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# Discouraging Racial Preferences in Adoptions

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*More than 20,000 white Americans go abroad each year to adopt children from other countries, the majority of whom are not white. At the same time, there are more African American children available for adoption than there are African American families seeking to adopt them. While Americans claim there are few healthy infants available for adoption in the United States, hundreds of African American newborns each year are placed with white families in Canada and other countries. Tracing the history of transracial adoption in the United States, this Article argues that one reason why Americans go abroad to adopt is race. The racial hierarchy in the adoption market places white children at the top, African American children at the bottom, and children of other races in between, thereby rendering Asian or Latin American children more desirable to adoptive parents than African American children. Drawing on the rich literature on cognitive bias, this Article debunks the myths about domestic and international adoptions and shows that racial preferences, even if unconscious, play a role in many Americans' decisions to adopt internationally. This Article proposes that the law discourage adoptions based on racial preferences by requiring that Americans seeking to adopt internationally, while there are available children in the United States who meet their non-race-based criteria, show non-race-based reasons for going abroad.*

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## TABLE OF CONTENTS

INTRODUCTION.....	1417
I. RACE AND ADOPTION.....	1420
A. <i>Racial Hierarchy</i> .....	1420
B. <i>Debunking the Myths</i> .....	1431
1. Myth: There Are No Healthy Infants in the United States.....	1431
a. Supply.....	1431
b. Health.....	1435
c. Medical Records.....	1437
2. Myth: International Adoptions Are Faster, Easier, and Cheaper.....	1439
3. Myth: International Adoptions Are Safer.....	1442
4. Myth: International Adoptions Are More Humanitarian.....	1446
II. BARRIERS TO TRANSRACIAL ADOPTIONS OF AFRICAN AMERICAN CHILDREN.....	1454
A. <i>Legal Barriers</i> .....	1454
B. <i>Concern About Society's Racism</i> .....	1458
C. <i>Implicit Preferences</i> .....	1467
III. DISCOURAGING PREFERENCES FOR NON-AFRICAN AMERICAN CHILDREN.....	1468
CONCLUSION.....	1479

## INTRODUCTION

For many years, child welfare advocates have lamented the sad reality that African American children in foster care wait longer to be adopted than children of other races.<sup>1</sup> African American infants<sup>2</sup> in the private adoption system are also apparently less desirable than their white counterparts. African American families adopt only a small number of the African American children available.<sup>3</sup> Although African Americans adopt at twice the rate of whites, there are fewer African Americans in the population and, thus, fewer African American families available to adopt African American children.<sup>4</sup> At the same time, there are many more white families seeking to adopt than there are white infants available. For years, legal barriers to transracial adoption<sup>5</sup> of African American children effectively barred whites from adopting them. Now that those legal barriers have been removed,<sup>6</sup> however, one might expect many white families to adopt African American children. Yet, very few

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<sup>1</sup> Forty-two percent (52,935) of children in foster care waiting to be adopted as of September 30, 2002 were African American. U.S. Dep't of Health & Human Servs., *The AFCARS Report: Preliminary FY 2002 Estimates as of August 2004* (9), [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report9.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report9.htm).

<sup>2</sup> The term "infant" refers to a child under one year of age. See U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICES, IMMIGRANT-ORPHANS ADOPTED BY U.S. CITIZENS BY SEX, AGE, AND REGION AND SELECTED COUNTRY OF BIRTH 65-66 tbl.15 (2000), available at <http://uscis.gov/graphics/shared/aboutus/statistics/1998yb.pdf>.

<sup>3</sup> See GAIL STEINBERG & BETH HALL, *INSIDE TRANSRACIAL ADOPTION* 140 (2000).

<sup>4</sup> *Id.*

<sup>5</sup> See *infra* Part II.A (discussing legal barriers). Transracial adoption includes families where the parents and children are of different races and ethnicities other than just Caucasian and African American, such as Caucasian and Chinese or Caucasian and Guatemalan. In the United States, however, debates on transracial adoption have focused primarily on whites' adoption of African American children and, until the enactment of the Indian Child Welfare Act ("ICWA") in 1978, on whites' adoption of Native American children. Michelle Mini, *Breaking Down the Barriers to Transracial Adoption*, 22 HOFSTRA L. REV. 897, 897 n.2 (1993). See generally Cynthia G. Hawkins-Leon, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201, 215 (1997) (arguing that the ICWA, "which demands in-family and in-tribal placements" should "apply to the African American extended family"); Christine W. Meeter, *A Law Unto Itself: The Indian Child Welfare Act as Inapplicable and Inappropriate to the Transracial/Race-Matching Adoption Controversy*, 38 BRANDEIS L.J. 47, 52 (1999) (arguing that "ICWA is inapplicable and inappropriate to the discussion" of transracial adoption of blacks); Kevin Noble Maillard, *Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoption*, 28 AM. INDIAN L. REV. 107, 112 (2003) (comparing "the motivations of the two movements against the transracial adoption of Native Americans and Blacks").

<sup>6</sup> *But see infra* note 214 (noting that some scholars argue that legal barriers remain).

do, choosing instead to adopt internationally despite the higher financial costs, extensive delays, and dual bureaucracies they must face.<sup>7</sup> In fact, since 2000, Americans have adopted more than 100,000 children from countries such as China, South Korea, Russia, and Guatemala,<sup>8</sup> making the United States the largest “importer” of foreign-born children.<sup>9</sup>

Americans cite many reasons for adopting internationally: there are few healthy infants available in the United States, and international adoptions are faster, cheaper, more humanitarian, and less complicated than domestic adoptions.<sup>10</sup> This Article argues that there is another reason many Americans opt to adopt internationally: race. Although the majority of children available for international adoption are not white, they are not Black either. Most come from Asia and Latin America — countries with nonwhite populations. In contrast, many of the infants available for adoption in the United States are African American or biracial<sup>11</sup> — children whom, for various historical and social reasons, the majority of white Americans have expressed little interest in adopting. In other words, although whites may be willing to adopt nonwhite children, most prefer that they not be Black.

Many Americans are not aware that their preferences for foreign-born children might be based, at least in part, on race. In fact, most Americans subscribe to an egalitarian norm and report having no racial preferences or biases. Cognitive bias tests repeatedly show, however, that most individuals have unconscious biases against certain groups, even when

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<sup>7</sup> See ALISON SISKIN, CONG. RESEARCH SERV., IMMIGRATION: INTERNATIONAL CHILD ADOPTION, at Summary (2003) (stating that number of foreign children adopted by United States citizens each year tripled from 6472 in 1992 to 20,099 in 2002). Approximately one-third of all unrelated adoptions are international. See Sue Zeidler, *Internet Transforms Adoption Process*, FORBES, May 19, 2004, available at <http://www.forbes.com/technology/networks/newswire/2004/05/19/rtr1377506.html> (noting that Americans adopt approximately 130,000 children each year). This figure includes step-parent and relative adoptions which comprise approximately one-half of all adoptions. Nancy Maxwell & Caroline Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples As Legal Parents*, 38 FAM. L.Q. 623, 626 (2004).

<sup>8</sup> United States citizens adopted 22,884 foreign-born children in 2004, 21,616 in 2003, 20,099 in 2002, 19,237 in 2001, and 17,718 in 2000. U.S. Dep’t of State, *Immigrant Visas Issued to Orphans Coming to the U.S.* Webpage, [http://travel.state.gov/family/adoption/stats/stats\\_451.html](http://travel.state.gov/family/adoption/stats/stats_451.html) (last visited Feb. 13, 2006).

<sup>9</sup> Jeff D. Opdyke, *Adoption’s New Geography: Changes in Global Rules Make Process Even Tougher, Costlier; Bolivia, Brazil May Open Up*, WALL ST. J., Oct. 14, 2003, at D1 (stating that United States citizens adopt more foreign children than all other nations combined).

<sup>10</sup> See *infra* Part I.B.

<sup>11</sup> A biracial child is one who is half African American. See *infra* note 52 and accompanying text.

they honestly believe that they do not.<sup>12</sup> To illustrate, although individuals may honestly report having no biases against Asian Americans or homosexuals, for example, implicit bias tests often reveal that they hold unconscious negative attitudes toward those groups.<sup>13</sup> Studies show that implicit biases against African Americans influence employment decisions, criminal convictions, views on the death penalty, and even the perception of their behavior as hostile.<sup>14</sup> Thus, it should come as no surprise that unconscious biases may also influence prospective adoptive parents to prefer non-African American children.

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

Part II explores the difficulties historically faced by whites who adopted or sought to adopt African American children. After examining the law's current approach toward transracial adoptions, it explores the continuing sociocultural barriers to whites' adoption of African American children and the cognitive biases that lead Americans to prefer foreign-born children over African American children.

Finally, Part III builds on the work of scholars who argue that the law must discourage adoptive parents from exercising racial preferences for white children. It argues that although some adoptive parents may have nondiscriminatory reasons for preferring non-African American children, many are motivated by unconscious racial preferences. Thus, the law should presume that Americans seeking to adopt internationally, while there are available children in the United States, are doing so for race-based reasons. The law should discourage racial preferences by providing incentives for Americans to adopt children without regard to race.<sup>15</sup>

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<sup>12</sup> See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1512 (2005); Project Implicit, The Implicit Association Test, <https://implicit.harvard.edu/implicit> (last visited Feb. 13, 2006) (enabling individuals to test their own implicit biases).

<sup>13</sup> Kang, *supra* note 12, at 1512.

<sup>14</sup> *Id.* at 1515 n.117 (discussing study showing that people are more likely to interpret ambiguous behavior as hostile or aggressive when actor is African American as opposed to white).

<sup>15</sup> There were 126,000 children in the United States foster care system waiting to be adopted as of September 30, 2002. See U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 1. However, this Article focuses primarily on children available through private agencies.

## I. RACE AND ADOPTION

## A. Racial Hierarchy

There is a rich literature demonstrating that most Americans have explicit or implicit biases against minority groups such as African Americans, Latinos, and Asian Americans.<sup>16</sup> Notably, it is not only whites who harbor negative attitudes toward certain groups — minorities themselves hold negative attitudes against other minority groups and against members of their own group.<sup>17</sup> To illustrate, Asian Americans' biases against African Americans are almost as strong as whites' biases against African Americans,<sup>18</sup> and African Americans, Latinos, and Asian Americans often implicitly favor whites over members of their own group.<sup>19</sup>

Although studies show that most Americans have implicit preferences for whites over nonwhites, biases against certain racial groups may be stronger than biases against other minority groups. Many scholars have

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Most Americans want to adopt healthy infants, but only 3% of the children available through the foster care system are under the age of one, and a substantial percentage of those children have special needs or are at risk of developing a significant medical condition. *Id.* As a result, most Americans seeking healthy U.S.-born infants turn to the private system. Although, fifty percent or more of all private adoptions of domestic infants are “independent,” meaning the newborn is placed by the birth parents directly with an adoptive family with the help of a facilitator (often an attorney, doctor, or clergy official) rather than through a licensed agency, see Elizabeth J. Samuels, *Time To Decide? The Laws Governing Mothers' Consents to the Adoptions of Their Newborn Infants*, 72 TENN. L. REV. 509, 566 (2005), almost all of the healthy, African American infants available are placed through private agencies. Thus, when discussing African American infants, this Article focuses on private agency placements.

<sup>16</sup> Kang, *supra* note 12, at 1512 n.103 (“Researchers have documented implicit bias held by Whites against Blacks, Latinos, and Asians.”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987); see Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 746 (1995).

<sup>17</sup> See *Castaneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (discussing social scientists' findings that “members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority”); Kang, *supra* note 12, at 1493 (noting that African Americans were just as likely as whites to mistake African American target as armed and to mistake white target as unarmed).

<sup>18</sup> Kang, *supra* note 12, at 1538.

<sup>19</sup> *Id.* at 1533-34 & n.224-25 (noting that African Americans showed no implicit preference toward other African Americans and instead showed slight bias in favor of whites or no bias at all, while Latinos and Asian Americans had implicit preferences for whites).

argued that a racial hierarchy exists in American society where “[w]hites are at the top, African Americans are at the bottom and Asians and Latinos are in between.”<sup>20</sup> These scholars contend that biases against African Americans are stronger and of a different kind than biases against Asian Americans or Latinos.<sup>21</sup> Indeed, racial stereotypes about the latter groups are somewhat conflicting. To illustrate, Asian Americans are negatively stereotyped as perpetual foreigners,<sup>22</sup> but they are also perceived as “the model minority,” “intelligent, gifted in math and science, polite, hardworking, family-oriented, law abiding, and successfully entrepreneurial.”<sup>23</sup> Latinos are often perceived as perpetual foreigners and as hot-blooded and disposed to criminal behavior, but they are also believed to be devout Catholics with strong family values.<sup>24</sup> In contrast, African Americans are rarely portrayed in a positive light. Although African Americans are believed to be good athletes and entertainers,<sup>25</sup> they are often portrayed as lazy, unintelligent, and likely

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<sup>20</sup> Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome” in ASIAN AMERICANS AND THE SUPREME COURT* 1087, 1090 (Hyung-Chan Kim ed., 1992); Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1179; see Harlon L. Dalton, *Racial Healing*, in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICAN 1130, 1131 (Juan F. Perea et al. eds., 2000) (reciting rhyme: “If you are white, you’re all right. If you’re brown, stick around. If you’re black, stay back.”).

<sup>21</sup> See Dalton, *supra* note 20, at 1131 (“Blacks believe that Latinos are more ‘acceptable’ to White society by virtue of their lighter color (on average).”); Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time*, in THE LATINO/A CONDITION: A CRITICAL READER 466, 471 (Richard Delgado & Jean Stefancic eds., 1998) (“[R]acism is experienced differently by Native Americans, African Americans, Latinos, and Asian/Pacific Americans.”); *id.* (“[T]he relatively light skin and ‘Caucasian’ features of many Latinos mean they are less threatening in the eyes of white racism . . . than African Americans”); Twila L. Perry, *People of Color Speak: Thoughts on Identity, Choice and Coalition*, 20 B.C. THIRD WORLD L.J. 111, 113-14 (2000) (arguing that although all non-white women “have been victims of racism” and none have status “that is accorded to white women,” “there is a hierarchy among women of color” in which “Black women are ranked at the bottom”); *id.* at 114 (arguing that oppression of Blacks is different than that of other people of color).

<sup>22</sup> FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 79, 84 (2002).

<sup>23</sup> *Id.* at 40; Cynthia Kwei Yun Lee, *Race and Self-Defense: Toward a Normative Concept of Reasonableness*, 81 MINN. L. REV. 367, 424 (1996).

<sup>24</sup> See Steven W. Bender, *Will the Wolf Survive?*, 78 DENV. U. L. REV. 719, 736-37 (2001) (discussing negative stereotype of Latinos as lazy along with positive perceptions of Latino culture — “spiritual influences, and the importance of family”); Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 118-19 (1997) (stating characterization of Latinos as foreign even if U.S.-born); Lee, *supra* note 23, at 441-43 & n.302 (discussing stereotypes of Latinos as lazy, law breaking, and hot-tempered). Further, not all Latinos are perceived in the same manner; those who are lighter-skinned are perceived more positively than darker-skinned Latinos. See *id.* at 441.

<sup>25</sup> See Lee, *supra* note 23, at 424 n.202.

to engage in criminal behavior.<sup>26</sup> Indeed, one study revealed that although 21.3% of whites believed that Asian Americans have violent tendencies,<sup>27</sup> 52.8% (two and half times as many) believed the same of African Americans.<sup>28</sup> Similarly, while 19.1% of whites believed that Asian Americans prefer welfare to work, 57.1% (three times as many) believed the same of African Americans.<sup>29</sup> Thus, although whites may hold similar negative views of minorities, those same stereotypes are likely to be much stronger or believed by many more people when directed at African Americans as compared to Asian Americans and, to a lesser extent, Latinos.

Arguably, African American women are also portrayed more negatively than other women of color. While women of Asian and Latin American descent are sometimes portrayed as good mothers and wives,<sup>30</sup> African American women are often stereotyped as “promiscuous welfare mothers” with high rates of nonmarital births and weak family values.<sup>31</sup>

Recent empirical studies also suggest that whites, Asian Americans, and Latinos also find African Americans to be the least desirable marriage partners. When marrying someone of another race, individuals are much less likely to choose an African American spouse.<sup>32</sup> Parents are

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<sup>26</sup> WU, *supra* note 22, at 204 (telling story of white police officers who shot African American police officers believing they were criminals); Lee, *supra* note 23, at 401-23, 424 n.202 (discussing stereotypes of African Americans as criminals, “mentally inferior, lazy and sub-human”).

<sup>27</sup> This is only slightly higher than the 18.8% who believe that whites have violent tendencies. See Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 303 (2003).

<sup>28</sup> *Id.* (citing 1990 survey). Forty-two point eight percent of whites believed that Latinos have violent tendencies. *Id.*

<sup>29</sup> *Id.* Forty-five point six percent of whites believed that Latinos prefer welfare to work. *Id.*

<sup>30</sup> Julie Yuki Ralston, *Geishas, Gays and Grunts: What the Exploitation of Asian Pacific Women Reveals About Military Culture and the Legal Ban on Lesbian, Gay and Bisexual Service Members*, 16 LAW & INEQ. J. 661, 686 n.100 (1998) (noting stereotype of Asian women as “sweet passive creatures who make the best mothers and wives in the world.”); see Elizabeth Iglesias, *Rape, Race and Representation*, 49 VAND. L. REV. 869, 918-24 (1996).

<sup>31</sup> Perry, *supra* note 21, at 113 (arguing that “the most degrading and vicious stereotypes are reserved for Black women”).

<sup>32</sup> Cf. Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 153-54 (1994) (noting that intermarriage rates between Mexican Americans and whites “have long been as high as those for European immigrant groups earlier this century”); *id.* (noting that since 1981, more children have been born to Japanese-American and white parents than to two Japanese American parents); Tanya Kateri Hernández, *Afro-Mexicans and the Chicano Movement*, 92 CAL. L. REV. 1537, 1542 (2004) (book review) (“Most Mexicans disfavor darker-skinned marriage

also much more likely to object to their child's interracial marriage when the child is marrying an African American partner than when the child is marrying a person of any other race or ethnicity.<sup>33</sup> Recent studies also suggest that whites, Asian Americans, and Latinos consider African Americans to be the least desirable neighbors, preferring to have fewer African Americans residing in their neighborhood.<sup>34</sup> Thus, scholars argue that "there is a unique and powerful stigma that is specifically attached to African ancestry."<sup>35</sup>

The adoption market reflects this same racial hierarchy. Although most white Americans prefer to adopt white children,<sup>36</sup> many are willing to accept Asian or Latin American children if they cannot adopt a white child or the wait is too long. Some white Americans may accept biracial children, but rarely will they choose African American children, except as a last resort.<sup>37</sup> In the same way that parents may be more supportive

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partners because of their desire for lighter-skinned children who "improve the race."); Perry, *supra* note 21, at 113 ("Black women have the lowest rates of exogamy of any women of color."); *id.* at 113-14 n.2 (noting that only 6% of African Americans married interracially as opposed to 40-60% of Native-Americans and 30% of Latinos); Brian Duncan & Stephen J. Trejo, *Ethnic Identification, Intermarriage, and Unmeasured Progress by Mexican Americans* 4 (IZA Discussion Paper No. 1629, 2005), available at <http://ssrn.com/abstract=741105> (noting that Native-Americans have "very high rates of intermarriage").

<sup>33</sup> See GEORGE YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NON-BLACK DIVIDE 68-71 (2003) (finding that there is no hierarchy of potential marriage partners once African Americans are eliminated since all groups consider Latinos and Asian Americans as acceptable marriage partners and only object to their children marrying interracially if they are marrying an African American).

<sup>34</sup> *Id.* at 76 (stating that whites "do not want to live next to blacks" even if property values and quality of education are good and crime is low; however, whites are "willing to live next to nonblack minorities" such as Latinos and Asian Americans); *id.* at 80 ("[W]ith the exception of African Americans, all respondents [Latinos, whites, and Asian Americans] reject African Americans more than members of other racial groups, which is evident in the higher percentages in each group who desire to have no African Americans in their neighborhoods compared to having no members of other racial groups.").

<sup>35</sup> Cf. Perry, *supra* note 21, at 114 (arguing that although "White America also has stereotypes of non-white men of different ethnicities . . . Black men conjure up in the white mind unique images in terms of physical strength, sexuality, and menace"). Some non-African American minorities also believe that bias against African Americans is greater than that against them. For example, in Piri Thomas' book, *Down These Mean Streets*, a dark-skinned Puerto Rican man adopts a strong Spanish accent because he wants everyone to know that he is Latino and not African American. PIRI THOMAS, DOWN THESE MEAN STREETS (1997).

<sup>36</sup> ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 87 (1993) (stating that majority of Americans seeking to adopt are white and for most part, are seeking white children, at least initially).

<sup>37</sup> Gabrielle Glaser, *Sending Black Babies North*, OREGONIAN, July 4, 2004, at L1 ("Blond blue-eyed girls are at the top and African American boys are at the bottom." (citing

of their child's intermarriage to a person of Asian or Latin American descent than of African American descent,<sup>38</sup> family members and neighbors may be more supportive of a white family's adoption of a child from China, Korea, or Guatemala than of an African American child.<sup>39</sup> As Professor Randall Kennedy has noted, white couples find it easier to bring children of Asian descent into their families because in the racial hierarchy, such children rank higher than African-American children.<sup>40</sup> Some white adoptive parents believe that it will be easier to integrate a child of Asian or Latino descent into their community than it will be to integrate an African American child,<sup>41</sup> in part because any stereotypes about such children are likely to be positive.<sup>42</sup> In cities such as New York and Los Angeles and neighboring suburbs, where a high percentage of professional white families have adopted internationally, white families with Asian or Latino children often do fit right in.<sup>43</sup> In contrast, white parents of African American children must sometimes contend with ignorant comments and odd looks from family members and neighbors.<sup>44</sup> Race might explain the different reactions.

When Americans first started adopting transracially in significant numbers in the 1960s, African American children were rarely their first

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Margaret Fleming, Director of Adoption-Link)); see Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. L. FORUM 393, 425 ("[P]resent adoption practices seem to reflect a racial ranking with white infants at the top of the hierarchy."); see also Telephone Interview with Beth Hall, Dir., Pact: An Adoption Alliance, in Oakland, Cal. (Feb. 9, 2005) ("There is a racial hierarchy. People prefer Chinese girls to African American boys.").

<sup>38</sup> See *supra* notes 32-33 and accompanying text.

<sup>39</sup> CHRISTOPHER BAGLEY ET AL., INTERNATIONAL AND TRANSRACIAL ADOPTIONS: A MENTAL HEALTH PERSPECTIVE 78 (1993).

<sup>40</sup> See Soo Ji Min, *Home Away from Seoul*, ASIANWEEK, Aug. 8, 2003, available at [http://news.asianweek.com/news/view\\_article.html?article\\_id=1e0655d0c137434e51ed09f862785ef7](http://news.asianweek.com/news/view_article.html?article_id=1e0655d0c137434e51ed09f862785ef7).

<sup>41</sup> See Beth Hall & Gail Steinberg, *Latino and Asian Children in Whites Homes*, <http://www.pactadopt.org/press/articles/latino-asian.html> (last visited Feb. 13, 2006) (citing white couple who requested "an Asian or Latino child [because] she or he will fit into our community with no problem"); *id.* (noting that white adoptive parents believe they can successfully raise child of another race so long as child's race or ethnicity is accepted by their community); *id.* (citing story of white couple that was encouraged to adopt Salvadorian baby because race would not be issue).

<sup>42</sup> For example, some Americans believe that a child adopted from Korea or China will be smart. See Min, *supra* note 40 (citing white adoptive mother stating that her Korean children "fit into the model minority stereotype").

<sup>43</sup> I thank Professors David Troutt and Kevin Kelly for this point.

<sup>44</sup> BAGLEY ET AL., *supra* note 39, at 78; see *infra* notes 227-29 and accompanying text (providing examples).

choice. They preferred Native American, Latino, or Asian American children to African American or biracial children.<sup>45</sup> This preference continues in both domestic and international adoptions today.<sup>46</sup> White Americans adopting transracially are five times more likely to adopt a non-African American child than an African American child.<sup>47</sup> Some whites unwilling to adopt an African American child have stated that they are willing to adopt a Latino,<sup>48</sup> Native American, or Asian American

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<sup>45</sup> See Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 888 (1998); Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER L. J. 39, 54 (1993) ("Non-white children who were not Black, or Black children with white features were preferred first."). Before the enactment of the ICWA, which has made it very difficult for non-Native American families to adopt Native American children, whites routinely preferred to adopt Native American children over African American children. See generally Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503, 531 (1984) (noting that prior to the ICWA, rate of placement of Indian children in white homes was so high that "Indians as an identifiable group [were] genuinely threatened," while "so few black children" were placed in white homes, "that no genuine threat exists as to the continuance of blacks as a cultural, racial or ethnic group").

<sup>46</sup> HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* 4 (2002); see also Telephone Interview with Gina Brockmeyer, Int'l Programs Dir., Adoption Servs., in Camp Hill, Pa. (Feb. 4, 2005) (stating that most white adoptive families are not willing to take African American infants, even though wait is much shorter than it is for white infant).

<sup>47</sup> Banks, *supra* note 45, at 964 n.20. One study found that whites were less willing to adopt an African American child than a drug-exposed child. *Id.* Although 17% of adopted children in the United States are of a different race than their parents, the vast majority of transracial adoptions involve white parents and children of Asian or Latin American descent, not African American children. See ROSE M. KREIDER, U.S. CENSUS BUREAU, *ADOPTED CHILDREN AND STEPCHILDREN: 2000*, at 15 (2003) (finding that 7% of adoptions involve Hispanic children and non-Hispanic parents). Although the Census did not report the percentage of adoptions involving Asian children, because the largest percentage of transracial adoptees come from Asia, we can fairly estimate that the percentage of transracial adoptions involving Asian children is at least equal to or greater than the percentage of transracial adoptions involving Hispanic children. Thus, at least 7% of all adoptions involve Asian children, and at least 14-15% involve Asian or Latino children. Consequently, at most, 2-3% of all adoptions involve African American children and white parents. Earlier studies had similarly found that a very small percentage of transracial adoptions involved African American children. See RITA J. SIMON & RHONDA M. ROORDA, *IN THEIR OWN VOICES: TRANSRACIAL ADOPTEES TELL THEIR STORIES* 6 (2000) (surmising that only 1.2% of adoptions in 1999 involved white parents and African American children); Sharon Elizabeth Rush, *Domestic and International Adoptions: Heroes, Villains, or Loving Parents*, in *MORAL IMPERIALISM* 116, 119 (Berta Esperanza Hernandez-Truyol ed., 2002) (stating that although 8% of adoptions in United States involve parent and child of different race, only 1.2% involve white parent and African American child).

<sup>48</sup> There is high demand for Latino infants. See Roberto Santiago, *Adopting Mixed Race Children Growing Trend*, PRESS ATLANTIC CITY, Dec. 27, 2004, at B1, available at <http://www.familyrightsassociation.com/news/archive/2004/dec/6.html> ("White babies, including Hispanic infants [are] in highest demand among American couples.").

child — “anything but black.”<sup>49</sup> Further, some white families unwilling to adopt an African American child are willing to accept a biracial child — a child who is only part African American.<sup>50</sup>

The lower fees many adoption agencies and facilitators charge for placing African American children further illustrates this racial hierarchy. Some agencies, guided by the laws of supply and demand, charge lower fees for African American children, higher fees for children who are only half African American, and the highest fees for all other (non-African American) children.<sup>51</sup> For example, one facilitator charges families seeking an African American child \$6900, families seeking a biracial child (defined by adoption agencies as “one who is at least part African American”)<sup>52</sup> \$7200, and families interested in adopting Caucasian, Asian American, or Hispanic (any race or ethnicity other than African American or any combination thereof) \$9700.<sup>53</sup> Under this framework, the same fee applies to adoptions of Caucasian, Latino, Asian American, or Native American children or any combination thereof. Thus, the fee to adopt a half Latino, half Asian American child (a nonwhite child) is the same as that to adopt a Caucasian (white) child. However, the fee to adopt a child who is half African American and half Asian American is the lower fee for biracial children. Clearly, these prices reveal a distinction not simply between white and nonwhite

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<sup>49</sup> Tamar Lewin, *New Families Redraw Racial Boundaries*, N.Y. TIMES, Oct. 27, 1998, at A1 (noting that whites can “imagine themselves the parents of a little Chinese girl, but not of Shaniqua with the kinky hair” (quoting Professor Randall Kennedy, Harvard Law School)).

<sup>50</sup> Telephone Interview with Deborah Fox, Esq., AAA Transitions Adoption Agency, in Haverford, Pa. (Feb. 4, 2005) (explaining that some white families are willing to adopt biracial child, but not African American child).

<sup>51</sup> Lewin, *supra* note 49 (“[W]hite children usually cost more than black children.”); Dean Schabner, *Why It Costs More to Adopt a White Baby*, ABC NEWS, Mar. 12, 2005, <http://abcnews.go.com/US/story?id=91834&page=1> (noting that some adoption agencies set fees depending on how difficult child is to place and, thus, charge lower fees for children in least demand (African American) and higher fees for those in high demand).

<sup>52</sup> See Adoption-Link, Inc., FAQ: Frequently Asked Questions, <http://www.adoptionlinkillinois.com/faqs.php> (last visited Feb. 13, 2006); see also Telephone Interview with Anonymous Adoption Facilitator, Lifetime Adoption Facilitation Ctr., in Rough & Ready, Cal. (Feb. 8, 2005) (explaining that in adoption world, biracial means “African-American with any other race”).

<sup>53</sup> Rush, *supra* note 47, at 117 n.14 (noting that fee for adopting her daughter was reduced by half because she is biracial); Schabner, *supra* note 51 (discussing agency that charges \$19,000-\$35,000 to place “non-African-American (i.e. Caucasian, Hispanic, Native-American, etc. or any non-African American combination of races) healthy newborns and infants,” but charges only \$8000-\$15,000 to place African American child); Telephone Interview with Anonymous Adoption Facilitator, *supra* note 52.

children, but between African American children (or children who are half African American) and children who have little or no discernable African American ancestry. These fee structures reflect a market where Americans are more willing to adopt and pay more for full-blooded Latino, Native American, and Asian American children (children who are not even partially white) than for children who are half white but also half African American.

This preference for white and non-African American children is present in international adoptions as well. As Professor Elizabeth Bartholet has noted, racial thinking dominates the world of international adoptions.<sup>54</sup> Many Americans prefer to adopt children from the former Soviet bloc countries despite numerous obstacles<sup>55</sup> and evidence that these children have greater health risks than children born in the United States.<sup>56</sup> Some commentators believe that Americans' preference for these children is largely explained by the fact that they are white.<sup>57</sup> While some whites might prefer white children because they do not want everyone to know that the child is adopted, others may simply prefer white children, consciously or unconsciously. Moreover, most of the children available for international adoption and two-thirds of the foreign-born children Americans adopt are not white.<sup>58</sup> Nevertheless, Americans are more likely to adopt a child from Asia or Latin America than they are to adopt an African American child.<sup>59</sup>

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<sup>54</sup> Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1249 (1991).

<sup>55</sup> See *infra* Part I.B.

<sup>56</sup> See *infra* Part I.B.1.b.

<sup>57</sup> See Alessandra Stanley, *Nationalism Slows Foreign Adoptions in Russia*, N.Y. TIMES, Dec. 8, 1994, at A1 ("Russia is particularly attractive to [Americans] who want white babies.").

<sup>58</sup> The reasons parents may not want others to know that their child is adopted is beyond the scope of this Article. For an excellent analysis of society's obsession with biological children, see BARTHOLET, *supra* note 36.

<sup>59</sup> See FOGG-DAVIS, *supra* note 46, at 12 ("[M]ost whites prefer healthy white infants and when they learn that such babies are in short supply, they are more likely to adopt children of Colombian, Korean and American Indian ancestry than to adopt African American children."). Even when adopting internationally, most Americans prefer lighter-skinned over darker-skinned children. In her 1991 article, Professor Elizabeth Bartholet noted that although the fee to adopt a child from a "darker" country such as Peru, Colombia, or Brazil was lower than that to adopt a child from Chile, many Americans preferred to adopt Chilean children because they were lighter-skinned and tended to have Caucasian features. Bartholet, *supra* note 54, at 1167; see also Michael S. Serrill, *Going Abroad to Find a Baby*, TIME, Oct. 21, 1991, at 86. Further, "darker" countries were less selective in their criteria for adoptive parents because they knew that Westerners found their children less desirable.

Race clearly plays a role in both domestic and international adoptions, even where the prospective adoptive parents are not consciously thinking about race or racial preferences.<sup>60</sup> Unfortunately, implicit biases against certain minority groups may influence their decisions with regard to whether to adopt domestically or internationally, whether to adopt a child of another race, and what that race will be. In recent years, legal scholars have shown that racial preferences are “frequently unconscious” and deeply rooted.<sup>61</sup> While more Americans than ever

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Bartholet, *supra* note 54, at 1167. To illustrate, Professor Bartholet notes that, at the time, Brazil allowed single and older persons to adopt and sometimes placed newborns in foreign adoptive homes immediately after birth. *Id.* Americans adopting a Brazilian child could expect a baby within a few months of completing their home study as compared to a year or longer in other countries. Adoptive parents had to spend only seven to ten days in Brazil to complete the necessary paperwork as compared to the six-week (or longer) stay required by some other countries. *Id.* According to Professor Bartholet, Brazil made it easier than other countries for foreigners to adopt its children because Brazilian children were primarily of African descent, which made them less desirable to most adoptive parents. BARTHOLET, *supra* note 36, at 87-88. Although current Brazilian law makes it much more difficult for foreigners to adopt Brazilian children, Professor Bartholet’s observations are significant because they show how racial hierarchy has influenced countries’ practices in the not-so-distant past.

<sup>60</sup> Americans are not the only ones exhibiting these racial preferences. Although, as noted above, Canadians and Europeans come to the United States to adopt African American babies, given the choice between lighter- and darker-skinned babies, they may choose the former. Swedes adopting children from Colombia, whose children range from those with a predominantly European phenotype and light skin color to those with African or indigenous features, generally prefer the lighter-skinned children. See Barbara Yngvesson, “*Un Nino de Cualquier Color*”: Race and Nation in Inter-Country Adoption, in GLOBALIZING INSTITUTIONS: CASE STUDIES IN SOCIAL REGULATION AND INNOVATION 169, 194 (Jane Jensen & Boaventura de Sousa Santos eds., 2000). According to one estimate, less than 5% of individuals seeking to adopt in Colombia were willing to adopt Afro-Colombian children (who were locally perceived as the least desirable adoptees), even though such adoptions “go really fast” because the demand for Afro-Colombian children is so low. *Id.*

<sup>61</sup> Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 355 (1980). In recent years, there has been an explosion in legal scholarship exploring unconscious biases. Although the phenomenon has been studied since at least the 1970s, see, e.g., *id.*, recent research has revealed both how deep-rooted attitudes regarding race and gender may be in cognitive structures and how pervasively such influences can operate. Scholars argue that discrimination now is both more pervasive and less conscious than the phenomenon that Title VII originally targeted in 1964. See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 737 (1995); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003) (“Both conscious and unconscious bias operate at multiple levels of social interaction, often

expressly subscribe to an antidiscrimination norm<sup>62</sup> and are expressly committed to racial equality and diversity, cognitive bias studies reveal a much larger unconscious preference among whites for whites than their explicit preferences suggest.<sup>63</sup> These biases against minority groups influence not only perceptions, but also result in disparate treatment of members of those groups despite the actor's explicit commitment to racial equality.<sup>64</sup> These unconscious preferences for whites might possibly extend to groups that are lighter-skinned and appear to be "closer" to white, such as Asians or Latinos.<sup>65</sup>

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resulting in decreased opportunity for disfavored groups without producing a single, identifiable discriminatory decision or a perceptibly hostile work environment."); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 647 (2005) (examining how "particular work cultures can develop and persist along gender and/or racial lines," and exposing harms that those cultures can impose on women and minorities); Kang, *supra* note 12, at 1536; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995); Lawrence, *supra* note 16, at 322; Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415, 419 (2000); Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 668 (2003); Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 606-07 (2001); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468-69 (2001). This insight, although labeled differently, has been accepted as playing a major role in present-day America. See Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 459, 470 (2003) (noting inconsistencies in terminology for cognitive bias and suggesting taxonomy). As Professor Krieger writes: "[t]hese subtle forms of bias . . . represent today's most prevalent type of discrimination." Krieger, *supra* at 1164.

<sup>62</sup> Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 303 (2003) (noting that some scholars estimate that only 20% of whites hold overtly racist views about minorities).

<sup>63</sup> See Brian A. Nosek, Mahzarin R. Banaji, & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, in 6 GROUP DYNAMICS 101, 105 (2002) (reporting results from some 600,000 tests which confirm much larger implicit preferences among whites for whites than their explicit preferences). The Implicit Association Test hosted at Harvard offers an opportunity to test one's own cognitive biases. See Project Implicit, *supra* note 12.

<sup>64</sup> See Kang, *supra* note 12, at 1525 (discussing study finding that people are more likely believe that target is armed and, therefore, a threat, when target is African American); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (MIT Dep't of Econ. Working Paper No. 03-22, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=422902](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=422902) (showing that identical resumes received more favorable treatment by employers when non-African American sounding names were used).

<sup>65</sup> See YANCEY, *supra* note 33, at 67 ("[G]roups who most closely physically resemble the dominant group are more likely to be accepted. Since they remind majority group members of themselves," whites prefer "those with lighter skin color . . ."); Leonard M.

Social cognition studies have found that individuals feel compelled to reconcile their explicit and implicit preferences,<sup>66</sup> and thus are likely to search for and process information that is consistent with their implicit beliefs.<sup>67</sup> To illustrate, although unconscious biases color how individuals process information, individuals attempt to find non-race-based reasons for attitudes and behaviors that appear inconsistent with an egalitarian norm and which would otherwise reflect racial biases. Quite possibly, the myths about international adoption discussed below have gone unchallenged because unconscious biases against African Americans make it easy to believe that foreign-born children are healthier and more readily available than are African American children. Unconscious biases may also lead whites to exaggerate both society's opposition to their adoption of African American children and the challenges of raising them as compared to other nonwhite children.

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Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Shadow Than Lightness*, in *MIXED RACE AMERICA AND THE LAW: A READER* 263 (Kevin R. Johnson ed., 2003) (noting that darker-skinned African Americans are more likely than lighter-skinned African Americans to report experiencing discrimination, as are more indigenous looking Mexican American when compared to lighter-skinned Mexican Americans with more European phenotype); *id.* at 266 (citing study finding that whites perceive darker-skinned African Americans as "less competent — someone less like them than a light-complected [African American] person"). Although there are greater genetic differences amongst persons of the same race than there are between persons of different races, see MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 23, 62 (1986); Ian Haney-Lopez, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1 (1994), the phenotype of some Native-Americans, Latinos, and Asians — for example, the hair texture and skin tone — may appear closer to that of whites than the phenotype of many African Americans. *Cf. id.* at 1-2 (noting how court decided slave women should be freed after it determined based on their complexion features and hair texture that they were not of African heritage and thus could not be enslaved). This might explain why some whites are more interested in adopting biracial children than African American children — biracial children are sometimes lighter-skinned and have "softer" hair.

<sup>66</sup> Lawrence, *supra* note 16, at 323.

<sup>67</sup> We process information in ways that confirm our beliefs and perceptions. EDWARD SAMPSON, *DEALING WITH DIFFERENCES: AN INTRODUCTION TO THE SOCIAL PSYCHOLOGY OF PREJUDICE* 121-22 (1999) (citing studies showing that we look for information that confirms our hypotheses); Kang, *supra* note 12, at 1515 (noting that humans "interpret data consistent with our biases"); Charles G. Lord, et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979) (arguing that individuals with strong beliefs about an issue examine empirical evidence in biased manner, accepting "confirming" evidence of their beliefs at face value while subjecting "disconfirming" evidence to critical evaluation). This is known as the "confirmation bias." See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998). I am grateful to Jeremy Blumenthal for this point.

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B. *Debunking the Myths*

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

1. Myth: There Are No Healthy Infants in the United States

a. Supply

A primary reason expressed by many Americans for adopting internationally is the alleged scarcity of infants available in the United States. Most prospective adoptive parents are white and would prefer to adopt healthy white infants.<sup>68</sup> However, the demand for healthy, white infants in the United States and other Western nations surpasses their supply.<sup>69</sup> Birth rates in the United States and other Western countries have declined significantly since the 1960s, as abortion and reliable methods of contraception have become available.<sup>70</sup> Further, as the stigma of raising children outside of marriage has declined, fewer single women in the United States surrender their babies for adoption.<sup>71</sup> At the same time, an increasing number of women in the United States experience difficulties conceiving, leading to an increased interest in adoption.<sup>72</sup> As a result, there are many applicants for every healthy

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<sup>68</sup> BARTHOLET, *supra* note 36, at 87.

<sup>69</sup> Dawn Davenport, *Born in America, Adopted Abroad*, CHRISTIAN SCI. MONITOR, Oct. 27, 2004, at 11. Although there are many older and special needs white children available for adoption in the United States, most prospective adoptive parents prefer infants. Elizabeth Bartholet, *International Adoption: Overview*, in ADOPTION LAW PRACTICE 10.02[2] (J. Hollinger ed., 1988); Margaret Liu, *International Adoptions*, 8 TEMP. INT'L & COMP. L.J. 187, 190 (1994).

<sup>70</sup> HOWARD ALTSTEIN & RITA SIMON, INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 1 (1991).

<sup>71</sup> *Id.* at 11; Twila Perry, *Mothers, Hierarchy, Race, and Feminist Legal Theory*, in FAMILIES BY LAW: AN ADOPTION READER 265, 267 (Naomi Cahn & Joan Hollinger eds., 2004). Sixty-five percent of white babies born to single mothers in 1966 were placed for adoption. See Serrill, *supra* note 59, at 86. By 1995, only 1% of single women relinquished their babies for adoption. See Paula Span, *Parallel Lives*, WASH. POST MAG., June 18, 2000, at W12.

<sup>72</sup> ALTSTEIN & SIMON, *supra* note 70, at 1. In addition, an increasing number of nontraditional families such as single women and gay and lesbian couples are seeking to

white infant available in the United States, resulting in a wait as long as seven years.<sup>73</sup>

In contrast, for many years, poverty, gender discrimination, and cultural norms in non-Western countries have led hundreds of thousands of mothers to abandon their children or put them up for adoption.<sup>74</sup> Each year, thousands of families in Latin America, Southeast Asia, and former Soviet countries give up children they cannot afford to support.<sup>75</sup> The devaluation of female children in India and China has led parents to abandon their infant daughters.<sup>76</sup> Social stigma and discrimination against single mothers and nonmarital children has forced unmarried mothers in South Korea to relinquish their newborns for adoption.<sup>77</sup>

However, the scarcity of white infants in the United States does not explain why Americans go abroad to adopt. First, almost two-thirds of the children Americans adopted from other countries in recent years, and 81% of all foreign-born adoptees in the United States, come from Asia or Latin America — countries with nonwhite populations.<sup>78</sup>

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adopt.

<sup>73</sup> Davenport, *supra* note 69, at 11; Span, *supra* note 71, at W14. *But see* Samuels, *supra* note 15, at 521 (stating that there are six families waiting for each available U.S.-born, white infant (citing Madelyn Freundlich, 2 ADOPTION AND ETHICS, THE MARKET FORCES IN ADOPTION 9 (2000))). This figure does not include “many more families interested in adopting, but [who] do not apply because they believe the process is too daunting and the cost too high.” Samuels, *supra* (quoting ADAM PERTMAN, ADOPTION NATION 34 (2000)).

<sup>74</sup> *See* Bartholet, *supra* note 69, at 10.02[2] (noting less developed countries have many orphans due to stigma of out-of-wedlock children, absence of contraception and abortion services, and governmental instability and wars).

<sup>75</sup> Peter Selman, *The Demographic History of Intercountry Adoption*, in INTERCOUNTRY ADOPTION: DEVELOPMENTS, TRENDS AND PERSPECTIVES 15, 23 (2000).

<sup>76</sup> The One Child Policy in China places a limit of one child per family, forcing parents to give up a female child if they want to have another (male) child. Nili Luo & Kathleen Ja Sook Berquist, *Born in China: Birth Country Perspectives on International Adoptions*, 8 ADOPTION Q. 21, 24 (2004). Indian families prefer male children because they do not require a dowry. Alison Wood Manhoff, *Banned and Enforced, The Immediate Answer to a Problem Without an Immediate Solution — How India Can Prevent Another Generation of “Missing Girls,”* 38 VAND. J. TRANSNAT’L L. 889, 890, 911 (2005) (noting that Indian families are more likely to abort female fetuses and adopt male children as result of dowry system).

<sup>77</sup> Sam Jameson, *Keeping Them Home*, L.A. TIMES, Sept. 1, 1989, at 1-1 (discussing discrimination against nonmarital and mixed-race children in Korea); Laura King, *If Korea Bans Foreign Adoptions in ‘96, Where Will Babies Find Homes?*, CHI. TRIB., June 23, 1994, at C2 (noting that because of stigma of unwed motherhood, almost all unmarried women in Korea relinquish their babies for adoption).

<sup>78</sup> Davenport, *supra* note 69; *see also* KREIDER, *supra* note 47, at 12; U.S. Dep’t of State, *supra* note 8 (showing that approximately 60% of children Americans adopted from abroad in 2004 came from Asia or Latin America).

Second, Americans claim to want infants, preferably newborns, but unlike United States-born children who are generally placed in adoptive homes when they are only days old, the majority of foreign-born adoptees are toddlers by the time they arrive in the United States and few are newborns.<sup>79</sup> Most Chinese and Russian adoptees, for example, who comprise almost half of the foreign children adopted by Americans in recent years, have celebrated their first birthday by the time they arrive in the United States.<sup>80</sup> Further, because over 30% of births worldwide are not registered,<sup>81</sup> adoptive parents often do not know their child's actual age and must rely on the representations of agencies or facilitators who sometimes lie in order to increase the likelihood of adoption. Individuals who choose to adopt internationally, in part because they want an infant, may be devastated to learn that their "one-year-old" child is actually a three-year-old with the physical and mental development of a one-year-old.<sup>82</sup>

Americans interested in adopting infants too often assume they need to look abroad. Although there are relatively few available white infants in the United States, African American infants are available.<sup>83</sup> Many agencies express "an ongoing need for families wishing to adopt African American infants and toddlers."<sup>84</sup> Although private agencies eventually find permanent homes for each of their healthy African American infants, these children are often placed weeks later than white infants.<sup>85</sup>

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<sup>79</sup> Evan B. Donaldson Adoption Inst., International Adoption Facts Webpage, <http://www.adoptioninstitute.org/FactOverview/international.html> (last visited Feb. 14, 2006) (showing that only 46% of children are younger than one year old).

<sup>80</sup> Spence-Chapin, Adoption Programs at a Glance Webpage, <http://www.spence-chapin.org/048.html> (last modified July 12, 2005) (noting children available for adoption from China and Russia are one year of age and older).

<sup>81</sup> David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 410 (2005).

<sup>82</sup> Kim Clark & Nancy Shute, *The Adoption Maze*, U.S. NEWS & WORLD REP., Mar. 12, 2001, at 60.

<sup>83</sup> Bartholet, *supra* note 54, at 1166 (stating "there are many nonwhite children available"); Davenport, *supra* note 69, at 11.

<sup>84</sup> The Children's Home Soc'y of N.J., Domestic Infant Adoption Webpage, <http://www.chsofnj.org/pages/dominfadoption.html> (last visited Feb. 14, 2006); see Glaser, *supra* note 37 ("[T]here is a shortage of American families willing to adopt [African American children]."); Adoption S.T.A.R., Traditional Agency Adoption Webpage, [http://www.adoptionstar.com/childplacement\\_traditional.php](http://www.adoptionstar.com/childplacement_traditional.php) (last visited Feb. 14, 2006) ("There is a need to identify singles and couples interested in the adoption of African-American infants. Adoption S.T.A.R. will consider couples and singles of all races.").

<sup>85</sup> Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 353 (1997) ("[A] healthy black infant will

African American boys are placed even later.<sup>86</sup> Adoption agencies in New York, California, Illinois, Pennsylvania, and New Jersey — the states where the largest number of Americans adopting internationally reside<sup>87</sup> — all need adoptive families for African American and biracial infants.<sup>88</sup>

While Americans point to the small number of healthy infants available in the United States, healthy African American newborns are ending up with white families in other countries such as Canada, France, and Germany.<sup>89</sup> One Illinois agency places one-third of its African American and biracial children in other countries and one Florida agency places 90% of its African American infants in Canada.<sup>90</sup> These foreign families “cite the availability of newborns as the primary reason they choose to adopt in the U.S.”<sup>91</sup> Ironically, although Americans adopt more foreign-born, nonwhite children than all other countries combined, the United States is one of the largest suppliers of Black infants to other countries.<sup>92</sup>

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wait approximately five times longer for placement than a healthy white infant.”).

<sup>86</sup> Davenport, *supra* note 69, at 11 (noting that African American boys are at bottom of adoptive parents’ preference list); Roni Rabin, *Can Black Children Raised by White Parents Develop a Positive Sense of Self and a Strong Racial Identity?*, NEWSDAY, July 10, 1995, at B4.

<sup>87</sup> Evan B. Donaldson Adoption Inst., *supra* note 79.

<sup>88</sup> Telephone Interview with Anonymous Adoption Coordinator, Adoption Assocs., in Lansing, Mich. (Feb. 7, 2005) (stating that her agency has 84 families waiting for newborn, but only seven of those are interested in adopting African American child even though agency is working with approximately 15-18 pregnant women who will be giving birth to African American or biracial children); Telephone Interview with Gina Brockmeyer, Int’l Programs Dir., Adoption Servs., in Camp Hill, Pa. (Feb. 4, 2005); Telephone Interview with Noreen Davidson, LCSW, Assoc. Dir., Adoption-Link, Inc. of Illinois, in Oak Park, Ill. (Feb. 4, 2005); Telephone Interview with Deborah Fox, *supra* note 50; Telephone Interview with Beth Hall, *supra* note 37; Telephone Interview with Kelly Reinhold, Adoption Coordinator, Adoption S.T.A.R., Inc. in West Amherst, N.Y. (Feb. 3, 2005).

<sup>89</sup> See Davenport, *supra* note 69, at 11. The United States government does not keep records of how many U.S.-born children are adopted by foreign families, but experts estimate that upwards of 500 children each year, primarily African American, are placed in other countries. Glaser, *supra* note 37; *60 Minutes: Born in USA; Adopted in Canada* (CBS television broadcast, Feb. 13, 2005). The United States also does not maintain statistics on the number of available infants or their race and ethnicity. Glaser, *supra* note 37.

<sup>90</sup> See Davenport, *supra* note 69, at 11; Santiago, *supra* note 48.

<sup>91</sup> See Davenport, *supra* note 69, at 11.

<sup>92</sup> Indeed, the United States is the fourth largest supplier of Black newborns to Canada. See *id.*; Glaser, *supra* note 37.

b. Health

Some Americans adopting internationally believe that foreign-born children are less likely than U.S.-born children to have physical or mental disabilities, or to have been exposed to drugs or alcohol in utero. Many Americans also assume that most African American babies available for adoption are “crack babies.”<sup>93</sup> This is a myth. Most American infants, including African American infants, placed through private agencies are healthy.<sup>94</sup> Indeed, foreigners say that they come to the United States to adopt, in large part, because American infants are healthy.<sup>95</sup>

The same is not true of children adopted from other countries. Most foreign-born adoptees have “at least one important medical condition.”<sup>96</sup>

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<sup>93</sup> Glaser, *supra* note 37 (stating media reports on babies born to African American women who smoked crack fueled fears that African American babies were crack babies). Films such as *Losing Isaiah*, portraying an African American crack addicted birth mother, may have also strengthened perceptions that all of the available African American babies had birth mothers who used crack cocaine. LOSING ISAIAH (Paramount Pictures 1995); see also *Adoption and African American Children* (July 4, 2004), <http://www.republicoft.com/index.php/archives/2004/07/04/adoption-and-african-american-children/> (discussing first time that someone assumed that author’s adopted African American son must be crack baby).

<sup>94</sup> The United States does not maintain records of how many children are placed through private agencies. See *supra* note 89. Therefore, there are no official statistics on the health of the children placed by private agencies. However, private agencies keep records of their placements and many report that the vast majority of children they place are healthy. See Telephone Interview with Anonymous Adoption Coordinator, *supra* note 88 (reporting that only 3-5% of their placements had special needs); Telephone Interview with Noreen Davidson, *supra* note 88; Telephone Interview with Kelly Reinhold, *supra* note 88 (reporting that less than 8% of the children her agency placed had special needs).

<sup>95</sup> Davenport, *supra* note 69, at 11.

<sup>96</sup> Elizabeth Vonk, et al., *Political and Personal Aspects of Intercountry Adoption of Chinese Children in the United States*, 80 FAM. SOC’Y: J. CONTEMP. HUM. SERVS. 496, 500 (1999) (stating that conditions include “gross motor, fine motor, language, cognitive and global developmental delays”); see also Kirsten Lovelock, *Intercountry Adoption as a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada and New Zealand in the Post W.W. II Period*, 34 INT’L MIGRATION REV. 907, 933 (2000) (“Many (if not all) children adopted from abroad, irrespective of age, have special needs.”). Of course, not all foreign-born children have special needs. South Korea and Guatemala, for example, have a reputation for having healthy babies. See Adopting from Korea and Afterwards, Choosing Korea Webpage, [http://www.adoptkorea.com/Choosing\\_Korea/Choosing\\_Korea.htm](http://www.adoptkorea.com/Choosing_Korea/Choosing_Korea.htm) (noting availability of healthy infants and toddlers as appealing reason to adopt from Korea) (last visited Mar. 6, 2006); Adoption Servs., Adoption of Children from Guatemala Webpage, [http://www.adoption-services.org/adoption/international\\_adoptionguatemala.htm](http://www.adoption-services.org/adoption/international_adoptionguatemala.htm) (last visited Mar. 6, 2006) (stating that “Guatemala has been a source of healthy boys and girls for many years”); see also Laura A. Nicholson, *Adoption Medicine and the Internationally*

One study found that over 80% of children adopted from former Soviet countries suffered delays in fine motor skills, 70% had delays in gross motor skills, and many others suffered from rickets, anemia, fetal alcohol syndrome, and parasites.<sup>97</sup> They are also significantly more likely than children born in the United States to have tuberculosis, hepatitis B or C, or syphilis, and to have birth mothers who abused drugs and/or alcohol while pregnant.<sup>98</sup> In the words of one adoption expert, “there are no healthy children available for adoption in Russia.”<sup>99</sup> Seventy-five percent of Chinese adoptees have similar medical conditions.<sup>100</sup>

This should come as no surprise. The birth mothers of foreign-born adoptees generally do not receive prenatal care and are unlikely to be adequately nourished during pregnancy, placing their children at risk for significant developmental delays and medical conditions.<sup>101</sup> Even

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*Adopted Child*, 28 AM. J. L. & MED. 473, 481 (2002) (noting that unlike most countries, Korea takes “excellent care of [its] orphaned children and provide[s] extensive medical records to adoptive parents”).

<sup>97</sup> Lisa H. Albers, et al., *Health of Children Adopted from the Former Soviet Union and Eastern Europe: Comparison with Preadoptive Medical Records*, 278 J. AM. MED. ASS'N 922, 924 (1997). Indeed, adoption agencies in the United States warn families that “to adopt from Russia, applicants must be open to accepting children with some risk factors for physical, emotional and/or developmental special needs.” Spence-Chapin, *supra* note 80.

<sup>98</sup> Albers, et al., *supra* note 97, at 924; Robert Gordon, *The New Chinese Export: Orphaned Children — An Overview of Adopting Children from China*, 10 TRANSNAT'L LAW 121, 128 (1997) (noting children adopted abroad are 1000 times more likely to carry tuberculosis than children born in United States, and children from Romania are 40 to 50 times more likely to carry hepatitis B); Clark & Shute, *supra* note 82, at 60 (noting foreign-born adoptees often have medical conditions such as syphilis, parasites, tuberculosis, and hepatitis B and C); Kathleen Hunt, *The Romanian Baby Bazaar*, N.Y. TIMES, Mar. 24, 1991, § 6, at 24 (noting in some Romanian orphanages, at least 50% of children had been exposed to hepatitis B and up to 50% were HIV positive); American Adoptions, Domestic Adoption vs. International Adoption Webpage, [http://www.americanadoptions.com/adopt/domestic\\_international](http://www.americanadoptions.com/adopt/domestic_international) (last visited Feb. 15, 2006) (advising parents considering international adoption that sending countries have severe drug and alcohol abuse problems).

<sup>99</sup> Interview with Olga Dyuzheva, Law Faculty, Moscow State Univ. & Expert to Russ. Ministry of Educ. and Science, in Salt Lake City, Utah (July 22, 2005).

<sup>100</sup> Ryiah Lilith, *Buying a Wife but Saving a Child*, 9 BUFF. WOMEN'S L.J. 225, 244 n.86 (2000) (noting that adopted Chinese girls often have developmental delays and suffer from “malnutrition, growth retardation, nutritional deficiencies, including rickets, anemia, lead poisoning and hypothyroidism” and “undiagnosed congenital defects . . . such as cerebral palsy”); see also Clark & Shute, *supra* note 82, at 60.

<sup>101</sup> Clark & Shute, *supra* note 82, at 60. There are exceptions of course. Birth mothers of children adopted from South Korea are likely to have received prenatal care. Baby Ctr., Parents Say: Domestic or International Adoption? Webpage, <http://www.babycenter.com/refcap/preconception/adopting/1381356.html> (last visited Mar. 6, 2006) (stating that “most Korean birth mothers receive prenatal care”); cf. Jane Aronson, *Guidelines for Interpreting Pre-Adoption Medicals from Russia and Other Countries: Syphilis, Hepatitis B and C*

children who are healthy at birth deteriorate in health while in an orphanage (where most available foreign infants reside until they are adopted) due to the lack of adequate food and individual attention.<sup>102</sup> Many are also neglected and/or abused.<sup>103</sup> Further, because most foreign-born adoptees are no longer infants by the time they arrive in the United States,<sup>104</sup> and many have spent most of their short lives lying in a crib twenty hours a day,<sup>105</sup> they often suffer from attachment problems and experience difficulties bonding with their adoptive families.<sup>106</sup>

c. Medical Records

Adoption agencies and facilitators in the United States have a legal duty to disclose to prospective adoptive parents all of the available information about their child's and the birth parents' health and medical histories.<sup>107</sup> Indeed, Canadians and other foreigners adopting U.S.-born infants point to the availability of medical records and family histories as another reason for preferring U.S.-born children to children from other countries.<sup>108</sup>

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and HIV, *Recommended Screening Tests and Evaluations*, 8 ADOPTION/MED. NEWS, Oct. 2002, <http://www.orphandoctor.com/services/assessment/guidelines.html> (discussing medical histories of Korean adoptees).

<sup>102</sup> Aronson, *supra* note 101; see also American Adoptions, *supra* note 98 (noting orphanages hire, on average, one day care worker to take care of 30 children).

<sup>103</sup> Vonk, et al., *supra* note 96, at 501; Gregory Katz, *From Foreign to Familiar*, DALLAS MORNING NEWS, Mar. 22, 2004, at A1 (stating significant number of foreign-born adoptees suffer from "emotional disorders stemming from long stays in crowded institutions where they were neglected or abused").

<sup>104</sup> See *supra* notes 79-80 and accompanying text.

<sup>105</sup> See American Adoptions, *supra* note 98.

<sup>106</sup> Lilith, *supra* note 100, at 244 n.86 (discussing attachment disorders); Carroll Bogert, *Bringing Back Baby*, NEWSWEEK, Nov. 21, 1994, at 78 (same); Jane Gross, *Seeking Doctors' Advice in Adoptions from Afar*, N.Y. TIMES, Jan. 6, 2006, at A1 (stating that although most children catch up developmentally and bond with their adoptive families, 20% are "fundamentally scarred and never fully recover").

<sup>107</sup> See ARIZ REV. STAT. ANN. § 8-129 (2003); CAL. FAM. CODE § 8706 (West 2004); OHIO REV. CODE ANN. § 3107.12(A)(3)-(4) (West 1996); *Wolford v. Children's Home Soc'y of W. Va.*, 17 F. Supp. 2d 577, 585 (S.D.W.V. 1998); *Ambrose v. Catholic Soc. Servs.*, 736 So. 2d 146, 149 (Fla. Dist. Ct. App. 1999); *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992); *Gibbs v. Ernst*, 647 A.2d 882, 892 (Pa. 1994). For example, agencies must disclose whether the birth mother smoked cigarettes or consumed alcoholic beverages during the pregnancy. See Lifetime Adoption Facilitation Center, Birthparents Seeking Adoptive Families Webpage, [http://www.lifetimeadoption.com/for\\_adoptive\\_families/children.html](http://www.lifetimeadoption.com/for_adoptive_families/children.html) (last visited Feb. 15, 2006) (providing list and brief description of available and soon to be born children).

<sup>108</sup> Davenport, *supra* note 69, at 11.

In contrast, Americans adopting internationally generally receive little or no medical history on their child, often because it is unavailable. Commentators have noted that “the most daunting and potentially devastating hurdle in international adoptions is assessing a child’s health in the face of incomplete or faulty medical information.”<sup>109</sup> Agencies placing children internationally generally require that parents waive their right to sue if they later discover that the child has a serious physical or mental condition.<sup>110</sup> Some adoptive parents have attempted to “return” their foreign-born children after discovering that the children have significant health needs.<sup>111</sup> During the height of Romanian adoptions in the 1990s, some California agencies received weekly telephone calls from adoptive parents seeking to place their Romanian children for re-adoption after discovering significant medical conditions.<sup>112</sup>

The simple reality is that health-wise, foreign adoptees are high risk. While a relatively small percentage of U.S.-born children are also considered high risk because they were exposed to drugs or alcohol in utero, they present no greater risk than many of the children Americans

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<sup>109</sup> Clark & Shute, *supra* note 82, at 60. Parents have so little information about the health status of children they are adopting from other countries that many provide doctors in the United States with photos or videos of the children they plan to adopt, hoping the doctor will be able to assess the child’s health from afar. Gross, *supra* note 106, at A1. These doctors who specialize in adoptions (there are 200 in the United States nationwide and the specialty of “adoption expert” is now recognized by the American Academy of Pediatrics) try to determine from a child’s photograph and orphanage medical records whether the child has fetal alcohol syndrome, cerebral palsy, or other health risks. *Id.* These doctors warn parents that even if the child appears healthy, “most institutionalized children are marked by their early deprivation, some in minor and transitory ways and others with medical and developmental disabilities that will last a lifetime.” *Id.*

<sup>110</sup> Clark & Shute, *supra* note 82, at 60; see Mary Hora, *A Standard of Service that All Families Deserve: The Transformation of Intercountry Adoption Between the United States and the Russian Federation*, 40 BRANDEIS L.J. 1017, 1018 (2002) (noting that adoption agencies usually prevail in wrongful adoption lawsuits involving international adoption because prospective parents sign contracts which relieve “agenc[ies] of any liability stemming from the health problems of the child”).

<sup>111</sup> Kleiman, *supra* note 85, at 351; Sarah Jay, *When Children Adopted Abroad Come with Too Many Problems*, N.Y. TIMES, June 23, 1996, at A1; see also James Rupert, *Kiev Bars Westerners’ Adoptions*, WASH. POST, Feb. 2, 1996, at A21 (discussing American couple seeking to annul adoption and return three-year-old child to Ukrainian orphanage after discovering he had severe physical and mental problems).

<sup>112</sup> Telephone Interview with Director, Holy Family Servs. Adoption & Foster Care, in Pasadena, Cal. (Feb. 9, 2005). Most private adoption agencies in the United States refused to even attempt to place those children. As a result, some ended up in the public foster care system. *Id.*

adopt from other countries.<sup>113</sup> While it is important for all children, both U.S-born and foreign-born, to find loving homes and care regardless of their special needs, it is clear that health concerns are not a logical reason for preferring foreign-born children to African American children.

## 2. Myth: International Adoptions Are Faster, Easier, and Cheaper

*“For all the publicity about the ‘impossibility’ of white people adopting black American children, doing so is still in most instances far easier than going to Romania or China . . . .”*<sup>114</sup>

Some Americans choose to adopt internationally because they do not want to wait years for a U.S-born child. Although the wait for a white infant can be long,<sup>115</sup> the wait for an African American infant is much shorter. Many families seeking to adopt an African American child have a newborn in their home within a few months of completing their home study, and almost all have a child within one year.<sup>116</sup> A family seeking to

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<sup>113</sup> Bogert, *supra* note 106, at 78 (“[C]ompared with adopting in the United States, adopting abroad may . . . run a greater risk that the child will have health problems.”).

This Article compares international adoptions and private agency adoptions in the United States. However, the better comparison is between foreign orphanages, where most foreign-born children reside until they are adopted, and foster care in the United States. The United States has a dual system — private agencies and facilitators that place primarily infants, and public agencies that place primarily older children, those with special needs, and those who were not relinquished voluntarily but whose parents’ rights were involuntarily terminated. *Cf.* Kleiman, *supra* note 85, at 329; Samuels, *supra* note 15, at 520. Interestingly, Americans unwilling to adopt children from the foster care system in the United States go abroad to adopt children from orphanages, children whose health is often comparable to, and oftentimes worse than, that of children in foster care in the United States. *See* Gross, *supra* note 106, at A1; Laura A. Nicholson, *Adoption Medicine and the Internationally Adopted Child*, 28 AM. J. L. & MED. 473, 480 (2002).

<sup>114</sup> Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913, 916 (1994).

<sup>115</sup> Telephone Interview with Director, Holy Family Servs., *supra* note 112 (stating some families have waited five years); *supra* note 73 and accompanying text.

<sup>116</sup> *See* Santiago, *supra* note 48 (noting that wait for African American baby can be only few months); Telephone Interview with Maria Ramirez, Co-Executive Dir., Adoptions Unlimited, in Chino, Cal. (Feb. 5, 2005) (stating that parents adopting African American infant will usually have child within three months); Adoption Servs., What Is the Waiting Period to Adopt? Webpage, [http://www.adoptionservices.org/adoption/adoption\\_waiting\\_period.htm](http://www.adoptionservices.org/adoption/adoption_waiting_period.htm) (last visited Feb. 15, 2006) (noting that wait for African American or biracial infant is only two to five months); Lifetime Adoption Facilitation Ctr., Frequently Asked Questions by Adoptive Families Webpage, [http://www.lifetimeadoption.com/for\\_adoptive\\_families/faq/faq12.html](http://www.lifetimeadoption.com/for_adoptive_families/faq/faq12.html) (last visited Feb. 15, 2006) (stating that families seeking to adopt biracial or African American child often get child within a few weeks to four months of completing home study).

adopt an African American boy (whose group is least in demand) will often have one even sooner.<sup>117</sup> In contrast, adoptions from China, Russia, Korea, Guatemala, and Kazakhstan — the countries from which Americans adopted the most children in recent years — often take longer than one year.<sup>118</sup> Canadians and other foreigners cite the short wait-time for a child, as compared to other countries, as another reason for adopting African American children.<sup>119</sup>

International adoptions are incredibly complicated. Applicants must satisfy the sending country's laws, United States immigration laws, and their own state's laws.<sup>120</sup> It can take months to obtain approval to bring a foreign-born adoptee into the United States. Further, most sending countries require that adoptive parents travel to and remain in the sending country anywhere from a few days to a month or longer to complete the adoption.<sup>121</sup> Some require two trips, thereby increasing the burden and costs for many families.<sup>122</sup>

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<sup>117</sup> There is a higher demand for girls, especially biracial girls. Davenport, *supra* note 69, at 11; Telephone Interview with Deborah Fox, *supra* note 50 (stating that African American boys are hardest to place and biracial girls are easiest because adoptive parents prefer girls).

<sup>118</sup> Bogert, *supra* note 106, at 78 ("Compared with adopting in the United States, adopting abroad may take longer [and] cost more."); Adopting from Korea and Afterwards, *supra* note 96 (noting 12-14 month wait time to adopt Korean child); AdoptionServices.org, China Program Description Webpage, [http://adoption-services.org/adopting\\_families\\_international\\_programs\\_china.htm](http://adoption-services.org/adopting_families_international_programs_china.htm) (last visited Feb. 15, 2006) (noting it takes 15-18 months or longer to adopt child from China); AdoptionServices Inc., Guatemalan Program Description Webpage, [http://adoption-services.org/adopting\\_families\\_international\\_programs\\_guatemala.htm](http://adoption-services.org/adopting_families_international_programs_guatemala.htm) (last visited Feb. 15, 2006) (noting 9-18 month waiting period to adopt child from Guatemala); Spence-Chapin, *supra* note 80 (estimating waiting period of 12 months for referral after file is submitted to Kazakhstan).

<sup>119</sup> Davenport, *supra* note 69, at 11.

<sup>120</sup> See RITA SIMON & HOWARD ALTSTEIN, *ADOPTION ACROSS BORDERS* 30 (2000). International adoptions are about to become even more complicated and expensive once the United States ratifies the Hague Convention on Intercountry Adoption in 2006, as expected. See Opdyke, *supra* note 9, at D1.

<sup>121</sup> See Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL LAW. 181, 186 (1996); see, e.g., Opdyke, *supra* note 9, at D1 (noting stay in Colombia is three to six weeks and stay in Ukraine is three weeks); U.S. Dep't of State, *supra* note 8 (stating that Americans adopting from Kazakhstan should expect to spend 23-40 days there). However, South Korea allows foreign adoptive parents to adopt through a third party so they do not have to travel to Korea. Alison Fleisher, Note, *The Decline of Domestic Adoption: Intercountry Adoption as a Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171, 178 (2003); Adoption.com, Korea Adoption Overview Webpage, <http://korea.adoption.com/foreign/korea-adoption-overview.html> (last visited Mar. 6, 2006) (noting that travel to South Korea is not required).

<sup>122</sup> See Bogert, *supra* note 106, at 78 (discussing adoptive father who lost his job as result

Many Americans claim to adopt internationally because it is less expensive than adopting domestically. This, too, is a myth. International adoptions are often more costly, especially as compared to adoptions of African American or biracial children. Although costs vary widely depending on the agency and the country of origin, adoptive parents can expect to pay \$18,000-\$35,000 to adopt a child from China, Korea, Russia, or Guatemala<sup>123</sup> as compared to \$10,000-\$12,000 to adopt an African American child.<sup>124</sup> As stated above, some agencies charge lower fees for African American or biracial children.<sup>125</sup> These policies, although disturbing, further reduce the cost of adopting African American children as compared to adopting internationally.

In addition to travel and accommodation costs and "donations" required by foreign orphanages,<sup>126</sup> parents who adopt internationally must sometimes rely on scouts in the sending country who demand a fee for locating a child.<sup>127</sup> Occasionally, these scouts take their money and

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of long absences from work while abroad adopting child); Opdyke, *supra* note 9, at D1 (noting that Russia, Bulgaria, and Vietnam require two trips).

<sup>123</sup> See Clark & Shute, *supra* note 82, at 60 (stating that foreign adoptions start at \$15,000 for China and well over \$20,000 for Guatemala, and that once costs such as travel, food, and lodging are included, most foreign adoptions cost between \$25,000-\$30,000); Opdyke, *supra* note 9, at D1 (noting that cost for Guatemalan adoption, excluding travel costs and costs of obtaining necessary documents, is \$20,500-\$24,000); Telephone Interview with Maria Ramirez, *supra* note 116 (asserting that Russian or Mexican adoptions cost \$25,000 and \$22,000, respectively, not including travel costs); Adopting from Korea and Afterwards, *supra* note 96 (estimating that Korean adoptions cost \$18,000-\$24,000); American Adoptions, *supra* note 98 (stating that average cost to adopt child from China and Russia is \$22,000 and \$35,000, respectively); Embassy of the U.S., Almaty-Kazakhstan, International Adoption Kazakhstan Webpage (Oct. 2005), <http://www.usembassy.kz/consular/adoptions.html> (noting that adoptions from Kazakhstan cost \$18,000-\$25,000).

<sup>124</sup> Davenport, *supra* note 69, at 11 (maintaining that cost of adopting African American newborn is \$10,000-\$12,000, and \$18,000 for biracial baby as compared to \$30,000 to adopt internationally); Santiago, *supra* note 48 (stating that adopting African American baby costs between \$8500-\$18,000). As a result of the \$10,390 adoption tax credit for allowable adoption expenses, adoptions of African American children may cost little or nothing. See IRS, TOPIC 607: ADOPTION CREDIT, <http://www.irs.gov/taxtopics/tc607.html> (last visited Feb. 15, 2006).

<sup>125</sup> See *supra* notes 51-53 and accompanying text.

<sup>126</sup> For example, Americans adopting internationally spend \$1500-\$2500 in immigration processing fees, \$600-\$2000 in adoption processing expenses, a \$10,500-\$15,000 "foreign source fee," \$435-\$1330 for visas, and another \$4800-\$11,000 in travel expenses. See American Adoptions, *supra* note 98.

<sup>127</sup> Smolin, *supra* note 81, at 404; Kristina Wilken, *Controlling Improper Financial Gain in International Adoption*, 2 DUKE J. GENDER L. & POL'Y 85, 86 (1995); see also Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoption*, 28 GA. INT'L & COMP. L. 319, 330 (2000).

never help them find a child.<sup>128</sup> In addition, in many sending countries, it is customary to “tip” officials at every step of the adoption process to ensure that they complete the necessary documents. These amounts can be significant.<sup>129</sup> Apparently, few Americans know what Canadians know — that adopting an African American child is faster, easier, and cheaper than adopting a child from another country.<sup>130</sup>

### 3. Myth: International Adoptions Are Safer

Some Americans choose to adopt internationally because it seems “safer” than adopting domestically. They believe there is less risk that the adoption will fall through or that a biological parent will reappear months or years later to reclaim the child. In reality, however, there are risks involved in both domestic and international adoptions. Unfortunately, many prospective adoptive parents minimize or disregard the risks associated with international adoptions while exaggerating the risks of domestic adoptions. This is not surprising. Individuals often perceive known risks and those close to home as greater than unknown and geographically distant risks.<sup>131</sup> Further, implicit preferences for non-African American children may affect how adoptive parents interpret the risks of domestic as opposed to international adoptions.

A number of Americans choose not to adopt domestically because they fear the birth parents will change their minds and take the child away from them. Contrary to popular perception, however, very few birth parents revoke their consent to an adoption. Indeed, “once consent is executed, revocation occurs so seldom as to be statistically insignificant.”<sup>132</sup> Further, those few parents who do change their minds

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<sup>128</sup> Clark & Shute, *supra* note 82, at 60; Katz, *supra* note 103 (discussing Americans ripped off by facilitator in Latin America).

<sup>129</sup> Clark & Shute, *supra* note 82, at 60 (describing woman carrying \$12,000 in cash on trip to adopt Russian child, some of which would be used to bribe officials, as customary).

<sup>130</sup> Santiago, *supra* note 48 (listing Canadians’ reasons for preferring African American infants).

<sup>131</sup> See generally PAUL SLOVIC, *THE PERCEPTION OF RISK* (Ragnar E. Löfstedt ed., 2000) (analyzing implications of societal risk taking on public policy).

<sup>132</sup> David K. Leavitt, *The Model Adoption Act: Return to a Balanced View of Adoption*, 19 FAM. L.Q. 141, 153 (1983). Although the exact figure is unknown, some experts estimate that 1% of birth parents try to reclaim parental rights. Sean Elder, *Journey to Adoption, PARENTING*, Nov. 1995, at 198; Homefield Advantage, *Adoption Gone Awry*, [http://homefieldadvantage.org/articles\\_hf.asp?art=5](http://homefieldadvantage.org/articles_hf.asp?art=5) (last visited Feb. 16, 2006). Others have estimated that 2% of parents change their mind. See Leavitt, *supra*, at 153. However,

rarely get their children back.<sup>133</sup> Unfortunately, the media and agencies with international programs greatly exaggerate the likelihood of a birth parent in the United States reclaiming his or her child. As a result, Americans focus on those extremely rare cases where a biological parent successfully reclaims a child after years of litigation, rather than the numerous successful adoptions that go unannounced.<sup>134</sup> Admittedly, the risk that a birth parent will attempt to reclaim a child, however small, may be sufficient to drive some prospective adoptive parents to adopt internationally.<sup>135</sup> However, the risks that an adoption will fall through,

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these figures apply to cases where the birth parents change their mind about placing the child *before* they sign the consent forms. *Id.* In approximately half the states, a validly executed consent to relinquish a child for adoption, meaning one that was obtained without fraud, duress, or coercion, is irrevocable. See MASS. GEN. LAWS ch. 210, § 2 (2006); MISS. CODE ANN. § 93-17-9 (1998); UTAH CODE ANN. § 78-30-4.20 (1995); Margaret Brinig, *The Effect of Transaction Costs on the Market for Babies*, 18 SETON HALL LEGIS. J. 553, 568 n.86 (1994) (listing 20 other states); see also Samuels, *supra* note 15, at 509 (noting that in 50% of states, consent is irrevocable in as little as four days after child's birth, and in 75% of states, consent is irrevocable in less than two weeks after birth); Nat'l Council for Adoption, Resources: State Laws Webpage, <http://infantadopt.org/statelaws.html> (last visited Feb. 16, 2006). *But see* MICH. COMP. LAWS § 710.29 (2002) (granting birth parents 20 days to revoke their consent, but only if in child's best interest).

<sup>133</sup> See American Adoptions, *supra* note 98 (stating that in over 75,000 adoptions in last ten years, there are no cases where birth mother successfully revoked consent after statutory period); Telephone Interview with Noreen Davidson, *supra* note 88 (maintaining that out of 700 adoptions, only two were challenged, and both challenges were unsuccessful); Telephone Interview with Maria Ramirez, *supra* note 116 (stating that in her 15 years at agency, only one birth mother revoked her consent and she did it within statutory period allowed); Telephone Interview with Kelly Reinhold, *supra* note 88 (asserting that no birth parents had challenged any adoptions in five years since her agency was founded). Furthermore, it is rare for a birth father to challenge an adoption and even rarer that he will succeed. See Sophronia Scott Gregory, *Can Adoptions Be Undone?*, TIME, July 19, 1993, at 50.

<sup>134</sup> In approximately 1% of all adoptions the birth father will attempt to assert parental rights, but few actually hire an attorney and seek to stop the adoption, and the few who do rarely prevail. In over 75,000 adoptions only a few birth fathers have successfully disrupted an adoption. See American Adoptions, *supra* note 98. Those cases have received a lot of publicity. See, e.g., *In re Kirchner*, 649 N.E.2d 324 (Ill. 1995) (known as the "Baby Richard" case); *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993) (referred to as the "Baby Jessica" case); see also *Adoptive Parents 'Numb' After Loss in Custody Battle*, MSNBC.com, Jan. 18, 2005, <http://msnbc.msc.com/id/6834940>.

<sup>135</sup> Some adoptive parents may prefer to adopt internationally because they do not want an "open" adoption. The trend in the United States favors open adoptions, but there are many misconceptions as to what that means. It does not mean that the birth parent sees the child regularly or that birth parents have any rights to make decisions about the child. The birth parents and adoptive parents negotiate how much contact the birth parent will have with the child, but it usually does not include visits or even telephone contact. Audra Behne, *Balancing the Adoption Triangle: The State, the Adoptive Parents, and the Birth Parents – Where Does the Adoptee Fit In?*, 15 BUFF. J. PUB. INT. LAW 49, 80 (1996/97); Lisa A. Fuller,

however small, are similarly present in international adoptions. A birth mother in a foreign country may change her mind after relinquishing the child<sup>136</sup> and family members or strangers in the child's country sometimes come forward at the last minute to adopt the child. Because most countries give preference to domestic adoptions,<sup>137</sup> in such cases, the American parents will usually lose the children they were promised.<sup>138</sup>

There are other risks associated with international adoption. Orphanages frequently offer the same child to various agencies. Inevitably, some adoptive parents who have been assured that a particular child is theirs will lose that child.<sup>139</sup> Countries frequently shut down or significantly restrict their international programs without making provisions for families who are in the process of adopting.<sup>140</sup> For

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Note, *Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended?*, 77 CORNELL L. REV. 1188, 1198 (1992); see American Adoptions, Open Adoptions Webpage, [http://www.americanadoptions.com/adopt/open\\_adoption](http://www.americanadoptions.com/adopt/open_adoption) (last visited Mar. 6, 2006) (“[I]n open adoptions, communication may include letters, e-mails, telephone calls, or visits. The frequency of contact ranges from every few years to several times a month or more, depending on the needs and wishes of all involved.”). Usually, the birth parent requests that the adoptive parents send annual photographs and letters updating her about the child's progress. Behne, *supra*, at 80. Child development experts unanimously agree that open adoptions benefit all of the parties, including the child. *Id.* The adoptive parents do not fear that the birth parent will reappear one day because they know where she is. *Id.* Adoptive parents also feel safe knowing that in case of a medical emergency they can turn to the birth parent for help clarifying the medical history. Alison Harvison Young, *Reconciling the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & LAW 505, 537-38 (1998). It also benefits a child who will be curious about his or her birth parents.

<sup>136</sup> See Catherine Elton, *Adoption vs. Trafficking in Guatemala*, CHRISTIAN SCI. MONITOR, Oct. 17, 2000, at 1 (discussing Guatemalan birth mother trying to get child back); Michael Riley, *Deceit Takes Babies Away in Honduras*, BALTIMORE SUN, July 2, 1998, at 2A (discussing American couple who learned, after they had flown to Guatemala and met child, that birth mother had changed her mind).

<sup>137</sup> For example, Russia allows foreigners to adopt its children only if they are not placed domestically after being available for adoption for six months. See Joint Council on Int'l Children's Servs., Russia Webpage, <http://www.jcics.org/Russia.htm> (last visited Feb. 16, 2006).

<sup>138</sup> See, e.g., Gita Ramaswamy, *The Baby Harvest: Scandals over Westerners 'Shopping' for Children in India*, NEW INTERNATIONALIST, Aug. 2003, available at <http://www.newint.org/issue359/currents.htm> (discussing United States citizen who lost Indian child she was in process of adopting after Indian family expressed interest in adopting her).

<sup>139</sup> See American Adoptions, *supra* note 98 (warning prospective adoptive parents).

<sup>140</sup> See Katz, *supra* note 103; see also Hilary Russ, *Many Families with Hopes of Adopting Children from Belarus Are Left Hanging with Suspension of Program*, N.Y. NEWSDAY, Aug. 10, 2005, at A4 (reporting that 118 families in United States were in process of adopting children from Belarus when its president suspended all international adoptions”).

example, China, Korea, Romania, and India have significantly reduced the number of children they allow to be adopted by foreigners,<sup>141</sup> or only allow intercountry adoption of disabled or racially mixed children — children considered less desirable.<sup>142</sup> Further, the United States may ban adoptions from certain countries if it suspects unethical adoption practices. Indeed, it recently banned adoptions from Cambodia after learning that scouts and adoption agencies were paying birth parents for their children.<sup>143</sup> Americans in the process of adopting from Cambodia, and even those who had been matched with particular children, were not allowed to continue with the adoptions.<sup>144</sup>

In other cases, Americans have completed an adoption in the foreign country only to learn that the child will not be allowed entry into the United States because he or she does not satisfy the definition of an

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Romania, Russia, Georgia, Ukraine, Vietnam, Colombia, Guatemala, and Brazil are just a few of the countries that have, in recent years, shut down their international adoption programs temporarily or permanently. MARIANNE BLAIR & MERLE H. WEINER, *FAMILY LAW IN THE WORLD COMMUNITY* 925 (2003) (discussing Vietnam); Barthelet, *supra* note 54, at 1166 (discussing Brazil); Marcia Kunstel & Joseph Albright, *Citing 'Trade' in Children, Russia Tightens Rules on Foreign Adoptions*, ATLANTA J. CONST., Nov. 18, 1994, at A9 (discussing Russia); Opdyke, *supra* note 9, at D1 (discussing Guatemala's temporary shutdown of international adoptions in 2003); Rupert, *supra* note 111, at A21 (discussing Ukraine); see U.S. Dep't of State, *International Adoptions: Update on Romanian Adoption Moratorium* (2004), [http://travel.state.gov/family/adoption/notices/notices\\_475.html](http://travel.state.gov/family/adoption/notices/notices_475.html) (discussing Romania).

<sup>141</sup> See SIMON & ALTSTEIN, *supra* note 120, at 19-20 (discussing Korea and Guatemala); Ethan Kapstein, *The Baby Trade*, 82 FOREIGN AFF. 115, 115 (2003) (stating that India now only allows Hindus to adopt Indian children); Katz, *supra* note 103 (noting that political opposition in some countries has slowed down international adoption to trickle); Shin Hye-son, *Government to Reduce Adoptions Going Overseas*, KOREA HERALD, July 26, 1997, available at 1997 WL 10712250 (discussing Korea's plans to reduce international adoptions 3-5% percent each year with goal of suspending all international adoptions by 2015); Nat'l Council for Adoption, *Intercountry Adoptions Increase for 11th Year in a Row*, [http://www.ncfa-usa.org/media\\_News\\_070904a.htm](http://www.ncfa-usa.org/media_News_070904a.htm) (last visited Feb. 16, 2006) (stating that Americans adopted only 200 Romanian children in 2003 compared to 1122 in 2000, and that Vietnam decreased foreign adoptions by 50% from 2002 to 2003).

<sup>142</sup> Gordon, *supra* note 98, at 128 n.58 (stating that until recently, Russia allowed foreigners to adopt only children who were handicapped, had history of family illness, or were of mixed race, and that Philippines currently allows foreigners to adopt only children with physical or mental disabilities).

<sup>143</sup> U.S. Dep't of State, *International Adoption: Cambodia Webpage* (Feb. 12, 2002), [http://travel.state.gov/family/adoption/country/country\\_361.html](http://travel.state.gov/family/adoption/country/country_361.html).

<sup>144</sup> *Id.* Americans who had been matched with children in Belarus have similarly been prevented from pursuing completion of the adoption. But in this case, it is the Belarusian government, not the United States government, that is standing in the way of the adoption. Russ, *supra* note 140, at A4.

"orphan" under our immigration laws.<sup>145</sup> Because the Bureau of Homeland Security (formerly the U.S. Department of Immigration) will not issue a decision as to whether a particular child will be admitted into the United States until after the child has been adopted, Americans adopting internationally cannot be assured that they will be able to bring their child home until after the adoption is completed.<sup>146</sup>

#### 4. Myth: International Adoptions Are More Humanitarian

Most Americans see adoption of a foreign-born child as a noble, humanitarian act, more so than the adoption of a U.S.-born child.<sup>147</sup> The history of international adoption contributes to this belief. Americans first began adopting internationally after World War II when they brought European war orphans into their homes.<sup>148</sup> They also adopted large numbers of orphaned and abandoned children after the Korean and Vietnam wars.<sup>149</sup> Thus, international adoption has its roots in humanitarian aid.

Americans believe that foreign-born children are worse off than the available children in the United States. Unlike the United States, where

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<sup>145</sup> Siskin, *supra* note 7, at Summary; see 8 U.S.C. § 1101(b)(1)(F) (2006) (defining "orphan" for purposes of foreign adoptions).

<sup>146</sup> SIMON & ALTSTEIN, *supra* note 120, at 32 (noting that child who is legally free for adoption in her home country may not satisfy United States' definition of "orphan"); Elizabeth Bartholet, *International Adoption*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE (Lori Askeland ed., forthcoming 2006), available at [http://papers.ssrn.com/sol3/paper.cfm?abstract\\_id=790624](http://papers.ssrn.com/sol3/paper.cfm?abstract_id=790624) (noting that United States' definition of "orphan" has "caused crisis in some number of individual adoption cases in which United States citizens unwittingly adopted abroad children who did not fit the orphan definition, only to find that although they were the legal parents of the adopted children, they could not bring them back to the United States"). The United States is starting a pilot program in four countries, Haiti, Honduras, the Philippines, and Poland, which will allow immigration officials to render an opinion, before the adoption is completed, as to whether a particular child meets the United States' definition of an "orphan" and will be allowed entry into the United States. See U.S. Dep't of Homeland Security, U.S. Citizenship and Immigration Servs., Adjudicate Orphan Status First Pilot Program Webpage, [http://uscis.gov/graphics/services/orphan\\_pilot.htm](http://uscis.gov/graphics/services/orphan_pilot.htm) (last visited Jan. 21, 2006).

<sup>147</sup> Twila Perry, *Transracial Adoption and International Adoption*, 10 YALE J.L. & FEMINISM 101, 135 (1998) (noting that Western adoptive parents view "international adoptions as simple acts of humanitarianism and altruism").

<sup>148</sup> ALTSTEIN & SIMON, *supra* note 70, at 3.

<sup>149</sup> *Cf. id.* Many of these children were the offspring of American servicemen stationed in Korea. Brandi R. Foster, *Evolution of the "Traditional Family": A Comparative Analysis of United States' and United Kingdom's Domestic and International Adoption Law*, 14 IND. INT'L & COMP. L. REV. 315, 319 (2003).

orphaned or abandoned children are placed in foster homes, in most countries, such children are housed in orphanages, many with deplorable conditions.<sup>150</sup> Adoption in their own country is highly unlikely because most families have more children than they can afford and adoption is stigmatized. Consequently, Americans may view rescuing a little girl from an orphanage in China or saving an orphaned boy from the streets of Peru as more humanitarian than adopting a U.S.-born child.<sup>151</sup>

Not all of the foreign-born children adopted by Americans, however, are orphaned or abandoned.<sup>152</sup> Indeed, one of the most serious risks surrounding international adoption is the possibility that the child was stolen or sold. Forty percent of the largest sending nations in the last fifteen years have shut down their international adoption programs because of allegations of "corruption, child trafficking or abduction."<sup>153</sup> Although some adoptive parents may not care that their child was sold,<sup>154</sup> most do.<sup>155</sup> Unfortunately, there is evidence that the sale of

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<sup>150</sup> Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 DUKE J. GENDER. L. & POL'Y 5, 12 (1995) (describing conditions in Romanian orphanages); Bartholet, *supra* note 121, at 196 n.39 (noting that institutionalization is far more common than foster care).

<sup>151</sup> Rush, *supra* note 47, at 116-17; *see also* Bartholet, *supra* note 150, at 12 (stating that Americans feel particularly compelled to adopt Chinese girls because, as result of One Child Per Family Policy, many will be killed or placed in orphanages); Joan Heifetz Hollinger, *Intercountry Adoption: A Frontier Without Boundaries*, in FAMILIES BY LAW: AN ADOPTION READER 215 (Naomi Cahn & Joan Hollinger eds., 2004) (arguing many Americans who adopt internationally are motivated, in part, "by a desire to raise children whose lives would otherwise be profoundly marred by poverty, disease, war, homelessness, or discrimination in their countries of origin").

<sup>152</sup> *See* Elton, *supra* note 136 (noting that only 12% of Guatemalan children adopted internationally come from institutions); Kathleen Hunt, *supra* note 98 ("[T]he majority of adoptive parents are coming back to America with [Romanian] infants and newborns, and about half of them are not from institutions."); *id.* ("[O]f those who remain in orphanages and hospitals, very few are bona-fide orphans. Nor have they ever been technically 'abandoned.'").

<sup>153</sup> Smolin, *supra* note 81, at 412.

<sup>154</sup> *Cf.* Hunt, *supra* note 98, at 24; Rupert, *supra* note 111, at A21 (reporting that some Americans paid \$100,000 to adopt child in Kiev); *60 Minutes: Children Are Hot Items on the Black Market in Romania* (CBS television broadcast Apr. 14, 1991) (showing that Americans went to homes of Romanian families and offered them cash or gifts for their children).

<sup>155</sup> Purchasing or selling a child violates international law. The United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3, and the United Nations Convention on the Rights of the Child art. 35, Nov. 20, 1989, 28 I.L.M. 1456, 1469 (1989), have condemned the practice of babyselling. One main purpose of the Hague Convention on Intercountry Adoption, which the United States is expected to ratify shortly,

children is common in Eastern Europe, Asia, and Latin America. For example, in the 1990s, many women in Guatemala falsely posed as mothers and relinquished for adoption infants that were not their own.<sup>156</sup> As a result, the United States and the United Kingdom now require DNA testing of infants adopted from Guatemala to ensure that the woman relinquishing the child is the biological mother.<sup>157</sup> Even so, babyselling continues. As recently as 2001, several countries<sup>158</sup> suspended adoptions from Guatemala after the United Nations Human Rights Commission discovered that large-scale trafficking of infants for international adoption continued.<sup>159</sup>

Even well-meaning adoptive parents may inadvertently adopt a child who was not voluntary relinquished. The United Nations Human Rights Commission found that some Guatemalan children left by their parents in orphanages *temporarily* until the parents could get back on their feet were adopted internationally. The parents only learned that their children had been adopted without their consent when they returned to reclaim them. Scouts also frequently contact doctors and orphanages to learn when a baby was (or will be) born. They then approach the poor, uneducated mother or pregnant woman directly and pressure her to give up her child in exchange for a small gift or payment.<sup>160</sup> In addition,

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is to prevent babyselling. See Hague Convention on Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1142 (1993) (prohibiting babyselling by banning "improper financial or other gain" from adoptions and activities related thereto); see also Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 77 (1999) (maintaining that prohibition against babyselling and child trafficking are "widely accepted rules of international law"). It is also a violation of United States law and recognized as immoral. John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 681 (1994) ("Babyselling is immoral.").

<sup>156</sup> One Guatemalan "mother" relinquished 33 children over a two-and-a-half year period before the United States Embassy caught on. By then, all 33 children had been adopted internationally. U.N. Economic & Soc. Council [ECOSOC], Comm. on Hum. Rts., *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Addendum: Report on the Mission to Guatemala*, at para. 102, U.N. Doc. E/CN.4/2000/73/Add.2 (Jan. 27, 2000) (prepared by Ofelia Calcetas-Santos) [hereinafter *Report of the Special Rapporteur on the Sale of Children*].

<sup>157</sup> BLAIR & WEINER, *supra* note 140, at 925.

<sup>158</sup> Such countries include the Netherlands, Iceland, Spain, and the Canadian provinces of British Columbia and Ontario. *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> William Pierce, *Independent Adoptions and the "Baby Market,"* in ADOPTION: INTERNATIONAL PERSPECTIVES 131, 139 (Euthymia Hibbs ed., 1991); Jini Roby & Stephanie Matsumura, *If I Give You My Child, Aren't We Family?*, 5 ADOPTION Q. 7, 22 (2002) (reporting that 60 out of 73 birth mothers in one study learned about international adoption through adoption agency personnel who contacted birth mothers directly or through relatives);

adoption agencies and scouts sometimes deceive birth mothers, telling them that they will be able to maintain contact with their children or reclaim them after the adoption.<sup>161</sup> These children are then placed in foreign homes.

In many countries, as in the United States, children are placed not only by adoption agencies but also by independent agents, usually lawyers, who facilitate the placement and complete the necessary documents. In Guatemala, for example, private attorneys, who pay birth parents to dissuade them from relinquishing their children to an agency or orphanage, arrange most adoptions.<sup>162</sup> Attorneys prefer to place children with foreign families who pay as much as \$25,000 per child, as compared to placement with a Guatemalan family, which costs the equivalent of \$300.<sup>163</sup> Not surprisingly, over 95% of adopted Guatemalan children are placed in other countries.<sup>164</sup> Further, most adoptive parents never meet or learn the identity of the birth parents, making it impossible for them to verify that the child was voluntarily relinquished.<sup>165</sup>

Although the United Nations' recent focus has been on Guatemala, many other Latin American countries have also been sites of babyselling and kidnapping scandals.<sup>166</sup> In some cases, stolen and purchased babies

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Wilken, *supra* note 127, at 86-87; Bogert, *supra* note 106, at 78; Riley, *supra* note 136. Over 41% of birth mothers who placed their children for adoption felt pressured by the agencies to relinquish their children. Roby & Matsumura, *supra*, at 22-23.

<sup>161</sup> Roby & Matsumura, *supra* note 160, at 21-22. Adoption agents promised 33.7% of mothers that their children would return to them when they turned 18, having acquired a good education and material wealth. *Id.* Almost 69% of the birth mothers believed that they would receive financial compensation for relinquishing the child, and 69.9% believed their child would be returned to them if the adoption did not work out. *Id.* at 15, 24. *Cf.* Rupert, *supra* note 111, at A21 (reporting that Ukrainian doctors encouraged women to give up their newborns by telling them they could reclaim them later).

<sup>162</sup> Almost 99% of adoptions in Guatemala are private, requiring only that the mother go to a notary public or a lawyer and sign a document relinquishing her child. *Report of the Special Rapporteur on the Sale of Children*, *supra* note 156, at para. 96.

<sup>163</sup> *Id.* at para. 92.

<sup>164</sup> *Id.* at paras. 96, 100; Elton, *supra* note 136 (reporting that 98% of all adoptions of Guatemalan children are international).

<sup>165</sup> *Report of the Special Rapporteur on the Sale of Children*, *supra* note 156, at paras. 98, 101; *cf.* Smolin, *supra* note 81, at 412 ("[I]ntercountry adoption has been plagued by claims of illegality, including . . . the forging of various documents related to the relinquishment, abandonment, or original origin of the child.").

<sup>166</sup> *See, e.g.*, Kenneth J. Herrmann, Jr. & Barbara Kasper, *International Adoption: The Exploitation of Women and Children*, 7 *AFFILIA* 45, 48 (1992) (stating that lawyers in El Salvador paid scouts to find babies for international adoption and many babies were kidnapped or coaxed from poor, desperate mothers); *id.* (stating that children in Colombia were purchased for \$600 and sold to foreigners for \$10,000); William R. Long, *Adopting a*

were kept in “fattening houses” where they were “fattened up” to look healthy, well-fed, and more attractive to foreign adoptive parents.<sup>167</sup>

After the collapse of the Soviet bloc, Russia, Romania, and the Ukraine, among others, began allowing Westerners to adopt their orphaned and abandoned children. As in Latin America, abusive adoption practices immediately plagued these countries.<sup>168</sup> Following extensive publicity of the horrible conditions in Romanian orphanages, thousands of Americans flew to Romania in the late 1980s and early 1990s to adopt orphaned and abandoned children.<sup>169</sup> Unfortunately, many of the children they adopted were neither orphaned nor abandoned; they were sold.<sup>170</sup> Some parents voluntarily sold their children, even naming the price or “gift”<sup>171</sup> they wanted in exchange, while others were coerced into relinquishing their children.<sup>172</sup> For example, Romanian nuns forced unmarried mothers to give up their children and then sold each child for up to \$15,000.<sup>173</sup> When Romania sought to join the European Union

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*Tougher Policy*, L.A. TIMES, Apr. 16, 1994, at A1 (reporting charges of child trafficking against New Jersey attorney who arranged international adoptions of Peruvian children, and noting that bribes were paid to Peruvian mothers, judges and other court officials, government attorneys, and police in connection with international adoptions); Opdyke, *supra* note 9, at D1 (discussing Colombia and Ecuador); Sheila Rule, *Couples Taking Unusual Paths for Adoption*, N.Y. TIMES, Jul. 16, 1984, at A1 (reporting that adoption brokers kidnapped children in Latin American countries and sold them to adoptive parents in United States).

<sup>167</sup> Long, *supra* note 166, at A1 (discussing police raid of fattening houses in Honduras); see also Kapstein, *supra* note 141, at 119 (discussing government officials in Honduras involved in kidnapping ring that took children from poor families and sold them to Westerners).

<sup>168</sup> Kunstel & Albright, *supra* note 140.

<sup>169</sup> SERGIU VERONA, CONG. RESEARCH SERV., ROMANIAN POLICY REGARDING ADOPTIONS, at CRS-3 (1994).

<sup>170</sup> *Id.* (stating that many of 3000 Romanian children adopted by Americans “before July 1991 came not from orphanages but from their biological families” and “were the result of a baby market where large sums of money were paid to baby brokers, resulting in the separation of poor children from their poor, illiterate, unsophisticated and often exploited parents” (citing cable from U.S. Embassy in Bucharest)).

<sup>171</sup> Kimberly Chadwick, *The Politics and Economic of Inter-country Adoption in Eastern Europe*, 5 J. INT’L LEGAL STUD. 113, 125 (1999) (describing case where adoptive parents gave birth mother necklace and matching earrings in exchange for her child and another case where adoptive parents offered mother her choice of new car); Hunt, *supra* note 98 (discussing Romanian mother who consented to her daughter’s adoption in exchange for 40,000 lei (approximately \$1100)).

<sup>172</sup> SIMON & ALTSTEIN, *supra* note 120, at 17; see Hunt, *supra* note 98 (discussing Americans’ experiences with Romanian birth parents seeking \$2800 and car in exchange for their toddler).

<sup>173</sup> Kate Bales, *Adoption: The World Baby Boom*, INT’L HERALD TRIB., Feb. 13, 1993, at 161.

("EU") in 2001, the EU concluded that Romania was selling its children and criticized its "profitable trade in child trafficking" and "persistent abandonment of children."<sup>174</sup> Romania has since banned international adoptions of Romanian children.<sup>175</sup> After numerous unsuccessful attempts to stop illegal adoption practices, Russia similarly banned foreign adoptions of Russian children in 2000, although it later lifted the moratorium.<sup>176</sup>

International adoptions of Chinese and Southeast Asian children have also been marred by widespread corruption. The Chinese government, concerned about baby trafficking, now requires that orphanages post notices in local newspapers with the child's photograph and caption "Is this your baby?" for three months before the child can be adopted.<sup>177</sup> As noted above, the United States has suspended adoptions from Cambodia based on reports of child trafficking.<sup>178</sup> India recently shut down several orphanages after learning that agencies had paid scouts to offer the families of poor women the equivalent of \$3-\$10 for their newborn daughters.<sup>179</sup> Vietnam also suspended all foreign adoptions of its children following reports of child trafficking.<sup>180</sup>

While many Americans adopting internationally adopt older children or children with special needs, most prefer infants for whom demand is so high that there is now a shortage in some sending countries.<sup>181</sup>

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<sup>174</sup> Romania Implements Law Restricting International Adoptions, S.E. EUR. TIMES, Mar. 1, 2005, at 1, available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2005/01/04/feature-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2005/01/04/feature-01).

<sup>175</sup> See U.S. Dep't of State, *supra* note 140 (stating that Romanian children are no longer available for international adoption). However, grandparents living abroad can adopt their Romanian grandchildren. *Id.*

<sup>176</sup> Cf. Kunstel & Albright, *supra* note 140.

<sup>177</sup> Renuka Rayasam, *Special Overseas Delivery: U.S. to Simplify Rules on Foreign Adoptions*, ATLANTA J. CONST., Dec. 3, 2003, at F1.

<sup>178</sup> U.S. Dep't of State, *supra* note 143; see also Alan Goldberg & Deb Apton, *U.S. Families Learn Truth About Adopted Cambodian Children: Woman at Center of Adoption Scandal Talks to "20/20,"* ABC NEWS, Mar. 25, 2005, <http://www.abcnews.go.com/2020/international/story?id=611826&page=1> (reporting on child trafficking in Cambodia).

<sup>179</sup> Ramaswamy, *supra* note 138, at 359. These children were later adopted by Westerners who paid upwards of \$22,000 per infant. *Id.* (noting global rate of \$22,000-\$25,000 for foreign adoptions). In March 2001, the Canadian province of Quebec suspended all adoptions from India. BLAIR & WEINER, *supra* note 140, at 925.

<sup>180</sup> Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179, 247 (2003) ("In January of 2003, Vietnam again closed its borders to international adoption."); Opdyke, *supra* note 9, at D1.

<sup>181</sup> Hunt, *supra* note 98 (noting that as early as 1991, "supply of adoptable young babies

Commentators have suggested that, rather than placing true orphans, the largest sending countries are producing children to satisfy Western adoptive parents' demands for infants.<sup>182</sup> Thus, humanitarian motives may not be a primary reason why many Americans adopt foreign-born children.<sup>183</sup> Indeed, 80% of Americans adopting through the private system, both domestically and internationally, cite infertility as the main reason why they decided to adopt.<sup>184</sup> As one scholar noted: "When infertile couples adopt, they forthrightly acknowledge that they are satisfying their own needs to parent, not attempting to rescue a child."<sup>185</sup> Thus, for many adoptive parents, international adoption may be less about finding homes for parentless children and more about finding children for childless couples.<sup>186</sup>

Even if Americans are motivated to adopt internationally for humanitarian reasons, it is no less humanitarian to adopt one of the 126,000 available children in the United States foster care system. Only 50% of Americans adopting children from the foster care system in the United States do so because of infertility (as compared to 80% of persons

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[in Romania was] dwindling"); Riley, *supra* note 136 (reporting that money that Westerners are willing to pay has created shortage of healthy infants in Guatemala).

<sup>182</sup> Herrmann, Jr. & Kasper, *supra* note 166, at 48-49 (stating that Honduran girls are offered \$50 to get pregnant and give up healthy baby for international adoption); Hunt, *supra* note 98. The fattening houses mentioned earlier might be evidence that the children adopted internationally are not the neediest children in orphanages but rather those who are being produced for that purpose. See *Report of the Special Rapporteur on the Sale of Children*, *supra* note 156, at para. 103 ("[T]he current situation is such that instead of seeking parents willing to adopt needy children, the production of babies to supply adoptive parents is being encouraged.").

<sup>183</sup> Kapstein, *supra* note 141, at 117 ("The [international] baby trade is likely to continue to grow, partly because it is no longer simply a response to wars and humanitarian crises. For better or worse, it now behaves much like a commodities market, with demand informing supply."); Kleiman, *supra* note 85, at 333 ("[T]ransnational adoption by American citizens has ceased to be a humanitarian act to 'rescue' war orphans, and has become a widely accepted option for couples . . . seeking to create or expand families.").

<sup>184</sup> Evan B. Donaldson Adoption Inst., Overview of Adoption in United States Webpage, <http://www.adoptioninstitute.org/FactOverview.html#head> (last visited Feb. 17, 2006). Of course, some parents motivated to adopt, at least initially, by their infertility, chose to adopt internationally for humanitarian reasons.

<sup>185</sup> Appleton, *supra* note 37, at 433-34.

<sup>186</sup> ALTSTEIN & SIMON, *supra* note 70, at 1; Kleiman, *supra* note 85, at 333 ("While there will always be people who are motivated by philanthropy to adopt internationally, the prevailing impetus for adoptive parents to explore the possibility of international adoption is their sense that they stand a greater chance of finding a child internationally than they do domestically."); Lovelock, *supra* note 96, at 908 (characterizing international adoptions after WWII and Korean War as "finding families for children" as opposed to international adoptions today which "find[] children for families").

adopting through the private system).<sup>187</sup> Thus, it is quite likely that individuals adopting domestically from the foster care system are driven by humanitarian reasons — the desire to give a child a home. Further, although foster care might be preferable to a foreign orphanage, foster homes are not ideal settings. Foster children in the United States are moved from home to home and are often rejected and abused by their foster families. More than 50,000 children in the foster care system waiting to be adopted are African American, older, and have special needs<sup>188</sup> — they are the children few people want to adopt. Americans adopting internationally have expressed that nothing “could be more humane . . . than to remove seemingly unwanted, even discarded, children from what appear to be lives of misery.”<sup>189</sup> That same sentiment would apply to foster children in the United States. What could be more humane than to adopt older, African American children with special needs, who, unlike the foreign-born infants many Westerners want, truly are discarded?

International adoptions are not necessarily more humanitarian, faster, easier, or cheaper than domestic adoptions.<sup>190</sup> Foreign-born children are also not necessarily healthier or at a lower risk for significant medical conditions than are U.S.-born children. Yet, prospective adoptive parents seeking to adopt internationally have readily accepted these reasons for not adopting U.S.-born children, many of whom are African

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<sup>187</sup> Evan B. Donaldson Adoption Inst., *supra* note 184.

<sup>188</sup> See U.S. Dep’t of Health & Human Servs., *supra* note 1.

<sup>189</sup> ALTSTEIN & SIMON, *supra* note 70, at 2.

<sup>190</sup> Some Americans who may have wanted to adopt domestically may have been discouraged because of their age, marital status, or sexual orientation. However, United States agencies’ restrictions with regard to marital status, sexual orientation, and age are generally applied only to adoptions of healthy white infants. Most United States agencies allow homosexuals, single persons, and older persons to adopt nonwhite infants. See generally EVAN B. DONALDSON ADOPTION INST., ADOPTION BY LESBIANS AND GAYS 7 (2003), available at <http://www.adoptioninstitute.org/whowe/Gay%20and%20Lesbian%20Adoption1.html> (finding that 60% of adoption agencies, including 46% of agencies placing primarily domestic infants and 85.3% of agencies placing special needs children, accept applications from homosexuals). In contrast, many sending countries do not allow unmarried persons, homosexuals, or older persons to adopt. For example, China and Guatemala, two of the five largest sending countries, see *id.* at 8, do not allow gays and lesbians to adopt, and Korea, another top sending country, does not allow unmarried persons to adopt. Adopting from Korea and Afterwards Homepage, <http://www.adopting.org/uni/frame.php?url=http://adoptkorea.com/> (last visited Mar. 6, 2006) (restricting adoptions from South Korea to “[m]arried couples, married at least three years. . . . Singles not accepted”); Adoption.com, International Adoption Webpage, <http://www.koreanadoptions.com/> (last visited Mar. 6, 2006) (same).

American. While cognitive biases, addressed above, may be partially to blame, various other historical, legal, and societal factors also affect white Americans' decisions to adopt internationally.

## II. BARRIERS TO TRANSRACIAL ADOPTIONS OF AFRICAN AMERICAN CHILDREN

Undoubtedly, many prospective adoptive parents believe the myths discussed above, even though they are easy to disprove. However, even adoptive parents who are aware that the myths are just that — myths — may still prefer to adopt internationally. This section explores the various historical, legal, and societal reasons why whites may prefer nonwhite children from Asia or Latin America to African American children.

### A. Legal Barriers

Relatively few white families in the United States express interest in adopting African American children.<sup>191</sup> However, some families who might have considered doing so may have been deterred by the politics of domestic transracial adoptions. Although the law currently prohibits consideration of race in adoptive placements, for years it favored race matching. The effect of those policies can still be felt today.

Soon after whites began adopting African American children in significant numbers in the 1960s and early 1970s,<sup>192</sup> the National Association of Black Social Workers ("NABSW") expressed strong opposition. It argued that African American children must be raised in African American homes in order to develop a positive racial identity and the skills to cope with racism in our society.<sup>193</sup> The NABSW

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<sup>191</sup> Elizabeth Bartholet, Correspondence, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2355 n.19 (1998) (reviewing R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998)) (stating that one-sixth of white families on adoption waiting lists in the United States are interested in adopting nonwhite children). Only a fraction of those interested in adopting nonwhite children are seeking African American or biracial children. See *supra* notes 37-50 and accompanying text (noting that some whites willing to adopt Asian, Hispanic, or Native American children refuse to adopt African American children).

<sup>192</sup> Jehnna I. Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 176 (1997) (noting that white families adopted approximately 10,000 African American children in the late 1960s and early 1970s).

<sup>193</sup> Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 926-27 (1994) (quoting National Association of

described whites' adoption of African American children as "a form of race and cultural genocide" because African American children raised in white homes would associate and identify with the dominant white culture and thereby be removed from the African American community, physically and psychologically.<sup>194</sup>

Although most African Americans disagreed with the NABSW's views,<sup>195</sup> transracial adoptions decreased dramatically after its statement.<sup>196</sup> A number of states enacted race-matching laws requiring "consideration of the child's race or ethnic heritage in adoption placements" and giving preference to "a family with the same racial or ethnic heritage as the child."<sup>197</sup> Government-funded agencies in states without race-matching statutes informally adopted race-matching policies,<sup>198</sup> as did many private agencies.<sup>199</sup>

Then, as now, the supply of African American children available for adoption surpassed the demand from African American families. As a result, African American children generally waited longer than white children for a same-race adoptive family. Some African American children remained in foster care indefinitely, even though there were white families willing to adopt them. Similarly, it took private agencies longer to place African American or biracial children than white children. Scholars have speculated that the NABSW's opposition to transracial adoption, along with agencies' race-matching policies,

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Black Social Workers).

<sup>194</sup> SIMON & ALTSTEIN, *supra* note 120, at 38 (quoting William T. Merritt, president of NABSW).

<sup>195</sup> David Rosettenstein, *Transracial Adoption and the Statutory Preference Schemes*, 68 ST. JOHN'S L. REV. 137, 145 n.36 (1994).

<sup>196</sup> Suzanne Campbell, *Taking Race Out of the Equation: Transracial Adoption in 2000*, 53 SMU L. REV. 1599, 1605 (2000) (stating that transracial adoptions dropped 39% in year following the NABSW's statement); Rosettenstein, *supra* note 195, at 141 (noting that whites' adoptions of African American children peaked in 1971 with 2574 placements, but had fallen to 831 by 1975).

<sup>197</sup> MINN. STAT. ANN. § 259.29(2) (West 1993); *see also* ARK. CODE ANN. § 9-9-102 (1993); CAL. FAM. CODE § 8708 (Deering 1993); Timothy Glynn, Note, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925-942 (1993) (critiquing race-matching policies). Arizona, Nevada, and Missouri had race-matching policies that required that a child be available for adoption for a certain period of time (i.e., 3-6 months) before he or she could be adopted by a family of a different race. Amanda T. Perez, Note, *Transracial Adoption and the Federal Adoption Subsidy*, 17 YALE POL'Y & L. REV. 201, 211 (1998).

<sup>198</sup> Rosettenstein, *supra* note 195, at 140 n.9 (noting that some states adopted race preferences in their department practice manuals).

<sup>199</sup> *See* Bartholet, *supra* note 191, at 2352.

deterred prospective adoptive white parents from seeking African American children and turned them to international adoption.<sup>200</sup> Indeed, in the years following the NABSW's statement in 1971, the number of Americans adopting internationally increased almost 200%.<sup>201</sup>

In 1994, the NABSW issued its current position on transracial adoption: "Transracial adoption of an African American child should only be considered after documented evidence of unsuccessful same-race placement has been reviewed and supported by appropriate representatives of the African American community."<sup>202</sup> Thus, although no longer completely opposed to transracial adoption, the NABSW still treats transracial adoption as a last resort. That same year, Congress passed the Multi-Ethnic Placement Act ("MEPA"),<sup>203</sup> which prohibited agencies receiving federal funds from "denying to any person an opportunity to become an adoptive or foster parent, solely on the basis of race."<sup>204</sup> However, MEPA allowed agencies to continue considering race "as one of a number of factors" in the placement decision, so long as it did not delay or deny an application solely on the basis of race.<sup>205</sup> 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>206</sup>

In 1996, Congress amended MEPA, prohibiting agencies receiving federal funding from "deny[ing] to any person the opportunity to become an adoptive or foster care parent on the basis of race, color, or national origin of the person or of the child involved."<sup>207</sup> In contrast to MEPA's original language which prohibited agencies from rejecting a

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<sup>200</sup> Lovelock, *supra* note 96, at 921-22; Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487, 489 (1991) (noting that as result of NABSW's opposition, transracial adoptions of African American children declined, although Americans continued to adopt foreign-born, nonwhite children).

<sup>201</sup> David Rosettenstein, *Transracial Adoption in the U.S. and the Impact of Considerations Relating to Minority Population Groups*, 9 INT'L J. L. & FAM. 131, 141-42 (1995) (stating after 1971, number of foreign children admitted to United States in following five years increased by 198.9%, not including children admitted from Vietnam).

<sup>202</sup> SIMON & ALTSTEIN, *supra* note 120, at 46-47.

<sup>203</sup> Howard Metzenbaum Multiethnic Placement Act of 1994, 42 U.S.C. § 5115a (1994), *repealed by* Act of Aug. 20, 1996, Pub. L. No. 104-188, § 1808(d), 110 Stat. 1904.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Rabin, *supra* note 86.

<sup>207</sup> 42 U.S.C. § 1996b(1)(A) (1996).

placement “solely on the basis of race,”<sup>208</sup> MEPA now prohibits agencies from rejecting a prospective family “on the basis of . . . race.”<sup>209</sup> The amendments also repealed the provisions that had allowed states to consider a child’s “cultural, ethnic or racial background”<sup>210</sup> and the capacity of the prospective adoptive parents to meet such needs in making placement decisions.<sup>211</sup> Thus, MEPA now not only prohibits race matching, but also no longer expressly allows agencies to consider the race, color, or national origin of the adoptive parents or child as a factor in the placement decision.<sup>212</sup> Placements must be colorblind.<sup>213</sup>

Undoubtedly, some agencies continue to race match, in contravention of the law,<sup>214</sup> and stronger enforcement mechanisms may be necessary.

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<sup>208</sup> 42 U.S.C. § 5115a(a)(1)(A), *repealed by* Act of Aug. 20, 1996, Pub. L. 104-188, § 1808(d), 110 Stat. 1904.

<sup>209</sup> 42 U.S.C. § 1996b(1)(A).

<sup>210</sup> Howard Metzenbaum Multiethnic Placement Act of 1994, 42 U.S.C. § 5115a (1994), *repealed by* Act of Aug. 20, 1996, Pub. L. No. 104-188, § 1808(d), 110 Stat. 1904.

<sup>211</sup> 42 U.S.C. § 1996b. MEPA, as amended, has no effect on the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (1978), which provides that Native American children shall be placed in adoptive homes that “reflect the unique values of Indian culture.” 42 U.S.C. § 1996b(3).

<sup>212</sup> *Id.* § 1996b(2) (creating private federal cause of action against public agencies considering race in placement decisions).

<sup>213</sup> Bartholet, *supra* note 191, at 2354 (“[F]ederal funded agencies are not allowed to use race at all in making foster and adoptive placement decisions.”); KAREN SPAR, CONG. RESEARCH SERV., ADOPTION: INTERETHNIC PLACEMENT LEGISLATION IN THE 104TH CONGRESS, at CRS-3 (1996). However, some scholars, relying on the Department of Health & Human Services’ administrative guidelines which define “good social work practice” as the “individualized assessment of a prospective parents’ ability to serve as a foster or adoptive parents,” have argued that agencies can consider race in exceptional cases when evaluating the ability of a prospective parent to “meet the child’s needs.” See FOGG-DAVIS, *supra* note 46, at 49-50. Thus, they claim that MEPA, as amended, allows race to be considered, for example, in cases where two families are seeking to adopt the same child and one family is of the same race as the child. See *id.* (noting that guidelines draw fine line between routinely using race as matter of general policy and using race as factor in particular placements). Some commentators argue that caseworkers might use this exceptional cases exception to continue race matching. Campbell, *supra* note 193, at 1619.

<sup>214</sup> See Susan K. Livio & Mary Jo Patterson, *The Colors of Love: Outside Walls and Warmth of a Happy Home, Debate Swirls About Crossing the Racial Divide*, STAR-LEDGER (N.J.), Dec. 27, 2005, at 1 (“We heard it over and over, there were social workers who were engaging in the systematic race-matching of kids. African-American children would be available, but they wouldn’t be made available if the homes belonged to white parents.” (quoting Children’s Rights Inc. Associate Director Susan Lambiase)); SIMON & ALTSTEIN, *supra* note 120, at 144 (concluding that many public agencies are not willing to support transracial adoptions and might try to get around MEPA). In 1999, Children’s Rights Inc. brought a class action suit against the state of New Jersey alleging, inter alia, race matching in adoptive placements in violation of MEPA. See Livio & Patterson, *supra*. The suit settled in 2003.

However, the majority of public agencies currently place children transracially, and most private agencies, although not bound by MEPA, frequently place African American children with white families.<sup>215</sup> Many agencies actively seek families of all races to adopt African American children and even provide cultural competence training for white families seeking to adopt such children.<sup>216</sup> Given the change in the law and agencies' practices, one might expect many more white families to be adopting African American children. Yet, although an increasing number of whites do, a much greater number still turn to international adoption. The next section explores some of the societal reasons why many whites still prefer foreign-born children over African American children.

### B. Concern About Society's Racism

Although there are no longer any formal barriers to transracial adoption of African American children, there are still societal and cultural reasons why whites in the United States might prefer not to adopt African American children. The NABSW and many well-meaning child welfare advocates of all races still oppose whites' adoption of African American children.<sup>217</sup> Further, some individuals who claim to

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<sup>215</sup> Adoption S.T.A.R., Traditional Agency Adoption Webpage, [http://www.adoptionstar.com/childplacement\\_traditional.php](http://www.adoptionstar.com/childplacement_traditional.php) (last visited Feb. 17, 2006) ("[T]here is a need to identify singles and couples interested in the adoption of African American infants. Adoption S.T.A.R. will consider couples and singles of all races."); Adoptions Together, Building Black Adoptive Families Webpage, <http://www.adoptionstogether.org/adoption-services/BBAF.htm> (last visited Feb. 17, 2006); see also David Crary, *Interracial Adoption: The Color of Conflict*, L.A. TIMES, July 9, 2000, at 18 (noting that North American Council on Adoptable Children offers programs for families considering transracial adoption).

<sup>216</sup> See Crary, *supra* note 215, at 18 (discussing North American Council on Adoptable Children in Minnesota); Telephone Interview with Laurie Morgan, Domestic Adoption Coordinator, Bldg. Black Adoptive Families, in Silver Spring, Md. (Feb. 15, 2005); Adoption-Link, Inc. Homepage, <http://www.adoptionlinkillinois.com> (last visited Feb. 26, 2006); Holy Family Servs., Adoptive Parent Services Webpage, <http://www.hfs.org/adoptive.html> (last visited Feb. 26, 2006).

<sup>217</sup> Bartholet, *supra* note 191, at 2352 (stating that there is enormous support among whites, especially those in child welfare system, for race matching); Crary, *supra* note 215, at 18 ("[T]he NABSW, backed by many white colleagues, opposes interracial adoption except as a last resort."). But many African Americans do not agree with the NABSW's position. See Bartholet, *supra* note 191, at 2352-53 ("[P]olls demonstrate very little support among blacks in the general population for the [NABSW]'s position supporting race matching . . . [a]nd many black intellectuals have joined with whites in challenging race matching policies."); Randall Kennedy, *Orphans of Separatism: The Painful Politics of Transracial Adoption*, 5 AM. PROSPECT, Mar. 21, 1994, available at <http://www.prospect.org/>

support transracial adoption still believe that African American children should be placed with white parents only as a last resort.<sup>218</sup>

Most Americans are well aware of this continued opposition to transracial adoption of African American children. Countless books, articles, and at least one major film have explored whether whites can and should raise African American children.<sup>219</sup> Despite studies concluding that the majority of African American children adopted by whites develop a healthy self-identity,<sup>220</sup> a number of African American transracial adoptees have publicly expressed opposition to transracial adoption. They claim that notwithstanding good intentions, white adoptive parents are unable to adequately prepare African American

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print/V5/17/kennedy-r.html (arguing that “there is no rationale sufficiently compelling to justify preferring same race child placements over transracial placements” and that “there is no evidence that black foster or adoptive parents, on average, do better than white foster or adoptive parents in raising black children”); *id.* (asserting that it is possible that transracial placements could benefit African American children because “white adults, as insiders to the dominant racial group in America, will know more than racial minorities about the inner world of whites and how best to maneuver with and around them in order to advance one’s interests in a white-dominated society”); *see also* Forde-Mazrui, *supra* note 193, at 926.

<sup>218</sup> Lewin, *supra* note 49, at A1 (“Many, perhaps most, social workers of all races still believe that, when possible, racial matching is in the child’s best interest.”). Even whites who have adopted African American children sometimes believe that, ideally, African American children should be adopted by African American families. *See* Crary, *supra* note 215, at 18 (quoting white adoptive mother). Some private agencies also prefer to place African American children with African American families. For example, the Evangelical Child and Family Agency in Illinois seeks “African American couples or individuals or couples where one’s spouse is of African American ancestry” to adopt African American infants. Evangelical Child and Family Agency, Adoption Services Webpage, <http://www.evancfa.org/adoption.htm> (last visited Feb. 17, 2006). Similarly, Building Black Adoptive Families “strives for timely same-race placements of children,” although they will facilitate transracial placements. Adoptions Together, Building Black Adoptive Families Webpage, <http://www.adoptions-together.org/adoptionservices/BBAF.htm> (last visited Feb. 17, 2006); *see also* Crary, *supra* note 215, at 18 (noting that North American Council on Adoptable Children offers programs for families considering transracial adoption, but favors same race adoptions).

<sup>219</sup> *See* Rabin, *supra* note 86, at B4; LOSING ISAIAH, *supra* note 93 (portraying African American crack addicted mother who abandons her infant son and later returns to reclaim him from his white adoptive family). The birth mother’s attorney successfully argues that African American children belong in African American homes. *Id.*

<sup>220</sup> *See* RITA SIMON, ET AL., THE CASE FOR TRANSRACIAL ADOPTION (1994) (discussing long-term studies); Rosettenstein, *supra* note 195, at 149 (citing studies showing that transracial adoptees do no worse than intra-race adoptees and sometimes do even better). *But see* William Feigelman & Arnold Silverman, *The Long-Term Effects of Transracial Adoption*, 58 SOC. SERV. REV. 588, 600-01 (1984) (suggesting that African American, but not Korean or Colombian, transracial adoptees have more adjustment problems than intra-racial adoptees).

children to cope with racial prejudice.<sup>221</sup> Some have stated that while they love their white adoptive parents, they wish they had been adopted by an African American family. These sentiments may deter whites from adopting African American children.

Many white, prospective adoptive parents are themselves concerned that they lack the ability to raise an African American child with a healthy self-image or to teach a child how to deal with racial prejudice. They worry that their child will grow up alienated from the African American community because, as whites, they have few African American friends and know little about African American history and culture.<sup>222</sup> They also worry that it might not be in an African American child's best interests to be raised in a predominantly white neighborhood.<sup>223</sup> These white, prospective adoptive parents express concern that they do not know how to care for African American hair or will be unable to explain to a young child why his or her skin is a different color.<sup>224</sup> In short, many whites are afraid that opponents of transracial adoption might be right — that white parents are not competent to raise African American children.

Although 17% of adoptions in the United States are transracial, a very small percentage are comprised of white parents and adopted African American or biracial children.<sup>225</sup> Thus, many communities have not yet been exposed to these families and are still resistant to them.<sup>226</sup> For example, neighbors and relatives will sometimes make offensive or ignorant comments and expect parents to explain why they chose to

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<sup>221</sup> Rachel H. Hoerdlinger, *A Look at . . . Interracial Adoption: A Last Resort: The Identity My White Parents Couldn't Give Me*, WASH. POST, June 30, 1996, at C3; Lena Williams, *Parent and Child: Beyond Losing Isaiah: Truth in Shades of Gray*, N.Y. TIMES, Mar. 23, 1995, at C1 (citing evidence that some African American transracial adoptees "experience a kind of racial neutering in which they feel no sense of belonging to any racial group"); *id.* (quoting David Watts, African American man who was adopted by white family: "I didn't know what being black meant in terms of culture.").

<sup>222</sup> Davenport, *supra* note 69, at 11.

<sup>223</sup> *Id.*

<sup>224</sup> Cf. Crary, *supra* note 215, at 18 (describing how white couple learned to care for their African American daughter's hair). A surprisingly large number of white adoptive parents mention grooming African American hair as a concern. See Lewin, *supra* note 49, at A1.

<sup>225</sup> See *supra* note 47 (discussing census findings and concluding that only 2-3% of all adoptions involve African American children and white parents).

<sup>226</sup> Rush, *supra* note 47, at 117-18 (arguing that many Americans still view whites' adoption of African American children with suspicion).

adopt an African American child.<sup>227</sup> African Americans sometimes express disapproval by sneering at these multiracial families, and others offer white parents unsolicited advice on how to raise and groom their African American children.<sup>228</sup> Curious strangers stare as the family walks down the street or dines in a restaurant because they do not resemble a “normal” American family.<sup>229</sup> Some white adoptive parents, especially those who reside in progressive states, have been surprised at the reactions triggered by their adoption of African American children.<sup>230</sup>

Given these reactions, it is not surprising that whites considering adopting an African American child express concern about how relatives, friends, neighbors, and even strangers might react.<sup>231</sup> Would other children ostracize their child? Would their neighbors ostracize them, the parents? How often will they be asked why they adopted an

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<sup>227</sup> See Crary, *supra* note 215, at 18 (discussing transracial family who received anonymous letter stating, “you’re making our neighborhood a ghetto”); *id.* (describing white adoptive father whose own father did not approve of his adoption of African American child); Rush, *supra* note 47, at 121 (stating that some whites who are surprised to learn that author’s adopted daughter is African American have proceeded to “assure her that ‘you’d never know it,’ because “she looks Asian, Hawaiian, even white with a really deep tan”).

<sup>228</sup> See Livio & Patterson, *supra* note 214 (reporting that Hispanic woman in department store said to white adoptive mother of African American child: “You couldn’t have your own daughter — you had to get a black baby!”); *id.* (describing experience of white adoptive mother at movie theater concession stand where black woman stared at mother and her African American daughter and loudly said: “That ain’t right. That just ain’t right,” while shaking her head); Posting of Trey to Republic of T, <http://www.republicoft.com/index.php/archives/2004/07/04/adoption-and-african-american-children> (July 5, 2004, 18:09 PST) (posting from white couple stating that before they adopted African American child, they were “warned . . . that the greatest disapproval [they’d] get would be from the African-American community”); *id.* (posting claiming that African American woman came up to white woman in café “screaming at her about how could she dare think she could raise a black child”); *id.* (posting claiming that that while at grocery store, African American man had loudly asked his friends: “What is a black baby doing with a white man . . . that’s what I’d like to know!”); *id.* (posting describing elderly African American woman who sneered at white woman and her African American daughters, while muttering, “Damn white people” as they strolled down street).

<sup>229</sup> See Livio & Patterson, *supra* note 214 (reporting that white mother was “shocked to encounter stares and nasty comments” when she and her African American, adopted daughter were out in public).

<sup>230</sup> *Id.* (reporting that adoptive white mother did not know that “transracial adoptions [of African American children] were still so controversial” in New Jersey).

<sup>231</sup> Davenport, *supra* note 69, at 11; Lewin, *supra* note 49, at A1 (noting that whites “worry that given the debate over transracial adoption, they’d be looked at coldly by African Americans if they adopted a black child” (quoting Harvard Law Professor Randall Kennedy)).

African American child? How often will others assume that their child is a crack baby?<sup>232</sup>

Whites' concerns that they might not be competent to raise African American children or that their communities might not welcome multiracial families are understandable. Some African American transracial adoptees, especially those whose parents pretended that race did not matter, grew up feeling alienated from the African American community.<sup>233</sup> Child development experts now advise parents not to ignore race, and some agencies require that parents seeking to adopt transracially take cultural competence classes where they learn how to help their children cope with racism and to expose them to African American culture and multiracial families.<sup>234</sup> Thus, adoptive parents should be concerned about the issues raised by transracial adoptions.

However, these issues are present to some degree in all multiracial adoptions, not just those involving white parents and African American children. Koreans adopted by white parents have described the difficulties of growing up with parents who were oblivious to racism or pretended that it did not exist.<sup>235</sup> They have also described their painful experiences with discrimination in predominantly white communities.<sup>236</sup> Some, just like the African American transracial adoptees discussed above, wished for parents of their same race.<sup>237</sup> Similarly, Chinese adoptees have had similar experiences with racism and have struggled with similar identity issues as African American and Korean transracial adoptees.<sup>238</sup> Critics of international adoption have noted that such adoptions separate children from their racial and cultural communities

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<sup>232</sup> See *supra* note 93 and accompanying text (discussing perception that African American adoptees are crack babies).

<sup>233</sup> See SIMON, ET AL., *supra* note 220, at 85-88.

<sup>234</sup> See Telephone Interview with Laurie Morgan, *supra* note 216 (explaining that her agency requires that adoptive parents participate in three-hour class which consists of questions and answers so that agency is satisfied that whites seeking to adopt African American or biracial child will culturally enrich child); see also Adoption-Link, Inc. Homepage, <http://www.adoptionlinkillinois.com> (last visited Feb. 26, 2006) (providing cultural competence class); Holy Family Servs., *supra* note 112 (same).

<sup>235</sup> See Madelyn Freundlich & Joy Kim Lieberthal, Evan B. Donaldson Adoption Inst., *The Gathering of the First Generation of Adult Korean Adoptees* (June 2000), <http://www.adoptioninstitute.org/proed/korfindings.html>.

<sup>236</sup> *Id.*

<sup>237</sup> Lewin, *supra* note 49, at A1.

<sup>238</sup> *Id.*; Carol Lloyd & Hank Pellissier, *Interracial Adoption: One Couple's Story*, SALON, Aug. 14, 1997, <http://archive.salon.com/aug97/mothers/adoption2970804.html> (telling story of Chinese transracial adoptee who opposes transracial adoption).

and subject them to discrimination in white communities.<sup>239</sup> Thus, some of the concerns that deter whites from adopting African American children should lead them to question whether they can adequately raise other nonwhite children.<sup>240</sup> To illustrate, if whites are deterred from adopting African American children, in part, because they do not have African American friends or do not believe they can adequately expose their children to African American culture, they should also be concerned that they will not be able to expose a Guatemalan or Cambodian child to her respective culture or to interact with other Guatemalans or Cambodians.

Yet, whites seeking to adopt internationally are either unaware of the similarities or choose to ignore them.<sup>241</sup> One reason may be that some Americans believe that race is of little or no significance to persons of Asian or Latin American descent. They believe that Asian Americans and Latinos (at least lighter-skinned Latinos) do not experience discrimination, and that non-African American minorities can more easily assimilate into white communities.<sup>242</sup> As one Italian American couple considering adopting a Salvadorian baby was told, "race would not be an issue," and some whites request an Asian or Latino child because they believe that the child "will fit into [their] community with no problem."<sup>243</sup> Some commentators assert that race is relatively fluid for members of non-African American minority groups.<sup>244</sup> For example,

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<sup>239</sup> BARTHOLET, *supra* note 36, at 156-58 (summarizing arguments); Leslie Doty Hollingsworth, *International Adoption Among Families in the U.S.: Considerations of Social Justice*, 48 SOC. WORK 209, 209 (arguing that international adoption interferes with children's rights to national, cultural, ethnic, and family of origin knowledge and access); Perry, *supra* note 71, at 268-69 (summarizing arguments).

<sup>240</sup> One scholar has noted the irony of not placing African American children in transracial homes because it might harm them, and apparently driving prospective adoptive parents to adopt nonwhite, foreign-born children even though they "will be subjected to the same potential risks the domestic children were being shielded from." Rosettenstein, *supra* note 201, at 149.

<sup>241</sup> Beth Brophy, *The Unhappy Politics of Interracial Adoption*, U.S. NEWS & WORLD REP., Nov. 13, 1989, at 72 (noting that not all adoptions between races are as controversial as ones involving African American children and that concern for preservation of cultural identity is far less often heard in case of foreign-born babies).

<sup>242</sup> See YANCEY, *supra* note 33 (arguing that Asian Americans and Latinos will soon become white and assimilate into white society, and thus, American society will be divided into Black and nonblack, rather than white and nonwhite); *supra* note 41 and accompanying text (discussing white parents' beliefs that it is easier to bring Asian or Latino children into their communities).

<sup>243</sup> Hall & Steinberg, *supra* note 41.

<sup>244</sup> *Id.*; see YANCEY, *supra* note 33, at 3, 15 (arguing that Latinos and Asian Americans

some Latinos, Asian Americans, and Native Americans identify as white,<sup>245</sup> and the children of Caucasian-Hispanic or Caucasian-Asian marriages are sometimes identified not as of mixed race, but as white.<sup>246</sup> In contrast, children who have one African American parent are identified as African American or biracial, regardless of the race of the other parent. These differences notwithstanding, biases against Native Americans and persons of Asian and Latin American descent do exist, and scholars tracing the history of discrimination against these groups argue that it is no less virulent than that against African Americans.<sup>247</sup> Further, as noted above, nonwhite foreign adoptees do experience racism and discrimination. Thus, whites adopting children from Latin America or Asia should expect that issues of racial identity and discrimination will arise.

Another reason why Americans may have greater concerns about adopting an African American child than they do about adopting a Chinese, Indian, or Guatemalan child, for example, is the strong opposition of the NABSW to whites' adoption of African American children. However, many sending countries have expressed opposition to international adoption, arguing that it is another form of imperialism where Westerners rob them of their children.<sup>248</sup> Fear that they might be

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will become white by 2050; they will acquire white racial identity).

<sup>245</sup> See YANCEY, *supra* note 33, at 127 (noting that as of 1992, 95% of Latinos self-identified as white); Freundlich & Lieberthal, *supra* note 235 (noting that 21% of Korean adults adopted by white Americans describe themselves as American/European or Caucasian).

<sup>246</sup> See Duncan & Trejo, *supra* note 32, at 4, 21.

<sup>247</sup> See generally Robert Chang, *Toward an Asian American Legal Scholarship*, 81 CAL. L. REV. 1241, 1247 (1993) (describing discrimination against Asian Americans); Richard Delgado, *Locating Latinos in the Field of Civil Rights*, 83 TEX. L. REV. 489, 489-90 (2004) (discussing anti-Latino sentiment); Ian Haney-Lopez, *Race, Ethnicity, Erasure*, 85 CAL. L. REV. 1143, 1192-93 (1997) (discussing historical discrimination against Mexican Americans, including de jure segregation and lynching); Kevin Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 109 (1997); Juan Perea, *The Black/White Binary Paradigm of Race*, 85 CAL. L. REV. 1213, 1253 (1997) (disputing claims that racism against Latinos is less virulent than that experienced by African Americans). These works are part of Latino Critical Race Theory and Asian American legal scholarship.

<sup>248</sup> ALTSTEIN & SIMON, *supra* note 70, at 2, 5 ("[W]hat the West has generally viewed as charitable, humane and even noble behavior, developing countries have come to define as imperialistic, self-serving and a return to a form of colonialism in which whites exploit and steal natural resources."); JANE ROWE, *Perspectives on Adoption*, in ADOPTION: INTERNATIONAL PERSPECTIVES 3, 6 (Euthymia Hibbs ed., 1991) (noting that "[f]irst you want our labor and raw materials; now you want our children" is a natural response from countries struggling to survive); Bartholet, *supra* note 121, at 182 (acknowledging that intercountry adoption can be understood as ultimate form of exploitation because

losing their children to wealthier nations<sup>249</sup> has led all of the sending nations to favor domestic adoptions over international adoptions.<sup>250</sup> Many countries, including Russia, India, Korea, and China, have reduced the number of children they make available for international adoption.<sup>251</sup> Many of the sending nations participating in the conference leading to the Hague Convention on Intercountry Adoption<sup>252</sup> expressed opposition to international adoption and favored making the process more burdensome for adoptive parents.<sup>253</sup> Similarly, various human rights and children's rights organizations have advocated for the elimination of international adoption.<sup>254</sup> Citizens in the sending nations have also expressed disapproval of international adoption. For example, Americans believed to be visiting Guatemala to adopt a child have been condemned in the same manner as whites who have adopted African American children.<sup>255</sup>

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privileged classes in industrialized nations adopt children of least privileged groups in poorest nations); Perry, *supra* note 71, at 268 ("Wealthy adopters come to poor countries in the wake of wars, earthquakes, and famines and take many healthy children, leaving behind older and disabled children for institutional care.").

<sup>249</sup> ADAM PERTMAN, *ADOPTION NATION* 23 (2000).

<sup>250</sup> See National Council for Adoption, *supra* note 141; see also *supra* notes 137, 140-42 and accompanying text.

<sup>251</sup> See National Council for Adoption, *supra* note 141 ("Many foreign adoption authorities have strong preferences for placing their country's orphaned children with nationals."); see also *supra* notes 140-42 and accompanying text (discussing specific countries).

<sup>252</sup> The United States has not yet ratified the Hague Convention on Intercountry Adoption, but it has passed the implementing legislation. See Intercountry Adoption Act of 2000, 42 U.S.C. § 14901 (2000).

<sup>253</sup> Bartholet, *Beyond Biology*, *supra* note 150, at 12.

<sup>254</sup> ROWE, *supra* note 245, at 12 (citing "danger that adoption can be used as an easier or cheaper alternative to providing services to children in their own homes"); Bartholet, *Beyond Biology*, *supra* note 150, at 12 (noting that child advocates argue that international adoption leads to child trafficking and harms orphaned and abandoned children who are left behind — the ones who not adopted); Perry, *supra* note 71, at 268 (stating that intercountry adoption may retard growth of child welfare services in sending countries); Vonk et al., *supra* note 96, at 496 (same). English Baroness Lady Nicholson, former president of Save the Children, has tried to end international adoption among countries in the European Union, demanding that Romania and Bulgaria ban international adoptions of their children as a prerequisite to admission to the European Union. See Diane B. Kunz, Remarks at the New York Law School Intercountry Adoption Conference (May 21, 2004).

<sup>255</sup> Long, *supra* note 166, at A1 (discussing American woman beaten in Guatemala); *id.* (discussing rumors in Latin America in early 1990s that Americans were buying or stealing babies for bogus adoptions to use them as organ donors for "spare parts," prostitutes, and household servants); *Foreigners Attacked in Guatemala*, N.Y. TIMES, Apr. 5, 1994, at A10 ("Fed by rumors that Americans were coming to kidnap children . . . an extraordinary wave of panic has swept Guatemala over the last month. Tourists and other foreigners have been

Interestingly, whites deterred from adopting African American children, in part, because of opposition from the NABSW and its sympathizers, have not been similarly dissuaded by the opposition of the sending countries from adopting internationally. Even though the media has publicized the concerns of the sending nations,<sup>256</sup> these concerns might be easier to disregard because the countries are so geographically distant. However, some Latinos and Asian Americans in the United States, although not as vocal as the NABSW, have expressed opposition to whites' adoption of children of Asian or Latin American descent (foreign- or U.S.-born) in the same manner that some African Americans have opposed transracial adoption of African American children.<sup>257</sup> Further, although the Native American community successfully lobbied Congress to pass the Indian Child Welfare Act,<sup>258</sup> which requires that Native American children be placed in Native American homes,<sup>259</sup> whites' interest in adopting Native American children has not waned. Whites still prefer to adopt Native American children over African American children (even if the process is difficult) as shown by their willingness to pay 30% or more to adopt a Native American child as opposed to an African American child.<sup>260</sup>

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attacked by mobs in at least three recent incidents . . ."); Interview with Olga Dyuzheva, *supra* note 99 (stating that many Russians, including orphanage staff, believe that Americans are buying Russian children for their organs); American Adoptions, *supra* note 98 (warning persons considering adopting internationally that American citizens are not well-received in many countries).

<sup>256</sup> See 60 Minutes, *supra* note 154. Many scholars are aware of the arguments that international adoptions are a potential form of imperialism. Cf. Ann Hornaday, *The Baby Chase: Women on the Verge in a Foreign Land*, WASH. POST, Oct. 3, 2003, at C5 (discussing film about American women in Latin American country to adopt). Yet, most legal articles quickly dismiss charges of imperialism and focus primarily on increasing access for white Americans. See Lilith, *supra* note 100, at 258-59. Similarly, United States scholars have dismissed or downplayed the problem of child trafficking, arguing that children should not be stolen nor bought or sold, but we must see "these evils in perspective" as these "are by no means the worst things that are happening to these children and their birth parents." BARTHOLET, *supra* note 36, at 154-55. But see Perry, *supra* note 147, at 105 (urging advocates of international adoption to address history of colonialism, cultural imperialism, and economic exploitation that lead poor women in poor countries to give their children to privileged women in Western nations).

<sup>257</sup> Hall & Steinberg, *supra* note 41.

<sup>258</sup> 25 U.S.C. § 1901 (1978).

<sup>259</sup> 25 U.S.C. § 1902; 25 U.S.C. § 1915(a) (providing that when placing Native American children, preference shall be given to Native American families).

<sup>260</sup> See *supra* notes 45-53 and accompanying text.

### C. Implicit Preferences

There is another reason why Americans continue to adopt Asian and Latin American children even though such adoptions raise many of the same concerns that transracial adoptions of African American children do: implicit preferences for non-African American children. Although some whites admit to having explicit preferences for non-African American children,<sup>261</sup> even those who do not express such preferences are likely to prefer non-African American children. As noted above, studies have repeatedly shown that most whites hold negative attitudes toward African Americans even when self-reports indicate zero bias. Studies also indicate that most Americans have a strong automatic preference for lighter-skinned persons over darker-skinned persons.<sup>262</sup> Thus, it is likely that Americans have implicit preferences for children from Asia and Latin America, who tend to be lighter-skinned than African American children. Americans' preferences for biracial children, who are often lighter-skinned, as shown by American parents' willingness to pay more to adopt a child who is only half African American than a child who is full African American, is further evidence of their implicit preferences for lighter-skinned children.<sup>263</sup>

Racial preferences, whether conscious or unconscious, do play a role in the decision to adopt. As shown above, such preferences might be, to some degree, the result of race-matching policies that effectively prohibited whites from adopting African American children. These legal barriers confirmed and contributed to social opposition and disapproval of such adoptions, even as support for international adoptions was increasing. The historical legal barriers to transracial adoptions of African American children and the lack of such barriers in international adoptions signal that the latter are encouraged while the former are tolerated only as a last resort. The legacy of these legal barriers is still felt today, a decade after Congress prohibited federally funded agencies

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<sup>261</sup> Lewin, *supra* note 49, at A1 (noting that some whites unwilling to adopt African American child express willingness to adopt Hispanic, Native American, or Asian American child — “anything but black”).

<sup>262</sup> Project Implicit, *supra* note 12.

<sup>263</sup> See *supra* notes 51-53 and accompanying text (discussing adoption fees). Some readers may wonder if whites are not adopting African American or biracial children because birth mothers are opposed to placing their children with white families. Although some birth mothers of biracial and African American children state a preference for a biracial or African American family, the majority state that they are “open to any family” or a family “of any race.” See, e.g., Lifetime Adoption Facilitation Ctr., *supra* note 107.

from considering race in adoptive placements. The law must take proactive measures to encourage adoptions of all children, regardless of race. Part III addresses how, after years of creating and encouraging racial preferences in adoption, the law should now act to discourage them.

### III. DISCOURAGING PREFERENCES FOR NON-AFRICAN AMERICAN CHILDREN

Adopting a child is one of the most personal decisions an individual can make. The United States Supreme Court has repeatedly recognized the fundamental rights of parents to raise their children as they see fit without interference from the state.<sup>264</sup> However, although individuals have a fundamental right to procreate, courts have never recognized a fundamental right to adopt.<sup>265</sup> Indeed, the state has an interest in protecting the adoptee, not the prospective adoptive parent. As a creation of the state, adoption is subject to state regulation<sup>266</sup> and persons seeking to adopt are carefully screened and must meet stringent statutory and agency requirements,<sup>267</sup> all in the interests of ensuring that

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<sup>264</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing fundamental rights of parents to control custody and care of their children); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that parents have fundamental right to “establish a home and bring up children”).

<sup>265</sup> See *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995) (“Whatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest.”); see also *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) (“[W]e are constrained to conclude that there is no fundamental right to adopt.”).

<sup>266</sup> *In re Robert Paul P.*, 63 N.Y.2d 233, 237 (1984) (stating that adoption is “solely the creature of, and regulated by, statute law”); cf. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (finding that, unlike natural family, “foster family . . . has its source in state law and contractual arrangements”).

<sup>267</sup> For example, some private agencies work only with heterosexual adoptive parents while others give preferences to married applicants under the age of 40 and those of a particular religious faith, even though these are not state requirements. See NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., *Single Parent Adoption: What You Need to Know* (1994), available at [http://naic.acf.hhs.gov/pubs/f\\_single/f\\_single.pdf](http://naic.acf.hhs.gov/pubs/f_single/f_single.pdf) (discussing rigorous screening process for single adults seeking to adopt and noting that some agencies do not accept unmarried applicants); Adopting.org, Review of Qualification Requirements for Adoptive Parents Webpage, <http://www.adopting.org/pg5b.php> (last visited Feb. 17, 2006); Evan B. Donaldson Adoption Inst., *supra* note 190 (stating that only 60% of adoption agencies accept applications from homosexuals). Indeed, 78% of adopted children in the United States live with two married adoptive parents. Joshua Baker & William Duncan, *MARITAL Preferences in Adoption Law: A 50 State Review*, IMAPP POLICY BRIEF., Feb. 4, 2005, at 1, available at <http://www.marriedebate.com/pdf/iMAPMarriage.adoption.pdf>.

applicants are fit to parent. One criterion should be that prospective adoptive parents not discriminate on the basis of race when selecting their children.

Many Americans subscribe to an antidiscrimination norm. We have laws prohibiting discrimination based on gender, age, or disability, and these laws have arguably created or reflect an egalitarian norm. But the strongest norm is that against discrimination on the basis of race. Society's interest in racial equality is so important that it frequently trumps other societal interests. For example, in the family law context courts have held that race is not a permissible consideration in a custody dispute between parents of different races, even if it is in the child's best interest to reside with a parent of a particular race.<sup>268</sup> Further, racial classifications are subject to the most stringent standard of review: strict scrutiny.<sup>269</sup>

The state has a duty to protect children's best interests.<sup>270</sup> Adoptive parents' preferences for non-African American children harm African American children. As Professor Richard Banks has argued in the context of public agency adoptions, because most persons seeking to adopt are white, preferences for non-African American children significantly reduce the number of potential adoptive parents available to African American children.<sup>271</sup> In the private adoption context, birth mothers of African American and biracial children have fewer adoptive families to choose from and, thus, are forced to be less selective than birth mothers of white children who have a larger pool of applicants seeking to adopt their babies. Thus, African American children might be at greater risk of being placed with "less qualified families" because their mothers have significantly fewer opportunities to find the perfect family for their child. Indeed, commentators have noted that because demand

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<sup>268</sup> See *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."); see also *In re Marriage of Brown*, 480 N.E.2d 246, 248 (Ind. Ct. App. 1985) (upholding "on equal protection grounds that race is not a permissible consideration to be employed by the courts in this context in determining custody"); *Farmer v. Farmer*, 439 N.Y.S.2d 584, 589 (N.Y. Sup. Ct. 1981) (rejecting African American father's argument "that the best interests [of a biracial child] compel award of custody to him because society will perceive [the child] to be black").

<sup>269</sup> *Palmore*, 466 U.S. at 432.

<sup>270</sup> *Id.* at 433 ("The State, of course, has a duty of the highest order to protect the interests of minor children."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) ("Protecting the welfare of children is a paramount State policy.").

<sup>271</sup> Banks, *supra* note 45, at 881.

for African American children is significantly lower than demand for other children, agencies require less stringent qualifications from families seeking to adopt African American children than from those seeking white children.<sup>272</sup> Even if African American children end up in homes comparable to those available to non-African American children, there is a symbolic harm associated with preferences for children of certain races. The mere fact that the pool of prospective adoptive parents available to non-African American children is many times greater than that available to African American children<sup>273</sup> signals that African American children are less desirable.<sup>274</sup> Because adoptive parents' racial preferences are harmful to African American children, the state has a duty to discourage them from acting on such preferences.

Although there is a vast literature condemning race-matching practices, only recently have scholars begun to view adoptive parents' racial preferences as problematic. Before MEPA's enactment, Professor Twila Perry argued that even if agencies stopped race-matching, adoptions would never be colorblind unless children were assigned to adoptive parents without regard to race.<sup>275</sup> A few years later, after MEPA was amended, Professor Richard Banks attacked, as a violation of the Equal Protection Clause, public agencies' practice of allowing and encouraging prospective adoptive parents to indicate their preference for a child of a particular race, thereby excluding entire racial groups of children (usually African American) from consideration.<sup>276</sup> Professor

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<sup>272</sup> Bartholet, *supra* note 54, at 1200 (noting that agencies apply significantly different parental screening criteria to prospective black adoptive parents than they do prospective white adoptive parents).

<sup>273</sup> See Jill Smolowe, *Babies for Export: Despite a Shortage of Adoptable U.S. Infants, Hundreds End Up in Homes Abroad*, TIME, Aug. 22, 1994, at 64 (noting that "there are 80 families waiting for every available white infant, but only five for every biracial baby and less than one for every black infant"); *supra* notes 85-88 and accompanying text (discussing lower demand for African American children).

<sup>274</sup> See Thomas Healy, *Stigmatic Harm and Standing* (Dec. 23, 2005) (unpublished manuscript, on file with author) (discussing how law has at times reinforced stigmatization of certain groups); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (discussing symbolic harm of segregation); *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 549 (1946) (same).

<sup>275</sup> See Twila Perry, *The Transracial Adoption Controversy*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 104 (1993-94).

<sup>276</sup> *Id.* Most adoption agencies ask prospective adoptive parents to select the race of the children they would consider adopting, and parents can be quite specific when selecting the racial and ethnic breakdown of their child. See Williams, *supra* note 111, at 916 (noting that forms allow applicants to choose many combinations — for example, child that is half African American and half Vietnamese, or mix of three or four particular ethnicities or

Banks proposed prohibiting state agencies from considering applicants' racial preferences and instead requiring them to assign children without regard to race.<sup>277</sup> White, prospective adoptive parents could still select or reject a particular child based on race, or any other criteria, but they would have to consider each child individually rather than exclude from consideration an entire racial category of children.<sup>278</sup>

One criticism of Professor Banks' proposal is that it would drive many individuals to adopt internationally where they could choose to only consider children of their preferred race.<sup>279</sup> Even though Congress has not yet implemented Professor Banks' proposal, some Americans are already adopting internationally because of racial preferences. Undeniably, some individuals want a child of the same race as themselves or their partner because they do not want anyone to know that the child is adopted or they want their family to resemble a "normal" biological family.<sup>280</sup> Although this may be evidence of society's obsession with biological children, adoptive parents' preference for same-race children by itself does not necessarily reflect a judgment that children of certain races are more desirable than others. However, the evidence of racial hierarchy in the adoption market suggests that racial biases might be at the root of these preferences for same-race children. Although some whites may want to adopt white children from Russia, for example, because they believe they might be more likely to "fit in" with their family, it is also quite possible that some whites want to adopt only white children because they hold implicit biases against nonwhite children. Whites' desire for white children may be influenced by implicit beliefs that white children are more attractive, more intelligent, and

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racess). Some public agencies have lists of available children classified by race. Thus, applicants who have indicated interest in adopting white children only would never view listings or photos of African American children. In private agencies, if applicants indicate that they will only adopt a white child, their profiles would never be shown to women who will be giving birth to African American or biracial children. See generally Banks, *supra* note 45, at 886-914; Bartholet, *supra* note 54, at 1186-87 ("[A]n initial order of business for most adoption agencies is the separation of children and prospective parents into racial classifications.").

<sup>277</sup> Banks, *supra* note 45, at 943-62. Other scholars have made similar arguments. See FOGG-DAVIS, *supra* note 46, at 11, 78 (arguing that children available for adoption should be randomly assigned to those seeking to become adoptive parents).

<sup>278</sup> Banks, *supra* note 45, at 901.

<sup>279</sup> Bartholet, *supra* note 191, at 2356 (critiquing Banks).

<sup>280</sup> Gabrielle Glaser, *Adoption: The Geopolitics, The Choices*, OREGONIAN, July 4, 2004, at L05 ("The natural tendency is to want a child who looks like you so you don't get obvious stares when you walk down the street.").

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healthier than children of other races. In other words, whites who refuse to adopt nonwhite children might be motivated not only by a desire for children who look like them, but also by unconscious biases against nonwhite children, especially African American children.

Even if we assume that families adopting internationally are not motivated by racial preferences but rather by a desire to find children who might resemble them physically, this justification is not available to the majority of Americans adopting foreign-born children. Most families adopting internationally are also adopting transracially. Sixty-three percent of the children white Americans adopted from other countries in 2003 were not white,<sup>281</sup> and 81% of all foreign-born adoptees in the United States were born in Latin America or Asia.<sup>282</sup> In those cases, it is evident to onlookers that such families are most likely not biologically related. Although a family adopting transracially might have non-race-based reasons for choosing to adopt, for example, a Guatemalan child as opposed to an African American child, the evidence strongly suggests that race plays a role in some, if not many, cases. The law's and society's interest in discouraging adoptive parents from choosing or rejecting children based on race requires that the burden of showing non-race-based reasons for preferring children of certain races be placed on the individuals making these choices. Thus, Congress should use its power to regulate international adoptions<sup>283</sup> and impose a mandatory one-year waiting period on all Americans seeking to adopt internationally so long as there are children who meet their non-race-based criteria (e.g., age, health status, sex) available in the United States. The proposed statute would provide as follows:

It appears that United States citizens' interest in international adoptions is sometimes driven by racial preferences. The United States has an interest in ensuring that its available children are adopted promptly and that all children are valued equally regardless of race. To deter United States citizens from adopting internationally for race-based reasons and to encourage United States citizens to adopt U.S.-born children, agencies are required to wait one year before processing United States citizens' applications

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<sup>281</sup> Davenport, *supra* note 69, at 11.

<sup>282</sup> KREIDER, *supra* note 47, at 12.

<sup>283</sup> Congress's plenary power to determine who is eligible to enter the United States grants it the authority to regulate international adoptions. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 22.2 (3d ed. 1999) ("[T]he power of Congress over the admission of aliens to this country is absolute.").

to adopt internationally unless the applicants show that (1) they have sought to adopt a U.S.-born child of similar age, health status, sex, etc., without regard to race, but have been unsuccessful, or (2) they rebut the presumption that their reasons for seeking to adopt internationally are race-based.

Foreign adoptees' entry into the United States would be contingent on their parents' compliance with the statute.<sup>284</sup>

An unsuccessful attempt to adopt a U.S.-born child would be one in which a family has been waiting for a child of any race for one year or longer, but has not received one.<sup>285</sup> Thus, if an American couple seeking to adopt a child from China or Russia shows that they applied thirteen months ago to adopt a U.S.-born child of any race, but have not received one, nor have they been selected by a birth mother for her soon-to-be-born child, they would immediately be allowed to pursue an international adoption. A family applying to adopt a U.S.-born child without regard to race is unlikely to be adopting based on racial preferences. The family would know that it would likely receive an African American or biracial child because demand for such children is lower than demand for children of other races. In contrast, a family who was offered, but rejected, an African American child because it wanted a child of another race would not be allowed to claim that its attempt to adopt a U.S.-born child was unsuccessful. They, along with families who never applied to adopt a U.S.-born child or who did not show non-race-based reasons for not doing so, would have to wait one year before pursuing an international adoption.

The proposed statute presumes that Americans seeking to adopt internationally while there are U.S.-born children available are motivated, at least in part, by race-based preferences, even if

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<sup>284</sup> Although the statute may penalize the child who is denied entry into the United States as a result of the adoptive parents' acts, it is no different from the current policy of denying entry to adoptees who do not satisfy the United States definition of an "orphan," even after they have been adopted by a United States citizen.

<sup>285</sup> One year is a reasonable period of time because most families seeking to adopt African American children receive one within one year, usually less. *See supra* note 116 and accompanying text. Thus, a family that has not received a child after such time should be able to adopt internationally. A person who has not applied to adopt a U.S.-born child would have to wait 12 months from the time she first sought to adopt a foreign-born child before the agency could even look at her application. To illustrate, if adopting a child from China generally takes 15 months, it would take at least 27 months (12 month wait plus 15 month regular processing time) for an American who did not first apply to adopt a U.S.-born child to adopt a child from China.

unconscious. The presumption could be rebutted only under narrow circumstances, for example, where one of the adoptive parents shares a familial relationship with the child or has already adopted a U.S.-born child without regard to race or where the sending country is at war or in a state of emergency. Thus, an American couple of Russian descent would be able to immediately pursue adoption of a Russian child related to one of them by blood or affinity, such as their grandchild, sibling, niece, or cousin. Admittedly, some individuals want to adopt children who resemble them physically and go to great lengths to create a family that mirrors a biological family.<sup>286</sup> Some families might prefer to adopt children of the same race as themselves because they might be more likely to look like them. However, most persons of the same race or ethnicity do not look alike. Thus, the law should not indulge adoptive parents' preferences for children of the same race as themselves merely because there is a slight possibility that the child might resemble them. In contrast, there is a much greater likelihood of physical resemblance when the adoptee and adoptive parent are blood relatives. Even absent any physical resemblance, which is unlikely when the adoptive parent and child are related by affinity, a familial relationship would be sufficient to rebut the presumption that the parents are seeking to adopt internationally for race-based reasons. The law recognizes the importance of familial ties and has found that extended family members may have constitutionally protected interests in maintaining relationships with minor children.<sup>287</sup> As such, these relationships rebut the presumption that race-based preferences are influencing the adoption decision.

Similarly, a prospective adoptive parent who has already adopted a U.S.-born child without regard to race and is now seeking to adopt internationally is unlikely to be motivated by racial preferences. Thus, she would be found to have rebutted the presumption that her interest in international adoption is based on racial preferences. Consequently, an agency could process her application to adopt a foreign-born child immediately without requiring her to first satisfy the one-year waiting period.

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<sup>286</sup> Americans often search for sperm and egg donors with particular eye colors, hair color and texture, tanning ability, etc. See BARTHOLET, *supra* note 36, at xxiv.

<sup>287</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Moore v. Cleveland*, 431 U.S. 494, 504-05 (1977).

Americans seeking to adopt children orphaned as a result of a national emergency such as the recent tsunami or the genocide taking place in Darfur would also be found to have rebutted the presumption that their reasons for adopting internationally are race-based. Humankind has an interest in ensuring that children are removed from life-threatening situations as soon as possible. As such, Americans seeking to adopt these children would not be required to wait one year or to show that they first attempted to adopt an American child.

This is not an exhaustive list of ways to rebut the proposed presumption that international adoptions are tainted by biases against children of certain races. Congress could determine that there are other circumstances where parents' motivations for adopting internationally are so unlikely to be driven by race-based preferences that they should not be subjected to the one-year waiting period. However, the burden of showing that their reasons for adopting internationally are not based on race would remain with the prospective adoptive parents.

By signaling to prospective adoptive parents that racial preferences are not appropriate considerations in the adoption decision and requiring them to show that their preference for foreign-born children is not motivated by illegitimate racial biases, the law may decrease the likelihood that adoptive parents will allow such biases to influence their decision to adopt. It forces whites seeking to adopt Korean or Indian children over African American children, for example, to question whether their preferences reflect unconscious biases.<sup>288</sup> Many Americans adamantly opposed to race discrimination are unaware of the racial biases and assumptions they have internalized regarding different groups.<sup>289</sup> Having to reflect for twelve months on their reasons for preferring children of certain races might reveal hidden biases. Once individuals become aware of their biases, they can work to change them.

This proposal would not require anyone to adopt children of their non-preferred race. Americans interested in adopting a child of a particular race could simply wait one year to pursue an international adoption.<sup>290</sup> However, the waiting period might lead some families to at

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<sup>288</sup> See *supra* note 61 and accompanying text (discussing unconscious biases).

<sup>289</sup> Lawrence, *supra* note 16, at 322 (arguing that "most of us are unaware of our racism").

<sup>290</sup> Although the number of international adoptions would initially decrease significantly since most Americans would have to wait one year before they could pursue an international adoption, this is a positive consequence of the waiting period. A decrease in Americans' demand for foreign-born children may decrease child trafficking as agents

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least consider adopting the first available American child, a child who, based on the adoption market's current supply and demand, will likely be African American. Some Americans who want a child as soon as possible are unlikely to wait one year to pursue an international adoption when they could get a U.S.-born child much sooner. The implication of not doing so — that they would rather wait a year than risk getting an African American child — might trigger shame or guilt. Fear that the agency staff would assume that their reasons for refusing to adopt the first available U.S.-born child who meets their non-race-based criteria are based on racial biases against African American children might lead some individuals to consider adopting domestically. Further, many Americans have internalized an antidiscrimination norm and believe that racial discrimination, especially against an innocent child, is immoral. Individuals feel compelled to reconcile their behavior with their explicit beliefs — in this case, a belief in racial equality. Thus, adoptive parents would either attempt to find non-race-based reasons for their refusal to adopt African American children or would actually consider adopting African American children.

Once the myths surrounding international and domestic adoptions are debunked, adoptive parents might have no choice but to acknowledge that racial biases might be influencing their preferences. This realization might lead them to alter their behavior to reflect their express belief in racial equality. Persons who are guilted into adopting African American children might not make good parents. However, requiring that persons adopting transracially (either domestically or internationally) satisfy cultural competence training, as some agencies now require, is likely to weed out those persons who are not capable of parenting a child of a different race.

Some Americans considering international adoption have never considered adopting African American children simply because they did not know it was possible. Given the historical opposition, some whites might still believe that they cannot easily adopt African American children or do not know anyone who has done so. Because transracial adoptions of foreign-born children are so much more common than transracial adoptions of African American children, many Americans know someone who has adopted a foreign-born child. Knowing someone who has adopted internationally demystifies the process and

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and scouts would no longer feel the need to pressure women into relinquishing their children to satisfy a much greater demand for infants than the available supply.

provides a support system for the parents and the adopted child. To illustrate, Americans who adopt children from Russia, China, and Korea, among others, find themselves part of a supportive community. There are numerous culture camps, mentoring programs, and support groups for foreign adoptees and their parents.<sup>291</sup> In contrast, fewer Americans know a white family who has adopted an African American child, and there is no similar extensive support network for African American transracial adoptees and their parents.<sup>292</sup>

Some commentators have speculated that whites in the United States are not adopting African American infants because they are not aware that such children are available.<sup>293</sup> This could be true. The media has focused on the positive aspects of international adoptions while highlighting the opposition to transracial adoptions of African American children.<sup>294</sup> Even after the news show *60 Minutes* aired a segment showing that hundreds of African American infants are adopted by foreign white families each year,<sup>295</sup> most Americans are probably not aware that African American infants are ending up in foreign homes.<sup>296</sup>

In addition to the one-year waiting period, Congress should require that adoption agencies provide all persons inquiring about adoption

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<sup>291</sup> Lewin, *supra* note 49, at A1. Although these resources are primarily privately funded, some entities that receive federal funds provide these services for international adoptees and their families. See Gabriella Doob, *Student Mentors Help Korean Adoptees Discover Their Heritage* BROWN DAILY HERALD, Mar. 23, 2004, <http://www.browndailyherald.com> (describing Brown University's Korean Adoptee Mentoring Program, which matches students with adopted Korean children to "talk, engage in activities, and learn about Korean culture").

<sup>292</sup> Lewin, *supra* note 49, at A1.

<sup>293</sup> Davenport, *supra* note 69, at 11.

<sup>294</sup> *Id.*; see also Vonk et al., *supra* note 96, at 499 (stating that United States media has focused on happy families giving their foreign-born adopted infants wonderful life). For example, one Kodak advertisement features a white couple on an airplane plane holding an Asian baby. The caption reads: "The flight takes 12 hours; taking the picture takes 2.5 seconds." Similarly, in an American Express commercial, a couple gets a call informing them that there is a child waiting for them in China. In a television commercial for Weight Watchers, people are eating, laughing, and enjoying life. Periodically, the camera focuses on a white woman feeding her Asian baby. These advertisements feature adoptions of Asian children positively, but there are no similar advertisements featuring happy white parents with African American children. See Abby Ellin, *The Media Business: Advertising: Adoptive Families Get a Starring Role in Several Television and Print Marketing Campaigns*, N.Y. TIMES, Mar. 19, 2003, at C6.

<sup>295</sup> *60 Minutes*, *supra* note 89.

<sup>296</sup> Most participants in the International Society of Family Law Conference in Salt Lake City, Utah, a meeting of family law experts, in July 2005, were not aware that the United States placed African American children in other countries.

with accurate information about both international and domestic adoptions. Specifically, this information should include the medical and social history of the available children; a detailed estimate of the costs and fees of domestic and international adoptions, broken down by country and services; the length of the adoption process; and the risks associated with adoptions from a particular country. To illustrate, agencies would have to disclose the risk that a birth mother or father might revoke consent, the risk that the mother was paid to sell her child, and the likelihood that the sending country or United States might bar such adoptions in the near future. These disclosure requirements could be modeled after other disclosure regimes, such as securities laws, and carry similar penalties for noncompliance or fraud.<sup>297</sup> Accurate information might debunk the myths discussed above and make it harder for Americans to find non-race-based reasons for preferring foreign-born children to African American children.

This Article's proposal might also eliminate some of the remaining opposition to whites' adoption of African American children. When whites first started adopting children from Korea, they were subjected to rude stares, ignorant comments, and opposition from neighbors and family members.<sup>298</sup> Their children were also subjected to racial prejudice. However, as international adoptions of Asian, and more recently, Latin American, children have become more common, especially in certain parts of the country, an increasing number of individuals support, or no longer even notice, families comprised of white parents and Asian or Latin American children.<sup>299</sup> This is because such families are no longer rare. Similarly, as transracial adoptions of African American children increase, more individuals will support such adoptions and, in time, few people will give such families a second glance. Furthermore, the law's statement that race is not an appropriate consideration in the adoption decision might eliminate much of the remaining opposition to whites' adoption of African American children. Over 70% of Americans support transracial adoption of African American children.<sup>300</sup> However, because opponents of transracial adoption are much more vocal than its supporters, many Americans might believe that the majority opposes

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<sup>297</sup> I am grateful to Timothy Glynn for this suggestion.

<sup>298</sup> See *supra* notes 235-36 and accompanying text.

<sup>299</sup> See *supra* notes 41-43 and accompanying text.

<sup>300</sup> Rita Simon, Address at Intercountry Adoption Conference, New York Law School (May 21, 2004) (citing 1991 Gallup poll finding that 71% of Americans support transracial adoption of African American children).

such adoptions. By formally expressing disapproval of adoptions based on racial preferences, the law would publicize the public consensus that most Americans support transracial adoption of African American children.<sup>301</sup>

Racial preferences are present in domestic adoptions as well. Thus, each state has an interest in discouraging not only preferences for foreign-born children, but also preferences for white, Native American, Hispanic, and Asian American children over African American children. Congress lacks the authority to regulate adoption agencies that do not receive federal funds or place foreign-born children. However, states, which license all public and private adoption agencies in their jurisdiction, can condition licensing on compliance with a one-year waiting period before allowing families to select children based on race. Alternatively, states could require that agencies process the applications of families seeking to adopt children without regard to race before processing the applications of parents seeking children of a particular race, thereby discouraging adoptions based on racial preferences.

#### CONCLUSION

Although some Americans do not yet support whites' adoption of African American children as readily as they support their adoption of other nonwhite children, this is changing. Most whites who have adopted African American children in recent years report that race is not an issue most of the time and that, aside from a few isolated incidents, most people are supportive of their multiracial families.<sup>302</sup> Further, there is evidence that an increasing number of whites are interested in adopting African American children. Indeed, 15% of adoptions of African American children from the foster care system in 1998 involved white parents, an increase from past years.<sup>303</sup> Although the United States does not collect statistics on the race of adoptive parents of African American children placed through private agencies, these agencies are increasingly placing African American children in white homes.<sup>304</sup> This

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<sup>301</sup> See Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 1001-03 (2005) (discussing how law creates and publicizes public consensus); Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (arguing that statutes inform public of what people support and do not support).

<sup>302</sup> See Cray, *supra* note 215, at 18.

<sup>303</sup> *Id.*

<sup>304</sup> See notes 89-90 and accompanying text (discussing placement of African American

suggests that the number of whites seeking to adopt African American children is increasing.

All children need permanent homes and all should be valued equally, regardless of race. The law has a responsibility to make this happen. By discouraging adoptive parents from basing decisions to adopt on racial preferences and by supporting all multiracial families,<sup>305</sup> the law can help ensure that African American children have the same opportunities as children of other races to be raised in permanent homes. If the law can successfully change racial preferences, this Article's proposal will have achieved its purpose.<sup>306</sup> Americans should look forward to the day when the demand for an African American child is the same as that for other children.

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children in white homes abroad); *see also* notes 215-216 and accompanying text (discussing private agencies' placement of African American children in white homes).

<sup>305</sup> Just as white families in Canada who have adopted African American children hold seminars to educate themselves about race issues, form support groups for transracial families, and send their children to African American summer camps, the United States can provide and fund similar programs. *See 60 Minutes, supra* note 89; *see also* Glaser, *supra* note 37 (noting that Canadian whites who have adopted African American children have sought out Blacks in Canada to mentor their children).

<sup>306</sup> For example, if a white couple seeking an African American child were told that the wait list is two years, they would be able to pursue an international adoption immediately.