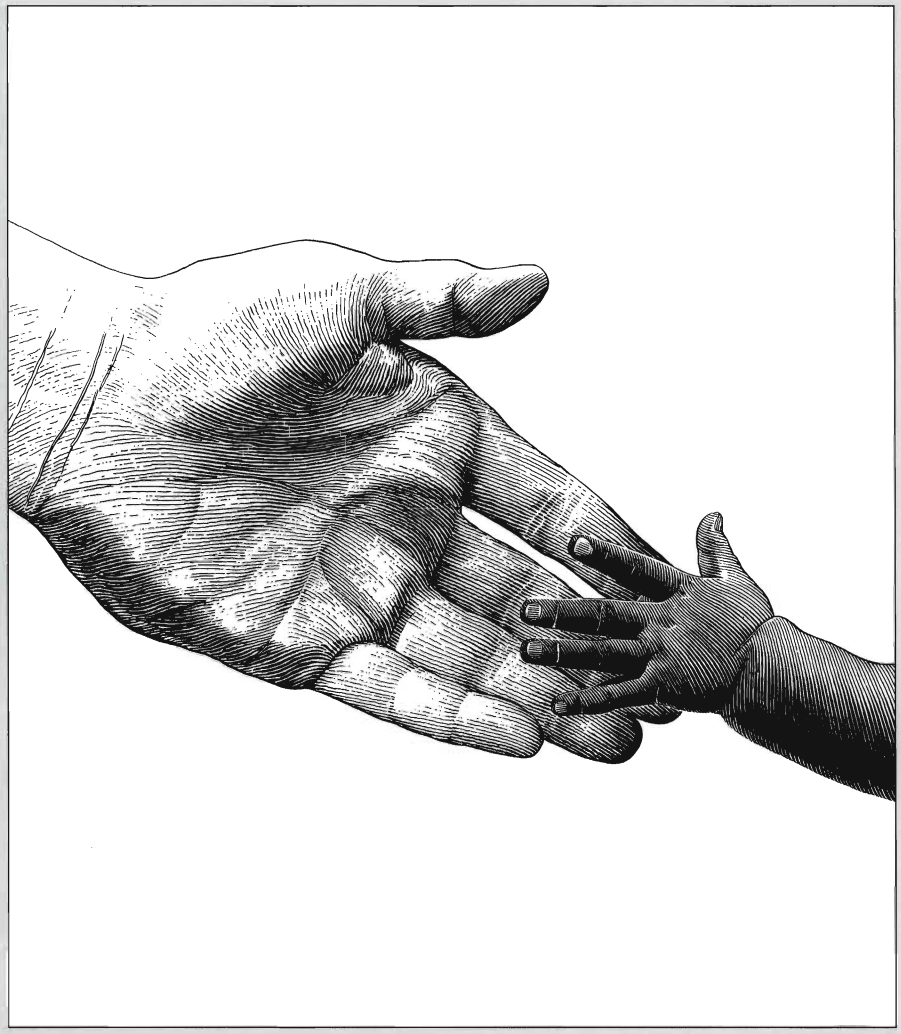
The Transracial Adoption Controversy

An essay by Boston College Law School Associate Professor Ruth-Arlene W. Howe



TRANSRACIAL ADOPTION IS A SENSITIVE TOPIC. Indeed, it has evoked acrimonious debate. Efforts to declare race-matching preference policies or statutory schemes unconstitutional are intensifying. Some legal writers assert that such a prohibition is needed to avoid or minimize harm to Black youngsters in the foster care system.

What drives the growing momentum to eliminate race considerations from all adoptive placement decisions? Whose interests would be served if consideration of race were completely eliminated from adoptive placement decision-making? Will the federal Multiethnic Placement Act of 1994, intended to increase the numbers of children placed for adoption, result in any radical changes or improvements in the delivery of adoptive services? Do opponents such as the National Association of Black Social Workers have some astute awareness of what Black children need to become successful, contributing adults in American society?

What are the probable consequences of transracial adoption for a particular Black adoptee, for the status and integrity of the Black family and Black community? For American society generally?

Finally, is there not something disingenuous about the constant references to the plight of Black children in foster care? Most Whites who seek to adopt are looking for healthy infants, not older children

with a possible range of special needs. And most of the growing number of transracial placements made today involve newborns or babies.

I assert that the transracial adoption debate is not really about the interests of Black children. Instead, it is about establishing a new right or entitlement for certain adults (White) who wish to become parents. Those who claim that the increasing numbers of Black children entering and remaining in foster care are victimized by a same-race placement preference are employing a diversionary strategy that obfuscates some very important systemic problems and barriers to meeting the needs of Black children, Black families, and the Black community.

FROM SOCIAL WORKERS TO LAWYERS: A BRIEF HISTORY OF ADOPTION

Adoption once was child-focused, a specialized service for the child in need of a permanent home. Today the focus has shifted to adults who seek to parent. Once the dominant professionals in adoptions were social workers. Now lawyers are often key players who assert that their clients have a legal right to adopt. These paradigm shifts pose challenges for both law and social work professionals and have important ramifications.

For nearly 150 years, adoption in the United States has been governed by state statutes. Massachusetts in 1851 was the first state to enact a "modern" adoption statute, rendering public what had been private by requiring judicial supervision and approval.

Between 1851 and the 1950s, adoption evolved as both a legal process and a child welfare service. By 1929, all states had enacted some form of adoption legislation, which typically required (1) the consent of the birth parent or guardian (and of the child over age 12 or 14, depending upon the state); (2) an investigation (or social study) conducted by the placing agency to determine the suitability of the prospective home; (3) a probationary trial period in the adoptive home, under appropriate supervision; (4) issuance of a final decree, withheld pending evidence of satisfactory adjustment of adoptive parent and child to one another; and (5) secrecy of the legal proceedings and provision for alteration of the child's birth certificate. This adoption process was thought to protect children against adoption by unsuitable persons, being casually removed from their natural parents, or being improvidently transferred by their parents into the custody of others. The dominant professionals were social workers, staff of public and private licensed child welfare agencies who had responsibility for conducting investigatory home studies and supervising the probationary trial placements.

By the mid-1950s, intake policies, practices, and procedures of many agencies had the effect of limiting adoption to the "perfect" or "near-perfect" baby — typically a healthy White infant born out of wedlock and relinquished at birth or shortly thereafter by a mother reluctant to buck the disapproval of family and community by attempting to rear the child as a single parent. The typical "perfect" prospective adoptive couple would be infertile, well-adjusted, well-established in their community and careers, and financially stable: that is, solid, middle-class, and White. Great emphasis was placed on matching an infant with an adoptive family in terms of appearance, religion, ethnicity, etc.

Over the years, the demand for healthy White infants has consistently exceeded the numbers available. As the shortage of infants increased, some infertile couples turned to non-traditional sources, such as transracial and international adoptions, and even surrogacy arrangements.

The single development most dramatically affecting both the size and composition of the domestic pool of children available for adoption, and hence the total number of annual adoptions, is the drastic decline in the rate of voluntary relinquishments of infants by unmarried mothers. Before 1973, nine percent of all children born to never-married women (approximately 36,000 annually) were given up for adoption, but from 1982 to 1988 voluntary relinquishments dropped to two percent of all non-marital births, or 16,500 annually. Most of this decline is the result of a significant drop in the rate of relinquishment by White, unmarried women. In the mid-1990s, with few healthy White newborns voluntarily relinquished, the children available through public and many private agencies often are older youngsters with special needs or, if infants, born HIV-positive or drug-exposed. In all parts of the country, the population of Black children in foster care continues to grow at an alarming rate, but not all of these children are legally free for adoption and, in some instances, the case plan goal may be a reunion with the birth family. Many of those who are legally free are both older and have disabilities. There is no strong demand for the growing number of older children with special needs; whether White or Black, these children pose extra challenges for a prospective parent.

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There also have been notable changes in how adoptions are arranged that raise important questions about the allocation of roles and responsibilities between child welfare and legal professionals involved with adoption. Today, a whole new generation of private services and networks have emerged to help bring a relinquishing parent or willing surrogate together with prospective adopters. Often, these placements are deemed "open" rather than

"closed" because all parties know one another and may expect to maintain ongoing relationships. More likely than not, lawyers are the key professionals who seek to help an adult client achieve his or her goal of becoming a parent. In some parts of the country, such as California, persons calling themselves adoption consultants operate without any professional oversight and are developing new strategies for bringing parties together, including franchising their services. A large percentage of these consulting operations are headed by lawyers and receive referrals from lawyers in private practice. The primary task of these new services is to find adoptable babies for childless adults, not to find homes for dependent, mistreated, and abused children, as is the continuing task of public agencies and private agencies servicing children in publicly financed foster care.

The Uniform Adoption Act of the National Conference of Commissioners on Uniform State Laws finalized at the August 1994 annual meeting is viewed by some as a culminating triumph of the private adoption bar, which for more than a decade had been attempting to establish dominance in the adoption field to meet the desires of adult clients seeking to adopt healthy infants. Among child welfare professionals, there is almost unanimous concern that the Uniform Adoption Act focuses too extensively on the rights of adults to adopt children rather than on adoption as a service for children, delivered with attention to fairness to all parties.

A RIGHT TO ADOPT?

What does this paradigm shift in the field of adoption mean for legal practitioners and theorists? Some commentators, such as Professors Elizabeth Bartholet of Harvard Law School and David S. Rosettenstein of Quinnipiac College School of Law, focus on the issue of the questionable constitutionality of statutory same-race preference schemes and agency practices. But does the prospective adopter have a constitutional "right to adopt" any child, including one whose racial and ethnic heritage is different from the adopter? Should the traditional Fourteenth Amendment guarantees — a substantive right protecting an individual's liberty or property interests and a procedural right requiring notice and a hearing before a protected interest can be taken away by the government — accorded legal parents be extended or enlarged to cover an adult's desire to become a parent?

For more than 70 years, the Supreme Court has defined "liberty" to include the right "to marry, establish a home, and bring up children." (*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)) The Court has described the custody rights of parents to be "far more precious ... than property rights." (*May v. Anderson*, 345 U.S. 528, 532 (1953))

Nevertheless, under the concept of *parens patriae*, parents' substantive rights to the custody and control of their child may be subordinated to the state's interest in the child's welfare. In resolving conflicts between parental rights and the state's interest in the welfare of a child, courts apply a "best interests of the child" standard.

And in *Griffith v. Johnston* (899 F.2d 1427, 5th Cir. 1990), Judge Edith H. Jones noted, "... Although the Supreme Court has rendered decisions defining various elements of family relationships as 'fundamental interests,' none of the cases announced a 'fundamental interest' in adopting children." She concluded, "To assert that such an individualized 'fundamental right' exists is sloganistic and oxymoronic, since society must balance the interests of at least three parties — birth parents, child, adoptive parents — when legitimizing adoptions. ... Bearing in mind [United States Supreme Court] Justice [Byron] White's admonition against the creation of novel fundamental rights, we cannot recognize a 'fundamental right' to adopt a child."

Not only was the Fifth Circuit unwilling to recognize adoption as a fundamental right in *Griffith*, but the Court also refused to impose any new obligations on the state to provide post-adoption assistance to those who adopt children with special needs.

THE RESULTS OF TRANSRACIAL ADOPTION

The consequences of the transracial adoptive placements of the 1960s have yet to be identified, but there is an emerging body of clinical literature that is beginning to recognize and address the additional problems and pain the individuals adopted during this period have encountered as they move into adulthood. It would appear that "a loving home" and "loving parents" may not be enough within a society in which diversity and difference is not honored, but denigrated. More care, not less, needs to be given to assessing the appropriateness of placing a Black child with parents of another race. Much more needs to be understood about challenges or dilemmas encountered by a person who, because of physical appearance, is deemed by others to be Black but, if reared by Whites without any close or intimate affiliations with Blacks, is socialized to be White.

Interracial marriages are increasing, and attitudes among younger generations are changing. But it is one thing for an adult to choose to enter into an interracial or interreligious marriage or relationship, or

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even to elect deliberately not to identify with one's racial or ethnic group. Those are adult decisions. But is it appropriate, fair, and equitable to eliminate a full range of future choices and to create difficult obstacles for a child who is a Black transracial adoptee?

This is not to deny that in some instances, a transracial adoption may be an appropriate placement for a specific child. But prospective adopters of a Black child, if not Black, should be willing and prepared to provide the child with a day-to-day living experience within a community that allows the child to have affiliations and associations with other children and adults of African-American descent. Non-Black adoptive parents who rear a Black child should have the courage to live in a Black community or a truly diverse community. To grow to productive adulthood, the Black child will need more than a storybook adventure or periodic museum excursions to acquire knowledge of and a positive feeling for his or her genetic inheritance, reference group affiliation, and social and cultural history. A successful transracial adoption should permit the adoptee as an adult to have an array of choices to exercise regarding the identifications and affiliations he or she elects to pursue. This will only be possible if the child is reared in a supportive environment and has had positive experiences with both Black and diverse persons and groups.

IN SEARCH OF NEW SOLUTIONS

Transracial adoption, as a response to the disproportionate numbers of Black children who enter into foster care and remain in the system longer than White children, is a classic example of embracing and promoting a solution without accurately defining the problem. The traditional standards and protocols of adoption were meant to be exclusive, to screen out more applicants than were accepted. In the 1960s and 1970s, as public and private agencies began to move incrementally into Black adoptions, they often functioned without making any changes in staff, policies, or protocols for recruiting or approving applicants. Nor did they generally make any meaningful use of existing organizational resources in Black communities.

There has been little aggressive movement to retool or fashion new, culturally sensitive services and strategies for meeting the relationship needs of the growing number of Black children in foster care. For example, state and private agencies could forge more partnerships with minority agencies, churches, and other community-based organizations. Definitions of family may need to be enlarged to accommodate the Black family kinship structure that recognizes both blood and non-blood relatives. Financial obstacles to grandparenting, kinship care, guardianship, and adoption may need to be removed or eased. There is a crucial need to find ways to provide Black children generally, and those in foster care particularly, with the kind of rearing and nurturing that will enable them to participate in and contribute to society as productive adults. This is the challenge for Black families, the Black community, and American society at large.

The transracial adoption controversy needs to be redefined. Although the Multiethnic Placement Act of 1994 is intended to increase the numbers of children able to be adopted, its prohibition on the use of race as a sole consideration in the placement of a child does not preclude consideration of race as *a* factor in determining what might be in the "best interests" of a child. This legislation does not, however, provide any guidance in assessing what weight should be given to race. More importantly, the mandate to "provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children ... for whom foster and adoptive homes are needed" may be meaningless without the allocation of financial resources to underwrite the hiring and training of new agency personnel or to develop and implement more effective practice protocols to identify and recruit appropriate applicants.

If a constitutional "right to adopt" were recognized, if consideration of race were totally eliminated from adoptive placement decision-making, but the size and composition of the pool of adoptable children remain unchanged, would the stage be set to meet the needs of Black children or to advance the interests of Black families and communities? The answer is a resounding "no."

Race and color remain unresolved issues in our society — inextricably tied and merged with issues of power, status, and inequality — that make a mockery of American claims to be a democracy. Race and poverty in American society directly shape the foster care system. Disproportionate numbers of Black children — the percentage of minority children in foster care is more than double their representation in the total population of children — enter and remain in the system for longer periods of time than other children because of a shortage of approved Black foster and adoptive homes. Yet African-Americans typically adopt at a higher rate than European-Americans or Hispanic families, and the National Urban League's Black Pulse Survey has revealed that three million (or one-third) of Black households were interested in adopting a Black child.

Race cannot be ignored; most individuals are not "color-blind." Thus, in determining a child's best interests, race is an appropriate factor to consider when assessing whether a prospective adopter has the awareness and capacity, with sensitivity, to prepare a non-White child to handle the challenges that will be encountered because of a child's racial appearance. Advocates for transracial adoption who espouse a "love conquers all" philosophy may represent as dangerous and pernicious an assault on the Black family and Black community as found in some recent Supreme Court decisions that seem to herald an end to the forward thrust and gains of the Civil Rights movement of the 1960s. ■

Boston College Law School Associate Professor Ruth-Arlene W. Howe has written extensively regarding family law, foster care, adoption, and social services. In 1994, she was appointed as a Bunting Fellow in Law and Social Policy by the President of Radcliffe College and as a member of the Massachusetts Trial Court's Gender Equality Advisory Board. Professor Howe was a social worker before she entered the legal profession.