

# BABIES, PARENTS, AND GRANDPARENTS: A STORY IN TWO CASES

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## I. INTRODUCTION

This is the story of two cases involving two babies, four biological parents, one foster parent, and six grandparents.<sup>1</sup> Many parallels can be found in the lives of the babies and their families. Few parallels can be found, however, in the ways that courts addressed their lives.

Both babies were the subject of adoption actions.<sup>2</sup> When the babies were born, their parents were young, unmarried, and dependent on older people.<sup>3</sup> Both babies spent a substantial amount of time in the care of single women.<sup>4</sup> Their grandparents had hopes and plans for both their children and their grandchildren.

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1. *Skeens v. Paterno*, 480 A.2d 820, 822 (Md. Ct. Spec. App.) (involving one baby, Michael; two biological parents, Debra Skeens and Jeffrey Paterno; maternal grandparents, the Skeens; and paternal grandparents, the Paternos), *cert. denied*, 484 A.2d 274 (Md. 1984); *In re Baby Girl D.S.*, 600 A.2d 71, 73-75 (D.C. 1991) [hereinafter *In re D.S.*] (involving one baby, D.S.; one biological parent, T.S.; one foster parent, V.V.; and maternal grandparents, the E.s.).

2. *Skeens*, 480 A.2d at 822 (noting that Jeffrey Paterno sued Debra Skeens and her parents to enjoin them from engaging in any suit relative to the child's adoption, but later, all adoption issues were discarded); *In re D.S.*, 600 A.2d at 73 (stating that both the foster parent and maternal grandparents sought to adopt the baby).

3. *Skeens*, 480 A.2d at 822 (discussing the fact that Debra Skeens was an unmarried minor when her child was born); *In re D.S.*, 600 A.2d at 74, 76 (involving T.S., a fifteen year old, who decided to stay with a friend of the family, V.V., who became the foster parent to both T.S. and her child, D.S.).

4. *Skeens*, 480 A.2d at 822 (awarding custody of the child to the unmarried mother, Debra); *In re D.S.*, 600 A.2d at 74 (noting that the child had remained in the custody of the foster mother, V.V., since her birth). V.V. testified that she lived with her twenty-three year old daughter, implying that she was a single mother. *Id.* at 78.

The court in each case discussed the roles of grandparents in the lives of babies born to young parents. And there the parallels in the lives of these families end.<sup>5</sup> In one case, the court upheld an order granting the paternal grandparents substantial visitation rights with the child, who was in the custody of his mother.<sup>6</sup> In the other case, the appellate court found the willingness of the maternal grandparents to adopt and raise the child irrelevant to its decision about whether to terminate the mother's parental rights.<sup>7</sup>

This article will first explore why the relationships of the grandparents, parents, and children were given such disparate treatment despite similar circumstances. My theory is that the trial and appellate courts were influenced by the sex, gender roles, class, and, to the degree the factor can be viewed, the race of the parents, foster parent, and grandparents. I will then address outcomes that might have been possible had the judges been less influenced by these factors in their decisions. Although my argument is less with the outcomes of these cases than with their analyses, I also believe that eliminating or reducing biased forms of analysis could lead to different results in similar cases.

I want to emphasize that the nature of my inquiry is to uncover operative ideologies associated with gender, race, and class, and not to accuse judges of being sexist, racist, or classist. In my view, how we think about families is profoundly influenced by how we think families should be; the ideals or norms of society have a profound influence on what conclusions we draw.

Although I think one's perspective is important in any type of law-making or judging, I think the perspectives we bring to family issues may be among the most influential, as well as the most obscured. Because we grow up in families, and because they seem so "natural" or preordained, we may go through life without giving much thought to the social constructions of families. When we have an opportunity to make law about families—as judges, legislators, and lawyers—we may never go back to ask the fundamental question,

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5. The cases are different because the court in *Skeens* upheld grandparental visitation rights while the court in *In re D.S.* found that grandparental rights could not be considered in an action to terminate a parent's rights. See *Skeens v. Paterno*, 480 A.2d 820, 827 (Md. Ct. Spec. App. 1984) (holding that the trial court had the power to award visitation rights to the child's paternal grandparents to be exercised when the father was away on naval duty); *In re D.S.*, 600 A.2d 71, 85 (D.C. 1991) (holding that the trial court erred in withholding termination, in part, on the assumption that grandparents' rights would be impermissibly affected).

6. See *Skeens*, 480 A.2d at 827 (upholding the court order granting the paternal grandparents the right to exercise the father's visitation rights in the father's absence).

7. See *In re D.S.*, 600 A.2d at 84 (finding that the termination statute expressly limits the effects of a termination hearing to the parent specified and that it has no effect on whatever legal rights the grandparents may have in the child's future).

"Why do we think people ought to act a certain way in family settings?" Similarly, many of our notions about gender, race, and class are embedded early in our socialization.<sup>8</sup> These beliefs often seem "natural" and preordained. It follows, therefore, that one's views of what is natural and right for families may well be influenced by what one thinks is natural and right about gender relations, people of a particular race, or the effect of having or lacking economic resources.

Gender, race, and class ideologies concerning parents and children have been discovered and debated often in legal circles.<sup>9</sup> In this article, I will be adding an additional layer of factual complexity: What role does ideological thinking about race, gender, and class play in judicial interventions when the decision also involves a third generation? Given the increasing importance of grandparents as caretakers for children<sup>10</sup> and the growing intensity of the fight some grandparents are waging for visitation rights with grandchildren,<sup>11</sup>

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8. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* 7 (1982) (discussing Robert Stoller's studies which indicate that gender identity in most cases is firmly established by the age of three); Janet W. Schofield, *An Exploratory Study of the Draw-A-Person As a Measure of Racial Identity*, 46 PERCEPTUAL AND MOTOR SKILLS 311, 320 (1978) (concluding that having white and African-American first and second graders "draw a person" was a valid method of measuring acceptance of racial identity); NANCY CHODOROW, *Family Structure and Feminine Personality*, in WOMAN, CULTURE, AND SOCIETY 43, 49 (M. Rosaldo & L. Lamphere eds., 1974) (stating that cognitive psychologists have established that by the age of three, boys and girls have an irreversible conception of their gender); JUANITA H. WILLIAMS, *PSYCHOLOGY OF WOMEN: BEHAVIOR IN A BISOCIAL CONTEXT* 108 (1977) (noting that gender identity is imprinted during a critical period between eighteen months and three years).

9. See, e.g., Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 823 (1989) (discussing a gender system that results in the impoverishment of women, since it leads mothers to systematically "choose" against performing as ideal workers in order to ensure that their children receive quality care); Karen Czapansky, *Volunteers and Drafts: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1451-57 (discussing the relationship between gender ideologies and unequal labor allocations at work and at home for parents and children); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 237-39 (1982) (advocating the use of the standard of "primary caretaker" rather than economic resources in determining the "best interest of the child" in custody awards); ARLIE HOCHSCHILD, *THE SECOND SHIFT*, 15-21 (1989) (discussing the development of gender ideologies in husbands and wives and how these ideologies affect the notion of family); Rivera V. Marcus, *The Due Process Rights of Foster Parents*, 50 BROOK. L. REV. 483, 488 (1984) (noting cases where courts considered the race of the parent in the adoption action and the practice did not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution).

10. See Jean Seligmann, *Variations on a Theme: Skip-generation Parents*, NEWSWEEK, Winter 1989-Spring 1990 Special Ed., at 46 (explaining the importance of the skip-parent generation phenomenon, where grandparents take care of their grandchildren when parents either become unable to fulfill their duty or refuse to be responsible for their children).

11. See Katherine Ames et al., *Grandma Goes to Court*, NEWSWEEK, Dec. 2, 1991, at 67 (noting that twelve states now permit grandparents to petition the court for visitation rights without the prerequisite of death or divorce of a parent); Jody George, *Children and Grandparents: The Right to Visit*, CHILDREN TODAY, Nov.-Dec. 1988, at 14, 14-15 (discussing the fact that since 1965, every state has enacted a visitation rights statute which allows grandparents the right to petition the court for visitation rights).

exploring the impact of gender, race, and class ideologies on three-generational families is timely.

## II. THE CASES

### A. *Skeens v. Paterno*

In *Skeens v. Paterno*,<sup>12</sup> the Maryland Court of Special Appeals granted visitation to the biological father's parents.<sup>13</sup>

*Skeens* was decided twice by the Maryland Court of Special Appeals. The case began with the birth of Michael in January of 1983.<sup>14</sup> Michael's mother, Debra, was an unmarried seventeen year old at the time of his birth.<sup>15</sup> She and her parents, the Skeens, planned to place the baby at birth with a couple who wished to adopt him.<sup>16</sup> Before the delivery, Michael's father, Jeffrey, learned of the adoption plans and objected.<sup>17</sup> Jeffrey was in the Navy and did not seek to care for the child himself.<sup>18</sup> Instead, he proposed placing the child with his sister and her husband, or with his parents.<sup>19</sup> Three days after Michael's birth, Jeffrey sued Debra and her parents, seeking custody and an injunction to prohibit placing Michael with the proposed adoptive parents.<sup>20</sup> Temporary custody was awarded to Jeffrey's sister and her husband after a hearing at which Debra was not permitted to testify.<sup>21</sup> Her attorney proffered that Debra would care for the baby herself if the adoption were not allowed.<sup>22</sup> In an unpublished opinion, the Court of Special Appeals

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12. No. 94 (Md. Ct. Spec. App. May 23, 1983), *appeal after remand*, 480 A.2d 820 (Md. Ct. Spec. App.), *cert. denied*, 484 A.2d 274 (Md. 1984).

13. *Skeens v. Paterno*, 480 A.2d 820, 822 (Md. Ct. Spec. App. 1984).

14. *Id.*

15. *Id.*

16. *See id.* at 822 (noting that the Skeens had arranged to place the child with Bruce and Bonnie Gordon).

17. *See id.* at 822 (noting that Jeffrey Paterno filed suit to enjoin the adoption proceedings three days after Michael's birth). The court in *Skeens v. Paterno*, No. 94 slip op. at 1 (Md. Ct. Spec. App. May 23, 1983), stated that Jeffrey Paterno objected to the Skeen's adoption plans before Michael's birth.

18. *See Skeens v. Paterno*, No. 94 slip op. at 1 (Md. Ct. Spec. App. May 23, 1983) (stating that Jeffrey preferred that the child be placed in his custody with the understanding that his sister and her husband, Cynthia Jo and Patrick Clayton Ortman, or alternatively, his parents, the Paternos, would care for the child).

19. *Id.*

20. *See Skeens v. Paterno*, 480 A.2d 820, 822 (Md. Ct. Spec. App. 1984) (noting that Jeffrey sued Debra and her parents to enjoin them from participating in any adoption proceedings involving the child).

21. *Skeens v. Paterno*, No. 94 slip op. at 3-4 (Md. Ct. Spec. App. May 23, 1983) (awarding temporary custody of Michael to the Ortman's, Jeffrey Paterno's sister and her husband, and finding Debra's testimony regarding her desire to keep Michael inadmissible).

22. *Id.* at 4.

reversed the award of custody to a nonparent over the objection of the mother where the mother had not been allowed to testify.<sup>23</sup>

During subsequent proceedings, Debra gave up her plan to have Michael adopted.<sup>24</sup> After another hearing, she was awarded custody.<sup>25</sup> Jeffrey continued his career in the Navy, which required him occasionally to be away from home.<sup>26</sup> The court awarded Jeffrey substantial visitation rights, including at least two consecutive days and nights a week, every other major holiday, and six consecutive weeks during the summer.<sup>27</sup> During Jeffrey's absences, his parents, the Paternos, were empowered to exercise Jeffrey's visitation rights.<sup>28</sup>

On appeal, the Court of Special Appeals upheld the visitation order.<sup>29</sup> After finding that a court of equity has the power to award grandparental visitation when it is in the best interests of the child to do so, the Court decided that the visitation order was necessary to nurture the relationship between Michael and his paternal relatives.<sup>30</sup> According to the Court, grandparental visitation was to be "an important way for [Jeffrey] to maintain contact with the child—and for the child to maintain contact with the paternal side of his family. . . ."<sup>31</sup>

### B. *In re D.S.*

In *In re D.S.*,<sup>32</sup> the Court of Appeals of the District of Columbia concluded that the willingness of the maternal grandparents to adopt the child was not to be considered when deciding whether to terminate the mother's parental rights.<sup>33</sup>

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23. *Id.* at 6 ("We can perceive of no situation in which it would be proper to remove custody of a child from its natural mother over the mother's objection without permitting the mother to testify as to her position on the matter.").

24. See *Sheens*, 480 A.2d at 822 (stating that the adoption issue disappeared from the case during the course of subsequent judicial activity).

25. *Skeens v. Paterno*, 480 A.2d 820, 822 (Md. Ct. Spec. App. 1984).

26. *Id.* at 822-23.

27. *Id.* at 823.

28. See *id.* (noting that the Paternos could exercise Jeffrey's visitation rights when he was away working for the Navy, including taking the child to their residence and having physical custody of the child).

29. *Sheens*, 480 A.2d at 827 (holding that the court had the power to award visitation rights to the grandparents and that it did not abuse its discretion in doing so).

30. *Skeens v. Paterno*, 480 A.2d 820, 827 (Md. Ct. Spec. App. 1984) (holding that a court has the power to decide visitation rights by grandparents using the best interest of the child standard). The court stated that "there is ample evidence that the child should have contact with its father and its father's family, and that the elder Paternos are in every respect fit grandparents." *Id.*

31. *Id.*

32. 600 A.2d 71 (D.C. 1991).

33. *Id.*

The child, D.S., was born to T.S. when she was fifteen years old and unmarried.<sup>34</sup> The biological father appeared to have taken no interest in the child.<sup>35</sup> At the time she gave birth, T.S. lived with a foster parent, V.V., because T.S. had a conflicted relationship with her mother and stepfather, the E.s.<sup>36</sup> T.S. had been adjudicated neglected.<sup>37</sup> T.S. appeared to have no interest in caring for the baby herself at the time of its birth.<sup>38</sup> The E.s were asked whether they would take the baby from the hospital, but they declined because T.S. would not care for the baby with them.<sup>39</sup> T.S. was charged with neglect of D.S., and she consented to a finding of neglect.<sup>40</sup> D.S. was placed with a foster parent, V.V.<sup>41</sup> The E.s regularly visited D.S.<sup>42</sup> T.S. rarely saw or inquired about D.S.<sup>43</sup>

When D.S. was nearly two years old, V.V. petitioned to adopt her.<sup>44</sup> The guardian ad litem for D.S. filed a petition to terminate T.S.'s parental rights.<sup>45</sup> V.V., already a party in the neglect proceeding, sought and was granted leave to intervene in the termination action.<sup>46</sup> The termination motion was the first of the proceedings to be heard.<sup>47</sup> T.S. twice moved to consolidate the

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34. *In re D.S.*, 600 A.2d 71, 74 & n.2 (D.C. 1991) (discussing the fact that T.S. was fifteen when she gave birth to D.S. and that there was a putative father named in the neglect petition implying that the parents did not marry).

35. *See id.* at 74 n.2 (stating that the role of the putative father in the proceeding was unclear because the record did not indicate whether the putative father's rights had been adjudicated, even though counsel had been appointed for him).

36. *See id.* at 74, 77 (noting that the mother, T.S., returned to V.V.'s home after the child's birth because "she said she could not get along with her mother" and her stepfather "would physically discipline her.") (quoting T.S.).

37. *See id.* at 74 (conveying that T.S. was adjudicated a neglected child in 1985).

38. *See id.* (noting that T.S. left the child with V.V. soon after the child's birth and V.V. remained the uninterrupted custodian for the child, D.S.).

39. *See In re D.S.*, 600 A.2d 71, 79 (D.C. 1991) (stating that Mrs. E. did not want to take the baby alone because she wanted T.S. to establish a bond with the child).

40. *Id.* at 74 (noting that the trial court, in accordance with a stipulation signed by T.S., found D.S. to be a neglected child within the meaning of D.C. CODE ANN. § 16-2301 (9)(B)-(C) (1989)).

41. *Id.* (stating that because V.V. was already acting as T.S.'s foster parent, she was appointed on July 17, 1986, to take care of D.S. as well).

42. *See id.* at 75 n.5 (discussing that in June 1987, the court permitted the E.s to have frequent visitation with the child, but that in 1989, the visits were limited to the social worker's office).

43. *See id.* at 78 (noting that T.S. visited the child only six times before the November 1989 termination hearing, and that when T.S. occasionally saw V.V. on the street, she did not inquire about D.S. or express interest in visiting her).

44. *In re D.S.*, 600 A.2d 71, 74 (D.C. 1991) (stating that in February 1988, V.V. filed a petition to adopt D.S., who was nineteen months old at the time).

45. *Id.* (noting that in December 1988, when D.S. was twenty-nine months old, her guardian ad litem filed a motion to terminate T.S.'s parental rights).

46. *See id.* at 76 (discussing that on July 13, 1989, V.V., already a party to the neglect action, filed a motion to be joined as a party to the termination proceeding pursuant to D.C. CODE ANN. § 16-2356 (1989), and that one month later the court granted the motion).

47. *See id.* at 73, 76 (stating that the termination hearing was held on November 24, 1989, while the adoption action was pending).

neglect/termination proceeding with V.V.'s adoption petition, but the motion was denied on both occasions.<sup>48</sup> Before the motion was heard the second time, the E.s petitioned to adopt D.S., and T.S. consented in writing to have the E.s adopt D.S.<sup>49</sup> Although the E.s were not parties to the termination proceeding, and although the termination proceeding was not consolidated with the competing petitions to adopt D.S., the central question at the termination hearing was whether the E.s should have an ongoing relationship with D.S.<sup>50</sup>

### 1. *The Trial Court's Holding*

After hearing the testimony of V.V., the E.s, several social workers, and mental health providers, the trial court concluded that D.S. would suffer harm if the parental rights of T.S. were terminated, because of the "irrevocable dismissal of the chance for [D.S.] to know her birth family."<sup>51</sup> According to the trial court, the statute failed to address the role of grandmothers in families with juvenile mothers in the District of Columbia.<sup>52</sup> The trial court argued that

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48. Counsel for T.S. moved on February 9, 1989, to consolidate D.S.'s neglect/termination proceeding with V.V.'s adoption proceeding. The motion was denied. *In re D.S.*, 600 A.2d at 75. On June 5, 1989, counsel for T.S. moved for reconsideration of her motion to consolidate the neglect/termination proceedings. Counsel argued that the same evidence would be presented in both cases and an adoption hearing would be necessary regardless of the ruling on the termination issue. V.V. opposed the motion on the ground that the actions did not involve the same parties. For example, V.V. was not yet a party to the termination proceeding and the E.s were not parties in the neglect/termination hearing. The court denied the motion again on June 19, 1989. *Id.* at 75-76.

49. *In re D.S.*, 600 A.2d 71, 75 (D.C. 1991) (noting that on April 6, 1989, T.S. signed a form consenting to D.S.'s adoption by the E.s, thereby relinquishing all her custody, guardianship, and parental rights over D.S. to the E.s).

50. The parties in the termination action were T.S. (the parent), D.S. (the child), and V.V. (the foster parent), who intervened. *In re D.S.*, 600 A.2d at 73. Counsel for T.S. failed on two occasions to convince the court to consolidate the termination/neglect action with the adoption proceeding. *Id.* at 75-76. The trial court, however, considered the termination proceeding as it related to the grandparent-child relationship and not the parent-child relationship. *Id.* at 83.

51. *In re D.S.*, 600 A.2d at 81. V.V.'s testimony involved the few times T.S. visited D.S. *Id.* at 78. Mr. E. testified regarding the family's problems with T.S., which prevented them from immediately taking D.S. from the hospital. *Id.* at 78. Mrs. E. testified that she only wanted D.S. if T.S. also came so that T.S. could establish a bond with her child. *Id.* at 79. Both Mr. and Mrs. E. testified regarding difficulties they encountered with the social workers and their visitation privileges. *Id.* Ms. Smith, a social worker, testified to T.S.'s history of drug usage, emotional instability, and the circumstances surrounding D.S.'s birth. *Id.* at 76-77. Ms. Bowman, also a social worker, testified that Mrs. E. refused to take D.S. because she already had a family to look after and that her relationship with T.S. was strained. *Id.* at 78. Dr. Wynne, a clinical psychologist, conducted psychological testing on T.S., V.V., D.S., and Mrs. E., and presented the test results. *Id.* at 77-78.

52. *In re D.S.*, 600 A.2d 71, 82-83 (D.C. 1991) (noting that the trial court compensated for the practical role grandparents play in the birth family's home by inserting a new factor, the grandparent factor, into the best interest of the child analysis under D.C. CODE ANN. § 16-2353 (b)(3) (1989 & Supp. 1990)).

grandmothers play a very practical role in the family, a role which must be considered when the best interests of the child are adjudicated.<sup>53</sup> Here, the trial court found that the E.s acted as an important resource for T.S. and expressed a sincere desire to maintain a relationship with D.S.<sup>54</sup>

## 2. *The Appellate Court's Holding*

The court of appeals reversed the decision of the trial court and held that once a proposed adoptive parent (here, V.V.) intervened in a termination of parental rights proceeding, it was error not to consolidate the adoption petitions with the termination proceeding.<sup>55</sup> The appellate court also commented on the question of whether continuing the grandparents' relationship with the child was pertinent to the termination decision.<sup>56</sup> According to the court, the two issues are separate. The court criticized the trial court for incorrectly considering the termination proceeding as it related to the grandparent-child relationship and not limiting its consideration to the parent-child relationship.<sup>57</sup> Judge Ferren noted that, unlike many jurisdictions, the District of Columbia does not expressly grant visitation rights to grandparents in either neglect or termination actions.<sup>58</sup>

The appellate court, however, noted that none of the parties argued that the E.s' visits should be discontinued if T.S.'s parental

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53. *Id.* at 83. The court noted the trial court's finding that:

[T]he statute does not consider all the real situations which occur when juvenile mothers are involved in matters such as [are] presented the instant case, specifically, the practical role which grandmothers play in the birth family's home and in many homes in the District of Columbia. Thus, the role of grandparents cannot be overlooked in considering what is in the best interests of the child.

*Id.*

54. *Id.* at 80-81. The court stated:

Both Mr. and Mrs. [E.] have expressed a sincere interest in D.S. and the court credits that interest. . . . The court credits the evidence presented which demonstrates the [E.s] sent letters to DHS and made aggravated telephone calls to DHS expressing their desire to maintain a relationship to [D.S.] Due to the fact that [T.S.] was fifteen when she gave birth to [D.S.], [T.S.] did not have the capacity to appropriately parent [D.S.] However, the grandparents have acted as a resource for [T.S.]

*Id.*

55. *Id.* at 89 (holding that the pending adoption and termination proceedings be consolidated because V.V. intervened in the termination action, an act which exhibited her willingness to confront the natural mother thereby nullifying the only reason to justify separate termination and adoption proceedings).

56. See *In re D.S.*, 600 A.2d 71, 83 (D.C. 1991) (finding "nothing in the statute [D.C. CODE ANN. §§ 16-2351 to 16-2365 (1989)] or in its legislative history that permits the court to conceptualize a termination proceeding by substituting the grandparents for a parent, even if the parent herself is a juvenile.").

57. *Id.* at 83 n.15 (noting that the focus of the termination proceeding is the parent-child relationship rather than the grandparent-child relationship).

58. *Id.* at 84 n.16.



rights were terminated.<sup>59</sup> The case was remanded to the trial court to consolidate the competing adoption petitions with the termination proceeding.<sup>60</sup>

### III. THE INFLUENCE ON THE COURTS OF GENDER, RACE, AND CLASS IDEOLOGIES

#### A. *A Description of the Factors*

##### 1. *The Gender of the Players Through the Lens of Carol Gilligan*

What ideological stances do the Maryland and D.C. courts take with respect to these children, parents, and grandparents? The first question is the stance of the courts with respect to gender. Before that question can be addressed, however, one must be convinced that the courts were aware of the gender of the players and that the awareness made a difference.

It is clear that the judges were aware of both the sex and gender of the players.<sup>61</sup> The Maryland judges often used a sex-specific term when a sex-neutral one was available, even where a person's sex was irrelevant.<sup>62</sup> The D.C. judges, writing their opinion in *In re D.S.*, nearly a decade later, sometimes referred to people sex-neutrally as parents or children, rather than mother, father, and daughter, but often referred to people using sex-specific terms.<sup>63</sup>

Both the D.C. and the Maryland courts placed the actors in sex-specific parent/child roles, even where the courts discussed behavior that had little to do with parenthood or childhood. For example, women were usually referred to by both courts as occupying a mothering role. V.V. was usually called a foster mother, not a foster par-

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59. *Id.*

60. *Id.* at 89.

61. I am using the term sex to refer to physical or biological characteristics usually found in male or female bodies. The term gender refers to the social constructions that apply to people based on their being biologically male or female. Thus, a person may be female by sex but behave in ways socially constructed for the male gender, and vice versa. See Williams, *supra* note 9, at 800 (discussing the existence of both biological sex differences and social gender differences between men and women).

62. For example, the court referred to Debra as "the unwed mother" when it discussed a jurisdictional issue. *Skeens v. Paterno*, No. 94 slip op. at 4 (Md. Ct. Spec. App. May 23, 1983). The court also referred to Jeffrey as "an unwed father" and Debra as "the natural mother" in the same sentence discussing parental rights. *Id.* at 6. In addition, the court phrased its holding as "it was improper to deny the mother the right to testify" rather than using the word "parent." *Id.*

63. See *In re D.S.*, 600 A.2d 71 (D.C. 1991) (using the terms "parent" seventy-six times, "child" one hundred and one times, "mother" sixty-three times, "foster mother" fifteen times, "father" fifteen times, and "daughter" six times in the opinion).

ent.<sup>64</sup> Debra was often referred to as an "unwed mother."<sup>65</sup> In *Skeens*, the Maryland court referred to men in the context of their fathering position, such as the "unwed father" or the "father."<sup>66</sup> This was true even though one grandfather also acted as an attorney in the case.<sup>67</sup>

The judges applied gender-specific stereotypes to the actors in the cases. Stereotyping, in this context, means the application of general norms or expectations to a person without taking into account evidence about his or her specific life circumstances or characteristics.<sup>68</sup> For example, the Maryland trial court conditioned its award of temporary custody of Michael to his aunt and uncle on the aunt's quitting her job.<sup>69</sup> There is no evidence in the opinion indicating what kind of job she held, why quitting was necessary for the baby's well-being, or why the aunt rather than the uncle should be the one to quit.<sup>70</sup> One can safely assume, therefore, that the court was applying the stereotypical notions that no mothers (or other woman caring for children) should work outside the home, while all fathers should engage in paid employment.<sup>71</sup>

Often the gender stereotypes employed by the courts seem to come directly out of the work of Carol Gilligan.<sup>72</sup> Gilligan's argument, stated broadly, is that women share a morality of care and connection, with relationships taking priority over individuality or autonomy. Men, on the other hand, are more rights-oriented, and seek to validate themselves as separated from others, self-directed

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64. See *id.* at 73-89 (employing the term "foster mother" fifteen times and the term "foster parent" three times in the opinion).

65. See *Skeens v. Paterno*, No. 94 slip op. at 3-4 (Md. Ct. Spec. App. May 23, 1983) (using the term "unwed mother" in two out of four of the questions the appellants presented for review); *Skeens v. Paterno*, 480 A.2d 820, 822 (Md. Ct. Spec. App. 1984) (using the term "unmarried minor" to refer to Debra).

66. See *Skeens v. Paterno*, No. 94 slip op. at 3, 6 (Md. Ct. Spec. App. May 23, 1983) (referring to Jeffrey as an "unwed father" three times); *id.* at 5, 13 (referring to Edward Skeens as "Debra's father" and "her father").

67. *Skeens v. Paterno*, 480 A.2d 820, 822 (Md. Ct. Spec. App. 1984) (noting that Edward John Skeens represented the appellants, Debra Skeens, Edward Skeens, and Dorothy Skeens).

68. See THE AMERICAN HERITAGE DICTIONARY 668 (2d ed. 1983) (defining a stereotype as a conventional and usually oversimplified belief or conception).

69. *Skeens*, No. 94 slip op. at 3.

70. *Id.* The persuasive authority of gender stereotypes overwhelms even precedent, on occasion. A full decade before this decision, the Maryland courts found that custody decisions based on sex were violative of gender equity. See *McAndrew v. McAndrew*, 382 A.2d 1081, 1086 (Md. Ct. Spec. App. 1978) (holding that Maryland may not apply a maternal preference in custody cases pursuant to a newly enacted Maryland statute).

71. Czapanskiy, *supra* note 9.

72. See GILLIGAN, *supra* note 8 (arguing that women speak in a "different voice" from men, reflecting their different conceptions of self and morality and different experiences of conflict and choice).

and standing alone.<sup>73</sup> In this sense, according to Gilligan's theory, a good mother is one who values and maintains connection, while a good father is one who asserts his rights. The court's use of these gender stereotypes should come as no surprise to those who accept Joan Williams's critical insight that Gilligan's work accurately describes the *ideology* of gender relations in the late twentieth century.<sup>74</sup>

What is unusual about the *Skeens* and *In re D.S.* cases is that the courts apply these gender ideologies to the grandparents. The grandparents come in pairs, with one member of each pair being biologically male and one biologically female.<sup>75</sup> Consequently, the courts find it hard to insist that each mixed-gender pair of grandparents behave more like a stereotypical man or a stereotypical woman. Rather than giving up on gender, however, both courts seem to ask the grandparents to act as a unit in accord with the stereotypes of both men and women. As I discuss more fully later, the grandparents must value care and connection above all else, but they must express the values with a rights-oriented toughness and vigor.<sup>76</sup>

## 2. *The Race of the Players*

How the gender ideologies play out, as we will see, is influenced by race. Two pairs of grandparents are European-American; one pair is African-American.<sup>77</sup> The European-Americans are allowed to place a lower value on informal kinship relationships than the African-American grandparents, who are expected to seek and foster informal kinship relationships.<sup>78</sup> Also, the European-Americans

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73. GILLIGAN, *supra* note 8, at 19-21, 64-66, 82-83. Gilligan's conception of women's morality is concerned with care and nurturing, consequently, women's moral development is characterized by a concern for maintaining relationships. GILLIGAN, *supra* note 8, at 19-21, 64-66, 82-83. Conversely, according to Gilligan, men do not focus on relationships, are defined by individual achievement, and are characterized as separate and autonomous. GILLIGAN, *supra* note 8, at 19-21, 64-66, 82-83.

74. Williams, *supra* note 9, at 799-802. Williams criticizes Gilligan's gender ideas for being a mere reflection of the present, oppressive gender system, not a description of actual gender difference. Williams, *supra* note 9, at 802. Similarly, I make no claim, and in fact do not believe, that Gilligan is accurately describing concrete differences between men and women. *See also*, Williams, *supra* note 9, at 803 n.17 (discussing literature that responds to Carol Gilligan's arguments).

75. *In re D.S.*, 600 A.2d 71, 75 (D.C. 1991); *Skeens v. Paterno*, 480 A.2d 820, 822 (Md. Ct. Spec. App. 1984).

76. *See supra* text accompanying notes 72-73 (characterizing the female gender stereotype as focusing on nurturing and relationships, and characterizing the male stereotype as valuing and preserving individual rights).

77. I determined the race of the parties through conversations with colleagues and court personnel.

78. *See In re D.S.*, 600 A.2d at 75 (reciting at length the behavior of the E.s, including their refusal to take D.S. into their home after returning home from the hospital). This recitation suggests an implicit expectation, by the court, that the E.s will immediately develop a

are expected to have options about how to treat an illegitimate child; the African-Americans are expected to fully accept the illegitimate child.<sup>79</sup>

### 3. *The Class of the Players*

Class bias is also a factor that crosses and confuses race and gender when it comes to expectations about who will hold paid employment, who will dedicate himself or herself to the unpaid care of a child, who will litigate, and which issues will be litigated.<sup>80</sup>

#### *B. How the Factors Influence the Courts: Some Telling Examples*

##### 1. *The Influence of Gender on the Judicial Evaluation of the Grandparents: Being a Good Mother and Good Father*

Looking at these cases through the lens of gender stereotypes helps to explain the somewhat contradictory conclusions arrived at by the two courts. The double-gender grandparents, those exhibiting both the male and female stereotypes, mostly win. The single-gender grandparents, those exhibiting only one of the male or female stereotypes, mostly lose.<sup>81</sup>

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relationship with D.S. This expectation is rooted in the image of an African-American woman as an asexual, maternal, black mammy. As a slave, she was the passive nurturer who gave without any expectation of reward and who reared the children of others as if they were her own. Dorothy Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 12-16 (1993).

See also CAROL STACK, ALL OUR KIN—STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (Harper Colophon ed., Harper & Row 1975)(1974) (describing the prevalence of informal kinship relationships among black families in a poor section of Chicago); Sr. Mary Jean Flaherty, *Seven Caring Functions of Black Grandmothers in Adolescent Mothering*, 17 MATERNAL-CHILD NURSING J. 191, 192 (1988) (noting that lower-class African-American families differ from middle-class families in that, among other things, grandmothers in African-American families care for the youngest generation). Kinship care is increasing. See e.g., TASK FORCE ON PERMANENCY PLANNING FOR FOSTER CHILDREN, INC., KINSHIP FOSTER CARE: THE DOUBLE EDGED DILEMMA (1990) (revealing that in New York City in 1990, 45.6 percent of children were placed with relatives in foster care); James F. Kennedy & Virginia T. Keeney, *The Extended Family Revisited: Grandparents Rearing Grandchildren*, 19 CHILD PSYCHIATRY AND HUM. DEV. 26, 26-27 (1988) (citing from Census Bureau data that in 1981, 3.7 percent of minor children were living apart from their parents; in 1990, the figure was suspected to rise to 4.1 percent).

79. The different choices permitted European-American families versus African-American families reflect, to some extent, slave-era patriarchal society choices. White slave owners had choices such that children, fathered by them and borne by their slaves, would be raised as slaves. Slaves had no choice but to care for these children, and any other children placed in their care. See Roberts, *supra* note 78 (describing familial relationships of slaves and slave-owners).

80. For example, it is assumed that Michael's aunt, rather than his uncle, will quit her job to care for Michael. Skeens v. Paterno, No. 94, slip op. at 3 (Md. Ct. Spec. App. May 23, 1983). This assumption reflects expectations about the gender roles of middle-class families. See CHODOROW, *supra* note 8, at 64 (describing child care, and non-economic contribution, as the middle-class housewife's important contribution).

81. The double-gender grandparents, the Paternos, mostly win by successfully blocking Michael's adoption and securing liberal visitation rights, but fail to gain custody in their first attempt. The Skeens mostly lose because although Debra gains custody of Michael, she and

The only double-gender grandparents to appear in these cases were the Paternos, whose very name resonates with "Pater Familias."<sup>82</sup> The Paternos were successful in achieving their goals: preventing the adoption of their grandchild, and gaining the right to substantial contact with him. They also avoided being criticized or having their involvement revealed by the appellate panels, although the evidence suggests that they, and not their son, controlled the litigation and stood to benefit from a favorable outcome.<sup>83</sup>

The prime example of the favored treatment accorded the Paternos is that they were awarded substantial visitation with Michael, although they were not parties to the litigation.<sup>84</sup> The appellate court holds that grandparents may petition for and be awarded visitation rights in Maryland, and upholds the grant of visitation to the Paternos. In fact, however, the Paternos never appear to have petitioned for anything; only their son is a party to the lawsuit.<sup>85</sup> Since they were not parties to any court order, it is even unclear whether the Paternos would have been subject to a contempt order if they, for example, failed to return Michael to his custodial parent at the conclusion of a scheduled visit.<sup>86</sup> In other words, they appear to have left the lawsuit with rights but no responsibilities, either financial or custodial.<sup>87</sup>

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her parents must abandon their plan to have Michael adopted, and must submit to liberal visitation by the Paternos. *Skeens v. Paterno*, 480 A.2d 820 (Md. Ct. Spec. App. 1984). The E.s mostly lose because although T.S. has consented to their adoption of D.S., this court's reversal of the lower court's decision to not terminate T.S.'s parental rights will make it more difficult for the E.s to adopt D.S. in the future. *In re D.S.*, 600 A.2d 71 (D.C. 1991).

82. "Pater Familias" is defined as "father as head and representative of the household." CHARLES T. LEWIS & CHARLES SHORT, *HARPER'S LATIN DICTIONARY* 1313 (E.A. Andrews, ed., 1907).

83. *Skeens*, 480 A.2d at 822, 827. That the Paternos controlled the litigation is demonstrated by the fact that they were paying Jeffrey's legal fees. A private Baltimore firm, whose fees exceeded Jeffrey's Navy pay, represented Jeffrey. See *infra* note 133 (establishing Jeffrey's pay in the Navy). In fact, the court highlighted Jeffrey's financial status by noting that there was no abuse of discretion by the chancellor in not compelling the "impecunious" Jeffrey to pay a portion of the expenses associated with Debra's pregnancy and recovery. *Skeens*, 480 A.2d at 829.

84. *Skeens*, 480 A.2d at 820 (naming only Jeffrey Paterno as plaintiff).

85. *Skeens v. Paterno*, 480 A.2d 820 (Md. Ct. Spec. App. 1984). Even though the Paternos are not a party to the lawsuit, the Maryland Court of Special Appeals characterizes the lawsuit as a "dispute about visitation rights of the father and paternal grandparents of an illegitimate child." *Id.* at 822.

86. *Id.* at 823 (reciting the Paternos visitation rights under Judge Ahalt's order which, because they are not named parties in the suit, does not legally bind them).

87. See generally Czapsanskiy, *supra* note 9 (analyzing parenting roles in terms of volunteers and draftees). Volunteers are usually fathers who have a choice about whether to initiate a relationship with their children. Thus, the volunteer's care of a child is viewed as virtuous, but not a required choice. Draftees, on the other hand, are usually mothers who have no choice; for them the job of parenting is inevitable. The Paternos are analogous to the volunteer parent: they have a choice about the extent of their parenting, but no responsibility arises from their role.

I think the Paternos convinced the court that they were entitled to favorable treatment by being a good mother and a good father who exhibit the qualities of double-gendered grandparents. The Paternos wanted a connection with their grandchild and were willing to care for him. Therefore, they served as the good mother fostering relationships and the ethic of care.<sup>88</sup> The Skeens, by way of contrast, were willing to see their grandchild adopted and lose contact with him altogether. They were the bad mother who was willing to sever the relationship.

In addition, the Paternos acted as the good father by having money and being willing to invest it in an aggressive fight to assert their son's rights to the grandchild.<sup>89</sup> After retaining a major law firm,<sup>90</sup> the Paternos helped their son file suit only a few days after the child's birth. They fought hard every step of the way.<sup>91</sup> In contrast, the Skeens relied on Mr. Skeens to act as their lawyer and, when push came to shove, gave up their adoption plans in favor of custody for Debra, rather than fight to the bitter end.<sup>92</sup> Clearly, the Skeens were not the better father of the two.

Like the Skeens, the E.s failed to exhibit good double-gender behaviors. And, like the Skeens, they lost rights as a result of the appellate decision. T.S. had consented to the E.s' adoption of D.S.<sup>93</sup> But, if the parental rights of T.S. were terminated, her consent would become meaningless. The appellate decision was unfavorable for the E.s because it reversed the decision not to terminate T.S.'s rights on the ground that preserving the relationship between the E.s and D.S. was irrelevant to the termination petition.<sup>94</sup> Since the trial court had denied termination solely for that reason, the remand was likely to result in termination.

Beyond losing, the E.s suffered substantial criticism by the appellate court for their failure to conform to dual-gender norms. Three

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88. See GILLIGAN, *supra* note 8, at 62-63, 79, 100 (relating that the ideal of care is seeing and responding to need, thereby sustaining the web of connection).

89. See GILLIGAN, *supra* note 8, at 100 (expressing that men's moral imperative acts to protect the right to self-fulfillment).

90. Skeens v. Paterno, 480 A.2d 820, 822 (Md. Ct. Spec App. 1984) (listing counsel for appellee as Melnicove, Kaufman, Weiner, and Smouse, P.A.).

91. See *id.* (characterizing the proceedings as "a battle about adoption" and "a dispute about visitation rights").

92. See *id.* (noting that although the suit began as a battle about the Skeens putting Debra's child up for adoption, after a plethora of subsequent judicial activity, the adoption issue disappeared and the case evolved into a dispute about the liberal visitation rights awarded to the father and the paternal grandparents).

93. *In re D.S.*, 600 A.2d 71, 75 (D.C. 1991) (reciting that on April 6, 1989, T.S. signed a form consenting to the E.s' adoption of D.S., at which time the termination motion and the adoption petitions were pending).

94. *Id.*

examples demonstrate the court's perspective. First, although it was largely irrelevant to the outcome, the court quoted extensive testimony concerning the decision of the E.s not to take in their grandchild at birth.<sup>95</sup> Second, the court noted that the E.s did not believe or act on T.S.'s charges when she was younger that her biological father sexually abused her.<sup>96</sup> Third, the court noted the E.s' failure to be a good father when they did not vigorously assert their legal rights to visit D.S.<sup>97</sup>

Absent the good mother/good father ideals applied to these three sets of decisions, the court could have construed the E.s' decisions and behavior in a more positive light. According to the E.s, they refused to take their grandchild from the hospital because they wanted to foster a relationship between the baby and her mother, and therefore, would not take the baby alone.<sup>98</sup> Also, the E.s were concerned that taking care of D.S. and T.S. would impair their ability to meet the needs of the other members of their household.<sup>99</sup> While their hope that a relationship might develop between T.S. and D.S. was unfulfilled, their attempt to foster a parent-child relationship in the first place is negative only if they are expected to be the good mother that their child was not, while simultaneously being the good father. The good mother, in this setting, would have performed the care the infant needed, rather than tried to assist someone else in providing the care. The good father would not have given primacy to the needs of other household members, because the good father would be more likely to view each household member as a separate individual rather than as an interactive member of the group. In order for the E.s to be good mother/good father in this difficult situation, it appears that they should have taken D.S. home while refusing T.S. access to their home. In that way, the E.s would have connected with the grandchild and asserted their rights against the mother.<sup>100</sup>

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95. *Id.* at 78 (recounting that Mrs. E. refused to take D.S. because she had never gotten along with T.S. and had two other children as well as her husband to look after). *See also* GILLIGAN, *supra* note 8, at 76 (describing a mother in the societal and physical sense as one who cares for and protects the child).

96. *Id.* at 78-79.

97. *Id.* at 79 (testifying that although they—the E.s—had a court appointed attorney, they did not utilize the attorney's services to expand their visitation rights). *See also* GILLIGAN, *supra* note 8, at 19 (quoting a male subject who describes his morality as focusing on the rights of individuals).

98. *In re D.S.*, 600 A.2d 71, 79 (D.C. 1991) (reciting testimony of Mrs. E. concerning events after the birth of D.S.).

99. *Id.* at 78.

100. *See* GILLIGAN, *supra* note 8, at 19, 100 (relating an interview in which a man discusses the importance of individual rights); *see also supra* text accompanying notes 89 and 97 (describing a good father as being assertive of rights).

The second example of the E.s' failure to meet dual-gender norms is their failure to believe T.S.'s allegations about being abused by her biological father.<sup>101</sup> The question is whether the behavior for which the E.s are criticized is bad maternal behavior, bad paternal behavior, or bad dual-gender behavior. In other words, should a good mother have sought to protect her daughter even if the allegation was ambiguous, or should she have given the alleged abusing father the benefit of any doubt about credibility? Should a good (step)-father have acted the same as a good mother, or differently?

Interestingly, the same court that decided *In re D.S.* also decided the now infamous case of *Morgan v. Foretich*.<sup>102</sup> In *Morgan*, the court upheld an order for unsupervised visitation by a father who, the mother believed, had sexually abused the young daughter, and where the evidence was in equipoise.<sup>103</sup> A good mother, the court seems to suggest, would have given the father the benefit of the doubt. A good mother who believes the child instead will risk destroying the father-child relationship and will fail to fulfill her role as the nurturer of that relationship.

Why, then, are the E.s criticized for *not* acting on their daughter's charges? According to the *Morgan* court, a good mother should have done exactly what the E.s did. Good grandparents, however, are expected to act both as a good mother *and* as a good father. The step-father here, Mr. E., should have joined with the mother and asserted their rights; in this case, their right to protect the child. As a man, the step-father is under no duty to foster a parent-child relationship between his step-daughter and her biological father. He is permitted to claim that the child is better off alone, separated from the relationship. Where the E.s had failed, then, is in not acting as a good father should. The court views this fact as indicating bad paternal behavior.

Finally, there is the issue of why the E.s were not assertive in a legal forum when their visitation with D.S. was changed from relatively free access to D.S. in V.V.'s home to a more restrictive ar-

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101. *In re D.S.*, 600 A.2d 71, 78 (D.C. 1991).

102. 546 A.2d 407 (D.C. 1988); *In re D.S.*, 600 A.2d at 73. Judge Steadman wrote the opinion in *Morgan v. Foretich* and sat on the panel that decided *In re D.S.*

103. See *Morgan*, 546 A.2d at 410 (upholding the trial court's decision to permit a two week unsupervised visit by the alleged victim's allegedly abusive father). Morgan took extreme steps to protect and care for her daughter by unequivocally refusing to comply with the visitation order. The court found Morgan in contempt and ordered her incarcerated. *Id.* at 409.



rangement in a social worker's office.<sup>104</sup> As the court observed, the E.s had a court-appointed attorney<sup>105</sup> and were aware that the attorney could have raised the visitation issue for them in court.<sup>106</sup> Since they did not ask their attorney to do so, the implication is that they were deficient in two ways: a caring mother would not have acceded to being separated from her child, while an assertive father would not have let his visitation rights be abridged.<sup>107</sup> If the court could have put aside its double-gender stereotype, however, other reasons could be seen for the E.s not contesting the limitations on their visitation with D.S. For example, there is the fact that their attorney was court-appointed.<sup>108</sup> Unlike the Paternos, the E.s did not have money for a private lawyer.<sup>109</sup> While people who have never had to rely on a court-appointed attorney might reject this notion, it is en-

104. In June 1987, the E.s were given liberal visitation of D.S. at V.V.'s house, including overnight and weekend stays with the E.s. *In re D.S.*, 600 A.2d at 75 n.5. By May 1989, the E.s were no longer allowed to visit D.S. at V.V.'s home and could only visit D.S. at the social worker's office. *Id.* Both of the E.s testified that the social worker had made visitation difficult after this occurred. *Id.* at 79. Despite the fact that the E.s' attorney was not helpful, they did not ask for new counsel. *Id.* Moreover, nowhere does the court mention that the E.s sought to use the legal process to obtain more visitation time with D.S. *Id.*

105. *In re D.S.*, 600 A.2d at 79.

106. An attorney is required to advise his/her clients of these types of matters. See WASHINGTON, D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1990) (requiring counsel to give his/her client sufficient explanation of a legal matter so that the client will be able to make "informed decisions" regarding the matter); *id.* cmt. 2 (stating that a client is entitled to all of the information about the "subject matter of the representation").

107. Because women are largely responsible for child care, girls tend to experience their mothers as being "more like, and continuous with, themselves." GILLIGAN, *supra* note 8, at 7 (quoting University of California at Berkeley sociology professor Nancy Chodorow). This means that girls fuse the experience of forming an attachment with a person (first with their mother, later with others) and the "process of identity formation." Gilligan, *supra* note 8, at 7-8. Thus, a woman who chooses not to see her child could be perceived as unnatural or deficient.

Boys, on the other hand, experience "more emphatic individuation and a more defensive firming of experienced ego boundaries" in forming an identity. GILLIGAN, *supra* note 8, at 8. By failing to assert his right to see his child, a man could be perceived as weak and unassertive.

108. See *In re D.S.*, 600 A.2d 71, 75 n.5, 79 (D.C. 1991) (noting that the E.s were appointed counsel by the court in July 1986).

Consider this statement from a legal aid lawyer about a consultation with a client:

I hadn't spent enough time with Mrs. G the previous Friday. For me, it had been one more emergency - a quick fix, an appointment, out the door. It suddenly seemed pointless to process so many clients, in such haste, without any time to listen, to challenge, to think together. But what to do, with so many people at the door?

Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 23 (1990). See Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 540-50, 579-86 (1985) (stating that Legal Aid offices in the United States are chronically under-funded and under-staffed, causing many attorneys to give only cursory attention to the majority of their cases); *Firsthand Accounts of Capital Justice*, NAT'L L.J., June 11, 1990, at 40 (quoting from a survey of sixty court-appointed attorneys to capital murder trials, which found that many felt that they were inadequately prepared for all or part of the trial and that they had inadequate resources to prepare an adequate defense).

109. See *supra* note 90.

tirely possible that counsel for the E.s would have been far less receptive to their request to fight for visitation than privately-retained counsel for the Paternos might have been. Also, the E.s might have been reluctant to ask their court-appointed attorney to be assertive for them, because the entire relationship might have made them feel embarrassed about accepting charity.<sup>110</sup> Thus, the impact of class, expressed in the absence of money for a lawyer, may have been interpreted by the court in negative ways against the E.s.

In light of a double-gender stereotype, the court may have been expecting the E.s to be assertive about visitation rights because that is what good, rights-oriented fathers would do.<sup>111</sup> The E.s' decision not to assert visitation rights was wrong, therefore, because it was not rights-oriented. It could be seen positively, however, if one were to believe that working things out privately is preferable to adversarial litigation. A non-litigious orientation is sometimes identified with the feminine, however.<sup>112</sup> To a court which was looking for the mother and the father in a grandparent,<sup>113</sup> a non-litigious orientation may have seemed too unbalanced toward the mother side of the equation.

## 2. *The Influence of Gender on the Judicial Evaluation of the Grandparent-Parent Relationship*

### A. *Atomism versus Connection*

In finding that T.S. must be evaluated as a parent separately from her parents, the D.C. court values atomism or individuality over relationships or connection. In permitting Jeffrey and his parents to act together in their relationship with Michael, the Maryland court values relationships over individuality. The question is whether the

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110. See generally White, *supra* note 108 (telling the story of an indigent client, Mrs. G., from a legal aid lawyer's perspective, and indicating that a client's pride can affect representation).

111. See GILLIGAN, *supra* note 8 (describing the relationship-oriented natures of women versus the rights-oriented natures of men). Carol Gilligan illustrates the male rights oriented mentality in her Jake and Amy study. In this study, she demonstrates her theory that men, even by age eleven, emphasize logic and individual rights over morality and the common good when resolving dilemmas involving a conflict between rights and morality. GILLIGAN, *supra* note 8, at 24-39, 49-51.

112. Carrie Menkel-Meadow observes that some women have "difficulty with the 'macho' ethic of the courtroom battle," and even when they are able to adopt the male model, women are often "confronted [with] a dilemma because women [are] less likely to be perceived as behaving properly when engaged in strong adversarial conduct." Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 53-54 (1985). Menkel-Meadow also observes that "left to their own devices," women might develop "alternatives to the adversary model," in the form of alternative dispute resolution models such as mediation. *Id.* at 52-53.

113. See *supra* text accompanying note 76 (asserting that the grandparents are treated according to double-gender stereotypes).

apparently opposing value perspectives are coincidental or whether they have something to do with the gender of the parent involved. My hunch is that the gender of the parent has at least some influence. As Professor Carol Gilligan has demonstrated, social norms about women require women to nurture connection and relationships.<sup>114</sup> Men, on the other hand, are expected to be independent and self-regarding.<sup>115</sup> Stereotypical gender thinking would suggest that a woman should have no problem doing her nurturing work. In that arena, she should be able to stand on her own two feet, separate from any dependencies which she might have. If she should have to rely on grandparents to help her have a relationship with her child, therefore, there must be something wrong with her.

Stereotypical gender thinking also would suggest that a man would have enormous difficulty taking care of a child, particularly an infant.<sup>116</sup> For him to rely on his parents—particularly his mother—

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114. GILLIGAN, *supra* note 8. See Menkel-Meadow, *supra* note 112, at 43 (stating that Gilligan has determined that "women experience themselves through connections and relationships to others"); see also Naomi R. Cahn, *Theoretic of Practice: The Integration of Progressive Thought and Action: Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1047 (1992) (summarizing Gilligan's assertion that "women use an ethic of care in their moral reasoning"). Professor Gilligan is not describing accurately the realities experienced by men and women, but she is accurately describing how we expect men and women to behave and experience reality. Williams, *supra* note 9. See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1565 (1991) (asserting that Gilligan's "'conventional feminine voice' reflects how conventional gender training instructs women to behave."). I am discussing here the social norms attached to social constructions of gender, not the lived realities of men and women.

115. GILLIGAN, *supra* note 8. See Menkel-Meadow, *supra* note 112, at 43 (stating that Gilligan has observed that "men see themselves as separately identified individuals"); see also Cahn, *supra* note 114, at 1047-48 (summarizing Gilligan's assertion that "men are more oriented to an ethic of rights . . . [and] are oriented towards individual autonomy and impartial rules.>").

116. The tender years presumption, which proposes that women are better suited than men to raise children under the age of seven, governed custody decisions for about fifty years, ending approximately twenty years ago. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 738 (1988) (describing the doctrine as one which gives the mother "ownership" rights to the children absent a showing of her unfitness). This presumption may have had the effect of discouraging fathers from seeking custody of younger children, which further perpetuated the stereotype that men are less capable of caring for infants. See GEOFFREY L. GREIF, *SINGLE FATHERS* 85 (1985) (stating that not only are fathers capable of caring for young children, but they actually feel more comfortable with them than with older children).

By the early 1970s, fathers' rights groups were successfully challenging the tender years presumption as one which promoted a pro-mother bias in custody decisions. Fineman, *supra*, at 738-39 (describing the effects of "male backlash" on the tender years presumption). Further, "mainstream feminists" challenged the presumption on the grounds that it perpetuated the stereotype that women should raise children. Fineman, *supra*, at 738-39 (describing the effects of "feminist equality rhetoric" on the presumption). See *Ex parte Devine*, 398 So. 2d 686, 695 (Ala. 1981) (holding that the presumption is an unconstitutional gender-based classification).

By the early 1990s the presumption had fallen out of favor with the courts. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1570 (1991) (stating that the "laws governing custody are now, in theory, gender neutral."); Gary Crippen, *Stum-*

would be neither a surprise nor a problem.<sup>117</sup> Thus, even though a stereotypical man should be fully independent in every other aspect of his life, there is no adequate reason to believe that he would be able to care for a child alone.

### B. Individualism and Relationship

It is also interesting that in the case of T.S. and the E.s, there is extensive evidence about their flawed relationship, while the appellate record is silent about the nature of the relationship between Jeffrey and the Paternos.<sup>118</sup> Recall that the D.C. Court of Appeals decided to remand the case to consolidate the termination proceeding with the competing adoption proceedings.<sup>119</sup> The exact relationship between T.S. and the E.s was, therefore, something that would be fully investigated on remand<sup>120</sup> and that was largely irrelevant to the appellate decision, except in broad outlines. Nonetheless, the D.C. Court of Appeals discussed at length the fact that T.S. had been adjudicated to be a neglected child<sup>121</sup> suffering from substantial emotional problems.<sup>122</sup> According to the evidence recited by the appellate court, a major source of T.S.'s emotional problems and of her eventual alienation from the E.s was the sexual abuse she

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*bling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 434-40 (1990) (describing various custody standards, including the primary caretaker standard, with which many states have replaced the tender years presumption).

117. Indeed, many custody decisions favoring fathers turn on the existence of a grandmother with whom the father and child will live. *See, e.g.*, Polikoff, *supra* note 9, at 239 (citing *Galayas v. Galayas*, 75 Mich. App. 128, 254 N.W.2d 818 (1977), a case in which custody was awarded to the father because, among other factors, his mother was going to care for the child). The fact that the child's mother had remarried in *Galayas* had no effect on this case. The court was more concerned with the fact that the mother worked and could not be home during the day to care for the children. Polikoff, *supra* note 9, at 239. *See also* Susan B. Boyd, *Child Custody and Working Mothers in THE IMPACT OF JUDICIAL BIAS ON FAMILY LAW* 168, 179 (stating that "custody decisions may favour the parent who can offer a family set-up [resembling] the traditional nuclear family, including 'female care,'" and in many of these cases a grandmother "was willing to perform the stay-at-home motherly functions" for a father who gained custody).

118. *In re D.S.*, 600 A.2d 71, 77-79 (D.C. 1991) (summarizing the testimony of several trial witnesses concerning the relationship between T.S. and the E.s); *Skeens v. Paterno*, 480 A.2d 820 (Md. Ct. Spec. App. 1984).

119. *In re D.S.*, 600 A.2d at 73-74, 89.

120. In order for the lower court to make a proper determination as to the competing adoption proceedings and the termination proceeding, the relationship between T.S. and the E.s would need further exploration. Otherwise, the court would be unable to rule on the E.s' adoption motion. *See In re D.S.*, 600 A.2d at 74, 89 (stating that consolidation of the adoption petitions was in the best interests of the child).

121. *See In re D.S.*, 600 A.2d at 74 (noting that T.S. herself had been adjudicated a neglected child in 1985, approximately one year before D.S.'s birth).

122. *Id.* at 76-77 (summarizing the trial court testimony of doctors and social workers concerning T.S.'s emotional problems).

suffered at age nine at the hands of her biological father.<sup>123</sup> The court reviewed in detail the considerable testimony that was taken on the question of why the E.s had failed to believe her and report the abuse<sup>124</sup> and how this continued to be an issue in their relationship for many years.<sup>125</sup>

The Maryland case, in contrast to the D.C. case, turned on whether the grandparents should be allowed to exercise visitation rights with their grandson while their son was absent due to naval duty.<sup>126</sup> Their visitation rights were upheld on the rationale that grandparental visitation would allow Jeffrey to have a relationship with his son as well as allow the grandchild to maintain contact with his paternal family.<sup>127</sup> Obviously, no such benefit would accrue if the parent and grandparents were alienated from one another. The record in the Maryland case, nonetheless, is silent on the nature of the relationship between the Paternos and their son Jeffrey. For all we can tell from the appellate decision, their relationship could have been described as negatively as that of the E.s and T.S.

One must ask, therefore, why the D.C. Court of Appeals focused its attention on the grandparent-parent relationship in a case where the issue is largely irrelevant, while the Maryland Court of Special Appeals ignored the apparent absence of evidence on the same question, although it was central to the issues. I think it relates to the care and connection stereotype of women versus the individualism stereotype of men.<sup>128</sup> The D.C. Court of Appeals may have understood that its decision to permit the termination of parental rights of a mother could be seen as inconsistent with the usual stereotypes about the motherliness of women. In response, the judges may have felt compelled to provide additional justification in the form of evidence that this particular woman could not get along with anyone, even her own parents. However, for the Maryland Court of Special Appeals to raise the possibility that Jeffrey could

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123. *In re D.S.*, 600 A.2d 71, 77 n.11 (D.C. 1991) (summarizing the trial court testimony outlining the progression and effects of childhood sexual abuse).

124. For example, when asked at trial about T.S.'s report of sexual abuse, Mr. E. described it as "like the boy who cried wolf" and claimed that T.S. played "head games" with the E.s about the issue. *Id.* at 79 n.12.

125. *Id.* at 77 (summarizing a psychologist's evaluation of T.S. as suffering from low self-esteem and emotional problems, stemming in part from her childhood sexual abuse and Mrs. E.'s subsequent refusal to believe T.S. about the alleged abuse).

126. *Skeens v. Paterno*, 480 A.2d 820, 822 (Md. Ct. Spec. App. 1984) (stating that the case "is now essentially a dispute about visitation rights of the father and paternal grandparents of an illegitimate child.").

127. *Id.* at 826-27 (noting that Jeffrey's absence due to naval duty constituted an exceptional circumstance under which grandparental visitation rights would be granted).

128. See *supra* text accompanying notes 72, 73 for a discussion of Carol Gilligan's argument regarding female connectedness and male individualism.

have had problems with his parents would have jeopardized awarding substantial visitation to him since Jeffrey, being a man, is not the stereotypically correct choice for parenthood.<sup>129</sup> Unless his parents are involved in the care of the baby, therefore, the decision of the Maryland court to uphold Jeffrey's substantial visitation could be just as questionable as the D.C. court's decision to terminate the parental rights of T.S. In other words, without the grandparents, Jeffrey is unable to provide a stereotypically satisfactory mother for his son.

### C. *Independence and Dependency*

Gender ideologies seem to control the court's view of whether Jeffrey is independent of his parents or dependent on them. When Jeffrey is in need of a female parent for Michael, he is viewed as being close to his parents, although no evidence is cited to support such a view, as discussed in the previous section. When Jeffrey has to be independent of his parents in order to satisfy his gendered role, the court overlooks evidence of his financial dependency on them. This is evident when one examines the question of who actually controlled the litigation. The court claimed that Jeffrey brought and controlled the lawsuit.<sup>130</sup> That this was a fiction is obvious in the opinions themselves. In fact, the Paterno grandparents must have controlled the litigation. The evidence is in the counsel: Jeffrey was represented by one of the most aggressive and expensive law firms available in Maryland at the time.<sup>131</sup> Nonetheless, the appellate court defended its decision not to require Jeffrey to pay for Debra's hospitalization because it was "concerned with Jeffrey's ability to pay."<sup>132</sup> His entire income was from the Navy, not an employer known for paying salaries high enough to pay the most ex-

129. This is particularly true of single men who seek custody or visitation rights. Some courts are more willing to give custody or liberal visitation rights to a father who remarries after a divorce or who lives with his parents. See e.g., *Galayas v. Galayas*, 254 N.W.2d 818 (Mich. Ct. App. 1977) (granting custody to the father whose mother cared for the child even though the mother had remarried); *Simmons v. Simmons*, 576 P.2d 589 (Kan. 1978) (emphasizing that the father's remarriage was the main factor in granting him custody); see also Polikoff, *supra* note 9 (discussing cases where the father was granted custody where female care was provided to the child); Boyd *supra* note 117 (noting Canadian cases where evidence that the father's mother or other female relative would be caring for the children influenced the judge's decision in awarding custody to the father.)

130. *Skeens v. Paterno*, No. 94, slip op. at 2 (Md. Ct. Spec. App. May 23, 1983) (naming "Jeff" as the person bringing the injunction), *Skeens v. Paterno* 480 A.2d 820, 823 (Md. Ct. Spec. App. 1984) (referring to the Paterno side as "Jeffrey" and the Skeens side as "Skeens" and occasionally "Debra").

131. See *supra* note 90 and accompanying text.

132. *Skeens*, 480 A.2d at 828-29 (describing Jeffrey as "impecunious" and deferring to Judge Ahalt's "concern[] with Jeffrey's ability to pay" in upholding the decision not to require Jeffrey to pay Debra's hospital expenses).

pensive legal fees in town.<sup>133</sup> The fiction of Jeffrey controlling the suit is necessary in both an obvious and obscure way because of Jeffrey's gender. The fiction is necessary in an obvious way because, in stereotypical terms, it is embarrassing for a man to be dependent on his parents for money. However, it is not embarrassing, and often expected, for a woman to be financially dependent on her parents or mate.<sup>134</sup> Without a second thought, therefore, the Maryland court charged Debra's parents with her hospital costs, because she was believed to be their dependent minor child although there was little evidence that she was.<sup>135</sup> At the same time, Jeffrey's actual financial dependency on his parents was, for reasons of fundamental courtesy, ignored.

The obscure part of the issue arises when one considers who was probably more interested in the child: Jeffrey or his parents. So long as the court pretended that the father was the real party, it did not need to confront the fact that it was giving priority to the desires of the paternal grandparents over the desires of the mother. The court could instead conceptualize the conflict as one between two people in equal positions with respect to the baby: the mother and the father.<sup>136</sup> Therefore, the issue was framed as one of sex equity, not one of power relations. If, however, Jeffrey had not sought custody of Michael and was only present to provide the biological link between the Paternos and Michael, then the court would have had to directly consider whether the interests of the grandparents were of greater weight than the interests of the mother.<sup>137</sup> Because men are generally considered autonomous beings, separate from their families,<sup>138</sup> Jeffrey's control over the litigation was an easy fiction to

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133. A seaman recruit would have received a base pay of \$448.80 per month in 1982. Telephone Interview with Paula Murphy, Reference Librarian, Navy Department Library, Washington, D.C. (Jan. 13, 1993).

134. *Cf.* Williams, *supra* note 9, at 822-23 (discussing the gendered structure of the Western wage labor system and how men "are raised to believe they have the right and the responsibility to perform as ideal workers," whereas women "generally feel that they are entitled to the pleasure of spending time with their children while [their children] are small.").

135. *Skeens v. Paterno*, 480 A.2d 820, 829 (Md. Ct. Spec. App. 1984) (noting that the Skeens, "as parents of a minor, Debra, had an obligation to provide for her support" and that "Edward provided for that obligation in part through his health insurance.").

136. *See id.* at 826 (indicating that the court's main concern was whether Jeffrey would be able to maintain a relationship with Michael, not whether the grandparents should be given custody or visitation).

137. *See id.* (holding that the grandparents could be granted custody of and visitation rights to their grandchildren "only under exceptional circumstances" in a context other than termination of marriage).

138. *See* Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979) (articulating the insight that Western wage labor is premised on an ideal worker with no child care responsibilities); Williams, *supra* note 9, at 823 ("[E]ven upon their return to work, the near-universal tendency is to assume that women's

accept. As a result, the confrontation of grandparents versus mother never had to occur.

### 3. *The Influence of Race on the Judicial Evaluation of the Grandparents*

Another useful contrast is between the judicial treatment of the Skeens and that of the E.s. Neither set of grandparents prevailed in their respective actions,<sup>139</sup> so in that way they are similar. The Skeens, although parties to the action and represented by counsel, are not critically discussed or negatively described. Rather, they are treated in a neutral fashion by the court, and are only discussed in connection with the statement of the facts and when the court is explaining their arguments on appeal.<sup>140</sup> The E.s, although not parties to the case, are subject to substantial negative attention by the court. For example, testimony about the many ways they could be seen to have failed both their daughter and their grandchild is not only cited,<sup>141</sup> it is quoted.<sup>142</sup>

In part, the difference in the court's treatment of the E.s and the Skeens seems attributable to racial stereotyping. The E.s, as African-American grandparents, and particularly Mrs. E., as an African-American grandmother, are expected, apparently, to be more nurturing than the average family. They "should" unquestioningly welcome their daughter's child into their home, and when they did not, the court finds them unworthy. The E.s explained that they needed

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work commitment must be defined to accommodate continuing child-care responsibilities." (footnote omitted).

139. The E.s were hoping to adopt D.S. outright, which did not occur. *In re D.S.*, 600 A.2d 71, 73-74 (D.C. 1991) (ordering the trial court to consolidate V.V.'s and the E.s' competing adoption petitions on remand). Similarly, the Skeens, hoping to have Debra's son adopted, instead were enjoined from proceeding with the adoption and were ordered to pay certain court and medical costs. *Skeens v. Paterno*, 480 A.2d 820, 823-24, 828-29 (Md. Ct. Spec. App. 1984) (upholding the lower court's award of custody to the biological parents, Debra and Jeffrey, as well as the lower court's order that the Skeens pay certain expenses).

140. *Skeens*, 480 A.2d 820.

141. The fact that T.S. did not get along well with the E.s is documented in the testimony of a social worker and of the E.s themselves. *In re D.S.*, 600 A.2d at 76-77. The court also notes that the E.s did not want to adopt D.S. at the time of her birth. *Id.* at 77-78, 79.

Much of the blame for the E.s' failure is placed on Mrs. E. The fact that T.S. had emotional problems, including prostitution and running away from home, is blamed, in part, on the fact that not only did Mrs. E. not believe that T.S. had been raped by her natural father, but she also sent T.S. to live with him later on. *Id.* at 77 n.11, 78-79 n.12. The court notes testimony that Mrs. E. refused therapy, did not appear to understand the reality of her situation with T.S. and D.S., and contributed no financial support through social service agencies. *Id.* at 77-79.

142. See *In re D.S.*, 600 A.2d at 75 (quoting from the motion filed by D.S.'s guardian ad litem to terminate T.S.'s parental rights, which states the fact that the "E.s expressed interest in caring for D.S., but not on a permanent basis"); *id.* at 78 (quoting Mr. E.'s admission that the E. family was in crisis and thus could not take D.S.); *id.* at 79 (quoting Mrs. E. about T.S.'s problems and the E. family's own problems); *id.* at 79 n.12 (quoting the E.s as saying that T.S.'s story of sexual abuse was like that of someone "crying wolf").



to attend to other family problems at the time and could not manage integrating a new baby into their family.<sup>143</sup> I think this explanation would be accepted if offered by white grandparents.

The kinship care expected by the court has been described in numerous scholarly works which document (in either positive or negative light) how African-American grandmothers head up their families and keep their kin together.<sup>144</sup> What the court seems to be doing is to essentialize these studies with the claim that, if many black grandmothers do this, then all black grandmothers must. In addition, the black "mammy"<sup>145</sup> image has not disappeared from the American ideological lexicon. So it is more difficult for those holding the image to imagine an African-American grandmother not wanting her grandchild, whatever her reasons, than it is to imagine a white grandmother not wanting her grandchild.

#### 4. *The Confluence of Gender, Race, and Class: The Parents*

##### A. *The Non-residential Parents*

Like the grandparents, the parents are viewed by the court in terms of gender and race ideologies. For example, an issue which seems to be a gender issue, but which cannot be adequately explained by gender theories alone, is the contradictory treatment accorded the two non-residential biological parents, T.S. and Jeffrey. Neither one provided a home for the baby or appeared to want to play an important role in the baby's home.<sup>146</sup> Neither one appears to have changed the course of his or her life to commit to, or even

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143. *In re D.S.*, 600 A.2d 71, 78-79 (D.C. 1991).

144. In a study conducted by Carol Stack of kinship patterns of African-American families living in a Chicago housing project, she found that a teenage mother frequently does not raise her child. Rather, her mother will raise the child if the teenager is not considered mature enough to do so. STACK, *supra* note 78, at 47-48 (describing the story of one teenage mother who left her child with her mother for six years; when she returned to reclaim the child, her mother refused to relinquish the child). Stack also found that as many as one-third of the children in the project were living with extended kin. STACK, *supra* note 78, at 69.

Furthermore, Elmer and Joanne Martin found in their study of the extended African-American family that the dominant figure in extended families is most often a grandmother. ELMER P. MARTIN & JOANNE MITCHELL MARTIN, *THE BLACK EXTENDED FAMILY* 17-21 (1978) (noting that in several of the families they studied, a family member took advantage of the grandmother's goodness by sending their child to live with the grandmother).

145. See Roberts, *supra* note 78 (describing the development of the "mammy" image in U.S. history).

146. T.S. took D.S. to live with her at V.V.'s house when D.S. was eight days old, and in this respect provided her with a physical home. However, T.S. left V.V.'s home soon after, effectively giving up any role that she would assume in D.S.'s psychological home. *In re D.S.*, 600 A.2d at 74. Jeffrey obtained custody at trial, providing a physical home for Michael with Jeffrey or the Paternos, Jeffrey's parents. However, Jeffrey's service with the U.S. Navy meant he would have no role in providing care for the baby. *Skeens v. Paterno*, 480 A.2d 820, 822-23, 826-27 (Md. Ct. Spec. App. 1984).

accommodate, parenthood.<sup>147</sup> If their parents, or a parental figure such as V.V., had not stepped forward to establish a relationship with the baby, it is likely that both parents would have disappeared from the lives of the children, both functionally and legally.<sup>148</sup> Nonetheless, Jeffrey's parental rights are never in serious dispute. In fact, although it appears that he never intended to provide daily care for the child, he is accorded the power to stop Debra's adoption plans. Furthermore, he is awarded substantial visitation rights.<sup>149</sup> T.S., on the other hand, stands to have her parental rights terminated.<sup>150</sup>

An apparently significant distinction between Jeffrey and T.S. is that T.S. was charged with neglect of D.S. two days after her birth,<sup>151</sup> while no such charge was ever brought against Jeffrey. In my view, however, the distinction is more one of class and extended family circumstances than of reality as it is experienced by the baby. From the baby's perspective, it does not matter if T.S. had a history of emotional problems, substance abuse, and absences from government-run group homes,<sup>152</sup> or that Jeffrey was required by his job to be away.<sup>153</sup> From the baby's perspective, what matters is that he or she is being cared for, and neither T.S. nor Jeffrey was doing that. Jeffrey was in a position to provide biologically-related substitute caregivers,<sup>154</sup> while T.S. was not.<sup>155</sup> This is a difference which is not of their making, but which arises instead out of the situations of

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147. T.S. appears to have little interest in her child. Consider that she left D.S. with V.V. while D.S. was still a newborn. T.S. visited her child at V.V.'s until March 1987, when D.S. was approximately nine months old. At this time, T.S. ceased visits with D.S. altogether until a visit in March 1988, due to her placement in a Florida drug treatment center. Between that date and the date of the hearing terminating her parental rights, T.S. visited D.S. only once, in January 1989. *In re D.S.*, 600 A.2d at 74-75, 77. As for Jeffrey, he neither quits his career in the Navy, nor appears to have offered to take the child with him on his Navy tours or to ask for a compassionate reassignment. *Skeens*, 480 A.2d at 823-24.

148. *In re D.S.*, 600 A.2d 71, 75 (D.C. 1991); *Skeens*, 480 A.2d at 823-24.

149. *Skeens*, 480 A.2d at 823 (quoting the lower court's award to Jeffrey of visitation at least two nights per week, alternating major holidays, and six consecutive weeks during the summer).

150. *In re D.S.*, 600 A.2d at 73-74 (ordering the lower court to consider on remand the termination of T.S.'s parental rights when addressing the consolidated and competing adoption petitions of V.V. and the E.s.).

151. *In re D.S.*, 600 A.2d at 74.

152. *Id.*

153. *Skeens v. Paterno*, 480 A.2d 820, 826 (Md. Ct. Spec. App. 1984).

154. Jeffrey preferred that Michael, instead of being adopted, be placed in Jeffrey's custody, with care being given by his sister and her husband or by his parents. *Skeens v. Paterno*, No. 94, slip op. 1 (Md. Ct. Spec. App. May 23, 1983).

155. For example, at one point during the trial, T.S.'s social worker testified that she had asked the E.s to take D.S. after her birth but that they refused this request. *In re D.S.*, 600 A.2d 71, 77 (D.C. 1991). Another social worker who worked at the hospital where D.S. was born made the same request, and was also refused. *Id.* at 78. Both Mr. and Mrs. E. similarly testified. *Id.* at 78-79.

their extended families: Jeffrey had siblings and parents able to take custody of the baby. Further, Michael did not need to have a guardian appointed for him, since his mother was available to consent to medical care. D.S., on the other hand, did need to have a guardian appointed, since neither her father nor her mother was available to give consent as needed. The different legal situations would produce different results: a neglect action had to be brought in the case of D.S. so that a person other than her mother could be named guardian. Because Michael had his mother available, no such action was needed in his case. Again, this is a difference that is not created by Jeffrey and T.S.; it has to do with the other people surrounding the baby. If D.S. had had a father available to act as guardian, just as Michael had a mother available, the neglect action would not have been needed.

Finally, the economic circumstances in which Jeffrey and T.S. found themselves may have had an impact on whether a neglect action was brought: Jeffrey came from a monied family, while T.S. did not.<sup>156</sup> Statistically, poorer families are more likely to come to the attention of protective service agencies and to be the subject of neglect actions.<sup>157</sup> The ability of their parents to earn money obviously is not something that accurately distinguishes between Jeffrey and T.S. in terms of their parenting abilities.

The only distinction between Jeffrey and T.S. that is relevant to the well-being of the babies is their willingness and ability to care for them. In these characteristics, T.S. and Jeffrey are identical: neither appeared willing or able to change his/her life or lifestyle to accommodate parenthood.<sup>158</sup> Nonetheless, Jeffrey was accorded an opportunity to seek custody and awarded extensive visitation with the baby to be exercised by his parents;<sup>159</sup> T.S.'s parental rights

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156. Consider that Jeffrey's parents paid a prominent Baltimore law firm to handle his case, *supra* note 90, while the E. family could not afford private counsel and instead had a court-appointed attorney. *In re D.S.*, 600 A.2d at 75 n.5 (noting that the E.s were appointed counsel when D.S. was only five days old).

157. See Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887-89, 894-96, 903-04, 910-12, 917 (1975) (asserting that the current neglect laws are derived from Elizabethan poor laws, which often assisted the poor by separating them from their children and sending the children away to work). Areen states that the most common characteristic of parents charged with neglect is poverty, despite the fact that child neglect is found at all income levels. *Id.* This fact raises the possibility that class bias is significant in determining whether a child is neglected. *Id.*

158. See *supra* note 147 (discussing the lack of interest that both T.S. and Jeffrey appeared to have for their respective children).

159. *Skeens v. Paterno*, 480 A.2d 820, 823 (Md. Ct. Spec. App. 1984) (quoting the lower court's holding that Jeffrey could exercise his visitation through his parents while he was on naval duty); *id.* at 826-27 (holding that allowing the Paternos visitation rights in Jeffrey's stead was an important way for him to maintain contact with his child).

were vulnerable to termination<sup>160</sup> despite the later willingness of her mother and stepfather to adopt the baby.<sup>161</sup>

In my view, the different treatment is more a product of gender, race, and class differences between Jeffrey and T.S. than a product of functional differences between them as parents. From the perspective of the court, Jeffrey looks like a good parent not because he *will* be caring for the child but because he is *willing* to find someone to care for the child. While willingness would not be sufficient to demonstrate that a woman will be a good mother, it is sufficient for a man, because, as I have discussed in another article, volunteering is what men "should" do as parents.<sup>162</sup> They may not be drafted into parenthood, but they must be praised for volunteering for duty.<sup>163</sup> T.S., of course, fails as a mother because she is not willing to care for the child herself, even though she has recruited her parents to stand in for her. As a woman-draftee, she must do the job, not delegate it. Race and class sharpen the distinctions between Jeffrey and T.S. because the ideology that a white man will be fully committed to paid work and, therefore, have no time for child-care<sup>164</sup> stands in sharp contrast to the ideological stance that an African-American woman can experience happiness as a welfare drone.<sup>165</sup>

### B. *Childrearing and Parental Employment*

Another set of gender ideologies is exposed when one compares Jeffrey and Debra. Jeffrey is seeking custody and/or visitation, but he intends to have his sister and her husband or, in the alternative, his parents, care for the baby while he is in the Navy.<sup>166</sup> Debra is seeking custody and would care for the child herself. In the second

160. *In re D.S.*, 600 A.2d 71, 75 (D.C. 1991) (noting that the lower court reduced T.S.'s visitation following two consecutive scheduled visits where T.S. did not keep the appointment); *id.* at 89 (ordering the lower court to consider on remand the termination of T.S.'s parental rights).

161. Nearly three years after D.S.'s birth, the E.s filed a petition in D.C. Superior Court to adopt D.S. *In re D.S.*, 600 A.2d at 75. The E.s obtained T.S.'s relinquishment of her parental rights to them. *Id.*

162. Czapanskiy, *supra* note 9.

163. Czapanskiy, *supra* note 9.

164. Williams, *supra* note 9.

165. See Nell Irvin Painter, *Hill, Thomas, and the Use of Racial Stereotyping*, in *RACE-ING JUSTICE, EN-GENDERING POWER* 200, 210 (Toni Morrison, ed., 1992) ("Mammy and Jezebel and the welfare queen may be the most prominent roles for black women in American culture, but even these figures, as limited as is their range, inhabit the shadows of American imagination.").

166. See *Skeens v. Paterno*, No. 94, slip op. at 1 (Md. Ct. Spec. App. May 23, 1983) (stating as a fact that Jeffrey "preferred that the child be placed in his custody with the understanding that Michael's care be committed to Jeffrey's sister and her husband . . . until such time as a final determination was made regarding Michael's status.").

appellate decision, in which the award of custody to Debra and visitation to Jeffrey via his parents were upheld, both of these facts are reported as if they were inevitable and obvious.<sup>167</sup> Nobody questions or even seems curious about why Jeffrey's attachment to the Navy is an absolute or whether he could not take care for his son while in the Navy. In the early 1980s, there were many single parents in the armed services.<sup>168</sup> It seems likely, however, that it did not occur to anyone that Jeffrey should leave the service or seek a compassionate reassignment,<sup>169</sup> because it is not part of the stereotypical role of fatherhood to reduce one's employment to perform parenting duties.<sup>170</sup> Indeed, it is more a part of stereotypical fatherhood to increase one's commitment to employment and seek to earn more money, even at the expense of time caring for one's children.<sup>171</sup>

At the same time Jeffrey's employment status is discussed, the appellate decisions in *Skeens* make no mention of whether Debra is employed, in school, or engaged in any activity other than being available to care for the baby.<sup>172</sup> While it is still more likely in two-

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167. *Skeens v. Paterno*, 480 A.2d 820, 822-23 (Md. Ct. Spec. App. 1984).

168. See Kathy Sawyer, *Military's Single Parents*, WASH. POST, June 21, 1982, at A1 ("The Army, for example, has 27,000 single parents among enlisted personnel and officers, more than five-sixths of them fathers."); Molly Moore, *Single Parents Struggle in the Military*, WASH. POST, Sept. 3, 1986, at A1, A4 (stating that the "single parent population in the Navy has exploded from 5,100 in 1980 to an estimated 25,000 in 1986 and that 80 percent of the single sailors with children are men").

169. Moore, *supra* note 168, at A5. In the Army, the Compassionate Review Branch handles requests for transfers from parents and other military personnel with personal problems. However, "[c]hild care difficulties are not on the list of automatically acceptable reasons for granting transfers." Moore, *supra* note 168, at A5. Transfers based on child care difficulties are more difficult in the Navy because of the sea duty requirement. Moore, *supra* note 168, at A5.

170. See Czapanskiy, *supra* note 9, at 1455 n.146 (indicating that in a survey, 41 percent of the men said that "men should not take off any time" to care for newborns (citing Cindy Skrzycki, *More Men Taking the Daddy Track*, WASH. POST, Nov. 6, 1990, at C1), and noting that because of employer and peer pressure against its use by men, most men do not take parenting leave (Carol Lawson, *Baby Beckons: Why is Daddy at Work?*, N.Y. TIMES, May 16, 1991, at C1)); see also Boyd, *supra* note 117, at 177 ("[u]nder traditional familial ideologies, the father is expected to provide financial support to the family and the mother is expected to render services in the home, including child care. . . . In this way judges reinforce expectations of gender job segregation within and outside the home."); Polikoff, *supra* note 9, at 239 ("a man with a full-time job who provides any assistance in childrearing, however limited, looks like a dedicated father, while a woman with a full-time job who still does primary, but not all, caretaking, looks like 'half' a mother, dissatisfied with the childrearing role.").

171. See Czapanskiy, *supra* note 9, at 1451-57, 1435 (discussing the impact of unequal allocation of household labor in families with two working parents and noting that women still do far more child care and housework while employers expect men to focus more on their jobs). "The average father living with his child spends less than ten minutes a day caring for his child, while the average mother spends several hours." Czapanskiy, *supra* note 9, at 1435 (footnote omitted).

172. *Skeens v. Paterno*, 480 A.2d 820, 826-29 (Md. Ct. Spec. App. 1984) (finding Jeffrey's naval duty an exceptional circumstance for awarding visitation rights through the Paternos, while Debra is only referred to as a minor).

parent families for mothers rather than fathers to forego wage work to stay home and care for the children, the percentage of single mothers who do so is, and has been, relatively small.<sup>173</sup> It may also be true that assumptions about class combined with gender stereotypes led the judges to assume that Debra should remain at home with the child. As the judges knew, Debra's father, who was both a lawyer and a party in the case, is a lawyer.<sup>174</sup> Although there was no evidence recited in the appellate decisions about Debra's family's income, the judges may have presumed that Debra was middle-class, and, like other middle-class mothers, was more "appropriately" at home with her child than in the world of paid work.<sup>175</sup>

In contrast, the D.C. Court of Appeals inquired into the employment status of V.V., the foster parent who was seeking to adopt D.S.<sup>176</sup> The judges indicated that they were satisfied that she was a good person even though unemployed, because she suffered from a disability.<sup>177</sup> One must wonder why her attachment to wage work is expected while Debra's is not, when they are identically situated as single caregivers to a very young child. One possible explanation is that assumptions about race, class, and sex are all at work to lead judges to conclude that a single African-American mother "belongs" in paid labor.<sup>178</sup> No similar attention is paid to the employ-

173. See BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 25 (1986) (noting that in 1970, 75.6 percent of divorced women with children under 18 years old participated in the labor force, and that figure rose to 79.1 percent in 1985). In comparison, 39.9 percent of married women (with husband present) with children under 18 years old worked outside the home in 1970, whereas this figure rose to 60.8 percent in 1985. *Id.*

174. See *Skeens v. Paterno* 480 A.2d 820, 822 (Md. Ct. Spec. App. 1984) (listing Edward John Skeens as representing appellant).

175. See CHODOROW, *supra* note 8, at 65 (suggesting that if the Western middle-class housewife worked outside the home, "neither she nor the rest of society is apt to consider this work to be important to her self-definition in the way that her housewife role is.").

176. *In re D.S.*, 600 A.2d 71, 78 (D.C. 1991) ("V.V. explained that she had not worked for six years because she had a back injury, that she applied for disability, that her twenty-year-old daughter lived with her . . .").

177. *Id.* at 80. The trial court judge found that V.V. "does not have physical and medical problems and is currently on medications and no longer works. However, [V.V.] has provided more than adequate care for [T.S.] when she needed it as well as for [D.S.]." *Id.*

178. See ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 230-31, 237 (Vintage Books 1983) (1981) (noting that the majority of Black women have worked outside their homes throughout this country's history and "have been receiving wages for housework for untold decades."). "Proportionately, more Black women have always worked outside their homes than have their white sisters (footnote omitted). The enormous space that work occupies in Black women's lives today follows a pattern established during the earliest days of slavery." *Id.* at 1. See also BERGMANN, *supra* note 173, at 280 (discussing the emergence of women in the workplace in the latter half of the nineteenth century, with domestic service being the largest single occupation open to them). "Black and immigrant women from poverty-stricken families" were most likely to hold domestic service jobs. Bergmann, *supra* note 173, at 18. "In addition, race and sex discrimination relegated most black women to domestic jobs." Bergmann, *supra* note 173, at 280-81. See also Roberts, *supra* note 78, at 19-22 (discussing how after slavery, Black women continued to work in patterns drastically different from those of white women).

ment status of Mrs. E., of Debra's mother, or of Jeffrey's mother, all of whom are married mothers and therefore exempt from the paid employment requirement because they are allowed to be financially dependent on their husbands.<sup>179</sup>

#### IV. WHAT TEST SHOULD HAVE BEEN USED? AN ARGUMENT FOR A FUNCTIONAL APPROACH

Asking where a decisionmaker might have gone wrong because of stereotypical thinking about gender, race, or class is only the beginning. The imaginative work of thinking about how a case might turn out in a bias-free environment is equally challenging. So, what should have happened to D.S. and Michael, their parents, foster parent, and grandparents? The answers are not entirely clear, but here are some suggestions and possible criteria for reaching a decision in such cases.

It seems likely that less bias would work its way into decisions like these if parenting conduct were evaluated from a functional approach.<sup>180</sup> Using this approach, the court would focus on what each potential parent or caregiver has to offer the child in very specific terms. Looking to the history of the relationship between the party and the child would make this inquiry even more fruitful.<sup>181</sup> The

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179. Boyd, *supra* note 117 and accompanying text.

180. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 490-91 (1990) (advocating that courts and legislatures focus on two criteria when defining parenthood: "the legally unrelated adult's performance of parenting functions and the child's view of that adult as a parent."); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1641 (1991) (noting that a functional approach to child custody preserves "existing non-nuclear relationships" and "gives individuals greater control over the structure of their family lives."). "Instead of focusing on the identities and formal attributes of the individuals within a relationship, the functional approach inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs." *Id.* at 1646 (footnote citing cases omitted).

181. See Czapskiy, *supra* note 9, at 1463, 1465 (noting that "[t]he question of whether a particular change is fair would have to be addressed from the perspective of the child, the father, and the mother; her role could not be assumed or ignored"). "No longer could it be assumed that, because of their sex, mothers always and fathers never do particular things that children need." Czapskiy, *supra* note 9, at 1463. I then suggest that "[l]egal questions involving parents and children would be evaluated according to whether a particular approach would promote responsible and altruistic conduct on the part of parents' connections with their children." Czapskiy, *supra* note 9, at 1465 (citing Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 298-306 (1988)).

See also Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 626-30 (1992) (examining how some courts have adopted the gender-neutral primary caretaker preference). Scott suggests that an "'approximation' approach can accomplish the conventional purposes of child custody law more effectively than any alternative." *Id.* at 630. This approach to child custody focuses "on the past relationship between parents and child and seeks to approximate as closely as possible the predivorce patterns of parental responsibility." *Id.*

alternative, as illustrated in the two cases discussed above, is to allow ideological stances about what constitutes a good mother or a good father to influence the court, perhaps to the detriment of the child.

In the case of D.S., the functional parent was V.V.<sup>182</sup> V.V. cared for the child from the time she was born and appears to have done a good job. Under a functional approach, I believe that her successful parenting history should give her an advantage to keeping the child in her care. The biological tie between T.S. and D.S. does not demonstrate that her views on who should raise the child are likely to better serve the child's needs. At the same time, the E.s were devoted to the child and might have initially been awarded custody based on their conduct as involved relatives. They too, therefore, have demonstrated a parenting history, at least according to the evidence so far. There seems to be no reason to exclude the E.s from the life of the child except to serve a theory that the person with custody of the child should also have the power to exclude others from the life of the child.<sup>183</sup> If the evidence should demonstrate that the E.s cannot respect V.V.'s approach as a primary parent or cooperate with her about the needs of D.S., however, the story could change.<sup>184</sup> Absent such evidence, it does not appear that D.S. would be harmed if V.V. adopted her, so long as the opportunity for the E.s to maintain their relationship is preserved.

The case of Michael is somewhat different. Once Debra was persuaded (or coerced) to give up her plans to permit Michael to be adopted,<sup>185</sup> she was willing to undertake his daily care and should have been awarded custody, as the Maryland Court of Special Appeals eventually decided. However, since Jeffrey was not willing to place himself in a position to care for Michael, he should not have been given the same standing to seek custody or even to object to

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182. *In re D.S.*, 600 A.2d 71, 74 (D.C. 1991). After the baby's birth, both the mother (T.S.) and the baby returned to V.V.'s home. After T.S. left, V.V. "remained the uninterrupted custodian of D.S." *Id.*

183. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusionary Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 933-39, 962 (1984) (advocating using a nonexclusive parenthood standard in custody disputes and noting a trend in favor of grandparent visitation). A nonexclusive parenthood standard would prevent the adult with custody from arbitrarily excluding others from the child's life and allow the child to maintain relationships with adults outside the nuclear family. *Id.* at 962.

184. Czapskiy, *supra* note 9, at 1477 (according the "right to object only to those parents who had acted as parents."). "The test would be whether a person had participated to the fullest extent of his or her capacities in the rearing of the child in a way which is mutually supportive of the child's other parent." Czapskiy, *supra* note 9, at 1477.

185. Debra and her parents sued for custody of Michael in response to Jeffrey's Petition for Immediate Custody. *Skeens v. Paterno*, No. 94, slip op. at 3 (Md. Ct. Spec. App. May 23, 1983). "Debra vigorously opposed Jeff's adoption of Michael, alleging his unfitness to assume such a role." *Id.*



the adoption under a functional approach. The fact that his parents or his sister and brother-in-law were willing to take custody when he was not should not give Jeffrey the same standing as Debra to seek custody. The birth mother should not be forced to choose between caring for the baby herself or giving the baby to custodians not of her choice when the birth father is not himself willing to be a functional parent to his child.

My position regarding Michael's case is an individualistic stance that seems incongruent with the notion that D.S. is well-served by requiring V.V. to permit the E.s to continue their relationship with her. How can I favor a relationship orientation in the case involving D.S. and an individualistic orientation in the case involving Michael? I feel comfortable with the apparent contradiction because I think there is a difference between deciding about the adoption or custody of an infant and deciding about the adoption or custody of an older child.<sup>186</sup> The difference is one of participation and history: when an adult has gone to the emotional, physical, and financial effort of becoming a reliable caregiver in a child's life, that history cannot be ignored from either the child's or the adult's perspective. At the time of a child's birth, there is no history of caregiving; there are only promises and predictions. If a birth mother forgoes placing a child for adoption and decides to care for the child herself, she is promising to become the caregiver the child needs and to make the sacrifices necessary to carry out that promise. If a birth father objects to placing the child for adoption, but is unwilling to make the same promise and sacrifice, it seems unfair to give him the power to force the birth mother to do the same.

In the situation where the paternal grandparents are, in effect, willing to substitute themselves for the parent as caregiver, as in the case of the Paternos, the question regarding custody or adoption is a closer one. The question becomes an issue as to whether, because of their blood relationship to the infant, their promise should be privileged over the promise being offered by proposed adoptive parents. I think that the birth mother should be authorized to reject the offer of the paternal grandparents. The reason is that the mother has already made a sacrifice on behalf of the infant by sharing her body and risking her health to bring the pregnancy to term. Therefore, if she is not persuaded that the grandparents' offer is preferable for her and the infant, she should be allowed to go for-

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186. Michael was born on Jan. 21, 1983, and would have been nineteen months old when the appeal was decided. D.S.'s termination hearing took place when she was forty months old. *In re* D.S., 600 A.2d 71, 76 (D.C. 1991).

ward with the adoption. Otherwise, her autonomy is sacrificed in the service of a blood relationship which holds only a promise and not a history.<sup>187</sup>

I am somewhat uncomfortable taking this stance because I am aware that informal kinship adoptions are more common in communities of people of color than in communities of Euro-Americans.<sup>188</sup> I have little direct experience with kinship adoptions, although I have done some lawyering involving families where such adoptions have occurred. In the course of this lawyering, I have been moved by the emotional investment that paternal grandparents have shown in grandchildren they have never met, but whom they are unwilling to let go to adoptive parents chosen by the mother. The loss and grieving of these grandparents it seems to me, is just as palpable as the grief of a young woman who gives up her childhood to raise a baby, or who gives up her baby with some degree of unwillingness. Nonetheless, it appears that kinship adoptions in communities of people of color usually are begun with the consent and approval of the mother. Therefore, there is often no issue that the mother's initial placement of the child with kin for adoption, whether maternal or paternal, was the product of the mother being persuaded that this was best for her and the baby at the time.

The Paternos offered no such power, nor respected any such authority in Debra to decide what was best before Jeffrey sued. Jeffrey, with the support and encouragement of his parents, sued before the baby was a week old.<sup>189</sup> Due to the timing of the suit, no substantial discussions could have taken place in an effort to persuade Debra that Michael would be better off in the care of his father's family. The litigation was protracted and bitter; it was a fight, not a respectful resolution. I cannot condone the paternal grandparents' exertion of power via their son over a mother who voluntarily bears a child. To exert this power by filing suit is to ignore the reality that pregnancy is not entirely safe or painless. It is a sacrifice, and the person making the sacrifice should largely control the outcome.

On the other hand, I think that a birth mother's autonomy has far less importance when the issue is allowing adults with a history of care and commitment to a child to continue having a relationship

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187. See Williams, *Gender Wars*, *supra* note 114, at 1561-72 (arguing that the ideology of American society—comprising autonomous individuals with rights—is gender-biased, because society perceives women who pursue their own self-interest, e.g., careers or education, over their children's needs as selfish).

188. See *supra* notes 78, 79 and accompanying text.

189. *Skeens v. Paterno*, No. 94, slip op. at 1-2 (Md. Spec. Ct. App. May 23, 1983) (noting that Michael was born on Jan. 21, 1983, and that Jeff instituted a "Petition For Immediate Custody" on Jan. 24, 1983).

with that child. Accordingly, I am not troubled by requiring V.V. or Debra to permit the grandparents to have visitation with D.S. and Michael. The only caveat should be that the grandparents act with respect toward the caregiving parent when it comes to scheduling visits, not criticizing or interfering with parenting decisions, and so on. The autonomy of the caregiver is earned through emotional, physical, and financial energy, and it is entitled to respectful regard and treatment from all those involved in the child's life.

Considering the role of grandparents in the complex issues of custody, adoption, and care of children is an important issue in modern America. Because of economics, more children are in families where both parents work outside the home or where a single parent supports the household.<sup>190</sup> Illness and substance abuse have left some parents incapable of caring for their children. The need of children to have adults in their lives who care about them and for them can only be on the increase. Sometimes, connections with grandparents and other caring adults, such as V.V., can benefit a child regardless of the level of attention his or her parents can provide. Whether the law legitimately can be involved in these relationships may turn on whether judges can set aside their preconceptions about who is a "good" man or woman, who is a "good" father or mother, and who is a "good" set of grandparents to be involved with a child. Instead, we should be asking who has done the job. The functioning of children and the adults who care for them should be our focus and our test in determining custody, adoption, and visitation rights.

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190. See James R. Wetzel, *American families: 75 years of change*, MONTHLY LABOR REV., Mar. 1990, at 4, 10 (fig. 4) (noting that single-person households in the United States rose from 13 percent in 1960 to 24.1 percent in 1988); Howard V. Hayghe, *Family members in the work force*, MONTHLY LABOR REV., Mar. 1990, at 14, 14, 17 (noting that in 1975, "53 percent of the married-couple families with children consisted of traditional families, while 43 percent fell into the dual-worker category; by 1988, the proportions were 33 percent and 63 percent."). In addition, divorce and separation have increased the number of families headed by single women and men. *Id.* at 14. By 1988, about 14 percent of families were headed by a single parent. *Id.* at 18.

