

## THE PARENTLESS CHILD'S RIGHT TO A PERMANENT FAMILY

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### INTRODUCTION

Despite a twenty-percent reduction over the past decade, more than 420,000 children in the United States remain in foster care, and more than 110,000 of them are waiting to be adopted.<sup>1</sup> These children are frequently subjected to multiple placements and lack a stable environment.<sup>2</sup> State adoption statutes typically seek to achieve adoption for each of these children as promptly as possible, based on an individualized home study and judicial determination that the proposed adoption would be in the child's best interests.<sup>3</sup> Some states, however, limit the pool of potential adoptive parents in one way or another. Arkansas and Utah prohibit adoption by any person cohabiting in a sexual relationship without the benefit of marriage.<sup>4</sup> Mississippi prohibits adoption by couples of the same

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1. *Trends in Foster Care and Adoption—FY 2002–FY 2009*, U.S. DEPARTMENT HEALTH & HUM. SERVICES, [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcfers/trends.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcfers/trends.htm) (last visited Mar. 1, 2011).

2. See *infra* notes 253–57 and accompanying text.

3. See, e.g., MISS. CODE ANN. § 43-15-13(8) (2010) (“The Legislature recognizes that the best interests of the child require that the child be placed in the most permanent living arrangement as soon as is practicably possible.”).

4. ARK. CODE ANN. § 9-8-304 (2009); UTAH CODE ANN. § 78B-6-117(3) (LexisNexis 2008). The Arkansas statute, which also prohibits foster care by such persons, was declared unconstitutional in *Cole v. Arkansas Department of Human Services*, No. 60CV-08-14284 (Ark. Cir. Ct. Apr. 16, 2010), *appeal docketed*, No. CV 10-840 (Ark. Aug. 12, 2010).

gender.<sup>5</sup> And Florida categorically prohibits adoption by gay men and lesbians.<sup>6</sup>

In *Lofton v. Secretary of the Department of Children & Family Services*, the Eleventh Circuit rebuffed a challenge to Florida's anti-gay adoption statute, asserting that the State has more latitude in establishing adoption policies than in other contexts because it acts "in loco parentis."<sup>7</sup> If the court means to say that the state has the same discretion a parent would have to say what is best for the child, that is surely wrong: parents can make decisions grounded in sectarian religious beliefs or invidious notions of racial superiority but the state cannot.<sup>8</sup> Even apart from explicit constitutional bars on particular forms of state action, however, the court is wrong to suggest that the state has an unusually free hand in this area: to do so overlooks the state's constitutional duties to the parentless child in its care.<sup>9</sup>

What are those duties? Does the provision of minimally adequate food, clothing, and shelter satisfy the state's constitutional obligations,<sup>10</sup> or must the state go further to facilitate the child's development and "prepare him for additional obligations"?<sup>11</sup> The answer, we submit, is that the state cannot merely provide the physical sustenance necessary to keep the child alive, but must also provide at least the minimum nurturing necessary to facilitate the child's development into an autonomous<sup>12</sup> human being.<sup>13</sup> That

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5. MISS. CODE ANN. § 93-17-3(5) (Supp. 2010).

6. FLA. STAT. § 63.042(3) (2010). This statute was declared unconstitutional in *Florida Department of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79, 91 (Fla. Dist. Ct. App. 2010).

7. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 809–10 (11th Cir. 2004).

8. See *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984). Of course, even a religious justification does not give parents carte blanche to do whatever they please. See *Prince v. Massachusetts*, 321 U.S. 158, 166, 170 (1944).

9. The court's focus in *Lofton* was on the claims of prospective adoptive parents, and its assertion was that the State's concern for the welfare of the adoptive child allowed it to classify prospective parents in ways that might be impermissible in other contexts. *Lofton*, 358 F.3d at 809–10. Although the foster children in *Lofton* also asserted a claim to constitutional protection of their foster family relationships, the court gave it no independent analysis, asserting summarily that the children had no "fundamental right to be adopted" and "no justifiable expectation of permanency in their relationships." *Id.* at 811–12, 814. Disposing of a child's claim to constitutional protection of family relationships by assuming that the child's claim merely mirrors the adult's is an error several courts have committed. See *infra* notes 268–76 and accompanying text. For a more thoughtful analysis distinguishing the child's interest from the parent's, see *Adoption of X.X.G.*, 45 So. 3d at 98 n.19 (Salter, J., concurring).

10. "[W]hen the State takes a person into its custody . . . the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

11. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

12. Autonomy is a psychological state that includes the ability to regulate

obligation constrains the state's choices in determining its foster care and adoption policies.

Here, then, is our central thesis: an enduring attachment relationship with a parent figure is essential to a child's healthy development into an autonomous adult. As developmental science demonstrates, attachment relationships are foundational in the formation of the self, critical to healthy psychological adjustment, and necessary for the acquisition of self-regulation and social competence, capacities essential to meaningful autonomy.<sup>14</sup> In short, children need a permanent parent<sup>15</sup> in order to achieve "the ability independently to define [their] identity that is central to any concept of liberty."<sup>16</sup> Accordingly, the parentless child<sup>17</sup> has a fundamental right to a permanent family relationship, and laws that interfere with the attainment of such a relationship must survive strict scrutiny in order to pass muster. In particular, given the unstable placements and repeated disruptions that typify foster care in the United States,<sup>18</sup> laws and policies restricting adoption may require such scrutiny on the basis that they directly and substantially interfere with the parentless child's attainment of a permanent family.

This Article proceeds as follows. In Part I we demonstrate that

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one's own behavior and to select and guide one's own decisions through independence of thought, emotion, and action. Laurence Steinberg, *Autonomy, Conflict, and Harmony in the Family Relationship*, in *AT THE THRESHOLD: THE DEVELOPING ADOLESCENT* 255, 255–76 (S. Shirley Feldman & Glen R. Elliot eds., 1990); accord Neil S. Binder, Note, *Taking Relationships Seriously: Children, Autonomy, and the Right to a Relationship*, 69 N.Y.U. L. REV. 1150, 1151 n.4 (1994) ("Autonomy, as used here, refers to the ability to respond in a critical and self-reflective manner to the decisions that one is confronted with throughout one's life.").

13. See *infra* Part I. This point follows directly from *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982), which holds that, in order to vindicate the liberty interests of developmentally disabled persons in state custody, the Constitution affirmatively requires the state to provide to such persons behavioral training that is calculated to minimize the need for use of physical restraints.

14. See *infra* Part II.

15. By "permanent parent" we mean a primary caregiver who is attached to the child in an enduring relationship that is expected to last throughout their lives. As we explain in Part II, below, the child's need for attachment to a primary caregiver remains fundamentally important to healthy development throughout the child's maturation to adulthood.

16. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

17. All children, not just those without parents, need a permanent family relationship, but when a parent's constitutionally protected liberty interests are also at stake they may be in tension with those of the child, suggesting that the child's rights in that context might be "substantially attenuated." See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 846–47 (1977). Accordingly, we limit our claims concerning the child's cognizable constitutional rights to contexts in which no competing right of a parent is present. See *infra* Part V.

18. See *infra* notes 253–55 and accompanying text.

the state has an affirmative constitutional duty to provide at least minimally adequate nurturing to children in its custody, and we explain how this duty accords with existing case law. Part II lays out the developmental science, documenting the critical importance of an enduring attachment relationship to the child's development of an autonomous self. Part III sets forth the specific constitutional analysis establishing the child's fundamental right to a permanent family relationship.<sup>19</sup> Part IV explains how this right constrains the state's choices in establishing foster care and adoption policies for parentless children. Finally, Part V explores possible objections to legal recognition of the child's right to a permanent family relationship, leading us to conclude that careful thought is needed before that right is extended to contexts in which it conflicts with the rights of parents.

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19. While courts have yet to rule on the argument we present, the scholarly literature expounds a number of related claims. The kernel of our thesis can be found in Neil Binder's note, *Binder, supra* note 12, at 1150–51. Related claims are thoughtfully developed in James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 760–61 (2009) [hereinafter Dwyer, *A Constitutional Birthright*]; Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 383–85 (1994); David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 898 (2006); Mark Strassner, *Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context*, 15 DUKE J. GENDER L. & POL'Y 223, 223 (2008); and Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 319–21 (2005). JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006), provides a sustained philosophical analysis of the associational rights that children should be deemed to possess, and James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 410 (2008) [hereinafter Dwyer, *The Child Protection Pretense*] grounds policy recommendations for child welfare systems on a summary of the developmental science. For a somewhat contrary perspective on the need of children in the child welfare system for a permanent parent, see Sasha Coupet, *Swimming Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405, 415 (2005). For additional commentary in accord with our thesis, see Michele Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. JUV. L. & POL'Y 381, 383–84 (2005); Kyle Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 285–91 (2001); Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1 (2008); Cassandra S. Haury, Note, *The Changing American Family: A Reevaluation of the Rights of Foster Parents when Biological Parental Rights Have Been Terminated*, 35 GA. L. REV. 313 (2000); and Nicole M. Onorato, Note, *The Right To Be Heard: Incorporating the Needs and Interests of Children of Nonmarital Families into the Visitation Rights Dialogue*, 4 WHITTIER J. CHILD & FAM. ADVOC. 491, 492–93 (2005).

## I. THE STATE'S DUTY TO CHILDREN IN CUSTODY

### A. *Youngberg v. Romeo and the State's Affirmative Constitutional Duty of Care*

Constitutional requirements typically function as negative rights.<sup>20</sup> They prohibit governmental actors from usurping powers beyond the scope of their authority<sup>21</sup> and they protect individuals from certain forms of state action,<sup>22</sup> rather than imposing affirmative duties on the government to provide for the individual's protection and welfare.<sup>23</sup> Thus, "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border."<sup>24</sup>

However, when the government takes an individual into custody, the Constitution requires that at least minimally adequate provision be made to protect the individual's safety and welfare.<sup>25</sup> This principle is well developed in the context of prison conditions<sup>26</sup> and extends as well to other forms of custodial confinement.<sup>27</sup> In

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20. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 552 (3d ed. 2006).

21. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644–45 (1952) (Jackson, J., concurring) (discussing the limits of the President's wartime powers); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (stating that the Constitution "organizes the government and . . . assigns, to different departments, their respective powers" and "establish[es] certain limits not to be transcended by those departments").

22. See, e.g., U.S. CONST. amend. I (protecting from government infringement the freedoms of religion, speech, press, and assembly).

23. See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (stating that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security"); *id.* at 196 ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid.").

24. *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

25. *DeShaney*, 489 U.S. at 199–200 ("[W]hen the State takes a person into its custody . . . the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."); see also *Youngberg*, 457 U.S. at 317 ("When a person is institutionalized . . . a duty to provide certain services and care does exist.").

26. See *Rhodes v. Chapman*, 452 U.S. 337, 345–46 (1981) (establishing the proper analysis for determining whether prison conditions violate the Eighth Amendment); *Hutto v. Finney*, 437 U.S. 678, 687 (1978) (affirming a remedial order addressing unconstitutional conditions of confinement in the Arkansas prison system); see also *Rhodes*, 452 U.S. at 352 n.17 (citing representative cases); *id.* at 353–54 (Brennan, J., concurring) (summarizing the extensive scope of litigation in lower courts). See generally William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R. 3d 111 (1973).

27. See, e.g., *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (suspect

particular, it extends to children in state custody, not only when they are confined in institutional settings,<sup>28</sup> but also when they are placed in foster care.<sup>29</sup>

In all these contexts, the standard of care imposed by this duty is not high. For prison inmates confined for the purpose of punishment, it requires that the state not adopt a posture of “deliberate indifference” to the prisoner’s needs.<sup>30</sup> For those with

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in police custody); *Youngberg*, 457 U.S. at 315–16 (patients at a state institution for the mentally retarded); *Beck v. Wilson*, 377 F.3d 884, 890 (8th Cir. 2004) (involuntarily committed patient at a state-run drug rehabilitation facility); *Buffington v. Balt. Cnty.*, 913 F.2d 113, 119 (4th Cir. 1990) (pretrial detainee); *Williams v. Nelson*, 398 F. Supp. 2d 977, 986–87 (W.D. Wis. 2005) (patient at state treatment center for sexually dangerous persons).

28. See, e.g., *Reno v. Flores*, 507 U.S. 292, 301 (1993) (juvenile aliens in an immigration detention facility); *Smith v. District of Columbia*, 413 F.3d 86, 95 (D.C. Cir. 2005) (minor participant in a juvenile independent living program); *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004) (minor detained in a juvenile detention center); *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1243 (2d Cir. 1984) (minor residents of state-operated schools for the mentally retarded); *Santana v. Collazo*, 714 F.2d 1172, 1183 (1st Cir. 1983) (minor in an industrial school and juvenile camp); *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974) (minor in a state-run mental health hospital); *Riddle v. Innskeep*, 675 F. Supp. 1153, 1161–62 (N.D. Ind. 1987) (minor at a juvenile rehabilitation center).

29. *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc); *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 892–93 (10th Cir. 1992); *Winston v. Children & Youth Servs. of Del. Cnty.*, 948 F.2d 1380, 1390–91 (3d Cir. 1991); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc); *Doe ex rel. Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981); *T.M. ex rel. Cox v. Carson*, 93 F. Supp. 2d 1179, 1187 (D. Wyo. 2000); *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996); *Eric L. ex rel. Schierberl v. Bird*, 848 F. Supp. 303, 307 (D.N.H. 1994); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 992 (D.D.C. 1991), aff'd sub nom. *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993); *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) (noting the emotional harm from multiple foster care placements); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1007 (N.D. Ill. 1989) (discussing the separation of foster children from siblings); *Doe ex rel. Johanns v. N.Y.C. Dep't of Soc. Servs.*, 670 F. Supp. 1145, 1172–73 (S.D.N.Y. 1987) (challenging a system of “overnight” foster care placements); *Wilder v. City of N.Y.*, 568 F. Supp. 1132, 1137 (E.D.N.Y. 1983); *Braam ex rel. Braam v. Washington*, 81 P.3d 851, 856–57 (Wash. 2003); *Kara B. v. Dane Cnty.*, 555 N.W.2d 630, 637 (Wis. 1996).

30. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); cf. *Whitley v. Albers*, 475 U.S. 312, 326–27 (1986) (holding that the Due Process Clause affords no greater protection to prison inmates than does the Cruel and Unusual Punishment Clause).

mental illness or developmental disabilities confined in institutions for their own protection, the standard is somewhat higher: “professional judgment” must be exercised to provide appropriately for their safety and welfare.<sup>31</sup> Likewise, for children in foster care, the better rule is that the “professional judgment” standard applies.<sup>32</sup> Under either standard, government officials enjoy substantial discretion in determining how the individual’s needs should be met.<sup>33</sup> Even where children are involved and there is no offending conduct justifying punishment, the government is not required to act solely on the basis of the child’s best interests: considerations of cost and administrative efficiency also can be taken into account.<sup>34</sup>

The scope of this duty encompasses the individual’s basic needs for “adequate food, shelter, clothing, and medical care.”<sup>35</sup> It extends as well to protection from physical harm: the State “has the unquestioned duty to provide reasonable safety” for persons confined in its custody.<sup>36</sup> And it has also been held to extend to protection from psychological harm.<sup>37</sup> Beyond this, whenever it is necessary in

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31. *Youngberg*, 457 U.S. at 321–23.

32. See *Jordan v. City of Phila*, 66 F. Supp. 2d. 638, 646 (E.D. Pa. 1999) (noting that the professional judgment standard of *Youngberg* is the “proper duty of care owed to a foster child”); *LaShawn A.*, 762 F. Supp. at 996 (holding that liability is based on whether competent professional judgment is exercised); *Braam*, 81 P.3d at 859–60 (holding that the appropriate standard of care for foster children is the professional judgment standard); *Kara B.*, 555 N.W.2d at 638 (stating that the duty of public officials to provide foster children with a safe and secure placement is based on a professional judgment standard). But see *Brendan P. Kearse, Abused Again: Competing Constitutional Standards for the State’s Duty To Protect Foster Children*, 29 COLUM. J.L. & SOC. PROBS. 385, 392 n.26 (1996) (describing the circuit split and noting decisions applying a “deliberate indifference” standard). See generally *id.* at 399–410 (critiquing the application of the “deliberate indifference” standard to the foster care context).

33. *Youngberg*, 457 U.S. at 317.

34. *Reno v. Flores*, 507 U.S. 292, 304–05 (1993).

35. *Youngberg*, 457 U.S. at 324.

36. *Id.*

37. See *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848–49 (7th Cir. 1990); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979) (noting that the constitutional protection of personal security “includes both physical and emotional well-being”); *Andrea L. ex rel. Judith B. v. Children & Youth Servs. of Lawrence Cnty.*, 987 F. Supp. 418, 423 (W.D. Pa. 1997) (noting that the right of foster children to be free from infliction of extreme psychological harm is “well-accepted”); *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996) (emotional harm in foster care); *LaShawn A.*, 762 F. Supp. at 992–93; *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1009–10 (N.D. Ill. 1989) (separation of foster children from siblings); *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) (emotional harm from multiple foster care placements); *Doe ex rel. Johanns v. N.Y.C. Dep’t of Soc. Servs.*, 670 F. Supp. 1145, 1175 (S.D.N.Y. 1987) (challenging a system of “overnight” foster care placements as resulting in emotional harm); *Braam*, 81 P.3d at 856–57; see also *Hudson v. McMillian*, 503 U.S. 1, 16–17 (1992) (Blackmun, J., concurring) (arguing that the Eighth

order to vindicate an identifiable interest in liberty, the state is required to take affirmative steps to provide the individual in its custody with nurturing, training, or education.

*Youngberg v. Romeo*<sup>38</sup> provides the doctrinal foundation. Nicholas Romeo, a profoundly retarded twenty-six-year-old man with the mental capacity of an eighteen-month-old child, was institutionalized after his father died and his mother could no longer take care of him.<sup>39</sup> Unable to speak, lacking basic self-care skills, and prone to violent tantrums, Nicholas was repeatedly injured “both by his own violence and by the reactions of other residents to him.”<sup>40</sup> For his own protection and the protection of others, Nicholas was routinely placed in restraints for prolonged periods of time.<sup>41</sup> His mother filed suit as his next friend, alleging that the conditions of Nicholas’s confinement violated his substantive due process rights under the Fourteenth Amendment.<sup>42</sup> Specifically, she alleged that Nicholas had constitutionally protected liberty interests in physical safety, freedom of movement, and appropriate training or “habilitation,” which the defendants had infringed.<sup>43</sup>

The Court began by noting that Nicholas’s commitment did not “deprive him of all substantive liberty interests under the Fourteenth Amendment.”<sup>44</sup> As the State conceded, Nicholas had a substantive due process right to “adequate food, shelter, clothing, and medical care.”<sup>45</sup> The question, then, was “whether liberty interests also exist in safety, freedom of movement, and training.”<sup>46</sup> Noting that both “the right to personal security” and the right to “freedom from bodily restraint” are core liberty interests that even incarcerated prisoners retain, the Court easily concluded that these two interests “also survive involuntary commitment.”<sup>47</sup> “If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.”<sup>48</sup>

The asserted right to training or habilitation required more careful analysis. If couched as a general “right to training *per se*,”

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Amendment provides protection against “psychological harm [even] without corresponding physical harm”; Babcock v. White, 102 F.3d 267, 273 (7th Cir. 1996) (noting that prisoners may maintain Eighth Amendment suits “grounded solely on claims of psychological injury” in some circumstances).

38. 457 U.S. 307 (1982).

39. *Id.* at 309.

40. *Id.* at 309–10.

41. *Id.* at 311.

42. *Id.* at 310.

43. *Id.* at 315.

44. *Id.*

45. *Id.*

46. *Id.*

47. See *id.* at 315–16.

48. *Id.*

calculated to enable those confined in state custody “to achieve [their] maximum potential” or “to cope as effectively as their capacities permit,” the claim would present difficulties.<sup>49</sup> “As a general matter, a state is under no constitutional duty to provide substantive services for those within its border.”<sup>50</sup> And while “a duty to provide certain services and care does exist” for those whom the state confines in institutions, “even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities. . . . Nor must a State ‘choose between attacking every aspect of a problem or not attacking the problem at all.’”<sup>51</sup>

But the claim asserted by Nicholas was more limited. The additional training and habilitation he sought—including training in self-care skills—was “needed to reduce his aggressive behavior,” and thus was related to his “constitutionally protected liberty interest in safety and freedom from restraint.”<sup>52</sup> Such training, the Court held, was constitutionally required.<sup>53</sup> Specifically, the Court concluded that Nicholas’s “liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraints.”<sup>54</sup> Because individual liberty interests are not absolute and must be balanced against relevant state interests,<sup>55</sup> the Court adopted a “professional judgment” standard as the measure of the state’s constitutional obligation to provide minimally adequate or reasonable training: “In determining what is ‘reasonable’ . . . courts must show deference to the judgment exercised by a qualified professional.”<sup>56</sup> In other words, “courts [must] make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.”<sup>57</sup> In the final analysis, then, the Court held that:

[T]he State is under a duty to provide [Nicholas] with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.<sup>58</sup>

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49. *See id.* at 318 & n.23.

50. *Id.* at 317.

51. *Id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970)).

52. *See id.* at 318.

53. *See id.* at 319.

54. *Id.*

55. *See id.* at 319–20.

56. *See id.* at 322–23.

57. *Id.* at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, C.J., concurring)) (internal quotation marks omitted).

58. *Id.* at 324.

Given “the kinds of treatment sought” by Nicholas in the case at bar, the Court stated that it “need go no further.”<sup>59</sup> Nevertheless, the Court offered specific guidance for claims made in other contexts:

A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy . . . may be stated as *that training which is reasonable in light of identifiable liberty interests and the circumstances of the case*. A federal court, of course, must identify a constitutional predicate for the imposition of any affirmative duty on a State.<sup>60</sup>

The import of this language is clear. The state’s affirmative duty to provide at least “minimally adequate or reasonable training” is measured by the “identifiable liberty interests” at stake.<sup>61</sup> For a profoundly retarded person like Nicholas—for whom “no amount of training will make possible his release”—the interests in safety and freedom from bodily restraint define the scope of the state’s obligation. But for those who, with appropriate nurturing and training, can achieve release from confinement, the state’s obligation is greater: it must provide nurturing and training calculated to achieve that release. More generally, whenever any individual liberty interest can be identified that requires nurturing or training in order to be vindicated, the state is constitutionally obligated to provide that nurturing or training for those individuals confined in state custody who can benefit by it.

To begin with a pedestrian example, some children enter foster care who, like Nicholas, “cannot talk and lack[] the most basic self-care skills.”<sup>63</sup> If they never learn to speak, to feed and dress themselves, to use the toilet, or otherwise to ensure their own well-being, they will be committed to state custody and institutionalized as a danger to themselves.<sup>64</sup> Such confinement infringes their identifiable liberty interest in freedom of movement.<sup>65</sup> To avoid that infringement, the state is constitutionally obligated to provide such children the nurturing and training they need in order to learn to take care of themselves.

Beyond the basics of self-care, children must develop certain

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59. *Id.* at 319.

60. *Id.* at 319 n.25 (emphasis added).

61. *Id.* at 319 & n.25.

62. *Id.* at 317.

63. *Id.* at 309.

64. See, e.g., FLA. STAT. § 393.11(8) (2009) (authorizing the involuntary commitment to a residential facility of developmentally disabled or autistic person who “lacks basic survival and self-care skills”).

65. See *Addington v. Texas*, 441 U.S. 418, 425 (1979) (“This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”).

psychological capacities in order to function in society as adults.<sup>66</sup> They must learn to regulate their emotions and behavior, or, like Nicholas, their out-of-control emotional outbursts will likely lead to injury from their own violence and others' reactions to them.<sup>67</sup> Similarly, they must develop social competence, or their inability to interact appropriately with others will likely lead to violent interactions or isolation so extreme that it interferes with basic self-care.<sup>68</sup> Without the capacities of self-regulation and social competence, these children will likely present a danger to themselves or others as adults, requiring institutionalization<sup>69</sup> that infringes their identifiable liberty interest in freedom of movement. To avoid that infringement, the state is constitutionally obligated to provide children in foster care the nurturing and training they need to develop the capacities of self-regulation and social competence.

Apart from the interests in safety, freedom from bodily restraint, and freedom of movement, individuals possess an identifiable liberty interest in "an autonomy of self that includes freedom of thought, belief, [and] expression."<sup>70</sup> As the Court affirmed in *Roberts v. United States Jaycees*, "the ability independently to define one's identity . . . is central to any concept of liberty."<sup>71</sup> Like the self-care skills and psychological capacities discussed above, this ability does not materialize on its own, but requires an appropriate nurturing relationship with a caregiver in order to develop.<sup>72</sup> Accordingly, the state is constitutionally required to structure its foster care and adoption practices so as to provide such a relationship for the children in its care.

In sum, while "adequate food, shelter, clothing and medical care" are "the essentials of the care that the State must provide"<sup>73</sup> to children in its custody, these essentials do not exhaust the state's responsibilities. In addition, the state "has the unquestioned duty to provide reasonable safety" for these children.<sup>74</sup> Beyond this, the state must provide the training and nurturing necessary to develop self-care skills, the psychological capacities of self-regulation and social competence, and the "autonomy of self"<sup>75</sup> that is "central to

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66. See *infra* Part II.

67. See *infra* notes 106–17 and accompanying text.

68. See *infra* notes 106–17 and accompanying text.

69. See, e.g., § 393.11(8) (authorizing the involuntary commitment of a developmentally disabled or autistic person who "lacks basic survival and self-care skills" or "[i]s likely to physically injure others"); *id.* § 394.467(1) (establishing similar criteria for the involuntary commitment of a mentally ill person to a psychiatric facility for treatment).

70. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

71. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (emphasis added).

72. See generally *infra* Part II.

73. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

74. *Id.*

75. *Lawrence*, 539 U.S. at 562.

any concept of liberty.”<sup>76</sup>

*B. Squaring the Implications of Youngberg with Existing Case Law on the Constitutional Claims of Children in State Custody*

The central claim asserted here—that children in state custody have a substantive liberty interest in a secure and stable family relationship, because such a relationship is essential in order for these children to attain the capacities needed to function as autonomous adults—has not been addressed by the courts.<sup>77</sup> However, a number of related claims have been considered.

Closest to the mark are cases like *Braam ex rel. Braam v. State*<sup>78</sup> and *LaShawn A. v. Dixon*,<sup>79</sup> which, relying on the state’s affirmative constitutional duties under *Youngberg*, sustained class action claims of children in foster care who alleged that repeated disruption of their placements violated their substantive due process right to be free from state-imposed harm.<sup>80</sup> While their precise rationales have differed, courts have consistently concluded that *Youngberg* requires the state to protect foster children in its custody not only from physical harm, but also from serious psychological harm,<sup>81</sup> including specifically the psychological and emotional harms that repeated disruption of attachment relationships causes.<sup>82</sup> In *Reno v. Flores*, the Supreme Court made clear that this constitutional obligation does not require the state to act solely out of concern for the best interests of the child: “Minimum standards must be met, and the child’s fundamental rights must not be impaired; but the decision to go beyond those requirements . . . is a policy judgment rather than a constitutional imperative.”<sup>83</sup> Thus, the Court held, where their institutional custodial placements meet minimal constitutional standards, children awaiting deportation have no right to be released to the temporary custody of a non-relative caregiver.<sup>84</sup> Notably, however, the Court suggested that if an appropriate permanent guardian or adoptive parent were willing

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76. *Roberts*, 468 U.S. at 619.

77. The claim was asserted in *Florida Department of Children & Families v. X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010), but was not reached by the court in its disposition of the case. See *id.* at 91.

78. 81 P.3d 851 (Wash. 2003).

79. 762 F. Supp. 959 (D.D.C. 1991), aff’d sub nom. *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993).

80. See also *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) (emotional harm from multiple foster care placements); *Doe ex rel. Johanns v. N.Y.C. Dep’t of Soc. Servs.*, 670 F. Supp. 1145, 1175 (S.D.N.Y. 1987) (challenging a system of “overnight” foster care placements).

81. See *supra* note 38 and accompanying text.

82. See, e.g., *LaShawn A.*, 762 F. Supp. at 992–93; *B.H.*, 715 F. Supp. at 1394–95; *Doe ex rel. Johanns*, 670 F. Supp. at 1175–77; *Braam*, 81 P.3d at 857. For a discussion of those harms, see *infra* Part II.D.

83. *Reno v. Flores*, 507 U.S. 292, 304–05 (1993).

84. *Id.* at 304.

and able to take custody, continued institutional confinement would violate the child's liberty interests.<sup>85</sup>

As these cases confirm, laws that unreasonably prevent a parentless child from attaining a permanent family relationship implicate constitutional concerns, both by prolonging the child's confinement in state custody,<sup>86</sup> and by exposing the child to serious harm from the repeated detachments that typify foster care throughout the United States.<sup>87</sup> But the analysis in these cases is incomplete because it overlooks the essential role a permanent attachment relationship plays in the formation of personal identity and the realization of meaningful autonomy. By focusing attention on that role, the argument we present here supplements the analysis in these cases and reveals an additional basis on which to conclude that laws interfering with the attainment of a permanent family relationship implicate the parentless child's constitutionally protected interest in liberty.

Other cases focus not on the state's affirmative duties under *Youngberg*, but on the constitutional protection afforded to family relationships under the line of cases extending back to *Meyer v. Nebraska*<sup>88</sup> and *Pierce v. Society of Sisters*.<sup>89</sup> For example, in *Smith v. Organization of Foster Families for Equality & Reform*, foster parents relied on the importance of parent-child attachments to press a claim for procedural due process protections before a foster child could be removed from the home, arguing that foster families have the same right to "the integrity of their family unit" as biological families do.<sup>90</sup> The foster children did not join in that claim, but in fact opposed it, arguing that New York's existing

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85. *Id.* at 303 (emphasizing that the persons offering to take custody in this case were "unwilling to become the child's legal guardian but [only] willing to undertake temporary legal custody"); *id.* at 304 (stating carefully that the Constitution does not require "nonadoptive" private custody to be substituted for institutional care).

86. The "nature and duration" of a person's confinement in state custody must bear a reasonable relationship to the purpose of that confinement. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Because this principle extends to the context of foster care, "[u]nnecessarily prolonged confinement in government foster care invokes the substantive due process liberty interests of foster children." E.C. *ex rel.* Katz v. Sherman, No. 05-726-CV-W-SOW, 2006 WL 1307641, at \*37 (W.D. Mo. May 9, 2006); *see also* Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 676 (S.D.N.Y. 1996) (finding that foster children stated a substantive due process claim as to the duration of their placement in foster care); G.S. v. T.B., 985 So. 2d 978, 984 (Fla. 2008) (noting governmental intrusion into family relationships in the context of foster care and legal guardianship, as distinguished from the freedom from intrusion available in the context of adoption).

87. *See infra* notes 241–46 and accompanying text.

88. 262 U.S. 390 (1923).

89. 268 U.S. 510 (1925).

90. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842 (1977).

procedures for removal of foster children appropriately served their best interests.<sup>91</sup> The Court discussed at length the foster parents' claimed liberty interest in the integrity of their families, but ultimately concluded that the existence of that interest did not need to be resolved: "even on the assumption" that foster parents had a constitutionally protected liberty interest, New York's procedures were constitutionally adequate.<sup>92</sup>

Likewise, *Lofton* involved a claim by foster parents and children to a constitutional right of "family integrity" protecting the foster family relationships from disruption.<sup>93</sup> The court rejected that claim, concluding that state law gave foster parents no justifiable expectation that their family relationships would be protected from disruption.<sup>94</sup> Because the foster parents had no right to adopt, the court assumed that the children had no right to be adopted.<sup>95</sup>

In contrast to the claims made in *Smith* and *Lofton*, our argument here is not that foster families have a constitutional right to "the integrity of their family unit."<sup>96</sup> We assert a right of children not to constitutional protection of their temporary foster care arrangements, but to constitutional protection of their interest in a permanent family.

Other court decisions addressing a child's claimed right to maintain important family attachments have arisen in contexts where the child's claim stands in tension with the rights of a custodial parent. In *Troxel v. Granville*, grandparents sued under a state statute that allowed a court to order visitation based simply on a "best interest of the child" standard.<sup>97</sup> Though the mother had not completely severed the child's ties with the grandparents, the court below ordered additional visitation, giving no weight or deference to the mother's decision.<sup>98</sup> A plurality of the Court held that the statute as applied violated the mother's substantive liberty interest in directing the upbringing of her child: "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."<sup>99</sup>

*Michael H. v. Gerald D.* also involved a relative's effort to

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91. *Id.* at 839.

92. *Id.* at 847.

93. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 809–15 (11th Cir. 2004).

94. *Id.* at 814.

95. *Id.* at 811–12. As noted above and discussed more fully below, the court was wrong to make this assumption. *See supra* note 9; *infra* notes 268–77 and accompanying text.

96. *Smith*, 431 U.S. at 842.

97. *Troxel v. Granville*, 530 U.S. 57, 61 (2000) (plurality opinion) (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

98. *Id.* at 71–72.

99. *Id.* at 72–73.

preserve a relationship with a child over the objections of the child's custodial parent.<sup>100</sup> In *Michael H.*, a woman married to one man had a child fathered by another, whom she and her daughter lived with for a time before she reconciled with her husband.<sup>101</sup> The biological father sued to establish paternity and gain rights of visitation, but was precluded by a California statute that conclusively presumed the husband to be the father of a child born in wedlock.<sup>102</sup> The Court upheld the statute over the substantive due process claims of the biological father and the daughter, who also sought to preserve the relationship.<sup>103</sup> Five of the justices recognized the father's substantive due process claim, but Justice Stevens joined the plurality in upholding the statute, reasoning that the statutory scheme gave the father an opportunity to obtain visitation rights by establishing that visitation would be in his daughter's best interests.<sup>104</sup>

As discussed more fully in Part V, *Troxel* and *Michael H.* are grounded in appropriate concern for the right of a custodial parent to direct the upbringing of her children—a concern that is completely absent when parental rights have been terminated and the child is in the custody of the state. These cases, therefore, pose no obstacle to recognition of a parentless child's fundamental right to a permanent family relationship.<sup>105</sup>

## II. THE ROLE OF ATTACHMENT IN THE DEVELOPMENT OF THE PERSON

In order to grow into a self-sufficient, autonomous individual, capable of at least minimal functioning in society, each of us must develop a number of capabilities by the time we reach adulthood. Those capabilities cluster into three domains: self-regulation, social competence, and the ability to learn.<sup>106</sup> These domains are not independent, but rather operate together to support success in all of

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100. *Michael H. v. Gerald D.*, 491 U.S. 110, 113–16 (1989) (plurality opinion).

101. *Id.* at 113–15.

102. *Id.* at 115–16.

103. *Id.* at 128–31; *id.* at 136 (Stevens, J., concurring).

104. *Id.* at 136.

105. Indeed, close analysis of the *Troxel* opinions suggests that the case affirmatively supports constitutional recognition of children's interests in maintaining family relationships. See Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & FAM. STUD. 71, 100–11 (2006); Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L.Q. 105, 112–14 (2002).

106. For a thorough explanation of the concepts discussed in this paragraph, see NAT'L RESEARCH COUNCIL & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 89–217 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000) [hereinafter NEURONS TO NEIGHBORHOODS].

the tasks of human functioning.<sup>107</sup> Within the domain of self-regulation, the child must master the regulation of emotion, behavior, and attention.<sup>108</sup> Each of these serves as the foundation for more advanced functioning that comes with the increasing demands of childhood, eventually yielding self-control, self-awareness, and independent functioning, the hallmarks of the autonomous individual.<sup>109</sup> Additionally, every child must develop social competence, which includes the ability to communicate with others and the ability to form relationships.<sup>110</sup> These skills are essential to existing in the inherently social environment of human societies. Finally, each child must be able to learn.<sup>111</sup> In this context, learning includes not only acquiring new information and solving problems, but also developing the ability to adapt to changing environmental input and demands. The interdependence of these three domains is easy to see. For example, the ability to learn is clearly necessary for developing self-regulation and social competence, and the abilities to regulate attention and to communicate are essential to learning and adaptability.

More than six decades of research confirms that attachment relationships in childhood are necessary for the development of these capabilities.<sup>112</sup> Starting in the late 1930s, numerous child care professionals in the United States and in Europe noted a disturbing trend of children, many of whom had been raised in institutions, who appeared to have no concern or feeling for anyone but themselves.<sup>113</sup> Many were withdrawn and isolated, while others were overactive and abusive toward peers.<sup>114</sup> By the time they were teenagers, they had histories of criminality and violence.<sup>115</sup> At about the same time, John Bowlby reported that children who had been separated from their parents during World War II were depressed or otherwise emotionally disturbed, and mentally immature. The

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107. *Id.* at 121.

108. *Id.*

109. Ross A. Thompson & Rebecca Goodvin, *The Individual Child: Temperament, Emotion, Self, and Personality*, in DEVELOPMENTAL SCIENCE 427, 427–61 (Marc H. Bornstein & Michael E. Lamb eds., 6th ed. 2010).

110. See NEURONS TO NEIGHBORHOODS, *supra* note 106, at 163.

111. *See id.* at 125.

112. See, e.g., Lisa J. Berlin & Jude Cassidy, *Relations Among Relationships: Contributions from Attachment Theory and Research*, in HANDBOOK OF ATTACHMENT 688, 688–712 (Jude Cassidy & Phillip R. Shaver eds., 1999); Michael E. Lamb & Charlie Lewis, *The Role of Parent-Child Relationships in Child Development*, in DEVELOPMENTAL SCIENCE, *supra* note 109, at 469–517; Thompson & Goodvin, *supra* note 109, at 414; Dwyer, *The Child Protection Pretense*, *supra* note 19, at 415–35; Douglas F. Goldsmith et al., *Separation and Reunification: Using Attachment Theory and Research To Inform Decisions Affecting the Placements of Children in Foster Care*, JUV. & FAM. CT. J., Spring 2004, at 1.

113. JOHN BOWLBY, CHILD CARE AND THE GROWTH OF LOVE 33–34 (1953).

114. *Id.*

115. *Id.*

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orphaned children tended not to develop normal emotional connections to others, a characteristic shared by the institutionalized children.<sup>116</sup> Bowlby's research with these groups captured the children's extreme reactions to disruptions of their attachment relationships, including fearful expressions, angry protests, desperate searching behaviors, sadness, despair, and over time, detachment, subdued physical activity, and subdued emotional expressiveness.<sup>117</sup>

On the basis of these observations, René Spitz conducted the now classic studies exploring how the lack of adequate caregiving affects development.<sup>118</sup> His research documented that in spite of receiving good physical care, children who received little or no emotional and social interaction with a regular caregiver were generally sickly, and both physically and cognitively retarded.<sup>119</sup> Research in this area blossomed and spread from observational studies of children to experimental work with monkeys. Harry Harlow conducted the famous rhesus monkey studies, in which he reared infant monkeys in isolation from birth, comparing their development to that of monkeys raised normally by their mothers.<sup>120</sup> The isolated monkeys showed severe behavioral disturbances when finally placed with other monkeys, such as compulsive self-biting, rocking, and aggression.<sup>121</sup> To examine the psychoanalytic claim that infant attachments were based on the provision of food by the mother, Harlow conducted further research in which he removed infant monkeys from their mothers and placed them with one of two surrogates.<sup>122</sup> The "wire cage mother" was made only of wire, but delivered food and water. The "terrycloth mother" was covered with soft material that might offer comfort but delivered no food. The infant monkeys with "terrycloth mothers" spent significantly more time clinging to and close to the surrogates than did infants with "wire cage mothers."<sup>123</sup> These infants would take sustenance and then move away from the surrogates.<sup>124</sup> This research demonstrated that contact comfort was more important to the infant monkeys'

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116. See *id.* at 36–38.

117. Roger Kobak, *The Emotional Dynamics of Disruptions in Attachment Relationships*, in HANDBOOK OF ATTACHMENT, *supra* note 112, at 21–43.

118. Robert N. Emde, *Individual Meaning and Increasing Complexity: Contributions of Sigmund Freud and René Spitz to Developmental Psychology*, in A CENTURY OF DEVELOPMENTAL PSYCHOLOGY 203, 218 (Ross D. Parke et al. eds., 1994). To view examples of this work, see Videotape: Psychogenic Disease in Infancy (René A. Spitz 1952), available at <http://www.archive.org/details/PsychogenicD?start=659.5>.

119. Emde, *supra* note 118, at 218.

120. ROBERT SIEGLER ET AL., HOW CHILDREN DEVELOP 415–16 (2d ed. 2006).

121. *Id.*

122. Harry Harlow, *The Nature of Love*, 13 AM. PSYCHOLOGIST 673, 674–76.

123. Harlow, *supra* note 122, at 676–77.

124. *Id.* at 676.

attachment than was receiving life-sustaining food and water.<sup>125</sup>

Attachment theory and its corresponding field of research grew out of this early work, leading ultimately to a vast body of scientific research documenting the critical importance of at least one warm, sensitive, continuous relationship with a caregiver to children's successful development.<sup>126</sup> This child development research overwhelmingly shows that children form strong bonds of attachment to their parents early in life, which strengthen and develop as children grow older.<sup>127</sup> These attachment relationships do not depend on biological connection, but form with any adult who "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs, as well as the child's physical needs."<sup>128</sup> Attachment relationships "shape the development of self-awareness, social competence, conscience, emotional growth and emotion regulation, learning and cognitive growth."<sup>129</sup> They "engage children in the human community in ways that help them define who they are, what they can become, and how and why they are important to other people."<sup>130</sup> In short, children need the attachments that form in a secure and stable family relationship in order to develop into autonomous, socially responsible, psychologically well-adjusted adults.<sup>131</sup> Indeed, courts have long recognized that "children require secure, stable, long-term, continuous relationships with their parents or foster parents."<sup>132</sup>

#### A. *The Formation of Attachments in Infancy*

Developmental scientists define an attachment relationship as a specific, enduring emotional bond between two individuals.<sup>133</sup> Infants and young children become attached to the individuals who establish with them a pattern of consistent, predictable responses to their signals and needs.<sup>134</sup> Attachment relationships appear to be

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125. *Id.*

126. See generally HANDBOOK OF ATTACHMENT, *supra* note 112; ROBIN L. HARWOOD ET AL., CULTURE AND ATTACHMENT: PERCEPTIONS OF THE CHILD IN CONTEXT (1995).

127. See, e.g., 1 JOHN BOWLBY, ATTACHMENT AND LOSS 260, 350 (2d ed. 1982).

128. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (2d ed. 1979).

129. NEURONS TO NEIGHBORHOODS, *supra* note 106, at 265.

130. Nat'l Scientific Council on the Developing Child, *Young Children Develop in an Environment of Relationships* 1 (Harvard Univ. Ctr. on the Developing Child, Working Paper No. 1, 2004).

131. Goldsmith et al., *supra* note 112, at 1–2.

132. Lehman *ex rel.* Lehman v. Lycoming Cnty. Children's Servs. Agency, 458 U.S. 502, 513 (1982).

133. See generally Jude Cassidy, *The Nature of the Child's Ties*, in HANDBOOK OF ATTACHMENT, *supra* note 112, at 3, 11–14; Lamb & Lewis, *supra* note 112, at 469–80.

134. Lamb & Lewis, *supra* note 112, at 475–76.

biologically based and to have evolved to provide protection for the virtually helpless young human.<sup>135</sup> The infant "appears to be so strongly motivated and prepared to develop attachments . . . that, given the opportunity to interact regularly with even a modestly responsive caregiver, he . . . will develop an emotional tie to that person."<sup>136</sup>

Although the infant is predisposed to form attachment relationships, the relationship is shaped by the environment of caregiving.<sup>137</sup> Healthy or secure attachments<sup>138</sup> between children

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135. See NEURONS TO NEIGHBORHOODS, *supra* note 106, at 230.

136. *Id.*

137. JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT 166 (1969); Cassidy, *supra* note 133, at 6. See generally Joan B. Kelly & Michael E. Lamb, *Using Child Development Research To Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297 (2000).

138. Attachment theory classifies an individual's attachment status according to four categories: *secure*; *insecure/avoidant*; *insecure/resistant*; and *disorganized*. BARBARA M. NEWMAN & PHILLIP R. NEWMAN, DEVELOPMENT THROUGH LIFE: A PSYCHOSOCIAL APPROACH 153 (9th ed. 2006); Nancy S. Weinfield et al., *The Nature of Individual Differences in Infant-Caregiver Attachment*, in HANDBOOK OF ATTACHMENT, *supra* note 112, at 68, 68–69. The pattern of interactions between the child and caregiver reveals the underlying character of the attachment. The four attachment classifications describe the child's perception of the availability of the caregiver in times of need and the organization of the child's responses to the caregiver given those perceptions of availability. See NEWMAN & NEWMAN, *supra*, at 153.

Secure attachments are those in which the child is able to rely on the caregiver as an available source of comfort, but is also comfortable to explore the world away from the caregiver and develop mastery of the environment; the child's confidence in the sensitivity and responsiveness of the caregiver engenders confidence in his own interaction with the world. See Weinfield et al., *supra*.

Children with insecure/avoidant and insecure/resistant attachments have not experienced consistent availability, responsiveness, and sensitivity to needs from caregivers. Caregivers of children with insecure/avoidant attachments seem to reject their children, spending less time holding, soothing, and interacting with them. The children's attempts to interact may be met with indifference or rebuke. In times of stress, children with insecure/avoidant attachments tend to avoid the caregiver and often fail to seek comfort or assistance. These children are also less likely to actively engage the surrounding environment. See NEWMAN & NEWMAN, *supra*.

Children with insecure/resistant attachments to caregivers alternate between clinging to the caregiver for comfort and pulling away from the caregiver in anger. Caregivers of insecure/resistant children tend to be inconsistent in their responsiveness to the child, sometimes ignoring clear signals of need and other times intruding upon the child to make contact, appearing to interact with the child based solely on their own needs rather than in balance with the needs of the child. *Id.* Because children with both insecure/avoidant and insecure/resistant attachments are not able to explore their environments without worry, they cannot achieve the same self-confidence and mastery of the environment as securely attached individuals. Weinfield et al., *supra*, at 69–70.

The fourth category of attachment status, disorganized attachments, is that in which the child has no consistent way of coping with stress. The child's

and their caregivers are formed when the care received is sensitive, warm, and responsive.<sup>139</sup> Through regular interaction with her caregivers during the first months, the infant learns three key principles that serve as the foundation of the attachment relationship.<sup>140</sup> First, the infant learns that in social interactions, partners take turns acting and reacting to each other.<sup>141</sup> The child comes to understand this concept of reciprocity through the give and take experienced as the caregiver engages the infant in smiles, talking, and other various interactions during routine care.<sup>142</sup> For example, in response to the caregiver's overtures, the infant gurgles, smiles, or waves an arm, leading the caregiver to react with additional communication efforts.<sup>143</sup>

Second, the infant learns that her behavior can affect the behavior of others in consistent and predictable ways.<sup>144</sup> Time after time, crying brings the caregiver to her side and leads to satiated hunger. Babbling results in smiles and talking from the caregiver. This initial understanding of agency leads to the third principle, trust.<sup>145</sup> Through repeated interactions, the infant learns that the caregiver "can be counted on to respond when signaled."<sup>146</sup> The child comes to expect certain patterns of response from the caregiver, and each response reinforces the expectation.<sup>147</sup> This knowledge leads to

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behavior is contradictory and often unpredictable, seeming to convey feelings of extreme fear or utter confusion in relation to the caregiver. Caregivers of children with disorganized attachments tend to be either negative and hostile toward their children or passive, seeming to be afraid of their children, or untrusting in their own ability to care for them. See NEWMAN & NEWMAN, *supra*, at 153–54. Children with disorganized attachments are also less likely to explore and master the world around them. See Jay Belsky et al., *Instability of Infant-Parent Attachment Security*, 32 DEVELOPMENTAL PSYCHOL. 921, 921–24 (1996).

139. The relationship between the development of healthy attachments and parental care that is more affectionate, more effective in soothing the child, less intrusive, and more sensitive to the child's needs has been established in numerous cultural groups and across numerous studies. See, e.g., MARY D. SALTER AINSWORTH ET AL., PATTERNS OF ATTACHMENT 137–53 (1978); Marianne S. De Wolff & Marinus H. van IJzendoorn, *Sensitivity and Attachment: A Meta-Analysis on Parental Antecedents of Infant Attachment*, 68 CHILD DEV. 571 (1997); Byron Egeland & Ellen A. Farber, *Infant-Mother Attachment: Factors Related to Its Development and Changes over Time*, 55 CHILD DEV. 753 (1984); German Posada et al., *Through Columbian Lenses: Ethnographic and Conventional Analysis of Maternal Care and Their Associations with Secure Base Behavior*, 40 DEVELOPMENTAL PSYCHOL. 508 (2004).

140. Lamb & Lewis, *supra* note 112, at 473.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

a fundamental trust on which the attachment relationship is built.<sup>148</sup> The rhythm of interaction established as the infant learns reciprocity, agency, and trust is an important component of the attachment relationship, creating consistency in the child's environment over time and contributing a source of familiarity and comfort that continues even when the interactions between child and caregiver evolve with the child's development.<sup>149</sup> This rhythm of interaction remains important throughout the child's life.<sup>150</sup>

Although the interaction style in the attachment relationship may remain consistent, attachment behaviors differ across the various stages of development. Attachment in infancy looks different than attachment in elementary school. One way to measure the health or security of attachment relationships at any developmental stage is to evaluate the degree of trust a child develops in the reliability of specific people.<sup>151</sup> This view of attachment is particularly appropriate as the child moves past the early years of total dependence on others and into the more independent developmental phases of the preschool years and beyond. In healthy attachment relationships, the caregiver's response consistently meets the child's needs.<sup>152</sup> Over time, this continuous and predictable responsiveness, behavior modeling, and nurturing enable the child to thrive across all domains of development and provide the basis for the child's understanding of human interaction.<sup>153</sup> Even when the caregiver input is less optimal, contributing to less healthy attachment relationships, the child learns a basic template of how relationships work.<sup>154</sup> In such situations, the child may learn that the caregiver is predictably unavailable, or even predictably unpredictable.<sup>155</sup> Still, these relationships form the child's basis for understanding human relationships and what it is to be a person.

#### B. *The Role of Attachments in the Emergence of the Self*

The developing attachment relationship spurs the creation of neurological pathways in the child's brain that lead to psychological advances, including the emergence of a sense of self.<sup>156</sup> Every experience causes an electrochemical reaction in the brain.<sup>157</sup> These

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148. *Id.*

149. *See id.* at 472–73.

150. *See infra* notes 178–84 and accompanying text.

151. Lamb & Lewis, *supra* note 112, at 473.

152. *Id.*

153. *See NEURONS TO NEIGHBORHOODS*, *supra* note 106, at 236.

154. *See id.* at 241.

155. *See supra* note 138 and accompanying text (describing different categories of attachment relationships).

156. *See Thompson & Goody, supra* note 109, at 427, 447–52.

157. *See Geraldine Dawson et al., The Role of Early Experience in Shaping Behavioral and Brain Development and Its Implications for Social Policy*, 12

reactions stimulate the neurons involved, leading to neuronal growth and strengthening.<sup>158</sup> Thus, through experience, connections between neurons in the brain are formed. Repeated experiences lead to pathways that are strengthened with each occurrence.<sup>159</sup> These pathways join together to form networks of neuronal connections, creating the hardwiring of brain functioning. Attachment relationships are *the* major environmental factor—the “active ingredient” in the environment—that shapes the development of the child’s brain during its period of maximal growth.<sup>160</sup> When a caregiver provides a pattern of consistent, predictable responses to the child’s signals and needs, forming an attachment relationship, the repeated experiences generate robust neuronal connections in the developing child’s brain. In short, healthy “development of a child’s brain architecture depends upon the establishment of [attachment] relationships.”<sup>161</sup>

As the baby gains more experience and builds understanding of reciprocity, agency, and trust, the child’s expectations solidify into a model that can be used to predict the behavior of others and to understand new experiences. These models are talked about in behavioral science as internal working models.<sup>162</sup>

An internal working model serves two functions. As described above, the model lets the child know what to expect from her attachment figures.<sup>163</sup> Additionally, the internal working model shapes the child’s understanding of and feelings about herself.<sup>164</sup> At the same time that the child develops expectations about behaviors and responses from the caregiver, she develops expectations about her own behaviors and preferences.<sup>165</sup> So for example, the toddler who tries kicking a soccer ball receives praise from the caregiver for

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DEV. & PSYCHOPATHOLOGY 695, 697 (2000) (explaining the role of chemical reactions in the brain, how memories are formed, and how neuronal growth reinforces those developments).

158. *Id.*

159. *Id.* at 697–98.

160. NAT’L SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 6 (2007), available at [http://developingchild.harvard.edu/index.php/download\\_file/-/view/67/](http://developingchild.harvard.edu/index.php/download_file/-/view/67/).

161. Nat’l Scientific Council on the Developing Child, *supra* note 130, at 1.

162. Internal working models are the child’s mental representations of the relationship between the child and the caregiver, based on shared experiences. The model governs the ongoing attachment relationship, in that the child interprets and predicts the caregiver’s behavior, thoughts, and feelings based on his or her established patterns of interaction. This consideration of the caregiver’s behavior, then, serves to support and regulate the child’s own behavior. Internal working models are continuously under revision as new experiences with the caregiver are added to the model. Inge Bretherton & Kristine A. Munholland, *Internal Working Models in Attachment Relationships*, in HANDBOOK OF ATTACHMENT, *supra* note 112, at 89, 90–91.

163. See Thompson & Goodvin, *supra* note 109, at 414.

164. *Id.*

165. *Id.* at 414–15.

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the effort, leading the child to repeat the behavior. Ongoing feedback from the caregiver providing praise, advice, and even participation as the caregiver kicks the ball back to the toddler leads the child to seek to play with the soccer ball. The caregiver may begin to talk about the child's love for soccer with the child and others in the child's environment, labeling the child as a "soccer player." Over time, the child comes to think of himself as a soccer player and as someone who loves soccer.

In addition, many of the child's abilities are mastered within early social relationships, structured and supported by the caregiver. With experience, these abilities emerge as capacities of the child.<sup>166</sup> For example, a two-year-old may grab her toy cat from her older brother while slapping him in frustration. The father takes her hand and explains the rules about sharing, hitting, and asking for the things that she wants. The next time she tries to claim a valuable item from her brother, the father reminds her of the rules and helps her to ask for the toy rather than grabbing it. Each time a similar scenario occurs, the father helps her to remember the rules and to comply, over time allowing and expecting the child to be better able to independently remember and to act on the rules. Eventually the child responds to her brother's snatching of her toy by inhibiting the urge to take it back and instead asking for its return. The child has now developed the ability to regulate her own behavior in social interactions, an essential skill for mastering social competence. The child is also able to generalize this response pattern to other situations with other people. This new capacity is added to the child's internal working model, elaborating her understanding of herself and how relationships function.<sup>167</sup>

Accordingly, there is first an organized relationship with the caregiver; this organization, then, serves as the foundation for the organization of the self.<sup>168</sup> In this way, ongoing feedback from the caregiving environment further refines the child's understanding of how others see her, expectations held by others regarding her behavior, and her own expectations, abilities, and feelings.<sup>169</sup>

The parent-infant attachment thus provides "a crucial foundation for the growth of healthy self-regard, because of its influence on the young child's developing self-representations."<sup>170</sup> Through such a relationship, parental values, expectations, and beliefs are transmitted in ongoing feedback about behavior, and this

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166. L.S. VYGOTSKY, MIND IN SOCIETY 70–72 (Michael Cole et al. eds., 1981); see also NEURONS TO NEIGHBORHOODS, *supra* note 106, at 113 (discussing this process in the context of children's development of emotional self-regulation).

167. Bretherton & Munholland, *supra* note 162, at 89.

168. See generally Louis W. Sander, *Infant and Caretaking Environment*, in EXPLORATIONS IN CHILD PSYCHIATRY 129 (E. James Anthony ed., 1975).

169. Thompson & Goodvin, *supra* note 109, at 450.

170. *Id.*

feedback strongly influences children's self-representations.<sup>171</sup> Over time, these patterns of beliefs, attitudes, expectations, and behaviors emerge as the child's own personality.<sup>172</sup> Although this process occurs during the preschool years, the person the child is to be continues to develop, adding to the complexity and organization of the internal working models of self and other throughout childhood.<sup>173</sup> The emergence of autonomy in late adolescence is associated with the child's attachment relationships.<sup>174</sup> Just as attachments in infancy provide the child with a secure base from which to explore the environment with the knowledge that the caregiver will be available to help and comfort when needed, healthy attachment relationships in adolescence support continued closeness while encouraging the expression of differences.<sup>175</sup> Caregivers facilitate identity exploration through an open exchange of ideas and an appropriate level of challenge.<sup>176</sup> "Attachment experiences" are thus "vital in the formation of the person."<sup>177</sup>

### C. The Ongoing Importance of Attachments to the Child's Development of Self-Regulation, Social Competence, and Ability To Learn

It is not just the character of the early attachment relationship that shapes later development; the ongoing nature of the parent-child relationship is fundamental to adult outcomes. Research now indicates that children vary significantly in whether early attachments have an enduring impact on their development, and it is the continuity of caregiving and interaction style between parent and child in the attachment relationship that shapes later developmental outcomes.<sup>178</sup> For example, a secure attachment in infancy does not predict more positive social functioning when the mother's interaction style has changed from warm and supportive to insensitive and intrusive.<sup>179</sup> However, when parents interact

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171. *Id.* at 451–52.

172. See L. ALAN SROUFE ET AL., THE DEVELOPMENT OF THE PERSON: THE MINNESOTA STUDY OF RISK AND ADAPTATION FROM BIRTH TO ADULTHOOD 25–27 (2005).

173. See Robert S. Marvin & Preston A. Britner, *Normative Development: The Ontogeny of Attachment*, in HANDBOOK OF ATTACHMENT, *supra* note 112, at 44, 62–63.

174. See Ross A. Thompson, *The Legacy of Early Attachments*, 71 CHILD DEV. 145, 146 (2000).

175. *Id.* at 148–50.

176. Karen M. Best et al., *Predicting Young Adult Competencies: Adolescent Era Parent and Individual Influences*, 12 J. ADOLESCENT RES. 90, 107–09 (1997).

177. L. Alan Sroufe, *Attachment and Development: A Prospective, Longitudinal Study from Birth to Adulthood*, 7 ATTACHMENT & HUM. DEV. 349, 365 (2005).

178. See Thompson, *supra* note 174, at 145–51.

179. See generally Martha Farrell Erikson et al., *The Relationship Between*

sensitively and warmly with their children not just in infancy but also throughout childhood, the children are likely to develop favorably.<sup>180</sup>

Attachment relationships serve the primary function of organizing behavior during the child's infancy.<sup>181</sup> As the child develops and the environmental demands on the child change, the functions of the attachment relationship change as well. For the toddler who is faced with the tasks of learning to seek goals and handle new-found abilities such as expressing feelings and desires, interaction with attachment figures provides assistance in managing the tension that arises between these skills and safety and social demands.<sup>182</sup> A responsive mother helps the frustrated toddler to manage the emotions that might lead to a tantrum, and to instead persist in working toward the goal, channeling the emotion and energy into a strategy to succeed. Thus, the attachment relationship provides the toddler with the safe space needed to develop emotion regulation.<sup>183</sup> "Attachment to a primary caregiver is essential to the development of emotional security and social conscience."<sup>184</sup>

During the preschool years, the child's major developmental tasks include growing her curiosity, self-direction, and self-management, as well as building her self-confidence and social skills.<sup>185</sup> Research shows that children's attachment relationships contribute to their success in meeting these benchmarks.<sup>186</sup> Attachment relationships affect children's ability to interact with unfamiliar people,<sup>187</sup> their memory processes,<sup>188</sup> their understanding of emotion,<sup>189</sup> their understanding of friendship,<sup>190</sup> their conscience

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*Quality of Attachment and Behavior Problems in Preschool in a High-Risk Sample*, 50 MONOGRAPHS SOC'Y FOR RES. CHILD DEV., Nos. 1–2, 1985, at 147; Douglas M. Teti et al., *And Baby Makes Four: Predictors of Attachment Security Among Preschool-Age Firstborns During the Transition to Siblinghood*, 67 CHILD DEV. 579 (1996).

180. LAURA E. BERK, INFANTS AND CHILDREN 277 (5th ed. 2005).

181. See SROUFE ET AL., *supra* note 172, at 87–88 (discussing the caregiver's interaction with infants as a behavioral organizational system).

182. See NEURONS TO NEIGHBORHOODS, *supra* note 106, at 229–30.

183. See SROUFE ET AL., *supra* note 172, at 106–07.

184. Comm. on Early Childhood, Adoption, and Dependent Care, Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1146 (2000) [hereinafter *Young Children in Foster Care*].

185. These tasks are directly related to the self-regulation and social competence essential for autonomous functioning in society.

186. See generally Marvin & Britner, *supra* note 173, at 55–62 (discussing the development of attachment during the toddler and preschool years).

187. See Ross A. Thompson, *Empathy and Its Origins in Early Development*, in INTERSUBJECTIVE COMMUNICATION AND EMOTION IN EARLY ONTOGENY 144, 144–45 (Stein Bråten ed., 1998).

188. See Jay Belsky et al., *Infant Attachment Security and Affective-Cognitive Information Processing at Age 3*, 7 PSYCHOL. SCI. 111, 111–14 (1996).

189. Deborah J. Laible & Ross A. Thompson, *Attachment and Emotional*

development,<sup>191</sup> and their reactivity to stressful situations.<sup>192</sup> Additionally, the early attachment relationship also serves as a prototype for relationships developed with others beyond the immediate family as the child's social circle widens, and for later social relationships.<sup>193</sup>

Attachment relationships are vital for the maturing child, not only in the early years, but throughout development. Attachment relationships with parents underlie the child's ability to emerge from the intimacy of the family to seek additional social relationships.<sup>194</sup> Research demonstrates that rather than opposing adolescents' need to establish autonomy, as one might expect, the parental-attachment relationship plays a vital role in helping adolescents successfully meet this challenge.<sup>195</sup> Attachment relationships with parents contribute to adolescents' self-esteem, social competence, emotional adjustment, behavioral self-control, and sense of identity.<sup>196</sup> The importance of attachment relationships

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191. *Understanding in Preschool Children*, 34 DEVELOPMENTAL PSYCHOL. 1038, 1038–44 (1998).

190. Kathryn A. Park & Everett Waters, *Security of Attachment and Preschool Friendships*, 60 CHILD DEV. 1076, 1076–80 (1989).

191. Grazyna Kochanska, *Multiple Pathways to Conscience for Children with Different Temperaments: From Toddlerhood to Age 5*, 33 DEVELOPMENTAL PSYCHOL. 228, 236–39 (1997).

192. Megan R. Gunnar et al., *Stress Reactivity and Attachment Security*, 29 DEVELOPMENTAL PSYCHOBIOLOGY 191, 200–02 (1996).

193. NEURONS TO NEIGHBORHOODS, *supra* note 106, at 236. The attachment relationship is also related to the child's competence in elementary school, including success with peers and academic abilities. Research shows that attachment is related to overall academic performance in elementary school, achievement test scores, attentiveness in school, and emotional health. See SROUFE ET AL., *supra* note 172, at 163–65. In fact, throughout childhood, attachment relationships are consistently related to functioning across social, emotional, and cognitive domains. For example, a large-scale research study following children and their attachment relationships over thirty years concluded that a healthy attachment was positively related to all measures of competence for fifteen-year-olds, including ratings of leadership, planning, self-confidence, and social skills—all capacities related to autonomous functioning. *Id.* at 179–82.

194. NEWMAN & NEWMAN, *supra* note 138, at 156.

195. Joseph P. Allen & Deborah Land, *Attachment in Adolescence*, in HANDBOOK OF ATTACHMENT, *supra* note 112, at 319, 319; see also Joseph P. Allen et al., *Longitudinal Assessment of Autonomy and Relatedness in Adolescent-Family Interactions as Predictors of Adolescent Ego Development and Self-Esteem*, 65 CHILD DEV. 179, 181–92 (1994) (studying the importance of establishing autonomy and relatedness in adolescent-family interactions); R. Chris Fraley & Keith E. Davis, *Attachment Formation and Transfer in Young Adults' Close Friendships and Romantic Relationships*, 4 PERS. RELATIONSHIPS 131, 132–33 (1997).

196. See Consuelo Arbona & Thomas G. Power, *Parental Attachment, Self-Esteem, and Antisocial Behaviors Among African American, European American, and Mexican American Adolescents*, 50 J. COUNSELING PSYCHOL. 40, 40 (2003); Maureen E. Kenny & Kenneth G. Rice, *Attachment to Parents and*

with parents continues into the college years and beyond. College students' attachment to their parents relates to their academic performance and their social and psychological adjustment during the transition to college.<sup>197</sup> The attachment relationship with parents serves as a model for other relationships as young adults establish their own lives, affecting their ability to successfully form close relationships both with romantic partners and with friends after leaving home.<sup>198</sup>

Attachment relationships also "buffer young children against the development of serious behavior problems, in part by strengthening the human connections and providing the structure and monitoring that curb violent or aggressive tendencies."<sup>199</sup> This remains true throughout childhood.<sup>200</sup> Attachment relationships thus form "the cornerstone for healthy psychological adjustment."<sup>201</sup>

#### D. The Need for Stability in Attachment Relationships

Disruptions in attachment relationships—and in particular repeated disruptions—cause profound emotional and psychological harm.<sup>202</sup> Disruption causes children to "not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful."<sup>203</sup> Displacing children's attachment relationships upsets the continuity of caregiving, which usually provides the consistent, enduring environmental input,

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*Adjustment in Late Adolescent College Students: Current Status, Applications, and Future Considerations*, 23 COUNSELING PSYCHOL. 433, 433–39 (1995).

197. See Simon Larose et al., *Attachment State of Mind, Learning Dispositions, and Academic Performance During the College Transition*, 41 DEVELOPMENTAL PSYCHOL. 281, 283 (2005).

198. Miri Scharf et al., *Adolescents' Attachment Representations and Developmental Tasks in Emerging Adulthood*, 40 DEVELOPMENTAL PSYCHOL. 430, 439–41 (2004).

199. NEURONS TO NEIGHBORHOODS, *supra* note 106, at 265.

200. For example, research studies have confirmed that family closeness and attachment relationships are the most important factors associated with teens' choices to not smoke, to use less alcohol and other drugs, to delay sexual activity, and to forego suicide attempts. See generally Michael D. Resnick et al., *Protecting Adolescents from Harm: Findings from the National Longitudinal Study on Adolescent Health*, 278 JAMA 823 (1997).

201. DAVID M. BRODZINSKY ET AL., CHILDREN'S ADJUSTMENT TO ADOPTION 13 (1998).

202. This harm is evidenced by changes in brain functioning. The stress caused by disruptions of attachment has enduring effects on the regulation of the Hypothalamic-Pituitary-Adrenal ("HPA") axis of the brain. The HPA axis is associated with the regulation of cortisol and is responsible for regulating the body's response to stress and for transmitting neurochemical information for the processes of the sympathetic nervous system, the system that maintains homeostasis in the body and directs the flight-or-fight response that might be necessary for immediate survival. See James R. Corbin, *Reactive Attachment Disorder: A Biopsychosocial Disturbance of Attachment*, 24 CHILD ADOLESC. SOC. WORK J. 539, 539–44 (2007).

203. GOLDSTEIN ET AL., *supra* note 128, at 33.

modeling, and support necessary for the child's emotional, social, and cognitive abilities to fully develop.<sup>204</sup> Thus, "repeated 'detaching' and 're-attaching' to people who matter . . . can lead to enduring problems."<sup>205</sup> Ultimately, interference with children's attachment relationships can lead to "aggression, fearful relationships, academic problems in school, and . . . elevated psychopathology."<sup>206</sup> As the American Psychiatric Association's DSM-IV confirms, repeated changes in caregivers is related to a child's inability to respond appropriately to social situations, hypervigilance, excessive fear or withdrawal, and disinhibited behavior with adults.<sup>207</sup> Courts also have repeatedly noted the long-term psychological harm caused by frequent disruption of parent-child attachments.<sup>208</sup>

Because parent-child attachment relationships are so critical to a child's cognitive, emotional, social, and psychological development, and because disruption of those attachment relationships (particularly repeated disruption) impairs the child's ability to form future attachments, children need "sustained, reliable relationships

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204. See generally Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

205. Nat'l Scientific Council on the Developing Child, *supra* note 130, at 4.

206. Ana H. Marty et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CHILDHOOD DEV. & CARE 271, 274 (2005).

207. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 118 (4th ed. 1994) [hereinafter DSM-IV]. Children with reactive attachment disorder, a psychopathology related to attachment disruptions, exhibit a range of severe behavioral disturbances, including tantrums, intentional destruction of property, age-inappropriate sexual acting out, physical aggression toward other children or adults, profanity, sociopathic tendencies, toileting accidents, lack of empathy, inability to learn from mistakes, stunted moral development, need for immediate gratification, inability to self-soothe, and significant antisocial or violent behaviors. See Steven R. Shaw & Doris Paez, *Reactive Attachment Disorder: Recognition, Action, and Considerations for School Social Workers*, 29 CHILD. & SCH. 69, 69–71 (2007). For further discussion of behaviors resulting from attachment difficulties, see Charles H. Zeanah, Jr. & Anna T. Smyke, *Attachment Disorders*, in HANDBOOK OF INFANT MENTAL HEALTH 421, 421–27 (Charles H. Zeanah, Jr. ed., 3d ed. 2009). Reactive attachment disorder is caused by "pathogenic caregiving," defined in the DSM-IV as "(1) persistent disregard of a child's basic emotional needs for comfort, stimulation and affection; (2) persistent disregard for the child's basic physical needs; [or] (3) repeated changes of primary caregiver that prevent the formation of stable attachments." DSM-IV, *supra*, at 118.

208. See, e.g., LaShawn A. v. Dixon, 762 F. Supp. 959, 986 (D.D.C. 1991), aff'd sub nom. LaShawn A. ex rel. Moore v. Kelly, 990 F.2d 1319 (D.C. Cir. 1993) ("Prolonged stays in foster care and frequent changes in placements lead to [psychological] disorders . . . all too frequently."); Braam ex rel. Braam v. State, 81 P.3d 851, 854 & n.1 (Wash. 2003) (noting that frequent movement of children in foster care "may create or exacerbate existing psychological conditions, notably reactive attachment disorder").

within the family.”<sup>209</sup> “Paramount in the lives of . . . children is their need for continuity with their primary attachment figures . . . .”<sup>210</sup>

The child’s need for a secure and stable family relationship is the foundation of every state’s child welfare policies.<sup>211</sup> Florida’s statutory declarations of policy are typical. They acknowledge that foster care “often fails to meet the needs of children” in part because children are “repeatedly placed” and “lack a stable environment.”<sup>212</sup> And they explicitly articulate the goals that “permanent placement with the biological or adoptive family [be] achieved as soon as possible for every child in foster care and that no child remain[] in foster care longer than 1 year.”<sup>213</sup>

Similarly, the Florida Adoption Act states that its overarching purpose is “to provide to all children who can benefit by it a permanent family life.”<sup>214</sup> The Act declares that “[t]he state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner,” and that “[a]doptive children have the right to permanence and stability in adoptive placements.”<sup>215</sup> The policy in favor of permanent and stable placements is so fundamental that it has been held to trump even the desire to maintain beneficial relationships with grandparents, which cannot be secured when a child is adopted.<sup>216</sup>

As these typical declarations of public policy demonstrate, the states have concluded that secure and stable family relationships are of fundamental importance to the well-being of children. That conclusion is unassailable: as the science confirms, these relationships are “vital in the formation of the person.”<sup>217</sup>

### III. THE PARENTLESS CHILD’S RIGHT TO A PERMANENT FAMILY

Given the critical importance of a secure and stable family relationship<sup>218</sup> to a child’s healthy development and well-being, as

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209. Nat’l Scientific Council on the Developing Child, *supra* note 130, at 3.

210. *Young Children in Foster Care*, *supra* note 184, at 1145.

211. See, e.g., MISS. CODE ANN. § 43-15-13(8) (2010) (“The Legislature recognizes that the best interests of the child require that the child be placed in the most permanent living arrangement as soon as is practicably possible.”). The universality of such policies can be explained in part by the federal Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.), which requires states accepting adoption subsidies from the federal government to report in detail how well their child welfare systems achieve permanent placements for children entering foster care. See 42 U.S.C. § 671(a)(1)–(6) (2006).

212. FLA. STAT. § 409.1673(1)(a), (1)(b) (2009).

213. *Id.* § 39.001(1)(h).

214. *Id.* § 63.022(3).

215. *Id.* § 63.022(1)(a), (c).

216. See G.S. v. T.B., 985 So. 2d 978, 983 (Fla. 2008).

217. See Sroufe, *supra* note 177, at 365.

218. By this, we mean an enduring relationship with a primary caregiver that is expected to be life-long. See *supra* note 15 and accompanying text. We

well as its crucial role in enabling a child to achieve the essential skills of self-regulation and social competence and to form a sense of his own identity, children have a fundamental constitutional right to a secure and stable family relationship.<sup>219</sup>

We start from first principles. “[T]he protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”<sup>220</sup> At the very core of this protected liberty is “an autonomy of self that includes freedom of thought, belief, [and] expression.”<sup>221</sup> “[T]he ability independently to define one’s identity . . . is central to any concept of liberty.”<sup>222</sup> “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>223</sup>

Because “[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State,”<sup>224</sup> the Supreme Court has long accorded constitutional protection to family relationships, not only safeguarding existing relationships from intrusion,<sup>225</sup> but also preventing the erection of barriers to their formation.<sup>226</sup> There is a “private realm of family life which the state cannot enter.”<sup>227</sup> “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for

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do not claim that children are constitutionally entitled to a “secure” attachment relationship as that term is used in the psychological literature. *See supra* note 138 and accompanying text (describing different categories of attachment relationships).

219. As explained in Part I, courts have not yet addressed the argument presented here. In *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 842 (1977) and *Lofton v. Secretary of the Florida Department of Children & Families*, 358 F.3d 804, 811–15 (11th Cir. 2004), the claims asserted were fundamentally different and focused on whether temporary foster care arrangements were entitled to constitutional protection from disruption. *Adoption of X.X.G.* declared Florida’s categorical ban on gay adoption invalid on other grounds without reaching the argument presented here, *see supra* notes 6 and 77, and *Cox v. Department of Health & Rehabilitative Services*, 656 So. 2d 902 (Fla. 1995) was brought by two adults who did not purport to assert any claim on behalf of adoptive children.

220. *Lawrence v. Texas*, 539 U.S. 558, 565 (2003). State constitutions also provide substantive protection for the individual’s interest in liberty. The Florida Constitution, for example, has been construed to protect “the right to liberty and self-determination,” *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004), and its explicit right of privacy, found in Article I, Section 23, provides even “more protection than the federal right.” *Id.*

221. *Lawrence*, 539 U.S. at 562.

222. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (emphasis added).

223. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion).

224. *Id.*

225. *E.g., Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

226. *E.g., Zablocki v. Redhail*, 434 U.S. 374, 386–91 (1978).

227. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

additional obligations.”<sup>228</sup> “[I]n the culture and traditions of the Nation” it is families that assume a primary role in “cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.”<sup>229</sup> In short, family relationships are critical to the independent formation of one’s core beliefs and ideals, and receive constitutional protection in order to safeguard the freedom of self-definition that is “central to any concept of liberty.”<sup>230</sup>

Additionally, “[f]amily relationships, by their nature, involve deep attachments and commitments,”<sup>231</sup> and their constitutional protection “reflects the realization that individuals draw much of their emotional enrichment from close ties with others.”<sup>232</sup> It is through family attachments that most of us find meaning and fulfillment. The importance of family relationships in this respect provides part of the justification for their constitutional protection.<sup>233</sup>

On both grounds—its importance to a child’s independent self-definition and its importance to a child’s emotional well-being—the child’s interest in a secure and stable family relationship warrants constitutional protection.<sup>234</sup> As explained above, an attachment

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228. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

229. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion) (“It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”); *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923) (noting that state-imposed collective rearing of children would do “violence to both letter and spirit of the Constitution”).

230. *Roberts*, 468 U.S. at 619.

231. *Id.* at 619–20.

232. *Id.* at 619.

233. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (protecting the liberty of consenting adults to engage in sexual conduct because “the conduct can be but one element in a personal bond that is more enduring”); *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (parent-child relationship is “far more precious than any property right”); *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972) (describing the importance of family and familial bonds); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”); *Meyer*, 262 U.S. at 399 (explaining that the right to “marry, establish a home and bring up children” is “essential to the orderly pursuit of happiness”); *In re Marriage Cases*, 183 P.3d 384, 424 (Cal. 2008) (marriage is “the most . . . individually fulfilling relationship that one can enjoy in the course of a lifetime” and “of crucial significance to the individual’s happiness and well-being” (quoting *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976)) (internal quotation marks omitted); *Padgett v. Dep’t of Health & Rehab. Servs.*, 577 So. 2d 565, 571 (Fla. 1991) (parent-child relationship is “sacrosanct”); *Grissom v. Dade Cnty.*, 293 So. 2d 59, 62 (Fla. 1974) (explaining that the right to establish a family though procreation or adoption “is so basic as to be inseparable from ‘the right . . . to pursue happiness’” (quoting FLA. CONST. art. I, § 2)).

234. Of course, “[m]inors possess constitutional rights under both the federal

relationship with a parent is critical to a child's healthy cognitive, emotional, social, and psychological development; it is essential to the mastery of self-regulation and social competence; and it plays a vital role in helping children "define who they are, what they can become, and how and why they are important to other people."<sup>235</sup> Without a parent figure to interact with and bond to, children lack an essential source of feedback that they need to develop "the ability independently to define [their own] identity."<sup>236</sup> In addition, the attachment to a parent figure that grows out of regular interaction "is essential to the development of emotional security and social conscience,"<sup>237</sup> and is "the cornerstone for healthy psychological adjustment."<sup>238</sup> Because a secure and stable family relationship is essential to protect the child's ability to form the attachments that are critically important to identity development, self-regulation, social competence, and emotional well-being, the child's interest in a secure and stable family relationship must be deemed a fundamental, constitutionally protected right.

#### IV. IMPLICATIONS FOR STATE FOSTER CARE AND ADOPTION POLICY

Because the child's interest in a secure and stable family relationship is constitutionally protected as a fundamental right, the state must have a justification sufficient to withstand strict scrutiny if it adopts laws or policies that interfere with the attainment of that interest.<sup>239</sup> In particular, in establishing its foster care and adoption policies for parentless children, the state's choices are significantly constrained, contrary to the Eleventh Circuit's suggestion in

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and Florida constitutions." *State v. J.P.*, 907 So. 2d 1101, 1110 (Fla. 2004); *see also In re Gault*, 387 U.S. 1, 9 (1967); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989); Holmes, *supra* note 19, at 385–88 (collecting cases); David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1117–19 (2003) (describing widespread judicial recognition of children's claimed rights "in classic individual-versus-state conflicts").

235. Nat'l Scientific Council on the Developing Child, *supra* note 130, at 1.

236. *Roberts*, 468 U.S. at 619.

237. *Young Children in Foster Care*, *supra* note 184, at 1146.

238. BRODZINSKY ET AL., *supra* note 201, at 13.

239. It is hornbook law that statutes that infringe a fundamental right must withstand strict scrutiny to survive. *See, e.g.*, CHEMERINSKY, *supra* note 20, at 792. Some courts are emphatic that this is the applicable standard whenever a fundamental right is implicated. *See, e.g.*, *J.P.*, 907 So. 2d at 1109–10 & n.3. But some scholars have argued that the Court has applied a somewhat less demanding form of scrutiny in contexts where the interests of family members are in tension and must be balanced. *See* David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1163 (2001); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 571–72 (2000) [hereinafter Meyer, *The Paradox of Family Privacy*]. Others have questioned the continuing vitality of the Court's fundamental rights/strict scrutiny doctrine in general. *See, e.g.*, Jeffrey Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 172 (1984).

*Lofton.*<sup>240</sup>

To be sure, recognition of the child's fundamental right to a secure and stable family relationship does not require every law or policy regulating foster care and adoption to pass strict scrutiny in order to survive. *Zablocki v. Redhail*<sup>241</sup> is instructive. There, the Court struck down a statute restricting the ability of persons in arrears on child support to marry, applying strict scrutiny on the basis that marriage is a fundamental right.<sup>242</sup> The Court disclaimed the view that "every state regulation which relates in any way to . . . marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."<sup>243</sup> But the statute at issue did significantly interfere: those lacking the means necessary to cure their delinquent support obligations were "absolutely prevented from getting married," and even for others, the statute's requirements were sufficiently burdensome to represent "a serious intrusion into their freedom of choice."<sup>244</sup>

By the same token, the state is free to regulate foster care and adoption in ways that do not significantly interfere with the attainment of a permanent family relationship. For example, regulations requiring an investigation and home study to confirm that a proposed adoption is suitable and in the child's best interest would not appear to infringe the child's right to a secure and stable family relationship: even though they may delay the completion of adoption proceedings,<sup>245</sup> they help assure that the proposed adoption will in fact provide the child with a permanent family.<sup>246</sup>

In theory, a state could even decide to abolish adoption altogether, so long as it vindicated the child's right to a permanent family relationship under a different legal rubric. From the child's perspective, attachments form regardless of biological or legal connections with the caregiver.<sup>247</sup> While formal legal recognition of

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240. See *supra* notes 7–9 and accompanying text.

241. 434 U.S. 374 (1978).

242. *Id.* at 383–91. *But see* Meyer, *supra* note 19, at 915 & nn.132–33 (suggesting that the Court's "ambiguous verbiage" in *Zablocki* signaled "a more flexible form of scrutiny").

243. *Zablocki*, 434 U.S. at 386.

244. *Id.* at 387.

245. Cf. *Sosna v. Iowa*, 419 U.S. 393, 410 (1975) (holding that the delay in obtaining divorce caused by a six-month residency requirement did not infringe on the right to marriage).

246. Indeed, even with regulations requiring such an assessment, many adoptive placements ultimately fail, and the parent returns the child to the custody of the state. See Woodhouse, *supra* note 19, at 318 n.136 (reporting that 10% to 25% of adoptions disrupt prior to finalization, and another 1% to 10% dissolve after the adoption is finalized).

247. For a general discussion related to this point, see St. Petersburg-USA Orphanage Research Team, *The Effects of Early Social-Emotional and*

the parent-child relationship provides a host of benefits,<sup>248</sup> including

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*Relationship Experience on the Development of Young Orphanage Children*, 73 MONOGRAPHS SOC'Y FOR RES. CHILD DEV., no. 3, 2008 at 1; see also GOLDSTEIN ET AL., *supra* note 128, at 27; NEURONS TO NEIGHBORHOODS, *supra* note 106, at 234; Susanne Bennett, *Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies Within Lesbian Adoptive Families*, 20 CHILD & ADOLESCENT SOC. WORK J. 159, 161 (2003); Marty et al., *supra* note 206, at 271, 273.

248. Legal recognition of the parent-child relationship through adoption enhances the child's sense of security, belonging, and psychological well-being, promoting a stronger sense of self and more favorable outcomes in terms of personal, social, and economic functioning. See David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 798–803 (1999) (summarizing studies); John Triseliotis & Malcolm Hill, *Contrasting Adoption, Foster Care, and Residential Rearing*, in THE PSYCHOLOGY OF ADOPTION 107, 111 (David M. Brodzinsky and Marshall D. Schechter eds., 1990); John Triseliotis, *Long-Term Foster Care or Adoption? The Evidence Examined*, 7 CHILD & FAM. SOC. WORK 23, 31 (2002). In part this can be explained by the legal significance of adoption: adopted children need not worry that child welfare workers will intrude into their lives or take them away from their home. See Meyer, *supra*, at 801 (noting the persistence of such fears in foster children despite foster parents' efforts to provide a sense of belonging and security); Triseliotis, *supra*, at 28 (noting that the lack of legal security in foster care creates a "continual state of anxiety" over possible termination of placement).

In part, the explanation lies in the social and cultural significance of adoption: adoption signifies (to the child and others) that the child "really" belongs to and is part of the adoptive family. See Triseliotis & Hill, *supra*, at 113–15 (noting significant change in status perceived by children who were adopted by their foster parents, who previously felt their "full family membership" was "called into question in the eyes of outsiders"); Woodhouse, *supra* note 19, at 323–24 (noting that "alternatives to adoption, even permanent guardianship," lack "the societal, cultural, and legal significance" of adoption, which is perceived as providing "a 'real' home and a 'real' family") (quoting *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 824 (11th Cir. 2004)); see also Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449, 467–69 (2002) (suggesting that the social and legal status of adoption as contrasted with that of foster care and kinship care explains the poorer outcomes for children who are not adopted); Meyer, *supra*, at 806 ("Laws that give a child's caregivers the status of long-term custodians but deny them the status of parents carry an explicit social meaning, that the caregivers are something less than true parents to the child and that the living arrangement thus created is something less than a true family.").

In addition, the legal insecurity of foster parent relationships may cause individuals to "hold back" in their commitment to and emotional investment in those relationships, impairing the quality of bonding and attachment that occurs. See Meyer, *supra* note 234, at 1125–26 (suggesting that "substantial legal insecurity in the relationship between children and their adult caregivers—at least when it relates to doubts about the continuity of custody or future contact with the child—can impair the quality of bonding"); Meyer, *supra*, at 798–802 (arguing from a variety of studies and sources that "insecurity concerning the continuity of a loving relationship negatively affects the bonding process between adult and child"); see also *In re Marriage Cases*, 183 P.3d 384, 424 (Cal. 2008) (describing importance of the security provided by

some that are of constitutional dimension,<sup>249</sup> legal recognition is not itself essential for the child's development into an autonomous adult.<sup>250</sup> Rather, what matters is that the family relationships are in fact secure from disruption.<sup>251</sup> Thus, for example, if children in foster care were placed permanently with their foster family, and the parents and children understood that the family relationships were as a practical matter (if not legally) secure from disruption, the child's interest in a permanent family relationship likely would be satisfied despite the absence of full legal recognition of the parent-child relationship.<sup>252</sup>

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legal recognition of the marital relationship, enabling the spouses to rely on each other's commitment to the relationship and thereby enhancing their own commitments and attachments to each other); Meyer, *supra* note 19, at 909 ("Marriage brings with it legal incidents and social norms that reinforce commitment and encourage deeper investment by the participants.").

249. Under legal regimes such as foster care and permanent guardianship the state significantly intrudes into the family and deprives it of the autonomy, permanence, and stability that legally recognized families possess. *See G.S. v. T.B.*, 985 So. 2d 978, 984 (Fla. 2008). Such intrusion into family autonomy is contrary to the "ideas . . . upon which our institutions rest." *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *see also* Meyer, *supra* note 19, at 895 (arguing that second-class legal status selectively imposed on certain family relationships implicates the constitutional right of family privacy). *See generally supra* notes 220–30 and accompanying text.

250. *See* Greg Kelly, *The Survival of Long-Term Foster Care*, in ISSUES IN FOSTER CARE 12, 32 (Greg Kelly & Robbie Gilligan eds., 2002) (explaining that children "have the opportunity to make satisfactory attachment relationships" in foster care); *see also* Lauren Frey et al., *Achieving Permanency for Youth in Foster Care: Assessing and Strengthening Emotional Security*, 13 CHILD & FAM. SOC. WORK 218, 220 (2008) (noting that placement stability in foster care can provide a sense of security and belonging, and encourage the development of trusting relationships); Gillian Schofield & Mary Beek, *Growing Up in Foster Care: Providing a Secure Base Through Adolescence*, 14 CHILD & FAM. SOC. WORK 255, 259 (2009) (describing the ability of foster care to provide a secure base for children through family membership, which typically requires support into adulthood).

251. *See* Kelly, *supra* note 250, at 33; Janet Lahti, *A Follow-Up Study of Foster Children in Permanent Placements*, 56 SOC. SERV. REV. 556, 567–68 (1982) (reporting higher child well-being scores "[w]here placements were seen as permanent by the parents," regardless of whether "the child was in legally permanent placement . . . or in legally temporary foster care").

252. However, it is difficult to conceive what legitimate purpose would be served by relegating these children to such a second-class legal status. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (holding that the prohibition of same-sex marriage furthers no legitimate governmental purpose and violates the due process and equal protection guarantees of the Fourteenth Amendment by imposing second-class legal status on same-sex couples); *see also* Meyer, *supra* note 19, at 895 (arguing that second-class legal status selectively imposed on certain family relationships implicates the constitutional right of family privacy). Thus, while permanent foster care or guardianship could theoretically satisfy the child's interest in a secure and stable family relationship, such a regime would implicate different constitutional concerns.

But the realities of foster care in the United States are quite different. Nationwide, two-thirds of children in foster care for two years or longer suffer repeated disruption of their placements.<sup>253</sup> In Arkansas, Florida, Mississippi and Utah—the four states with categorical restrictions on who may adopt—the record is far worse, with as many as five out of six of these children experiencing three or more placements.<sup>254</sup> Recent data<sup>255</sup> show that for vast numbers of children in foster care, the instability of placements is extreme: 131,652 children had five or more placements; 34,782 had ten or more; and 5034 had twenty or more.<sup>256</sup> Plainly, as even state legislatures have acknowledged, foster care “often fails to meet the needs of children” because children are “repeatedly placed” and “lack a stable environment.”<sup>257</sup>

Given these realities of the foster care system, categorical restrictions on the pool of adoptive parents significantly interfere with the attainment of a permanent family relationship for parentless children in the state’s care. By disqualifying a group of adults from adopting regardless of their ability to parent, the system

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253. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 2003–2006, at 29 tbl.V-1 (2010), available at <http://www.acf.hhs.gov/programs/cb/pubs/cwo03-06/cwo03-06.pdf> (reporting a state-by-state median of only 32.1% with two or fewer placements).

254. See *id.* at 56 tbl.6.1 (reporting Arkansas data showing 82.6% of children experiencing three or more placements); *id.* at 92 tbl.6.1 (reporting Florida data showing 71.1% of children experiencing three or more placements); *id.* at 185 tbl.6.1 (reporting Mississippi data showing 66.9% of children experiencing three or more placements); *id.* at 324 tbl.6.1 (reporting Utah data showing 85.2% of children experiencing three or more placements).

255. NAT’L DATA ARCHIVE ON CHILD ABUSE AND NEGLECT, AFCARS DATA FOR 2007: DATASET NUMBER 143, at app. C, element 24 (2009). The data set forth here were made available by the National Data Archive on Child Abuse and Neglect, Cornell University, Ithaca, NY, and have been used with permission. Data from the Adoption and Foster Care Analysis and Reporting System (“AFCARS”) were originally collected by the Children’s Bureau. Funding for the project was provided by the Children’s Bureau, Administration on Children, Youth, and Families, Administration for Children and Families, U.S. Department of Health and Human Services. The collector of the original data, the funder, NDACAN, Cornell University, and their agents or employees bear no responsibility for the analyses or interpretations presented here.

Appendix C reports the data on the current foster care episode. Element 24 specifies how many different placement settings the child has experienced in this foster care episode. The total number of children with data points on foster placements was 782,984. The minimum number of placements reported in the AFCARS data was one, and the maximum number was ninety-three. Using SPSS (a statistical program used to analyze social and behavioral science data) we calculated the number of the 782,984 children who had been in each frequency of placement, ranging from one to ninety-three placements, and derived the number of children with five or more placements (for example) by summing the number of children at each data point between five and ninety-three placements.

256. *Id.*

257. FLA. STAT. § 409.1673(1)(a)1, (1)(b) (2009).

limits children's opportunity to become part of a stable family. Like the statute struck down in *Zablocki*, the categorical exclusions mandated by the Arkansas, Florida, Mississippi, and Utah statutes<sup>258</sup> impose an absolute legal bar to a child's adoption when the person otherwise eligible to adopt falls within the terms of the statute.<sup>259</sup> Such restrictions therefore must have some compelling justification to pass constitutional muster.<sup>260</sup>

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258. See *supra* notes 4–6 and accompanying text.

259. See ARK. CODE ANN. § 9-8-304(a) (2009) (“A minor may not be adopted . . . if the individual seeking to adopt . . . is cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state.”); FLA. STAT. § 63.042(3) (2009) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”); MISS. CODE ANN. § 93-17-3(2) (2010) (“Adoption by couples of the same gender is prohibited.”); UTAH CODE ANN. § 78B-6-117(3) (LexisNexis 2008) (“A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.”).

260. No such justification exists, at least from the standpoint of child welfare concerns. First, gay people and straight people make equally good parents. See Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEVELOPMENTAL SCI. 164, 175 (2010); Nanette Gartrell & Henny Bos, *U.S. National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 28, 34 (2010); see also Brief for Am. Psychological Ass'n. as Amicus Curiae Supporting Appellee at 13–20, Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G. 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (No. 3D08-3044), available at <http://www.apa.org/about/offices/ogc/amicus/xxg-nrg.pdf> (collecting studies regarding the suitability of gay and straight people as parents); *Adoption and Co-Parenting of Children by Same-Sex Couples: Position Statement*, AM. PSYCHIATRIC ASS'N (2002), <http://www.psych.org/Departments/EDU/Library/APAOOfficialDocumentsandRelated/PositionStatements/200214.aspx> (“Numerous studies over the last three decades consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents.”). The exclusions imposed by the Florida and Mississippi statutes are thus factually insupportable on child welfare grounds.

Second, even if there were genuine child welfare concerns that some in the excluded groups were not fit parents, categorically excluding everyone in those groups is not narrowly tailored to address those concerns. Cf. *Stanley v. Illinois*, 405 U.S. 645, 654 (1972) (explaining that even if “most unmarried fathers are unsuitable and neglectful parents,” the state may not categorically deem them unfit, since “some are wholly suited to have custody of their children”); *Carrington v. Rash*, 380 U.S. 89, 95–96 (1965) (holding that the state may not categorically deem service members to be nonresidents when it is feasible to assess residency on an individualized basis). Indeed, all four states’ categorical exclusions exist in the context of a regulatory regime that requires individual screening, and that mandates that the child’s best interest be the court’s paramount concern. See ARK CODE ANN. § 9-9-214(c) (2009) (authorizing issuance of adoption decree only if “the court determines that . . . the adoption is in the best interest of the individual to be adopted”); FLA. STAT. § 63.022(2) (2009) (“[I]n every adoption, the best interest of the child should govern and be of foremost concern in the court’s determination.”); MISS. CODE ANN. § 93-17-11 (2010) (requiring home study to determine whether the petitioners are suitable parents for the child and whether the proposed adoption is in the child’s best

Similarly, in light of the extensive period of time many children remain in foster care,<sup>261</sup> laws or policies preventing the formation of parent-child attachments in foster care would merit strict scrutiny. For example, if a state decided to provide foster care solely in faceless institutional settings,<sup>262</sup> or to regularly move children from home to home in order to prevent the formation of attachments,<sup>263</sup> the policy would implicate the child's fundamental right to a secure and stable family relationship.

#### V. RECONCILING PARENTAL RIGHTS WITH THE CHILD'S RIGHT TO A PERMANENT PARENT

A number of objections might be raised to recognition of a child's substantive due process right to a permanent family relationship. First, it could be asserted that any constitutional interest a child has in a family relationship necessarily mirrors the corresponding liberty interest of the parent, and so need not be given separate recognition or analysis.<sup>264</sup> Second, given that the law historically did not recognize an independent right of a child to establish or maintain a family relationship,<sup>265</sup> it could be argued that

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interest); UTAH CODE ANN. § 78B-6-102(1) (LexisNexis 2008) (stating that the primary concern of the court in adoption cases is the best interest of the child). In such a context, the categorical exclusion effectively instructs the court to *disregard* the child's best interest in cases where the categorical exclusion applies. That instruction necessarily fails to promote child welfare concerns, unless *every* person so excluded would not be a fit parent.

261. Nationwide, about 60% of the children entering foster care for the first time remain in foster care twelve months or longer. See CHILDREN'S BUREAU, *supra* note 253, at 19 tbl.IV-1. For those who are ultimately adopted, the median length of stay in foster care prior to adoption is more than two and a half years. *Id.* at 23 tbl.IV-4.

262. *Cf. Reno v. Flores*, 507 U.S. 292, 315 (1993) (upholding the temporary confinement of unaccompanied children awaiting deportation in institutions meeting minimal constitutional standards). Even in institutional settings, attachments can form where the caregiving environment is deliberately structured not to be "faceless" but to foster relationships between a child and specific caregivers. See St. Petersburg-USA Orphanage Research Team, *supra* note 247, at 235–38.

263. See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 836 n.40, 838 n.41 (1977) (describing then-existing New York policy of moving children in foster care to prevent the formation of emotional attachments); *Doe ex rel. Johanns v. N.Y.C. Dep't of Soc. Servs.*, 670 F. Supp. 1145, 1175 (S.D.N.Y. 1987) (challenging a system of "overnight" foster care placements).

264. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989) (plurality opinion); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 811–12, 814 (11th Cir. 2004).

265. See Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1043–50 (1992); see also Dwyer, A Constitutional Birthright, *supra* note 19, at 803–05 (explaining that "the constitutional personhood and rights-bearing status of children" was not "firmly established" until "after World War II"). But see *id.* at 799–807 (arguing that a child's right not to be placed with unfit parents is

no substantive due process right of a child to a permanent family relationship can exist, because such a right finds no footing in the history and traditions of our nation.<sup>266</sup> Third, to the extent that recognition of this right is extended to contexts in which a conflicting right of a parent is present, it could be argued that recognition of the child's right would undermine the constitutional protection of parental authority and family autonomy.<sup>267</sup>

*A. Does a Child's Constitutional Interest in a Family Relationship Merely Mirror the Parent's?*

Courts sometimes fail to give full consideration to claims asserted on behalf of children seeking constitutional protection of their family relationships, asserting summarily that the child's interest merely mirrors the claim of the parent.<sup>268</sup> For example, in *Michael H. v. Gerald D.*, a plurality of the Supreme Court analyzed and rejected the substantive due process claim of the biological

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nevertheless sufficiently "rooted in our traditions" to be recognized as a substantive due process right).

266. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *Michael H.*, 491 U.S. at 127 n.6 (plurality opinion); *United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008), cert. granted, 78 U.S.L.W. 3537 (U.S. Mar. 22, 2010) (No. 09-5801).

267. This concern was central to the Court's decision in *Michael H. v. Gerald D.*: "Here, to provide protection to [the child's relationship with her] adulterous natural father is to deny protection to [her] marital father [in directing her upbringing], and vice versa." *Michael H.*, 491 U.S. at 130 (plurality opinion); see also *Smith*, 431 U.S. 846–47 (suggesting that a child's constitutional rights may be "substantially attenuated" when they conflict with constitutional rights of parents).

268. See, e.g., *Michael H.*, 491 U.S. at 131 (plurality opinion); *Lofton*, 358 F.3d at 811–12, 814. However, as David D. Meyer has noted, numerous court decisions have upheld claims that "children possess their own constitutional rights to maintain important family relationships." Meyer, *supra* note 234, at 1119. Indeed, some courts have robustly asserted the independence of the child's constitutional interests from the parent's. See, e.g., *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994) ("Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent."); *Oldfield v. Benavidez*, 867 P.2d 1167, 1172 (N.M. 1994) ("Although parents have certain rights regarding their children, the children also have certain fundamental rights which often compete with the parents' interests."); *In re Guardianship of Victoria R.*, 201 P.3d 169, 173–74 (N.M. Ct. App. 2008), cert. denied, 203 P.3d 102 (N.M. 2009) (affirming a guardianship order giving custody of a child to long-term caregivers over a fit parent's objection and noting that the child "is herself a 'person' for purposes of the Fourteenth Amendment"); *Clifford K. v. Paul S.*, 619 S.E.2d 138, 159 (W. Va. 2005) ("A child has rights, too, some of which are of a constitutional magnitude."). See generally Suellyn Scarneccchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41 (1995) (asserting that children in contested adoption cases have independent constitutional rights, including a right to protect existing relationships with nonbiological parents and a right to be free from state-imposed psychological or emotional harm).

father to maintain a relationship with his daughter, and then disposed of the daughter's claim by stating simply that her claim was "the obverse" of her father's and "fail[ed] for the same reasons."<sup>269</sup>

This is error, for at least two separate reasons. First, the child's interest and the parent's interest in a parent-child relationship are analytically distinct.<sup>270</sup> For the parent, the right to "establish a home and bring up children" is "essential to the orderly pursuit of happiness"<sup>271</sup> in part because of the meaning and sense of fulfillment it gives to the parent's life.<sup>272</sup> It is doubtful that children typically draw the same sense of fulfillment from teaching their parents.<sup>273</sup> On the other hand, "[t]here is good reason . . . to think that the consequences for relationship disruption are not identical for children and adults,"<sup>274</sup> and that those consequences may well be far more significant for children.<sup>275</sup> On a variety of grounds, then, the child's interest in the relationship is distinct from that of the parent, and therefore requires separate analysis.<sup>276</sup>

Second, regardless of whether the child's interest in a family relationship mirrors the parent's, children in state custody have an additional constitutional claim under *Youngberg* that the parent lacks. That claim, we have argued, requires the state to provide at least minimally adequate nurturing to the children in its care, in order to vindicate their liberty interests in healthy development into autonomous adults.<sup>277</sup> Thus, regardless of whether the constitution protects the family relationships of foster parents and foster children, for example, the parentless child in state custody has a constitutional claim that stands on its own footing and merits

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269. *Michael H.*, 491 U.S. at 131 (plurality opinion).

270. In other contexts, the Court has rejected such an identity of interests, refusing to conclude, for example, that because parents have a fundamental right to procreate, a developing fetus has a corresponding fundamental right to be born. *See Roe v. Wade*, 410 U.S. 113, 156–59 (1973).

271. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

272. *See supra* notes 231–33 and accompanying text.

273. *But see CROSBY, STILLS, NASH & YOUNG, Teach Your Children, on DÉJÀ VU* (Atlantic Records 1970) (suggesting the child's parallel role in passing along values and beliefs to parents).

274. *Meyer, supra* note 234, at 1128.

275. *See supra* Part II.D.

276. In addition to the distinctions elaborated above, a child's reasonable expectations as to the permanence of a relationship may well be different from those of a parent who is on notice of the state's right to terminate it. *See Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79, 98 n.19 (Fla. Dist. Ct. App. 2010) (Salter, J., concurring); *see also Holmes, supra* note 19, at 383 (critiquing the "parent-centered" nature of courts' analyses of liberty interests in child-parent relationships for "overlook[ing] any liberty interest the child may have"); *Woodhouse, supra* note 19, at 319–20 (critiquing courts' treatment of a child's right to be adopted as the mirror image of an adult's right to adopt).

277. *See supra* Part I.A.

independent analysis. It is wrong, therefore, for courts to dispose of the child's claims by asserting that those claims merely mirror the claims of the parent.

*B. Does Substantive Due Process Protect Only Narrowly Defined Liberty Interests that Are Deeply Rooted in the Nation's History and Traditions?*

The recognition of children as persons capable of having cognizable constitutional and legal rights is a relatively recent development in the law.<sup>278</sup> Accordingly, some courts have summarily rejected substantive due process claims asserted on behalf of children, relying on a theory that only those narrowly defined liberty interests that are deeply rooted in the nation's history and traditions can receive protection under the doctrine of substantive due process.<sup>279</sup> To be sure, *Washington v. Glucksberg* does suggest that any asserted substantive due process right must be "carefully descri[bed]" and be "deeply rooted in this Nation's history and traditions."<sup>280</sup> Justice Scalia has maintained the even more restrictive view that the doctrine extends only to those rights—described at "the most specific level" of generality—that are so rooted in tradition.<sup>281</sup> But a majority of the Court has expressly repudiated that view,<sup>282</sup> and even the formulation in *Glucksberg* is hard to reconcile with a host of decisions ranging from *Loving v.*

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278. See Woodhouse, *supra* note 265, at 1043–50; see also Dwyer, *A Constitutional Birthright*, *supra* note 19, at 805 (explaining that "the constitutional personhood and rights-bearing status of children" was not "firmly established" until "after World War II").

279. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 130–31 (1989) (plurality opinion); *United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008), cert. granted, 78 U.S.L.W. 3537 (U.S. Mar. 22, 2010) (No. 09-5801).

280. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)) (internal quotation marks omitted).

281. *Michael H.*, 491 U.S. at 127–28 n.6 (plurality opinion) (suggesting that the proper due process inquiry is whether legal traditions protected parental rights of an adulterous natural father, not whether legal traditions protected parental rights of natural fathers in general).

282. See *id.* at 132 (O'Connor, J., concurring) ("I concur in all but footnote 6 of Justice Scalia's opinion. This footnote sketches a mode of historical analysis . . . that may be somewhat inconsistent with our past decisions in this area."); *id.* at 133 (Stevens, J., concurring in the judgment) ("I do not agree with Justice Scalia's analysis."); *id.* at 137–41 (Brennan, J., dissenting) ("The plurality's interpretive method is more than novel; it is misguided."); see also *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992) (plurality opinion) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").

*Virginia*<sup>283</sup> to *Lawrence v. Texas*.<sup>284</sup>

As numerous scholars have noted, the Court's substantive due process decisions generally follow one of two distinct patterns of analysis. Either the Court emphasizes the nation's history and traditions, or the Court grounds its analysis on the importance to the individual of the particular liberty interest in question, as balanced against society's legitimate concerns.<sup>285</sup> As David Meyer has suggested, "the Court emphasizes the importance of historical consensus when it wishes to deny constitutional protection and downplays it when it is otherwise inclined to extend protection."<sup>286</sup> Thus, the historical legal status of children should not prevent the recognition of their right to a permanent family relationship.<sup>287</sup> At least for parentless children in the state's custody, that right follows directly from *Youngberg v. Romeo* and the Court's numerous substantive due process decisions protecting intimate family relationships.<sup>288</sup>

### C. Would Recognition of the Child's Right to a Permanent Family Relationship Undermine the Constitutional Protection of the Family?

All children, not just those without parents, need a permanent family relationship. If the law recognizes a constitutional claim of children *without* parents to such a relationship, the question arises whether that right also should be recognized for children *with* parents.

Potentially, recognition of the child's constitutional claim in contexts where it is in tension with the rights of a parent could have far-reaching consequences. For example, it could be claimed that the child's constitutional interest in a relationship with the parent is sufficient to require the parent to undergo unwanted life-saving medical treatment, or to prohibit the parent from relocating in the context of divorce.<sup>289</sup> One scholar has gone so far as to suggest that the constitutional rights of newborn children trump the interests of their natural parents and can justify the state in taking them at

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283. 388 U.S. 1 (1967).

284. 539 U.S. 558 (2003); *see also* Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1921–25 (2004) (arguing that *Lawrence* marks *Glucksberg* "as a failed bid by Chief Justice Rehnquist to curb the reach of substantive due process").

285. *See, e.g.*, Dwyer, *A Constitutional Birthright*, *supra* note 19, at 798–99; Meyer, *supra* note 234, at 1122–23.

286. Meyer, *supra* note 234, at 1124; *see also* Meyer, *The Paradox of Family Privacy*, *supra* note 239, at 562–63.

287. *See* Meyer, *supra* note 234, at 1124; *see also* *Lawrence*, 539 U.S. at 579 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

288. *See supra* Parts I.A & III.

289. *See* Binder, *supra* note 12, at 1174–75 (suggesting that a child's relationship interests should be taken into account and be balanced against the parent's autonomy interests in these contexts).

birth and giving them to adoptive parents.<sup>290</sup>

Whatever one thinks of these possible outcomes, serious objections could be raised if the child's right to a permanent parent were extended to contexts in which it conflicts with a parent's rights. As Mark Brown has argued, "Extending rights to children that are independent of the rights of their parents invites extensive governmental intervention into existing family units."<sup>291</sup> That intervention might undermine the effort and commitment parents bring to the parent-child relationship,<sup>292</sup> and diminish the quality of parent-child attachments.<sup>293</sup> Moreover, as Emily Buss has noted, children cannot assert their own rights; some adult must stand as surrogate to assert the child's rights for her.<sup>294</sup> Thus, where those rights stand in tension with the rights of a parent, the pragmatic effect of recognizing them is to substitute another surrogate for the parent, and there is no reason to think other surrogates will do a better job in protecting the child's interests than a parent would.<sup>295</sup>

At a minimum, *Smith v. Organization of Foster Families for Equality & Reform* makes it clear that the constitutional claims of a child are attenuated when they conflict with the rights of a natural parent.<sup>296</sup> And, as noted in *Troxel v. Granville*, it may interfere with the parent's fundamental right to family integrity even to give a child legal standing to assert a claim.<sup>297</sup> We believe that exploration of this complex subject is an appropriate matter for further

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290. Dwyer, *A Constitutional Birthright*, *supra* note 19, at 835. For a more comprehensive exposition of Dwyer's views, see generally DWYER, *supra* note 19.

291. Mark R. Brown, *Closing the Crusade: A Brief Response to Professor Woodhouse*, 34 CAP. U. L. REV. 331, 333 (2005); see also Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L.J. 733, 764–65 (2001); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1100 (2003). But see Holmes, *supra* note 19, at 405 (suggesting that recognition of a child's interest in preserving attachment relationships need not interfere with parental rights of custody).

292. See Brinig, *supra* note 291, at 765 ("Granting rights to third parties disrupts the intimacy and autonomy necessary for families—marriages and children—to thrive."); Scott, *supra* note 291, at 1080, 1097 (arguing that legal regulation interfering with parental authority and discretion "makes the job of being a parent less rewarding" and "diminishes [parents'] investment in the relationship"); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2414 (1995).

293. See Meyer, *supra* note 234, at 1125 (suggesting that "[f]or many parents . . . immunity from second-guessing . . . may be an essential incentive to their full and unqualified investment in the hard work of parenting," which in turn "may be vitally important to the bonding of parent and child").

294. Emily Buss, *Children's Associational Rights?: Why Less Is More*, 11 WM. & MARY BILL RTS. J. 1101, 1104 (2003).

295. *Id.*

296. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 846–47 (1977).

297. *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (plurality opinion); *id.* at 101 (Kennedy, J., dissenting); see also Buss, *supra* note 294, at 1107, 1115.

consideration.<sup>298</sup> Accordingly, at present we limit our claims to contexts in which no competing right of a parent exists.<sup>299</sup>

#### CONCLUSION

We have argued that children in state custody have a substantive liberty interest in a secure and stable family relationship, because such a relationship is essential in order for these children to attain the capacities needed to function as autonomous adults. Without an enduring attachment to a primary caregiver, children are not likely to achieve the self-regulation and social competence necessary to function as autonomous adults, nor will they receive the essential feedback they need to develop a sense of “who they are, what they can become, and how and why they are important to other people.”<sup>300</sup> A secure and stable family relationship is therefore a component of the minimally adequate nurturing that the state is constitutionally obligated to provide to parentless children in its custody, and this constitutional obligation constrains the state’s choices in establishing its foster care and adoption policies. In particular, given the unstable placements that typify foster care in the United States, laws and regulations that categorically disqualify a class of people from adopting work a direct and substantial interference with the child’s right to a secure and stable family relationship, and therefore must survive strict scrutiny in order to pass muster. However, careful thought is needed before the child’s right is extended to contexts in which it conflicts with the rights of a parent.

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298. See generally Martha Minow, *What Ever Happened to Children’s Rights?*, 80 MINN. L. REV. 267 (1995); Michael S. Wald, *Children’s Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255 (1979) (proposing four categories of children’s rights and describing claimed rights against parents as presenting “the most controversial and the most complex questions”); Symposium, *The Relationship Rights of Children*, 11 WM. & MARY BILL RTS. J. 843 (2003).

299. As several scholars have noted, not all claims for the recognition of children’s rights stand on an equal footing: those which demand that the state respect a fundamental interest of the child do not generate the same objections as those which make the same demand of a parent. See Meyer, *supra* note 234, at 1117–19 (describing different judicial reactions to children’s claimed rights “in classic individual-versus-state conflicts” as distinguished from conflicts posing a challenge “to the authority of parents”); Wald, *supra* note 298, at 270 (contrasting a claim that a school “should not be able to dictate to children and their parents the length of children’s hair” with a claim that children should have a legally enforceable right against their parents “not to cut their hair if their parents want it cut”); Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 332–39 (1996) (criticizing efforts to infuse “rights” into parent-child relationships but suggesting that rights of children against the state should be recognized).

300. Nat’l Scientific Council on the Developing Child, *supra* note 130, at 1.