

The Multiethnic Placement Act: Threat to Foster Child

Safety and Wellbeing?

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I. Introduction

Despite the efforts of public officials to reduce the time children spend in foster care, many children live in foster homes for a substantial portion of their childhoods.¹ In order to improve conditions for these children, it is necessary to understand the dynamics of the foster parent/foster child relationship. Findings from behavioral biology and social psychology research are helpful in addressing this need.² This article uses this research to formulate a

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¹ See U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, The AFCARS Report—Preliminary FY 2005 Estimates as of September 2006 at [http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report_1\(2006\)](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report_1(2006)) [hereinafter the AFCARS Report] (Revealing that 37% of the 513,000 children in foster care had spent more than two years in foster care placements, with 15% having spent five years or more.). See also Fred Wulczyn, *Closing the Gap: Are Changing Exit Patterns Reducing the Time African American Children Spend in Foster Care Relative to Caucasian Children*, 25 CHILD. & YOUTH SERVICES REV. 431 (2003); Brenda D. Smith, *After Parental Rights are Terminated: Factors Associated with Exiting Foster Care*, 25 CHILD. & YOUTH SERVICES REV. 965 (2003); Susan P. Kemp & Jami M. Bodonyi, *Beyond Termination: Length of Stay and Predictors of Permanency for Legally Free Children*, 81 CHILD WELFARE 58 (2002).

² See, e.g., Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117 (1997); David J. Herring, *Foster Care Safety and the Kinship Cue of Attitude Similarity*, 7 MINN. J. L. SCI. & TECH. 355 (2006) [hereinafter *Attitude Similarity*]; David J. Herring, *Foster Care Placement: Reducing the Risk of Sibling Incest*, 37 MICH. J. L. REFORM 1145 (2004); David J. Herring, *Child Placement Decisions: The Relevance of Facial Resemblance and Biological Relationships*, 43 JURIMETRICS J. 387 (2003) [hereinafter *Facial Resemblance*].

hypothesis that has implications for the current prohibition on the routine consideration of race in making foster care placement decisions.³ Namely, children placed with non-kin, same-race foster parents are likely to be safer and healthier than children placed with non-kin, different-race foster parents.

Since the 1970's, federal law has been the dominant mechanism for reform of state public child welfare systems.⁴ Although many assert that family matters are primarily subject to state control, Congress has largely taken over state child welfare systems through the exercise of its spending power. For example, if states want to receive federal funds for foster care expenditures, they must comply with a set of federal statutes and regulations that dictate the design of their child welfare systems.⁵ Because every state depends heavily on federal funds to sustain their public child welfare systems, state laws, policies, and practices comply with federal law, at least in form if not in operation.⁶

The construction of federal child welfare law proceeds primarily from permanency planning concepts.⁷ These concepts have their origin in child development theory and social

³ See The Multiethnic Placement Act (MEPA), Pub. L. 103-382, § 551, 108 Stat. 4056 (1994) [hereinafter MEPA] (codified as amended at 42 U.S.C. § 1996b (2000) and 42 U.S.C. § 5115a (1994) (repealed 1996)).

⁴ See *id.*; The Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 671 *et seq.*); The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended at 42 U.S.C. § 671 *et seq.*).

⁵ See, e.g., *id.*; Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637 (1999).

⁶ See *id.*; David J. Herring, *The Adoption and Safe Families Act—Hope and Its Subversion*, 34 FAMILY L.Q. 329, 331-36 (2000).

⁷ See *id.* at 329-31; ANTHONY M. MALUCCIO ET AL., PERMANENCY PLANNING FOR CHILDREN: CONCEPTS AND METHODS 5 (1986).

work policy and practice.⁸ Their goal is to secure child wellbeing by having at least one adult make a permanent commitment to care for and raise each child.⁹

Permanency planning concepts have significant implications for state actors in public child welfare systems. Namely, these actors should be reluctant to disrupt an established parent/child relationship. Intervention in family associations, especially interventions that involve removal of children from parental custody, should occur only when necessary to protect children from serious harm.¹⁰ In addition, if state actors must intervene, the period of intervention should be as short as possible.¹¹ For instance, if they must place a child in foster care, state actors should return the child to parental custody as soon as a parent can provide minimally adequate care. Because this is a strongly favored outcome, state actors should actively provide services to the parent and child so that reunification can occur as soon as possible.¹² However, if state actors determine that a child's parents will be unable to provide minimally adequate care in time to meet the child's developmental needs, they should secure an alternative permanent placement as soon as possible. This could mean an adoption placement, permanent guardianship, or another arrangement that results in an adult making a permanent commitment to care for the child.¹³

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Current federal law and the state laws that parrot it appear well designed to achieve timely permanent placements for children while also securing child safety and health. Federal law requires states to maintain systems that encourage and facilitate the reporting of child maltreatment.¹⁴ Once state actors receive a report, they must investigate and take appropriate action such as providing the subject family with support services or removing a child from parental custody.¹⁵ If they remove a child, state actors must make efforts to return the child to the parents as soon as possible unless the particular family's circumstances are egregious.¹⁶ While making reunification efforts, state actors' paramount concern must be the child's safety and health.¹⁷

In addition, an administrative or judicial officer must review the affected family's situation at least every six months while the child remains out of parental custody.¹⁸ This officer must determine if the state child welfare agency is making reasonable efforts to return the child to the parent and formulating appropriate plans for the child's future.¹⁹ The state must provide a permanency hearing at the time a child has been out of parental custody for twelve months.²⁰ The presiding officer must ensure that the state agency has an appropriate plan to achieve a

¹⁴ 42 U.S.C. § 5106f-1 (2003).

¹⁵ *See* 42 U.S.C. § 671(a)(15) (1994) (calling for states to require public child welfare agencies to make reasonable efforts to maintain or reunify a child's family of origin).

¹⁶ *Id.*

¹⁷ *Id.* § 671(a)(15)(A).

¹⁸ *Id.* § 671(a)(16).

¹⁹ *Id.*

²⁰ *Id.* § 675(5)(c).

timely permanent placement for the child.²¹ Once a child has been in foster care for 15 of the past 22 months, the state agency must petition a court to terminate parental rights unless the child is living with kin, termination would clearly not serve the child's best interests, or the state has failed to make adequate reunification efforts.²² If the court grants the petition, state actors must make efforts to secure a permanent placement for the child, with adoption being the favored outcome.²³

Through this process of case review, the law seeks to secure an affected child's safety and health while also achieving a timely permanent placement for the child. If effectively implemented, this legal scheme should reduce the number of cases in which state actors remove a child from parental custody. Removal would occur only after state actors have provided an affected family with appropriate public services and only when necessary to protect a child from a significant risk of serious harm. In addition, children whom the state must remove from parental custody should exit their temporary foster care placements within 6 to 24 months.²⁴

In light of these expectations, one could reasonably predict a significant reduction in the number of children residing in foster care. Thus, statistics concerning the nation's foster care population constitute one measure of the effectiveness of the federal legal scheme.²⁵

Unfortunately, the foster care statistics reveal the failure of federal child welfare law. The number of children living in foster care has grown steadily during recent years.²⁶ There are

²¹ *Id.*

²² *Id.* § 675(5)(E).

²³ *Id.*

²⁴ *See generally* Gordon, *supra* note 5; Kemp & Bodonyi, *supra* note 1; Smith, *supra* note 1.

²⁵ *See* Kemp & Bodonyi, *supra* note 1.

now well over half a million children living in temporary placements.²⁷ And it should be noted that these placements are not so temporary, with many children spending more than two years in foster care.²⁸

Even the extreme measure of terminating parental rights has not addressed this latter problem. Many children are now legal orphans, having been freed for adoption without the prospect of joining new families anytime soon, if ever.²⁹ Making matters worse is the demographic profile of children who live in foster care. They are disproportionately from poor, minority families.³⁰ Living in poverty within a minority community appears to significantly increase the risk of spending a substantial portion of childhood in foster care.³¹

Governmental actors have failed to adequately support and effectively implement a well-intentioned, well-designed child welfare legal scheme.³² The current reality is that a substantial number of children (especially minority children) spend a significant amount of time in temporary foster care placements. Accordingly, focusing exclusively on family preservation and permanency planning, while ignoring conditions in foster care, eliminates viable opportunities to

²⁶ *Id.*

²⁷ The AFCARS Report, *supra* note 1.

²⁸ *Id.*

²⁹ See Smith, *supra* note 1; Kemp & Bodonyi, *supra* note 1.

³⁰ See Wulczyn, *supra* note 1, at 431, 433; DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

³¹ *Id.*

³² See Gordon, *supra* note 5; Herring, *supra* note 6.

improve children's lives. In order to seize these opportunities, public officials must realize that one aspect of the child welfare system calls out for their attention—foster care.³³

Because many children will spend a great deal of time growing up in foster care, the decision to place a child in a particular foster home is extremely important.³⁴ In fact, a child

³³ Many aspects of the current conditions faced by children in foster care are problematic. After experiencing the trauma of maltreatment and removal from parental custody, these children experience a high level of instability. For example, a recent study found that a cohort of children in foster care from 1990 to 1992 in San Diego experienced an average of more than 4 different placements during an 18 month period, with the number of placements ranging from 1 to 15. James, *infra* note 195, at 195. Another recent study of a cohort of children who had been placed in foster care between 1988 and 1998 in Washington and Oregon found that these children experienced an average of over 6 moves during their time in foster care. See Pecora et al., *infra* note 34 at 26. Over 65% of these children spent more than 3.5 years in care. *Id.* at 27. (This is largely consistent with national data indicating the average stay in foster care is more than 28 months. The AFCARS Report, *supra* note 1.) Almost one-third of the children experienced 10 or more school changes from elementary through high school, with 65% experiencing 7 or more school changes. Pecora et al., *infra* note 34, at 28. The former foster children reported that a significant number of their foster parents had been disengaged or authoritarian, expressing little warmth. *Id.* at 30. Over 32% of the former foster children experienced some form of maltreatment while in care (i.e. sexual abuse, physical abuse, or physical neglect). *Id.* at 31. (This finding is consistent with other studies that have found a high level of maltreatment in foster care. See Benedict et al., *infra* note 125; Chaifetz, *infra* note 125.) The study did find that the former foster children had had access to a high level of education and therapeutic services, but that many of these individuals experienced negative outcomes in terms of mental health, employment, and finances. Pecora et al., *infra* note 34, at 28, 32-39. In light of these findings, there are opportunities to improve conditions in foster care.

³⁴ This is especially true in light of public agency efforts to achieve stable foster care placements. See Peter J. Pecora et al., *Improving Family Foster Care: Findings from the Northwest Foster Care Alumni Study* 25 (2005), available at http://www.casey.org/NR/rdonlyres/4E1E7C77-7624-4260-A253-892C5A6CB9E1/300/nw_alumni_study_full_apr2005.pdf (noting the importance of and recommending placement stability). Because of these efforts, foster children are likely to spend a significant period in a chosen foster home thus increasing the stakes of a foster care placement decision for the placed child. Despite the importance of a foster care placement decision, a team of researchers that investigated agency practices in placing children in specific foster homes characterized the process as exhibiting institutional neglect. See EMILY JEAN MCFADDEN & PATRICIA RYAN, *Allegations of Maltreatment in Family Foster Homes*, in ASSESSING CHILD MALTREATMENT REPORTS 209, 213 (Michael Robin ed., 1991); James A. Rosenthal et al., *A Descriptive Study of Abuse and Neglect in Out-of-Home Placement*, 15 CHILD ABUSE & NEGLECT 249, 251 (1991). Another group of researchers discussed the

placed in a foster home may remain in that home for an extended period, with a significant possibility of remaining there permanently.³⁵

The federal Multiethnic Placement Act (MEPA) significantly affects foster care placement decisions.³⁶ This law prohibits public child welfare agencies from delaying or denying a child's foster care or adoptive placement on the basis of the child's or the prospective parent's race, color, or national origin.³⁷ Public agencies cannot routinely and systematically

realities of the foster care system in an attempt to explain their findings that a significant portion of reports of abuse and neglect in foster care involves serious incidents:

Dynamics in family foster care demonstrate the interaction of multiple causal factors. Low pay leads to shortages in foster homes. These shortages create pressure to license marginal homes. Pressures to place children in the least restrictive setting direct difficult, behaviorally disturbed children into family foster care. Large caseloads mitigate against adequate supportive services by foster care workers. Inevitably, an overstrained family helps out in a crisis. [For example,] perhaps two abused children need emergency short-term placement. As no other placements are available, the short-term placements [sic] extends on. These events combine with stress in the family home—perhaps the husband is laid off at work—to create a tension-filled setting. A foster child reacts to this tension with provoking behavior and is abused. The children are removed, placed in another home, and a similar cycle repeats. The county investigation assigns blame to the foster family. *Id.* at 257-58.

This description identifies the frequent failure of agencies to carefully match children with foster parents and homes. In current practice, the availability of a bed for the child often appears to be the driving force in making placement decisions. The placement process is often haphazard, leaving a great deal of room for improvement. *See id.* For a more extensive discussion of this process, see *Facial Resemblance*, *supra* note 2, at 401-05.

³⁵ It is important to note that a significant portion of these children effectively, if not formally, will be permanently placed with their foster parents. For example, the adoption of foster children by their foster parents is supported by public agencies and has grown dramatically. *See* The AFCARS Report, *supra* note 1, at 11 (reporting that 60% of the children adopted from the public foster care system during fiscal year 2005 were adopted by their foster parents).

³⁶ MEPA, *supra* note 3.

³⁷ *Id.*

consider race in placing a child in a particular foster home. In other words, the law precludes these agencies from pursuing children's best interests through a policy or practice that matches a child's race with that of a foster parent. Only in exceptional circumstances related to an individual child's demonstrated, specific need for a foster parent of a particular race does MEPA allow an agency to consider race.³⁸

A primary purpose of MEPA is to eliminate discrimination that lengthens the time that minority children wait for adoption placements.³⁹ Under the law, agencies cannot delay an adoption placement in order to match the race of the child with that of the adoptive parent. Because there is a shortage of minority adoptive parents,⁴⁰ an expected result of MEPA is an increase in the number of transracial adoptions,⁴¹ and to date, commentators have focused their attention on identifying and weighing the benefits and harms of transracial adoption on minority

³⁸ See U.S. Department of Health and Human Services, Administration for Children and Families, A Guide to the Multiethnic Placement Act of 1994 As Amended by the Interethnic Adoption Provisions of 1996 (1998) [hereinafter "HHS Guide"] at <http://www.acf/hhs.gov/programs/cb/pubs/mepa94/mepachp1.htm>, at 2.

³⁹ See *id.*; Devon Brooks et al., *Adoption and Race: Implementing the Multiethnic Placement Act and the Interethnic Adoption Provisions*, 44 SOC. WORK 167 (1999).

⁴⁰ See Devon Brooks et al., *Preferred Characteristics of Children in Need of Adoption: Is There a Demand for Available Foster Children?*, 76 SOC. SERVICE REV. 575, 577 (2002); Richard P. Barth, *Effects of Age and Race on the Odds of Adoption versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285 (1997).

⁴¹ See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 182 (1999); Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONTANA L. REV. 21, 40-46 (2005); Brooks et al., *supra* note 40, at 577.

children and communities.⁴² As a consequence, they have not addressed the impact of MEPA on foster care placement decisions in any detail.

Findings from behavioral biology and social psychology research that investigates kinship cues and in-group favoritism provide reasons to suspect that a prohibition on the consideration of race affects child safety and wellbeing in foster care.⁴³ This article will examine this research and explore its implications for MEPA's prohibition on the consideration of race in making foster care placement decisions. Part II discusses MEPA's development, current provisions, and implementation. Part III describes the debate surrounding MEPA—a debate primarily focused on transracial adoption placements. Part IV presents a hypothesis concerning MEPA's possible impact on child safety and wellbeing in foster care. Part IV also calls for a test of the hypothesis, explains how such a test may proceed, and discusses possible implications for law and policy addressing race and foster care.

II. The Multiethnic Placement Act

Congress enacted MEPA in 1994 in response to the widespread practice of placing children with foster or adoptive parents of the same race and a separate set of practices that

⁴² See, e.g., BARTHOLET, *supra* note 41; RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B. U. PUB. INT. L.J. 409 (1997); Carla Bradley & Cynthia G. Hawkins-León, *The Transracial Adoption Debate: Counseling and Legal Implications*, 80 J. COUNS. & DEV. 433 (2002); Devon Brooks & Richard P. Barth, *Adult Transracial and Inracial Adoptees: Effects of Race, Gender, Adoptive Family Structure, and Placement History on Adjustment Outcomes*, 69 AM. J. ORTHOPSYCHIATRY 87 (1999).

⁴³ See notes 94-207, *infra* and the accompanying text.

discouraged minority individuals from serving as foster or adoptive parents.⁴⁴ These latter practices contributed to a shortage of minority foster and adoptive parents.⁴⁵ As a result, it was very difficult for many public agencies to place children with same-race foster or adoptive parents. Minority children frequently had to live in a temporary placement while the agency sought a same-race home. This wait could last a considerable time, allowing a child to form a strong bond with a temporary caretaker such as a different-race foster parent. When this occurred, the agency would eventually have to disrupt an established family bond when it secured a same-race placement.⁴⁶ In many other cases, agencies failed to secure a same-race adoptive family, effectively denying affected children a permanent placement.⁴⁷

Some members of Congress believed this situation of delay and failure surrounding the placement of minority children in foster and adoptive homes harmed affected children.⁴⁸ Lawmakers perceived public agencies as failing to promote the best interests of minority children by effectively denying them timely placements in permanent homes. They passed

⁴⁴ See HHS Guide, *supra* note 38, at 1-4; Brooks et al., *supra* note 40.

⁴⁵ See *id.*; HHS Guide, *supra* note 38.

⁴⁶ *Id.* at 3-4.

⁴⁷ See *id.*; Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care*, 29 FAM. L.Q. 121 (1995).

⁴⁸ HHS Guide, *supra* note 38.

MEPA in order to prohibit agencies from using race, color, or national origin⁴⁹ to delay or deny a child's placement in a particular foster or adoptive home.⁵⁰

Originally, MEPA expressly permitted agencies to consider race as one of a number of factors in assessing a child's best interests and the capacity of prospective foster or adoptive parents to meet the child's needs.⁵¹ An agency could not delay or deny a placement solely on the basis of race, but in making a placement decision an agency could routinely consider race as one relevant factor among many. In 1996, Congress amended this provision of MEPA.⁵² The current version of MEPA prohibits agencies from routinely considering race as one of many factors relevant to a placement decision.⁵³

The Administration of Children and Families of the United States Department of Health and Human Services has issued a guide to MEPA.⁵⁴ Federal officials intend the guide to "assist

⁴⁹ For purposes of this article, the word "race" stands for the broader statutory phrase "race, color, or national origin."

⁵⁰ MEPA, *supra* note 3; HHS Guide, *supra* note 38. MEPA also requires agencies to make diligent efforts to recruit minority foster and adoptive parents. *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* The HHS Guide states that "on rare occasions, the distinctive needs of an individual child may warrant the consideration of the child's race, color, or national origin." The Guide makes it clear that the use of racial or ethnic factors is permitted only in "exceptional circumstances where the special or distinctive needs of a child require it and where those needs can be documented or substantiated."

⁵⁴ HHS Guide, *supra* note 38.

states and child welfare agencies in their efforts to comply with the new federal mandates concerning the role of race, color, and national origin in foster care and adoptive placements.”⁵⁵

In the guide, federal officials present their view of foster care placement practices prior to the enactment of MEPA. They note that public agencies had generally favored placing children with families of the same race. These agencies had considered transracial placements as a last resort, acceptable only in unusual circumstances.⁵⁶

Federal officials also articulate their view of the reasoning used by agencies to justify the race matching approach. Agency officials believe that children have special needs because of their immutable racial characteristics, as well as because of their cultural experiences.⁵⁷ Agency officials also believe that agencies should place children with adult caretakers who can fully address these race-based needs.⁵⁸ Federal officials conclude their description of the rationale for race matching,

Just as it was assumed that most prospective parents want children who resemble them, it was assumed that children would be uncomfortable in an adoptive family that did not have a similar racial or ethnic heritage. It was alleged that children raised in racially or ethnically matched families would more easily develop self esteem and a strong racial identity, and that minority children would have the best opportunity to learn the skills needed to cope with racism they were likely to encounter as they grew up in American society.⁵⁹

⁵⁵ *Id.* at 1. State officials have a significant incentive to comply with MEPA because the law provides for the withholding of federal funds and the right of any aggrieved individual to seek relief in federal court against a state or other entity alleged to be in violation. MEPA, *supra* note 3; HHS Guide, *supra* note 38.

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Apparently child welfare agencies had assumed that their race matching policies and practices complied with federal law. Federal officials challenge this assumption, asserting that both the Constitution and Title VI of the Civil Rights Act bar states and publicly-funded entities from discriminatory practices such as systematically placing children in racially matched foster care and adoptive homes.⁶⁰ In their view, MEPA simply makes it clear that such placement practices are to be reviewed under a strict scrutiny standard.⁶¹ Therefore, a state must have a compelling interest that it is pursuing through race matching.⁶² In addition, the policy and practice of race matching must be narrowly tailored to achieve the compelling interest.⁶³ Therefore, a state agency cannot simply assume that every child's best interests (arguably a compelling state interest) call for a same-race placement.⁶⁴ In other words, race matching cannot be a routine practice. In the view of federal officials, routine race matching has always been illegal and MEPA clarifies this point.⁶⁵ The federal guide concludes its discussion of the law by stating that MEPA,

encourages child welfare workers to make decisions on the basis of individualized needs of each child, and renders suspect any placement decision based on stereotypical thinking or untested generalizations about what children need. From

⁶⁰ *Id.* at 4-5.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* Federal officials acknowledge that some courts had struggled with this issue and had evaluated some racial classifications with less than strict scrutiny if public agencies intended to promote diversity or remedy the effect of historic discrimination. However, in the view of federal officials, the United States Supreme Court has applied the strict scrutiny standard to all racial classifications, even those that are allegedly benign. *Id.*

now on, it should be clear that any use of race, color, or ethnicity is subject to the strict scrutiny standard of review, and that the use of racial or ethnic factors is permitted, only in exceptional circumstances where the special or distinctive needs of a child require it and where those needs can be documented or substantiated.⁶⁶

As to enforcement, federal officials note that MEPA authorizes the United States Department of Health and Human Services to impose Title I fiscal penalties and Title IV-E graduated financial penalties on offending states.⁶⁷ In addition, MEPA expressly authorizes private individuals who are adversely affected by a violation of the law to seek injunctive relief, monetary damages, and attorneys' fees in federal court.⁶⁸ State officials are likely to view the financial implications of these enforcement mechanisms as significant incentives to comply with MEPA.⁶⁹

III. The MEPA Debate

In the federal guide to MEPA, federal officials expressly acknowledge that their views are controversial and that they cannot resolve the debate surrounding MEPA.⁷⁰ In beginning their discussion of this debate, federal officials identify two primary concerns Congress addressed in passing MEPA. First, Congress was concerned about reports that child welfare agencies were removing minority children from stable transracial foster homes in order to place

⁶⁶ *Id.* at chapter 3, page 2.

⁶⁷ *Id.* at chapter 2, pages 6-7; MEPA, *supra* note 3.

⁶⁸ *Id.*

⁶⁹ *See* HHS Guide, *supra* note 38, at chapter 2, pages 5-7.

⁷⁰ *Id.* at 1.

them with someone of the same race whom the children had never met.⁷¹ Second, Congress was concerned with reports of child welfare agencies denying minority children timely adoptive placements because of their prolonged efforts to find race-matched adoptive homes.⁷²

In light of these congressional concerns, federal officials' discussion of the controversy surrounding MEPA primarily focuses on achieving timely permanent placements. In fact, their discussion focuses almost exclusively on adoption. Although the guide alludes to the insistence of proponents of race matching policies that agencies recruit a diverse pool of both foster and adoptive parents (an issue that federal officials believe MEPA addresses),⁷³ the remainder of the discussion emphasizes adoption placements.⁷⁴ In presenting their view of the controversy, federal officials assert the superiority of adoption by referring to studies that indicate that adopted children perform better on most outcome measures than do children who remain in foster care.⁷⁵

Federal officials then discuss the desirability of transracial adoption. Initially, they note that critics of racial matching assert that no credible evidence supports the claim that transracial adoption is harmful to children's self-esteem, sense of racial identity, or ability to cope with racism.⁷⁶ Federal officials themselves then assert that transracial adoptees do as well as same-

⁷¹ *Id.* at chapter 3, page 1.

⁷² *Id.* The guide notes that some agencies required specific waiting periods during which they would search for a same race placement or required caseworkers to justify a transracial placement.

⁷³ *Id.* at 4.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

race adoptees in these areas, developing a positive sense of racial identity and having higher educational attainments.⁷⁷ They conclude the discussion on a positive note concerning race relations,

There are some differences that manifest themselves over time between same-race and transracial adoptive families. Among these is that transracial adoptees have a more positive attitude about relations with whites, are more comfortable in integrated and multiethnic settings, and do not consider race as basic to their self-understanding as do most same-race adoptees.⁷⁸

Federal officials perceive and embrace transracial adoption as an effective mechanism for achieving a color-blind society.

Commentators who support the consideration of race in making placement decisions disagree with federal officials' views and conclusions.⁷⁹ They also focus almost entirely on permanent placements, especially the issues surrounding transracial adoptions.⁸⁰ These commentators raise methodological and analytical questions about studies that indicate that transracial adoptees do not suffer developmental harm and turmoil, especially in relation to their racial identity and sense of belonging.⁸¹ These opponents of transracial adoption also raise the

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Bradley & Hawkins-León, *supra* note 42; Brooks et al., *supra* note 39; Howe, *supra* note 42; Twila L. Perry, *Power, Possibility and Choice: The Racial Identity of Transracially Adopted Children*, 9 MICH. J. RACE & L. 215 (2003); Ruth McRoy, *Expedited Permanency, Implications for African-American Children and Families*, 12 VA. J. SOC. POL'Y & L. 475 (2005); Margaret F. Brinig, *The Child's Best Interests: A Neglected Perspective on Interracial Intimacies*, 117 HARV. L. REV. 2129 (2004).

⁸⁰ See, e.g., Brooks et al., *supra* note 39 (mentioning foster care, but primarily as a complicating factor in achieving adoption); Howe, *supra* note 42; McRoy, *supra* note 79.

⁸¹ See Bradley & Hawkins-León, *supra* note 42, at 434-36; Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The PEW Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21, 42 (2005).

prospect of harm to minority communities posed by transracial adoption.⁸² The majority, often using the power of the state, devalues minority parents and communities, removing their children and “saving” them through placement in a majority family.⁸³ In the past, the National Association of Black Social Workers has characterized this as “cultural genocide.”⁸⁴

Because both sides in the debate surrounding MEPA focus on adoption policy, they largely ignore foster care. Both proponents and critics of race matching simply demonize foster care in passing.⁸⁵ Foster care placements do harm, result in worse outcomes for children, and are to be limited in duration as much as possible.⁸⁶

However, as discussed previously, numerous children spend a substantial portion of their childhood living in a foster home. For all intents and purposes, the foster home is their childhood home, and the foster family is their family. This is the reality of the current public child welfare system—a system that affects a disproportionate number of minority children.⁸⁷

Several leading social work scholars have noted that the debate surrounding MEPA has focused on transracial adoption despite the fact that MEPA regulates foster care placement decisions as much as adoption decisions.⁸⁸ These scholars view transracial adoption as a mere

⁸² See Howe, *supra* note 42; ROBERTS, *supra* note 30.

⁸³ *Id.*; Howe, *supra* note 42.

⁸⁴ ROBERTS, *supra* note 30, at 246-48.

⁸⁵ See, e.g., KENNEDY, *supra* note 42; Brinig, *supra* note 79. See also Ramsey, *supra* note 81, at 39-44.

⁸⁶ *Id.* at 42.

⁸⁷ See *supra* notes 26-34 and accompanying text.

⁸⁸ See Mark E. Courtney, *The Politics and Realities of Transracial Adoption*, 76 CHILD WELFARE 749 (1997); Brooks et al., *supra* note 40.

distraction for child welfare officials who are attempting to secure child safety, wellbeing, and permanency.⁸⁹ There are not nearly enough white adoptive parents who would seriously pursue the adoption of minority children living in foster care.⁹⁰ Therefore, transracial adoption is unlikely to be an effective mechanism for addressing the needs of these children.⁹¹ And all the energy and effort expended in pursuing or resisting transracial adoption only diminishes the resources available to effectively address the situation of these children and their families.⁹² For example, public officials could be much more effective if they emphasized family support and preservation programs, family reunification efforts, kinship care placements and support, and foster care conditions and support.⁹³

The latter possible area of emphasis raises the prospect of a close examination of conditions in foster care. Such an examination would properly include an inquiry into the impact of MEPA on foster care placement decisions shortly after a child is removed from parental custody. Namely, how does the prohibition on the consideration of race at this point in a case affect child safety and wellbeing in foster care? More specifically, does the failure to consider race contribute to securing child safety and wellbeing? Conversely, would a consideration of race lower the risk of harm faced by foster children? Raising such questions may provide a basis for formulating testable hypotheses that could eventually contribute to the improvement of

⁸⁹ See Courtney, *supra* note 88.

⁹⁰ See *id.*; Brooks et al., *supra* note 40; Barth, *supra* note 40.

⁹¹ Courtney, *supra* note 88.

⁹² *Id.*

⁹³ *Id.*

conditions in foster care. In the next section, this article uses scientific research to formulate one such hypothesis.

IV. MEPA and Foster Care Placement Decisions: The Formulation of a Hypothesis

Research in the fields of behavioral biology and social psychology provides a basis for the formulation of a hypothesis concerning race and foster care placements.⁹⁴ Namely, children are likely to experience less maltreatment and receive more favorable treatment in non-kin, same-race foster placements than in non-kin, different-race foster placements.⁹⁵

There are two primary lines of research that support this hypothesis. The first is behavioral biology research addressing kinship cues.⁹⁶ The second is social psychology research examining in-group favoritism.⁹⁷ The behavioral biology line of research arises from evolutionary theory and the concept of inclusive fitness.⁹⁸ Individuals who are biologically related share a significant amount of genetic material that distinguishes them from other members of their species.⁹⁹ As a result, an individual can increase the amount of his or her

⁹⁴ See, e.g., *Attitude Similarity*, *supra* note 2, at 388-90.

⁹⁵ *Id.*

⁹⁶ See, e.g., Steven M. Platek et al., *Reactions to Children's Faces: Resemblance Affects Males More than Females*, 23 *EVOLUTION & HUM. BEHAV.* 159 (2002); Irene Bevc & Irwin Silverman, *Early Separation and Sibling Incest: A Test of the Revised Westermarck Theory*, 21 *EVOLUTION & HUM. BEHAV.* 151 (2000); Justin H. Park & Mark Schaller, *Does Attitude Similarity Serve as a Heuristic Cue for Kinship?*, 26 *EVOLUTION & HUM. BEHAV.* 158 (2004).

⁹⁷ See *infra* notes 138-70 and accompanying text.

⁹⁸ See ROBERT TRIVERS, *SOCIAL EVOLUTION* 109-44 (1985).

⁹⁹ *Id.*

genetic material that passes on to future generations not only through his or her own reproductive success, but also through the reproductive success of kin.¹⁰⁰ In other words, an individual who possesses a behavioral trait or inclination to assist kin in achieving reproductive success will be more likely to maximize the amount of his or her genetic material present in future generations. Accordingly, there has been and is significant natural selection pressure to possess the trait of kinship altruism.¹⁰¹ In the end, an individual is likely to favor members of his or her kin group, providing them with beneficial treatment that increases their reproductive success directly and his or her reproductive success indirectly.¹⁰²

A hypothetical may help to illustrate this point. [Consider illustration with life and death situation (e.g. drowning)—sacrifice uncle’s life for nephew’s.] An individual has a twenty-two-year-old nephew who is having great difficulty in securing employment. Although this individual regularly refuses to use his professional connections to help young adults find a job, he makes a series of phone calls on behalf of his nephew. Even though he does not know his nephew well, he vouches for his intelligence and desire to work hard. In doing this, he risks losing credibility with those with whom he works and conducts business—a loss that may subsequently diminish his direct reproductive success. But he also provides potentially substantial benefits to his nephew that may subsequently enhance his nephew’s reproductive success. Because the uncle shares approximately 25 percent of his genetic material with his

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* Justin H. Park et al., *The Psychology of Human Kin Recognition: Heuristic Mechanisms and Their Implications* (2006) (Paper on file with the author p. 22-25).

nephew,¹⁰³ the uncle may increase his own reproductive success by favoring and assisting his nephew in this way. If the nephew is more successful in producing children who possess some of the uncle's genetic material, the uncle will realize benefits in terms of his own reproductive success. These potential benefits may outweigh the possible diminution of the uncle's direct reproductive success.¹⁰⁴

Research on animal behavior has found a tendency to favor kin.¹⁰⁵ Research on human behavior has also found this tendency.¹⁰⁶

In order for an individual to treat favorably others who are biologically related, the individual must have the capacity to recognize kin. Kinship cues serve this function, constituting cognitive heuristic mechanisms for the recognition of kin that often operate at an unconscious level.¹⁰⁷

¹⁰³ See DAVID J. BULLER, ADAPTING MINDS 351-55 (2005).

¹⁰⁴ See Trivers, *supra* note 98, at 113-14. Robert Trivers presents this concept in mathematical form by asserting that an individual tends to provide benefits to another if the indirect benefit to the donor's reproductive success (B) multiplied by the degrees of relatedness (r) (25% in the example in the text) is greater than the direct cost to the donor's reproductive success (C)— $Br > C$.

¹⁰⁵ See *id.*; DAVID J. C. FLETCHER & CHARLES D. MICHENER, KIN RECOGNITION IN ANIMALS (1987); Paul W. Sherman, *Nepotism and the Evolution of Alarm Calls*, 197 SCIENCE 1246 (1977).

¹⁰⁶ See Eugene Burnstein, Christian Crandall & Shinobu Kitayama, *Some Neo-Darwinian Decision Rules for Altruism: Weighing Cues for Inclusive Fitness as a Function of the Biological Importance of the Decision*, 67 J. PERSONALITY & SOC. PSYCHOL. 773 (1994); Martin Daly, Catherine Salmon & Margo Wilson, *Kinship: The Conceptual Hole in Psychological Studies of Social Cognition and Close Relationships*, in EVOLUTIONARY SOC. PSYCHOL. 265 (Jeffrey A. Simpson & Douglas T. Kenrick eds., 1997); Daniel J. Kruger, *Evolution and Altruism: Combining Psychological Mediators with Naturally Selected Tendencies*, 24 EVOLUTION & HUM. BEHAV. 118 (2003); Park & Schaller, *supra* note 96.

¹⁰⁷ *Id.*

Behavioral biology researchers have identified several kinship cues such as facial resemblance,¹⁰⁸ attitude similarity,¹⁰⁹ odor,¹¹⁰ and co-residence during early childhood.¹¹¹ These researchers have also explored the operation of kinship cues and the inclination to provide beneficial treatment to kin.¹¹² For example, researchers examining facial resemblance as a kinship cue have conducted a series of studies using arrays of photographs of children's faces that include a photograph constructed by morphing a child's face with that of the adult subject.¹¹³ The results of these studies indicate that adult subjects strongly favor a child who shares their facial features.¹¹⁴

Some of these researchers have also found that this inclination is stronger in men than in women.¹¹⁵ The researchers note that men face a higher degree of uncertainty surrounding their biological relationship to a particular child, and therefore, an increased risk of misdirected parental investment. In light of this paternity uncertainty, the researchers speculate that men rely

¹⁰⁸ See Platek et al., *supra* note 96; Lisa M. DeBruine, *Resemblance to Self Increases the Appeal of Child Faces to Both Men and Women*, 25 EVOLUTION & HUM. BEHAV. 142 (2004).

¹⁰⁹ See Park & Schaller, *supra* note 96.

¹¹⁰ See Richard H. Porter & John D. Moore, *Human Kin Recognition by Olfactory Cues*, 27 PHYSIOLOGY & BEHAV. 493 (1981); Glenn E. Weisfeld et al., *Possible Olfaction-based Mechanisms in Human Kin Recognition and Inbreeding Avoidance*, 85 J. EXPERIMENTAL CHILD PSYCHOL. 279 (2003).

¹¹¹ See Bevc & Silverman, *supra* note 96.

¹¹² See, e.g., Platek et al., *supra* note 96; Park & Schaller, *supra* note 96.

¹¹³ See Platek et al., *supra* note 96; DeBruine, *supra* note 108; Steven M. Platek et al., *Reactions to Children's Faces: Males Are More Affected by Resemblance than Females Are, and So Are Their Brains*, 25 EVOLUTION & HUM. BEHAV. 394 (2004).

¹¹⁴ *Id.*; DeBruine, *supra* note 108; Platek et al., *supra* note 96.

¹¹⁵ *Id.*; Platek et al., *supra* note 113.

more heavily on facial resemblance to assure themselves that a particular child is biologically related to them and to identify the child for favorable treatment.¹¹⁶ While the inclination to provide favorable treatment to a child who resembles them is present in women, it is stronger in men.¹¹⁷

Research examining attitude similarity as a kinship cue provides a second example.¹¹⁸ The findings indicate that an individual tends to favor others who share his or her attitudes.¹¹⁹ In a recent study, researchers initially determined the attitudes of subjects as to ten items. They then introduced the subjects to two women through photographs and descriptions of their attitudes on the measured items. The women were comparable in terms of age and physical features. However, one woman shared the attitudes of the subject, while the other did not.¹²⁰ The researchers found that subjects favored the woman who shared their attitudes, exhibiting a significantly stronger inclination to provide beneficial treatment to this woman in comparison to the woman who did not share their attitudes. In addition, through careful design of the study, the researchers determined that the positive feelings evoked by attitude similarity were not simply

¹¹⁶ *Id.*; Platek et al., *supra* note 96.

¹¹⁷ *Id.*; Platek et al., *supra* note 113. *But see* DeBruine, *supra* note 108 questioning the differences between men and women in their reaction to children's facial resemblance.

¹¹⁸ *See* Park & Schaller, *supra* note 96.

¹¹⁹ *Id.* *See also* D. Byrne et al., *The Ubiquitous Relationship: Attitude Similarity and Attraction: A Cross-Cultural Study*, 24 HUM. REL. 201 (1971); Fang Fang Chen & Douglas T. Kenrick, *Repulsion or Attraction? Group Membership and Assumed Attitude Similarity*, 83 J. PERSONALITY & SOC. PSYCHOL. 111 (2002); Milton E. Rosenbaum, *The Repulsion Hypothesis: On the Nondevelopment of Relationships*, 51 J. PERSONALITY & SOC. PSYCHOL. 1156 (1986).

¹²⁰ Park & Schaller, *supra* note 96, at 162-63.

the result of general feelings of pleasantness. Instead, the subjects' reactions to the profiles of the two women arose independently from perceptions of kinship.¹²¹

The researchers also determined that the subjects' favorable reaction to the similar attitude other was largely unconscious.¹²² The subjects did not consciously assess the woman who shared their attitudes as genetically related to them. Attitude similarity is simply a component of an unconscious heuristic mechanism that gives rise to perceptions of kinship and evokes favorable feelings toward the other individual.¹²³ However, it must be noted that it is unclear how powerfully and for how long shared attitudes evoke favorable feelings and possible favorable treatment.¹²⁴

Although researchers need to conduct further studies on the effects of various kinship cues, the research completed to date has potential implications for foster care placement policy. Foster care presents risks for children such as maltreatment and low parental investment.¹²⁵

¹²¹ *Id.* at 164-67.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 167. *See also* Jerry M. Burger et al., *What a Coincidence! The Effects of Incidental Similarity on Compliance*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 35 (2004) (raising the possibility that prosocial behavior evoked by superficial similarities may constitute only a fleeting sense of attraction and that additional research needs to be conducted in order to determine the limits of the effect).

¹²⁵ *See* Anne Case et al., *Educational Attainment of Siblings in Stepfamilies*, 22 EVOLUTION & HUM. BEHAV. 269 (2001) (research findings indicate low parental investment in foster children in comparison to investment in biological children who reside in the same household); Mary I. Benedict et al., *Types and Frequency of Child Maltreatment by Family Foster Care Providers in an Urban Population*, 18 CHILD ABUSE & NEGLECT 577 (1994); Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 7 (1999) (noting high incidences of abuse and neglect within foster care); National Working Group to Improve Child Welfare Data, *Child Maltreatment in Foster Care: Understanding the Data*, CHILD WELFARE LEAGUE OF AMERICA HIGHLIGHTS, October,

Thus, it may be desirable to secure placements in which foster parents are likely to favor the biologically unrelated children in their care.¹²⁶ If so, caseworkers would benefit from having tools that allow them to match a particular foster child with a foster parent who is more likely to favor that child. Kinship cues may constitute one such tool.

For example, by placing a foster child with a foster parent who has similar facial features, a caseworker may evoke unconscious perceptions of kinship and favorable treatment.¹²⁷ (This strategy may be especially effective with foster fathers because men are more influenced by facial resemblance.¹²⁸ This is important because most incidents of child maltreatment in foster care are perpetrated by men.)¹²⁹ Similarly, a caseworker may be able to evoke favorable treatment for a foster child by matching some of the child's attitudes with those of the foster parent.¹³⁰ In summary, child welfare agencies may be able to use knowledge of kinship cues in order to enhance foster child safety and wellbeing.

A possible characteristic that may serve as a rough, partial proxy for facial resemblance and attitude similarity is race.¹³¹ Skin color or tone may be a factor an individual considers in

2002 (asserting that the incidence of maltreatment in care is relatively low, but that it is a significant problem that is difficult to measure).

¹²⁶ It is important to note that this article does not address kinship foster care placements.

¹²⁷ *Facial Resemblance*, *supra* note 2.

¹²⁸ See Platek et al., *supra* note 96; Platek et al., *supra* note 113. *But see* DeBruine, *supra* note 108 (presenting research findings that indicate that men and women are equally affected by perceptions of facial resemblance).

¹²⁹ See James A. Rosenthal et al., *A Descriptive Study of Abuse and Neglect in Out-of-Home Placement*, 15 CHILD ABUSE & NEGLECT 249 (1991).

¹³⁰ *Attitude Similarity*, *supra* note 2.

¹³¹ See *id.*, at 408-09; *Facial Resemblance*, *supra* note 2, at 388-90.

assessing facial similarities. Other facial features that correlate with race may also be relevant to an assessment of similarity.¹³² In addition, some attitudes possessed by both children and adults may correlate with race.¹³³

Of course, race does not invariably indicate facial resemblance or attitude similarity, but on average, individuals who share racial features may be more likely to perceive each other as similar.¹³⁴ Conversely, individuals of different races may be more likely to perceive each other as dissimilar.¹³⁵ The likelihood of these perceptions of similarity and dissimilarity allows one to reasonably speculate that two individuals of different races are less likely to perceive each other as kin than are two individuals of the same race and that two individuals of the same race are more likely to perceive each other as kin than are two individuals of different races.

¹³² See Robert W. Livingston & Marilyn B. Brewer, *What Are We Really Priming? Cue-Based Versus Category-Based Processing of Facial Stimuli*, 82 J. OF PERSONALITY & SOC. PSYCHOL. 5 (2002); Leslie A. Zebrowitz & Joann Montepare, *The Ecological Approach to Person Perception: Evolutionary Roots and Contemporary Offshoots*, in EVOLUTION AND SOC. PSYCHOL. 97 (Mark Schaller et al. eds., 2006).

¹³³ Within American Society, the formation of attitudes that correlate with race may occur relatively early in childhood. See generally Daphne Blunt Bugental, *Acquisition of the Algorithms of Social Life: A Domain-Based Approach*, 126 PSYCHOL. BULL. 187 (2000); Reid Hastie & Nancy Pennington, *The O.J. Simpson Stories: Behavioral Scientists' Reflections on the People of the State of California v. Orenthal James Simpson*, 67 U. COLO. L. REV. 957, 972-74 (1995); Reid Hastie, *Emotions in Jurors' Decisions*, 66 BROOK. L. REV. 991, 996-97 (2001); John M. Broder, *Amid Criticism of Federal Efforts, Charges of Racism Are Lodged*, N.Y. TIMES, Sept. 5, 2005, at A9;; Todd S. Purdum & Marjorie Connelly, *Support for Bush Continues to Drop as More Question His Leadership Skills, Poll Shows*, N.Y. TIMES, Sept. 15, 2005, at A18.

¹³⁴ See generally Zebrowitz & Montepare, *supra* note 132; Livingston & Brewer, *supra* note 132.

¹³⁵ See generally *id.*; Zebrowitz & Montepare, *supra* note 132.

This reasoning provides a foundation for the formation of a hypothesis concerning race and foster care placements.¹³⁶ Because foster parents caring for a child of the same race may be more likely to perceive the child as kin and to provide favorable care, children in non-kin, same-race foster care placements are likely to be safer and healthier than children in non-kin, different-race foster care placements.¹³⁷

The second line of research provides stronger support for this hypothesis. Namely, social psychologists and behavioral biologists have begun to examine the consequences of in-group

¹³⁶ In formulating this hypothesis, it is important to note that there are considerable doubts surrounding the idea that race serves as an independent kinship cue. The characteristics that allow for categorization by race emerged relatively recently in the course of human evolution. See TIMOTHY H. GOLDSMITH & WILLIAM F. ZIMMERMAN, BIOLOGY, EVOLUTION, AND HUMAN NATURE 289-90 (2001). In other words, it is unlikely that individuals possessed racial features in the environment that existed for most of human evolution. Therefore, it is highly unlikely that humans would have developed a cognitive mechanism that relies on racial features in order to identify kin. In addition, research indicates that racial features do not belie or signal significant genetic similarities or differences among individuals. See *id.* Thus, even if differential racial features were present in the evolutionary environment, these features would not relate to genetic material in a way that would support the development of a kinship recognition mechanism.

Despite the likelihood that race does not serve as an independent kinship cue, race may be related to particular kinship cues in a way that influences an individual's perception of others as kin or non-kin. As noted in the text above, the observation of shared racial features may contribute to a perception of facial resemblance and a corresponding perception of kinship. In addition, without essentializing individuals by race, it may be the case that shared racial features signal an increased likelihood of shared attitudes on particular matters. Thus, the observation of shared racial features may contribute to a perception of attitude similarity and a corresponding perception of kinship.

¹³⁷ Kin placements are not included because they are presumably same-race placements and they usually involve an actual biological relationship. Based on behavioral biology research, one could reasonably hypothesize that children will be safer in kinship placements than in non-kin placements. Child welfare researchers have formulated this hypothesis and have begun testing it. See Jill Duerr Berrick, *Assessing Quality of Care in Kinship and Foster Family Care*, 46 FAMILY RELATIONS 273 (1997); Gary S. Cuddeback, *Kinship Family Foster Care: A Methodological and Substantive Synthesis of Research*, 26 CHILD. & YOUTH SERV. REV. 623 (2004). The results may support the increasing use and prevalence of kinship placements.

favoritism arising from superficial similarities.¹³⁸ Their research indicates that individuals perceive and treat more favorably, at least in the short-term, those with whom they share an attribute.¹³⁹ The shared attribute does not have to be high in heritability or relate in any consistent or strong way with kinship.¹⁴⁰ (In this sense the attribute is considered superficial or arbitrary.) Yet if the attribute is shared with another, and especially if it is relatively rare or unique, it is likely to evoke favorable perceptions and behavior.¹⁴¹

Several experiments provide illustrations of this behavioral tendency. Kerris Oates and Margo Wilson conducted an experiment that initially examined whether surnames operated as a kinship cue.¹⁴² They noted that a kinship cue “can be arbitrary provided that it is statistically associated with relatedness.”¹⁴³ They hypothesized that a shared family surname may operate as a cue of kinship, stating that “people may respond to nominal kinship cues as if they are kin markers, and feel more inclined to help people with the same surname than those with a different surname.”¹⁴⁴

¹³⁸ See Burger et al., *supra* note 124; Kerris Oates & Margo Wilson, *Nominal Kinship Cues Facilitate Altruism*, 269 Proceedings of the Royal Society of London B (2002).

¹³⁹ *Id.*; Burger et al., *supra* note 124.

¹⁴⁰ See *id.*; Oates & Wilson, *supra* note 138.

¹⁴¹ *Id.*; Burger et al., *supra* note 124 (noting that previous work indicates that “incidental similarities often create a sense of association between two people.” *Id.* at 36.

¹⁴² Oates & Wilson, *supra* note 138.

¹⁴³ *Id.* at 105.

¹⁴⁴ *Id.*

Oates and Wilson also examined personal names.¹⁴⁵ They thought it unlikely that a shared first name would operate as a kinship cue in the absence of a shared surname or another cue of kinship.¹⁴⁶ (If individuals share a surname, a shared personal name could be an additional cue of kinship because an infant is often named after another member of the family.) However, Oates and Wilson expected shared personal names to evoke favorable treatment independent of surnames because “almost any arbitrary marker shared in common is effective in facilitating favoritism toward in-group members over out-group members.”¹⁴⁷

In summary, Oates and Wilson hypothesized that individuals would be more likely to provide assistance to another who shares both their surname and personal name in comparison to another who shares neither of their names.¹⁴⁸ In addition, if shared names serve primarily as kinship cues, Oates and Wilson expected individuals to be significantly more likely to provide assistance to another who shares only their surname in comparison to another who shares only their personal name.¹⁴⁹ However, if a shared name serves more as an arbitrary marker that facilitates in-group favoritism, the experiment would not find a significant difference between shared surnames and shared first names.¹⁵⁰ Finally, Oates and Wilson expected individuals who share unique or relatively unusual names to be more likely to provide assistance than those who

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 105.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 106.

share relatively common names because unusual names would send a stronger signal of kinship or constitute a more powerful in-group marker.¹⁵¹

In order to test these hypotheses, Oates and Wilson sent e-mail messages to 2,961 valid North American addresses. The researchers varied the name of the e-mail addressee and the e-mail sender so that the addressees could receive a message from a sender who shared both their surname and first name, only their surname, only their first name, or neither name. The names used for both senders and addressees fell within two categories—(1) names that are relatively prevalent in the U.S. name census, and (2) names that are less prevalent in the name census, but that are not rare.¹⁵²

Each addressee received a standard message that requested assistance. More specifically, the sender's message asked the addressee to identify his or her city's sports team mascot(s) and its date of inception. If the addressee replied to the message within two weeks, the researchers considered this a minor act of altruism. If the addressee failed to respond within two weeks, the researchers considered this a lack of assistance and an absence of altruism.¹⁵³

Based on the results of the experiment, the researchers found that sharing less prevalent names elicited a higher response than sharing more common names.¹⁵⁴ In addition, when both names were identical there were significantly more e-mail replies than when neither name was the same and when only one name was the same.¹⁵⁵ Overall, there was no difference in response

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 106-07.

¹⁵⁵ *Id.*

rate when the addressee and the sender shared only a surname and when they shared only a first name.¹⁵⁶ However, if the researchers considered only less prevalent names (for which a shared surname was more likely to be perceived as indicating kinship), the response rate for a shared surname was significantly higher than for a shared first name.¹⁵⁷ Nonetheless, a shared first name elicited more responses than no shared names.¹⁵⁸ Finally, the researchers noted that women's response rate was significantly higher than that for men, especially when the sender and the addressee shared less prevalent names. For women, the response rate was 26.6% when they shared both names, 12.5% when they shared a last name, 8.4% when they shared a first name, and 3.3% when they did not share a name. For men, the response rate was 8.3% when they shared both names, 6.3% when they shared a surname, 2.6% when they shared a first name, and 1.5% when they did not share a name.¹⁵⁹

The results indicate that shared names evoke favorable treatment, with the strongest reaction to shared surnames. This latter finding indicates that shared surnames give rise to perceptions of kinship.¹⁶⁰ However, shared first names also evoke favorable treatment. This result indicates either that there is an inclination to view another individual as kin based on similarities that do not logically signal genetic relatedness or that sharing any superficial attribute

¹⁵⁶ *Id.* at 107-08.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 107. The researchers speculated that women in North American societies are more attuned to kinship markers than men in these societies. *Id.* at 108.

¹⁶⁰ *Id.*

with another will give rise to in-group favoritism.¹⁶¹ The first possibility indicates a strong tendency to view non-kin as kin—in other words to make a false-positive error. (Behavioral biology researchers have provided theoretical support for such a tendency in relation to heuristic kinship cues developed under certain evolutionary conditions.¹⁶²) The second possibility indicates a tendency to favor others who share some superficial attribute whether or not it gives rise to perceptions of kinship.¹⁶³

The attribute of race may operate consistent with this second possibility. Even if race does not give rise to perceptions of kinship, it may evoke favorable treatment among those who share a particular racial category.¹⁶⁴ This may be especially true for individuals who are members of a minority race within their community.¹⁶⁵ In this context, race may be analogous to sharing a less prevalent first name.

Researchers have conducted additional experiments on superficial similarities that may support a hypothesis concerning race and in-group favoritism. For example, a team of researchers conducted a set of experiments in which some subjects believed they shared a birthday, a first name, or unusual fingerprint characteristics with another person.¹⁶⁶ In each

¹⁶¹ *Id.*

¹⁶² See Park et al., *supra* note 102; Hudson Kern Reeve, *The Evolution of Conspecific Acceptance Thresholds*, 133 AM. NATURALIST 407 (1989).

¹⁶³ See Oates & Wilson, *supra* note 138, at 105-06.

¹⁶⁴ See Zebrowitz & Montepare, *supra* note 132, at 96-97.

¹⁶⁵ See Oates & Wilson, *supra* note 138; Burger et al., *supra* note 124 (indicating that an attribute shared with another is more likely to evoke prosocial behavior if it is less prevalent within the relevant population).

¹⁶⁶ Burger et al., *supra* note 124.

experiment, the researchers asked subjects to provide assistance to another person participating in the experiment. The results of each experiment supported the hypothesis that sharing a superficial characteristic with someone who requests assistance evokes favorable treatment. In the experiment using birthdays, 62.2% of the subjects who shared a birthday with the person who asked for assistance agreed to help her with a paper assignment while only 34.2% of subjects who did not share a birthday with the requester agreed to provide assistance.¹⁶⁷ In the experiment using first names, a participant asked each subject to donate money to the Cystic Fibrosis Foundation. The subjects who shared a first name with the participant gave an average donation of \$2.07, whereas the subjects who did not share a first name with the participant gave an average donation of \$1.00.¹⁶⁸ In the experiment using fingerprint characteristics, a researcher told one group of subjects that they shared an uncommon fingerprint type with another person, a second group of subjects that they shared a common fingerprint type with another person, and a third group of subjects nothing about their fingerprints. The researchers then asked each subject to provide assistance to the other person on a paper assignment. The findings revealed that 82.1% of the subjects who shared uncommon fingerprints agreed to provide assistance, 54.8% of the subjects who shared common fingerprints agreed, and 48.3% of the subjects told nothing about fingerprints agreed to assist.¹⁶⁹

¹⁶⁷ *Id.* at 38.

¹⁶⁸ *Id.* at 39.

¹⁶⁹ *Id.* at 40.

It is possible that race may constitute a superficial characteristic akin to birth date, first name, or fingerprints.¹⁷⁰ If so, sharing race with another person may evoke favorable treatment, especially if one shares membership in a minority race.

To summarize, behavioral biology and social psychology research provide a basis for the formation of a hypothesis concerning race and foster care placements. Race may contribute to perceptions of kinship that arise from cues such as facial resemblance or attitude similarity.¹⁷¹ In addition, race may be a superficial attribute that gives rise to in-group favoritism.¹⁷² Therefore, one may reasonably expect non-kin foster parents to be more likely to perceive foster children of the same race either as kin or as members of an in-group whom they are inclined to favor. And when examining a large population of foster children, one may reasonably expect that, overall, foster parents would treat foster children of the same race more favorably than foster children of a different race. This favorable treatment would likely result in better outcomes for same-race foster children in terms of child safety (e.g., lower rate of maltreatment) and wellbeing (e.g., healthier attachments and family bonds, less mental health problems, better educational performance, less delinquency).¹⁷³

Of course, the research also gives rise to a converse expectation. Foster parents are less likely to perceive different-race foster children as kin or as members of an in-group. Therefore, foster parents in this placement context may be inclined to provide their foster children with less

¹⁷⁰ See Zebrowitz & Montepare, *supra* note 132, at 96-97.

¹⁷¹ See notes 96-137 *supra* and accompanying text.

¹⁷² See notes 138-70 *supra* and accompanying text.

¹⁷³ For a general discussion of safety and wellbeing measures that researchers consider relevant to an assessment of the quality of care provided in foster care placements, see Cuddeback, *supra* note 137, at 627-32.

favorable treatment. Such an inclination may result in worse outcomes for different-race foster children.

It is interesting to note that the hypothesis formulated in this article is similar to a hypothesis concerning stepparent care formulated by Martin Daly and Margo Wilson.¹⁷⁴ Daly and Wilson based their hypothesis on evolutionary theory and behavioral biology research.¹⁷⁵ Because stepparents are not genetically related to their stepchildren, one would expect stepparents, overall, to make a relatively low investment in stepchildren.¹⁷⁶ By conferring benefits on a stepchild, a stepparent would only incur a cost in terms of the stepparent's own reproductive success. The stepparent may receive a benefit related to this cost if his or her effort increased the likelihood of mating success with the stepchild's biological parent. But Daly and Wilson reasoned that the indirect mating strategy benefit provided by investment in stepchildren would be significantly less than the direct reproductive benefit provided by biological children.¹⁷⁷ Thus, in comparison to a biological parent's treatment of his or her child, a stepparent would be less inclined to provide favorable treatment to a stepchild.

Daly and Wilson tested their hypothesis by examining the most severe cases of parental failure—those involving child death as a result of parental maltreatment.¹⁷⁸ An examination of

¹⁷⁴ MARTIN DALY & MARGO WILSON, *THE TRUTH ABOUT CINDERELLA* (1998).

¹⁷⁵ *Id.*; Martin Daly & Margo Wilson, *Discriminative Parental Solicitude: A Biological Perspective*, 42 J. MARRIAGE & THE FAM. 277 (1980).

¹⁷⁶ *Id.*; DALY & WILSON, *supra* note 174.

¹⁷⁷ *See id.*; Sievert Rowher, et al., *Stepparental Behavior as Mating Effort in Birds and Other Animals*, 20 EVOLUTION & HUM. BEHAV. 367 (1999).

¹⁷⁸ MARTIN DALY & MARGO WILSON, *HOMICIDE* (1988); Martin Daly & Margo Wilson, *An Assessment of Some Proposed Exceptions to the Phenomenon of Nepotistic Discrimination*

the data collected in cases of child death supported their hypothesis. The rate of child death at the hands of a stepparent is much higher than the rate of child death at the hands of a biological parent.¹⁷⁹ The researchers concluded that children who live with a stepparent or another unrelated adult are much more likely to experience serious maltreatment than children living exclusively with one or both of their biological parents.¹⁸⁰

Although this finding was not a complete surprise, it cut against a popular, hopeful view concerning the parity of stepparents and biological parents. This view arose from an effort to remove a stigma surrounding stepfamilies.¹⁸¹ Following Daly and Wilson's work, policymakers may still want to pursue this agenda, but they may be able to more fully consider the risks posed to stepchildren. If considered seriously, Daly and Wilson's research would likely impact child protection policies, possibly leading to adjustments in risk assessment protocols applicable to child maltreatment investigations and in the level of support services provided to stepfamilies.¹⁸² Such adjustments may result in improvements to stepchild safety and wellbeing.

Although stepfamilies differ from foster families in important ways that may have implications for the level of parental investment,¹⁸³ both family situations raise reasonable

Against Stepchildren, 38 ANNALES ZOOLOGICI FENNICI 287 (2001) [hereinafter *Nepotistic Discrimination*].

¹⁷⁹ *Id.*; DALY & WILSON, HOMICIDE, *supra* note 178.

¹⁸⁰ *Id.*; *Nepotistic Discrimination*, *supra* note 178. *See also* Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting From Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 PEDIATRICS 687 (2005).

¹⁸¹ *See* Jones, *supra* note 2, at 1238.

¹⁸² *See id.* at 1234-36.

¹⁸³ Foster parents do make a conscious decision to invest in caring for a child. They are not engaged in a mating strategy similar to that of stepparents. Related to this point, it is important

concerns about parental investment by adults who are not biologically related to the children in their care.¹⁸⁴ These concerns not only provide a basis for the formulation of hypotheses about foster care conditions and outcomes, but also call for the testing of these hypotheses. The results of such research may have significant implications for foster care placement policies and practices, just as Daly and Wilson's test of their hypothesis concerning stepfamilies has implications for public policies related to child protection.¹⁸⁵

The test of the specific hypothesis formulated in this article would entail a comparison of child outcomes for non-kin, same-race foster care placements with those for non-kin, different-race foster care placements. If the hypothesis is true, one would expect a lower rate of maltreatment for foster children in same-race placements than that for foster children in different-race placements. One would also expect children in same-race placements to perform better than children in different-race placements on measures of child wellbeing such as

to note that foster parents' decision to provide care for a child may not be as strong as that of adoptive parents whom Daly and Wilson expressly recognize as presenting a different situation than stepparents. DALY & WILSON, *supra* note 175, at 282-83. (The data on child deaths reveal that children living with adoptive parents are not maltreated at a higher rate than children living with biological parents. *See, e.g.*, Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions By Kin Caregivers*, 36 FAM. L.Q. 449, 462-63 (2002).) Parents who adopt a child are making a long-term commitment to a particular child that calls for a conscious decision to heavily invest in the adopted child. In contrast, adults who decide to provide foster care make a commitment to care for a child for a limited period that will likely not extend throughout childhood. They contract to provide temporary care and to receive financial compensation from the state. Although the compensation is often meager, it is often part of the foster parent's calculation in agreeing to provide short-term care for what likely will be a series of children living in their home. In summary, the foster care situation may be somewhat less problematic than the stepparent situation in terms of the level of parental investment, but somewhat more problematic than the adoptive or biological parent situation.

¹⁸⁴ *See generally* DALY & WILSON, *supra* note 175; Schnitzer & Ewigman, *supra* note 180.

¹⁸⁵ *See* Jones, *supra* note 2, at 1234-38.

attachment, mental health, educational attainment, delinquent behavior, and social relationships.¹⁸⁶

The new knowledge produced by such a comparative study would likely affect assessments of particular laws and policies. On one hand, researchers may prove the hypothesis false with findings that indicate insignificant differences between same-race foster care placements and different-race placements. This would mean that the MEPA prohibition on the systematic consideration of race in making foster care placement decisions is not problematic in terms of child safety and wellbeing. In terms of the debate surrounding MEPA, participants could reasonably view foster care placement decisions as similar to adoption placement decisions. In both contexts, transracial placements would not appear to present a significant risk of harm to affected children.¹⁸⁷ The debate could then reasonably focus on MEPA's impact on the racial identity and coping skills of minority children and on the composition and health of minority communities.¹⁸⁸

¹⁸⁶ In considering this specific research project, it is interesting to note that researchers have already begun examining another hypothesis about foster care—children placed in kinship placements are likely to have better outcomes than children in non-kin foster care placements. See Berrick, *supra* note 137; Cuddeback, *supra* note 137; Brinig & Nock, *supra* note 183. The initial research efforts in this area indicate that researchers have the capacity to design and implement comparative studies of foster care conditions and outcomes. It may be difficult to gather the detailed data necessary for exhaustive comparative analyses, but this type of research appears feasible. In fact, the public child welfare system appears to provide a natural setting for applied research on theories and hypotheses related to kinship, kinships cues, and superficial similarities. Researchers should take advantage of this setting in order to test hypotheses outside the laboratory and to include legal scholars on the research team. See DAVID J. HERRING, *Legal Scholarship, Humility, and the Scientific Method* (May 31, 2006), available at SSRN: <http://ssrn.com/abstract=905573>.

¹⁸⁷ See Courtney, *supra* note 88; Brooks & Barth, *supra* note 42, at 94-98; Bradley & Hawkins-León, *supra* note 42, at 433-36.

¹⁸⁸ See *supra* notes 81-84 and accompanying text.

On the other hand, research may confirm the hypothesis. This would mean that the MEPA prohibition is problematic in terms of child safety and wellbeing in foster care. In barring the consideration of race, MEPA would expose children to a heightened risk of maltreatment in foster care and worse developmental outcomes. Such research findings would also support the alleged covert agency practice of matching the race of the foster child with that of the foster parent even if it means a delay in achieving a relatively stable foster care placement.¹⁸⁹ By engaging in such a practice, child welfare workers may be ensuring the safety and wellbeing of many minority children.

At the least, research that confirms the hypothesis would provide new knowledge relevant to the debate of MEPA and transracial placements. It would likely give rise to a new debate—one focused on foster care placement decisions. This new debate would reveal a tension between MEPA and the federal Adoption and Safe Families Act (ASFA).¹⁹⁰ ASFA expressly states that its paramount concern is child safety and health.¹⁹¹ By prohibiting the systematic consideration of race in making foster care placement decisions, MEPA may increase the risk of harm faced by children in foster care. Thus, the MEPA approach may conflict, or at least stand in tension with the paramount goal of ASFA. This type of conflict or tension begs a difficult and controversial question—does the pursuit of a colorblind foster care placement regime justify placing some children at an increased risk of maltreatment or other negative

¹⁸⁹ For discussion of the longstanding practice of race matching and possible resistance to MEPA, see Brooks et al., *supra* note 40, at 576-77; Brooks & Barth, *supra* note 42, at 87; HHS Guide, *supra* note 38.

¹⁹⁰ Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997); 42 U.S.C. § 671(a)(15)(A) (2000).

¹⁹¹ *Id.*

outcomes? If research supports the hypothesis formulated in this article, this difficult question is worthy of consideration and public discussion.

Furthermore, federal officials would likely have to reconsider their constitutional analysis.¹⁹² If the systematic consideration of race in making foster care placement decisions significantly enhances child safety and wellbeing, state actors may have a compelling interest in such an approach.¹⁹³ In addition, the consideration of race along with the numerous other factors that relate to a foster child's best interests may constitute a narrowly tailored means for securing the state's compelling interest.¹⁹⁴ This latter conclusion would be especially likely in the context of placement decisions made near the time of a child's emergency removal from parental custody or from a foster home. The public agency must place the child at this point. Although the initial

¹⁹² See HHS Guide, *supra* note 38, at 4-5.

¹⁹³ See generally *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (stating that a state has a duty of the highest order to secure children's interests and that the best interests of the child constitute a substantial government interest for purposes of the Equal Protection Clause, but that the state cannot accommodate and reinforce racist attitudes in pursuing this interest); *Drummond v. Fulton County Department of Family & Children's Services*, 563 F.2d 1200, 1205 (5th Cir. 1977) (finding sufficient government interest in securing the best interests of a child to allow the consideration of race as one of many factors in making an adoption placement decision); *McLaughlin v. Pemsley*, 693 F. Supp. 318, 324 (E.D. Pa. 1988) (stating that the goal of making an adequate long-term foster care placement that provides for a foster child's racial and cultural needs and that is consistent with the best interests of the child is indisputably a compelling governmental interest for purposes of the Equal Protection Clause); *Hunter v. The Regents of the University of California*, 190 F.3d 1061 (9th Cir. 1999) (finding state's interest in the operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools is compelling, allowing the consideration of race as one of many factors in making admissions decisions).

¹⁹⁴ See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Drummond*, 563 F.2d 1200, 1205; *Hunter*, 190 F.3d 1061; *Tallman v. Tabor*, 859 F. Supp. 1078, 1086 (E.D. Mich. 1994) (finding that if racial considerations are not the sole reason for placement decisions, but only one of several factors, they do not run afoul of the Equal Protection Clause); *Compos v. McKeithen*, 341 F. Supp. 264, 266 (E.D. La. 1972) (finding the difficulties inherent in interracial adoption as justifying the consideration of race as a relevant factor in adoption, but not as justifying the use of race as a determinative factor).

emergency placement may truly be temporary in nature (e.g., a group shelter facility), the agency in most cases must find a relatively stable foster care placement in a timely manner.¹⁹⁵

Therefore, any delay in placement is likely to be limited (i.e., less than 90 days) even if state actors attempt to secure a same-race placement.¹⁹⁶

It should be noted that this time pressure in making a foster care placement decision is different than that typically confronted in making an adoption placement decision. In the adoption situation, a long delay is much more feasible, and thus, likely. For example, there would be no pressing need to remove a child from a stable, transracial foster placement. Therefore, an agency could take its time in seeking a same-race adoptive home, letting the child remain in foster care and forgoing an adoptive placement with different-race parents. The resulting extended delay in achieving an adoption placement could expose the affected child to a significant risk of harm.¹⁹⁷

Because of this difference, the constitutional analysis would not be the same for both placement situations. Noting the higher risk of harm to the child posed by race matching in the adoption context, a court would be less likely to view race matching as a narrowly tailored

¹⁹⁵ See Sigrid James et al., *Placement Movement in Out-of-Home Care: Patterns and Predictors*, 26 CHILD. & YOUTH SERV. REV. 185, 192-96 (2004) (articulating and verifying the child welfare system intent to achieve an initial stable placement within 45 days).

¹⁹⁶ This is true even within a system that regularly places children in a central shelter, then moves them to an emergency care unit, and then moves them to the intended initial placement site. See James et al., *supra* note 195; Sigrid James, *Why Do Foster Care Placements Disrupt? An Investigation of Reasons for Placement Change in Foster Care*, 78 SOC. SERVICE REV. 601 (2004).

¹⁹⁷ See HHS Guide, *supra* note 38; Barth, *supra* note 40.

approach to securing a child's best interests.¹⁹⁸ In fact, as the delay lengthens and opportunities for timely transracial adoption present themselves, the state may no longer have a strong, let alone compelling, interest in placing the child with a same-race adoptive family.¹⁹⁹ At this point, the best interests of the child would likely be better served by a timely transracial adoption placement than by an extended or permanent wait for a same-race adoption placement.²⁰⁰

As to the foster care placement process shortly after a child's removal from parental custody, the more appropriate constitutional analogy is provided by the practice of affirmative action in the context of higher education.²⁰¹ The United States Supreme Court has acknowledged a state's compelling interest in securing a diverse student body.²⁰² Similarly, a state is likely to have a compelling interest in securing child safety and wellbeing in foster care.²⁰³ The Court has also found that the consideration of race as one factor among many in making college admissions decisions is a narrowly tailored means for achieving the state's compelling interest.²⁰⁴ One can certainly argue that the consideration of race as one of many

¹⁹⁸ See HHS Guide, *supra* note 38; Davidson M. Pattiz, *Racial Preference in Adoption: An Equal Protection Challenge*, 82 GEO L.J. 2571, 2597-98 (1994).

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

²⁰¹ *See Grutter*, 539 U.S. 306.

²⁰² *Id.*

²⁰³ The state's interest in child safety and wellbeing is arguably as important as its interest in educational diversity. *See generally Palmore*, 466 U.S. 429, 433; *Drummond*, 563 F.2d 1200, 1205; *McLaughlin*, 693 F. Supp. 318, 324.

²⁰⁴ *Grutter*, 539 U.S. 306.

factors in making an initial foster care placement decision is a similarly tailored means for achieving the state's particular compelling interest.²⁰⁵

In summary, if careful, rigorous research confirms the hypothesis that non-kin, same-race foster care placements are safer and healthier than non-kin, different race placements, it would call into question the MEPA prohibition on the consideration of race in making early foster care placement decisions. MEPA would conflict with the paramount goal of federal child welfare law—securing child safety and health.²⁰⁶ In addition, such research findings would likely support the constitutionality of a public agency's systematic consideration of race in making early foster care placement decisions.²⁰⁷ In the end, this research would encourage serious discussion and consideration of laws, policies, and practices that allow race matching in foster care.

V. Conclusion

Based on behavioral biology and social psychology research addressing kinship cues and superficial similarities that give rise to in-group favoritism, one can formulate a hypothesis that non-kin, same-race foster care placements may be safer and healthier for children than non-kin, different-race placements. Because such a hypothesis may have significant implications for laws, policies, and practices related to foster care placement decisions, it is worthy of serious investigation. At its core, this investigation should entail a careful collection of data on

²⁰⁵ See generally *Drummond*, 563 F.2d 1200; *Tallman*, 859 F. Supp. 1078; *Compos*, 341 F. Supp. 264.

²⁰⁶ See *supra* notes 190 and 191 and accompanying text.

²⁰⁷ See *supra* notes 192-205 and accompanying text.

maltreatment in foster care and other measures of foster child wellbeing. Such data would allow researchers to engage in a detailed analysis comparing non-kin, same-race foster care placements with non-kin, different-race placements.

Ideally, an interdisciplinary research team would pursue this line of inquiry.²⁰⁸ This team would include a behavioral biologist, a social psychologist, a social work scholar, and a legal scholar. Together they could design and implement a research project to test the hypothesis formulated in this article, effectively extending laboratory research on kinship cues and in-group favoritism to field research conducted within the context of a natural experiment—foster care. The legal scholar could communicate the research results to legal decisionmakers and policymakers, hopefully spurring a serious public discussion of the consideration of race in making foster care placement decisions. Such a discussion could provide significant benefits to many children who enter foster care, especially the substantial number who end up spending a substantial portion of their childhood in a foster home.

²⁰⁸ See Herring, *supra* note 186.