

Intimacy and Racial Equality: The Limits of Antidiscrimination

INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION.
By Randall Kennedy. New York: Random House, 2002. Pp. 676. (\$30.00).

*R. Richard Banks**

Professor Randall Kennedy has written an engaging and provocative book about a topic—interracial intimacies—that legal scholars all too frequently and implicitly view as unrelated to racial equality.¹ Whereas intimate decision-making is associated with the ineffable mysteries of love and sexual attraction, racial equality brings to mind the public realm: employment, education, housing, and politics. State regulation seems desirable in one sphere and inimical to the other.

This intuitive distinction is reflected in divergent attitudes toward judicial decisions pertaining to laws that mandated racial segregation in intimate relations on the one hand and in the public realm on the other. Although *Loving v. Virginia*² invalidated nearly as many state statutes as *Brown v. Board of Education*,³ many legal scholars likely do not know the year that *Loving* was decided. The miscegenation laws it voided seem less central to racial equality than the de jure segregated school districts that *Brown* invalidated. Whereas *Loving* generated little controversy,⁴ *Brown* precipitated riots and resistance and remains perhaps the pivotal constitutional decision of the twentieth century.

* Associate Professor, Stanford Law School. For extremely useful criticism of a draft of this Review, thanks go to Jennifer Eberhardt, Kim Forde-Mazrui, Rachel Moran, and Michael Wald. Julie Lipscomb provided outstanding research support.

¹ RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2002) [hereinafter KENNEDY, *INTERRACIAL INTIMACIES*]. Randall Kennedy is Professor of Law at Harvard Law School.

² 388 U.S. 1 (1967).

³ 347 U.S. 483 (1954). The ruling in *Brown* invalidated school segregation laws in twenty-one states, including Kansas, see Brown Found. for Educ. Equity, Excellence & Research, *In Pursuit of Freedom and Equality: Brown v. Board of Education of Topeka*, at <http://brownvboard.org> (last revised Feb. 15, 2003), while *Loving* struck down miscegenation laws in fifteen states. See Robert A. Destro, *Law and the Politics of Marriage: Loving v. Virginia After 30 Years*, 47 CATH. U. L. REV. 1207, 1208 n.3 (1998).

⁴ Commentators support both the outcome and the rationale of *Loving* and quibble only about whether the Court should have acted sooner. See, e.g., Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119 (1998) (examining the legal debates that led the Supreme Court to initially dodge ruling on the constitutionality of miscegenation laws); Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT L. REV. 371, 415 (1994) (pointing to rising tension in race relations as the reason why the Supreme Court avoided deciding miscegenation cases until *Loving*).

The nineteenth-century precursors to *Loving* and *Brown* are accorded similarly asymmetrical treatment. Just as *Brown* provides a counterpoint to the infamous *Plessy v. Ferguson*,⁵ *Loving* contrasts with the Supreme Court's 1883 decision in *Pace v. Alabama*,⁶ where the Court upheld the fornication conviction of a black man and white woman under a statute that mandated a stricter penalty for interracial than intraracial fornication.⁷ In a brief opinion that presaged the constitutional justification of Jim Crow, the Court concluded that the law did not discriminate unfairly because it punished equally black and white participants in interracial fornication.⁸ Yet, legal scholars have virtually ignored the *Pace* opinion.⁹ It does not even appear in many constitutional law casebooks. The relative obscurity of *Loving* and *Pace* signifies a tendency to discount the centrality of issues of intimacy in our ongoing struggle with the legacies of slavery.¹⁰ In *Interracial Intimacies*, Randall Kennedy seeks to move "interracial intimacy to center stage as a necessary focus of inquiry for anyone seriously interested in understanding and improving American society."¹¹

⁵ 163 U.S. 537 (1896).

⁶ 106 U.S. 583 (1883).

⁷ Under the applicable code, a first offense for intraracial fornication could be punished with a fine and imprisonment for up to six months. *Id.* at 583. One convicted of interracial fornication, by contrast, could be sentenced to as many as seven years imprisonment. *Id.* A more direct analogue to *Pace* is *McLaughlin v. Florida*, 379 U.S. 184 (1964).

⁸ The Court acknowledged that the purpose of the Equal Protection Clause was to "prevent hostile and discriminating State legislation against any person or class of persons." *Id.* at 584. The Court concluded without difficulty that the fornication prohibitions did not entail "any discrimination against either race [W]hatever discrimination is made in the punishment prescribed . . . is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same." *Id.* at 585.

⁹ But see Steven A. Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303 (1995); Emily Field Van Tassel, "Only the Law Would Rule Between Us": *Anti-miscegenation, the Moral Economy of Dependency, and the Debate over Rights after the Civil War*, 70 CHI.-KENT L. REV. 873 (1995); Wallenstein, *supra* note 4. For a discussion of *Pace* by a political scientist, see Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934*, 20 LAW & HIST. REV. 225 (2002).

¹⁰ Of course, some legal scholars have considered the racial equality dimensions of intimate decisionmaking. See, e.g., Jim Chen, *Unloving*, in MIXED RACE AMERICA AND THE LAW: A READER 47 (Kevin R. Johnson ed., 2003); Garrett Epps, *What's Loving Got to do With It?*, in MIXED RACE AMERICA AND THE LAW, *supra*, at 481; see also Laurence C. Nolan, *The Meaning of Loving: Marriage, Due Process and Equal Protection (1967-1990) As Equality and Marriage, From Loving to Zablocki*, 41 HOW. L.J. 245 (1998).

¹¹ KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 12. Kennedy has written a number of other articles relating to race, identity, and intimacy in both scholarly and popular publications. See, e.g., Randall Kennedy, *How Are We Doing With Loving?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815 (1997); Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, Adoption*, 17 HARV. BLACKLETTER L.J. 57 (2001); Randall Kennedy, *My Race Problem—And Ours*, ATLANTIC MONTHLY, May 1997, at 55; Randall Kennedy, *Orphans of Separatism: The Painful Politics of Transracial Adoption*, AM. PROSPECT, Spring 1994, at 38.

This Review has three Parts. Part I describes Kennedy's basic approach and orientation. Kennedy advocates individual autonomy in racial matters, unconstrained by the influences of the past, the demands of the group, and the coercion of the state. Part II examines Kennedy's extension of this approach to the issue of race and adoption. Kennedy identifies two distinct forms of racial discrimination that pervade the adoption process. Social workers match children to parents on the basis of race, and adoptive parents typically choose a child on the basis of race. Kennedy would prohibit the use of race by social workers, but not by adoptive parents. He distinguishes these two forms of discrimination on both substantive and pragmatic grounds. He views the use of race by social workers as illegitimate state discrimination, and by adoptive parents as a morally justifiable assertion of individual autonomy. Moreover, he argues that, as a practical matter, permitting parents to discriminate and attempting to eliminate discrimination by social workers both serve the interests of children.

In Part III, I evaluate Kennedy's analysis. While I do not find particularly compelling Kennedy's substantive justification for permitting adoptive parents to discriminate racially, I share his opposition to racial discrimination by social workers. However, Kennedy's single-minded emphasis on ending discrimination by social workers unjustifiably sleights the pragmatic considerations central to his rejection of prohibition of parental preferences. The same sort of pragmatic concerns that weigh against prohibition of discrimination by adoptive parents also counsel caution in efforts to eliminate discrimination by social workers. In both cases, vigorous enforcement of the antidiscrimination principle might not meaningfully benefit children. Given the uncertain practical benefits of enforcing the antidiscrimination principle, one should consider alternative means of aiding those children on whose behalf the antidiscrimination principle is invoked.

I. AUTONOMY AND INTIMACY

Written for a popular rather than scholarly audience, *Interracial Intimacies* includes more narrative than analysis. In addition to legal materials, Kennedy mines a wide variety of historical and contemporary sources—movies, novels, and plays—to assemble a collection of captivating and illuminating accounts of interracial intimacy from slavery to the present. In examining legal disputes, he regularly supplements judicial opinions and court records with contemporaneous accounts and sometimes even interviews with the parties to the controversy. The result is a compelling treatment of “the ways in which interracial intimacy has

shaped and in turn been affected by laws and customs in the United States.”¹²

Kennedy describes himself as a “liberal individualist who yearns for a society in which race has become obsolete as a significant social marker.”¹³ As a means of realizing that ideal, Kennedy opposes governmental restrictions on interracial intimacy and urges “rigorous adherence to . . . antidiscrimination [as] an essential requirement for ridding society of the pernicious habit of submerging individuals in the racial group to which they are said to belong.”¹⁴ Kennedy seeks as well to undermine the constellation of inherited values and practices that constitute informal barriers to interracial intimacy. These barriers include the demands of group loyalty and cultural preservation, and the assumption that interracial relationships are exploitative or demeaning.¹⁵ While Kennedy recognizes the impossibility of applying the nondiscrimination mandate to individuals’ intimate decisionmaking, he wants racial discrimination even in that realm to be “a cause for concern, a matter worthy of worry, something that requires careful justification.”¹⁶ Kennedy urges readers to embrace “a positive ideal: a cosmopolitan ethos that welcomes the prospect of genuine, loving interracial intimacy.”¹⁷ While some commentators may be neutral or opposed to interracial romantic couplings, Kennedy applauds them as an affirmative good, a salutary softening of the color line.

Kennedy’s selection and presentation of stories reflect the book’s fundamental antinomy: that of the resilience of individual autonomy as against the oppressive power of the state. Kennedy recounts stories that highlight both the destructively coercive power of the state *and* individuals’ valiant efforts to resist state domination of their intimate lives. Even as Kennedy describes the myriad historical restrictions on interracial intimacy, he consistently highlights the always incompletely repressive power of the law.

The Introduction begins: “Jacqueline Henley’s aunt turned her [infant] niece over to the custody of the New Orleans Department of Welfare on October 1, 1952, because she was becoming darker by the day and some of the neighbors had complained that ‘the child was possibly a nigger.’”¹⁸ Although the aunt had agreed to care for Jacqueline while her

¹² KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 12.

¹³ *Id.* at 332.

¹⁴ *Id.* at 412–13.

¹⁵ Kennedy describes himself as urging “rejection of racial idolatry and racial authoritarianism of every stripe.” *Id.* at 34. He identifies the “primary targets of his campaign against racial idolatry and racial authoritarianism [as] state-supported discouragements of interracial intimacy.” *Id.* at 35.

¹⁶ *Id.* at 36.

¹⁷ *Id.* at 35. He notes that for much of American history, and still today, interracial intimate affiliation is marked by a sense of shame and guilt, and an element of tragedy, as though such relationships are doomed to failure.

¹⁸ *Id.* at 3.

mother was unable to and had expressed genuine affection for the child, the neighbors' scorn had become too much to bear. After the death of her mother, the welfare department placed Jacqueline with a black foster family. This family attempted to adopt Jacqueline, but state law blocked their efforts. Jacqueline was the child of a white unwed mother and an unidentified, though evidently black, father—and her birth certificate listed her as white. “The same segregationist logic that prevented individuals from marrying interracially also banned couples from adopting interracially.”¹⁹ Social pressures and legal rules left Jacqueline in limbo. White families were unwilling to adopt her, and black families were not permitted to adopt her.²⁰ Kennedy traces in exquisite detail the efforts—ultimately unsuccessful—of the black foster family to have Jacqueline's racial designation changed so that they could adopt her.²¹ Eventually, Jacqueline was consigned to an orphanage for “colored” children, until Louisiana officials permitted her to be adopted out-of-state by a black family in Chicago. This heart-wrenching tale, the first of many stories that Kennedy brings to light, usefully serves as an emblem of the extent to which racial regulations have shaped intimate relations and of the tragic consequences of such a perverse allegiance to racial boundaries.

Underscoring his normative commitment to autonomy even in the most oppressive of circumstances, Kennedy, on the first page of chapter 1, broaches the possibility of “mutually desired sex” between slaves and their masters.²² Kennedy asserts that “slavery did not extinguish altogether the possibility of choice.”²³ “Bondage severely limited the power—including the sexual power—of slaves. But it did not wholly erase their capacity to attract and shape affectionate, erotic attachments of all sorts, including interracial ones.”²⁴ Kennedy only later recounts episodes of coercive sex, and repeatedly emphasizes the modicum of choice available to those who were enslaved.

Many of the stories dramatize the practical and moral complications of those choices. For example, Kennedy characterizes *State v. Celia* as one

¹⁹ As Kennedy notes, “[t]he resulting ambiguity surrounding Jacqueline's racial identity posed a dilemma for a legal system that demanded everyone be assigned a racial station that he or she would then occupy for life.” *Id.* at 4–5.

²⁰ The black family also encountered resistance from their friends and neighbors. Many thought that Jacqueline was too light skinned to be adopted by the brown skinned couple. *Id.* at 4.

²¹ The prospective adoptive parents petitioned the Bureau of Vital Statistics to change the child's racial designation, and, when that claim failed, they sued. In urging the court to order a change of racial designation, the family's lawyer presented testimony from an anthropologist who had scrutinized the child's physical features and even produced the child's black father, who vehemently denied that he had had sexual relations with a white woman. *Id.* at 5–7. Imposing a rigorous burden of proof, the court declined to alter the child's racial designation, and the appeals court affirmed that ruling. *Id.* at 8–9.

²² *Id.* at 41.

²³ *Id.* at 43.

²⁴ *Id.* at 44.

of “the most appalling cases in the law of slavery.”²⁵ A slave named Celia was repeatedly raped by her widowed master, and twice impregnated by him. The master’s sexual assaults continued even after Celia became romantically involved with another slave, George, who eventually insisted that Celia bring an end to the master’s abuse. Celia, by this time pregnant again, killed the master and burned his body. Ironically, George revealed Celia’s crime. George escaped. Celia was tried and hanged after giving birth to a stillborn child.

Kennedy’s approach to more contemporary controversies is often refreshingly unpredictable. Rather than focus on the persistence of some of the ugly aspects of the race-sex coupling to which the book’s historical chapters attest—the sexual oppression of black women and the sexual vilification of black men, for example—Kennedy instead considers the ways in which the past inappropriately influences perceptions of the present. The contemporary resonance of historical injustices causes many analysts, wrongly in Kennedy’s view, to interpret current controversies through the lens of past oppression. Kennedy illustrates this point by discussing the Tawana Brawley episode from the late 1980s.²⁶ After being found in a plastic bag with feces smeared across her body, Brawley claimed that six men had raped her, including one alleged to be a police officer. Although Brawley’s story would eventually prove to be fabricated, Kennedy notes that many blacks continued to believe her, and indeed to insist upon her honesty, despite increasingly apparent inconsistencies in her account. For Brawley’s supporters, her “alleged ordeal evoked terrible collective memories of white men’s sexual brutalizing of black women under the tolerant gaze of white officials.”²⁷ Kennedy thus castigates those who are so beholden to the past that they invariably interpret current events as consistent with their historical antecedents.²⁸

However, in amplifying that point Kennedy offers an example that undercuts rather than bolsters his own inclination to disregard the past. Kennedy surmises that “[d]emonization [of black men has] prompted many blacks to regard allegations of black-on-white crime—particularly sexual crime—with great skepticism; some refuse to condemn black criminals even when their guilt is patent.”²⁹ Kennedy criticizes those who doubted the guilt of a group of young black and Latino men accused of brutally raping a female jogger in New York City’s Central Park in 1989.³⁰

²⁵ *Id.* at 168.

²⁶ *Id.* at 181.

²⁷ *Id.*

²⁸ Kennedy depicts supporters of Brawley as being either inattentive to or unconcerned about the actual facts. According to Kennedy, the latter group “contended that establishing the facts in this particular instance was less important than putting to effective use the publicity generated by the controversy.” *Id.* at 182.

²⁹ *Id.* at 198.

³⁰ Kennedy also considers the case of O. J. Simpson, who was accused of murdering his former wife, Nicole Brown Simpson, and her friend, Ron Goldman. *Id.* at 199–200.

Kennedy characterizes defenders of the young men as unreasonably unwilling to admit their guilt, and implies that such skeptics' recollection of the many past instances when black men were unfairly vilified as sexual criminals has distorted their perspective. Rather than reflexively fit current events into a historical template, Kennedy emphasizes the possibility of discontinuities between present and past.

While Kennedy is certainly correct to guard against the tendency to subsume interpretations of the present in the patterns of the past, subsequent developments in the Central Park jogger case highlight the risks of disconnecting the present from the past. Notwithstanding what Kennedy characterizes as "overwhelming evidence of their guilt,"³¹ the boys convicted in that case now appear to have been innocent. In 2002, a man imprisoned for other crimes claimed to have acted alone in raping the jogger in Central Park that night more than a decade earlier. After confirmation of his involvement³² and renewed scrutiny of the police department's investigation,³³ a New York state court judge exonerated the young men and vacated their convictions.³⁴

The turn of events in the Central Park jogger case highlights the potentially contradictory influences of the past. At the time, evidence of the boys' guilt may have seemed overwhelming. But to what extent did that appearance reflect not simply the weight of the evidence but the weight of historically produced racial imagery as well? The victim was white; the boys were not. Did their guilt seem obvious to the police, prosecutors, and much of the public in part because it so neatly fit the roles established by the history that Kennedy recounts?

Although Kennedy believes that the specter of past injustices often distorts interpretations of contemporary controversies, he does find signs of encouragement. Consider the Army sex scandals of 1996 and 1997.³⁵ After numerous women, nearly all white, leveled accusations of improper sexual conduct, a number of black soldiers were court-martialed, including the highest ranking enlisted soldier in the United States Army, Ser-

³¹ *Id.* at 199.

³² DNA analyses of evidence at the scene of the crime confirmed that Matias Reyes had had sexual relations with the woman. See William K. Rashbaum, *Convicted Killer and Rapist Says He Attacked Central Park Jogger*, N.Y. TIMES, June 12, 2002, at B2.

³³ Lawyers for the young men asserted that the identification of the DNA as belonging to Reyes was conclusive evidence of Reyes' guilt and claimed that the other young men had been coerced into giving scripted confessions. See Robert D. McFadden & Susan Saulny, *DNA in Central Park Jogger Case Spurs Call for New Review*, N.Y. TIMES, Sept. 6, 2002, at B1.

³⁴ See *Excerpts from Decision Reversing the Convictions*, N.Y. TIMES, Dec. 20, 2002, at B5; Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1. Police Commissioner Raymond W. Kelly denied there was any police misconduct, and a lawyer for the detectives contended that it was still possible that Reyes and the other young men committed the attack together. The district attorney, however, has declined to re-try the young men. Saulny, *supra*.

³⁵ KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 207.

geant Major Gene McKinney.³⁶ Six different women, all white, accused McKinney of rape or improper sexual conduct. Although the case against McKinney initially seemed strong, it gradually fell apart. Some witnesses had testified in exchange for lenient treatment on some other charge or had been pressured to describe as rape sexual activity that in fact they viewed as consensual.³⁷ Sergeant Major McKinney was acquitted of all charges.³⁸

Kennedy draws two heartening conclusions from the Army sex scandals. First, he notes that no civil rights organization or racial activist chose to characterize the Army sex scandals as simply another episode in the ongoing sexual vilification of black men.³⁹ Second, Kennedy emphasizes the significance of a white judge finding a black man, Gene McKinney, innocent in the face of numerous accusations by white women. In Kennedy's view, both developments evince a healthy ability to relegate the past to the past and attend to the unique features of specific controversies.⁴⁰

Kennedy's penchant for novel interpretations of social phenomena is at its height in the chapter on racial passing, which brims with scintillating stories. By "passing," Kennedy refers to active misrepresentation or concealment of one's racial identity. Passing is usually undertaken by light-skinned blacks and is typically viewed as a subterfuge about which one should be ashamed. Kennedy recounts fascinating stories that complicate the conventional view of passing: the slave couple whose escape was made possible by the woman's passing as a white man accompanied by a male slave; the civil rights leader Walter White, who passed for white in order to investigate lynchings in the South and encountered white men who vowed to kill the "nigger" they heard was trying to pass himself off as white; and many others.⁴¹ These narratives reframe passing not as a tragic denial of one's racial identity, a betrayal of one's people, or a rejection of one's true self, but rather as a pragmatic and sometimes effective strategy.⁴²

³⁶ *Id.* at 208.

³⁷ *Id.* at 212.

³⁸ Other black soldiers were convicted and sentenced to serve periods of up to twenty-five years in jail. See, e.g., Elaine Scidino, *Army Trial Raises Questions of Sex, Power and Discipline*, N.Y. TIMES, Apr. 12, 1997, at A1.

³⁹ KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 213.

⁴⁰ Kennedy's interpretation of this episode reflects an almost irrepressible optimism that inclines him not to consider, for example, whether the zealous prosecution of, or the accusations against, Sergeant Major McKinney did reflect racial bias.

⁴¹ For example, Kennedy recounts the story of Gregory Howard Williams, the child of a white woman and a light-skinned black man who didn't reveal his "true" racial identity to Williams until the boy was ten. Williams, who lived in Virginia, was outraged at the "mean lie" his father had told. *Id.* at 284. Williams tells his fascinating story in his autobiographical book, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995).

⁴² In Kennedy's view, the morality of passing depends on the circumstances:

Is passing a self-defeating betrayal of the passer's race, or a defensible assertion

Seizing upon the insight that racial designations reflect social conventions and legal rules,⁴³ Kennedy reasons that to decline to pass because the rules don't permit it, so to speak, would be to succumb to the twisted and oppressive logic of a racist system. Emphasizing yet again the primacy of individual autonomy, Kennedy recasts passing as an often morally justifiable assertion of one's right to self-identify one's race. Kennedy wants to loose racial identity from the strictures imposed by the past, the group, and the state—to make race a matter of individual choice. In this view, individuals, no matter their heritage or appearance, would have “free entry into and exit from racial categories, even if the choices they make clash with traditional understandings of who is ‘black’ and who is ‘white,’ and even if . . . individuals mislead observers who rely on conventional racial signaling.”⁴⁴

II. RACE AND ADOPTION

In the last third of the book, Kennedy extends his analysis of interracial intimacy to race and parenting, devoting particular attention to adoption.⁴⁵ Consistent with his emphasis throughout the book, Kennedy advocates rigorous enforcement of the antidiscrimination principle against social workers who engage in race matching.⁴⁶ Although race matching takes many forms, its consistent premise is that same-race placements are preferable to cross-race placements; the optimal placement for a black child, for example, is with a black family.⁴⁷ Strong forms of race match-

of individual autonomy? Satisfactory answers cannot be determined in the abstract; they must always depend on the context. In any given instance, we have to ask, what are the consequences of declining to pass? Are there alternative avenues for seeking the same goals? To whom must the passer lie in order to pass? To which groups, if any, does he or she feel a sense of affiliation? To what extent does passing entrench or subvert a particular social order?

KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 331–32.

⁴³ See Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. REV. 1 (1994).

⁴⁴ KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 333.

⁴⁵ Recent books concerning race and adoption include SANDRA PATTON, *BIRTHMARKS* (2000), and HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* (2002).

⁴⁶ Since the early 1990s, race matching has received considerable scholarly attention. See, e.g., ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999) [hereinafter BARTHOLET, *NOBODY'S CHILDREN*]; Elizabeth Bartholet, *Where Do Black Children Belong?: The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) [hereinafter Bartholet, *Where Do Black Children Belong?*]; Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994). Kennedy also examines the race matching policies embodied in the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2000). See KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 480–518. This Review does not consider Kennedy's analysis of the Indian Child Welfare Act.

⁴⁷ Throughout this Review, I discuss race matching in terms of black children and white parents because these are the terms within which the issue has arisen and been de-

ing preclude adoptive placement across racial lines; moderate forms consider racial commonality as one factor among many in the matching of children with prospective adoptive parents.⁴⁸

Although race matching is currently illegal for adoption agencies that receive federal funding,⁴⁹ the practice persists, partly as a result of broad support for moderate race matching among social work professionals, judges, and the public at large. As Kennedy notes: “Many pertinent officials, including judges, are still guided by the premises of race matching, and many ordinary citizens deem its moderate form eminently reasonable. Even many adopters and adoptees who have together created loving multiracial families nonetheless believe that . . . same-race adoption is preferable to interracial adoption.”⁵⁰

Kennedy opposes race matching as a pointless practice that impedes the adoptive placement of black children. He states that “[r]ace matching is a destructive practice in *all* its various guises, from moderate to extreme. It ought to be replaced by a system under which children in need of homes may be assigned to the care of foster or adoptive parents as quickly as reasonably possible, *regardless* of perceived racial differences. Such a policy would greatly benefit vulnerable children.”⁵¹

Kennedy rejects the premise of race matching: that black children are better served by black parents, who are, as a consequence of their

bated. Although in this Review I focus on race matching in adoptive placements, the same issue arises in foster placements as well.

⁴⁸ In a still subtler form, race matching occurs through consideration of what has been termed the cultural competency of potential adoptive parents in meeting the needs of racial minority children. An emphasis on cultural competency results, practically, in same-race rather than transracial placements, because same-race parents are generally presumed to be culturally competent, whereas white parents must prove, to the satisfaction of a social worker, that they can meet the cultural needs of a black child. KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 393–401.

⁴⁹ Federal Law mandates that:

A person or government that is involved in adoption or foster care placements may not

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

42 U.S.C. § 1996B (2000). Although the language of the statute only formally prohibits delay or denial of placement on account of race, the Department of Health and Human Services seems to have interpreted the statute to prohibit social workers’ consideration of race even when it does not delay or deny placement. *See* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HEHS-98-204, *FOSTER CARE: IMPLEMENTATION OF THE MULTIETHNIC PLACEMENT ACT POSES DIFFICULT CHALLENGES* 56 (1998), *available at* <http://www.gao.gov/archive/1998/he98204.pdf>.

⁵⁰ KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 400–01.

⁵¹ *Id.* at 402.

race, especially likely to impart the “survival skills” that black children need to navigate a still racist society.⁵² Kennedy faults the survival skills claim for both unjustifiably slighting the potential strengths of white parents and romanticizing the insights of black parents.⁵³ He observes that white parents “might be able to bring to bear on behalf of their black children advantages generally denied to blacks.”⁵⁴ Kennedy reasons that black parents’ experiences with racism could be as likely to harm as to benefit their children: “Unfortunately, the truth is that racism can also cripple its victims and, worse, result in the development of adaptive behaviors that may lead those victims to hobble their own children.”⁵⁵ Kennedy notes that there is no evidence that black adoptive parents are better on average at raising black children than are white adoptive parents.⁵⁶

Kennedy also challenges the significance of first person accounts by transracially adopted children who, as adults, support race matching. He urges:

[P]roponents of interracial adoption [to] . . . challenge the ‘authority of experience’ that is all too often automatically conceded to those transracial adoptees who, as adults, support race matching. Far from lending persuasive force to their arguments, such veterans’ autobiographical polemics exemplify the tendency of people to imagine, without due investigation, that the pastures of others must be greener than their own.⁵⁷

⁵² I do not mean to imply that survival skills is the only proffered justification for race matching. Some commentators also defend the policy as a means of furthering racial group solidarity and cultural preservation. *Id.* at 395–401 (describing these arguments). I do not believe these are good bases for adoption policy. I focus on the survival skills claim because I think it is the most widely held, and also the most normatively appealing, basis for race matching.

⁵³ Kennedy would prohibit race matching even if black children generally were better served by black parents. *Id.* at 412. Even rational race matching would contravene the individualism principle that, in Kennedy’s view, antidiscrimination law implements.

⁵⁴ *Id.* at 408. For example, white parents “might be able to share knowledge gleaned from their experience on the white side of the racial divide.” *Id.*

⁵⁵ *Id.* at 409. Kennedy goes on to observe that “black self-destructiveness persists and must be taken into account in any serious assessment of the internal racial dynamics of black communities.” *Id.* at 410. Kennedy later quotes approvingly a 1966 article by Professor Lee Rainwater:

The caste-facilitated infliction of suffering by Negroes on other Negroes and on themselves appears most poignantly within the confines of the family The victimization process as it operates in families prepares and toughens its members to function in the ghetto world, at the same time that it seriously interferes with their ability to operate in any other world.

Id. at 478 (quoting Lee Rainwater, *Crucible of Identity in the Lower-Class Family*, 95 *DAEDALUS* 172 (1966)).

⁵⁶ KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 408.

⁵⁷ *Id.* at 476–77.

In Kennedy's view, popular support for race matching reflects "racial superstition."⁵⁸ He recognizes that "many people simply [accept the logic of race matching] on faith, as a matter of common sense,"⁵⁹ but he believes that "common sense is often tainted by baleful habits of thought and can be highly resistant to unexpected realities."⁶⁰

In Kennedy's view, however, the "strongest argument against race matching is that it inhibits or even prevents" the adoptive placement of those black children at risk of languishing in foster care.⁶¹ Black children, who comprise nearly forty percent of the approximately 500,000 children in foster care,⁶² are less likely than white children to be placed in adoptive homes.⁶³ Kennedy depicts race matching as perpetuating this disparity in two distinct ways. First, social workers committed to race matching may "either decline to make a child eligible for adoption until a suitable black household can be found, or list only blacks on the roster of possible adoptive placements for the child."⁶⁴ "This strategy of racially aligning children and adults imposes a burden of delay."⁶⁵ It also "diminishes the chances that the child will *ever* be adopted."⁶⁶

Second, even moderate race matching "thin[s] the ranks of those who might adopt [black children]" by discouraging them from doing so.⁶⁷ "Whites who might otherwise have been happy to adopt regardless of racial differences may feel intimidated or stigmatized by race matching policies and rhetoric."⁶⁸

⁵⁸ *Id.* at 415.

⁵⁹ *Id.* at 408.

⁶⁰ *Id.*

⁶¹ *Id.* at 406.

⁶² The U.S. Department of Health and Human Services released estimates in September 2000 that 556,000 children were currently in foster care, of whom approximately 110,000 were eligible for adoption; 220,660, or about forty percent, were black. ADMIN. OF CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT (2002), available at <http://www.acf.hhs.gov/programs/cb/publications/afcars/report7.htm>. According to U.S. census data, as of March 2000, black children constituted sixteen percent of children under the age of fifteen nationally. Census Bureau, U.S. Dep't of Commerce, *Population by Age, Sex, and Race and Hispanic Origin: March 2000*, at <http://www.census.gov/population/socdemo/race/black/pp1-142/tab01.txt> (last visited Apr. 24, 2003). For an analysis of the origins and impact of the racial disparity in the foster care system, see generally DOROTHY ROBERTS, SHATTERED BONDS (2002).

⁶³ ROBERTS, *supra* note 62, at 13–14, 23. Black foster care children are also less likely than white children to be returned to their biological families. *Id.*

⁶⁴ KENNEDY, INTERRACIAL INTIMACIES, *supra* note 1, at 404.

⁶⁵ *Id.* "In many locales . . . the pool of black parentless children overwhelms the available number of black prospective adoptive parents." *Id.* at 404. Kennedy concludes that "black adopters alone [are too few in number] to provide homes for all of the black children in need of parents." *Id.*

⁶⁶ *Id.* Kennedy notes that "[c]hildren become less attractive as adoptees as they age." *Id.*

⁶⁷ *Id.* at 404.

⁶⁸ *Id.* Kennedy adds that by "chasing away a substantial number of prospective adoptive parents, race matching policies necessarily condemn some children to a childhood without any permanent parents whatsoever, or to a longer wait for adoption than they otherwise would have had to endure." *Id.*

Although Kennedy's opposition to race matching is unyielding, he would not apply the nondiscrimination mandate to another form of racial discrimination that similarly reduces the adoptive chances of black children. As Kennedy notes at the outset of his discussion of race matching, "[d]isproportionately large numbers of blacks among the ranks of parentless children also reflect racial selectivity in the private preferences of those seeking to become foster or adoptive parents, the great majority of whom have a preference for children of the same race as themselves."⁶⁹ Because most prospective adoptive parents are white, adoptive parents' same-race preferences reduce the relative availability of adoptive homes for black children compared to white children.⁷⁰

Although Kennedy would prohibit social workers from race matching, he would permit adoptive parents to do so. His proposal is unclear regarding the extent to which adoption officials should facilitate or impede adoptive parents' racial preferences.⁷¹ He implies at one point that he would make it difficult for parents to exercise such preferences,⁷² yet elsewhere suggests that agency officials should facilitate racial preferences provided that the prospective adoptive parent states a preference without any prompting by the agency.⁷³

Kennedy offers two rationales—one substantive, the other pragmatic—for exempting adoptive parents' preferences from the antidiscrimination principle. The substantive rationale is that it "is essential that people be allowed an ambit of privacy within which they may form intimate relationships, even if those relationships are based on considerations that are properly thought to be silly or even pernicious. Choosing a child to adopt, like choosing a mate to marry, should be located within that ambit, safely insulated from the intrusion" of social workers.⁷⁴

⁶⁹ *Id.* at 402.

⁷⁰ For a discussion of parental preferences compared to the characteristics of children in need of adoption, see Devon Brooks et al., *Preferred Characteristics of Children in Need of Adoption: Is There a Demand for Available Foster Children?*, 76 *SOC. SERV. REV.* 576, 578, 585 (2002); see also 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).

⁷¹ I have elsewhere described the institutional and legal promotion of adoptive parents' racial preferences as a policy of facilitative accommodation. R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 197 *YALE L.J.* 875 (1998). Facilitative accommodation refers to a policy whereby adoption officials' "classification of children on the basis of race facilitates and promotes the exercise of racial preferences by prospective adoptive parents." *Id.* at 880.

⁷² He recommends that it be "illegal for [adoption] officials either to ask those seeking to adopt to state a racial preference in a child or to offer to prospective parents racially coded lists or directories of children eligible for adoption." KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 435.

⁷³ He states that "[r]ace could be taken into account . . . if a prospective adoptive parent indicated that she was interested only in adopting a child of a given race." *Id.* at 416.

⁷⁴ KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 435–36. Kennedy describes as "grotesque" the idea that adoptive parents would be penalized for racially discriminating in their choice of a child. *Id.* For reasons that should become clear, I do not view that possi-

The pragmatic reason is that a prohibition of adoptive parents' preferences would be counterproductive. Kennedy surmises that enactment of such a prohibition "would likely pressure some number of prospective adoptive parents to conceal their racial feelings in order to remain eligible to adopt."⁷⁵ He then observes, "It serves no one's interest, however, to place a child with adults who would actually prefer a youngster of a different race. Indeed, to do so would merely seem to invite disaster for all concerned."⁷⁶ A prohibition of racial preferences also might prompt prospective adoptive parents to flee the system.⁷⁷ To the extent that parents would resent and resist the prohibition, it would not improve the adoptive placements of black children.

Thus, in Kennedy's view, substantive and pragmatic concerns alike weigh *in favor of* the prohibition of race matching and *against* the prohibition of adoptive parents' exercise of their racial preferences. Kennedy's analysis of race and adoption neatly fits with his broader emphasis on enforcement of the antidiscrimination principle against the state as a means of promoting individual autonomy and well-being.

III. ANTIDISCRIMINATION AND CHILDREN'S BEST INTERESTS

Prohibitions of race matching and parental preferences cannot be as sharply distinguished, on either substantive or pragmatic grounds, as Kennedy suggests. In my view, the substantive justifications for promoting either use of race are not persuasive. More importantly, the same sorts of pragmatic considerations that weigh against the prohibition of parental preferences also undermine the exclusive focus on enforcement of the race matching prohibition as a means of aiding those black children at risk of languishing in foster care. The likely resistance of social workers and adoptive parents would diminish the efficacy and utility of prohibitions of race matching and parental preferences alike. The uncertain benefits of enforcing nondiscrimination suggest the need to consider alternative means of promoting children's interests.

A. *Substantive Justifications*

Whereas Kennedy thinks that substantive justifications weigh in favor of parental preferences and against race matching, I do not find persuasive the substantive justification for either form of discrimination. I agree with Kennedy that race matching rests on an empirically unsupported and proba-

bility as any more grotesque than the pervasive discrimination by adoptive parents that disadvantages black children.

⁷⁵ *Id.* at 436.

⁷⁶ *Id.*

⁷⁷ Kennedy suggests that such a prohibition would "likely dissuade a substantial number of people from entering the adoption market." *Id.* at 436.

bly erroneous premise that black children are better served by black parents. Along some dimensions, studies have found no differences between transracial and inracial adoptees.⁷⁸ Along other dimensions, some studies have found differences that are either difficult to rank⁷⁹ or that favor transracial over inracial placements.⁸⁰ These studies do not prove that black children are better served by white parents. But they certainly provide no evidence for the contrary assumption.

As Kennedy notes, the intuition that same-race placements are preferable to transracial placements is sustained in part by a continual stream of first-person accounts of transracially adopted children, many of whom support moderate forms of race matching.⁸¹ While one must accept such stories as accurate renderings of adoptees' subjective experiences, their policy import is less obvious. My own view is that such narratives reveal pervasive intuitions about race.⁸² They are less persuasive as indicators of the costs and benefits of transracial adoption.⁸³ Kennedy is correct, I think, to describe race matching as a form of racial superstition.

⁷⁸ For example, one study found "no elevated levels of adjustment problems associated with being transracially adopted." William Feigelman, *Adjustments of Transracially and Inracially Adopted Young Adults*, 17 CHILD & ADOLESCENT SOC. WORK J. 165, 180 (2000). These findings are consistent with an earlier study in which black inracial, transracial, and single-parent adoptees were rated almost identically in assessments of their overall adjustment. See Joan F. Shireman & Penny R. Johnson, *A Longitudinal Study of Black Adoptions: Single Parent, Transracial, and Traditional*, 31 SOC. WORK 172, 173 (1986). Moreover, transracial adoptees are no more likely than inracial adoptees to run away from home, have drug or alcohol problems, or be arrested. Feigelman, *supra*, at 170.

⁷⁹ Some studies have found that transracial adoptees tend to view race as a less important or defining aspect of their identity than do inracial adoptees. See, e.g., Bartholet, *Where do Black Children Belong?*, *supra* note 46, at 1218 (describing these findings).

⁸⁰ Transracially adopted black children tend to perform better in school and on measures of mental ability than their inracially adopted peers. One study found that transracially adopted children scored a full standard deviation higher than traditionally adopted black children on IQ tests. Elsie G.J. Moore, *Family Socialization and the IQ Test Performance of Traditionally and Transracially Adopted Black Children*, 22 DEVELOPMENTAL PSYCHOL. 317, 319 (1986). Moore suggests that this disparity is a consequence of the different parenting styles of whites and blacks, rather than a consequence of socioeconomic status. *Id.* at 321, 324. See also Elsie G. J. Moore, *Ethnic Social Milieu and Black Children's Intelligence Test Achievement*, 56 J. NEGRO EDUC. 44, 50 (1987). I do not view Moore's interpretation of her findings as necessarily correct.

⁸¹ See, e.g., RITA J. SIMON & RHONDA M. ROORDA, IN THEIR OWN VOICES: TRANSRAcial ADOpTEES TELL THEIR STORIES (2000).

⁸² Adoptees have been socialized no less than researchers and members of the public to expect racial problems to arise as a consequence of racial difference, but not as a consequence of racial commonality. Thus, transracial adoptees might tend to attribute personal difficulties to having been adopted by white parents, even as inracial adoptees would be less likely to attribute similar difficulties to having been adopted by black parents. Relatedly, inracial adoptees might be more likely to perceive the advantages of black parents than are transracial adoptees to perceive the advantages of having white parents.

⁸³ I recognize that transracial adoptees' subjective experiences (e.g., feeling out of place, misunderstood, or culturally uprooted) may properly be viewed as costs of transracial adoption. But I would not accord such costs especially significant weight, at least to the extent they arise from the social and cultural primacy of racial commonality within the family. I would discount the significance of this sort of "harm" from transracial adoption just as I would discount the potential harm to school children from the invalidation of de

In contrast to Kennedy and as my prior work indicates, I do not view as especially compelling the substantive justification for exempting adoptive parents' racial preferences from the antidiscrimination norm.⁸⁴ The parallel between adopting a child and choosing a spouse is more attenuated than Kennedy indicates. For one, the constitutional statuses of these choices differ. Adults have a constitutionally protected liberty interest in their choice of a spouse⁸⁵ (as well as in their decision to procreate)⁸⁶ but not in their decision to become an adoptive parent.⁸⁷

Whereas the state's participation in the marriage process is minimal,⁸⁸ the state acts affirmatively to further the best interests of the children for whom it has assumed responsibility.⁸⁹ Judges and social workers scrutinize adoptive parents and evaluate the match between parent and child. The active involvement of the state in the adoption process complicates Kennedy's emphasis on limiting state power as a means of enhancing individual autonomy and well-being. The autonomy of children in the child welfare system depends on the assertion of state power.

Moreover, the values and norms that shape the spousal and parent-child relationships differ. People select spouses for all sorts of reasons—appearance, personality, intelligence—that might strike many people as objectionable bases for selecting a child to parent.⁹⁰ While spouses might comfortably discuss the characteristics that attracted them to each other, would most parents have an analogous sort of conversation with their

jure segregated school districts, or the potential harm to a child from remaining in the custody of a parent in a mixed-race relationship. I think that both *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Palmore v. Sidoti*, 466 U.S. 429 (1984), were correctly decided.

⁸⁴ See generally *Banks*, *supra* note 71. The substantive justification I find most compelling is one on which Kennedy does not rely: that same-race preferences primarily reflect the desire not to make public the fact of the adoption.

⁸⁵ *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating state restrictions on prison inmates' right to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (reaffirming the fundamental character of the right to marry); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating miscegenation laws).

⁸⁶ *Roe v. Wade*, 410 U.S. 113 (1973) (striking down state prohibitions of abortion).

⁸⁷ *Cf. Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (rejecting the foster parents' claim that procedures governing the removal of foster children violated the foster parents' constitutional rights); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977) (declaring that foster parents' relationship with their foster child "is not a protected liberty interest, but [is] an interest limited by the very laws which create it").

⁸⁸ Of course, the state does define marriage, and thus restricts one's marital choices. In particular, same-sex marriages remain prohibited in every state. Vermont has extended same-sex couples the right to enter into a civil union, VT. STAT. ANN. tit. 15, § 1202(2) (Supp. 2001), but stopped short of marriage. See also Defense of Marriage Act, 28 U.S.C. § 1738c (2000).

⁸⁹ The independent adoptions that occur with less state involvement are not the adoptions on which Kennedy is focused. For a brief description of independent adoptions, see *Banks*, *supra* note 71, at 897.

⁹⁰ Wanting a spouse who is tall, slim, and smart somehow does not seem on par with choosing a child for analogous reasons.

adopted child? Two adults mutually agree to marry. Children don't choose their parents and, in most cases, parents don't choose their children. Parenting is asymmetrical and unconditional from the start in a way that adult relationships are not.

B. Pragmatic Considerations

Whereas Kennedy thinks that pragmatic considerations militate *against* prohibition of parental preferences and *in favor of* prohibition of race matching, I think that pragmatic considerations might weigh against extreme efforts to eliminate either form of discrimination.

The consequences of a preference prohibition depend on how it is applied. For instance, prohibiting the exercise of racial preferences by individuals adopting through the public child welfare system might not be as disastrous as Kennedy posits. The racial composition of the foster care population in many locales is such that most parents who adopt through that system expect to adopt a non-white child.⁹¹ Because parents have selected themselves into that process in part on the basis of their willingness to adopt a child of color, a prohibition of racial preferences would neither cause those parents to flee the system nor result in the placement of children with families who would prefer a child of a different race.

At the same time, Kennedy's proposed policy, applied broadly to public and private agencies,⁹² might promote the same parental exodus and parent-child mismatches that he fears. Requiring a social worker to act as though parents do not have a racial preference, when almost all do, would create the sort of "negative, restrictive, bureaucratic" process Kennedy disclaims.⁹³ A policy that would constrain a social worker in expeditiously satisfying a parent's racial preference might incline a parent either to leave the system or to accept a child that would not be that parent's first choice. If a goal is to bring parents into the system,⁹⁴ why not make it easy for them to exercise a racial preference rather than merely permit them to do so?⁹⁵ Kennedy is inclined to apply a rigid nondiscrimination rule to the state but disinclined to recognize the practical consequences of such a rule.

⁹¹ For example, in 1993, "black children comprised almost ninety percent of the foster care population" in New York City. Amanda T. Perez, Note, *Transracial Adoption and the Federal Adoption Subsidy*, 17 YALE L. & POL'Y REV. 201, 204 n.7 (1998).

⁹² Kennedy endorses extension of the race matching prohibition to agencies that do not receive federal funding. KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 433.

⁹³ *Id.* at 436 (quoting Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2353 (1998)).

⁹⁴ Kennedy approvingly quotes Elizabeth Bartholet's statement that "[w]e should be drawing prospective parents into our public adoption system, not driving them away." *Id.* (quoting Bartholet, *supra* note 93, at 2353).

⁹⁵ For example, why not offer racially coded lists of children available for adoption.

Most importantly, pragmatic considerations might weigh against enforcement of the race matching prohibition as well. Contrary to Kennedy's assumption, the redoubling of efforts to eliminate race matching might not be the most effective means of aiding those children at risk of languishing in foster care. Given widespread support for race matching among social work professionals, efforts to eliminate it might backfire. Moreover, even the genuine cessation of race matching might not substantially improve the adoptive outcomes of foster care children.

Kennedy repeatedly acknowledges the persistence of race matching notwithstanding the current prohibition, but he does not sufficiently consider the limited efficacy and utility of efforts to eliminate it. Many social workers are passionately committed to race matching,⁹⁶ and their professional role entails the discretionary judgments that make it easy to conceal discriminatory practices.⁹⁷

Kennedy suggests that changing public opinion would be sufficient to end race matching.⁹⁸ It would not. The views of social workers are probably more resistant to change than those of the lay public. Public opinion might be susceptible to change insofar as it reflects either misperception of the empirical evidence or unfamiliarity with the arguments against the logic of race matching. The commitment to race matching on the part of social work professionals, by contrast, probably does not rest on either type of ignorance. Social work professionals probably have heard and rejected the arguments against race matching and have decided that the empirical evidence is insufficient to overcome their own intuitions, borne, perhaps, of years of professional experience and reaffirmed by the culture of social work organizations.⁹⁹ Social work practitioners

⁹⁶ See, e.g., PATTON, *supra* note 45, at 155 (noting that all of the social workers she interviewed during the course of research into transracial adoption "affirmed their belief in the importance of racial matching in adoption"); see also Samella B. Abdullah, *Transracial Adoption is Not the Solution to America's Problems of Child Welfare*, 22 J. BLACK PSYCHOL. 254 (1996); Lawford L. Goddard, *Transracial Adoption: Unanswered Theoretical and Conceptual Issues*, 22 J. BLACK PSYCHOL. 273 (1996); Algea O. Harrison, *Comments on Transracial Adoption*, 22 J. BLACK PSYCHOL. 236 (1996) (all skeptical of arguments against race matching).

⁹⁷ See Barthelet, *supra* note 93 (criticizing the persistence of race matching notwithstanding the change in law); Jacqueline Macaulay & Stewart Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, 1 RES. L. & Soc. 265 (1978) (emphasizing the centrality of discretion in social work practice).

⁹⁸ Kennedy is certainly correct when he observes that the "judicial system, by itself, will never satisfactorily police the conduct of decision makers whose personal aims and sentiments are in opposition to the law." KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 376. Kennedy states that the "only thing that will decisively end the practice of race matching is a persistent and vocal campaign to educate and transform public opinion." *Id.* at 434. I think Kennedy understates the difficulty of ending race matching.

⁹⁹ See, e.g., PATTON, *supra* note 45, at 155 (noting that all of the social workers interviewed by the author during the course of her research regarding transracial adoption strongly supported race matching). A study conducted by the General Accounting Office after enactment of the prohibition of race matching found continued support for race matching among social work professionals. U.S. GEN. ACCOUNTING OFFICE, *supra* note

and researchers, after all, *are* the experts, as a consequence of their professional role, if not their unbiased judgment.¹⁰⁰ Consequently, the views of those social work professionals most deeply committed to race matching are unlikely to change, no matter the empirical evidence.¹⁰¹ Their commitment to race matching would, of course, prompt social workers to continue the practice in a clandestine manner.¹⁰² The discretion inherent in their role affords them ample means of doing so without detection.¹⁰³

To his credit, Kennedy acknowledges “the prevalence and intensity of strong race-matching tendencies within social-worker bureaucracies, and the difficulty of ferreting out the covert racial considerations buried in decentralized, low-visibility, open-ended, highly discretionary child-placement decisions.”¹⁰⁴ He characterizes some social workers supportive of race matching as “true believers [who are often] irrepressible and likely to fight for what they genuinely feel is right, even if it entails engaging in deception.”¹⁰⁵

49. The report states: “The belief that race or cultural heritage is central to a child’s best interests when making a placement is so inherent in social work theory and practice that a policy statement of the National Association of Social Workers still reflects this tenet, despite changes in federal law.” *Id.* at 11.

¹⁰⁰ It seems that for many social work professionals, the assumption that same-race placements are preferable to cross-race placement is so ingrained that virtually no empirical evidence would be sufficient to refute it. See, e.g., Devon Brooks et al., *Adoption and Race: Implementing the Multiethnic Placement Act and the Interethnic Adoption Provisions*, 44 SOC. WORK 167 (1999). These social work researchers described their professional “consensus” that “children’s best interests are served—all else being equal—when they are placed with families of the same racial, ethnic, and cultural background as their own.” *Id.* at 169.

¹⁰¹ For the views of race matching proponents who find current empirical evidence regarding transracial adoption unpersuasive, see Abdullah, *supra* note 96; Goddard, *supra* note 96; Harrison, *supra* note 96. These commentators’ assumptions about racial commonality and difference are so deeply ingrained as to be immune to evidence or augmentation.

¹⁰² Social workers who continued to emphasize same-race placements and to avoid transracial placements would see themselves as furthering the best interests of children, and perhaps not as violating the law. The law itself is ambiguous and, by its terms, does not forthrightly preclude consideration of race. See Brooks et al., *supra* note 100, at 171 (noting the lack of clarity in the law itself); U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 12 (noting the views of some social workers supportive of race matching that consideration of race did not delay or deny placement so as to violate the federal law); Rita J. Simon, *Transracial Adoptions: Does the Law Matter?*, AM. EXPERIMENT Q., Fall 1999, at 85 (reporting that nearly all of the agencies surveyed reported that the statute had “little to no impact” on their placement of children).

¹⁰³ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 14 (noting that the federal foster care “database lacks sufficient information on the racial identity of foster and adoptive children and their foster parents to conduct the type of detailed analysis of foster care and adoption patterns that would likely be needed to identify discriminatory racial patterns”). The report then goes on to discuss in some detail the difficulties in determining whether social workers are considering race in violation of the law. *Id.* at 14–15.

¹⁰⁴ KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 417.

¹⁰⁵ *Id.* at 423. At yet another point, Kennedy refers to the “out and out deception engaged in by officials even while under oath in court proceedings [as] a notable—and ongoing—feature of the continuing struggle over transracial adoption.” *Id.* at 430.

What Kennedy does not sufficiently emphasize, however, is the extent to which social workers' efforts to evade a stringently enforced prohibition of race matching might harm children. In a pathbreaking article more than a decade ago, Professor Elizabeth Bartholet illuminated the ways in which social workers' misguided efforts to avoid transracial adoptive placements caused them to leave children in foster care or even to allow children to remain in unsuitable home environments.¹⁰⁶ While it is difficult to predict with any certainty the consequences of social workers' efforts to evade a prohibition at odds with their own deeply held commitments, it seems to me quite plausible that efforts to enforce the prohibition would exacerbate social workers' tendency to take actions contrary to children's best interests.¹⁰⁷

The most effective way to banish race matching would be to eliminate the discretion through which it operates. Such a system is not unimaginable,¹⁰⁸ but it would require a drastic reformation of the child welfare system. The costs of eliminating discretion in this manner might exceed the gains from eliminating discrimination.

Even if race matching could be easily eliminated, the benefits to children are less certain than Kennedy supposes. The cessation of race matching might produce either or both of two effects: an improvement in children's adoptive outcomes, or a redistribution of children from black adoptive parents to white adoptive parents. In other words, the elimination of race matching might mean that black children spend less time in foster care. The wait to be adopted might diminish, and the likelihood of being adopted might increase. The other possibility is that the end of race matching would simply reallocate from black to white adoptive parents those children who would have been adopted anyway. Black children, in this scenario, would be no less likely to languish in foster care. Which of these effects would predominate is essentially an empirical question.¹⁰⁹

¹⁰⁶ Bartholet, *Where Do Black Children Belong?*, *supra* note 46, at 1193–94 (noting increased holding periods as a consequence of disinclination to place children transracially). One obvious way of enforcing a race matching prohibition would be through statistical analysis of placement decisions for foster care children. Assuming that such data would be available, one might look for statistical patterns indicative of efforts to avoid transracial placements. In order to avoid detection, social workers deeply committed to race matching might leave black children in unsuitable home environments so that those children simply would not become a part of the statistical analysis.

¹⁰⁷ Of course, the social workers would not understand their actions as harming children. Quite the contrary, they would view their efforts as saving children from the harm associated with transracial placements. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 3 (noting that “not all [social work professionals] believe that eliminating race will result in placement decisions that are in the best interests of children, which is the basic criterion for placement decisions”).

¹⁰⁸ In such a system, social workers' role in the adoption process would be reduced to the ministerial. The elimination of discretion in decisions about whether to remove children from their biological families and place them in foster care seems barely conceivable.

¹⁰⁹ *See* PATTON, *supra* note 45, at 149 (relating that the social workers she interviewed believed that “lifting the restrictions on transracial placements would do little or nothing to

My goal is not to resolve the empirical question, but simply to emphasize its complicated nature. For the elimination of race matching to improve dramatically the adoptive outcomes of children, there would have to be some non-trivial number of white parents who would seek to adopt black children.¹¹⁰ Even if significant numbers of white adults want to adopt black children from foster care, it is unclear whether the influx of white adopters would increase the rate of adoptions or reduce children's wait for adoption. White adults willing to adopt transracially *may* be willing to adopt the most difficult-to-place black children—children who might otherwise remain unadopted because they are older, part of a sibling group, or disabled.¹¹¹ On the other hand, most white parents willing to adopt transracially may prefer to adopt the healthy infants who are prized throughout the adoption world.¹¹² In this case, white adoptive parents would compete with and, at least partially, displace black adoptive parents.¹¹³ The displaced black adoptive parents might then decide to adopt children who would have otherwise remained unadopted, or they might decide not to adopt. In this scenario, if black parents are more likely than white parents *not* to adopt if they cannot adopt a healthy infant, then the aggregate number of adoptions through the child welfare system might actually decrease.¹¹⁴ Kennedy does not adequately consider these potential consequences. He certainly provides no basis for a confident prediction that those black children most at risk of languishing in foster care would benefit substantially from the elimination of race matching.¹¹⁵

Because Kennedy assumes that stringent enforcement of the race matching prohibition would meaningfully benefit children, he does not contemplate the limits of antidiscrimination. Consideration of the limits and unintended consequences of antidiscrimination efforts is appropriate and important because the antidiscrimination principle is meant to serve substantive ends.¹¹⁶ To the extent it fails to serve those ends, the commit-

help the growing population of children waiting in foster care”).

¹¹⁰ Kennedy mentions only one study suggesting that possibility and seems himself to regard the findings of that study as somewhat dubious. KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 449 (discussing a study by the National Center for Health Statistics).

¹¹¹ According to most researchers, race is one of many elements that accounts for children's remaining in foster care rather than being adopted. *See, e.g.*, Brooks et al., *supra* note 70, at 580 (noting that “nearly 70 percent of children in foster care have at least one form of developmental or social impairment that reaches the level of clinical concern”).

¹¹² *See id.* at 578 (describing survey findings that a majority of adopters prefer to adopt a child younger than two years old).

¹¹³ I do not view such redistribution as undesirable. But I also do not think it benefits children.

¹¹⁴ Thanks go to Michael Wald for noting this last possibility.

¹¹⁵ I do not here wish to imply that the limited benefit of ending race matching constitutes an argument in favor of the practice. It does not. But an assessment of consequences is essential to an analysis of how best to help foster care children.

¹¹⁶ One might for any number of reasons remain committed to enforcement of the antidiscrimination principle, even if it does not realize one's substantive goals in a particular context. One might believe, for example, that the realization of the principle in one area

ment to antidiscrimination should be reassessed and other means of realizing those goals should be explored.

Antidiscrimination should be viewed as a means rather than an end and assessed pragmatically. As should be clear by this point, I am not a supporter of race matching. I do not believe that race matching serves any legitimate substantive purpose. There is no evidence that black children benefit by having black, rather than white, parents. At the same time, however, efforts to eliminate discrimination should be informed by realistic assessment of the extent to which those efforts will realize substantive goals. Normative commitment to antidiscrimination should not preclude more direct attention to the interests of the children that antidiscrimination might be thought to serve. I do not mean to imply that race matching should be promoted or that adoption policy should embrace the practice. I think we should fight against it, but that our efforts to end it should be tempered by recognition of the potentially perverse consequences of doing so. Race matching might be a necessary evil. Even if efforts to eliminate it are not counterproductive, it is unlikely that ending race matching, by itself, would solve the problem of unadopted children.¹¹⁷

Alternative means of promoting children's interests ought to be considered. There are a variety of other potentially beneficial policy alternatives: expanded recruitment of black adoptive families,¹¹⁸ support services for biological families,¹¹⁹ relaxed criteria for adoptive parents,¹²⁰ increased adoption subsidies,¹²¹ and longterm kinship care,¹²² for example. I do not here want to argue for any hierarchical ranking of these options, nor do I suggest that any or all of them should be viewed as an alterna-

bleeds into other areas where the principle is, in fact, useful. Or one might endorse as an end in itself the individualism that the antidiscrimination principle vindicates. There might be other reasons as well for embracing a nondiscrimination principle that does not realize the practical goals with which it is associated. But these are the two that seem most compelling to me—and neither seems especially compelling.

¹¹⁷ See Brooks et al., *supra* note 70, at 600 (concluding on the basis of their empirical study that the prohibition of race matching “may be insufficient . . . for achieving permanency for significant numbers of available foster children”).

¹¹⁸ See Brooks et al., *supra* note 100, at 174 (discussing the importance of aggressive and ongoing recruitment of adoptive parents).

¹¹⁹ See Barth, *supra* note 70, at 301–02 (arguing that the creation of a better social safety net would help keep more black children at home with their families, thereby equalizing the number of black children up for adoption and black families willing to adopt and reducing the disproportionate impact of race matching).

¹²⁰ See Bartholet, *Where Do Black Children Belong?*, *supra* note 46, at 1253 (advocating expanded outreach and recruitment of adoptive parents and the use of more flexible criteria in evaluating adoptive parents).

¹²¹ See Perez, *supra* note 91, at 1276.

¹²² In kinship care arrangements, children are placed with relatives and, typically, parental rights are not terminated. For a discussion of kinship care, see Cynthia G. Hawkins-Leon & Carla Bradley, *Race and Transracial Adoption: The Answer is Neither Simply Black Or White Nor Right Or Wrong*, 51 CATH. U. L. REV. 1227, 1276–85 (2002).

tive to the elimination of race matching. Rather, these policies might complement both each other and prudent efforts to end race matching.

The particular policy mix should be determined simply on the basis of the benefit to children. The sort of assessment I have in mind is empirical and context-specific. The relevant questions are practical ones. For example, will the adoptive chances of children be enhanced more by attempting to eliminate race matching or by expanding recruitment of black adoptive parents?¹²³ Might family support services be used to decrease the number of children entering foster care, and hence the need for adoptive parents? The costs of recruiting additional black parents might be less than the costs of pressuring social workers to place black children with white parents. Or it might be preferable to provide the necessary support services so that fewer children are removed from their biological families in the first place.¹²⁴

* * *

In sum, Kennedy's rendering of historical and contemporary interracial intimacies, and the controversies they have occasioned, dramatizes the central role of intimacy in matters of racial equality. His analysis of race and adoption usefully illuminates the error of race matching. In a more ideal world, the adoption process would not be distorted by invidious discrimination by either parents or social workers. For now, efforts to aid children should realistically consider the consequences of alternative policies.

¹²³ Kennedy considers and too hastily dismisses this possibility. He reasons that "even if [the numbers of black adoptive parents] increased considerably, black adopters alone would be unable to provide homes for all of the black children in need of parents." KENNEDY, *INTERRACIAL INTIMACIES*, *supra* note 1, at 403. The question is not whether black adopters can provide homes for all black children in need of adoption, but simply whether additional recruitment of black adopters would be beneficial.

¹²⁴ See ROBERTS, *supra* note 62.