

"ARE YOU MY MOTHER?": CONCEPTUALIZING CHILDREN'S IDENTITY RIGHTS IN TRANSRACIAL ADOPTIONS

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I. ADOPTION AND THE CLASH OF RIGHTS PERSPECTIVES

Adoption law in the United States, depending on whom you ask, is either at a turning point or hopelessly gridlocked.¹ Many issues seem to defy consensus. Media reports of high profile adoption cases² have attracted

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1. After a five year effort, the Commissioners on Uniform State Laws proposed the carefully crafted and comprehensive UNIF. ADOPTION ACT (1994), which has created great dissension and has failed to garner support from many influential constituencies. Mark Hansen, *Fears of the Heart*, A.B.A. J., Nov. 1994, at 58, 59-60. In the 1980s, the ABA Family Law Section also spent several years working on a model adoption act that never made it out of committee. Similarly, a federal effort to draft a uniform act failed to produce any comprehensive legislation. *Id.* at 62.

2. Baby Jessica DeBoer's failed adoption made headlines when she was removed from the DeBoer family, with whom she had lived from birth to age two and a half. Jessica's biological mother had lied about the father's identity and the true biological father later appeared to assert his rights. Ellen Goodman, *Parents' "Property" Rights Top Kids' Adoption Interests*, CHI. TRIB., Aug. 1, 1993, §5 (Tempo), at 4 (*In re Clausen* (DeBoer v. Schmidt), 502 N.W.2d 649 (Mich. 1993)). The U.S. Supreme Court recently denied certiorari in the Baby Richard case involving a similar fact pattern (*In re Doe*, 638 N.E.2d 181, 182 (Ill.) cert. denied, 115 S. Ct. 499 (1994)). Here, the birth father was told that his son had died. After the child's adoptive placement, the birth father came forward to challenge the adoption. Associated Press, *Court Reverses Adoption Awards Son, 3, to Parents*, CHI. TRIB., June 16, 1994, at 1. At the time of this writing, the Illinois Supreme Court has issued an order directing the adoptive parents to surrender the child to the biological father without any provision for a hearing on the child's best interest and the U.S. Supreme Court has denied an application to stay the order (*O'Connell v. Kirchner*, No. A-555, 1995 WL 55384 (U.S. Feb. 13, 1995)). Baby Emily is a Florida infant whose biological mother placed her for adoption after the father pressured the

enormous attention, not only because of their inherent drama, but also because they implicate highly contested definitions of what makes a family. Many of the most volatile adoption issues are couched in terms of rights: the birth mother's right to confidentiality; the adoptive parent's right to be treated equally without regard to race, ethnicity, religion, or sexual orientation; the rights of a racial, ethnic, or national community to custody and control of children born into that community; the adult adoptee's right to information about her origins; the right of unwed fathers to veto the birth mother's adoption decision, and so on, ad infinitum. These clashes of rights highlight the tensions between claims of blood and nurture, biological and social connection, and individual and communal definitions of self.

Of all the debates, the furor over racial matching in adoption is perhaps the most problematic for American legal culture. Most recently in the United States, Congress enacted the Multiethnic Placement Act (MPA).³ Originally designed to avoid delay stemming from reluctance to place children in homes with parents of another race or ethnicity, the MPA has become a battleground for competing visions of individual and group identity and has revived longstanding controversies about what role, if any, children's community of origin should play in adoptive placements. The very notion of preserving children's cultural or ethnic identities seems to conflict with liberal conceptions of parents' and children's individual rights, ideals of color-blind equality, and a peculiarly American kind of liberty embracing the freedom to reinvent oneself as a new citizen of a new world.

Missing from the debate, however, is a coherent schema for articulating children's rights to preservation of their identity in adoption. Perhaps this is partially because we think of children not as subjects claiming rights under law, but as objects of law-making who have relatively nebulous and indeterminate "interests."

In this Essay, I purposely shift the focus from adults' rights, whether those of parents or of cultural and ethnic communities, to the continuing task of developing a schema of children's rights to preservation and support of their identity. I propose to apply this schema in addressing the dilemmas of racial, ethnic, religious, and cultural identity in adoption policy. I will suggest a fluid conception of identity rights reflecting children's own evolv-

mother to get an abortion; now the father claims a right to veto the adoption in spite of his prenatal conduct and a history of convictions for rape and assault. Larry Barszewski, *Judges Agonize Over Baby Emily Case*, SUN SENTINEL (Palm Beach, Fla.), Dec. 2, 1994, at 1B. The last decision from the 4th District Court of Appeal of Florida in November of 1994 favored the adoptive parents (*In re Adoption of Baby E.A.W.*, 647 So.2d 918 (Fla. Dist. Ct. App., 1994)). At the time of this writing, the case is before the Florida Supreme Court. Larry Barszewski, *Adoption Lawyer Sometimes Stirs Up Controversy*, SUN SENTINEL (Palm Beach, Fla.), Feb. 9, 1995, at 1B. Gregory K. is the 11 year old child now known as Sean Russ who, after many years in foster care, sought successfully to sever his biological mother's rights in order to be adopted by the Russ family. Michael E. Young, *Standing Up for Children*, SUN SENTINEL (Palm Beach, Fla.), Sept. 19, 1993, at 1A (*Kingsley v. Kingsley*, 623 So.2d 780, *rev. denied*, 634 So.2d 625 (Fla. 1994)).

3. Howard M. Metzenbaum Multiethnic Placement Act of 1994, PUB. L. NO. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994) (to be codified at 42 U.S.C. § 5115a (1994)) [hereinafter MPA].

ing capacities and developmental concerns as well as their need for family and group.

Wary as I am of the destructive potential of "rights talk,"⁴ I have chosen in other writings to consciously adopt a discourse of "needs-based rights" to describe children's so-called interests.⁵ I do so because of my conclusion that, in a rights-oriented legal culture, children need more than the weak reed of a claim to "interests" if they are to make their needs and voices heard.⁶ I will argue that a child-centered, relational, and evolving understanding of children's identity rights can provide the crucial point of intersection in the dialogue about race, culture, and ethnicity in adoption.

II. PLACING ISSUES OF IDENTITY IN A NARRATIVE AND THEORETICAL CONTEXT

Legal norms have long reflected children's needs for nurture and for protection from harm, but legal norms also increasingly recognize the importance of children's familial, cultural, and national identities. For example, Article 8 of the United Nations Convention on the Rights of the Child recognizes "the right of the child to preserve his or her identity, including nationality, name and family relations."⁷ In the United States, at the federal level the principle of group identity or consciousness is present in civil rights remedies like affirmative action,⁸ and in laws which discourage placement of Native American children outside their tribe.⁹ These laws further direct that concepts like neglect or abandonment be viewed through the lens of Native American cultural norms.¹⁰ On the local level, many jurisdictions use kinship preferences in adoption and foster care or racial, religious, or ethnic matching to maintain children's identification with family and culture.¹¹

4. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 9-15 (1991) (arguing that "rights talk" has stifled political discourse in the United States).

5. See Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDozo L. REV. 1747, 1814-20 (1993) (discussing parents' authority over children and their obligations to children, and each other, through the lens of children's needs and experiences) [hereinafter Woodhouse, *Hatching the Egg*]; Barbara B. Woodhouse, "*Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 B.Y.U. J. PUB. L. 321, 321-24 (1994) (suggesting a new rights discourse regarding children's rights to have their basic needs met by adults) [hereinafter Woodhouse, *Children's Needs*].

6. See Woodhouse, *Children's Needs*, *supra* note 5, at 329-33 (developing a basis in history and international law for a needs-based description of children's rights within the family).

7. United Nations Convention on the Rights of the Child, art. 8, Nov. 20, 1989, 28 I.L.M. 1448, 1456 [hereinafter Convention]. Other articles protect religious and cultural heritage. *Id.*, arts. 14, 30, at 1462, 1468. For a general discussion of the Convention, see CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (Cynthia P. Cohen & Howard Davidson eds., 1990) [hereinafter CHILDREN'S RIGHTS].

8. See 20 U.S.C. § 1712 (1988) (permitting remedies to correct particular denials of equal educational opportunity); 42 U.S.C. § 2000e-5(g) (Supp. V 1993) (permitting reinstatement, hiring or any other equitable relief for employees who have been discriminated against).

9. The Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (1988).

10. *Id.* § 1915(d).

11. See ELIZABETH BARTHOLET, FAMILY BONDS 95-99 (1993) (citing a study of the North

This recognition of a communal identity conflicts with interpretations of individual rights and equal treatment provided by modern constitutional jurisprudence.¹² It is also unclear how such identity rights apply to children who have lived apart from their family, group, or nation of origin and have developed their own social and psychological identities through interactions with their environment. The nature of adoption—creation by the state of a new, nonbiological family—forces us to raise questions about children's individual identity versus group identity. In addition, adoption requires us to examine how we conceptualize children's relationship to community and state, their individual and collective past, present, and future. Does consideration of race or ethnicity violate the prospective adopter's equal protection rights? Does it violate the child's rights to equal protection or to the "best" available placement? And how does the passage of time, during which children grow and evolve, acquiring and shedding identities, affect these conflicting rights and interests?

A. Thinking About Identity

Identity itself is a contested and contextual concept. Judith Masson and Christine Harrison have described identity as "an organizing framework which holds the past and present together providing some anticipated shape to future life."¹³ In the history of child psychology, Erik Erikson's influential theories located identity achievement as the fifth in eight stages of development.¹⁴ Margaret S. Mahler, a student of children's earliest developmental tasks and experiences, defined identity as "the earliest awareness of a sense of being, of entity. . . . It is not a sense of *who* I am but *that* I am."¹⁵ Mahler's theory associated identity formation with the child's emerging awareness that she is separate from, yet completely dependent upon, those who nurture her and to whom she is attached.¹⁶ These descriptions of identity focus on the internal life of the individual and on the individual's intimate relationships.

Modern child development scholars increasingly have acknowledged the role of the larger social order and surrounding cultural environment in shaping and defining identity.¹⁷ Clearly, many aspects of identity are more so-

American Council on Adoptable Children finding that 76% of state agencies had racial preferences) [hereinafter BARTHOLET, FAMILY BONDS].

12. See, e.g., J.E.B. v. Alabama, 114 S. Ct. 1419 (1994) (holding that potential jurors, as well as litigants, have an equal protection right to jury selection procedures, in both civil and criminal trials); Planned Parenthood of S.E. Pennsylvania v. Casey, 112 S. Ct. 2791 (1992) (reaffirming a woman's right to have an abortion prior to fetal viability).

13. Judith Masson & Christine Harrison, Identity: Mapping the Frontiers, Paper Presented Before the 8th World Congress of the International Society for Family Law 2 (June 28-July 2, 1994) (on file with author).

14. See generally ERIK H. ERIKSON, IDENTITY, YOUTH, AND CRISIS (1968); ERIK H. ERIKSON, CHILDREN AND SOCIETY (1977).

15. MARGARET S. MAHLER ET AL., THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT 8 (1975).

16. *Id.*

17. See generally STEWART COHEN, SOCIAL AND PERSONALITY DEVELOPMENT IN CHILD-

cially prescribed and attributed than they are individually chosen and personally enacted.¹⁸ In this process, law is both an active agent in prescribing, proscribing, and attributing identity, and a public medium for choosing and enacting it.¹⁹

In legal discussions of children's identity, as in many debates about adoption or custody, children have often figured as passive objects whose identity (like title in property) can be transferred with a stroke of the pen from one to another name, family, and group. But children, scientists tell us, are not blank slates. They arrive in the world with a lively genetic heritage and become active participants in construction or reconstruction of those internal frameworks that constitute identity. Although the role of biology is still under investigation, most studies agree that genetic heritage shapes not only physical appearance, but also personality.²⁰ On the other hand, psychologists tell us that children begin to construct and enact their own "personal identity" from a very early age, through attachments to caregivers and through interactions with their family environment.²¹ At six months of age, children (through the lens of social interaction) have already begun to recognize their "native" tongue (the one they hear from infancy) and identify their "parents" (the people who care for them).²² They grow as individuals, but in relation to the people and the cultures around them.

A child's identity, moreover, is far from a static concept. We parents know that children play an ongoing role in the evolution of their own identities, in constant dialogue with their surroundings. Children evolve and their needs change. For young children, who experience self, family, and community in highly concrete terms, continuity and stability of their attachments to intimate caregivers may be of paramount importance in forming a coherent sense of self. As children mature and their capacities for understanding evolve, they are able, and often appear driven, to integrate more

HOOD (1976); DAVID ELKIND, THE CHILD AND SOCIETY: ESSAYS IN APPLIED CHILD DEVELOPMENT (1979); DAVID INGELBY, DEVELOPMENT IN SOCIAL CONTEXT (1986); LEON J. YARROW ET AL., INFANT AND ENVIRONMENT: EARLY COGNITIVE AND MOTIVATIONAL DEVELOPMENT (1975).

18. Masson & Harrison, *supra* note 13, at 3-4.

19. Compare the coercive force of an action to establish paternity and the enactment of an adoption proceeding; contrast the personal choice of a marital partner of the opposite sex with the proscription against marriage between persons of the same sex.

20. LAURA E. BERK, CHILD DEVELOPMENT 109, 404-05 (2d ed. 1991).

21. Elsewhere, I have used the term "social" parent and family to describe the relationships that a child forms through interaction with her environment and caregivers. I have used the term "genetic" family to describe relationships of biological connection. Woodhouse, *Hatching the Egg*, *supra* note 5, at 1747, 1758. In this discussion, I will use the term "personal identity" to describe the personal sense of self and connection to others that a child acquires through interaction with her social family. I will use the term "identity of origin" to describe the child's identification, both by others and by herself, as belonging by birth, either physically or historically, to a particular racial, ethnic, or cultural community. I do not attempt to draw a bright line between the two terms, since they are obviously interconnected. Nor do I decide whether concepts like race and ethnicity are objectively defined or subjectively constructed. I am interested in children's experiences and children inhabit a world in which personal, social, biological, racial, and ethnic identities, whatever their origin, are all powerful factors.

22. BERK, *supra* note 20, at 352-53.

complex understandings of their own identity and of their membership (attributed and chosen) in biological, social, and cultural families and groups. Although various groups may claim a right of custody or control of their children, a child-centered perspective would suggest that the right to preservation of a group identity of origin is best analyzed as a right of the child, and a responsibility or trust of the group.

B. Competing Definitions of "Best Interest"

Much of the debate about transcultural and transracial adoptions, international adoptions, and racial matching has centered on the effects on children of being raised in social families who differ from the children's race or ethnicity of origin.²³ Proponents of transracial adoption argue that acquiring racial identity and coping skills is not contingent on being raised by same race parents but on the parents' sensitivity to the child's needs and on healthy early attachments.²⁴ Critics of transracial adoption argue that children must struggle, sometimes unsuccessfully, to acquire a positive racial identity when neither parent can provide a same race role model.²⁵ They argue that children of color need to be raised by parents of color in communities of color in order to acquire the "coping skills" necessary for survival in a racist society.²⁶

Having followed the many studies that purport to measure transracially adopted children's well-being, I am certainly not persuaded by its critics that transracial adoption creates a serious risk of harm to children, especially when the alternative is prolonged delays in placement and foster care drift.²⁷ Nor am I persuaded by those who believe that considerations of race and culture should be banned as a form of racial separatism and as irrelevant to the adoptee's interests. My uneasiness with policies advocating either

23. BARTHOLET, FAMILY BONDS, *supra* note 11, at 143. Many authors have addressed issues of transracial adoption and racial identity; see generally 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?*]; James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487 (1987-88); Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487 (1991); Angela T. McCormick, Note, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 304 (1989-90); Shari O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485 (1986); Twila L. Perry, *Race and Child Placement: The Best Interest Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1991); David Rosettstein, *Trans-Racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the Melting Pot*, 68 ST. JOHN'S L. REV. 137 (1994). For a comprehensive review of the research to date, see Arnold R. Silverman, *Outcomes of Transracial Adoption* THE FUTURE OF CHILDREN, Spring 1993, at 104, 117 (adoption issue) (David and Lucille Packard Foundation ed., 1993) (concluding that transracial adoption is a viable means of providing stable homes for waiting children and presents fewer risks to children than delayed placement and institutional care).

24. See Bartholet, *Where Do Black Children Belong?*, *supra* note 23, at 1213 (citing positive results in studies comparing transracially and intraracially adopted children).

25. See, e.g., Marlon N. Yarbrough, *Transracial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. Rev. 353, 355-56 (1988).

26. *Id.* at 356.

27. See Silverman, *supra* note 23, at 115.

relentless race-matching or relentless race-blindness goes beyond the obvious difficulties of gathering data and creating scientifically sound techniques of measurement that might prove conclusively that one or the other policy is in children's best interest. In my view, there simply is no easy empirical answer to the question whether transracial and transcultural adoption are "good" or "bad" for children. In an objective sense, it is impossible to say that a child has acquired a "good" or "bad" self concept or acquire a "healthy" or "unhealthy" individual, racial, or cultural identity without also making tacit judgments about relative values of sameness and difference, individual and group, independence and interdependence.

Kim Forde-Mazrui, in his Note "*Black Identity and Child Placement: The Best Interests of Black and Biracial Children*,"²⁸ makes explicit the many ambiguities and underlying value choices inherent in discussions of whether inracial or transracial placements better serve children's needs for "racial identity" and "coping skills."²⁹ He also identifies these elements in debates about whether the placements advance or impede "progress" of individual black and biracial children and blacks as a group.³⁰ Forde-Mazrui questions a number of assumptions others have made in discussions about racial identity: must a racial identity be "strong" in order to be "positive"?³¹ Must a child identify with "black culture" in order to acquire a positive racial identity? He compares two hypothetical people, one who says:

"I am a husband and a father, a writer, a teacher, and a musician. I am also Black, a man, and a Methodist." The second person replies: "I am Black, and I am a doctor; I am a mother, a wife, and a Presbyterian. I also write poetry and sing in a choir." Does the second person necessarily have a healthier identity because race is a priority? Can one even conclude that the second person's racial identity is more positive? In fact, the first person may feel equally or more positive about being Black although he gives it less significance.³²

In continuing his analysis, Forde-Mazrui challenges the view that identification with black culture is a necessary predicate to acquisition of "coping skills." He claims:

Rightly or wrongly, achievement in American society generally inures to those whose values and motivations track the dominant culture. . . . Transracial adoptees are more likely to embrace the achievement goals of the dominant culture and, in turn, achieve greater success in school than inracially placed black children. Therefore, in terms of coping with the demands of academic achievement, transracial placement is not only as good as, but arguably better than, same-race placement.³³

28. Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994).

29. *Id.* at 926-27.

30. *Id.* at 945, 959.

31. *Id.* at 949-50; see also Silverman, *supra* note 23, at 115 (suggesting that although transracially adopted children may have a positive racial identity, they may not have a racial identity as strong as that of a children in same race placement).

32. Forde-Mazrui, *supra* note 28, at 950.

33. *Id.* at 951-52.

Turning to skills for coping with racism, he argues that these too are ambiguous, since "white parents, by deemphasizing race, may enable a Black child to cope better with racial attacks because the child may view the attacks less personally."³⁴

As Forde-Mazrui's discussion so sharply illustrates, perspectives on what constitutes human flourishing are highly contingent. Many feminists have drawn contrasts between the dominant individualist perspective and what they identify as a more relational perspective on flourishing, good, and evil.³⁵ A reader grounded in a culture of individual achievement, self definition, and material success may resonate to the wisdom of Kim Forde-Mazrui's arguments, while a reader grounded in a culture of identity defined by social relationship, self-effacement, and group solidarity may turn away in dismay. Certainly, Forde-Mazrui himself speaks from a unique perspective. He is the biracial child of a marriage between a Caucasian woman and an African man; he is the adoptive parent of a "black" child; and he is legally blind.³⁶ His experience illustrates how infinitely complex and diverse the experience of race in America can be. Fundamental differences over the meaning of a "good" life and a "whole" self will remain, even after social scientists have perfected methodological techniques to measure children's adjustment over time, to compare adoptions in different social settings and at different ages, and to establish control groups for assessing concepts like "strength of identity."

The debate about racial matching has raised a host of questions that I do not plan to address since they beg the central question and seem to evade any logical resolution. These include whether there is such a thing as "race" or whether race is merely a cultural construct? Similarly, I acknowledge the dilemma in deciding to what "race" or "culture" a child of mixed heritage "belongs." While I have no answer to these questions, I reject the notion that their indeterminacy forecloses discussion of race in child placement. My premise is that race and culture of origin, no matter how hard to define with satisfying logic, *do* matter to children and therefore *should* matter in adoption law. They may well be contingent and socially constructed, but children's awareness of race and group identity indicate that they are "real" for the purposes that matter here—the fostering and protection of children's identity.

34. *Id.* at 953-54. Forde-Mazrui does not argue that transracial adoption is superior to interracial adoption, but rather that there is no logical basis for preferring one over the other and the law ought, therefore, to be race neutral in regard to adoptive placement. *Id.* at 955, 966-67.

35. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 29 (1982); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 115, 123 (Martha Fineman & Nancy S. Thompson eds., 1991).

36. Kim Forde-Mazrui, Remarks Before the DeBoer Committee for Children's Rights Conference (Oct. 2, 1994).

C. The Role of Narrative in Reformulating Children's Rights

In this Essay, I employ both theoretical and narrative frameworks to explore the tensions between preserving children's individual and group identities. These tensions are apparent in children's struggle to affirm the social families that they construct through experience while preserving their connection with their communities and families of origin. Although especially salient in adoption, these conflicts are present in every family and every cultural or national community. To structure the discussion and to give it emotional and narrative context, I draw upon stories from children's lives, as well as stories about children and for children. Stories provide a window on children's experience from which to draw not facts, but meaning.³⁷ Narratives contextualize the child's intertwined needs for caregiving and connection, immediate nurture and longterm continuity. The issues children's stories raise can help us in thinking about transracial adoption, international adoption, and many other settings in which claims of community identity and ownership conflict with concepts of individual rights and the child's individualized best interest. In each of these contexts, the issues are placed in sharpest conflict when some tragedy or simply the passage of time has eliminated what most would agree is the first choice solution—a child nurtured to adulthood in her family and community of origin.

There is another reason why I find children's stories helpful in talking about family law. It is easier to deal with the really terrifying monsters, as children well know, when they are presented in terms of an elephant's or a bird's fanciful journey. They capture your imagination because you *know* there are "real" monsters lurking under your own bed or rattling the door to your own basement. Beginning with children's stories, I find, helps to defuse the passions that surround these discussions.³⁸ I borrow this trick from a wonderful teacher, my colleague Lani Guinier who uses colors like blue, yellow, and green to talk about dividing political power among various communities under the Voting Rights Act. Transracial adoption, like any issue involving race, is a hot button issue—as my friend and mentor Gail Laster, who was instrumental in shepherding the Multiethnic Placement Act through Congress, and her employer, Senator Howard Metzenbaum discovered. Gail is an African-American woman married to an Italian-American man and mother of the curious and intelligent three-year-old, Jordan. Gail Laster and her daughter know that issues of racial identity are not just academic or political, but concrete and personal.

Accordingly, I will use stories to illustrate how a child-centered perspective on the dilemma of identity might help to resolve many tensions between claims of biology and nurture in adoption and might even bridge the ideological divisions over group and individual rights to children's custody and control. I will argue that an analysis that begins with parental or group

37. DONALD E. POLKINGHORNE, NARRATIVE KNOWING AND THE HUMAN SCIENCES 6-8 (1988).

38. See, e.g., Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1138 (1991).

"rights" over children tends to polarize, rather than move forward, the debates about who children are and about where and by whom they should be raised. I have developed elsewhere my argument for a child-centered perspective on parents' rights that conceptualizes parental power as a form not of ownership, but of trusteeship.³⁹ Children, I argue, do not (and in fact cannot) develop into adults in isolation. They grow embedded in families and groups and they actively derive their identities from their family and group membership as well as from their relationships with individual caregivers.

III. CHILDREN'S STORIES AND CHILDREN'S RIGHTS

In an attempt to illustrate the complex relationships that define children's lives, I begin with an unlikely authority, children's stories. I will particularly focus on the "I Can Read" book by Paul Eastman titled *Are You My Mother?*⁴⁰ in addition to a source I have used before, Dr. Seuss's *Horton Hatches the Egg*.⁴¹ These storybook tales about an elephant who hatches an egg and a baby bird in search of a mother are "silly" fiction. What does Dr. Seuss have to do with issues of race and culture in adoption? I will explain.

I have long been a student of the relationships between children and their caregivers, not only as a professor of children's law and an advocate for children, but also as a former nursery school teacher, the parent of two and sometimes three,⁴² and as a former child myself. Children's literature provides a window on children's feelings about the child-parent relationship. Beloved classics of children's literature, like children's own stories about themselves, deserve respect and attention in our search for meaning in children's law and policy, because they speak in complex visual and sensory images that are especially meaningful to children.

A. *Horton Hatches the Egg*: A Child's Right to Protection of Family Relationships Formed Through Nurture and Care

In my article, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*,⁴³ I use the classic story of *Horton Hatches the Egg*⁴⁴ to provide a visual metaphor for the social and psychological relationship that forms between a child and the adult who faithfully cares for her. Horton, for those readers unfamiliar with the story, was "faithful one hundred percent"⁴⁵ to an egg that had been left in his care by a certain irresponsible Mayzie bird who promptly flew off to Palm Beach. When the egg hatched, out came an elephant-bird.

39. Woodhouse, *Hatching the Egg*, *supra* note 5, at 1747.

40. PAUL EASTMAN, *ARE YOU MY MOTHER?* (1960).

41. DR. SEUSS, *HORTON HATCHES THE EGG* (1968).

42. In my time, I have raised one adopted child, one biological child, and, for a short time, a kinship foster child. All of them are now over 21 and seem to be thriving.

43. See Woodhouse, *Hatching the Egg*, *supra* note 5.

44. See SEUSS, *supra* note 41.

45. SEUSS, *supra* note 41 (unpaginated).

Children love this story about the elephant who hatches the abandoned bird's egg. They know that the story is about them and their survival, and they know that the egg would not remain warm and intact long enough to hatch without Horton's sitting on it. The elephant-bird's trunk and tail are tangible proof that Horton has become the baby's social parent; he earns his parenthood through nurturing care. It seems inevitable that the creature who hatches from the egg should be visibly related to Horton. When the baby elephant-bird rides off into the jungle on Horton's trunk, readers of all ages accept as right that Horton's faithfulness created a real and tangible relationship as significant to both the baby's identity, and to Horton's parenthood, as the biological relationship.

In *Hatching the Egg*, I advocate an approach to thinking about family policy which I term a "generist perspective."⁴⁶ A generist perspective, as exemplified by Horton, recognizes nurture of the next generation as paramount. A generist perspective views adults' relationship to children as one of responsibilities of trusteeship rather than rights of ownership. Adults' competing "rights" to control and maintain custody of children should be replaced by the less adversarial notions of obligation to provide nurture, authority to act on children's behalf, and standing to participate in collaborative planning to meet the child's needs. In other writings, I have argued that children are the most vulnerable citizens in our political community.⁴⁷ A generist perspective demands not only that we tame our penchant for talking in terms of adults' rights to children, but that we replace it with a discourse of children's rights to have their needs met by adults.

But what do I mean by "children's rights"? Children's rights is a rapidly maturing area of law. The 1989 United Nations Convention on the Rights of the Child⁴⁸ shows how radically the concept of children's rights has changed, and charts a direction for developments in the theory of adult-child relationships—between parents and children, between cultural and racial groups and their children, and between nations and their children.⁴⁹ Before the advent of children's rights, children were seen as property or, at best, as possessing various "interests," but few, if any, so-called "rights." The recent U.N. Convention, drawing on a spectrum of human rights traditions, invokes broad notions of children's rights to respect combined with needs-based rights. Most importantly for this discussion, children's needs for continuity of relationships and for protection in the formation and preservation of their religious, cultural, and family identity are articulated as children's rights and adults' responsibilities.

Consistent with the Convention, a child-centered perspective on issues of racial identification and cultural heritage would focus on children's rights to have their needs for identity met and their voices respected by the adults who care for them and who make laws affecting them. This leaves us with

46. Woodhouse, *Hatching the Egg*, *supra* note 5, at 1754.

47. Woodhouse, *Children's Needs*, *supra* note 5, at 327.

48. Convention, *supra* note 7.

49. For general discussions of the provisions described below see CHILDREN'S RIGHTS, *supra* note 7.

the problematic questions of how to determine what children "need" and what they are trying to "say?" Although we are accustomed to applying a particular style of rational assessment to these questions, I would argue that each is highly contingent, subjective, and contextual. In *Hatching the Egg*, I urge that we learn to draw on children's own voices and experiences—not only through their direct testimony, but also by bringing a child-centered perspective to thinking about children's law.⁵⁰ By paying attention to children's lives, how they grow, and what they say and do, rather than merely listening to what others say about children, we can begin to mediate the tensions between independence and dependence, between psychological relationships to caregivers and relationships to larger social communities, and between individual and group identity.

B. "Are You My Mother?": In Defense of Matching

If the adopted child constructs her personal identity through intimate experience, what role remains for the identity of origin? In *Hatching the Egg*, my project was to examine stories about children's need for protection of their relationship with nonbiological, "social" parents like Horton—stepparents, foster parents, lesbian co-parents, grandparents, or other de facto caregivers. For this reason, I focus the reader's attention on the elephant-bird's ears, trunk, and tail—those features that signalled the baby bird's relationship to the caregiver. One of my colleagues commented sagely after reading *Hatching the Egg*, "I loved your story, but tell me the truth—the baby didn't *really* look like Horton."⁵¹ Well, yes and no. While ears, trunk, and tail were important to the parable, the elephant-bird's wings, feathered body, and bird-like feet were also integral to the elephant bird's identity.

In the final illustration, we see Horton taking the baby elephant-bird home to a jungle populated by what I called the "family of families"—a wonderful variety of creatures born of Seuss's imagination. If you look closely, however, you will see that all of the families are composed of look-alike parents and children. How will Horton's elephant-bird define her difference in this jungle of sameness?

This is the other half of the story of adoption, and it is equally important to a theory of children's rights. In the book *Are You My Mother?*,⁵² a baby robin hatches and falls out of the nest while mother is gone. The baby bird wanders from one to another unlikely mother figure plaintively asking the question that provides the book's title. As readers, young and old, we worry when the baby attempts to bond with a dog, a cat, a cow, an airplane, and finally a huge and snorting earth moving machine, asking each of them "Are you my Mother?" We are delighted, on turning the page, to see that the steam shovel, instead of crushing the bird in its jagged teeth, has lifted the baby back into her original nest at the top of the tree. It seems

50. See Woodhouse, *Hatching the Egg*, *supra* note 5, at 1815.

51. Comment by Professor Michael Wachter, William B. Johnson Professor of Law and Economics, University of Pennsylvania, in conversation with the author (Apr. 1994).

52. See EASTMAN, *supra* note 40.

appropriate, as a matter of children's rights, that the author, like the current rules of law, should prefer reunification with the family of origin. He puts the baby robin back in the nest from which she fell, so she can be raised by the parent who laid and hatched her.

I had forgotten about this book until Harvard Law Professor Elizabeth Bartholet, author of *Family Bonds*,⁵³ pointed it out to me. She critiqued this book as profoundly anti-adoption. On reflection, it seems neither pro- nor anti-adoption, but simply a compelling story about displaced children's dual needs for appropriate care and for continuity with their origins. Although this intuition is not universally shared, one need not be anti-adoption to join the fairly broad consensus that children "belong" with their biological families and are served, barring serious perils, by rules that protect their stability and continuity in their families of origin.

This intuition is matched, however, by another. If the alternative were to leave the baby bird wandering indefinitely in physical peril and developmental limbo in search of mother, we would be equally delighted to see the steam shovel place her in the nest of some other appropriate mother who could speak her language and meet her needs for worms and attention—if not a robin, then perhaps a sparrow, a finch, or even the rather large hen she earlier tried to adopt as her mother.

This story, of course, is not offered as logical argument. Any skeptic would be quick to point out, for example, that people of all colors, unlike sparrows, robins, and hens, and obviously unlike cats, dogs, and steam shovels, are members of the same species and can and do produce offspring. Nevertheless, it embodies the widely shared principle that the first and best choice for children generally is to preserve and protect the child's biological family and community of origin from disruption. Unfortunately, sometimes these "biological" connections have already been ruptured by a foster or adoptive placement or the child's safety makes removal and the state creation of a new "social" family unit necessary. In our society, as in children's stories, there are few absolutes and we manage the best endings we can, given the available story elements.

Both stories embody the intuition that adoption should be structured to serve children's needs, specifically their needs for early and secure attachments to permanent caregivers and for support of their evolving capacities as they grow into adults. One listener reflected on the future of the baby robin if she were placed in the nest of the hen: "Isn't it likely," this African American woman asked me, "that the baby robin or sparrow, no matter how much she needs that mother hen right now, might someday want to experience the joy of flight?"⁵⁴ She posed a critical question. Children have characteristics and qualities that they are born with and characteristics and qualities that they acquire in interactions with a larger social reality. The identity of any child is inevitably shaped by her own and others' perceptions of her biological and often racial or ethnic kinship. I call this value the child's "identity of origin." Our children, as they mature, draw meaning from this

53. BARTHOLET, *FAMILY BONDS*, *supra* note 11.

54. Remarks at the University of Maryland Legal Theory Workshop (Nov. 10, 1994).

legacy, as they come to understand it, as well as from their relationships to intimate caregivers. Horton's baby is not born an elephant but an elephant-hyphen-bird and she will grow up with a dual legacy. The elephant-bird belongs to Horton's family, but her wings and the potential for flight belong to *her*.

I have argued that out of children's needs we can develop a theory of children's rights, including rights to protection of identity.⁵⁵ When we place children for adoption across cultural, ethnic, and political frontiers, children's needs must dominate our decisions about issues such as consideration of racial and cultural factors, the speed and legal consequences of adoptive placement, the child's dual citizenship, access to records of birth and identity of origin, and contacts with community of origin. Our conception of adoption and the adoptive family, I would argue, should be as flexible as possible if we are to further the child-centered goals of adoption.

IV. EXAMINING CHILDREN'S RIGHTS-BASED SOLUTIONS

A. The Multiethnic Placement Act: A Clash of Perspectives

Transracial adoption combines some of the most potent dilemmas of modern America—relationships of race and class and gender, as well as generational conflicts between parents' rights and children's rights. In the United States, our history is one of pluralism in constant tension with racism. It is a history of privilege for white protestants, while other ethnic and racial groups generally begin life in America (and people of color disproportionately remain) near the bottom of the ladder of material success.⁵⁶ Nonetheless, Americans believe passionately in equality, although they struggle to define its meaning in practice.

Recently, these tensions have been played out in response to the Multi-ethnic Placement Act of 1994 (MPA).⁵⁷ Senator Howard Metzenbaum and other sponsors (including African American Senator from Illinois Carol Moseley-Braun, and Asian American Senator from Hawaii Daniel K. Inouye) introduced the Act in the fall of 1993 to address what they perceived as a serious problem—the delay or denial of adoption of children of color while social service agencies searched for adoptive parents of the same race or ethnicity. The MPA was designed to withdraw federal funding from agencies that delay adoptions because of racial factors, and thus, to force agencies to shorten and even eliminate barriers caused by racial matching policies. Before its final enactment in the Fall of 1994, the MPA sparked a series of debates.

At first, the key issue appeared to be one of time: how much time could reasonably be allowed for finding a placement within the child's racial or cultural community before the child's interest in acquiring a stable caregiving relationship began to outweigh the positive value of a same-race

55. Woodhouse, *Children's Rights*, *supra* note 5, at 321.

56. See, e.g., BUREAU OF THE CENSUS 464 (1994) (Tables 706, 707) (summarizing income distribution and median income in the United States by race).

57. MPA, *supra* note 3.

placement? Many who initially supported the proposal, like Marian Wright Edelman of the Children's Defense Fund, made it clear that they viewed transracial adoption as a second choice solution.⁵⁸ These advocates stressed that the first priority should be preserving biological families and, failing that, placing children in adoptive families of similar race, culture, and ethnic background. Similarly, organizations like the Child Welfare League and American Civil Liberties Union opposed the project and argued that more effort must be invested in increasing early options by actively recruiting more racially diverse families and changing procedures to avoid lengthy stays in foster care.⁵⁹

The bill, however, raised an unexpected furor—some opponents of the bill argued that it gave too little respect to ethnic identity. They lobbied successfully to change the wording from “no delay” to “no undue delay.”⁶⁰ Meanwhile, another contingent including several distinguished Harvard professors, both white and black, rallied significant opposition both to this amendment and to the underlying bill.⁶¹ They contended that prohibiting “undue” delay would only worsen and institutionalize the already severe delays to which children of color were subjected.⁶² Even more pernicious, in their view, the bill unconstitutionally endorsed racial separatism because it implied that government could *prefer* same race adoption to adoption by persons of a different race or ethnicity.⁶³ Some liberal observers called for a bill prohibiting racial matching entirely.⁶⁴

The bill was amended once again, this time to delete the word “undue.”⁶⁵ It still implied a preference for placing children within their ethnic community of origin and a preference for biological over adoptive families. Section 603(a)(1)(A) and (B) prohibited the delay or denial of an adoption or foster care placement “solely” on the basis of race, color or national origin.⁶⁶ This version passed the Senate on March 25, 1994 as part of the Disadvantaged Minority Health Improvement Act of 1994.⁶⁷ Identical legislation was introduced in the House.⁶⁸

58. Randall Kennedy, *Orphans of Separatism: The Politics of Transracial Adoption*, CURRENT, Oct. 1994, at 8.

59. See Letter from David S. Liedermaier, Executive Director, Child Welfare League of America, to the United States House of Representatives 1-2 (May 25, 1994) (on file with author); Memorandum from the American Civil Liberties Union on the ACLU Position on Multi-ethnic Placement Bills, to Interested Persons 5-6 (May 12, 1994) (on file with author).

60. Barbara Vobejda, *Legislation Fans Flames of Heated Interracial Adoption Debate*, WASH. POST, Mar. 19, 1994, at A4.

61. Letter from Teachers at American Law Schools, to the Congress of the United States 2-3 (Dec. 1, 1993) (on file with the Duke Journal of Gender Law & Policy).

62. *Id.* at 2.

63. *Id.* at 1.

64. Elizabeth Bartholet, *Adoption is About Family, Not About Race*, CHI. TRIB., Nov. 5, 1993, § 1 (Perspective), at 23 [hereinafter Bartholet, *Adoption is About Family*].

65. See 140 CONG. REC. S4044 (daily ed. Mar. 25, 1994).

66. S. 1224, 103d Cong., 2d Sess. § 3(a)(1)(A), (B) (1994).

67. *Id.* (pending legislation which did not survive conference committee).

68. H.R. 4181, 103d Cong., 2d Sess. (1994).

Opposition to the bill came from many quarters. For example, Harvard Law Professors Elizabeth Bartholet and Randall Kennedy believed consideration of race was unconstitutional.⁶⁹ Similarly, the American Civil Liberties Union asserted that race may be included as one factor among many factors, but that the wording of the bill would allow improper and discriminatory weight to be given to race.⁷⁰ Other groups like the Child Welfare League were concerned that the bill paid too little attention to the importance of continuity in children's racial and ethnic communities, as well as too little attention to those communities' own claims to their children.⁷¹

After a prolonged struggle, the provision was enacted as part of the Education Act in October of 1994.⁷² In its final form it reads:

- (1) PROHIBITION. An agency, or entity, that receives federal assistance and is involved in adoption or foster care placements may not (A) categorically deny to any person the opportunity to become an adoptive or a foster parent, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved; or (B) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.
- (2) PERMISSIBLE CONSIDERATION. An agency or entity to which paragraph (1) applies may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interest of a child.⁷³

Thus, although race is not a disqualifying factor in adoptive placements, it may still serve as a factor in assessing children's needs.

The MPA also contains a provision requiring recruitment efforts directed at potential adoptive families that "reflect the ethnic and racial diversity of children in the state for whom foster and adoptive homes are needed."⁷⁴ Critics of racial matching remained deeply concerned by this provision and by the inclusion of language allowing consideration of race as a "permissible consideration" in determining the child's best interest.⁷⁵ Ultimately, the impact of the new provisions on the speed of adoptive placements and the numbers of transracial adoptions will depend in large part on regulations that are scheduled, under § 553 (c), to be issued within six months.⁷⁶

The struggle over the Multiethnic Placement Act exposes the polarized visions held by various individuals and groups concerning the meaning and

69. See Bartholet, *Adoption is About Family*, *supra* note 64, at 23; Randall Kennedy, *Kids Need Parents of Any Race*, WALL ST. J., Nov. 9, 1993, at A18.

70. See Memorandum from the American Civil Liberties Union, *supra* note 59, at 6-7.

71. See Liederman, *supra* note 59.

72. See Improving America's Schools Act, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (to be codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

73. MPA, *supra* note 3, § 553.

74. *Id.* § 554(9).

75. See Vobejda, *supra* note 60 (describing National Council for Adoption's position against the practice of race-matching).

76. MPA, *supra* note 3, § 553(c).

role of group identity in American society. Professor Twila Perry, an African American legal scholar from Rutgers University, has captured the dilemma in her writings about transracial adoption discourse.⁷⁷ She describes the debate as a discourse between two very different perspectives on what values are important. These perspectives represent radically different views both as to what is "good" for children and "good" as a matter of social justice. One viewpoint is characterized by what Professor Perry calls "race blind individualism" and the other by what she calls "color and community consciousness."⁷⁸ The perspective of race blind individualism sees racial matching as a threat to the individual rights of children to a nurturing home and to the rights of prospective adoptive parents to equal treatment regardless of their race or ethnicity.⁷⁹ Race blindness insures that the individual's life will not be defined and confined by considerations of race and ethnicity.⁸⁰

The color and community consciousness perspective, Perry argues, sees race and belonging in a community as inextricably linked and inevitably defining elements.⁸¹ Protecting the child's community, according to the color and community consciousness perspective, also protects the child, because the child's life-chances will inevitably be connected to the status of the racial and ethnic community of which she is visibly a part, even if she is placed outside that community during her childhood years.⁸²

Professor Perry points out that we in the United States have never had or even seriously considered a race blind adoption system, since we always have allowed prospective adoptive parents to choose which race child they wanted to adopt.⁸³ Understandably, people of color, having directly experienced the invidious side of a highly color conscious society, are skeptical that it can or should become race blind when addressing the claims of white families to adopt black children. A truly race blind system, Perry asserts, would allocate parents to children on a first come first served basis, regardless of the color or ethnicity of either.⁸⁴ Why is it that Americans have never really embraced this revolutionary form of color blindness?

The lines between discrimination and sensitivity to a child's needs, between racial separatism and respect for pluralism, are notoriously difficult to delineate. The United States Supreme Court in *Palmore v. Sidoti*⁸⁵ held, in the context of a child custody dispute, that the Equal Protection Clause of the United States Constitution precludes courts from considering the effects of racial prejudice, no matter how real, in determining a child's best interest. In *Palmore*, a judge had removed a white child from her mother's custody, reasoning that the child would suffer from the stigma of difference in a

77. See, e.g., Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1994).

78. *Id.* at 43.

79. *Id.* at 43-47.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 55-56.

84. *Id.*

85. 466 U.S. 429 (1984).

black community and from hostility to her mother's interracial marriage. Palmore was the easy case: it involved state interference with a biological parent's custody, not a state-created adoption—in which the state is charged with acting, in its *parens patriae* role, to promote the child's best-interest. Moreover, the stigma alleged had no connection to the child's own identity or heritage—the child and her biological parents were of the dominant racial group, not a minority laboring under a history of discrimination. Yet, the underlying principle—that giving legal effect to racial or ethnic factors in evaluating children's interests impermissibly perpetuates racial separatism and bias—is at the heart of liberal concerns about racial and ethnic matching.

In adoption, considerations of race and ethnicity have often been cast in a role analogous to their role in affirmative action in the civil rights context—as a response to the effects of racism and as recognition of the fact that race still matter. Like affirmative action, racial matching seems to pit individual versus communal identification.⁸⁶ The Multiethnic Placement Act is hardly the first site of struggle over individual versus communal identification of children and the role of the community in determining children's custody and, ultimately, their identity.⁸⁷ An earlier piece of legislation, the Indian Child Welfare Act of 1978 (ICWA),⁸⁸ explicitly adopted the color and community consciousness perspective.⁸⁹ The ICWA mandates tribal involvement in the placement of children eligible for enrollment in the tribe and establishes a hierarchy of preference for placements of Native American children, preferring blood family, other members of the same tribe, or other Native Americans over non-Native American adoptive placements.⁹⁰ In many cases, it gives exclusive jurisdiction of such adoptions to the Tribal Courts.

This federal legislation, passed in 1978 when as many as one third of Native American children were being placed outside their tribes,⁹¹ was designed to decrease the number of transcultural adoptions of Native American children. Whether or not intentionally, some whites continued to adopt Native American children without conforming to the terms of the ICWA.⁹² These cases produced many poignant stories, in which a law designed to

86. See *supra* note 8 and accompanying text.

87. See *supra* note 2 and accompanying text.

88. Indian Child Welfare Act, *supra* note 3, § 1901 (1988).

89. Indian Child Welfare Act, *supra* note 3, § 1902 (1988) (explaining congressional policy to assist adoptive placement of Native American children in Native American communities). Section 553(f) of the MPA specifically states that “[n]othing in this section shall be construed to affect the application of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.).” MPA, *supra* note 3, § 511(f).

90. Indian Child Welfare Act, *supra* note 3, § 1915 (1988); see also *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (invalidating the adoption of twins who had resided in their adoptive home for over three years).

91. Michael E. Connelly, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1978: Are the States Respecting Indian Sovereignty?*, 23 N.M. L. Rev. 479, 480-82 (1993).

92. Kathryn A. Carver, *The 1985 Minnesota Indian Family Preservation Act: Claiming a Cultural Identity*, 4 LAW & INEQ. J. 327, 329 (1986).

insure preservation of a political, ethnic, and cultural community and of its children's ties to family, tribe, race, and culture was pitted against children's psychological bonds to non-Native American families who had raised them from infancy.⁹³

Thus, as with the ICWA, a statutory preference for placing children of color with families of similar ethnic background may be seen by insiders as a means of enabling the child to learn the survival skills necessary in a race conscious society, of preserving the child's heritage, and of strengthening her sense of identity.⁹⁴ Simultaneously, outsiders may view this preference as enacting the bigoted constraints against individual liberty associated with racial separatism and racial determinism.⁹⁵

Not long after its decision in *Palmore*, the Supreme Court, without addressing the Indian Child Welfare Act's constitutionality, overturned a lower court's ruling that would have allowed state court jurisdiction to supplant tribal court jurisdiction in many ICWA cases.⁹⁶ Thus, the principles of race preference embodied in the ICWA continue to coexist uneasily with the race blindness seemingly mandated by *Palmore*.

B. Looking at Kinship Through Children's Eyes

My project here is not to take a position as to which of these perspectives is right or wrong—they both seem compelling to me as accurate reflections of different people's experiences, goals, and aspirations. Returning to Horton's story, one perspective sees primarily the ears and the tail. The other sees the wings and the feathers.

My contribution to the debate is to suggest that adopting the child-centered perspective I have proposed above might help mediate the disputes between discussants who seem at present entrenched in polarized positions. A child-centered perspective would provide a halfway point between these poles, and would shift the focus to children's needs-based rights defined through the lens of children's experiences. Adopting the generist, child-centered perspective I outlined earlier, which is reflected in modern trends such as the Children's Act in England⁹⁷ and the 1989 U.N. Convention on the Rights of the Child,⁹⁸ one would start with the proposition that biological and adoptive parents, communities of color, and political communities should not compete for ownership, but should share in a trusteeship of children. Rather than asserting rights in children, we should focus on articulating responsibilities. These responsibilities include: (1) an *obligation* to meet

93. See, e.g., *Choctaw Indians*, 490 U.S. at 30; *Matter of Adoption of Halloway*, 732 P.2d 962, 965 (Utah 1986) (acknowledging that removal of nine year old from adoptive home where he had lived since age three would inflict "a great deal of pain and anguish").

94. See, e.g., Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503, 517 (1984) (discussing the National Association of Black Social Workers' opposition to transracial adoption).

95. Bartholet, *Where Do Black Children Belong?*, *supra* note 23, at 1222.

96. *Choctaw Indians*, 490 U.S. at 30.

97. Children's Act 1989 (Eng.), reprinted in *LAW STATUTES ANNOTATED REPRINTS* (Judith Masson ed. 1990) (restating the bases on which all issues relating to children are decided).

98. Convention, *supra* note 7.

children's needs; (2) *authority* to act on their behalf; and (3) *standing* to participate in planning for children's care on their journey to adulthood. As trustees, we are obligated to make every effort to create social systems that allow children to grow up secure in their families and communities of origin. Both adoption and foster care are important tools. Their purpose, however, is not to give adults equal rights to acquire the children of their choice, but to provide families for children when the family of origin is not available or presents a serious threat to the child's safety.

Let me end my storytelling with a true story which illustrates my meaning, but from a child-centered perspective. A children's attorney shared the story with me after he heard my speech about Horton at the American Bar Association National Conference on Children and the Law in April 1994.⁹⁹ This lawyer had taken over from a colleague a painful case involving a biological mother with a troubled history wanting to reclaim a four year old who had been raised from infancy by foster parents who wanted to adopt. The child and mother were black and the foster parents were white. The lawyer (a seasoned child advocate) assumed he would press for termination of parental rights and adoption by the foster parents, as the lawyer before him had done. He took the case file home to read it. One entry in the file absolutely stunned him and caused him to reopen the issue of the child's need for continuity and identity. It was a psychological study of the various caregivers and their interactions with the child. The psychologists used an interesting technique. They sent each adult with the little girl into a room where the experts could observe the interaction through a two way mirror. They instructed each grown up to tell the child, "I'll play the little girl and you play the Mommy." The foster parents took their turns according to the script and it was clear that the child loved and trusted them and reflected their warm parenting back to them in her play. Then the biological mother tried the game. "You be the Mommy and I'll be the little girl." The child seemed perfectly comfortable with the mother but she simply refused to play the game. Finally, she led the mother over to the mirror and sat facing her so that their profiles were reflected in the mirror. She traced with her finger the mother's face and then she traced her own, a smaller version of her biological mother's profile. "No," she said, "You are the Mommy and I am the little girl."

Like the attorney in this case, I am always amazed by our ability to ignore what children are trying to tell us. In a case like this one, in which the child seemingly remained strongly identified with her biological mother, I would argue that the law ought to bend to fit the child's reality, rather than trying to bend the child to fit some legal or ideological blueprint for perfection. This is why I believe we need flexible principles like open adoption and kinship adoption, foster care with tenure, and access to adoption records for adoptees who want to find their families of origin. We need to expand the options and create more story elements to meet the complex needs of our children who live in an imperfect world.

99. Barbara B. Woodhouse, Address at the American Bar Association National Conference on Children and the Law (Apr. 21, 1994) (transcript on file with author).

Listening to children's voices suggests that children who are very young experience their sense of self, family, and community in extremely concrete terms. They identify as their family and draw their own identity from the people who take daily care of them and are their psychological parents. As children mature, however, they begin to define themselves in relation not only to their caregivers, but also to a larger society and history. As they begin to integrate more complex understandings of who they are and how they fit into the world, children themselves and the larger society that surrounds them both take on a greater role in defining them. As a result, biological, racial, and cultural identities take on increasing importance in their development.

I would argue that, as trustees, we must structure adoption and foster care policies that preserve children's long term access to their cultural and racial legacies to the greatest extent possible, even as we recognize and protect their short term needs for security and nurture. We must be blind to group interests at times, because children are blind in their attachments. To deprive a child of her "Mommy" or "Daddy" because of color, ethnicity or political jurisdiction, violates the child's right to protection of her intimate relationships. On the other hand, we need to be color and community conscious because our children grow up in a pluralist and sometimes a racist society in which group identities do matter and, many would argue, *should* matter as an element of group pride and a healthy sense of belonging. A mandate that race and ethnicity may play no role at all in adoptive placement, while seeming to provide a shield against discrimination, actually discriminates against the child who is placed for adoption. Such a law ignores the impact on the child of race and ethnicity and deprives the child of a potentially valuable legacy.

C. Children's Identity Rights

What do this theoretical framework and the narratives I have outlined mean to the legal question of preserving children's identity across visible boundaries and at the intersections of culture, community, and time? The complex interplay between children's immediate survival needs, their relationships to parent figures, and their long term quest for identity and a sense of community are present in many of the stories children tell and the stories that we read to them. For most young children, these rights do not conflict because most children are raised in their family and community of origin. Where biological parents live apart, the laws on visitation go far toward protecting children's contacts with the noncustodial parent and help to preserve those aspects of the child's family, ethnic, and racial legacy which are not a part of daily life in her custodial family. Although issues of identity can be complex in divorce, they are potentially more complex in the adoptive or foster family and are particularly salient in transracial or transnational adoptions that cross visible boundaries. In such situations, children may need specially tailored protections. Perhaps they need the power to claim more complex rights of identity.

These rights arguably have two important components that the law ought to acknowledge and respect. The first component is children's right to

protection of their "personal identity"—defined as their sense of self developed in relation to those they call "family." I refer, here, to the social family that children construct from their daily experiences in interactions with their caregivers, the people Goldstein, Freud, and Solnit would call the psychological parents.¹⁰⁰ As a pragmatic matter, every child needs a safe and secure caregiving relationship in order to survive infancy and to begin forming any identity at all. Children have a needs-based right to protection of their intimate caregiving relationships and to a voice in defining their own family.

I would also argue, however, that children's identity has a second component, one that becomes more important as children mature. I would designate this the child's right to claim her "identity of origin," defined as a right to know and explore, commensurate with her evolving capacity for autonomy, her identity as a member of the family and group into which she was born. The trusteeship model of adult power implies that we adults (including adoptive and biological parents, cultural and racial groups, states and nations) have a duty to recognize and protect the child's access to this heritage, as well as recognizing and protecting the young child's need for continuity in her psychological or social family.

V. CONCLUSION

Adults suffer from a singular inability to hear and see when children begin talking about ambiguities. I have suggested that the law ought to bend to fit the child's reality, rather than trying to bend the child to fit some legal or ideological blueprint for seamless perfection. To meet the complex needs of children as well as their caregivers, we should strive for a system that provides a full array of flexible tools, to be used when developmentally and legally appropriate.

These options should include not only traditional adoption, with its nuclear family model, but also open adoption, which allows creation of new ties without necessarily severing the old, and kinship adoption, which also maintains children's ties with families of origin. Ideas like longterm kinship foster care, group homes for teens, and foster care with tenure need not be dismissed simply because they fail to reflect the nuclear family model. Laws should respect children's rights to visitation with biological siblings and extended family. We should encourage exploration of novel concepts like "community visitation," which can provide a context in which children are able to explore their kinship with racial and cultural communities of origin.¹⁰¹ As they mature, all adopted children should have the right of access to adoption records if they wish to know their biological origins or to make contact with their families of origin.

100. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD 17 (1974) (introducing the concept that law should protect children's relationships with their "psychological" as opposed to their "biological" parents).

101. The novel by Barbara Kingsolver entitled PIGS IN HEAVEN (1993) draws this story element from real life cases involving children enmeshed in ICWA litigation. In several of these painful cases, the Tribe, once it acquired jurisdiction, decided in favor of leaving school year custody with the adoptive parents and instituting summer visitation with the tribe.

These proposals, I recognize, challenge dominant paradigms of the adoptive family and also ask adults to make major sacrifices of their autonomy and their privacy. Our conceptions of children's rights, however, are in a state of active revolution. Increasingly, society as well as legal reform is defining children as rights-bearing individuals who are entitled to a system of norms recognizing their unique needs. Acknowledging that children's individuality is nurtured and develops *within* the context of family, group, and community can help resolve many adoption dilemmas. A healthy respect for children's dual rights to protection of both their identities of origin and their socially constructed identities can help adults mediate the tensions, in defining and justifying adult power over children, between individual and group claims, between claims of social and biological kinship, and between claims of individual and collective identity.

