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# STRANGERS AND BROTHERS: A HOMILY ON TRANSRACIAL ADOPTION\*\*

CARL E. SCHNEIDER\*

*And, behold, a certain lawyer stood up, and tempted him, saying, Master, what shall I do to inherit eternal life? He said unto him, What is written in the law? . . . And he answering said, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbour as thyself. And he said unto him, Thou hast answered right: this do, and thou shalt live. But he . . . said unto Jesus, And who is my neighbour?*

Luke 10:25-29

## INTRODUCTION: A PARABLE AND A HISTORY

The common law speaks to us in parables. Ours is *Drummond v. Fulton County Department of Family and Children's Services*.<sup>1</sup> Just before Christmas 1973, a boy named Timmy was born to a white mother and a black father. A month later, his mother was declared unfit, and the Department of Family and Children Services placed Timmy with white foster parents - Robert and Mildred Drummond. The Drummonds were "excellent" and "loving" parents, and Timmy grew into "an extremely bright, highly verbal, outgoing 15-month baby boy."

Then the Drummonds asked to adopt Timmy. The Department's reviews of the Drummonds' devotion to Timmy remained enthusiastic,

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\* Chauncey Stillman Professor of Law & Professor of Internal Medicine, University of Michigan. I am grateful for the helpful of my research assistants, Sara K. Orr and Lance Rich. And I am glad to thank Kim Forde-Mazrui, Marsha Garrison, and Suellyn Scarnecchia for their perceptive, learned, and wise comments on an earlier draft of this lecture.

1. 563 F2d 1200 (1977, 5<sup>th</sup> Circuit en banc).

if condescending,<sup>2</sup> but the Department told the Drummonds that Timmy needed a black family. The Drummonds “stated they could let Timothy go to a young, energetic, religious, *adoptive* couple. They expressed primary concern that he not be moved from their home to another foster home . . . They feel that separation from Timothy will tear their hearts out but that they can do it because it would be best for Timothy in the long run.”<sup>3</sup> In August 1975, a Department evaluation concluded that the Drummonds had given Timmy “excellent care” and had “accepted a mixed race child and . . . handled the attendant problems well.” In September, a court terminated Timmy’s parents’ rights and freed him for adoption. The Drummonds said they would “do anything we [the social workers] suggested to go through a series of intensive interviews with black caseworker [*sic*] to help them understand the black culture and heritage, to read books and other literature in order to educate themselves in the black experience, and to talk with their own black friends at work about their feelings and experiences about being black.”<sup>4</sup> The social workers acknowledged that “[t]he fact that there presently are no appropriate homes for Timmy, and the fact that he might also experience some rejection by some members of the black community due to his ‘whiteness’ is [*sic*] also a consideration.”<sup>5</sup> In November 1975, when Timmy was almost two years old, the Department told the Drummonds “that Timmy will be better off adopted by a black couple.”<sup>6</sup>

The Drummonds sued to be allowed to adopt, and after their odyssey through the Georgia and federal courts, the Fifth Circuit en banc (on November 28, 1977, when Timmy was almost four) held against the Drummonds, since “the difficulties inherent in interracial adoption’ justify the consideration of ‘race as a relevant factor . . .’”<sup>7</sup>

Timmy Drummond is emblematic of no small number of children adoption agencies have thought should be adopted only by a black couple. Historically, agencies generally prevented parents from adopting interracially. But in the late 1950s and early 1960s, the racial climate shifted and minority children’s need for homes was pressing. By the middle to late 1960s, “transracial adoption seemed to be the ‘in’ thing for progressive agencies.”<sup>8</sup> However, there was soon a

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2. “Because the Drummonds are not from the kind of upper-middle class achievement oriented home most caseworkers come from it does make it hard to visualize seeing Timmy grow up ‘successfully’ in this kind of culture.” *Drummond v. Fulton County Department of Family & Children’s Services*, 547 F2d 835, 846 (1977).

3. *Id.* at 839.

4. *Id.* at 845.

5. 547 F2d at 846.

6. *Id.* at 846.

7. 563 F2d at 1205, quoting *Compos v. McKeithen*, 341 F. Supp. 264, 266 (E.D. La. 1972) (three-judge court).

8. Jacqueline Macaulay & Stewart Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, 1 Research in Law & Sociology 265, 283 (1978).

“counterrevolution . . . sparked by the National Association of Black Social Workers,”<sup>9</sup> which vowed to “work to end this particular form of genocide.”<sup>10</sup> “This counterrevolution cut transracial adoption by 39% in a single year, just when the movement seemed to be growing rapidly.”<sup>11</sup> The critics of transracial adoption argued that the only legitimate answer to the problem of unplaced black children was to find black parents by, for example, having adoptions of black children handled only by black social workers, subsidizing adoptions of black children by black parents, and recognizing informal adoption by black extended families.

Despite efforts of this kind,<sup>12</sup> black children languished in the limbo of foster care.<sup>13</sup> In 1994, Congress passed, and in 1996 it tried to sharpen, the Multiethnic Placement Act, which sought to keep searches for black adoptive parents from preventing black children from being

9. *Id.* at 287.

10. Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 *Notre Dame L Rev* 503, 518 (1984).

11. Macaulay & Macaulay, *Adoption for Black Children* at 287-88.

12. Elizabeth Bartholet, *Where Do Black Children Belong?: The Politics of Race Matching in Adoption*, 139 *U Penn L Rev* 1163, 1193 - 1207 (1991). Writing before the Multiethnic Placement Act (see the next paragraph), Professor Bartholet observed, “The matching policies of today place a high priority on expanding the pool of prospective black adoptive parents so placements can be made without utilizing the waiting white pool. . . . [P]rograms have been created to recruit black parents, subsidies have been provided to encourage them to adopt, and traditional parental screening criteria have been revised.” More specifically, one article written around the time MEPA was enacted reported that

the importance attached to finding minority parents is such that they are actively screened in, to the extent of “canvassing bars, pool halls, speaking to ministers and their church groups, women’s clubs, and simply stopping people in the street.” . . . Considerable latitude is afforded to minority parents: a couple, for example, should not be rejected merely because the husband or boyfriend has no interest in adopting a child and refuses to attend any interviews. Peter Hayes, *Transracial Adoption: Politics and Ideology*, 77 *Child Welfare* 301, 304 (1993).

13. Professor Bartholet wrote that “some notable efforts” to recruit black adoptive parents “have had some success in encouraging black families to consider adoption.” Bartholet at 1196. “Nonetheless, the numbers mismatch continues. . . . [B]oth the number of children in foster care and the proportion that is black have been growing.” *Id.* at 1188. Professor Howard concluded that “[c]urrent figures are hard to locate, but only a small number of transracial placements are still being made. Since no data suggest that more black homes have become available, the inevitable conclusion is that adoptable black children remain in foster homes and institutions.” Howard, 59 *Notre Dame L Rev* at 518. HHS reported in January 2000 that 51% of all foster children waiting for adoption are black, 11% are Hispanic; and 32% are white. Black children are 44% of the foster care population.

adopted at all.<sup>14</sup> MEPA, however, seems to have made it scarcely easier for white parents to adopt black children, evidently because many adoption agencies implacably resist transracial adoptions,<sup>15</sup> the HHS regulations that implement MEPA leave the agencies leeway, and enforcement has not been vigorous.<sup>16</sup>

### THE CONFLICTING CLAIMS

Who were Timmy's parents? He was legally an orphan. Should he have been adopted by his foster parents, the Drummonds? This is classically a question for family law. Primarily, family law resolves disputes among individuals about how their lives in families should be organized. But family law also referees the claims of various collectivities to influence people's intimate lives. These collectivities include families, ethnic and religious groups, and the broader community as it is represented by the government. Tensions among these collectivities are so Protean that no stable resolution of them is

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14. Multiethnic Placement Act of 1994, Pub L No 103-382, 551-554, 108 Stat 4056, 4056-57 (codified as amended at 42 USC 1996(b) and 42 U.S.C. 5115a (1994)). MEPA was amended by the Adoption Promotion and Stability Act of 1996, in the Small Business Protection Act of 1996, Pub L No 104-188, 1808(c), 110 Stat 1755, 1904 (codified as 42 USC 1996(b)).

15. Professor Bartholet writes, "Adoption agency bureaucrats moved swiftly to accommodate the position taken by the NABSW." She quotes Macaulay & Macaulay at 294 - 300: "When the black social work community turned professional attitudes around, it seemed prudent to do such things as to turn responsibility for all black children over to black social workers and agencies. The transracial adoptive parent organizations might be unhappy, but they were less of a threat than black power exercised directly or through the workers' professional peers." 139 UPenn L Rev at 1181. By the time of MEPA, "strong institutional opposition to . . . transracial adoption . . . has spread from the National Association of Black Social Workers . . . to child welfare agencies throughout the United States and Britain. Today, child care professionals in both countries routinely stress the importance of race-similarity between parents and children and discourage or prohibit TRA." Hayes, 77 Child Welfare at 301. Similarly, Moran notes that although "many Americans, black and white, support transracial placements, some social workers are still vehemently opposed to them. As a result, adoption across the color line continues to be a rarity, especially for black children who are not racially mixed." Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* 128-129 (U Chicago Press, 2001).

16. Systematic evidence on this issue is hard to find, but my impressions have been much assisted by an admirable memorandum my research assistant, Lance Rich, is preparing for publication. While the evidence about MEPA's success is not encouraging, there is reason to think that another recent federal statute B the Adoption and Safe Families Act, Pub L No 105-89, 111 Stat 2115 B has evidently hastened the adoption of foster care children. That act, among other things, gives states financial incentives to move children out of foster care. In 1999 (the last year for which we have figures), the number of finalized adoptions of children in foster care increased 28%. Since so many of the children available for adoption in foster care are black, and since there is no strong reason to believe the number of black adoptive parents has radically increased, it seems likely that transracial adoptions account for part of the increase.

plausible. Nevertheless, if there is a trend, it is toward favoring the choices of individuals, toward the adage that, in America, all affinities are elective.<sup>17</sup>

To be sure, family law attributes special status to “the family” by, for example, exalting “family autonomy.” But that principle is at heart a generalization about what best promotes the interests of the individuals within the family and a presumption readily abrogated to protect individuals from the power of families or their dominant members. Furthermore, the primacy of the family has been eroded by developments like no-fault divorce and a mounting willingness to intervene in families to pursue and punish familial violence.<sup>18</sup> Indeed, we have increasingly deinstitutionalized the family and ratified as a family whatever relationships individuals choose to call one.<sup>19</sup> So I repeat: in America, all affinities are elective.

Family law has been even more loath to defer to the authority of social groups than to the autonomy of families. Groups may govern people, but only by their consent. Perhaps the greatest exception is one that almost proves the rule: The Indian Child Welfare Act of 1978<sup>20</sup> accords tribes authority over the custody of Indian children that Indian parents have tried in vain to evade.<sup>21</sup> In enacting that statute, “Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.”<sup>22</sup> But ICWA is special because the group is special - American law attributes to tribes kind of sovereign authority that, however partial, no other group can boast.

But can family law’s skepticism of groups’ authority be squared with its avowals of allegiance to pluralism? Yes: A pluralist regime serves individuals by offering them an array of affinities to elect.<sup>23</sup> Thus family law has resisted justifying pluralism on the grounds that it benefits the group itself. Indeed, it has doubted whether it is useful to talk about “groups,” as opposed to collections of individuals.<sup>24</sup> And it

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17. Although the phrase beautifully fits the American case, it was originally the title of a novel by Goethe.

18. See generally Carl E. Schneider, *Family Law in the Age of Distrust*, 33 *Family L Q* 447 (Fall 1999); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 *Michigan L Rev* 1803 (1985).

19. See, for one recent example, *Baker v. Vermont*, 744 A2d 864 (1999). See generally Carl E. Schneider & Margaret F. Brinig, *An Invitation to Family Law: Principles, Process, and Perspectives* 1306-17 (2d ed) (West, 2001).

20. 25 USC §§ 1901-1963.

21. See, for example, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30 (1989).

22. *Id.* at 49.

23. See e.g. Joseph Raz, *Multiculturalism: A Liberal Perspective*, *Dissent* 67 (Winter 1994).

24. A good discussion of this problem is Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (U California Press, 1986).

has feared giving power to groups - as to families - exactly because it fears for the individuals within the group. *Pierce v. Society of Sisters*<sup>25</sup> thought the Constitution “precludes any general power of the State to standardize its children.” But is standardization more appealing when enforced by the church instead of the state?<sup>26</sup>

Presiding over the conflicts among individual, family, and group - and representing interests of its own - is the state. But family law supposes that the state should stay its hand, should accommodate individuals’ preferences wherever possible, and should intervene principally to protect the welfare of individuals. So what rules should the state employ to govern the dispute over Timmy? How should the claims of individual, family, group, and state be analyzed?

#### THE CHILD’S CLAIM

If all affinities are elective, Timmy himself should chose his parents. But he is too young. Ordinarily, parents choose for their children, but the very issue is who Timmy’s parents are. Still, many of the reasons we make parents trustees for their children fit the Drummonds - they knew him best, they loved him most. For such reasons, the Supreme Court has intimated that foster parents like the Drummonds may have a constitutional interest in their relationship with their foster children.<sup>27</sup>

But even if Timmy cannot speak for himself and the Drummonds cannot speak for him, a court could consider what he might have said. What - to invoke the classic custody test - were his best interests? If one truth is universally acknowledged, it is that children need parents, need people wholly committed to them to whom they are wholly committed. Timothy had parents in the Drummonds. Leaving them would be a little Gethsemane.<sup>28</sup> The Department had no black adoptive parents in view, and the social workers thought it could take years to find them. Even were the Drummonds mediocre parents, they might still be better than no parents at all. But even the Department called them exceptional parents.

Such persuasive justifications for supposing Timmy would choose the Drummonds could only be rebutted by impressive reasons. The *Drummond* court essentially accepted two. First, it thought “a child and adoptive parents can best adjust to a normal family relationship if the child is placed with adoptive parents who could have

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25. 268 US 510 (1925).

26. “[T]hough the nation-state is less tolerant of groups, it may well force groups to be more tolerant of individuals.” Michael Walzer, *On Toleration* 27 (Yale U Press, 1997).

27. See *Smith v. Offer*, 431 US 816 (1977).

28. The literature on children’s need for reliable ties with their parents and children’s pain when those ties are broken is too vast and too familiar to need citation.

actually parented him.”<sup>29</sup> Second, it deferred to a purported “professional literature” and to “the accumulated experience of unbiased professionals” and their supposed conclusion that white parents might “not be able to cope with the [black] child’s problems.”<sup>30</sup>

There was no evidence that either of these problems had troubled Timmy and the Drummonds. But might they do so later? In fact, the literature reaches quite a different conclusion than the court imagined. Studies of transracial adoptions overwhelmingly find that black children adopted by white parents do just as well on all the plausible measures as children adopted by black parents.<sup>31</sup>

Furthermore, the specific injuries transracial adoption is alleged to inflict are not well demonstrated. A more specific statement of those injuries comes from a District of Columbia “*Drummond*” - *Petition of R.M.G.*<sup>32</sup> *R.M.G.*’s opinions feared that “the child may not perceive herself as black or develop an identity as a black person”<sup>33</sup> and that “the child may experience a ‘conflict of loyalties’ as she grows older.”<sup>34</sup> Timmy might well be uncertain about his identity. Many children are. Adopted children especially may be. Children of inter-racial marriages likewise may be specially concerned about their identity. But would Timmy’s identity be any more disturbed by white parents than it already was complicated by the circumstances of his birth and his separation from the Drummonds?

And need struggling with his identity injure Timmy? Were that struggle injurious, we would expect to see signs in the empirical research, but we do not. On the contrary, there is evidence that transracially adopted children are generally content with their racial identities. Furthermore, mediating conflicting identities is what most of us do. America’s efflorescing cosmopolitanism grants us the gift of multiple, flexible identities,<sup>35</sup> and Americans increasingly believe that

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29. 563 F2d at 1205-1206.

30. 563 F2d at 1205.

31. The studies as of 1991 are surveyed at some length in Elizabeth Bartholet, *Where Do Black Children Belong?: The Politics of Race Matching in Adoption*, 139 U Pennsylvania L Rev 1163 (1991). The studies as of 2000 are briefly but informatively surveyed in Rita J. Simon & Rhonda M. Roorda, *In Their Own Voices: Transracial Adoptees Tell Their Stories* 13-27 (Columbia U Press, 2000).

32. 454 A2d 776 (DC App 1982).

33. *Id.* at 802.

34. *Id.*

35. See David A. Hollinger, *Postethnic America: Beyond Multiculturalism* 3 - 4 (Basic Books, 1995):



life's central moral enterprise is the interminable remodeling project of creating and revising one's identity by the choices one makes from the givens of one's past and the possibilities of one's present.<sup>36</sup> On this view, Timmy's questions about identity are not a crucifixion; they are questions we all profit by asking.

The *R.M.G.* opinions also observed that a boy like Timmy might face more social obloquy growing up in a white than a black family.<sup>37</sup> But the Supreme Court's opinion in *Palmore v. Sidoti*<sup>38</sup> seems to preclude that argument. There the trial court had awarded custody to the white child's white father because the court thought she would suffer from the community's reaction to her white mother's cohabitation with a black man. The Supreme Court acknowledged the risk but had "little difficulty" concluding that "the reality of private biases and the possible injury they might inflict" were constitutionally irrelevant. And, constitutional concerns aside, some courts asked to deny custody to parents with eccentric religious views have wondered whether the hostility those views provoke must harm and might benefit children. "We are not unaware that deviation from the normal often brings ridicule and criticism. We reject, however, the notion that it is necessarily the basis for implanting neuroses. Criticism is the crucible in which character is tested."<sup>39</sup>

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Pluralism respects inherited boundaries and locates individuals within one or another of a series of ethno-racial groups to be protected and preserved. Cosmopolitanism is more wary of traditional enclosures and favors voluntary affiliations. Cosmopolitanism promotes multiple identities, emphasizes the dynamic and changing character of many groups, and is responsive to the potential for creating new cultural combinations. Pluralism sees in cosmopolitanism a threat to identity, while cosmopolitanism sees in pluralism a provincial unwillingness to engage the complex dilemmas and opportunities actually presented by contemporary life.

36. See my criticism of courts that try to adjudicate disputes over religious education between divorced parents of different religions in Carl E. Schneider, *Religion and Child Custody*, 25 U Michigan J L Reform 879, 897 - 904 (1992).

37. *R.M.G.*, 454 A2d at 803:

When some people see a child whose race is different from that of his parents, they assume he is an illegitimate child or the product of a multi-racial marriage C circumstances they may disapprove of. Other people overreact in a well-meaning way, commenting on how wonderful it is to adopt a minority child. But however well-intentioned, such reactions have the effect of emphasizing to the child that he is "different," and can lead to a sense of isolation.

38. 466 US 429 (1984).

39. *Smith v. Smith*, 367 P2d 230, 233 (Ariz 1961). Similarly: "There may also be a value in letting the child see, even at an early age, the religious models between which it is likely to be led to choose in later life. And it is suggested, sometimes, that a diversity of religious experience is itself a sound stimulant for a child." *Felton v. Felton*, 418 NE2d 606, 607 - 08 (Mass 1981).

Another of *R.M.G.*'s arguments against transracial adoption is one a social worker made to the Drummonds: that in a black home Timmy "would be given guidance from people of the black race as to how to protect himself and win difficult situations. It would be much easier for a black parent to give him these skills than would a white parent, as they would be teaching him from their own experience."<sup>40</sup> Perhaps. But consider the testimony of Kim Forde-Mazrui, who is the son of a black father and a white mother and the adoptive father of a white child. He criticizes the "coping skills" argument because it falsely "assumes that a person must experience racism first hand . . . to teach a child how to cope with it."<sup>41</sup> He asks, "Must a parent have worn glasses, been fat, worn braces, or been short in order to help her child who, while on the playground, is called 'four eyes,' 'fatso,' 'tinsel teeth,' or 'shrimp'?"<sup>42</sup> In addition, Professor Forde-Mazrui thinks black children of white parents may acquire some "coping" advantages, such as a greater ease in dealing with white people.<sup>43</sup>

All the harms we have canvassed could occur. But they are speculations, speculations about problems likeliest to occur, if they occur at all, years into the future. They are thus kinds of harm child-custody law has increasingly distrusted. That law now emphasizes the quality of the relationship between the child and would-be custodians. Furthermore, the harms we have canvassed are only a few of the many factors that will affect that relationship, Timmy's happiness as a child, and his worth as a man. Not least, the Drummonds had it right when they told a social worker that "they felt that the most important thing Timmy needed to be secure and happy about himself, was to have parents who truly loved him." And all the evidence unites to proclaim that Timmy's relationship with the Drummonds was exemplary.

And that leads us to a last and crucial consideration: The issue is not whether the Drummonds might be imperfect, for all custodians are; it is which custodian will serve him best. The realistic alternative to adoption by white parents for Timmy and many black children is languishing in a foster-care system that is a woeful alternative even to mediocre parents. And, most ironically, foster parents are likely to be white. For the foreseeable future, then, Timmy's choice is between life as an orphan and life with the only parents he had ever known, the parents who loved him, the parents he loved. Was this a choice?

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40. 547 F2d at 844. To like effect, see *R.M.G.*, 454 A2d at 802 - 03, and . *NABSW's Position on Trans-Racial Adoption*, 5 National Association of Black Social Workers Journal 9 (Summer 1973).

41. Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 Michigan L Rev 925, 953 (February 1994). I am proud to say that Professor Forde-Mazrui was once my research assistant.

42. *Id.* at 954.

43. *Id.* at 951.

## THE ETHNIC CLAIM

I have just argued that if we heed the principle that all affinities are elective by making for Timmy the choice he would make for himself, we would confide him to the care and comfort of the Drummonds. But did his race have an interest in his being raised by members of that race? The most influential sentence ever written about transracial adoption reviled it as genocide.<sup>44</sup> The National Association of Black Social Workers's accusation rested partly on "the philosophy that we need our own to build a strong nation."<sup>45</sup> The NABSW's president asserted in 1985 that it was protecting "the rights of Black children, Black families, and the Black community. We view the placement of Black children in white homes as a hostile act against our community. It is a blatant form of race and cultural genocide."<sup>46</sup>

Generally, groups' interests in their children are recognized by honoring parents' preferences. For example, children ordinarily take the religion their parents assign them - *cujus regio, ejus religio* - and parents ordinarily assign children their own religion. Even *Wisconsin v. Yoder*<sup>47</sup> is not to the contrary. There the Supreme Court found unconstitutional a statute that required Amish children to attend ninth and tenth grades. The opinion famously celebrates the virtues of the Amish and denounces the statute's menace to their life, their religion, and their community. However, *Yoder's* facts and reasoning are less consoling than its language to any argument that a group has a claim to its children that is independent of their parents' claim. Mr. Yoder was a parent, and the parents and the community were as one. In addition, the Court independently examined whether the children would be injured by their parents' and their community's arguments and concluded that they would not be.

But let us take seriously *Yoder's* rhapsodic language about the Amish community's interests in their children. Are the interests of Timmy's race in his choice of parents then legally cognizable? This question provokes another: What is Timmy's race? If all affinities are elective, only Timmy can say. But here we might imagine two exceptions to the elective-affinities principle. First, if race is a "natural" category, if "science" identifies human characteristics that reliably define "race," we might freely assign children to races. But who today believes this? "Biologists, geneticists, and physical anthropologists, among others, long ago reached a common understanding that race is not a "scientific" concept rooted in

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44. Quoted in Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 Notre Dame L Rev 503, 518 (1984).

45. Quoted *Id.* at 517.

46. Quoted in R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 Yale L J 875, 919 n 190 (1998).

47. 406 US 205 (1972).

discernible biological differences.”<sup>48</sup>

Second, assigning children to races might be legitimate if races are social categories about whose membership there is a stable consensus. However, there has been no such consensus historically or today. Races have changed unsettlingly over time and remain unsettled. For example, Jews were once considered a race, and “Asian” comprehends many peoples who do not cheerfully group themselves together.<sup>49</sup>

But has not a widely accepted understanding of “black” evolved - the “one-drop” rule which essentially calls “black” anyone with any “black” ancestor, however remote?<sup>50</sup> That rule captures the way many, perhaps most, Americans define “black,” but it must also evoke unease, since its Jim Crow origins<sup>51</sup> and Nürnberg parallels are palpable and odious. In any event, should that rule override the elective-affinities principle? While many people who fit the definition embrace it, not all do. Some pass for white. Some people who call themselves Indian or Hispanic have black ancestors.<sup>52</sup> “Many first-generation Black immigrants . . . distance themselves from, subscribe to negative stereotypes of, and believe that, as ethnic immigrants, they are accorded a higher status than, Black Americans.”<sup>53</sup> Perhaps most significantly, interracial marriages are multiplying, although they

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48. Michael A. Omi, *The Changing Meaning of Race*, in Neil J. Smelser, William Julius Wilson, & Faith Mitchell, eds, *America Becoming: Racial Trends and Their Consequences* 243 (National Academy Press, 2001). For example, “In 1997 the American Anthropological Association counseled the federal government to phase out use of the term ‘race’ in the collection of data because the concept has no scientific justification in human biology.” *Id.* at 254.

49. Even subracial groupings can provoke disagreement: “Many Americans from Central America think of themselves as ‘mestizo,’ a term that refers to a mixture of Central American Indian and European ancestry. Among those surveyed in the National Latino Political Survey in 1989, the greatest number of respondents chose to be labeled by their country of origin, as opposed to ‘pan-ethnic’ terms such as ‘Hispanic’ or ‘Latino.’” Amitai Etzioni, *The Monochrome Society* 20 (Princeton U Press, 2001).

50. F. James Davis, *Who Is Black?: One Nation’s Definition* (U Pennsylvania Press, 1991).

51. *Id.* at 15.

52. “Large numbers of Hispanics with some black ancestry have succeeded in defining themselves as Hispanics or Latinos.” *Id.* at 158. “[A] great many people classed as Indians have some black background.” *Id.* at 21.

53. Michael A. Omi, *The Changing Meaning of Race*, in Neil J. Smelser, William Julius Wilson, & Faith Mitchell, eds, *America Becoming: Racial Trends and Their Consequences* 246 (National Academy Press, 2001). Professor Omi continues, “Children of Black immigrants, who lack their parents’ distinctive accents, have more choice in assuming different identities. Some try to defy racial classification as ‘Black Americans’ by strategically asserting their ethnic identity in specific encounters with Whites. Others simply see themselves as ‘Americans.’” Nor are people who meet the one-drop test necessarily welcomed as black by blacks. “Some groups, such as Black Cubans in Miami, encounter marginalization from both Black and Hispanic American communities.” *Id.* at 249.

remain unusual between blacks and whites.<sup>54</sup> These marriages significantly produce children who are likely - ever more likely - to regard themselves as something other than a member of either race *simpliciter*.

In short, even race can be an elective affinity. As Moran notes, "people readily shift their identities in response to changing policy, such as preferential treatment under affirmative action programs. . . . [F]rom 1950 to 1990, the Native American population in the United States grew over fivefold from 377,000 to 1.96 million."<sup>55</sup> More significantly for our purposes, a growing number of Americans explicitly call themselves biracial and insist on their right to designate themselves that way.<sup>56</sup> They passionately contend that they draw from multiple heritages and are entitled to have all of them acknowledged.<sup>57</sup> This makes it yet more perilous to assign people to races. It specifically makes it hard to assign Timmy to a race, for, while we have perhaps been assuming he is black, his mother was white and his father was black. Indeed, in the likely course of things, Timmy would have lived only with his mother and thus grown up in a white household.

In sum, it is harder to assign children a race than one might think, and we might well flinch from deciding, for example, the race of the

54. "Between a quarter and a third of all marriages involving Japanese Americans are now out-group marriages. More indigenous people marry outside the Indigenous bloc than marry within it. Even marriages between African Americans and whites, prohibited in some States as late as the 1960s, have increased by 300 percent since 1970." David A. Hollinger, *Postethnic America: Beyond Multiculturalism* 41 B 42 (Basic Books, 1995).

55. Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* 108 (U Chicago Press, 2001). One striking confirmation of this proposition comes from

the growing body of evidence indicating that ethnic and racial identities are far more sensitive to method of data collection than a simple biological model would suggest. Reinterview studies, for example, have demonstrated that respondent-reported race and interviewer-reported race are not always consistent. . . . Similarly, other research has also demonstrated that self-reports are not always consistent with either self or proxy reports at reinterview . . . , and that responses to self-administered and interviewer-administered questionnaires are inconsistent as well. Timothy P. Johnson et al, *Dimensions of Self Identification Among Multiracial and Multiethnic Respondents in Survey Interviews*, at <<http://www.census.gov/prod/2/gen/96arc/iiijohn.pdf>> pg. 7.

56. For example, 5.4% of the population classified itself as "others" in the 2000 census, up from 4% in 1990. Amitai Etzioni, *The Monochrome Society* 26 (Princeton U Press, 2001).

57. In one study, "multiracial respondents largely prefer[red] a question format that permits them to self-identify themselves as 'multiracial.' Many, in fact, expressed negative emotional reactions to their common experience of forced categorization into a single racial group or relegation to a residual 'Other-specify' category." Timothy P. Johnson et al at 7 B 8.

child of a Jewish father and a mother who “is of Black, American Indian and Irish heritage.”<sup>58</sup> But the problem is not just assigning a race to the child; it is also attributing opinions to the race. Who speaks for any race in the way representatives of Amish communities speak for them? Amish communities are homogeneous and structured, and they maintain orthodoxy through disciplined resistance to the pluralizing influence of the world and by splitting into separate communities when divided by doctrinal disputes. In contrast, blacks are an eighth of the American population, geographically dispersed, and socially and culturally heterogeneous.

Most significantly, polls indicate that a substantial majority of black people oppose restrictions on transracial adoption.<sup>59</sup> For example, in 1991 seventy-one percent of black Americans supported transracial adoption.<sup>60</sup> They may, for instance, feel that their race’s interests regarding Timmy would not be best served by severing him from the only parents he ever knew, parents with whom he flourished, and expelling him into a world of strangers.

Let me put the point differently. At a conference I once cited the views on transracial adoption of one black academic. Another black academic angrily insisted that the first was not a “real” black and that his opinions therefore had to be ignored B even scorned B in favor of her authentic views. Were the government to defer to “the group” in choosing parents for Timmy it would have to decide what position a “genuinely” black person would take. It is hardly clear that races have orthodoxies or that we should want them to. In any event, no court is well situated to ascertain any race’s orthodoxy, and since ascertaining orthodoxy inevitably influences it, we should not want a court to try.<sup>61</sup>

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58. *Tubwon v. Weisberg*, 394 NW2d 601, 604 (Minn App 1986).

59. Many blacks reject the views of the NABSW in other respects. For example, “48% of blacks and 47% of whites agreed that the Census Bureau should stop collecting information on race and ethnicity ‘in an effort to move toward a more color-blind society C even if it becomes more difficult to measure progress on civil rights and poverty programs.’” Amitai Etzioni, *The Monochrome Society* 14 (Princeton U Press, 2001).

60. Rita J. Simon, *Transracial Adoptions: In the Children’s Best Interests*, Black Issues in Higher Education, May 4, 1995, reprinted in Congressional Record, Senate, 104th Cong 1st Session, 141 Cong Rec S 12624 (Sept 5, 1995).

61. Compare the cases in which courts confronted with disputes over church property decline to decide which groups represent the authoritative view of the religion’s dogma. See Carl E. Schneider, *Religion and Child Custody* 25 Michigan J L Reform 879, 888-889 (1992). Cf Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U Michigan J L Reform 751, 787 B 788 (1992): [T]here is something artificial about a commitment to *preserve* minority cultures. Cultures live and grow, change and sometimes wither away; they amalgamate with other cultures, or they adapt themselves to geographical or demographic necessity. To *preserve* a culture is often to take a favored ‘snapshot’ version of it, and insist that this version must persist at all costs . . . .”

## THE CLAIMS OF THE COMMUNITY

The task of the community (as it is represented by the government) is twofold: first, to nurture and mediate the claims of the individual, the family, and the group, second, to cherish those claims that promote the kind of society we aspire to. As to the competing claims, I have argued that Timmy would have chosen the Drummonds; that though Drummonds' legal position is tenuous, since they began as contractual foster parents, they are truly *in loco parentis* and ache to adopt Timmy; and that government has no place to look for an authoritative statement of how any race's interests would best be served. On this view, the conflicting claims should be resolved by a decision for the Drummonds.

This leaves us with the second issue: What rule for children like Timmy would best foster the society we want? To answer this question, let us ask another: Why did transracial adoption, which not long ago was blossoming, which seemed to succor the needs of many black children and assuage the wants of many white adults, wither when attacked? Reasons abound. For example, racial matching fits adoption agencies' longstanding preference for matching of all kinds. And it fits the politics of diametrically opposed groups. The NABSW's hostility to transracial adoption eerily echoes the Jim Crow of the past and finds untoward allies in the racism of the present. Who said: "These unfortunate girls . . . will have a much better opportunity to take their rightful place in society if they are brought up among their own people"?<sup>62</sup> And who said: "We affirm the inviolable [*sic*] position of Black children in Black families where they belong physically, psychologically and culturally in order that they receive the total sense of themselves and develop a sound projection of their future"?<sup>63</sup>

In addition, a broader cultural development gives resonance to criticisms of transracial adoption. Americans increasingly think people cannot understand each other and thus are doomed to be strangers one to another. Several versions of this view enjoy cultural currency. First, many disciplines make opacity plausible. Freud convinced us that people are propelled by unconscious and non-rational drives so primal and painful that people do not perceive and cannot acknowledge them. If people mystify themselves, how can they understand each other? Psychology and sociology have convinced us that people are shaped by biological and social forces whose influence is indirect but inescapable - genes, parental attitudes, child-rearing practices, family status, education, and so on. If we cannot know what has formed our neighbors, we cannot understand them. And people are not just

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62. This remark is from the court in *Ward v. Ward*, 216 P2d 755, 756 (Wash 1950), explaining its decision to award custody of children of an interracial couple to the black father.

63. *NABSW's Position on Trans-Racial Adoption*, 5 National Association of Black Social Workers Journal 9, 9 (Summer 1973).

molded from without, they define themselves. This private and dynamic process also makes people inscrutable to each other.

More specifically, it is a triumphing cliché that people who have not shared experiences cannot understand each other. Hence the proliferation of support groups, which unite people with shared experiences narrowly defined, like teenage children of alcoholic parents. Many people who join these groups expect true understanding and communion only from doppelgängers.<sup>64</sup> The work of providing intelligent sympathy once performed by generalists - friends, family, or clergy - now requires experts taught by specific experience (yet another example of the division of labor in society).

The sense that men and women can never understand each other, perhaps always lively, has effervesced in recent decades. It has long been folk wisdom - and folk humor - that men and women think and act differently; today it is a leitmotif of best seller lists: e.g., *Men Are From Mars, Women Are From Venus*. That idea has acquired academic dignity. For example, Carol Gilligan argues that men and women approach moral reasoning differently, and John Townsend contends that evolution has led men and women to seek crucially different things.<sup>65</sup> These differences are magnified by a careless slide from the observation that as groups men and women differ statistically to the assumption that every man differs *tout court* from every woman.

If individuals are mutually incomprehensible, how much more so must be groups. On this view, America comprises cultural groups - particularly ethnic groups - that differ monumentally, whose members are primarily defined by their membership, and whose members thus differ irreconcilably from each other. They think differently, act differently, are different. These differences arise from diverging cultural traditions and varying ways society treats groups. For example, "[t]here is now a virtually unchallenged presumption that, looking at the issue of race, blacks and whites see altogether different realities."<sup>66</sup> Thus we are often instructed that black and white Americans not only understand a common language differently, but speak different languages that use different words and different grammar. And thus it was routinely said blacks and whites had had such different encounters with the police that they saw the evidence about O.J. Simpson in hopelessly conflicting ways that could never be

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64. For example: "All the other chronically ill people on the waiting list can't be wrong either. Only they and I really know how Irv can help us. It is something so private, inside yourself . . ." Ellen Burstein MacFarlane with Patricia Burstein, *Legwork: An Inspiring Journey Through a Chronic Illness* 134 (Scribner's, 1994). Irv, as her family saw and Burstein later recognized, was a charlatan offering false hopes for high fees.

65. *What Women Want - What Men Want: Why The Sexes Still See Love & Commitment So Differently* (Oxford U Press, 1998).

66. Paul M. Sniderman & Edward G. Carmines, *Reaching Beyond Race* 135 (Harvard U Press, 1997).



reconciled by reasoned argument. On a strong view of these perceptions, groups not only cannot understand each other, but an attempt to do so is an act of aggression, an attempt to arrogate the power to define a group instead of allowing it to define itself.

No one doubts that people differ, that we regularly surprise even ourselves and certainly each other. But our mutual incomprehensibility is lethally exaggerated. Even blacks and whites see many contentious issues similarly. Thus one of the most meticulous studies of its subject insists that, "to an extent which deserves to be appreciated again, black Americans and white Americans share the same culture."<sup>67</sup> More, "[i]t was emphatically not the case that blacks saw one reality of race, and whites another, with blacks fixing the blame for blacks being worse off on whites and whites pointing the finger at blacks. On the contrary, most cited the same factors, and to approximately the same degree."<sup>68</sup>

In short, the differences among us are real, but they are not the whole story. Our similarities are numerous and strong enough to make possible a society of mutual concern, a society which recognizes the elements of common humanity that bind and oblige us to each other. That is the kind of society the civil rights movement in its earliest and in some ways most radical incarnation marvelously and movingly invoked. And that I believe is the kind of society the community, acting through the government, should wish to promote in cases like *Drummond*. And that is the kind of society the *Drummond* court, with its fixation on what might separate Timmy from his parents and its indifference to what might unite them, implicitly depreciated and deplorably discouraged.

I opened with the parable of *Drummond*. Recall another parable. We are told that "the Jews ha[d] no dealings with the Samaritans," that a Jew "went down from Jerusalem to Jericho, and fell among thieves, which stripped him of his raiment, and wounded him, and departed, leaving him half dead," that a priest and a Levite "passed by on the other side, . . . [b]ut a certain Samaritan . . . had compassion on him, [a]nd went to him, and bound up his wounds . . ." We are rhetorically asked, "Which now of these three. . . was neighbour unto him that fell among the thieves?"

#### CONCLUSION

I have told two stories, both remarkable. The first is the story of transracial adoption. Not long ago, it seemed a modest but well founded solution to the needs of minority children without parents and the wants of couples without children. The evidence that white parents must fail black children is hardly more than bare assertion, while the evidence that transracially adopted children grow up as happily as

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67. *Id.* at 138.

68. *Id.* at 135.

other adopted children is substantial. Certainly such children are better off than if left to the mercies of foster care. A majority of black Americans opposes bans of transracial adoption. And those bans (now tacit and even illegal, but apparently still effective) are ever more anachronistic in an era of multiplying interracial marriage. And yet transracial adoption is resisted.

The second remarkable story is Timmy Drummond's. I will tell you what I know of its end. In May 1976, during the litigation and when Timmy was about two and a half, the Department apparently took Timmy from the Drummonds and placed him with a couple of "mixed racial ancestry." This placement seems to have failed, and the last we hear is that Timmy was eventually put in yet another foster home with a "mixed race couple" who thought they wanted to adopt him.<sup>69</sup>

The parable of Robert and Mildred Drummond and their son Timmy is the story of people who needed each other and who came to love each other. They understood each other well enough to live together as happily as is usually given to human beings. The Drummonds and Timmys of this world can be taught to regard themselves as irredeemably strangers. They cannot afford to. More broadly, it need not take the lessons of the last century, or of the last year, to remind us of our need for each other or our capacity for endless enmity. When I open the copy of *Why We Can't Wait* I bought in high school, I find underlined this closing passage from the *Letter from Birmingham Jail* with which I will close today: "Let us all hope that the dark clouds of racial prejudice will soon pass away and the deep fog of misunderstanding will be lifted from our fear-drenched communities, and in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their cintillating beauty."

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69. Larry I. Palmer, *Adoption: A Plea for Realistic Constitutional Decisionmaking*, 11 *Columbia Human Rights L Rev* 1, 7 (1979).