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# Raising Hope for Children in Foster Care: An Argument in Favor of Expanding the Pool of Qualified Applicants

Frances Tapia Mateo

## **I. Introduction**

Children of color, predominantly African American, are overrepresented in the foster care system.<sup>1</sup> In 2010, African American children represented 30% of the foster care population but only 15% of the U.S. child population.<sup>2</sup> The major theories explaining this overrepresentation of children of color in the foster care system include; (1) social implications of poverty,<sup>3</sup> (2) explicit and implicit bias and incompetence amongst decision makers in the child welfare system,<sup>4</sup> and (3) a lack of prospective adoptive parents willing to adopt within this category which causes children of color to experience longer stays foster care.<sup>5</sup>

According to a report issued by the Administration of Children and Families, “[a]lmost one third of African-American (30%) and Hispanic (28%) children live in poverty...”<sup>6</sup> There is

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<sup>1</sup> See, HOWLEY FOGG-DAVIS, *THE ETHIC OF TRANSRACIAL ADOPTION* 4 (2002); U.S. DEP’T OF HEALTH & HUM. SERV., *CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY* 4 (2003), <http://www.childwelfare.gov/pubs/otherpubs/children/children.pdf>.

<sup>2</sup> See U.S. DEP’T OF HEALTH & HUM. SERV., *CHILD HEALTH USA* 9 (2011), <http://mchb.hrsa.gov/chusa11/popchar/downloads/pdf/c119.pdf>; U.S. DEP’T OF HEALTH & HUM. SERV., ADMIN. FOR CHILD. & FAM., *THE AFCARS REPORT 2* (2010), [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report17.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report17.pdf); U.S. DEP’T OF HEALTH & HUM. SERV., ADMIN. FOR CHILD. AND FAM., *CHILDREN’S BUREAU* ii (2010), <http://www.acf.hhs.gov/programs/cb/pubs/cwo06-09/cwo06-09.pdf> (“In 2009, there were many States in which the percentage of minority race/ethnicity children entering foster care disproportionately was greater than the percentage of these children in the State population. ... Long-range trends using case-level AFCARS data indicate that, from 2002 through 2009, there was a downward trend for Black children as a proportion of the children entering foster care. The same source showed that Hispanic children have increased as a proportion children entering foster care, although this may be a function of the increase in the Hispanic population, in general, given that the number of Hispanic children entering foster care has not increased in proportion to their numbers in the general child population.”).

<sup>3</sup> See *The Multiethnic Placement Act, Minorities in Foster Care and Adoption: Briefing Before U.S. Commission on Civ. Rts.* 15 (2010); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 385 (1997); DEP’T OF HEALTH & HUM. SERV., *supra* note 1, at 4.

<sup>4</sup> *Id.*, at 5,

<sup>5</sup> See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* vi (2002).

<sup>6</sup> See DEP’T OF HEALTH & HUM. SERV., *supra* note 1, at 4.

a strong correlation between poverty levels and state child welfare intervention, in fact, poverty is the biggest predictor of out-of-home child placement.<sup>7</sup> Some of the consequences of living in poverty include a family's lack of access to proper housing,<sup>8</sup> clothing, medical care, nutrition, child care and overall dependence on governmental subsidies.<sup>9</sup> Correspondingly, these families experience a higher incidence of being reported to child welfare agencies, either through their children's school officials, medical institutions, or through their interactions with the governmental agencies they resort to for help.<sup>10</sup> Therefore, some scholars argue that poverty in and of itself is often equated with child neglect and parental unfitness.<sup>11</sup>

Child welfare critics argue that the system is not set up to serve and support children and families of color.<sup>12</sup> A particular concern raised by scholars in this area is that child welfare agencies and caseworkers, who are the ones making child removal determinations, may interject their personal biases into this critical decision.<sup>13</sup> These scholars point to research showing that children of color, specifically African American children are more likely to be removed from their home than offered in-home services, "even when they have the same problems and characteristics as white children."<sup>14</sup> Others suggest that even in the absence of personal bias, caseworker incompetence, lack of training on specific laws and policies addressing child

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<sup>7</sup> See supra, note 5 at 26-27; Symposium, Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community, 26 B.C. Third World L.J. 25, 48 (2006); The Multiethnic Placement Act, supra note 3, at 22.

<sup>8</sup> Id. ("A 1997 U.S. Department of Health and Human Services National Study found that black children in foster care were more likely to come from families with housing problems, and that among families with housing problems, white families were offered housing services at nearly twice the rate of black families, 43 percent versus 25 percent, respectively. Black families were more likely to be offered parenting skills services, a benefit not as tangible as housing services.").

<sup>9</sup> See supra note 5, at 27. The Multiethnic Placement Act, supra note 3, at 15 ("Studies have shown that families living in poverty have difficulty gaining access to social services, counseling and housing services that could assist in helping families stay together.").

<sup>10</sup> See supra note 5, at 27.

<sup>11</sup> Id.

<sup>12</sup> See DEP'T OF HEALTH & HUM. SERV., supra note 1, at 5.

<sup>13</sup> See supra note 5, at 16; The Multiethnic Placement Act, supra note 3, at 15.

<sup>14</sup> supra note 5, at 17.

placement, or pressure to promote adoptions by expediting the termination of parental rights contribute to the overrepresentation of African American children in the foster care system.<sup>15</sup>

Lastly, African American children experience longer stays in the child welfare system than do their White and Latino counterparts.<sup>16</sup> Generally, these children are categorized as “hard to place”<sup>17</sup> or “special needs”<sup>18</sup> because they are older, belong to sibling sets, have some physical or developmental disability, are a member of a minority group or because of a lack of prospective adoptive parents interested in adopting within this category.<sup>19</sup>

This paper will focus on the overrepresentation of children of color in the foster care system and the lack of prospective adoptive parents for these “hard to place” children. This paper will argue that any “categorical”<sup>20</sup> ban or hurdle, specifically one based on the race or sexual orientation, of a particular group of prospective adoptive parents is against the best interests of these children. Part II will explore the current state of the law as it pertains to both

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<sup>15</sup> *Id.* at 16; The Multiethnic Placement Act, *supra* note 3, at 15; Tanya M. Washington, Throwing Black Babies Out With the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans, 6 HASTINGS RACE & POVERTY L.J. 1 (2008). (“Since the passage of the 1997 Adoption and Safe Families Act (ASFA) legislative calls or reform have emphasized securing speedy and permanent placements for orphans and not on preventing removal of children from their families.”).

<sup>16</sup> See Fogg-Davis, *supra* note 1, at 4; Solangel Maldonado, Discouraging Racial Preferences in Adoptions, 39 U.C. DAVIS L. REV. 1415, 1417 (2006); DEP’T OF HEALTH & HUM. SERV., *supra* note 1, at 5.

<sup>17</sup> H. Markley, Jr., Committee of Health & Rehabilitative Serv., House of Representatives, Staff Report of Adoptions Services in the State of Florida (1970) ( provided definition for “hard to place” children. “The hard-to-place child typically (1)is at least one year old; (2) has a physical, mental or emotional handicap; or (3) is difficult to place because of race, ethnic background, color, or language.”) For a more current definition of the term *see also*, NEW YORK STATE, OFFICE OF CHILD. & FAM. SERV., ADOPTION SUBSIDY GLOSSARY, (2012), <http://www.ocfs.state.ny.us/adopt/glossary.asp>. (“Hard-to-Place Child: A child other than a handicapped child who has not been placed for adoption within six months from being freed or placed within six months from an adoption disruption, ...or who meets certain age, sibling group, or other requirements.”)

<sup>18</sup> The Multiethnic Placement Act, *supra* note 3, at 5.

<sup>19</sup> See U.S. DEP’T OF HEALTH AND HUM. SERV., ADMIN. FOR CHILD. & FAM., A REPORT TO CONGRESS ON BARRIERS AND SUCCESS FACTORS IN ADOPTIONS FROM FOSTER CARE: PERSPECTIVES OF FAMILIES AND STAFF SUPPORTED BY THE ADOPTION OPPORTUNITIES PROGRAM (2007), <http://www.acf.hhs.gov/programs/cb/pubs/barriers/barriers.pdf>; The Multiethnic Placement Act, *supra* note 3, at 8; Symposium, *supra* note 7, at 29-30; Washington, *supra* note 15 at 7.

<sup>20</sup> Washington, *supra* note 15 at, 8-9; (“Categorical placement bans will condemn greater number of these children to foster and institutionalized care – rendering them more vulnerable to entering the juvenile justice and criminal justice systems, and to futures marked by homelessness and unemployment.”)

adoptions by LGBT persons and transracial adoptions<sup>21</sup> and will by analyze the role that race continues to play in the adoption process. Part III considers the arguments in favor and against transracial adoptions and adoptions by LGBT persons. This section will explore the challenges LGBT couples face in the adoption process as a result of social biases and assumptions. Lastly, this section will also explore some recent judicial opinions that call into question the propriety of LGBT adoptions which leave the door open for judges, adoption agencies, caseworkers and others involved to continue to interject their moral and political agendas in the adoption process. Finally Part IV suggests why transracial adoptions and adoptions by LGBT persons merit social support. Lastly, this paper proposes factors that courts and agencies should consider in determining the “best interest” of potential adoptees of color, as well as advocate for specialized training and support for adoptive parents on how to deal with issues of race, social stigma and discrimination, as well as provide continued support to children placed in these non-traditional family settings.

## **II. State of the Law**

This section explores the current state of the law as it pertains to both transracial adoptions and adoptions by LGBT persons. This section will emphasize how some of our current laws add confusion to the already cumbersome adoption process and in some instances create additional hurdles for prospective parents and the children they seek to adopt.

### **LGBT Persons and Adoptions**

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<sup>21</sup> M. Elizabeth Vonk, Cultural Competence for Transracial Adoptive Parents, 46 SOC. WORK 246, 246 (2001) (Transracial adoption is defined as the placement of children with a parent or parents of a different race usually refers to the domestic or international adoption of racial or ethnic minority children by White parents).

In the United States there is no constitutional right to adopt instead; being able to adopt and be adopted is considered a privilege.<sup>22</sup> Because most states still don't allow LGBT persons to legally marry or enter into civil unions (a legally recognized union of a same-sex couple, with rights similar to those of marriage), LGBT persons must resort to the adoption process to legalize their relationships with their non-biological children.<sup>23</sup> One of the obstacles prospective LGBT adoptive parents face is the confusion created by the wide variation (and sometimes absence) in state laws and policies governing adoptions by LGBT persons.<sup>24</sup> “Moreover, adoption practice is confidential and local, not only among the 50 states, territories and districts of the United States, but some would say also within the states, often varying by county and even within counties by judge” which creates a certain level of vulnerability for those navigating their way through the system.<sup>25</sup>

Presently, a majority of states explicitly allow adoptions by single LGBT persons;<sup>26</sup> however, a number of states do not have specific laws addressing same-sex joint adoptions (legal procedure in which a same-sex couple jointly adopts a child) or second parent same-sex adoptions (legal procedure by which a co-parent adopts his or her partner's child without terminating the partner's parental rights).<sup>27</sup> Consequently, in the jurisdictions where there is no

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<sup>22</sup> See Lofton v. Secretary of Dep't. of Child. & Fam., 358 F. 3d 804, 812 (2004); Washington, supra note 15 at, 6; Richard Banks, The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences, 107 YALE L.J. 875, 920 (1998).

<sup>23</sup> See DAVID M. BRODZINSKY & ADAM PERTMAN, ADOPTION BY LESBIANS AND GAY MEN: A NEW DIMENSION IN FAMILY DIVERSITY 36 (2012) (these persons are either seeking to adopt as singles, couples or as second parents).

<sup>24</sup> See Washington, supra note 15 at, 11-12; Brozinsky, supra note 23, at 53 (other notable barriers include “increased scrutiny and being disadvantaged by norms that do not permit lesbian and gay couples to enter into legal marriages.”).

<sup>25</sup> Id. (“Because of these conditions, lesbian and gay families, their attorneys, and other adoption professionals may not know what the rules are or even which courts, attorneys or agencies are open to same-sex parent adoption.”)

<sup>26</sup> Michigan does not have a law specifically addressing adoption by single LGBT persons. The law in Missouri, Nebraska and North Dakota is unclear as to whether single LGBT persons may legally adopt in those states; see Brozinsky, supra note 23, at 39-40.

<sup>27</sup> Second Parent or stepparent adoptions by same sex couples are allowed in California, Connecticut, Delaware, Illinois, Indiana, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Vermont and the District of

law addressing adoption by LGBT persons the “best interest”<sup>28</sup> standard is used to make the determination on a case by case basis.<sup>29</sup> The best interest standard affords great discretion to individual decision makers (adoption agencies, caseworkers, judges, etc.) in determining who is fit to serve as an adoptive parent.<sup>30</sup> Some courts have held that a person’s homosexuality is relevant in determining their suitability to become an adoptive parent.<sup>31</sup> For example, in 2000, the Tennessee Supreme Court held that it is permissible to consider a “parent’s lifestyle” when assessing the best interest of a child.<sup>32</sup> This case involved the contested adoption of a child by an openly gay woman. Ultimately, the court held that, this factor alone was not dispositive in a custody or adoption determination, and the adoption was granted.<sup>33</sup>

While no state currently has an outright ban on adoptions by LGBT persons, both Mississippi and Utah have laws that indirectly exclude same-sex couples from adopting.<sup>34</sup> Mississippi specifically bars non-heterosexual couples while Utah applies its ban to all unwed couples (which eliminates same-sex couples since they cannot get married in that state).<sup>35</sup> Arkansas was recently removed from this list in 2011, when the Arkansas Supreme Court held that the best interest of children in need of adoption or foster care was not being served by the

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Colombia. However, Colorado, Kentucky, Nebraska, Ohio, West Virginia, and Wisconsin have specific bans on second parent same-sex adoptions.

<sup>28</sup> U.S. DEP’T OF HEALTH AND HUM. SERV., ADMIN. FOR CHILD. & FAM., DETERMINING THE BEST INTERESTS OF THE CHILD: SUMMARY OF STATE LAWS, (2010). (“Although there is no standard definition of “**best interests of the child**,” the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. “Best interests” determinations are generally made by considering a number of factors related to the circumstances of the child and the circumstances and capacity of the child’s potential caregiver(s), with the child’s ultimate safety and well-being as the paramount concern.”) [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm)

<sup>29</sup> See Washington, *supra* note 15 at, 18 (2008); Brozinsky, *supra* note 23, at 39.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 54.

<sup>32</sup> *In re Adoption of M.J.S.*, 44 S.W.3d 41, 57 (2000).

<sup>33</sup> *Id.* at 61.

<sup>34</sup> See Brozinsky, *supra* note 23, at 39.

<sup>35</sup> EVAN B. DONALDSON ADOPTION INSTITUTE, EXPANDING RECOURSES FOR CHILDREN III: RESEARCH-BASED BEST PRACTICES IN ADOPTION BY GAYS AND LESBIANS, (2011), [http://www.adoptioninstitute.org/publications/2011\\_10\\_Expanding\\_Resources\\_BestPractices.pdf](http://www.adoptioninstitute.org/publications/2011_10_Expanding_Resources_BestPractices.pdf)

State's categorical ban on adoptions and foster care by persons who were cohabitating outside of marriage, (which included same-sex couples since they cannot legally marry in Arkansas).<sup>36</sup> Noteworthy is that fact that only twenty (20) states and the District of Columbia have statutory or case law specifically allowing same-sex couple adoptions.<sup>37</sup>

The laws and policies governing LGBT person's ability to become foster parents are even far more uncertain. Currently, eleven (11) states prohibit discrimination against foster and/or adoption applicants on the basis of sexual orientation,<sup>38</sup> thirty-nine (39) states, and the District of Columbia, remain silent on the issue, and two (2) states, Nebraska and Utah have specific restrictions on fostering by LGBT persons.<sup>39</sup> Furthermore, "[e]ven in the absence of legislation or a stated policy against foster care and permanent placements with gay and lesbian couples and individuals, there is significant evidence of de facto discrimination against this demographic of prospective parents."<sup>40</sup> For example, a survey done by the Donaldson Adoption Institute found that of all the adoption agencies sampled, 60% of the agencies were willing to accept applications from LGBT applicants however, only 39% made such placements.<sup>41</sup> Also, "some legal experts report that the Virginia Attorney General's office and the state of Missouri have

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<sup>36</sup> See Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145, 24 (2011) The Court held that the individualized assessments by the Arkansas Department of Human Services and their trial courts were effective in addressing issues that could potentially create a risk to the child or otherwise render the applicant unsuitable to be a foster or adoptive parent. The court held that this would be the least restrictive means for addressing the compelling state interest of protecting the welfare, safety, and best interest of Arkansas's children.

<sup>37</sup> See Brozinsky, supra note 23, at 53 (Some of those states include: California, Connecticut, Illinois, Indiana, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Texas, Vermont, and Washington.)

<sup>38</sup> Arkansas, California, Connecticut, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Rhode Island and Wisconsin.

<sup>39</sup> See Movement Advancement Project, Family Equality Council and Center for American Progress, All Children Matter: How Legal and Social Inequalities Hurt LGBT Families (Full Report) 26 (2011).

<sup>40</sup> Washington, supra note 15 at 12; Movement Advancement Project, supra note 39 at 28 ("North Dakota explicitly permits agencies not to place children with foster families if it violates the agency's moral or religious beliefs, though it does not ban such foster families statewide...")

<sup>41</sup> EVAN B. DONALDSON ADOPTION INSTITUTE, ADOPTION BY LESBIANS AND GAYS: A NATIONAL SURVEY OF ADOPTION AGENCY POLICIES, PRACTICES, AND ATTITUDES, 21-24 (2003), [http://www.adoptioninstitute.org/publications/Lesbian%20and%20Gay%20Adoption%20Report\\_final.pdf](http://www.adoptioninstitute.org/publications/Lesbian%20and%20Gay%20Adoption%20Report_final.pdf)

instructed agencies not to consider applicants who are LGBT.”<sup>42</sup> And, courts in Chicago, Illinois, where second parent adoptions are routinely permitted, require that home studies be conducted for these types of adoptions but do not require the same for stepparent adoptions (legal procedure in which a heterosexual step parent adopts the child of his current spouse).<sup>43</sup>

### **Race and Adoption**

Prior to the 1960’s transracial adoptions were fairly uncommon in the United States because caseworkers and others involved in the adoption process believed that race-matching (efforts to match children’s ethnic/racial background with that of their adopters) was in the child’s best interest.<sup>44</sup> In the late 1960’s, during the height of the Civil Rights Movement, several states like Texas<sup>45</sup> and Louisiana,<sup>46</sup> struck down laws banning transracial adoptions.<sup>47</sup> Additionally, adoption agencies began to promote transracial adoptions of African American children to white prospective adoptive families<sup>48</sup> and by 1971 approximately 2,574 transracial adoptions had been finalized in the United States.<sup>49</sup> However, in 1972, the National Association of Black Social Workers (NABSW) issued a position paper condemning transracial adoptions of African American children, relating these types of placements as a form of “cultural genocide”.<sup>50</sup> The position taken by the NABSW proved to be a powerful deterrent in the advancement of transracial adoptions, the number of African American children adopted by White families

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<sup>42</sup> Movement Advancement Project, supra note 39 at 31.

<sup>43</sup> See Brozinsky, supra note 23, at 40 (citing, In re C.M.A., 306 Ill. App. 3d 1061 (1999)).

<sup>44</sup> See John E.B. Myers, A Short History of Child Protection in America, 42 FAM. L.Q. 449, 457-8 (2008).

<sup>45</sup> See In re Gomez, 424 S.W.2d 656, 658 (1967)

<sup>46</sup> See Compos v. McKeithen, 341 F. Supp. 264, 266-67 (1972)

<sup>47</sup> See Myers, supra note 44, at 457.

<sup>48</sup> See Fogg-Davis, supra note 1, at 3; Solangel Maldonado, Race, Culture, and Adoption: Lessons From Mississippi Band of Choctaw Indians v. Holyfield 17 COLUM. J. GENDER & L. 1, 33 (2008).

<sup>49</sup> See Fogg-Davis, supra note 1, at 3.

<sup>50</sup> RITA J. SIMON, HOWARD ALSTEIN, AND MARYGOLD S. MEILI, THE CASE FOR TRANSRACIAL ADOPTION 40 (1994) (Citing the National Association of Black Social Workers, Position Paper, April 1972). EVAN B. DONALDSON ADOPTION INSTITUTE, FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE, (2008), <http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf>

steadily declined as did society's support for the same.<sup>51</sup> This opposition to transracial adoptions by the NABSW resulted in policy changes by many child welfare organizations, such as the Child Welfare League of America, who went from publicly encouraging transracial adoptions in 1968 to revising its standards to emphasize the importance of same-race placements in 1973.<sup>52</sup> Again, race matching policies gained traction and the number of African American children in foster care continued to rise.<sup>53</sup>

In 1994, in response to the increased number of African American children in foster care and the difficulty in finding permanent placements for these children, the Multiethnic Placement Act (MEPA) was enacted.<sup>54</sup> The purpose of MEPA was to promote the best interest of children awaiting adoptions by removing barriers hindering their permanent placement.<sup>55</sup> "It was the sense of Congress that some of the key factors contributing to the long waits experienced by these children are the race, color and national origin matching policies and practices of public agencies that generally discouraged minorities from becoming foster and adoptive parents."<sup>56</sup> Therefore, foster care or adoption agencies receiving federal funds were required to (a) prohibit the delay or denial of foster care or adoption based solely on race, color or national origin, and (b) required state agencies to make diligent efforts to expand the pool of foster and adoptive parents who represented the racial and ethnic backgrounds of children in the foster care system.<sup>57</sup>

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<sup>51</sup> See Fogg-Davis, *supra* note 1, at 3 (2002) (the number of [transracial adoptions] dropped to 1,569 in 1972 and then to 1,091 in 1973 and then according to [Elizabeth Bartholet], to 831 in 1975"); Elizabeth Bartholet, *Where do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1180 (1991) ("The number [of transracial adoptions] fell from a peak of 2574 in 1971, to 1561 in 1972, to 1091 in 1973. By 1975, the last year in which these statistics were systematically generated, the number was 831.").

<sup>52</sup> Rachel Farr & Charlotte J. Patterson, *Transracial Adoption by Lesbian, Gay, and Heterosexual Couples*, *Adoption Quarterly*, 12:187, 188 (2009); Bartholet, *supra* note 51, at 1181.

<sup>53</sup> See Rachel Farr & Charlotte J. Patterson, *Transracial Adoption by Lesbian, Gay, and Heterosexual Couples*, *Adoption Quarterly*, 12:187, 188 (2009).

<sup>54</sup> See *The Multiethnic Placement Act*, *supra* note 3, at 12; Maldonado, *supra* note 16, at 1441-42.

<sup>55</sup> See *The Multiethnic Placement Act*, *supra* note 3, at 12-13.

<sup>56</sup> *The Multiethnic Placement Act*, *supra* note 3, at 47.

<sup>57</sup> *The Multiethnic Placement Act*, *supra* note 3, at 1; Roberts, *supra* note 5, at 166.

MEPA proved to be ineffective in its application and enforcement as many adoption agencies continued using race matching practices that denied foster children the opportunity of being permanently placed with otherwise qualified white adoptive families.<sup>58</sup>

In 1996, Congress amended MEPA with the Inter-Ethnic Adoption Provisions (MEPA-IEP).<sup>59</sup> MEPA-IEP still shared the some of the same goals established by MEPA, to reduce the time children were waiting for permanent placements, to encourage recruitment of adoptive and foster parents who can meet the needs of waiting children and to eliminate discrimination on the basis of race, ethnicity, or national origin of the child or prospective adoptive parent.<sup>60</sup> However, the amendment eliminated the ambiguous language of MEPA by removing the word “solely” from MEPA’s prohibitions against delaying or denying an adoptive placement on the basis of race, color or national origin.<sup>61</sup> The only exception carved out to the 1996 MEPA-IEP amendment is when the placement involves an older child, whose preferences are allowed to be taken into consideration.<sup>62</sup>

To strengthen its enforcement, MEPA-IEP created penalties such as withholding federal funds for noncompliant agencies and created a private right of action for individuals to pursue if they felt they have been discriminated.<sup>63</sup> Some critics argue that the enforcement of MEPA-IEP

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<sup>58</sup> See Maldonado, *supra* note 16, at 1456 (“White families alleged that agencies continued to reject their applications to adopt African American children even when there were no African American families seeking to adopt them. Child advocates sued state agencies, alleging that adoptive placements had been delayed because agencies continued race matching.”)

<sup>59</sup> See 42 U.S.C. § 5115a(a)(1)(B) (effective Oct. 20, 1994), *repealed by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808(d), 110 Stat. 1904 (1996).

<sup>60</sup> See A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994, AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996, <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-50/man/appendixp.pdf>

<sup>61</sup> See The Multiethnic Placement Act, *supra* note 3, at 1.

<sup>62</sup> *Id.* at 34.

<sup>63</sup> See Fogg-Davis, *supra* note 1, at 47 (citing ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT AND THE ADOPTION ALTERNATIVE, 134-37 (1999); A Guide to The Multiethnic Placement Act of 1994, As Amended by the Interethnic Adoption Provisions of 1996, <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-50/man/appendixp.pdf>

has been one sided, primarily focusing on the removal of barriers for those seeking transracial adoptions and very little has been or is being done to ensure that state agencies are recruiting families of color.<sup>64</sup> Lastly, there is a concern that MEPA-IEP is being misinterpreted as completely eliminating the issue of race from the foster care/public adoption process, when in fact MEPA-IEP allows consideration of race in placement decisions so long as “racial generalizations” are not used in making individual placement decisions.<sup>65</sup> Some critics posit that adoption service providers are abandoning “good social work practices,” and avoiding the discussion of race all together when placing a child transracially, because of fear being in violation of MEPA-IEP.<sup>66</sup>

### **III. Race and Sexual Orientation in Adoptions**

This section considers the arguments in favor and against transracial adoptions and adoptions by LGBT persons. This section focuses on the major arguments advanced by proponents of race-matching and transracial adoptions and highlights the critical debate about the effectiveness of MEPA-IEP in resolving the overrepresentation of children of color in the foster care system. Next, this section explores the challenges LGBT couples face in the adoption process as a result of social biases and assumptions. Lastly, this section will explore some recent judicial opinions that call into question the propriety of LGBT adoptions, leaving the door open for judges, adoption agencies, caseworkers and others involved to interject their moral and political agendas in the adoption process.

#### **The Transracial Adoption Debate**

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<sup>64</sup> The Multiethnic Placement Act, *supra* note 3, at 25.

<sup>65</sup> Id. at 34.

<sup>66</sup> Id. at 33.

Transracial adoptions in general represent a small number of the adoption finalized in the U.S. each year.<sup>67</sup> Regulations prohibition of race-matching policies, have increased the number of children placed transracially, however have not “led to a surge in these numbers”.<sup>68</sup> Reporter Mary Jo McConahay, stated in an article she wrote for the Los Angeles Times Magazine, that of the dozens of white parents she interviewed in three years, “almost all said they would consider adopting a Latino child abroad before a black child at home.”<sup>69</sup> Most prospective adoptive parents are white and the majority have a preference to adopt white children.<sup>70</sup> Transracial adoptions of African American children often occur as a second or third choice with Asian and Latino children being the next option in line.<sup>71</sup> Also, domestic private adoptions are far more prevalent than adoptions from public agencies.<sup>72</sup> Scholars contend that although the number of children affected by transracial adoptions is so small, the issue remains highly contested because it challenges the notion of what constitutes a traditional family and touches upon the often complex issues of race relations in America.<sup>73</sup>

### **Colorblind Adoptions**

Scholars like Elizabeth Bartholet and Richard Banks argue that race matching practices fail to serve the best interest of children in need of adoption.<sup>74</sup> As proponents of a colorblind adoption process these scholars believe adoption agencies should focus on achieving permanency with qualified adoptive parents, which in their opinion, has nothing to do with race

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<sup>67</sup> See Twila L. Perry, Power, Possibility And Choice: The Racial Identity of Transracially Adopted Children 9 MICH. J. RACE & L. 215, 233 (2003) (reviewing HAWLEY FOGG-DAVIS, THE ETHICS OF TRANSRACIAL ADOPTION (2002)).

<sup>68</sup> See The Multiethnic Placement Act, *supra* note 3, at 37; Roberts, *supra* note 5, at 172.

<sup>69</sup> *Id.*

<sup>70</sup> See The Multiethnic Placement Act, *supra* note 3, at 37; Roberts, *supra* note 5, at 172.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Perry, *supra* note 67, at 233.

<sup>74</sup> See Bartholet, *supra* note 51, at 1203.

and everything to do with being able to provide a fit, loving and stable environment.<sup>75</sup> Furthermore, these advocates believe that race considerations in the adoption process work to the disadvantage of African American children.<sup>76</sup> They specifically argue that race matching policies cause African American children to “languish” in foster care by creating barriers that disallow these children to achieve permanency through transracial placements.<sup>77</sup> And while Banks argues that “the facilitation of whites’ preferences for white children, not barriers to transracial adoption, is mainly responsible for low Black adoption rates.”<sup>78</sup> Bartholet contends that race considerations discriminate against qualified prospective white adoptive parents.<sup>79</sup> She states that adoption agencies’ race matching preference, delay or deny African American children the opportunity to be permanently placed in their attempt to find a same race family for these children.<sup>80</sup>

Scholars in support of MEPA-IEP argue that if race were “even slightly” allowed as a consideration in the child placement process, all placement decisions concerning children of color would revolve around this factor.<sup>81</sup> These scholars relate race matching practices and preferences as reinforcing social practices of racial separatism and discrimination.<sup>82</sup> These scholars argue against allowing adoption agencies to “screen” parents in order to determine their ability to care for a child of a different race or even provide prospective parents with some

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<sup>75</sup> See Bartholet, *supra* note 51, at 1255.

<sup>76</sup> *Id.* at 1193-94.

<sup>77</sup> See Maldonado, *supra* note 16, at 1454-55; Roberts, *supra* note 5, at 166.

<sup>78</sup> Banks, *supra* note 22, at 963.

<sup>79</sup> See Bartholet, *supra* note 51, at 1188.

<sup>80</sup> *Id.* at 1885.

<sup>81</sup> See The Multiethnic Placement Act, *supra* note 3, at 38; Bartholet, *supra* note 51, at 1188.

<sup>82</sup> See The Multiethnic Placement Act, *supra* note 3, at 38.

“orthodoxy” as to how children of color should be raised.<sup>83</sup> The consensus here is that the focus should remain on the parent’s ability to provide a stable and loving home for these children.<sup>84</sup>

Additionally, these transracial adoption advocates call into question the constitutionality of racial considerations in the adoption process.<sup>85</sup> Both Bartholet and Banks have argued that in no other area of the law is race allowed to be used as a consideration or determining factor, and in the limited instances in which race considerations are allowed, it must be related to a legitimate governmental interest, its application must be narrowly tailored in order to surpass constitutional standard of strict scrutiny.<sup>86</sup> Banks believes prospective adoptive parents should not have the right to express race-based preferences over their foster or adoptive children.<sup>87</sup> In supporting their proposition, these scholars cite to cases, like Palmore v. Sidoti, where courts have held it unconstitutional for the state to use race as the dispositive factor in a child custody determination.<sup>88</sup>

In terms of how transracial adoptions affect a child’s racial identity, Bartholet states that “the main difference revealed by the evidence is that transracial adoptees appear more positive than blacks raised inracially about relationships with whites, more comfortable in those relationships, and more interested in a racially integrated lifestyle.”<sup>89</sup> She suggests that transracial adoptees “having this unique racial experience” will have a greater sense of identity that allows them more fluidly navigate in a multi-racial society.<sup>90</sup> Lastly, Bartholet suggest that

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<sup>83</sup> The Multiethnic Placement Act, *supra* note 3, at 44.

<sup>84</sup> *Id.* at 39.

<sup>85</sup> Banks, *supra* note 22, at 885; Bartholet, *supra* note 51, at 1163; Elizabeth BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993).

<sup>86</sup> Bartholet, *supra* note 51, at 1231 (“The racial matching policies fit none of the exceptions to the anti-discrimination norm. There is no compelling necessity for racial matching...”).

<sup>87</sup> Banks, *supra* note 22, at 920.

<sup>88</sup> Bartholet, *supra* note 51, at 1227 (citing City of Richmond v. J.A. Croson Co., 488 U.S.469 (1989) which holds that “even benign racial classifications are highly suspect and must be limited to narrowly defined situations.”).

<sup>89</sup> *Id.* at 1218.

<sup>90</sup> *Id.*

there is no research indicating that African Americans parents do a better job than white parents of raising African American children to have a strong sense of their cultural identity.<sup>91</sup>

Scholars like Bartholet disagree with transracial adoption critics who believe that more should be done in terms of the recruitment and retention of more families of color by stating that research has shown that African Americans are currently adopting at the same rate as white Americans.<sup>92</sup> Bartholet also believes that use of kinship care, as a form of foster care, should be used cautiously. Her presumption is that “neglect tends to be an extended family problem” and kinship care might return these children to an unfit or abusive environment.<sup>93</sup> Bartholet advocates that once a removal determination has been made, children should be transitioned into foster care in order facilitate permanency through adoption.<sup>94</sup>

### **Race Matching Advocates**

The impact race has on a child’s self-development is a major point of contention between transracial adoption colorblind adoption proponents Banks and Bartholet and scholars like Twyla Perry and Dorothy Roberts who strongly believe that racial considerations belong in the adoption process.<sup>95</sup> Scholars Perry and Roberts argue that children need affiliations with other people like themselves in order to learn coping skills in what they consider is a race conscious society.<sup>96</sup> These scholars point to the research showing that transracial adoptees experience low levels of racial identity - which they claim hinders their successful navigation of a society in which they will face stigma and discrimination.<sup>97</sup> They propose that when an African American

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<sup>91</sup> See Bartholet, *supra* note 51, at 1220.

<sup>92</sup> See The Multiethnic Placement Act, *supra* note 3, at 38.

<sup>93</sup> *Id.* at 43; Roberts, *supra* note 5, at 168 (2002).

<sup>94</sup> See The Multiethnic Placement Act, *supra* note 3, at 42-43.

<sup>95</sup> See Perry, *supra* note 67, at 216.

<sup>96</sup> *Id.* at 225.

<sup>97</sup> See Maldonado, *supra* note 16, at 1460.

adoptive family is available to meet the needs of the child, race can and should be the determining factor.<sup>98</sup>

Opponents of transracial adoptions believe that children adopted transracially experience greater difficulty integrating into their new family settings and may never gain a feeling of belonging.<sup>99</sup> Hawley Foggs-Davis describes the process that transracial adoptees take on while living between two cultural communities, as “racial navigation.”<sup>100</sup> Foggs-Davis states that racial navigation is “both a coping device for living in a race-conscious society...”<sup>101</sup> The argument is that racial identity is an integral part of self-development and transracial adoptions hinder a child’s ability to fully understand and embrace their racial background.<sup>102</sup>

Proponents of race matching policies suggest that the aims of MEPA-IEP serve the interest of white prospective adoptive parents over the interest of waiting children.<sup>103</sup> These critics argue that the government changes its child placement policies based on the supply and demand of children in order to accommodate the interest of prospective adopters.<sup>104</sup> These scholars suggest that the shortage of white babies available for adoption has led white adoptive parents to resort adopting African American children as a second choice alternative.<sup>105</sup> Transracial adoption critics argue that despite the advocacy for transracial adoptions of African American children, race matching policies are used to match white babies to white families, and

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<sup>98</sup> See Bartholet, *supra* note 51, at 1188.

<sup>99</sup> See GAIL STEINBERG & BETH HALL, *INSIDE TRANSRACIAL ADOPTION* (2000) (“Adoptees in transracial adoptions face a greater crisis as compared to adoptees in inracial adoptions. This is because transracially adopted individuals experience double rejection, the rejection from their birth mother, and the rejection of their race and culture.”).

<sup>100</sup> Foggs-Davis, *supra* note 1, at 5.

<sup>101</sup> *Id.* (“The racial and genetic discrepancy created by TRA illuminates the value of recognizing racial categories as a first step toward challenging the static, and often negative, meanings attached to this system of racial pigeonholing. Families, both biological and adoptive, can and should be launching pads for initiating a lifelong process of flexible racial self-identification.”).

<sup>102</sup> See Steinberg, *supra* note 99 (“Positive racial identity depends on our ability to identify fully with our ethnic roots, yet remain confident that race or ethnicity does not limit our opportunities in life.”).

<sup>103</sup> See Roberts, *supra* note 5, at 166; Perry, *supra* note 67, at 220.

<sup>104</sup> See Roberts, *supra* note 5, at 166.

<sup>105</sup> *Id.*

very little is being said or done to encourage the transracial adoption of a white children by an African American families.<sup>106</sup> Roberts, states that the idea that public adoption agencies were at some point turning away thousands of white prospective adoptive parents is “ludicrous,” and suggests that current policies have added an additional burden on the preservation of African American families.<sup>107</sup>

Roberts suggest that “the rhetoric the Adoption and Safe Family First Act (ASFA),<sup>108</sup> and MEPA-IEP support the dissolution of poor Black families by depicting adoptive homes as superior to children’s existing family relationships.”<sup>109</sup> Roberts states that the federal child welfare policy promoted by ASFA, (which restricted race-matching practices and limited prolonged family reunification efforts) and MEPA’s 1996 amendment were strategies “for increasing adoptions of Black children by white families.”<sup>110</sup> These scholars advocate that part of the solution to the overrepresentation of children of color lies in devoting more resources to the preservation and recruitment of African American families.<sup>111</sup>

Critics of MEPA-IEP state that more should be done on the front end to keep children within their birth communities, often suggesting the use of kinship care should be used, whenever possible, as a form of family preservation for those children that are removed from their homes.<sup>112</sup> These advocates suggest that as a temporary solution, kinship care would allot

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<sup>106</sup> See Roberts, *supra* note 5, at 167.

<sup>107</sup> *Id.* at 172.

<sup>108</sup> See CHILD WELFARE LEAGUE OF AMERICA, SUMMARY OF THE ADOPTION AND SAFE FAMILIES ACT OF 1997, <http://www.cwla.org/advocacy/asfap1105-89summary.htm> (last visited May 9, 2012). (On November 19, 1997, the President signed into law (P.L. 105-89) the Adoption and Safe Families Act of 1997, to improve the safety of children, to promote adoption and other permanent homes for children who need them, and to support families. This new law makes changes and clarifications in a wide range of policies established under the Adoption Assistance and Child Welfare Act (P.L. 96-272), the major federal law enacted in 1980 to assist the states in protecting and caring for abused and neglected children.”).

<sup>109</sup> Roberts, *supra* note 5, at 171.

<sup>110</sup> *Id.* at 167.

<sup>111</sup> See *Id.*

<sup>112</sup> See The Multiethnic Placement Act, *supra* note 3, at 42; Roberts, *supra* note 5, at 24.

parents the time needed to comply with the requirements they need to meet in order to recover their children while preserving the family, and reducing the traumatic impact on children.<sup>113</sup> These scholars state that “[b]ecause parents involved with child protective services are so often portrayed as brutal monsters, the public usually ignores the trauma experienced by the children.”<sup>114</sup> The ultimate goal according to these scholars is that children remain in their communities setting as often as possible in order to reduce emotional trauma and promote family reunification.<sup>115</sup>

Although recruitment of underrepresented communities of color has been “in the books” for decades, actual efforts to recruit within these communities has been minimal.<sup>116</sup> Race-matching proponents believe that MEPA-IEP’s requirement to recruit families of color should be strictly enforced and public adoption agencies should be mandated to become proactive in attracting diverse families for both permanent and temporary placement of children entering the foster care system.<sup>117</sup>

#### **IV. Adoptions by LGBT Persons**

The biggest obstacle in securing permanency for waiting children in foster care is the lack of qualified persons willing to adopt within this category.<sup>118</sup> Scholars in support of adoptions by LGBT persons state that members of this community are more open to transracial adoptions<sup>119</sup> and point to research showing that gays and lesbians interested in raising children are finalizing adoptions through the foster care system at a higher rate than heterosexual adults.<sup>120</sup> This section

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<sup>113</sup> See Roberts, *supra* note 5, at 24.

<sup>114</sup> *Id.* at 17.

<sup>115</sup> See *The Multiethnic Placement Act*, *supra* note 3, at 42.

<sup>116</sup> *Id.* at 34.

<sup>117</sup> *Id.* at 43.

<sup>118</sup> See Movement Advancement Project, *supra* note 29, at 23.

<sup>119</sup> See Farr, *supra* note 53, at 204.

<sup>120</sup> See Movement Advancement Project, *supra* note 29, at 23.

begins by highlighting some of the major arguments put forth in favor and against adoptions by LGBT persons. This section will also explore some recent judicial opinions that call into question the propriety of LGBT adoptions.

Many commonly held stereotypes regarding LGBT persons have their basis in dated medical and social science research.<sup>121</sup> At one point, homosexuality was seen as a type of mental illness, it wasn't until 1973, that the American Psychiatric Association removed homosexuality from its list of mental disorders.<sup>122</sup> Some of these past findings have been the basis for the social resistance against homosexuality and specifically against finding LGBT persons suitable to rear children.<sup>123</sup> Courts have continuously expressed concern about the potential negative impact that a parent's homosexuality may have on children.<sup>124</sup> Some of the concerns frequently raised about LGBT parenting/adoptions include the potential for child abuse, the impact that a parent's sexual orientation may have on the child's development of identity, and a child's increased potential for confronting social bias and/or discrimination as a result of their parent's sexuality.

### **Increased Potential for Child Abuse**

Opponents of adoptions by members of the LGBT community bring up certain "risks" associated with adoptions by this group.<sup>125</sup> They state that because adoptions LGBT persons is still a relatively new phenomenon, the available data is not reliable enough to ensure that these

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<sup>121</sup> See Steve Susoeff, Comment, Assessing Children's Best Interest When a Parent is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. REV. 852, 871 (1985). ("Until the mid-1950's virtually all research on same-sex orientation used subjects who were mental hospital patients or convicted prisoners. Many scientific "findings" and resulting social beliefs about gay men and lesbians were based on these highly distorted samples.").

<sup>122</sup> Id. at 852. ("Sigmund Freud, whose psychoanalytic theory dominated all mental-health related thought and practice from the turn of the century until the early 1950's...adopted the designation of homosexuality as an "obsessional neurosis"... and suggested that sexual orientation could be changed through suggestion [hypnosis] or psychoanalysis, he created the source of business for psychoanalysis who still engage in "curing" homosexuality...").

<sup>123</sup> Id. at 869.

<sup>124</sup> Id. at 869, 876.

<sup>125</sup> Id.

placements are in the child's best interest.<sup>126</sup> LGBT adoption opponent Lynn Wardle, states that the existing research ignores and evades the "hard questions" about the effect of homosexual sexual activity by residential parents (and their partners) on the children they are raising.<sup>127</sup> Some suggest that a child of a homosexual parent is at a higher risk of being sexually molested by the child's parent, or parent's partner/friends.<sup>128</sup> This fear is based on the assumption that homosexuals, gay men in particular, are inclined to sexually abuse children.<sup>129</sup> LGBT Advocates challenge this notion by pointing to research on the molestation of children that dispels this assumption by showing that offenders "in disproportionate numbers are heterosexual men," and that homosexuals as a group are not sexually oriented toward children."<sup>130</sup>

### **The Impact an LGBT parent's Sexual Orientation has on Children**

Some scholars believe that "prolonged" exposure to a homosexual parent, in particular that parent's relationship with a same sex partner, can influence a child into engaging in a homosexual lifestyle.<sup>131</sup> Proponents of adoptions by LGBT persons argue that "[n]ot a single reputable study has found that children raised by gay or lesbian parents are harmed because of their parents' sexual orientation".<sup>132</sup> They further argue that the sexual preference of these

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<sup>126</sup> See Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 980 (2003); Hernandez v. Robles, 821 N.Y.S.2d 770, 777 (2006); Lynn D. Wardle, Inner Lives of Children in Lesbian Adoption: Narratives and Other Concerns, 18 ST. THOMAS L. REV. 511, 516 (2005) ("The day will come when through, serious, longitudinal research will be available, but that day has not yet arrived. ... we can expect that it will take about one full generation from the general acceptance of the phenomenon... before reliable research that examines such development begins to be generally available").

<sup>127</sup> See Wardle, supra note 126, at 516.

<sup>128</sup> See Susoeff, supra note 121, at 869, 880.

<sup>129</sup> Id.

<sup>130</sup> Id. at 880 (Citing Baker v. Wade, 533 F. Supp. 1121, 1130 (1982), SAM HOUSTON STATE UNIVERSITY, Criminal Justice Center, RESPONDING TO CHILD SEXUAL ABUSE: A REPORT TO THE 67<sup>TH</sup> SESSION OF THE TEXAS LEGISLATURE (1980)).

<sup>131</sup> Id.

<sup>132</sup> Movement Advancement Project, supra note 29, at i.

children is independent from that of their LGBT parents and the incidence of homosexuality amongst these children is as random as that of the general population.<sup>133</sup>

These scholars also argue that children need both female and male role models, a mother and a father which inherently, LGBT parents cannot provide.<sup>134</sup> This argument was reinforced by the court in Lofton v. Secretary of Dept. of Children & Family, where a Florida Court of Appeals affirmed a lower court's findings banning adoptions by LGBT persons and one of the reasons supporting its decision was that "homosexual household are necessarily motherless or fatherless and lack...stability."<sup>135</sup> The concern over providing children with both male and female role models is shared by some LGBT parents.<sup>136</sup> For example, a research study conducted by UCLA's Gender Identity Clinic found that the lesbian mothers tended to share this concern and consciously tried to provide male role models in their children's lives.<sup>137</sup> The focus here is that children with homosexual parents will suffer some type of gender confusion as a result of their parent's sexuality. However, LGBT advocates point to research reinforcing the belief that children of homosexual parents "follow typical development patterns of acquiring sex-role concepts and sex-typed behaviors."<sup>138</sup>

### **Increased Risk of Social Stigma and Bias Discrimination**

Another concern shared by both scholars advocating for and against adoptions by LGBT persons is the possibility that these adoptees are at a higher risk of facing bias discrimination or

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<sup>133</sup> See Susoeff, *supra* note 121, at 882. ("UCLA gender identity research compared children of lesbians with the children of single heterosexual women. The findings showed that "gender confusion" and related problems occurred with the same frequency among children of both sets of mothers.")

<sup>134</sup> See Goodridge, 798 N.E.2d at 1000; Hernandez, 821 N.Y.S.2d at 776 .

<sup>135</sup> Lofton, 358 F. 3d at 819 (later repealed by Fla. Dep't of Children & Families v. X.X.G., 45 So. 3d 79 (2010)).

<sup>136</sup> See Susoeff, *supra* note 121, at 876.

<sup>137</sup> Id. (citing Beverly Hoeffler, Lesbian and Heterosexual Single Mothers Influence on Their Children's Acquisition of Sex-Role Traits (1979) "...Lesbian mothers tended to be more concerned with providing male figures for their children than were the comparison [single heterosexual] mothers.")

<sup>138</sup> See Heather J. Langemak, Comment, The "Best Interest of the Child": Is a Categorical Ban on Homosexual Adoption an Appropriate Means to this End? 83 MARQ L.REV. 825, 845 (2000).

social stigma associated with their parent’s sexuality.<sup>139</sup> Some research does show that children of LGBT parents are at higher risks of being isolated, questioned about their own sexuality at a young age and bullied as result of their parent’s sexual orientation.<sup>140</sup> In fact, a 2008 study conducted by the Gay, Lesbian and Straight Education Network (GLEN), found that 42% of children with LGBT parents were verbally harassed at school over the past year because their parents were LGBT.<sup>141</sup> Scholars/advocates point to the seriousness of the issue and agree that the impact of stigma, harassment and/or discrimination on a child should not be understated, however, there is a general disagreement as to whether this issue on its own should be enough to disqualify an otherwise suitable person from parenting.<sup>142</sup> In 1984, the Supreme Court considered this issue within the context of racial discrimination in Palmore v. Sidoti.<sup>143</sup> In this case, a white mother lost custody of her 3 year old daughter as a result of her relationship with an African American man, whom she later married.<sup>144</sup> Respondent defended his petition for the change in custody by stating his ex-wife chose for herself and their child, “a life-style unacceptable to the father and to society...” and as a result, their child “will be, subject to environmental pressures not of choice.”<sup>145</sup> The Court while acknowledging that the child “might be subject to a variety of pressures and stresses” stated that “the reality of private biases and possible injury they might inflict [were] not [a] permissible consideration.”<sup>146</sup> In the unanimous opinion, Chief Justice Burger went on to state that “although private biases may be outside the

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<sup>139</sup> See Movement Advancement Project, supra note 29, at 4.

<sup>140</sup> Id. at 14-15 (citing, Gay Lesbian, and Straight Education Network (GLEN) et al., Involved, Invisible, Ignored: The Experiences of Lesbian, Gay, Bisexual and Transgender Parents and Their Children in Our K-12 Schools (2008)).

<sup>141</sup> Id. at 93 (Citing a survey done by, Joseph K. Kosciw and Elizabeth M. Diaz, Involved, Invisible, Ignored: The Experiences of Lesbian, Gay, Bisexual and Transgender Parents and Their Children in Our Nation’s K-12 (2008)).

<sup>142</sup> See Steve Susoeff, Comment, Assessing Children’s Best Interest When a Parent is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. Rev. 852, Susoeff, supra note 121, at 903.

<sup>143</sup> See Palmore v. Sidoti, 466 U.S. 429 (1984).

<sup>144</sup> Id. at 430.

<sup>145</sup> Id. at 430-31.

<sup>146</sup> Id. at 433.

reach of the law, the law cannot directly or indirectly, give them effect.”<sup>147</sup> The mother regained custody.<sup>148</sup>

### **Recent Judicial Opinions Regarding the Propriety of LGBT Adoptions/Parenting**

Some argue that “judges take tacit judicial notice of their personal beliefs” about gay parenting and the result is a great variation in case law pertaining to LGBT parenting.<sup>149</sup> The following are some examples of recent cases addressing the propriety of adoption and childrearing by LGBT persons. In 2004, it was the opinion of the court in Lofton, that “not placing adoptees in homosexual households increases the probability that these children eventually will be placed with married couple families...”<sup>150</sup> Furthermore, the court held that “it is not in the best interest of its displaced children to be adopted by individuals who engage in current, voluntary homosexual activity.”<sup>151</sup> Similarly in 2003, the dissent in Goodridge v. Dept. of Pub. Health (a Massachusetts case which granted same-sex couples the right to marry) argued that “...same-sex relationships, although becoming more accepted, are certainly not so “deeply rooted in this Nation’s history and tradition” as to warrant such enhanced constitutional protection.”<sup>152</sup> A counter to this last argument is found in the dissent opinion in Hernandez v. Robles, (a 2006 New York case which upheld a lower court’s ban on same-sex marriage). The dissent argued that “...fundamental rights, once recognized (referring to the fundamental right to marry) cannot be denied to particular groups on the ground that these groups have historically been denied those rights. The dissent went on to say, “[s]ame-sex families are, among other things, denied equal treatment with respect to intestacy, inheritance, tenancy by the entirety, taxes, insurance,

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<sup>147</sup> Id. at 429.

<sup>148</sup> Id. at 434.

<sup>149</sup> Susoeff, supra note 121, at 903.

<sup>150</sup> Lofton, 358 F. 3d at 823.

<sup>151</sup> Id. at 826.

<sup>152</sup> Goodridge, 798 N.E.2d at 987.

health benefits, medical decisionmaking, workers' compensation, the right to sue for wrongful death, and spousal privilege. Each of these statutory inequities, as well as the discriminatory exclusion of same-sex couples from the benefits and protections of civil marriage as a whole, violates their constitutional right to equal protection of the laws.”<sup>153</sup>

## **V. Conclusion**

This paper seeks to reconcile both the argument that race should not be a barrier in securing a child a permanent placement while acknowledging that race is still an important factor and should play a role when placing a child with an adoptive family. Considering the arguments on both sides of the transracial adoption debate, it's fair to say that the ultimate goal sought is to preserve the best interest of these already vulnerable children. Race should be one of the factors considered when placing a child with a foster or adoptive family; in particular, the family's attitudes about race should be examined, along with their willingness and ability to raise a child of a different race. In order to do that we must acknowledge that a colorblind adoption process runs counter to a child's best interest if a family is not prepared to cope with the particular issues of race that impact that particular child. The reality is that “[r]ace-consciousness pervades American society ...and adoptive placements should recognize and accommodate this truth.”<sup>154</sup> This is not an argument in favor of only placing children of color in same race families, but instead, a proposal that it be acknowledged that race still plays a role in a child's self-development and therefore needs to be considered when placing a child with an adoptive family. In an article for the National Resource Center for Foster Care and Permanency Planning, Jane K. Long summarizes it best:

“The intentions of MEPA is a positive one since it attempted to promote permanency and attempted to decrease the number of years children wait for

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<sup>153</sup> Hernandez, 821 N.Y.S.2d at 796.

<sup>154</sup> Steinberg, supra note 99.

homes. However, it is naïve to believe that children of color are placed sooner because of the law because the reality is, there are greater number of children (of color) waiting to be adopted than there are available adoptive families. The supply and demand is not balanced. In addition, the haste to place children may have a reverse effect. Transracial adoption is beneficial to children, only when the adoptive parents are competent enough. Love is colorblind. However, in raising a child, love is not enough.”<sup>155</sup>

While acknowledging that race is an important factor that should always be considered when making placement decisions about a foster child or adoptee, other factors, like the availability of a capable<sup>156</sup> adoptive parent who is willing to adopt transracially and understands the complexities of such an adoption should always remain a viable option.

### **LGBT Persons and Transracial Adoptions**

The biggest obstacle in securing permanent homes for waiting children in foster care is the shortage of prospective adoptive parents willing to adopt within this category. We need to reevaluate the laws, policies and practices that create additional hurdles in achieving permanency for these children. We need to shift our notion of what a family should look like to reflect our current reality. In 2009, 54,407 foster care adoptions were finalized, one third of these children were adopted into non-traditional families.<sup>157</sup> During this time, approximately 14,000 foster children (3% of the population of children in foster care) were residing in households headed by LGBT persons.<sup>158</sup> Encouraging Transracial adoptions and adoptions by LGBT persons is just part of the solution to this ever-growing issue, however it is one that merits support, both financial and socially.

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<sup>155</sup> JANE KHIET LONG, NATIONAL RESOURCE CENTER FOR FOSTER CARE & PERMANENCY PLANNING, INFORMATION PACKET: DOMESTIC TRANSRACIAL ADOPTION, (2002), [http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information\\_packets/transracial\\_adoption-domestic\\_info\\_pkt.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information_packets/transracial_adoption-domestic_info_pkt.pdf)

<sup>156</sup> Capable meaning, an adoptive family who although not of the same race as the child, is willing to adopt this child and provide this child with the tools needed to navigate our race conscious society.

<sup>157</sup> See Movement Advancement Project, *supra* note 29, at 24.

<sup>158</sup> *Id.*

As much as we have progressed in our understanding and acceptance of sexual orientation, we are still far from the grips of bias (conscious or unconscious). The social pressures that arise out of being bullied or treated differently because of your parent's sexuality can have grave consequences on a child, specifically in the adoption context where it can lead to an adoptee's rejection of their adoptive parents.<sup>159</sup> A child's social interactions play an important role in their self-development; it impacts how they feel about themselves and are able to relate to others.<sup>160</sup> The concern that a parent's sexuality/sexual orientation affects a child is valid, but it is not particular to the LGBT community. As role models, both homosexual and heterosexual parents alike need to be mindful of the way in which they comport themselves within the intimate relationships to which their children are exposed. The concerns raised by opponents of adoptions by LGBT persons are based on stereotypes and assumptions of what constitutes a homosexual relationship.

A person's sexual Orientation and race should not be a disqualifier for an otherwise qualified prospective adoptive parent. There is too dire a need for qualified persons willing to adopt children, especially children in the foster system who are older, and disproportionately representative of communities of color and less often adopted. Our current laws need to become supportive of non-traditional families (single parent, transracial, LGBT families, etc.) and, as later proposed, resources need to be put in place to support and address their particular needs.

### **Final Recommendations**

There's an old adage that says, "If you're not part of the solution, then you are a part of the problem." The following recommendations are not novel, most have already been proposed by scholars and advocates invested in improving the conditions of waiting child in foster care

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<sup>159</sup> Movement Advancement Project, supra note 29, at 15.

<sup>160</sup> Id. at 14.

however, they are worth repeating because they get to the core of the basic steps we must take to improve the lives of so many children lost within our child welfare system.

### **Training and Support**

There is a general need for training and support for all players in the adoption process. Training must be provided to Social workers, adoption case workers and other adoption agency personnel. Based on the research, there is a general confusion amongst these service providers regarding the actual laws and policies that govern the adoption processes within their state and agencies. The goals of MEPA-IEP must be clarified to alleviate some of the existing misunderstandings regarding the role that race considerations should play within the adoption process. Second, every state adoption agency should be instructed on the particular laws and policies pertaining to adoptions by LGBT persons and as these laws are updated, service providers should be provided with key changes and a basic understanding of the impact these changes have on the adoption process.

Next, adoptive parents should be provided with on-going resources that are supportive of their unique challenges they will face as adoptive parents. In the case of a transracial placement, all adopters should be equipped with cultural competency training to help them understand the impact racial differences have on a child's life as well as provide them with some of the tools they will need to help their children deal with issues of bias and discrimination. As for LGBT adoptive parents, their training should address how a parent's sexual orientation will impact their child's life, as well as the significance of providing both male and female role models for children. In general, adoptive parents should also receive training on how to cope with special needs children, this training should be tailored address the specific needs of their adoptive child. The goal of these trainings should be to create awareness of the challenges involved with

becoming an adoptive parent, provide a supportive environment where parents can address their fears and expectations.

There is a general sentiment that the foster care system lacks adequate support services for children, specifically health related services that address the particular needs of these children. Children adopted from our child welfare system should receive counseling that helps them cope with the often traumatic experience of being removed from their biological families as well as address their history of abuse and neglect. Child welfare organizations should be invested in assuring these children successfully transition into their new environments by providing them with the resources needed to teach these children how to cope with their individual circumstance.

### **Promote Domestic Adoptions**

An increasing number of Americans are opting to adopt internationally.<sup>161</sup> “Americans cite many reasons for adopting internationally: there are few healthy infants in the United States, and international adoptions are faster, cheaper, more humanitarian, and less complicated than domestic adoptions.”<sup>162</sup> Promoting domestic adoptions needs to be a part of our child welfare agenda. More information needs to become available that debunks some of the mystery behind adoption, in general, and the assumptions made about adoptions from our child welfare system. Recruitment of prospective adoptive parents should be encouraged and enforced across the board currently; we don’t have the luxury of only recruiting within a limited category. The objective in these recruiting efforts should be to secure safe and welcoming environments for adoptees with qualified and capable persons who understand or are willing to deal with the challenges associated with these types of adoptions.

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<sup>161</sup> Maldonado, supra note 16, at 1418

<sup>162</sup> Id.

## **The Best Interest Standard**

The last recommendation involves a constant reevaluation of the factors that should be considered in analyzing a child's best interest. The best interest standard should match the realities of the children in foster care and should focus on the protection, interest and rights these children. There is "one size fits all standard so generalizations should be left out of this evaluation. The best interest inquiry requires a broader look at the child welfare problem. For starters, in securing the best interest of foster care children, we should provide devote more resources to family preservation by disassociating poverty with child neglect and providing these families the help they need before making a removal determination. Next, if it's determined that removal is in the child's best interest that we should move away from categorical bans that limit the already scarce pool of prospective adoptive parents. Ultimately, we want children to belong to loving families who can provide them with the stability, love and the tools they need to have a chance at healthy life.

As a society, we have a very innate need to pick sides on every debatable issue. Sometimes however, it is important to remain open to the idea that certain issues are not as simple as "black or white. Finding a way to secure a brighter future for the disheartening number of waiting children in foster care is one of those issues where we need to remain flexible and focused on safeguarding their best interest. Children are not and should never be burdened by our inability as a society to get past our "private biases" and hang-ups.