition to transracial adoption based on cultural nationalism cannot be translated into public policy without accommodating the racist idea that a "proper" family must avoid "race-mixing," serious consideration of the cultural nationalist critique produces two crucial, related theoretical insights: 1. Structural racism, both in the adoption system and the United States society generally, persists and disadvantages blacks as a group, making a black child more likely to be in need of adoption than a (healthy) white child, and that black adults wishing to adopt will have greater difficulty accessing the adoption system than their white counterparts. 2. Until structural changes occur to correct for racial disadvantage outside of the adoption system, cultural nationalism will offer many blacks a vehicle for healing what Cornel West describes as "metaphysical wounds" on black souls.⁵

This article reframes the current theoretical debate over transracial adoption by exploring the unique moral concerns raised when government must legally construct adoptive families within a race-conscious social structure. Instead of replicating the rhetorical chasm between colorblindness and color consciousness, I argue that the transracial adoption debate should be interpreted as a unique set of disagreements over the normative role of adoptive families in fostering the racial identity of black adopted children. It is this particular set of conflicts which distinguishes the transracial adoption controversy from other policy debates involving the explicit use of racial classification, such as various affirmative action programs.

State parental interest in the welfare of children (*parens patriae*) mandates that courts perform a utilitarian calculus of the predictive well-being of individual children in individual cases where children are in need of adoptive homes by

as assigned by the majority culture, impedes access to structures of economic and political power. Red-lining, for example, impedes blacks' access to residential housing markets. In the political arena, the drawing of voting districts which reflect racially segregated housing patterns is another example structural racism.

⁴ In this article, the term "black" and/or "African-American" includes bi-racial individuals, though I recognize and appreciate arguments which assert distinctions between those having one black parent and one white parent, and those having two black parents. It seems that transracial adoptions involving bi-racial children raise an especially instructive set of issues for our consideration of race in adoption policy, and in American politics more generally.

⁵ Cornel West, *Being and Blackness: The Struggle Against Nobodiness*, The W.E.B. Du Bois Lectures, Harvard University, 1992.

using a "best interests of the child" standard.⁶ Often criticized for its vagueness and malleability, "the best interest test does not begin to provide some guidance for resolution of these [adoption] conflicts by emphasizing the individual child's interests, rather than those of adoptive children in general."⁷

Interpreting (or predicting) the best interests of individual black children in the adoption context necessitates a two-tiered conceptualization of race. On one tier, race exists as a structural variable which pre-dates an individual's life. Race, in this respect, refers to the "raced" structure into which one finds herself born, as a factor in the structural make-up of the society from time to time, and from place to place. On another tier, race exists as an ideological factor in personal identity struggles. The individual, physically, psychologically, and spiritually, becomes the locus of that age-old drama: To know thyself.

Families form a nexus, albeit a complicated one, between these two interpretive levels of race.⁸ What is missing from both sides of the current transracial adoption debate is a sustained analysis of this particular nexus in the unique setting of the adoptive family. I use this interpretive framework to argue that although race should not be a legal factor in adoptive placements, white adoptive families are morally obligated to have compassion for their black adoptive child's individual struggle to develop her personal identity within a system of culturally enforced racial classification.

The first section of this article situates the transracial adoption debate within some of the major theoretical forays into multiculturalism. Do existing models of cultural pluralism help us to understand black American group experience? Next, I consider the effects of societal racism on the particular institutional practices involved in adoption, pointing out the dense capillary nature of the systemic manifestations. Part three explores the legal theoretical debate over transracial adoption, concluding that conditions of structural racism, as evidenced in the

⁶ The "best interest of the child" standard in modern American jurisprudence derives from the English common law principle of *parens patriae* or "the parent of the country," which referred to the King's royal prerogative to act as guardian to infants and the insane. In the United States, *parens patriae* remains the domain of individual states. Despite the English common law derivation of the "best interest of the child" standard, United States adoption law and social practice did not originate from the common law. Instead, American adoption law used Roman adoption law as its guide, except that United States adoption law prioritizes the protection of children whereas Roman law focused on the rights of the adoptive parents. See Ruth-Arlene Howe, *Adoption Practice, Issues, and Laws 1958-1983*. 17 FAM. L. Q. 2 (1983).

⁷ Margaret Howard, *Transracial Adoption: An Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 509 (1984).

⁸ Arlene Skolnick poignantly captures the ordered chaos of family life generally: "The family is a place of enduring bonds and fragile relationships, of the deepest love and the most intractable conflicts, of the most intense passions and the routine tedium of everyday life. It is a shelter from the workings of a harsh economy, and it is battered by forces beyond its control." ARLENE SKOLNICK, *EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY* xvi (1991).

adoption system, preclude colorblindness as a theoretical justification for permitting the placement of black children in white homes.

II. CULTURAL PLURALISM AND AFRICAN AMERICAN GROUP IDENTITY

Multicultural theorists value the ideal of many different ways of life thriving in our civic realm, what Rawls optimistically calls a "social union of social unions."⁹ At the same time, many theorists embrace the equally elusive ideal of a politics that remains neutral with respect to these differences.¹⁰ This fundamental tension spawns hard questions such as: what constitutes a culture within our democratic commitment to cultural pluralism? Or, to use Charles Taylor's term: Which culture deserves recognition in our public life? And once we have answered these questions we must decide what practical form such preservation and/or recognition should take in our contemporary society.

While theorists have grappled with these questions, constructing various descriptive and prescriptive models designed to map general trends of cultural and religious pluralism, they fail to explain the anomalous trajectory of black Americans in this American Experience. Unlike the majority of Americans, black Americans can claim no voluntary immigrant ancestry.¹¹ Coerced importation and slavery, based on the economic advantages of cheap labor, forged a racial caste system in the United States that would cement a national obsession with keeping the races, blacks and whites, separate.¹² Louis Hartz's confident assertion that "the American way of life" derives from the unique experience of being "born equal" instead of having to achieve equality via revolution, as in the case of France, rings hollow for black Americans whose ancestors were born slaves. After slavery and decades of Reconstruction, black Americans would be born into the totalitarian system of *de jure* racial segregation in the South and *de facto* racial segregation in the North.¹³ The Southern Civil Rights Movement was needed to establish for blacks the Constitutional pinnings of "natal" equality: *Brown v. Board of Education*¹⁴ and its legal progeny: the Civil Rights Act of 1964, and the Voting Rights Act of 1965. In light of these unfinished reforms, the question which Hartz posed to his fellow Americans during the mid-1950s becomes an unintended internal critique of American race relations: "Can a people 'born equal' ever understand peoples elsewhere [or within the United

⁹ Quoted in MICHAEL WALZER, *WHAT IT MEANS TO BE AN AMERICAN: ESSAYS ON THE AMERICAN EXPERIENCE* 6 (1996).

¹⁰ For a discussion of these critiques, see generally MICHAEL SANDEL, *INTRODUCTION TO LIBERALISM AND ITS CRITICS* (Michael Sandel ed., 1984).

¹¹ Except for African and West Indian immigrants, who mostly emigrated to the United States in the twentieth century. Of course, Indians are an exception, too.

¹² See generally OLIVER COX, *CASTE, CLASS, AND RACE* (1948) and ROBERT FOGEL AND STANLEY ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1989).

¹³ For a first-person account of the totalitarian nature of Jim Crowism, see LILLIAN SMITH, *KILLERS OF THE DREAM* (1949).

¹⁴ 349 U.S. 294 (1955).

States] that have to become so?"¹⁵ It is easy to garner a moral disposition of understanding or empathy toward those we perceive to be most like us. The moral challenge, as we intuitively know, is to work towards an understanding of those we perceive to be most different from us.¹⁶

Pluralist theories, shaped by the "American success stories" of ethnic pluralism and religious toleration, fall short of meeting this challenge. They celebrate American multiculturalism without explaining multiculturalism's failure to incorporate black Americans in the same manner as ethnic and religious groups. In Michael Walzer's model, for instance, three pivotal moments mark out a "politics of difference" course. First, a repressed group, fearful and invisible, articulates its existence as a distinct entity and demands public recognition of both its members' solidarity and the group's value within the society. At this point of articulation, the group "can no longer be denied, abolished, assimilated, or transcended. It is simply *there*, a feature of the social world, and from now on any refusal to recognize it will itself be recognized as an act of oppression."¹⁷

Multiculturalism, at this stage, is "cacophonous" and will need to be negotiated.¹⁸ In the negotiation phase, the limits of one group's legitimate claims are set by the legitimate claims of other groups.¹⁹ Domestically, such negotiation may take the form of limited access to public funds based on, for example, the constitutional "wall" dividing religious beliefs from state support.²⁰ From this point, groups work toward the final moment of incorporation, which is difficult to carry out in practice as the First Amendment example suggests. Fragments resulting from the articulation and negotiation stages are brought together in the ideal of a non-repressive "universe of difference," a process that will necessitate economic assistance and political cooperation.

Racism stalls African American group claims at the first moment of Walzer's trajectory: articulation of the group's distinctness, its solidarity and above all *its value* in a world of other group claims. There are, according to Walzer, instances when African American group claims seemed to move beyond the first stage of pluralist incorporation. Walzer's own example of affirmative action programs, indicating progress towards the third moment — incorporation — would seem-

¹⁵ LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 309 (1983).

¹⁶ In her review of JOAN TRONTO'S *MORAL BOUNDARIES*, Carrie Menkel-Meadow states that an important legacy of the Scottish Enlightenment thinkers is this challenge of extending moral sentiments such as care beyond those in our own familial, racial, national, and class group. See Carrie Menkel-Meadow, *What's Gender Got To Do With It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 265-93, 275 (1996) (book review).

¹⁷ WALZER, *supra* note 9, at 4-5.

¹⁸ *Id.*

¹⁹ See *id.*

²⁰ Jefferson's famous, "wall of separation between church and state," was given emphasis for the first time in the 1947 Supreme Court case, *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1946). See Michael Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, ARTICLES OF PEACE 81 (1990).

ingly disprove racism as an insurmountable obstacle on the road to pluralist success.²¹ One need only consider, however, recent judicial roll-backs of state and federal affirmative action programs as evidence of the precarious state of African-American incorporation.²² The impermanence of such "incorporation" throughout history points to the particular difficulty blacks have had in validating their group's solidarity and its value within both the social and political structure.²³

Contrary to the insistence of neoconservative intellectuals like Thomas Sowell and Nathan Glazer, race does not equal ethnicity in America. African Americans do not constitute an ethnic group amidst the multicultural sea of ethnic pluralism. It is even doubtful that the popularization of the term "African-American" by many blacks during the 1980s signals any sincere ethnic ambitions, as Michael Walzer suggests it might.²⁴ Instead, as Toni Morrison posits, whiteness continues to define American identity and this whiteness defines itself against the "shadow" of blackness which forms the edges of the American community.²⁵ Morrison's literary insight spins out the intuitive truth about race in America: its fictionality. Still, one must cede the power of this fiction, for it certainly produces experiential consequences, both materially and psychologically.²⁶

The whole picture, as historian Ronald Takaki reminds us, is of course more complicated than this duality of whiteness and blackness suggests. It is true, for instance, that "[o]ne of the lessons of the Los Angeles explosion is the recognition of the fact that we are a multiracial society and that race can no longer be

²¹ See WALZER, *supra* note 9, at 7.

²² In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court of the United States held that Richmond's local affirmative action plan in city contracting violated the Equal Protection Clause of the Fourteenth Amendment. In *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), the Supreme Court held that the "strict scrutiny" standard applied in *Croson* also applies to federal affirmative action programs, thus overruling *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990).

²³ The problem of achieving and demonstrating group solidarity on particular political issues has been a significant factor in the debate over affirmative action since middle-class blacks have benefitted disproportionately as compared to working- and lower-class blacks. Hence the argument is often made that affirmative action fails to yield benefits to blacks as a group. See generally STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

²⁴ In a footnote, Walzer writes: "The current demand of (some) black Americans that they be called African-Americans represents an attempt to adapt themselves to the ethnic paradigm - imitating, perhaps, the relative success of various Asian-American groups in a similar adaptation." WALZER, *supra* note 9, at 44-45 n.30.

²⁵ See generally TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1992). Cornel West advanced a similar argument, drawing on philosophy and popular United States culture, in his 1992 W.E.B. Du Bois Lectures at Harvard University. See West, *supra* note 5.

²⁶ See JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (1970) for an exploration of racism from a psychoanalytic perspective.

defined in the binary terms of black and white."²⁷ Yet, equally true is the recognition that in our multi-ethnic society, the persistent racial exclusion of blacks hinders non-white ethnic minorities' chances of cultural incorporation. Takaki points out, for example, that the Asian American Janus-faced stereotype of "model minority" and overly-studious "nerd" is used to both discipline blacks (chastising them for their "laziness") and to justify admissions quotas for Asian-Americans seeking higher education.²⁸ Non-white ethnic minorities are caught in this web of racial exclusion. Their prospects for successfully negotiating the Walzerian course of cultural incorporation are alternatively dimmed and lit by such racial exclusivity.

This web of racial exclusion prevents non-whites from being recognized by whites as fully American, thus denying these individuals proper recognition. It is precisely such failure to properly recognize an individual that Charles Taylor diagnoses as one of our modern ailments. In pre-modern times, when honor was based on one's station in a social hierarchy, such questions never arose. One was born a prince or a pauper, as the proverb goes, and chances for social mobility were practically nil. It was, Taylor argues, only when the egalitarian concept of dignity replaced that of honor at the end of the eighteenth century that the "politics of recognition" became a central pinning of our personal and public identity understandings.²⁹ Moreover, "[w]hat has come about with the modern age is not the need for recognition but the conditions in which the attempt to be recognized can fail."³⁰ The promise of due or proper recognition by others propels models of American pluralism such as Walzer's. It is, therefore, not enough to recognize a group in the politics of difference initial moment: the group must be properly recognized; it must be valued. Misrecognition, as in the case of negative racial stereotyping, "can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."³¹

On this point, Taylor takes his cues from the Martinique-born psychiatrist, Frantz Fanon, whose theoretical accounts of African liberation from colonial rule during the 1950s continue to illuminate our understanding of racial subordination.³² Fanon defined racial subjugation as the imposition of inferior self-images upon colonized blacks. Applying the concept of overdetermination, which Jean-Paul Sartre had used to describe anti-Semitism in France,³³ to the condition of colonized blacks, Fanon formulates:

²⁷ RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 5 (1993). The role of race and ethnicity in urban uprising that followed the Rodney King verdict are discussed in the reader, *READING RODNEY KING/READING URBAN UPRISING* (Robert Gooding-Williams ed., 1993).

²⁸ See Takaki, *supra* note 27, at 8.

²⁹ CHARLES TAYLOR: *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* 27 (Amy Gutmann ed., 1992).

³⁰ *Id.* at 35.

³¹ *Id.* at 25.

³² See *id.* at 65-66.

³³ See generally JEAN-PAUL SARTRE, *ANTI-SEMITISM AND JEW* (1948).

I am overdetermined from without. I am the slave not of the "idea" that others have of me but of my own appearance . . . I am being dissected under white eyes, the only real eyes. I am *fixed*. Having adjusted their microtomes, they objectively cut away slices of my reality. I am laid bare. I feel, I see in those white faces that it is not a new man who has come in, but a new kind of man, a new genus. Why, it's a Negro!³⁴

In this widely-quoted passage, Fanon's phenotype, his black appearance, imprisons him. More pointedly, the colonial relationship between oppressor and oppressed, a relationship visibly marked by skin color, sets the stage for identity struggle. Convinced that revolt was necessary to eradicate the degrading self-image, Fanon advocated violence to overcome the violence inflicted by the colonizer. Yet, his ideas can also be read metaphorically. In Fanon's second book, *The Wretched of the Earth*, "to shoot down a European is to kill two birds with one stone, to destroy an oppressor and the man he oppresses, at the same time: there remain a dead man, and a free man."³⁵ "Shooting" one's oppressor might be interpreted as killing a degraded self-image.

Fanon's conception of overdetermination, read this way, provides an explanatory framework in which to interpret the various struggles of black Americans to re-interpret and re-write the negative life-scripts given to them by the majority culture.³⁶ If overdetermination causes "metaphysical wounds,"³⁷ "[o]ne form of healing the self that those who have these identities participate in is learning to see these collective identities not as sources of limitation and insult but as a valuable part of what they centrally are."³⁸ The collective identity associated with having a black phenotype is particularly encumbering because unlike the collective identities of, say, Catholicism or being a Californian, there is virtually no "passing" out of the collective identity at will.³⁹ Moreover, the designation of blackness is rooted in derision, unlike a host of other collective identities which the majority culture may arrange itself into at will.

Hence, struggle against overdetermination ensues, and generally tends in two directions: integrationism or nationalism, a tension which provides a point of departure for our inquiry into the case of transracial adoption. Both sides of the

³⁴ FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 116 (1967).

³⁵ FRANTZ FANON, *THE WRETCHED OF THE EARTH* 122 (1963).

³⁶ The term "life-script" is taken from K. Anthony Appiah's essay, *Identity, Authenticity, Survival*, and is derived from Charles Taylor's theory of dialogical identity formation. See Taylor, *supra* note 29, at 161.

³⁷ West, *supra* note 5.

³⁸ Appiah, *supra* note 36, at 161.

³⁹ The issue of blacks "passing" for whites has a long, fraught history in the United States. In her family memoir, *THE SWEETER THE JUICE*, Shirley Taylor Haizlip details the vocation of "spotters," blacks hired by whites to spot those "blacks" attempting to "pass" into "whites only" movie houses, and other segregated businesses. Haizlip's book mainly focuses upon her learning that her mother's light-skinned siblings left their black family and began living as whites, thus initiating a secretive "white" limb of an otherwise "black" family tree. See SHIRLEY-TAYLOR HAZLIP, *THE SWEETER THE JUICE* (1994).

debate center around the quest for human dignity or due recognition, a basic demand echoed in the ironic understatement of Michael Roemer's 1964 film title, "NOTHING BUT A MAN."⁴⁰

The integrationist approach, marked by the ideal of colorblindness, is characterized by a de-emphasis of race in the public realm and the goal of racial integration in all spheres of American life. Proper recognition of black Americans, in this view, means not recognizing skin color as a distinction in politics and the law, though black culture might be celebrated in the private sphere. The other end of the continuum is marked by the ideal of black racial and cultural distinctness. We can refer to this end as black nationalism or color-consciousness, generally. While colorblind approaches to politics risk reifying existing inequalities between racial groups by ignoring the effects of prior racial discrimination, race-conscious remedial politics risk reifying the very racial classifications that have triggered or facilitated racial discrimination by institutionalizing them. These approaches, however, do not constitute monolithic ideologies. Nor are they necessarily diametrically opposed. Indeed, the dichotomy drawn between integrationism and black cultural nationalism is false. Before delving into the debate, itself, let us first consider the effects of racism on the adoption system in order to better understand the socio-legal factors triggering the cultural nationalist response.

III. RACE AND THE ADOPTION SYSTEM

The failure of multicultural theory to explain the persistent exclusion of blacks from Walzer's "politics of difference" indicates that we are far from achieving a colorblind society. Political theory must take this background condition seriously. How does structural racism affect the adoption system? Currently, black children account for more than half of all children in the foster care system, their ranks increasing.⁴¹ However, many of these children are currently unavailable for adoption because the Adoption Assistance Act of 1980⁴² requires child welfare agencies to "make 'reasonable efforts' to prevent the removal of children from their homes,"⁴³ and to reunite families in a "timely manner" if foster placement is necessary.⁴⁴ As a consequence of prevailing "family preservation" ideology, many of the black children legally free for adoption are both older and have special needs, attributes which decrease their chances of being adopted. These children are disproportionately in need of adoption for a variety of reasons, many of which are traceable to larger social structures that disproportionately disadvantage blacks such as poverty, homelessness, AIDS, drug addiction, and

⁴⁰ The film was shown as part of the 1994 exhibit, "Black Male: Representations of Masculinity in Contemporary American Art," at the Whitney Museum of American Art, New York, New York.

⁴¹ See ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 95 (1993).

⁴² Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, § 471(a)(15), 94 Stat. 500 (1980).

⁴³ *Id.*

⁴⁴ *Id.*

heightened government surveillance of poor black women's reproductive lives.⁴⁵

Children become available for adoption when one of two events occur: the biological parents voluntarily relinquish their parental rights (by signing adoption papers), or a court terminates these parental rights upon a finding of parental unfitness. Prior to 1973, white unmarried women (usually teens) had the highest relinquishment rates. This group had a relinquishment rate of 19%, as compared to 1.5% for black unmarried women (usually teens). From 1973, the year of *Roe v. Wade*,⁴⁶ until 1981, birth and relinquishment rates for both groups dropped. *Roe*, together with increased availability of contraceptives (especially the Pill), contributed to decreased birthrates among unmarried young white women. At the same time, the Women's Movement helped to decrease the social stigma of unwed motherhood, which led to more single women keeping their children.⁴⁷ The effect was far more drastic among white unmarried women, however, whose relinquishment rate fell to 7.6%, as compared to black unmarried women's mere 0.2%. In the period of 1982 to 1988, even fewer white unmarried women placed their children for adoption, while relinquishment rates among black unmarried women rose slightly to 1.1%.⁴⁸ In 1986 the National Council for Adoption reported that American women were 97% likely to keep their infants after giving birth, thus further shrinking the pool of available healthy infants.⁴⁹

These demographic shifts produced four major reverberations. First, Americans seeking to adopt looked to other countries, creating a surge in international adoption which continues to grow.⁵⁰ Second, a market was created for new reproductive technology such as in vitro fertilization, embryo transfer, and donor insemination.⁵¹ Third, where social workers, whose jobs were to secure safe, stable, permanent homes for children in need, used to mediate adoptions, now "lawyers are often the key players, asserting that their clients have a legal right to adopt."⁵²

Finally, along with the above socio-legal changes, the medical profession identified the battered child syndrome in the 1960s, which dramatically changed social and legal attitudes towards abused children. Federal legislation, such as mandatory reporting of all suspected incidents of child abuse by professionals,

⁴⁵ See Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995); and Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

⁴⁶ 410 U.S. 113 (1973).

⁴⁷ See Howard, *supra* note 7, at 509.

⁴⁸ See Christine A. Bachrach et al., *Relinquishment of Premarital Births: Evidence from National Survey Data* 24 FAM. PLAN. PERSP. 27, 29 tbl. 1 (1992) (cited in Ruth-Arlene Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER & L. & SOC. POL'Y 131, 142-43 (1995)).

⁴⁹ See Howe, *supra* note 6, at 143 n.65.

⁵⁰ See *id.* at 151; see also RITA SIMON ET AL., *THE CASE FOR TRANSRACIAL ADOPTION* (1994).

⁵¹ See Howe, *supra* note 48, at 151; see also ELIZABETH BARTHOLET, *FAMILY BONDS* (1993).

⁵² Howe, *supra* note 48, at 149-50.

and in some states by the public, was introduced during this period. Many observers of the child welfare system argue that such laws disproportionately affect the non-white poor. Social psychologist Richard Gelles, for example, bases his argument to revoke mandatory reporting laws on evidence that these laws have resulted in the overreporting of child abuse among lower-class minority families, and the underreporting of child abuse in middle-class households.⁵³ In step with the larger social structure, invidious treatment according to race and class plagues the child welfare system.

While studies show that black couples adopt at slightly higher rates than their white counterparts,⁵⁴ the adoption "market," with its increasingly business-like structure, continues to be administered predominately by white professionals who serve a predominately middle and upper-class white clientele. Likewise, the fertility market is geared toward middle and upper-class whites who can afford both the exorbitant cost of procedures such as in vitro fertilization and the time and means to make repeated medical visits.⁵⁵ Most medical insurance companies do not cover the cost of the procedures. While expense partly explains the absence of blacks in the fertility service market, Dorothy Roberts speculates that this absence may also reflect cultural differences in attitudes towards reproduction. For example, Roberts suggests that infertile middle-class black couples might not seek fertility treatments due to religious beliefs, culturally-grounded feelings of shame (i.e., failed "maternal duty"), a distrust of technological interference with their bodies, and historically-grounded skepticism about obsessions with genetic ties.⁵⁶

Critics of today's adoption system fault adoption agencies for failing to recruit blacks wishing to adopt. They also point to institutional barriers, such as a lack of people of color in adoption agency managerial and staff positions, high adoption fees and a historical trend within black communities toward informal adop-

⁵³ See generally RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* (1966).

⁵⁴ "[W]hen social class factors are held constant, Blacks were found to adopt through formal institutions at a slightly higher rate than do whites." James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 493 (1987-88). This is partly the result of "affirmative action" measures over the past twenty years to compensate for the exclusion of blacks from child welfare services prior to the 1950s. "The state and federal governments have provided financial subsidies to encourage these adoptions. Agencies have radically revised parental fitness criteria for black adopters to permit more to qualify, and have mounted advertising campaigns to reach out to the black community. These efforts, however, have not produced enough black adoptive parents for all the waiting black children." Elizabeth Bartholet, *Race Separatism in the Family: More on the Trans-racial Adoption Debate*, 2 DUKE J. GENDER & L. & SOC. POL'Y 1, 100 (1995).

⁵⁵ See Dorothy Roberts, *Race and the New Reproduction* (Paper given at the Institute for Law and Society Conference, *The Culture of Choice in Law and Social Policy*, at New York University School of Law, April 26, 1996).

⁵⁶ See *id.*; see also Roberts, *supra* note 45.

tion.⁵⁷ For instance, in her ethnographic study of one midwestern black urban community during the late 1960s, Carol Stack describes informal kin networks existing alongside legal family structures.⁵⁸

These factors, coupled with ideological ideal of racial integration forwarded by Southern Civil Rights Movement of the 1950s and 1960s,⁵⁹ dramatically altered the adoption world. The "shortage" of healthy white infants in the adoption "market" forced whites who wanted to adopt to consider alternatives such as adopting a "special needs" child, a category which often included black and biracial children, as well as children with physical or mental disabilities.

All of these factors contributed to what would become a historically grounded socio-political phenomenon of whites adopting black children for the first time in any significant numbers.⁶⁰ These adoptions were concentrated in the period spanning the late 1960s to the early 1970s. While precise numbers of transracial placements are difficult to ascertain due to the absence of nationally reported adoption statistics according to race, scholars estimate that such adoptions reached their peak numbers in 1971, and then declined following the National Association of Black Social Workers 1972 position paper denouncing the practice as a form of cultural and racial genocide.⁶¹ The numbers of transracial adoptions during this period were relatively small, compared to the numbers of adoptions by non-relatives generally. "At its peak in 1971, transracial adoption involved the placement of only a tiny fraction of the black children waiting for adoptive homes and roughly half the number of black children placed in black homes."⁶² It is further instructive to note "that such transracial adoption as has taken place in our society has generally involved 'black' children who have in fact a mixed black-white heritage — children who look biracial and who often have one white as well as one black biological parent."⁶³ As biracial Americans increasingly resist racist, outdated "one-drop" racial classification, and insist on the right to identify with their white parentage, as well as their black parentage,

⁵⁷ See North American Council on Adoptable Children (cited in Karin D. Berry, *Adoption, Race & Red Tape*, EMERGE 44 (April 1995)). Others, however, point to the affirmative action measure undertaken by many agencies to recruit blacks to become adoptive parents. See Bartholet, *supra* note 54.

⁵⁸ See CAROL STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 93 (1974).

⁵⁹ For an overview of the integrationist strategy of the Southern Civil Rights Movement of the 1950s and early 1960s, see FRED POWLEDGE, *FREE AT LAST? THE CIVIL RIGHTS MOVEMENT AND THE PEOPLE WHO MADE IT* (1991).

⁶⁰ See Ruth-Arlene Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo* (in this issue) (notes that the earliest United States transracial adoption, a white couple adopting a black child, occurred in 1948).

⁶¹ See NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, *POSITION PAPER* (April 1972).

⁶² Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1179 (1991).

⁶³ *Id.* at 1175 n.8; see also DAWN DAY, *THE ADOPTION OF BLACK CHILDREN: COUNTER-ACTING INSTITUTIONAL DISCRIMINATION* (1979).

arguments for "race-matching" adoption policies waged on their behalf will become increasingly obsolete.⁶⁴

The small numbers, and the fact that most transracial adoptees are biracial, would seem to extinguish any lingering fire from the early 1970s. Today, more prevalent trends, such as international adoption, and the use of fertility services would seem to eclipse heated debates over whether whites should be allowed to adopt black children. Two decades and a plethora of technological advances, however, have not dissolved the ideological divide sparked by the "spectacle" of transracial adoption. A quick survey of our news and popular media confirms this.⁶⁵

The persistence of the controversy surrounding transracial adoption reflects the "unmeltability" of blacks in the American "melting pot" of ethnic, cultural and religious pluralism. Yet the story does not end here. Nor is the complete picture so simple. The next section delves into the theoretical arguments advanced by each side of the legal debate over the placement of black children in white adoptive homes.

IV. THE LEGAL DEBATE OVER TRANSRACIAL ADOPTION

So far, this article has noted some of the ways in which the transracial adoption controversy reflects larger theoretical disagreements over how to "integrate" blacks into models of cultural pluralism such as Walzer's "politics of difference," recalling that the prior task is that of gaining public recognition of the group's value within the society.⁶⁶ Historical tensions between integrationism and

⁶⁴ See Connie Leslie et al., *The Loving Generation: Biracial Children Seek their Own Place*, NEWSWEEK, Feb. 13, 1995, at 72. For example, the activist organization, Project Race (Reclassify All Children Equally), seeks to add a "multiracial" category to the next census. College campus interest groups such as Prism at Harvard and Spectrum at Stanford have developed around biracial and multiracial identity concerns. There are books such as LISA FUNDERBURG's *BLACK, WHITE, OTHER*, and magazines like *NEW PEOPLE* and *INTERRACE*, as well as biracial family support groups in Chicago (The Biracial Family Network) and San Francisco (I-Pride). See also Michel Marriott, *Multiracial Americans Ready to Claim Their Own Identity*, N.Y. TIMES, July 20, 1996, at 5; Daryl Strickland, *Interracial Generation: "We are who we are:" Individuals of mixed heritage are tired of being labeled as "other" on Census forms*, THE SEATTLE TIMES, May 5, 1996. For a discussion of the history of the "one-drop" rule, also known as hypodescent, see JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN* 4 (1995); see also Ellis Cose, *One Drop of Bloody History*, NEWSWEEK, Feb. 13, 1995, at 70.

⁶⁵ See, e.g., Jill Smolowe, *Adoption in Black and White*, TIME, Aug. 14, 1995, at 50; James McBride, *Adopting Across the Color Line*, N.Y. TIMES, June 3, 1996 (Op-Ed); Steven A. Holmes, *Bitter Racial Dispute Rages Over Adoption*, N.Y. TIMES, Apr. 13, 1995, at A16; Rebecca Carroll and Bill Dockery, *The Debate Over Cross-Racial Adoption: An Odd Coalition Takes Aim at the Decades-Old Prejudice Against Transracial Placements*, USA Weekend Magazine, Mar. 17-19, 1995; LOSING ISAIAH (PARAMOUNT PICTURES 1995); and Lena Williams, *Beyond "Losing Isaiah:" Truth in Shades of Gray*, N.Y. TIMES, Mar. 23, 1995, at C1.

⁶⁶ See WALZER, *supra* note 9, at 4-5.

nationalism in black American politics mark the contours of opposing theoretical efforts toward such recognition. The current transracial adoption debate traces the political rift that emerged during the late 1960s between a coalition of whites and blacks whose political activism was based on the goal of formal racial equality, and the rise of black nationalist political activism in northern urban black communities. Today, this basic divide continues in what Twila Perry describes as a debate between a liberal colorblind individualist perspective and a color and community consciousness perspective in the transracial adoption debate.⁶⁷

A. *Liberal Colorblind Individualism: The Integrationist Approach*

In the transracial adoption debate, proponents of integrationism or liberal colorblind individualism contend that race should not be a factor in adoptive placements. They assert that race-matching policies violate the rights of the prospective adoptive parents and black adoptees to be free of state-supported invidious discrimination on the basis of race. They further argue that taking race into account harms the "best interests" of black children by delaying or jeopardizing their opportunity to be placed in a permanent home. The overarching theoretical goal is often couched in terms of the good of racial integration within the adoptive family, which is presented as a microcosm of larger social integration.

Elizabeth Bartholet and Randall Kennedy argue against race-matching adoption policies, opposing even "mild preferences" such as those which had been permitted under the Multiethnic Placement Act.⁶⁸ Recently enacted federal legislation,⁶⁹ referenced by President Clinton in his Democratic Convention Address, prohibits the consideration of race as a factor in determining adoptive placement, thus repealing even "mild racial preferences."⁷⁰

Together, Bartholet and Kennedy's arguments represent one strand of a basic tension within antidiscrimination law between "equality as process" and "equality as result." Endorsing the former, Bartholet and Kennedy maintain that any effort to match black children with black adoptive parents violates the equal protection rights of white individuals seeking to adopt. The adoption process, they assert, should be neutral with respect to the races of the individuals involved.

⁶⁷ See Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 43 (1993-94).

⁶⁸ While the Multiethnic Placement Act of 1994 prohibited federally funded child welfare agencies from using race as the determinative factor in adoptive placements, it allowed for consideration of "the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of the child." Pub. L. No. 103-382, 108 Stat. 4056 (1994) (as text).

⁶⁹ Section 1808, *Removal of Barriers to Interethnic Adoption*, part of The Adoption Promotion and Stability Act of 1996, repeals § 553 of the The Howard Metzenbaum Multiethnic Placement Act. For a brief legislative history, see generally Howe, *supra* note 60.

⁷⁰ See Howe, *supra* note 60.

Bartholet, for example, criticizes racial consideration in adoption as inconsistent with judicial interpretation of the Fourteenth Amendment, maintaining that "[r]ace-conscious action has generally been allowed only where it can be justified on the grounds of compelling necessity, or where it is designed to benefit racial minority groups either by avoiding or preventing discrimination or by remedying its effects, as in the case of affirmative action."⁷¹ Race-matching adoption policies, in her estimation, fit none of these exceptions to antidiscrimination law.⁷²

Kennedy makes a similar claim, arguing that transracial adoption is a form of racial integration which can only be opposed on racist grounds.⁷³ Likening opposition to transracial adoption to an endorsement of legal segregation, Kennedy writes: "[t]his state of affairs is, quite simply a political disaster - at least for integrationists like me who view the anti-racist impulse of the civil rights movement circa 1963 as the great guiding sentiment around which struggles for racial justice should continue to cohere."⁷⁴ Guiding sentiments, nonetheless, often oversimplify practical conditions.

For instance, there remains some moral discomfort with the "equality as process" vision of discrimination because it focuses upon "isolated actions against individuals rather than as a societal policy against an entire group."⁷⁵ Achieving just outcomes in antidiscrimination law requires an acknowledgment that fair results are related to fair process, and that both transpire within larger structural constraints. Interpreting this relationship correctly remains, of course, the sticking point in antidiscrimination law. In the adoption context, social policies which have placed blacks, as a group, at an economic and political disadvantage must be remedied before colorblind adoption policies can be justified. For example, a redistribution of resources is needed so that black children are not disproportionately at the mercy of the child welfare system, and therefore in need of permanent placement. Patricia Williams makes this point, rhetorically wondering: "[w]hile I very much agree with the impulse behind [Bartholet's] solution, does the social reality of unbalanced race relations and racial power suggest some constraints on complete colorblindness as a possibility?"⁷⁶

While one can sympathize with the impulse of racial integration expressed by both Bartholet and Kennedy, in practice, however, the moral good of racial integration does not easily translate into colorblindness with respect to adoptive placements. Adoption, the legal construction of a non-biological family, is not

⁷¹ Bartholet, *supra* note 62, at 1227.

⁷² See *id.*

⁷³ See Randall Kennedy, *Orphans of Separatism: The Painful Politics of Transracial Adoption*, 17 AM. PROSPECT 38, 45 (1995).

⁷⁴ *Id.*

⁷⁵ Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1342 (1988).

⁷⁶ PATRICIA J. WILLIAMS, THE ROOSTER'S EGG: ON THE PERSISTENCE OF PREJUDICE 220 (1995).

simply an extension of the civil rights vision of the 1950s and 1960s. When, for instance, Kennedy points to the "guiding sentiment" of racial integration, he fails to acknowledge that the merits of integrationism depend upon the particular policy question at hand. One must always ask, who will bear the costs of integration? And, which costs are morally justified? If, for example, forced busing of black children to white suburban communities to accomplish the good of integrating a public school seems unfair,⁷⁷ surely using black children to integrate white families intensifies such moral doubt. Children arguably have an interest in growing up in a less racially segregated society, but it is the moral responsibility of adults to bear the cost of achieving that end. It is the Kantian imperative against using children as means towards accomplishing adult wishes that produces moral doubt in the integrationist approach to adoption.⁷⁸

Implicit in Kennedy's integrationist-based support of transracial adoption is what Twila Perry identifies as the problematic goal of cultural exchange between black children and white adults within the adoptive setting.⁷⁹ Many whites assume that they will become "multicultural" by simply adopting a child of a different race. When whites adopt transracially, hoping to learn something about the cultural group which the child "represents," they are not prioritizing the care needs of that child over their own self-interests. The following description by a white couple of their decision to adopt transracially highlights this problem:

'Since we wanted to have a different kind of family, one with all kinds of people in it and since we thought we could provide a good home and since we were interested in black people and black culture and since we had a feeling that we wanted to know more about black people and what their struggle was, we went about with the adoption.'⁸⁰

While this couple had good intentions motivating them to adopt transracially, Perry asks: "[h]ow is this proposed process of cultural exchange . . . prevented from ultimately becoming a process of cultural imperialism?"⁸¹ "A danger exists," she writes,

that as a result of the status and power dynamic of the parent-child relationship, a parent may be unable to convey to a child of a different race that the child's birth culture is different from, but equal to, the parent's culture. This danger is greatest when the society in which the child is raised per-

⁷⁷ See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 580-81 (1992) (while discussing efforts to integrate public schools by busing black students to suburban schools, Bell notes that "in the 1980s it was the disillusionment of black parents with a remedy which has disproportionately burdened blacks that most dramatically shifted the political landscape regarding busing").

⁷⁸ "If a person is treated as a mere means, then he is treated as nothing more than a thing without purposes of his own rather than as a self-determining rational agent." IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* vii (1981).

⁷⁹ See Perry, *supra* note 67, at 76.

⁸⁰ RITA SIMON ET AL., *THE CASE FOR TRANSRACIAL ADOPTION* 80 (1994) (written response of Mr. and Mrs. "G").

⁸¹ Perry, *supra* note 67, at 76.

ceives the child's birth culture as disabling. The concern is that the minority culture will be viewed as subordinate and, therefore, inferior.⁸²

Though Perry's use of the term "birth culture" is problematic insofar as it portrays culture as prison-like, she makes the instructive point that white parents have a moral obligation not to reproduce the cultural imperialism of the larger society.⁸³

Moral considerations must play a role in the construction and implementation of public policy. In the case of transracial adoption, the background conditions of American society — the cumulative effects of past and present racial discrimination — impose some constraints on the kind of liberal colorblind individualism advanced by Bartholet and Kennedy. In the case of adoption, race must not be ignored. This does not, however, mean that race ought to be a legal factor in the construction of adoptive families. Black children's opportunities for permanent placements in loving homes should not be delayed or prevented by race-matching policies. In turn, there is a moral obligation to take seriously the unjust background conditions which create and perpetuate an adoption system in which black children are disproportionately subjected to foster care "drift," and competent black adults are denied the opportunity to become adoptive parents. The black cultural nationalist critique of transracial adoption, if examined closely, orientates our moral compasses in this direction.

B. *Color and Community Consciousness: Cultural Nationalism and Adoption*

Black nationalist thought has a rich intellectual history in the United States dating back to the late eighteenth century.⁸⁴ Although present throughout this history, black nationalism "tends to be most pronounced when the Negroes' status has declined, or when they have experienced intense disillusionment following a period of heightened but unfulfilled expectations."⁸⁵ Set in motion during the Revolutionary period, this cyclical trend began with elevated prospects for racial equality produced by anti-slavery fervor surrounding the American Revolution.⁸⁶ Such hopes evaporated with the framing of the Constitution in 1787, which explicitly recognized African slavery.⁸⁷ Then, in 1793, Congress passed the first fugitive slave law, issuing a mortal blow to any lingering hopes among blacks for equality with whites.⁸⁸ This trend would repeat itself cyclically, with black nationalist ideology flowering in the downturns.⁸⁹

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *See* JOHN H. BRACEY, JR., *BLACK NATIONALISM IN AMERICA*, xxvi (1970).

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ To date, four major surges of black nationalist ideology have sprouted during the following historical periods: 1790-1820, the late 1840s (particularly the 1850s), 1880-1920s, and the mid-1960s to the early 1970s. *See id.* at xxv-xxvi.

The black nationalist-inspired objection to the placement of black children in white adoptive homes follows this trend. Born amidst the larger racial discourse of the late 1960s and early 1970s, the initial response to the increased numbers of transracial adoptions during this period was inextricably linked to the rhetorical appeals to racial separatism advanced by the Black Power movement.⁹⁰ In Harold Cruse's opinion, Black Power represented "nothing more than a strategic retreat for a purpose. It proposes to change, not the white world outside, but the black world inside."⁹¹ This movement was sparked by frustration among many northern blacks with the Southern Civil Rights Movement's inability to ameliorate poverty and racist police brutality in northern cities such as Los Angeles, Detroit, Chicago and Newark.⁹² The National Association of Black Social Workers' denunciation of transracial adoptions as a form of cultural and racial genocide reflected this surge of black nationalism.⁹³

Cultural nationalism generally represents expressions of racial solidarity within the existing political and economic institutions, unlike, for instance, revolutionary black nationalism which seeks to overthrow these structures.⁹⁴ Black cultural nationalism focuses on Afro-American sub-culture within the United States, sometimes asserting the moral and/or aesthetic superiority of this culture over European culture.⁹⁵ The purpose of Afro-centric education, newspapers, journals, and black arts movements, to name a few examples of cultural nationalism, is to disseminate and celebrate Afro-American sub-culture.⁹⁶

Major arguments against transracial adoption stem from black cultural nationalism. Concentrating on the transmission of black cultural values from parents to children within an adoptive family, James Bowen and Ruth-Arlene Howe maintain that black children have an interest in a black cultural identity, which they further assert can only be attained by growing up in a black family setting.⁹⁷ In "a social system where race is socially identified and societally emphasized," these scholars predict that black adoptees reared in white homes will fail to de-

⁹⁰ Adam Clayton Powell first used the term "Black Power" in a 1965 Chicago rally. Kwame Ture, then known as Stokely Carmichael, picked up the term and popularized it within the radical wing of the civil rights movement. See HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* 545 (1967). See also KWAME TURE AND CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION* (1992).

⁹¹ CRUSE, *supra* note 90, at 548.

⁹² For a discussion of how the leaders of the Black Panther Party turned their autobiographies into narrative ideologies of resistance, see David Ray Papke, *The Black Panther Party's Narratives of Resistance*, 18 VT. L. REV. 645 (1994).

⁹³ See NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, *supra* note 61.

⁹⁴ See BLACK NATIONALISM IN AMERICA, *supra* note 84, at xxvi.

⁹⁵ See *id.*

⁹⁶ See *id.* at xxvi-xxvii.

⁹⁷ See Bowen, *supra* note 54, at 487. Bowen argues that "[t]he placement of the Black child will most often coincide with the interests of his/her geneological forbears." Therefore, "[a] Black child's best interests entail being reared and socialized in the Black community." While Bowen concedes that transracial adoption is preferable to institutional foster care, he argues strongly in favor of inracial placement. See *id.*

velop healthy self-concepts.⁹⁸ Thus, black cultural self-identification is equated with a healthy self-concept. Longitudinal studies such as the Simon-Altstein twenty year study of transracially adoptive families would seem to assuage this worry, concluding that black adoptees reared in white homes are "aware of and comfortable with their racial identity."⁹⁹ Still, arguments based on the transmission of black culture vis-a-vis a black family continue to fuel the contemporary political debate over transracial adoption. Why do such seemingly specious claims continue to carry weight in legal academic discourse?

Scholars respond by linking the preservation of black American culture and the interests of black children. Rather than expressing genuine concern for the best interests of individual black children, as the legal standard "best interests of the child" mandates,¹⁰⁰ proponents of color and community consciousness conceptualize black children, collectively, as vital to the reproduction of "the black community." "Since Blacks as a group are embattled," the argument goes, "the loss of [their] children threatens the entire group, not just individuals."¹⁰¹ As Twila Perry states, "Black children raised by white parents may fail to identify with the Black Community and will, accordingly, be lost as a resource to the that community."¹⁰² This statement betrays a major problem with the use of cultural nationalism in adoption policy: the instrumental use of black children to further adult conceptions of community.

The "threat" to the black community cannot refer to the physical existence of blacks, as a minority group within the United States, since, as already noted, the numbers of transracial adoptions are so small. Hence,

[t]he black community within this nation is not threatened with extinction. The number of black children available for adoption is very small compared to the size of the black community; placing more of those available for adoption transracially poses no realistic threat to the existence of that community or the preservation of their culture.¹⁰³

Instead, what drives the color and community consciousness critique is a concern for the survival of black culture and, more specifically, validation of that culture's positive aspects. The objective is to recognize blacks properly as in Taylor's argument, thus making inroads along the sort of Walzerian model of cultural pluralism discussed in this article.¹⁰⁴

Racism is a group experience, and negative racial stereotypes make it difficult for all who are designated black to develop "healthy self-concepts." This is the real loss signaled by the color and community consciousness perspective: the assault on the group's value, and therefore on its members' public and personal

⁹⁸ *Id.* at 488.

⁹⁹ SIMON ET AL., *supra* note 50, at 115.

¹⁰⁰ See Howard, *supra* note 7, at 545.

¹⁰¹ See Perry, *supra* note 67, at 68.

¹⁰² *Id.*

¹⁰³ Bartholet, *supra* note 62, at 1231.

¹⁰⁴ See WALZER, *supra* note 9.

identities. The worry is that transracial adoption, particularly as it is portrayed in the media, perpetuates negative stereotypes of pathologically inept black families who are incapable of raising their children. In this scenario, whites take on the role of rescuers or saviors of black children.

One reading of the color and community consciousness critique of transracial adoption, then, is that it attempts to de-pathologize "the black family" by drawing upon cultural nationalism. James Bowen, for example, asserts a nexus between what he terms "Afro-American family values" and the best interests of black children, as a group.¹⁰⁵ Bowen contends that Afro-American cultural values equip black children with "survival mechanisms" with which to better cope with racism in both its overt and subtle manifestations.¹⁰⁶ He further argues that these survival skills can only be transmitted within a black family setting.

These survival devices include several learned abilities: to ignore (racial) insults; to decipher the appropriateness of fighting back or submission; to emphasize Black strength, beauty and worth as a countermeasure to the denigration of Blackness in America; to rationalize Black shortcomings and failures as a measure of discrimination and racism; to evaluate both objectively and subjectively the level of nepotistic advantage or same-group favoritism which precludes opportunities for advancement in education, employment or business.¹⁰⁷

While the use of counter-narrative figures prominently in cultural nationalisms, generally, Bowen's formulation ceases to be a vehicle for black self-empowerment when applied to adoption policy because it lacks an account of the adoptee's agency. The proposed nexus turns out to be a misdirected, not altogether malign, effort to re-value black families in a society which has typically derided "the black family" as pathologically inept.

Bowen's deployment of "Afro-American family values" in the transracial adoption debate echoes the "manifesto of identity" at the heart of black nationalist theories. In his study of black nationalisms in the United States, E.U. Essien-Udom observes,

Perhaps the black nationalists' agitation is the loudest expression of a 'manifesto of identity' — the Negroes' conscious, though slow, awakening to their heritage of abuse and degradation, and especially, to their possible destiny as human beings . . . The manifesto of identity is a subjectivity: its voice reflects the past and present and perhaps the future as well. It requires no real objects for its expression; yet in a significant way, the manifesto brings into public attention 'voices from within the veil'¹⁰⁸

¹⁰⁵ See Bowen, *supra* note 54, at 488.

¹⁰⁶ *Id.* at 510.

¹⁰⁷ *Id.*

¹⁰⁸ E.U. Essien-Udom, *BLACK NATIONALISM: A SEARCH FOR AN IDENTITY IN AMERICA* 328 (1962).

Black children play a key role in this "manifesto of identity." The color and community consciousness perspective depicts black children as assets to and progenitors of a black community, a community which is largely metaphysical.

As with theories of cultural survival, generally, this "manifesto of identity" uses the idea of reproduction, both literally and metaphorically, to assert the present value of the group, predicated on the transmission of the group's culture through future generations. Taylor relies on this theory of cultural survival when he argues for Canadian government recognition of Quebec as a "distinct society." "Policies aimed at survival actively seek to create members of the community, for instance, in their assuring that future generations continue to identify as French-speakers."¹⁰⁹ For those of us who value cultural differences, such a goal appears to be quite rational. One can, however, simultaneously value cultural differences and set limits on the means employed to achieve the perpetuation of a particular group. Instances arise which justify breaks from pure procedural liberalism. Adult members of groups may encourage children to identify with the group and carry on its values. But, adults are not morally justified in predetermining the personal identity of children.

A more useful theory of cultural community is given by Will Kymlicka, who envisions culture as a flexible entity with which one dialogically engages in order to understand one's self better.¹¹⁰ This understanding of cultural membership does not involve any necessary connection with the shared ends which characterize the culture at any given moment. The primary good being recognized is the cultural community as a context of choice, not the character of the community or its traditional ways of life, which people are free to endorse or reject.¹¹¹

This flexibility can only be achieved extra-governmentally. Otherwise, policy recommendations like Bowen's amount to "a correlation between race, family, and biology that becomes suspect if one considers that, given our history, black families themselves may not provide assurance that their children will be well adapted to racism."¹¹² And what, after all, is the value in being well adapted to racism?

Bowen uses the idea of black children as a means to someone else's end in an effort to alter existing adoption policy with cultural nationalism. Bowen, however, curtails an adoptee's opportunity to engage in the dialogical identity construction described by Taylor and Kymlicka. Taylor writes, "We define our identity always in dialogue with, sometimes in struggle against, the things our significant others want to see in us."¹¹³ Respect for individual adoptees' agencies need not preclude them from incorporating forms of black cultural nationalism into their self-concepts as they grow up; there is good reason to expect that such strategies (of surviving in a racist society) may be actively sought and acquired by black children who grow up in white adoptive families. The proactive nature

¹⁰⁹ TAYLOR, *supra* note 29, at 58-59.

¹¹⁰ See WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 172 (1989).

¹¹¹ See *id.*

¹¹² Kevin Gaines, *Race and Racism*, in *SOCIAL TEXT* 45, 52 n.33 (1995).

¹¹³ TAYLOR, *supra* note 29, at 32-33.

of such engagement with cultural nationalisms later on in the adoptee's life might ultimately be a more rewarding experience than the passive reception of such values which is likely to occur in Bowen's schema. Indeed, because adolescents often rebel against their families and its "values," we might expect transracially adopted individuals to engage dialogically with putative black cultural values more tenaciously than those individuals raised in black homes where such values are emphasized. In other words, the cultural context of black cultural community will be a dialogical presence in black children's lives whether they grow up with black or white parents.

The concept that white adoptive parents, lacking the experience of racism, cannot effectively prepare their black adopted children to "survive" the pressures of racism pathologizes these children.¹¹⁴ References to pathological racial identity confusion echo the facile literary trope of the tragic mulatto in American fiction.¹¹⁵ For example, Ruth-Arlene Howe worries that "[m]uch more needs to be understood about the challenges or dilemmas encountered by the black person who, because of physical appearance, is deemed by others to be Black, but who, if reared by whites without any close or intimate affiliations with Blacks, is socialized to be white."¹¹⁶ To illustrate this concern, Howe recounts the story of a law school application she read in which the applicant described himself as a black man who had been adopted by white parents and raised in a white middle class world:

He described himself as a Black man in a white world, reared in it and by it, yet not truly a part of it. His skin told those whom he encountered that he was Black at first glance, before his personality — shaped by his upbringing and experiences — came into play. For him, the dilemma was: "how can I be Black when Black culture and relations have forged so little of my persona? How can I be white when my skin dictates otherwise? How in truth am I to envision myself? Do I consider myself white or Black?"¹¹⁷

This prospective law school student's "personal statement" underscores the constraint placed on individual lives by racial classification, a constraint not peculiar to transracial adoptees.

Racial classifications do impose constraints on individuals designated black. This coercive designation creates and sustains the need for black cultural community.¹¹⁸ Yet, Howe's rendering of black identity fails to account for the subjec-

¹¹⁴ See generally Gaines, *supra* note 112 ("Those opposing the adoption of black children by nonblack families contend that while white parents may be as loving as any other parents, they lack the cultural experience of racism, and thus cannot prepare black children to withstand the pressures of societal racism. Such logic effectively pathologizes black children of white adoptive parents.").

¹¹⁵ See Hawley (Russell) Fogg-Davis, *Identity Under Construction: A "Tragic Mulatto" Goes to Work*, 3 LIGHTHOUSE 111 (April 1993).

¹¹⁶ Howe, *supra* note 48, at 160.

¹¹⁷ *Id.*

¹¹⁸ For a philosophical argument about the coercive nature of racial classifications, see NAOMI ZACK, *RACE AND MIXED RACE IDENTITY* (1993).

tive, flexible engagement with this context of choice. Missing also is an account of the intercultural and transnational formation of black culture — what Paul Gilroy coins “the black Atlantic.”¹¹⁹ Gilroy’s theoretical description of the rich exchange of cultural artifacts between blacks across the Atlantic, is meant to highlight the “instability and mutability of identities which are always unfinished, always being remade.”¹²⁰ While such a formulation sounds suspiciously postmodern, Gilroy’s larger thesis asserts that black people have a “sense of embeddedness in the modern world.”¹²¹ Within such embeddedness one finds black intellectuals both affirming and critiquing basic tenets of modern existence.

In the end, Gilroy’s theoretical account of black identity as a pattern of “movement, transformation, and relocation”¹²² is compelling because it avoids the moral error of predetermining black and biracial adoptees’ identities. Such movement need not be interpreted as free-floating or nihilistic. Instead, Gilroy’s “black Atlantic,” grounded in cultural histories of blacks across the Diaspora, allows for lived experiences of cultural hybridity within specific group histories. Hence, Gilroy’s theory affords black children adopted by white families more autonomy than the color and community consciousness perspective. The “black Atlantic” amounts to a flexible form of cultural nationalism which underscores the historical value of such an ideology as a form of resistance within racist social structures.

V. CONCLUSION

Adoptive families form a unique nexus between the American race-conscious social structure which pre-dates an individual life and the personal identity struggles of adopted children. Ultimately, the best interests of individual black children in need of permanent placement entail the maximization of their agency, and in defining their own self-concepts within the race-conscious society into which they have been born. White adoptive parents have a moral duty to expose their black adopted children to various “contexts of choice” within the society. For example, they ought to live in racially integrated neighborhoods and interact with blacks socially. At the same time, no adult, black or white, is justified in pre-determining the racial self-identity of individual adopted children. Assigning race legal weight in adoptive placements violates the agency of individual adoptees by pre-determining the “proper” racial self-understanding of black children and prejudging white adults’ ability to foster this “proper” identity in their adopted children.

Recently enacted federal legislation barring race as a factor in adoption would seem to free the adoption system of racism. Such a conclusion would, however, be woefully naive and premature. Every structural inequality in American soci-

¹¹⁹ PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993).

¹²⁰ *Id.* at xi.

¹²¹ *Id.* at preface.

¹²² *Id.* at xi.

ety, especially those based on race, impact the child welfare system. Eliminating race as a legal factor in adoption chips the tip of a bigger, more foreboding, iceberg. In light of these larger structural inequalities, we should expect cultural nationalist responses such as those found in the opposition to transracial adoption. It behooves us not to dismiss these arguments as mere "separatism" or "reverse racism." While not conducive to furthering the needs of black children in the adoption policy context, these arguments stress the value of black cultural community in a society that denounces black culture as pathological. Alerting us to the ice beneath adoption policies turns out, finally, to be cultural nationalism's greatest contribution to our understanding of race and adoption in late twentieth century America.