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If Black is So Special, then Why isn't it in the Rainbow?

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"IF BLACK IS SO SPECIAL, THEN WHY ISN'T IT IN THE RAINBOW?"

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INTRODUCTION

My daughter was only three years old when she asked this question as I was tucking her into bed one night last year. As soon as I heard it, I felt a little sick to my stomach, thinking, "What a question," and wondering how I was going to respond to it in a way that affirmed her as a biracial child whose biological father is African-American and whose biological mother is white. I, her adoptive mother, am also white.

When I first considered adoption, I was told that I was likely to have a biracial child offered to me because I was single and because biracial children are hard to place in Florida.[1] I also knew that

* Visiting Professor, Washington College of Law, American University. Professor, University of Florida College of Law. I would like to thank the members of the *Connecticut Law Review* for inviting me to participate in this symposium. I am especially grateful to Professor Barbara Woodhouse whose insights are reflected throughout this introduction. Finally, Ibtisam Hijazi read drafts of this article, offering many valuable comments about her experiences as a mother.

1. Typically, potential adoptive parents and children are matched according to various criteria depending on the desires of the parents and the needs of the child. In Florida, applicants who are married are more "suitable" or attractive as adoptive parents than are single applicants. Similarly, in Florida, white children are the easiest to place for adoption, followed by Hispanic children, Hispanic/white children, black children, and black/white children. Thus, because my daughter and I were both at the bottom of the hierarchies in terms of our "suitability" for the adoption process, we were a "perfect" match in the eyes of the State and social workers. And

transracial adoptions are controversial,[2] and that raising a biracial child would be different in many ways. I was prepared to teach my daughter and learn from her about the differences in our races and cultures. I also knew on some theoretical level that she and I would have to face the judgment of people who made an issue out of the differences between our races.

What I was not prepared for was being so close to the pain she would experience because she is African-American. As a mother, of course, I hurt when she hurts. I recall one sunny day when she was about two, and we were out on a playground. She excitedly ran up to a swing where another little girl, who was white, was playing. As my daughter got closer to the swing, the little girl's mother ran over to it, grabbed her daughter, and took her off the swing. My daughter stopped, turned around, looked at me and burst into tears.

It seems as if my daughter and I have been working on racial issues ever since she started talking. I know that before she was three she made comments like, "I wish I were white like Annie" (her friend). These kinds of comments would tear me apart, as they still do. They reflect how hard it is for her to be "different," especially from me, but also from her grandparents, aunts, uncles, cousins, and most of her friends. I try to put her comments into the context of "normal developmental behavior" because, to a certain extent, it is "normal" for a child to want to be like his or her parent(s), family, and friends.

However, my daughter's comments about race seem to go much deeper. They seem more like social statements; poignant and insightful comments about what it is like to be a black toddler in a predominantly white world. For example, her solution to problems posed by Martin Luther King's death came from reading "Sleeping Beauty" (a version in which all of the characters are black). As she was about to fall asleep (or so I thought), she joyously popped out from under her blanket, sat up and exclaimed, "I have a good idea. Why don't I go and kiss Martin Luther King so he can wake up!"

Thus, when she made the comment about the rainbow, I was not surprised at the depth of it, but, once again, I was surprised at the pain it evoked. Fortunately, I quickly realized that white isn't in the rainbow

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they were absolutely right—not because of my marital status or my daughter's race—but because of the deep love we have for each other as mother and daughter.

2. *See generally* Elizabeth Bartholet, *Where Do Black Children Belong?: The Politics of Race-Matching in Adoption, in* FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 66 (Martha Minow ed., 1993).

either, so I pointed this out to her. She was silent. During that silence, I wondered what she was thinking. She probably was just imagining a rainbow and assessing whether or not I was correct. Since she didn't offer a retort, I assumed she was satisfied with my response, although I'll never know whether she was thinking that whites aren't so special either and that's why white isn't in the rainbow. Somehow, I doubt it.

I begin with the rainbow story for two reasons. First, storytelling in law is becoming increasingly prevalent and is growing in significance.[3] It is one way, a very powerful way, for people who are caught on the outside of normative standards, like my daughter and me, to explore and explain how those standards are exclusionary. Equally important, storytelling makes law less abstract and more contextualized. By being more contextualized, legal rules become less academic and their effects more real.

For example, defining "family" becomes less of a theoretical debate when one's own family unit is different from the traditional married, middle-class mother and father with their biological children. For non-traditional families, redefining family takes on enormous practical significance. A broader definition of family actually may enable people to create families. Laws permitting transracial adoptions and surrogacy are illustrative. Moreover, a broader definition of family provides greater legal security to non-traditional families. Without such legal protection, non-traditional families live in fear of traditional laws tearing them apart.

Significantly, implicit in any definition of family is a notion of "goodness,"[4] which usually gets expressed when a "bad" family reminds us of our differences. For example, in *In re Doustou*,[5] a Virginia state judge recently denied a mother the custody of her young son because the mother is a lesbian in a committed relationship with another woman. This Virginia decision reflects the view held by many that some families are "bad" and not deserving of legal protection.

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3. *See generally* Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). *But see* Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

4. Professor Marie Ashe has also written extensively on the "good mother/bad mother" dichotomy. *See, e.g.*, Marie Ashe, *"Bad Mothers," "Good Lawyers," and "Legal Ethics,"* 81 GEO. L.J. 2533 (1993); Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 947 (1992). *See also* Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387.

5. No. CH93JA0517-00 (Cir. Ct. of Cty. of Henrico, Va. Sept. 7, 1993) (also referred to as *Bottoms v. Bottoms*), *rev'd and remanded*, 444 S.E.2d 276 (Va. Ct. App. 1994).

Categorizing families into "good ones" and "bad ones" tends to be dysfunctional. In terms of family dynamics, the "goodness/badness" dichotomy is dysfunctional because it inevitably and unnecessarily breaks bonds between people. From society's view, the emphasis on "good/bad" families is dysfunctional because it promotes discrimination against many non-traditional families. Rather than valuing relationships, this approach values the values of those in positions to define "family." It allows judges, like the Virginia judge, to discount the importance and significance of the lesbians' bonds to each other and to their son simply by condemning homosexuality.[6] The Virginia judge believes that homosexuality is "bad," that therefore the mother is a "bad" parent, and that her family unit is "bad." Because everything about this family is "bad," in his opinion, he is justified in splitting it up. He creates new "family units" without even asking whether the original family functioned.[7] Significantly, his decision also promotes heterosexual hegemony.[8]

Unfortunately, the debate over the definition of family all too often is carried out in the context of excluding people from a child's life. And sometimes this is necessary; perhaps extreme cases of abuse provide the best examples. If only Joshua DeShaney had been taken away from his father.[9] But the debate extends beyond the extremely abusive parent or even the gay or lesbian parent. It arises in many, many other contexts as well. What role does and should an abusive parent, a negligent parent, a working parent, a single parent, a surrogate parent, a grandparent, a foster parent, a step-parent, an adoptive parent, and other "third parties" play in a child's life? Stated alternatively, just who and what is a "family"?

The papers in this Symposium reflect the importance of storytelling and also "play-off" the "good family/bad family" dichotomy that seems

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6. To quote the judge, "I will tell you first that the mother's conduct is illegal. It is a Class 6 felony in the Commonwealth of Virginia. I will tell you that it is the opinion of this Court that her conduct is immoral . . . and that [her] conduct . . . renders her an unfit parent." *Id.* at 4.

7. For a discussion of "functional" families, *see* Martha Minow, *Redefining Families: Who's in and Who's out?*, 62 U. COLO. L. REV. 269 (1991).

8. I think two critical factors in the court's decision were testimony that the son had called his mother's lover "Da Da," and that the two women "kissed and patted" each other in front of the son. These factors perhaps raised concerns about whether the child was learning "appropriate" gender and sex roles.

9. DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989), *discussed in* Raymond O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209 (1994).

to drive most of the debate on redefining family. To illustrate, in her presentation entitled *Who in the World is Clarabel Ventura?*,[10] Professor Marie Ashe told a story about Clarabel Ventura, an Hispanic, single, pregnant mother of six children living on welfare. Ms. Ventura and her family became the focus of the news media because her four-year-old son's hand was "burned to the bone" when it was immersed in a bucket of hot water mixed with Drano. Ms. Ventura did not seek immediate medical help for her son, fearing that she would be suspected of child abuse and would lose custody of him and possibly her other children as well. Ms. Ventura, who spoke only Spanish, claimed that she had left the bucket in the bathroom and that her son accidentally played in it. Officials, in contrast, believed that the child's hands could get so seriously burned only if they had been forcefully immersed and held in the bucket. As she feared, state officials charged Ms. Ventura with child abuse and removed her son and the other children from the home and placed them in foster care.

Professor Ashe used this story to explore how officials involved in Ms. Ventura's case, including news media personnel, lawyers, and "human services" professionals, depicted her as someone who is "not us." Professor Ashe suggested that this was done by some officials who characterize Ms. Ventura as so "unimaginably sadistic" that she became an "other." She was not anyone "we" would know.[11] Interestingly, other officials who presented Ms. Ventura as a "victim of trauma," in efforts to rebut the sadistic image, also distanced themselves from her because she was so victimized by "the system." Thus, from almost all perspectives, Ms. Ventura became "the other" and the paradigmatic example of "what's wrong with welfare."

Interestingly, this story highlights some essential aspects of the debate on custody, which are fleshed out by the other papers in the Symposium. For example, both Dean Howard Eisenberg and Professor Raymond O'Brien suggest, at least implicitly, that the concept of family should be a narrow one. Although neither author expressly rejects a concept of family that might include non-traditional families, both seem to imply that family is and should be exclusive—however it is defined.

A dramatic illustration of this is Dean Eisenberg's suggestion, in *A*

10. Marie Ashe, Presentation to the *Connecticut Law Review* Symposium, *Solomon's Dilemma: Exploring Parental Rights* (Mar. 1, 1994) (transcript available at the *Connecticut Law Review*).

11. *Id.*

Modest Proposal: State Licensing of Parents,[12] that anyone who wishes to become a parent be required to first obtain a state license. As an adoptive parent who is licensed by the state, I am a bit suspicious about the correlation between meeting licensing requirements and being a "good" parent. Generally, to secure a license under Dean Eisenberg's proposal, one must be a graduate of a mandatory course on child care and be financially able to provide for a child. Significantly, if an applicant is HIV positive, or a drug addict, or an alcoholic, then he or she is disqualified. Applicants who have been convicted of certain crimes (of violence, child abuse, spousal abuse, drug distribution, child neglect, or non-support), and applicants who have been involuntary committed to mental hospitals would be presumptively denied licenses. They could overcome the presumption by presenting "clear and convincing evidence" of their rehabilitation to the juvenile court.

Many people might agree that it would be "good" for parents to be "educated" about child care matters. Whether "good" parents can be produced through educational programs is an open question. Moreover, many, many people who become parents without a licensing scheme appear to be "good" at it. Similarly, that some applicants might be able to provide financially for a child does not mean that they would be "good" parents, or that someone who has less financial means would be a "bad" parent. Admittedly, being knowledgeable about child care and having the financial means to obtain necessities and luxuries for one's child make it *easier* to parent, and correspondingly, make it easier to appear to be a good parent. We must be careful to remember, however, that the quality of one's parenting abilities is more accurately measured by the mutual love, affection, and respect between the parent and child.

Moreover, eliminating from the field of potential parents all people who do not meet the licensing requirements is a dramatic way for the government to participate in the debate on family. The constitutionality of such a proposal is seriously in doubt. Even if such a scheme were to pass constitutional muster, consideration must be given to its fundamental effect on those who fail to qualify as parents and on society as a whole.

Consider adoption and foster parenting, which are licensing schemes. Gays and lesbians are disfavored as adoptive and foster parents. Transracial adoptions are quite controversial and generally discouraged except as a last resort. For example, I suspect that I was approved

12. 26 CONN. L. REV. 1415 (1994).

as an adoptive parent because the adoption agency and the state needed me to take a "special needs" child. In Florida, biracial children are considered "special needs" children because they are so difficult to place.

By enabling my daughter and me to become a family, albeit a non-traditional one, the adoption agency and the state were able to perpetuate a racial, class, and heterosexual caste system that by-and-large promotes dominant values. White babies are placed with married, white couples; black babies are placed with married, black couples, and so on. The value preferences built into the licensing scheme reflect dominant cultural preferences about what a "good" family is. Under this view, it was unlikely that anyone but a middle class, white, single woman (they also try to match by sex if the parent is single) would be interested in adopting a black/white baby girl. It was equally unlikely that a black/white baby girl was likely to be placed with anyone else. Officials decided that under the circumstances, my daughter and I would be a "good" match.

In addition, the inherent biases against me as a single parent also made it more attractive for me to agree to accept a child who was harder to place, either because of race or mental or physical conditions that would require special attention. As a caveat, of course, I have always thought it somewhat odd that a single parent, who has less time to spend with a child because of work demands, is nevertheless considered a "good" match for a child with "special needs." In any event, I was "good enough" to adopt a child with "special needs," but I wasn't "good enough" to adopt a child that a married couple might want. My daughter became a part of my family because I was the "best" choice at the time. It is a matter of good fortune that my preferences coincided with the state's. Other applicants, however, might find the matching policies so objectionable that they voluntarily drop out of the process or are involuntarily screened out of the process as "unsuitable."

Thus, like the Virginia decision in *Bottoms* that promotes heterosexual hegemony, a parental licensing scheme would promote many, if not most, dominant cultural values to the exclusion of people who fall outside normative standards. Ms. Ventura might be an excellent parent, who, giving her the benefit of the doubt, acted negligently in one instance toward her son. Because she is on welfare, however, she would be ineligible to receive a parental license under Dean Eisenberg's proposal. Similarly, someone who is HIV positive, or someone who is an alcoholic, especially if they are reformed, can be a loving and caring parent, but would be denied the opportunity. Significantly, a dispropor-

tionate number of people on welfare are women and people of color. People with disabilities, such as AIDS, drug addiction, and alcoholism, also tend to be marginalized in our society. A parental licensing scheme, no matter how well-intentioned it is, inevitably will promote discrimination and marginalization of those people who are already outside the dominant groups.

More subtly, Professor O'Brien also narrows the definition of family by suggesting it should be easier to terminate parental rights by lowering the burden of proof from "clear and convincing" to a "preponderance of the evidence" test in proceedings to terminate parental rights. In his paper, *An Analysis of Realistic Due Process Rights of Children Versus Parents*,[13] he suggests that lowering the standard to make it easier to exclude parents from a child's life evidences a stronger commitment to acting in a child's best interest.

Consideration should be given in custody decisions to what the child needs and wants. Perhaps this seems obvious, but watching Jessica DeBoer's agony in being taken away from her adoptive parents is a reminder that in some jurisdictions the child's wants and needs can be superseded by more traditional views on parental rights. In that case, biological connections of the "natural" parents with Jessica trumped Jessica's psychological connections with her prospective adoptive parents. Significantly, relevant family law in the DeBoer case did not even allow the judge to consider the interests of Jessica. This was an intolerable injustice to Jessica and other adopted children, particularly those who were mature enough to watch the story unfold and wonder about the security of their own placements.[14] Moreover, even when the "child's best interest standard" is invoked in custody disputes, it is not always clear what it means.[15]

What *is* clear, however, is that the arguments used to support a custody decision under the child's best interest standard or any other standard, like the licensing scheme, reflect value judgments. Generally, the values that win out in custody decisions are those represented by dominant groups. Thus, perhaps it matters less whether the standard for terminating parental rights is "clear and convincing" or "preponderance of the evidence." Either standard is likely to be met if the judge is

13. 26 CONN. L. REV. 1209 (1994).

14. This consideration was brought to my attention by an unidentified audience participant in a symposium on family at the Washington College of Law, American University, April 9, 1994.

15. *See* Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 53 (1994).

persuaded that the parent's rights should be terminated. As Professor Ashe suggested, Ms. Ventura was likely to have her son taken away from her because of the inherent race, sex, ethnic, and class biases disfavoring her as a single, Hispanic, poor mother. Professor Ashe acknowledged that if her son had suffered similar injuries, she would have taken him immediately to the pediatrician, knowing that her pediatrician would be inclined to think it was an accident.[16] That Professor Ashe, a white law professor, might abuse her child would probably be a distant concern, if it was a concern at all. It certainly would not be the immediate assumption made about Professor Ashe, as it was about Ms. Ventura.

Dean Eisenberg's and Professor O'Brien's proposals highlight the reality that our society does not focus enough attention and resources on children and families at the margin or who are in some kind of trouble. Dr. Albert Solnit, in his commentary on the day of the Symposium, was correct that a licensing scheme is not only unrealistic, but also a very unappealing way to deal with the problems facing many children and families. He suggests that only in a non-free society would such a scheme be supported. Rather than attempt to attain "quality control" in families by regulating who gets to become a parent, perhaps we should focus more on trying to keep existing, functioning families together and to ensuring that they have adequate means to become and remain healthy family units. Dean Eisenberg's and Professor O'Brien's proposals should make us ask: "What can be done about poverty, racism, sexism, homophobia, and classism, so that all of our children and their families can participate equally in our democratic society?"

Although there is no clear answer to this question, it seems imperative that if we, as a society, are truly committed to our children, then we must begin to see the world from their perspectives.[17] As another Symposium commentator, Professor Barbara Woodhouse, suggested, we must ask what it means for a child to be separated from the only parent he or she has ever known. What does it mean *to a child* for someone to be that child's "mother" or "father" or "parental figure?" When we ask, "Who in the world is Clarabel Ventura?," I suggest that at least six people know very well who she is. She is their mother. All too often, as lawyers, we get carried away with the legal issues[18] and

16. *See generally Ashe, supra* note 10.

17. *Id.*

18. Professor and Clinician Suellyn Scarnachia represented the DeBoers in their battle to adopt Jessica. Professor Scarnachia related publicly how even she could not think of Mrs.

forget to look at what Professor Ann Scales calls the "moral crux of the matter."[19]

Thus, in her paper, *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*,[20] Professor Janet Dolgin explores how current analysis in custody disputes in some jurisdictions seems to be shifting from a heavy reliance on biological connections to a greater reliance on the adults' intent in becoming parents. For example, she relates the story of a married couple who wanted to have a baby, but for medical reasons the wife could not carry a child to term. They entered into a contract with another woman, the "gestational mother," to have her carry their fertilized egg until the baby was born. At birth, the parties all agreed and understood that the gestational mother would "surrender" the baby to the married couple. A few months before the baby was due, the gestational mother found that she was unable to follow through on her agreement. She had become so emotionally, physically, and psychologically attached to the baby that she felt it was "hers." Litigation ensued.[21]

In trying to resolve the classic Solomon's Dilemma, "Who is this baby's mother?," the role of biological ties to the child became ambiguous in the court's eyes. In reality, all three adults had some "biological interest" in the baby, although the court depicted the problem as one arising between the "two mothers." Alternatively, the court decided to look to the "intent" of the parties, "Which woman intended to bring about the birth of the child?," asked the court. This woman, in the court's opinion, would be the baby's "natural" mother. Not surprisingly, the married woman was awarded custody of the baby. Many might agree, including myself as an adoptive parent, that less reliance on traditional rules about biological relatedness in family law is healthy and encouraging. Professor Ruthann Robson, for example, explores in

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DeBoer as Jessica's "real" mother because she felt she needed to stay focused on the legal issues in order to zealously represent them. Throughout the litigation process, Mrs. DeBoer would often meet with Professor Scarnachia and bring Jessica along. It was only when Mrs. DeBoer visited Professor Scarnachia's house for a meeting and came without Jessica that Professor Scarnachia realized that Mrs. DeBoer was Jessica's mother. At that moment, Professor Scarnachia realized how tragically abstract and theoretical the entire case had become. Suellyn Scarnachia, Remarks at the Washington College of Law, American University, Symposium, *Gender, Family & Chance: Developments in the Legal Regulation of Family Life* (April 9, 1994).

19. Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1378 (1986).

20. 26 CONN. L. REV. 1261 (1994).

21. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

her paper, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*,[22] how reliance on biological relatedness in determining family law dynamics promotes patriarchy and heterosexual hegemony. Many gay men and lesbians are unable to reproduce within the traditional framework for understanding and analyzing reproductive rights and family law.[23] For many non-traditional families, then, a move away from biology is a welcome relief.

This is not to suggest that biology is unimportant or insignificant. Many people want and need to reproduce within a traditional family and our Constitution rightfully protects those choices. In fact, Professors Karen Czapanskiy and Madeleine Kurtz suggest that while the biological connections between parent and child are important, the importance of biological connections between other relatives and the child tend to be devalued or overlooked. Their papers highlight the complexity of defining family and the inherent weaknesses in relying too heavily either on biological ties between the parent and child, or on formal contract principles.

For example, in her article, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*,[24] Professor Kurtz relates the story of Nora and her granddaughter, Evelyn. The moment Evelyn was born she was a cocaine addict just like her mother. Child welfare workers filed a neglect petition against the mother, alleging that her drug addiction rendered her unfit to care for Evelyn. The court agreed, and temporarily placed Evelyn in foster care with Nora while the mother received drug treatment. Over the next several years, the mother's drug rehabilitation efforts failed, and welfare officials began to consider terminating her rights and placing Evelyn for adoption with Nora. Although the idea of adopting her granddaughter seemed strange and unnecessary to Nora, she agreed to the officials' plan. The mother's rights were terminated, which had the concomitant legal effect of rendering Nora solely a foster mother and not Evelyn's grandmother.

On the one hand, it was easy and somewhat logical to define Nora's and Evelyn's relationship in contractual terms; they were foster mother and foster child. By becoming Evelyn's foster mother and the state's agent, Nora became entitled to the much needed corresponding

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22. 26 CONN. L. REV. 1377 (1994).

23. Sharon E. Rush, *Breaking with Tradition: Surrogacy and Gay Fathers*, *in* KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY 102 (D. Meyers et al. eds., 1993).

24. 26 CONN. L. REV. 1453 (1994).

financial benefits. Simultaneously, however, once she became the official foster parent, her significance as Evelyn's biological grandmother became so attenuated that it eventually became irrelevant. When the state suspected that Nora had a "drinking problem," it was all too easy for it to terminate her as a foster parent. Because the state deemed her "unfit" to be a foster parent, Nora was not allowed to take care of Evelyn. Without her mother or her grandmother to parent Evelyn, the state began to consider placing her for adoption with a stranger. Nora and Evelyn faced the real possibility that their relationship would be terminated for life, and that Evelyn would lose all contact with her extended family.

Most people who are concerned about children and child custody issues realize that because Nora might no longer be "good enough" to qualify as a *foster parent* in the state's eyes, it should not necessarily mean that she no longer has any right to be involved in Evelyn's life. Terminating the contractual relationship between the state and the foster grandmother proved too facile a resolution. Not only did it ignore the role Nora played as Evelyn's biological grandmother, it also ignored the importance to Evelyn of maintaining ties with her biological kin—those people who also represented her psychological and emotional family. Nora's and Evelyn's story remind us once again that strict application of legal rules can often lead to unsatisfactory, harsh, and even tragic results.

Professor Czapanskiy's article, *Grandparents, Parents, and Grandchildren: Actualizing Interdependency in Law*,[25] approaches the problem of giving grandparents more legal protection in their relationships with their grandchildren from the perspective of coguardianship. Specifically, she explores the growing trend among some parents and grandparents to assume co-responsibility for a child. Under current law, however, a grandparent who is a "coguardian" with a child's parent has virtually no legal standing to act as a "co-parent." The grandparent who acts as a guardian without state sanction or parental permission has no legal authority to seek medical care for the child, or make other significant decisions that a parent often makes on behalf of a child. Thus, to protect their status as coguardians, grandparents are forced to sue their children or have them declared unfit and have their own status as coguardian grandparents legally sanctioned. In an effort to surmount some of the inherent difficulties in giving legal protection to grandpar-

25. 26 CONN. L. REV. 1315 (1994).

ents who maintain "parent-like" relationships with their grandchildren, Professor Czapanskiy suggests that law recognize the validity of coguardianship contracts.

Professor Czapanskiy's idea also should motivate those who are concerned about family and custody issues to think about the role of contracts in other contexts. For example, although Nora and her daughter were not actually "coguardians" of Evelyn, it is worth exploring if they nevertheless could have benefitted from a guardianship-type contract between the mother and Nora. The mother who risks losing her parental status may very well find the shifting of legal authority over her child to kin an attractive alternative. I suspect that Nora would have had no reservations about assuming guardianship over Evelyn without becoming an official foster mother. In fact, if she had not needed the foster care benefits that go along with being a foster parent, we must ask whether she would have wanted the state involved at all. Taking care of Evelyn may have been the natural thing for her to do. Of course, if Nora were unable to assume the role of guardian and that contract had to be terminated, it does not follow, as it seems to in the foster care situation, that she also would have to be cut out of Evelyn's life.

Professors Czapanskiy and Kurtz motivate us to think of an answer to this question: What can be done, legally and socially, to strengthen the bonds among Evelyn, Nora, and Evelyn's mother so that they can function as a healthy family?

Doing what is right for our children is not easy. Families defined by factors other than biology merely argue that they, too, deserve constitutional protection, and that biology should not be the controlling or even dominant consideration in defining or creating families or in resolving custody disputes.

Similarly, even though biological ties between parent and child are important, we must also begin to recognize the significance of other biological relatives. More importantly, a shift away from the biological ties between parent and child to other biological relatives or to some other measure, like intent or contract, does not necessarily obviate the inherent biases in custody disputes. For example, I think it is extremely relevant in the story told by Professor Dolgin that the married couple is a white man and an Asian woman, and that the gestational mother is African-American. Like potential adoptive parents in Florida where African-American and African-American/white children are the "least desirable" children to adopt, perhaps this court felt the same way about

the gestational mother. As Cornel West reminds us, "race matters."[26] At a minimum, attention should be given to the racial overtones of the decision.

Thus, just as a standard for resolving custody disputes that relies on biology can promote hegemony in many ways, so, too, can other standards, like "child's best interest," or "intent." When decisionmakers become aware of the value preferences in their decisions, we, as a society, will begin to focus on the problems posed by racism, sexism, homophobia, classism, and poverty. When we make this transition, perhaps we will be more understanding of what family means to some people who are marginalized in our society and will begin to redefine family in ways that value them.

26. CORNEL WEST, RACE MATTERS (1993).