

# Recent Developments in the Transracial Adoption Debate

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**This article places the controversy over transracial adoption (TRA) in its historical context and analyzes recent developments in the law governing TRA policy. Because unfounded "authority" from the field of mental health infuses current debate, the authors alert psychiatrists to two powerful forces that improperly influence today's legal arena: community preference for same-race families and biased professional norms of mental health professionals.**

No concern is more precious than our children, not simply because we care so much about their present happiness but because the future depends upon their wholesome growth. . . .<sup>1</sup>

The adoption of black children by white families continues to provoke substantial discussion, as evidenced by recent hotly contested legal cases,<sup>2</sup> broad coverage in the lay press,<sup>3</sup> and renewed government concern.<sup>4</sup> Obviously, this transracial adoption (TRA) issue is far from settled. The TRA debate highlights the dilemma of whether the state can acknowledge the role of race in the development of children today without imposing identities and defining life opportunities on the basis of skin color. In the past few years, further clarification

about how agencies make TRA decisions has led to a rekindling of the public debate. The National Coalition to End Racism in America's Child Care System has undertaken a number of suits aimed at resurrecting the judicial veto over agency decisions.<sup>5</sup> In addition, AIDS, crack addiction, and homelessness have contributed to the numbers of children flooding child welfare agencies.<sup>6</sup>

The three forces of community values, judicial standards, and professional norms currently shape TRA public policy. Each force, however, contains its own internal conflicts. Community values, arguing for sameness or at least similarity in the construction of families, extol policies promoting same-race adoptions. On the other hand, Americans seem to believe that children, in crisis because of dysfunctional parents, belong with surrogates who can offer the children benefits of education and financial security that may be readily available in white homes.

Judicial standards designed to imple-

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ment the Fourteenth Amendment prohibit the use of race as a broad classification in legally enforced policies.<sup>7</sup> However, the highly individualized “best interests of the child” standard governing adoption proceedings<sup>8</sup> may necessitate considerations of race in some situations.

Social workers’ professional norms grow out of a history and tradition of placing children with adoptive families who are similar to their biological relatives. On the other hand, a recent review of TRA research<sup>9</sup> has shown quite clearly that the strong claims about TRA’s negative effects on children are to date unfounded. The research shatters the preconceptions of long-term practice and supports transracial adoption. It may be that the community bias toward single-race families has infected professionals’ ability to evaluate research in their field and judges’ willingness to apply Fourteenth Amendment standards in a disciplined fashion.

The TRA question has often been left to “expert” discretion. However, social workers, the TRA “experts” in practice, have not applied scientific principles or used accumulated knowledge in an ongoing process of trial and error so as to achieve the logical goal of providing what is best for children placed for adoption. Instead, the experts in trying to place black children have sought to do so while not offending or provoking those who oppose TRAs.<sup>10</sup> On the other hand, the Supreme Court’s pronouncement in *Palmore v. Sidoti*<sup>11</sup> that judicial standards must preempt community values in the area of race seems to have

stimulated the courts to become the most activist sector in TRA policy.

Having outlined in a previous article TRA case law and the mental health research on TRAs,<sup>12</sup> we wish in this article to describe the relevant historical context of the TRA debate and to address judicial trends in the post-*Palmore* era. We argue that community preference for same-race families and biased professional norms continue to influence the legal arena. Because policy makers invoke the language of mental health in their debate, we believe that mental health professionals, and particularly child psychiatrists and forensic psychiatrists, should be aware of the recent developments in the debate on TRAs.

### Historical Background

For over a decade, policy makers chose not to generate the statistics necessary for informed management of our child welfare system. The federal government last produced national estimates of all types of adoptions in the mid-1970s.<sup>13</sup> This dearth of reliable data supports our belief that discussions of TRA policy have long revealed more about political platforms and private biases than about children in need of homes.

Congress has recently provided for the compilation of adoption statistics.<sup>14</sup> This move demonstrates heightened attention to adoption policy and, perhaps, a renewed willingness to hold government accountable for child welfare. We hope this Congressional attention will reinforce the notion that TRA policies have

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long been ripe for sustained efforts at reform. "Awareness that few black children were adopted in proportion to the number coming into the child care system can be found in the professional literature as early as 1935."<sup>15</sup>

The recent statistics we do have indicate that TRAs constitute a very small percentage of all adoptions. In the state of Connecticut, for example, 131 of 1,715 adoptions completed between July 1, 1980, and June 31, 1987, were "transracial." Within this category, whites adopted black mixed race children 40 percent of the time and black children 10 percent of the time. The 131 TRAs also included blacks adopting black mixed race children and whites adopting Latino and Latino mixed race children.<sup>16</sup>

While TRAs have been held to a minimum in Connecticut, black children have remained disproportionately represented in foster care and in institutions. In 1987, black children constituted only 10 percent of that state's youth population, but filled 35 percent of Connecticut's foster homes, group homes, and institutions. The state commissioned report containing these figures advocated an ambitious program to place these children without resort to transracial adoptions.<sup>17</sup>

National statistics corroborate what we find in Connecticut: low numbers of TRAs and blacks overrepresented by every measure of children awaiting permanent homes.<sup>18</sup> According to the National Association of Black Social Workers' own statistics, the black community would have to increase its adoption ef-

fort by 144 percent, from 18 to 44 children per 10,000 black families, for all waiting children to be placed without resort to TRAs.<sup>19</sup>

Large numbers of minority children are both older and handicapped. As of 1988, there were three times as many of these difficult-to-place children as there were younger healthy children. There were five times as many of these older and handicapped children as there were minority families waiting to adopt them.<sup>20</sup>

As reported in *USA Today* on November 19, 1990, "anecdotal evidence suggests the number of transracial adoptions is slowly beginning to rise."<sup>21</sup> The researchers Simon and Altstein<sup>22</sup> have reported that both public and private child welfare agencies arrange TRAs, but few from either group will publicly admit to doing so. TRA continues to be identified in most areas as a highly charged racial issue and a rallying point symbolic of historic grievances. Most adoption agencies would rather not draw attention to themselves by actively supporting or encouraging this type of child placement. The dominant pattern continues to be adoption agencies' systematic use of race to exclude possible permanent parent-child matches from consideration.<sup>23</sup>

### Judicial Activism

*Concern for the Racial Integrity of Families* Fears of racial mixing have long dominated an area supposedly governed by the standard of a child's best interests.

One Georgia agency, for example, responded in 1954 to a Child Welfare League of America

study [on transracial adoption] by citing the state's antimiscegenation statute: "Our laws prohibit interracial marriage. A child reared in a home with parents of a different race will be apt to meet and want to marry a person of his or her parents' background, not his own."<sup>24</sup>

Adoption practitioners have gone to great lengths to preserve the appearance of sameness in families. The Child Welfare League of America advised agencies in the 1950s that they could place children of interracial background who appeared to be white in white families. Agencies were encouraged to consult geneticists or anthropologists in questionable cases.<sup>25</sup>

The Supreme Court spoke over two decades ago to the law's role in protecting "sameness" in family composition. In the 1967 case of *Loving v. Virginia*, the Court struck down a miscegenation statute for violating the Fourteenth Amendment due process clause. Appellants argued that the 1924 Act (An Act to Preserve Racial Integrity) was intended to reinforce notions of white racial superiority. The statute prohibited black/white marriages but allowed intermarriage between, for example, blacks and Asians. Justice Warren found that the law would be invalid even if it treated all racial groups alike. The state simply had no legitimate interest in safeguarding racial purity: "[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an evenhanded state purpose to protect the 'integrity' of all races."<sup>26</sup> The *Loving* ruling effectively overturned the laws of 16 states in addition to Virginia's.<sup>27</sup>

Five years later, in *Compos v. Mc-*

*Keithen*, a three-judge federal district court panel struck down a state statute prohibiting interracial adoptions, finding it unconstitutional on equal protection grounds. The court held that the statute "promotes not the child's best interests, but only the integrity of race in the adoptive family relationship."<sup>28</sup>

*Compos* extended *Loving's* message regarding state regulation of sexual relations to family relations more generally: a community cannot write laws for the purpose of keeping the races apart. In the adoption context, a child's best interests must come first. However, *Compos* struck down motives, not effects. A child-based focus may legitimately result in the same policy as the forbidden statute. Following *Loving* with respect to adult rights, *Compos* left open a "best interests of the child" route for behind-the-scenes agency policy.

Though it stands as a milestone in TRA jurisprudence, *Compos* technically controlled only a limited jurisdiction. As late as 1977, a South Carolina law permitted whites to adopt black children but explicitly forbade blacks from adopting white children.<sup>29</sup>

The Supreme Court finally addressed social prejudices against interracial families in the landmark case of *Palmore v. Sidoti*. In *Palmore*, a white man wanted an alteration of custody because his child's white mother had moved to a black neighborhood with a black man. The Supreme Court determined that it could not give private prejudices the effect of law and therefore could not base a custody decision on projections that

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the child would face social prejudice if raised in an interracial setting.

Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. . . . Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917.<sup>30</sup>

The Supreme Court used *Palmore* as a vehicle for making an unequivocal statement about community values and adult rights. The Court in effect reinforced the message of *Loving* (and of the Eastern District of Louisiana in *Compos*).

The current legal battleground is over the scope of *Palmore*. The first sentence quoted above from *Palmore* suggests a broad proscription against using race as a factor in adoption proceedings. The second, however, provides an opportunity for a narrower reading; it essentially guards “constitutional rights” against the fears and the forms of discrimination that racially mixed households may stir, but does not identify the constitutional rights at issue or state whom they protect. This wording leaves the door open for arguments that the use of race is prohibited only from affecting biological parents’ rights, for these are of an undoubted Constitutional dimension.<sup>31</sup> According to this line of reasoning, race *can* be used to impinge on other adults’ desires to adopt specific children, for their rights are less clearly protected by the Constitution. This distinction makes *Palmore* applicable to custody matters but not to adoption policy. Given the Court’s analogy to residential integra-

tion, we read *Palmore* broadly, as speaking to adoption as well as custody decisions.

We will take up *Palmore*’s legacy again below. The important point here is that, in spite of *Palmore*’s warning against giving biases legal effect *even indirectly*, agencies continue to find ways out of the box by claiming that biases play no role in their race-conscious decisions. The individualized “best interests of the child” standard—not explicitly mentioned anywhere in *Palmore*—is used as an escape route.

Agencies continue to insist that they are innocent of effectuating racial bias. Instead, they say they are serving children’s best interests. Mental health professionals use their own private policies against TRAs in the face of evidence that transracial adoptees develop self-esteem, achieve academically, and maintain close relationships with their adoptive families.<sup>32</sup> Private policies range from discouraging prospective families seeking transracial placements to requiring a search of some months’ duration for in-race placements before allowing consideration of TRAs. Many courts defer to agency norms, accepting agency invitations to merge concerns that the Eastern District of Louisiana managed to pull apart almost 20 years ago: what is good for a child and the racial integrity of families. “[The courts] are either unaware, or unwilling to acknowledge, that adoption agencies throughout the country are operating under rules that systematically make race a central factor in placement decisions for virtually all black children.”<sup>33</sup>

**The Post-Palmore Era** The case law evoking *Palmore v. Sidoti* has provided little clear indication of how that opinion will affect transracial adoption policy. In reading cases decided after *Palmore*, we are most struck by the fact that these cases reached appellate courts at all. That these cases are still being litigated itself indicates the power of community values and, more directly, judicial skepticism about *Palmore v. Sidoti*. Two Circuit Court opinions—Circuit Courts being only one tier below the U.S. Supreme Court—demonstrate a split between limiting *Palmore* to custody cases involving biological parents and reading it broadly as a proscription against considering race in adoption as well.

In the 1986 case of *McWilliams v. McWilliams*, the Fifth Circuit seemed to read *Palmore* as a broad proscription against the consideration of race in custody or adoption proceedings. The Fifth Circuit here dismissed a claim of discrimination brought by a black woman against her white former husband and against the judge who presided over their divorce proceedings. The judge had awarded primary custody of the couple's child to Mr. McWilliams and had restricted the mother's visitation rights by ordering her not to take the child to her black church. Counsel's earlier failure to present the constitutional challenges in state court precluded any opportunity to argue those points in later proceedings. The reviewing federal court thus had no reason to decide the case on its merits. The court did, however, discuss the merits question as settled by *Palmore*: "[I]n

*Palmore* the Supreme Court decided that the best interests of the child must yield to the overriding national policy of eradicating racial discrimination."<sup>34</sup>

In the 1989 case of *J.H.H. and S.C.H. v. O'Hara*, though, the Eighth Circuit found *Palmore* relevant only to determinations depriving natural parents of permanent custody of their children solely on the basis of race. Although the case had a rather bizarre factual history, the court here upheld an agency decision to transfer two black children from a white foster family wishing to adopt them to a black foster family without such immediate intentions. The court cast its decision as preserving chances for reuniting biological families rather than as creating imitations of them through foster care and adoption. The court accepted this "best interests" assessment of a social service supervisor with the Missouri Division of Family Services: "The Division's plan for the children—eventual reunification with the natural father—would best be met by continued placement with the J.'s, as they were able to provide both cultural and religious experiences to prepare the children for this event."<sup>35</sup>

The goal of preserving black families presents a substantive, complex challenge to our society today. Some public and private child welfare agencies have successfully dedicated intensive human and financial resources to keeping families together. In these programs, interventions begin for troubled families before children are removed from their homes; when removal is still necessary, the agency ensures that the parents

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maintain contact with the child while benefitting from rehabilitative services designed to decrease the risks that they will abuse or neglect the child when the family is reunited. We believe these programs represent child welfare policy at its very best.

Unfortunately, however, case by case arguments such as that made in *O'Hara*—in the absence of any program aimed at making family preservation viable or decision making timely—often result in neither family reunion nor new family bonding. Given the disproportionate number of black children already living in this limbo, we cannot help but see *O'Hara* as bad precedent with regard to the vision of *Palmore*. Since foster care is by definition temporary, *O'Hara* essentially argued that only black foster families should care for black children. Furthermore, *O'Hara* invited assumptions about how black and white households operate, and about the difficulty of transitions between them.

*O'Hara* appropriately inquired about the importance of transmitting to children the culture deriving from their ethnicity. A lower court took up this question one year earlier, but insisted that the child welfare agency before it articulate the relationship between a child's cultural needs and the color of that child's adoptive parents' skin. In *McLaughlin v. Pernsley*, white foster parents challenged the city's removal of a black foster child from their care. The Eastern District of Pennsylvania found an equal protection violation. Although the judge found a compelling governmental interest in providing for the ra-

cial and cultural needs of a child in state custody, he determined that "The use of race alone in making long-term foster care placements is not necessary nor appropriate to accomplish those salutary governmental objectives stated above."<sup>36</sup> He granted a preliminary injunction returning the child to the McLaughlins' care. The most interesting point inherent in this opinion, however, lay in the identification of the compelling state interest as a child's "racial and cultural needs." The court neither defined nor distinguished these two categories. Both *O'Hara* and *McLaughlin* foreshadowed the ambiguous requirement of "cultural education" for prospective adoptive parents.

We are wary of accepting arguments about "culture" at face value, for in spite of the *Loving* line of cases, *Palmore*, and all that has transpired since, we still have the 1990 Illinois case of *In re Marriage of Burton*.<sup>37</sup> In a custody battle between a black father and a white mother, the court awarded custody to the father because the child's physical features resembled his father's. His father had flourished a weapon in the presence of the child, had failed to pay \$19 per week in child support, and had caused the child's mother to obtain temporary restraining orders against him twice. The statute under which the lower court deliberated explicitly enumerated factors to be considered. As the appellate court noted in overturning the custody award, the mother had prevailed on every count. But at least for the lower court judge, race had overwhelmed all else.

### *The Hamilton County Compliance*

**Agreement** The federal government recently confronted *de facto* agency rules that for 20 years would not have withstood scrutiny if enshrined in law. In November 1989, a white couple from Cincinnati, OH, filed a complaint against the Hamilton County Department of Human Services (HCDHS) alleging violations of Title VI of the Civil Rights Act of 1964. The Office of Civil Rights (OCR) of the United States Department of Health and Human Services investigated the charge that HCDHS discriminated against black and racially mixed children and against white prospective parents/families by discouraging or refusing to permit TRAs. The OCR found that the county did base its placement decisions on generalized presumptions about race:

Specifically, the investigation showed that the Recipient [of Federal funds] had policies, procedures, and practices that required documented efforts for six months to secure a same race adoptive placement, for all children prior to any consideration of transracial adoptive placement, thus making race the deciding criterion in placement decisions.<sup>38</sup>

In a compliance agreement dated May 1990, Hamilton County promised not to delay adoptive placements because of failure to find racial matches. "Nothing in this policy shall be construed to permit the recipient to unduly extend the child's stay in substitute care until a same cultural heritage adoptive placement is maintained."<sup>39</sup> The agreement allowed the county to require plans for advancing a child's cultural identity as a prerequisite to transracial adoption: "In keeping with the best interests and special needs of the child, consideration will

be given to adoptive parents who are not of the same cultural heritage of the child but who develop a plan for assuring the child's cultural identity is maintained."<sup>40</sup> Several months following the signing of the agreement, in fact, a Hamilton County court referee ordered a prospective white adoptive family to undergo education on black culture before adopting a black foster child.<sup>41</sup>

The *Loving* line made *race* a taboo consideration in family law. The state then indicated a capacity to see racial discrimination in adoption policy effects as well as in illicit motivations. Without giving clear content to their new terminology, we wonder whether agencies are now renaming their concern *culture*.

### Discussion

As the cases cited above suggest, TRA denials are routinely challenged under two different legal theories: as violations of the due process rights of white foster parents wishing to adopt black children in their care, and of those children themselves; and, as Equal Protection Clause violations harming white prospective adoptive parents (and, in one instance, a class of black children awaiting adoption longer than their white peers). Both theories turn, in part, upon the intersection of law and psychiatry.

White foster parents who have had black foster children removed from their homes have alleged that state agencies deprived them of a liberty interest in maintaining their family's integrity without the notice and opportunity to be heard that comprise due process of law. The Supreme Court has refused to rec-

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ognize a liberty interest in foster family integrity, but has left open the possibility of acknowledging such an interest when faced with more compelling cases.<sup>42</sup> In other words, the judiciary promises to define “psychological parenthood”<sup>43</sup> in its own terms. Courts have also rejected legal claims arguing that a child’s psychological need for stability entitles the child to the right to be heard before child welfare agencies disrupt his or her family life.<sup>44</sup> Foster care as a temporary holding device has essentially withstood allegations that it is illegal because unsound from a mental health perspective.

Without due process rights, foster parents cannot penetrate agency decision making when agencies deny their requests to adopt. No process serves to expose the reasons for such placement decisions, although all concerned would agree that those reasons are pivotal to winning under the second legal theory of Equal Protection.

Under the Equal Protection Clause of the Fourteenth Amendment, white foster parents allege that agency policy arbitrarily bases placement decisions on racial classifications. Courts have assumed that the use of race in adoption decisions passes even the strict scrutiny test—the most stringent judicial standard for determining when the state may adopt race-conscious policies.<sup>45</sup> To withstand strict scrutiny, the state must demonstrate that its policy furthers a compelling state interest and is neatly tailored to serve that interest.<sup>46</sup> With little discussion, most courts have identified “the best interests of the child” as a compelling state interest and have then

accepted agency determinations that race-conscious policies are necessary to satisfy those “best interests.” Implicit in such cursory analysis is the assumption that agencies know the consequences of transracial placements and act on that knowledge. *McLaughlin v. Pernsley* broke from this mold, illustrating both the reasoning we believe appropriate in Equal Protection cases and the importance of mental health testimony at trial.

In the typical case, the “best interests of the child” test is applied as a counter to the Equal Protection claims of adults. In one class action suit in New York City, however, black children awaiting permanent placements longer than their white peers claimed that race-driven policies violated their rights to Equal Protection.<sup>47</sup> The judge disagreed, finding that the agency was not responsible for the disparity. Presuming that only black adults were appropriate parents for black children, the court blamed an inadequate supply of black adoptive applicants for the long-term resort to institutions and foster homes. Today, mental health studies could inform such a court of viable alternatives. The children sought an overhaul of discriminatory agency practices rather than TRAs, but their Equal Protection claim could argue for more liberal TRA policies. As we mentioned earlier, the complaint that ultimately resulted in the Hamilton County compliance agreement alleged discrimination against both black children and white adoptive families. The wording of OCR’s findings suggests that the federal government will not accept “supply and demand” as an impenetra-

ble excuse for disparate treatment of black children.

We believe the struggle over TRAs essentially pits the generic preservation of individual rights (particularly for blacks in the area of family law) against the theoretical possibility of total assimilation and thus the disappearance of a culture. In our argument, we concede this theoretical possibility.

Although distinguishable on empirical grounds, the example of Native Americans stands before us too powerfully to be dismissed.<sup>48</sup> Native American tribes, however, are legally recognized as sovereign peoples within United States borders. Their cultures remain relatively distinct and unassimilated. Consequently, we think Native American adoption issues present complicated questions of court jurisdiction rather than of equal protection doctrine.

We believe that focusing on the Native American model obscures rather than illuminates what drives and has always driven policies toward whites' adoption of black children. Contrasting the attitudes here with those toward whites' adoption of Asian children, for instance, shows that in the black/white context, culture is not the central, nor explosive issue. Skin color is. We believe that TRA policy implicates the fundamental rights to marry and to raise children free from racial strictures. We have found no evidence that transracial adoptions are inherently inimical to the interests of the individual child. We thus advocate adoption policies free from racial restraints.

The line of cases culminating in *Pal-*

*more v. Sidoti* created a hierarchy of legitimacy among the forces shaping TRA policy. According to this hierarchy, judicial standards regarding racial classifications take precedence over professional norms dictating same-race placements while the community value of racial integrity in families is an altogether improper ground for making TRA decisions. The post-*Palmore* era has illustrated both the continuing force of professional and community biases and the significance of the *Palmore* doctrine. *Palmore* has forced practitioners and judges to act against their biases or to create more surreptitious ways to "save" children from the Fourteenth Amendment.

Policies developed explicitly to serve either an assimilationist or pluralist vision do not promise stability in a society embattled over pluralism in the university, race-based college scholarships, and affirmative action "quotas" in the workplace. They do not promise effective implementation at a time when popular T-shirts boast the saying "It's a black thing, you wouldn't understand." Even assuming it a desirable one, insulating child welfare from the battlefield may seem a futile task. Nevertheless, for children, delay and uncertainty can be evils in and of themselves. The TRA debate encompasses all the issues under fire in racial politics today. That very reason supports focusing on informed individual decision making. Such a focus could ultimately teach us most about where our country is and is capable of going on facing up to race.

## Conclusion

We hope we have successfully drawn attention to the very reasons that TRAs pose more than an academic dispute. By understanding that deep feelings about race underlie TRA practice, we come to see that waiting for dramatic normative victories for or against TRAs may mean watching many children grow to adulthood without permanent homes. Instead, we should set about constructing agency incentives to work for every child and policy mechanisms that protect every child.

Agencies run by committed people have shown encouraging results. Agencies should exercise discretion in serving a child's best interests without that discretion being held captive and paralyzed by racial fears.

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  38. U.S. Department of Health and Human Services, Office of Civil Rights, and Hamilton County Department of Human Services. Compliance Agreement. Docket #0590306, June 1990, p 2
  39. *Id.* at 3
  40. *Id.* at 2
  41. "Harrison Foster Parents Test Adoption Race Policy." *Cincinnati Post*, Aug. 8, 1990, at 1A: "Court Gives White Couple OK to Adopt Black Child." *Cincinnati Post*, Aug. 9, 1990, at 12A
  42. *Smith v. Organization of Foster Families for Equality and Reform*. 431 U.S. 816 (1976)
  43. Goldstein J, Freud A, Solnit A. *Beyond the Best Interests of the Child*. New York, The Free Press, 1973
  44. *Drummond v. Fulton County Dept. of Family and Children's Services*, 563 F.2d 1200 (5th Cir. 1977)
  45. Petition of R.M.G., 454 A2d 122, 132
  46. *Korematsu v. U.S.*, 323 U.S. 214 (1944)
  47. *Child v. Beame*, 425 F.Supp. 194 (S.D. N.Y. 1977)
  48. *Indian Child Welfare Act of 1978*. Pub. L. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§1901-1963 (1982))