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When Grandma Becomes Mom: The Liberty Interests of Kinship Foster Parents

Cover Page Footnote

J.D. Candidate, 2002, Fordham University School of Law. I would like to thank Professor Ann Moynihan for her invaluable assistance with this Note. I would also like to thank Mom, Dad and Jessica for their constant love and support.

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NOTES

WHEN GRANDMA BECOMES MOM: THE LIBERTY INTERESTS OF KINSHIP FOSTER PARENTS

*Gabrielle A. Paupeck**

INTRODUCTION

A commentator on children's rights made an analogy between the parent-child relationship and the relationship that develops between an elephant and a baby bird about to hatch in the beloved Dr. Seuss book *Horton Hatches The Egg*.[1] In this children's story, Horton the elephant sits on an egg for a mother bird who runs off and leaves her baby unguarded.[2] When she returns, Horton sadly relinquishes his role as parent and caregiver. However, when the child emerges it looks like an elephant and not like a bird.[3] The crowd observing these strange events exclaims: "it should be, it *should* be, it SHOULD be like that! Because Horton was faithful! He sat and he sat!"[4] Horton's ties to the baby in the egg were not weakened because he was not the natural parent. They were strengthened by the passage of time and the careful attention that Horton gave to the baby.

Charlene Bannon knows all too well about making this kind of sacrifice.[5] In 1998, she moved to San Francisco to study acupuncture. She struggled with her finances, like most students, but was making ends meet by using her savings and credit cards. Charlene did not anticipate that she would soon have two extra mouths to feed and the

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1. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747, 1749-54 (1993); Dr. Seuss, Horton Hatches The Egg (1940).

2. Woodhouse, *supra* note 1, at 1750.

3. *Id.* at 1750-51.

4. *Id.* at 1751 (quoting Dr. Seuss, Horton Hatches The Egg (1940)). "HORTON STAYED ON THAT NEST!/He held his head high/And he threw out his chest.. /'I meant what I said/and I said what I meant.... An elephant's faithful/One hundred percent!'" *Id.* at 1750 (quoting Dr. Seuss).

5. Steve Christian, *Helping Kin Care for Kids*, 26 St. Legis., Dec. 2000, at 20, *available at* 2000 WL 15407517.

responsibilities of a primary caregiver. She found no other option but to take on the role of surrogate mother when she discovered the "grotesque" conditions in which her niece and nephew were living.[6] Aged five and nine, the children suffered from neglect and abuse at the hands of their drug and alcohol addicted mother, Charlene's sister. Charlene had to care for the children and accept welfare payments of $565 a month to cover their expenses.[7]

Ann Lester of Passaic, New Jersey is 66 years old.[8] She is raising her twin grandchildren because her son and his girlfriend could not do so. She works to supplement her Social Security checks and the monthly welfare stipend she receives for the children. Charlene and Ann are part of a growing group of Americans who are, under state auspices, taking in relatives' children in times of need. They are collectively referred to as kinship caregivers.

The American foster care system provides daily care for children who lack suitable primary caregivers.[9] The current trend is, and has been for some time, away from institutional care and toward family homes.[10] This is both less expensive for the state and better for the child because he or she will receive more individualized attention.[11] Each day in this country about one half million children live in foster homes.[12] The paradigm that most people typically associate with the term "foster care" is an unrelated stranger who temporarily opens up his or her home to a child in need in return for a subsidy from the state. Not every foster home, however, follows this model.

"Kinship care" has emerged as an increasingly common option.[13] "Kinship care" is a broad umbrella term for a variety of placement

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6. *Id.*

7. *Id.*

8. Ovetta Wiggins, *Advocates Propose More Help For Givers of 'Kinship Care'*, The Record (New Jersey), Oct. 4, 2000, 2000 WL 15834194.

9. In fact, state and federal law require that states provide this service for children who need it. Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Party Options in Permanency Planning*, 48 Buff. L. Rev. 835, 835 (citing 42 U.S.C. § 622 (1994)).

10. This shift is at least partly attributable to the cost of keeping a child in institutional care. *See* The Nat'l Ass'n. of Attys. Gen., Legal Issues in Foster Care 3 (1976) (citing a study stating that in Massachusetts it is seven times more expensive to keep a child in an institutional rather than in a home setting).

11. *See id.*

12. Mangold, *supra* note 9, at 835 (citing Staff of House Comm. on Ways and Means, 105th Cong., 1998 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means 783 (Comm. Print 1998)).

13. Noy Davis & Janet Chiancone, *The Kinship Care Option: Applying Research to Practice*, *in* What I Wish I'd Learned In Law School: Social Science Research For Children's Lawyers 103 (ABA Ctr. on Children and the Law ed., 1997) [hereinafter What I Wish I'd Learned in Law School]. *But see*, *Losing Our Children: An Examination of New York's Foster Care System* (1999), *available at* http://assembly.state.ny.us/Reports/Chil/199905 (last visited Mar. 15, 2001) (noting reduction in kinship placements in New York City in the late 1990s).

options, but generally it involves a child being placed in a relative's home instead of a stranger foster home.[14] It is estimated that more than two million children in the United States are living with relatives other than their parents.[15] This situation raises the issue of what rights the members of these extended family units should have in the family law and constitutional law arenas. Do these rights equal those of the stereotypical mom, dad and 2.5 children,[16] or are they similar to those of the foster family, which has no constitutional right to family association,[17] or do they fall somewhere between the two? The answer is significant because, if the relationship is like a stranger foster family and not a biological family, the state has a greater interest in the relationship and a greater right to interfere. This includes the right of the state to remove the child from the home.[18]

This Note will concentrate on the rights of kinship foster parents. These foster parents are relatives who receive monthly stipends to help support the children in their care.[19] Part I will define kinship care and consider it as an alternative to traditional foster care. Specifically, this part will examine the rise of kinship foster care in the last twenty years, its advantages as an alternative to stranger foster care, and criticisms of kinship care.

Part II will examine the idea of a liberty interest for families generally, and will discuss the rights of kinship foster families in particular. This part will place this liberty interest in the context of the due process clause. It will then consider the court system's recognition of biological parents' interest in their children and the

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14. Davis & Chiancone, *supra* note 13, at 103.

15. Jodi Nirode, *Agencies Lagging in Helping Relatives Care For Their Kin*, The Columbus Dispatch, Nov. 4, 2000, 2000 WL 27863448.

16. Natural parents have a due process interest in their children. Foster parents may have certain procedural due process rights, but their rights are not equal to those of natural parents. The Supreme Court has never directly addressed whether or not kinship foster parents are entitled the substantive due process rights accorded to natural parents. *See infra* part II.

17. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845-46 (1977) ("[I]t is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family."); Rodriguez v. McLoughlin, 214 F.3d 328, 341 (2d Cir. 2000) (declining to find a liberty interest in the foster family, but leaving the door open for possibility that kinship foster families may have this right); Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1210 (5th Cir. 1977) (finding that foster families do not have a liberty interest under the constitutional right to family privacy). A liberty interest may either arise directly from the Constitution itself or from an expectation created by the laws of the states. Ky. Dep't of Corrs. v. Thompson, 490 U.S. 454, 460 (1989).

18. *See infra* notes 169-73.

19. Gerald Wallace, *Grandparents Parenting Grandchildren: A New Family Paradigm*, 185 PLI/Crim 195, 205-06 (2000). Although Wallace's article is aimed at grandparent caregivers, the principles are equally applicable to all relative caregivers.

shortcomings of this traditional model. These rights will be contrasted with the limited recognition of foster parents' rights in relation to their foster children.

Part III will argue that tradition and family should be defined broadly and that traditional analyses may be inappropriate for the kinship foster care situation. Finally, this part will find that kinship foster families have a protectable liberty interest arising under the Fourteenth Amendment. It will, however, recognize that this interest must be evaluated on a fact-specific, case by case basis to discover whether a particular kinship foster family has a relationship that rises to the level of, and deserves the same protection as, a "typical" nuclear family. This Note concludes that kinship foster parents and their foster children have a right of family association that is protected by due process.

I. KINSHIP CARE AS AN ALTERNATIVE TO "TRADITIONAL" FOSTER CARE

Traditional foster care provides shelter and support for children in times of family crises when their biological parents are unable to care for them. These arrangements are generally intended to be temporary.[20] Often, however, they end up being long term.[21] Such placements may be made voluntarily by the parent through an agreement that gives the state responsibility for the child's daily care, and relinquishes part of the parent's decision-making authority.[22] If there is neglect or abuse in the family, an involuntary placement can occur.[23] The traditional model centers on the placement of children with stranger foster families. However, the foster care system, indeed the entire child protection system, is overburdened and strapped for resources.[24] One way in which the system has expanded to accommodate this problem is to include kin as a foster care option.

As long as there have been human families, relatives have cared for nieces, nephews, grandchildren and other relatives in times of need. While the historical origins of such arrangements were probably informal, two of the three options that have emerged to define these relationships are formalized procedures.[25] First, the relative could

20. Kristin J. Brandon, Comment, *The Liberty Interests of Foster Parents and The Future of Foster Care*, 63 U. Cin. L. Rev. 403, 405 (1994) (citing Cristina Chi-Young Chou, *Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety*, 46 Vand. L. Rev. 683, 683-84 (1993)).

21. *Id.*

22. *Id.* at 406.

23. *Id.* at 407.

24. Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, 8 The Future of Children 104, 107 (1998).

25. Wallace, *supra* note 19, at 205-06.

forego a court order and care for the child informally.[26] This generally means that the relative would receive no funding except, perhaps, for a welfare subsidy.[27] Second, the relative could seek court-ordered legal custody or guardianship.[28] Funding may or may not be granted in these situations depending on which state or federal laws apply.[29] Lastly, the caregiver can take the child in as a kinship foster parent.[30] Kinship foster care is defined as "the placement of a child who is in the custody of a state child protection agency into a home in which the caregiver(s) are the child's relative by birth, marriage, or other adults with whom the child or parent already have a close emotional attachment."[31] Generally, child welfare workers view these familial placements in a positive light.[32] Many do find, however, that kinship placements are difficult to supervise.[33] Still, in urban areas it appears that more foster children are placed with relatives than with strangers.[34]

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26. *Id.*

27. *See id.* at 216-17 (quoting N.Y. Soc. Serv. Law § 349(B)(1)).

28. *Id.* at 210 (stating that both legal custody and guardianship provide "sufficient health, educational, and financial authority" though there may be practical differences between the two).

29. *See id.* at 216.

30. *Id.* at 205-06.

31. Elizabeth Killackey, *Kinship Foster Care*, 26 Fam. L.Q. 211, 211 (1992) (quoting Ivory L. Johnson, *Kinship Care: Issues and Challenges*, Paper Presented at the ABA Fifth National Conference on Children and the Law (Nov. 1-3, 1990)) (discussing both traditional and kinship foster care and proposing a model for kinship care).

32. Sandra Beeman & Laura Boisen, *Child Welfare Professionals' Attitudes Towards Kinship Foster Care*, 78 Child Welfare 315, 315 (1999).

33. *Id.*

34. In New York City, there was a two hundred percent increase in kinship placements, as opposed to a twenty-six percent increase in stranger placements, between 1986 and 1990. Marla Gottlieb Zwas, Note, *Kinship Foster Care: A Relatively Permanent Solution*, 20 Fordham Urb. L.J. 343, 354 (1993). More than fifty percent of all foster children were in kinship foster care in New York City as of December, 1991; in Philadelphia, it was more than sixty-seven percent as of March, 1992; in Chicago fifty-seven percent of all new foster care placements in 1989 were into kinship foster families. Marianna Takas, *Kinship Care: Developing a Safe and Effective Framework for Protective Placement of Children With Relatives*, 13 Child. Legal Rts. J. 12, 12 (1992). *But see* Losing Our Children: An Examination of New York's Foster Care System, *available at*, http://assembly.state.ny.us/Reports/Chil/199905 (last visited Mar. 15, 2001) (New York State Assembly report). This report shows a decline in kinship foster placements, finding thirty-three percent of placements in 1997 to be with kinship foster parents, whereas, as discussed above, the number was more than fifty percent in 1993. *Id.* However, the report states that kinship care is "the best solution for children because they maintain ongoing relationships with their families." *Id.*; *see also* Outcome & Performance Indicators: New York City Administration for Children's Services 81 (June 1998), *available at* http://www.ci.nyc.ny.us/html/acs/pdf/rpindrep.pdf (last visited Mar. 15, 2001) (charting statistics about foster care in New York City from 1977-1997, and finding that in 1997 the percentage of children in kinship care had dropped to thirty-three percent of all placements).

A. *The Rise of Kinship Foster Care*

In the 1980s, a huge increase in reports of child abuse and neglect increased the demand for foster parents.[35] Reports of neglect and abuse rose from four in every one thousand children in 1975, to forty-seven in every one thousand children in 1994.[36] This increase has been attributed to several factors, including substance abuse, specifically the rise in crack cocaine abuse during the 1980s.[37] Additionally, many foster children are placed when their family is homeless or has inadequate housing and, by 1994, almost half of the U.S. homeless population consisted of families with children.[38] The rise in the number of children in need of placement created a large demand for suitable foster homes. Simultaneously, nationwide the number of foster families has decreased and child welfare agencies have increasingly recognized that relatives are a vital placement resource.[39]

In *Miller v. Youakim,*[40] the Supreme Court held that relatives were entitled to receive state payments for acting as foster parents.[41] This eased the burden on relatives who otherwise could not afford to care for these children.[42] Concurrently, views about both governmental and extended family responsibilities to protect children changed and services tended to become more family-oriented.[43] In the last twenty years, new policies and legislation have concentrated on "family preservation and family ties."[44] Caseworkers began paying more attention to the idea of keeping families together. As a response, children were increasingly placed with kinship foster parents.[45] By

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35. Zwas, *supra* note 34, at 343 (citing Manhattan Borough President's Advisory Council on Child Welfare, Failed Promises: Child Welfare in New York City 3 (July 1989)). In 1962, the U.S. population between the ages of zero and eighteen was 69,864,000, of which 272,000 were in foster care. By 1994, the population for this age group had risen by two percent but the population in foster care had risen by seventy-three percent. Ira M. Schwartz & Gideon Fishman, Kids Raised by the Government 55 (1999).

36. Waldfogel, *supra* note 24, at 105.

37. *See* Robert H. Mnookin & D. Kelly Weisberg, Child, Family, and State: Problems and Materials on Children and the Law 525 (4th ed. 2000).

38. *Id.* at 524-25 (citing Children's Defense Fund, State of America's Children 37, 41 (1994)).

39. Jill Deurr Berrick, When Children Cannot Remain Home: Foster Family Care and Kinship Care, 8 The Future of Children 72, 74 (1998) (stating that the number of foster homes in the United States was 147,000 in 1987 but shrank to 100,000 by 1990); Davis & Chiancone, *supra* note 13, at 103.

40. 440 U.S. 125 (1979).

41. *Id.* at 145.

42. *See* Berrick, *supra* note 39, at 76 (noting that in New York approved kinship placements receive the full foster care subsidy whereas in Colorado, Illinois and Texas the full rate is only received when the home is licensed).

43. *See id.* at 74.

44. Laurel K. Leslie et al., *The Heterogeneity of Children and Their Experiences in Foster Care*, 79 Child Welfare 315, 316 (2000). The piece is a study of 484 children in San Diego County, California. *Id.* at 315.

45. *See* Davis & Chiancone, *supra* note 13.

1990, one study estimated that thirty-one percent of placements by child welfare authorities were with kin.[46]

The statutory schemes regarding kinship foster parents vary among states. Some states require that families receive the same training and licensing as stranger foster parents receive, while some states have written a preference for kinship care directly into their statutes.[47] Since all foster parents must become licensed, these kinship foster parents can be stranger foster parents to other children in need, helping the foster care system generally.[48] If the number of children in foster care continues to rise, these additional resources could be invaluable to a system that is already strapped for foster parents.[49]

B. *Benefits of Kinship Foster Care*

Kinship foster care also brings many benefits for the child. Sibling groups are more likely to be kept together if they are placed with kinship foster parents.[50] It is also less traumatic for a foster child to be placed with relatives than to be placed with strangers.[51] There is a tremendous difference to a seven-year old between going home to grandma, or going home to a stranger, when that child has already been traumatized by removal from his mother or father.[52] Kinship foster parents, more than stranger foster parents, focus on the emotional issues of separation and loss a child feels when he or she enters placement.[53] Also, children placed in kinship foster care are less likely to be shuttled from foster home to foster home, a reality faced by many children in stranger foster care.[54]

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46. Berrick, *supra* note 39, at 73.

47. *Id.* at 76 (stating that all counties in California have lower standards for kinship foster parents, while in Colorado and Texas kinship caregivers must undergo the same licensing process as stranger foster parents); *see also* N.Y. Fam. Ct. Act § 1017(1) (McKinney 1983 & Supp. 1993); *In re* W. Children, 167 A.D.2d 478 (1990) (finding it acceptable to place a child with a relative where the parent who neglected the child lives in the same household).

48. *See* Megan M. O'Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification*, 51 Vand. L. Rev. 1427, 1451-52 (1998).

49. *See* Waldfogel, *supra* note 24, at 107.

50. Leslie et al., *supra* note 44, at 316-17.

51. Zwas, *supra* note 34, at 354; Editorial, *Blood and Money: Kinship Doesn't Disqualify Foster Parents From Payment*, Pittsburgh Post-Gazette, Aug. 18, 2000, 2000 WL 22078376.

52. Zwas, *supra* note 34, at 354 (stating that kinship care avoids "the difficulty of establishing rapport with complete strangers").

53. *See* Leslie et al., *supra* note 44, at 317.

54. O'Laughlin, *supra* note 48, at 1451; Berrick, *supra* note 39, at 81 (stating that shifting placements may lead to "disruptive behavior" in children and that when kinship foster children changed homes it was often to live with another relative and not a stranger).

In addition, foster care status can stigmatize a child in the community, especially among his or her peers.[55] Living with relatives can mitigate this stigma because the child is still living with family and is not viewed by others as a ward of the state.[56] Kinship care is also more likely than stranger foster care to result in a healthy self-esteem and to help maintain the child's identity.[57] Studies have shown that kinship foster children are more likely to consider themselves happy and loved than children in non-kinship care.[58] In addition, the natural parent may be more likely to visit in a kinship care setting.[59] As one commentator notes, "[i]f instituted in the framework of specifically-tailored, family-sensitive legislative policies, kinship care can promote family and cultural unity, while reducing trauma to the most vulnerable children."[60]

C. *Criticisms of Kinship Foster Care*

Some commentators have disputed the assertion that kinship care is the best alternative for children. Their concern is the effectiveness of replacing informal extended family caregiver arrangements with formalized state intervention in the form of kinship foster parent programs.[61] In the past, these informal arrangements generally have taken place outside the child welfare system.[62] The caregivers often relied on public assistance where necessary and available.[63]

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55. Zwas, *supra* note 34, at 354 (citing Council of Family and Child Caring Agencies, Kinship Foster Homes and the Potential Role of Kinship Guardianship 3 (Apr. 1991)).

56. *Id.*

57. *Id.* (citing Child Welfare League of Am., Nat'l Comm'n on Family Foster Care, A Blueprint for Fostering Infants, Children and Youth in the 1990's 74 (Mar. 1991)); Christina M. Zawisza & John M. Ratliff, *Helping Relatives Raise Kids*, S. Fla. Sun-Sentinel, Oct. 23, 2000, 2000 WL 22204166 ("[K]inship care provides children with permanence, continuity and connections.").

58. Berrick, *supra* note 39, at 80 (stating that seventy percent of kinship foster kids rate themselves as happy or very happy, whereas only fifty-nine percent of stranger foster children do so, and that ninety-four percent of kinship kids but only eighty-two percent of non-kinship foster kids always feel loved).

59. Zwas, *supra* note 34, at 354 (citing Task Force on Permanency Planning for Foster Children, Inc., Kinship Foster Care: The Double Edged Dilemma 1 (Oct. 1990)). *But see* Marsha Garrison, *Why Terminate Parental Rights?*, 35 Stan. L. Rev. 423, 468 (1983) (noting that mentally disturbed or "psychologically destructive" parents should not be allowed visitation, but generally promoting visitation by natural parents for children in foster care); *infra* note 73 and accompanying text (noting that there can be a conflict where a caseworker cannot control whether an abusive parent has access to the child).

60. Takas, *supra* note 34, at 17. Minorities represent a disproportionate number of the children in foster care and more should be done to encourage kinship placements in these cases in order to help kids preserve their identity and self-confidence. Schwartz & Fishman, *supra* note 35, at 136.

61. James P. Gleeson et al., *Understanding the Complexity of Practice in Kinship Foster Care*, 76 Child Welfare 801, 803 (1997).

62. *Id.* Mark E. Courtney theorizes that public assistance reform could cause more families to enter into the foster care system. Mark E. Courtney, *The Costs of*

Kinship foster parents may not receive the financial support and services that stranger foster families receive from the government.[64] This is due, in part, to a view that relatives should take care of their own kin and not place additional burdens on the state.[65] Fewer services may result in great financial and emotional stress as the family adapts to having an additional member. This focuses the debate on the financial aspects of kinship foster care. One commentator has observed that "[t]he growing cost of kinship foster care has caused some to reach for simple explanations of the growth of kinship care and simple means of reducing the use of kinship foster care."[66] Simply put, the institutionalization of kinship care has cost the state money in the form of granting foster care subsidies to relatives who might otherwise perform the same function for free. Child welfare programs cost over $11 billion in federal and state spending in 1995 alone.[67] The financial issue is diminished where a family does not need a state subsidy and takes the child in under a guardianship arrangement.[68] The state's interest would then shift from financial and protective to simply protective, guarding the child against neglect and abuse.

Family history may indicate that a particular kinship foster parent is actually inappropriate due to previous abuse and neglect.[69] Studies have documented that these problems can be part of a cross-generational cycle.[70] There is definitely a need to determine the risk of harmful behaviors in kinship foster placements.[71] Abuse and neglect are not the only dangers. Kinship caregivers are often over-burdened. In one study, seventy-eight percent of kinship caregivers had between five and twelve residents in their homes and fifty-six

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Child Protection in the Context of Welfare Reform, 8 The Future of Children 88, 89 (1998). Concurrently, there will be a fiscal impact because foster care is much more expensive for the state than public assistance programs. *Id.*

63. *See* Courtney, *supra* note 62, at 89.

64. *See* Zwas, *supra* note 34, at 356-57.

65. Courtney, *supra* note 62, at 99. Courtney notes the irony that if subsidies are taken from kinship foster parents who then cannot afford to care for their foster children, the children will just end up in more expensive foster placements. *Id.* Additionally, the reluctance to fund such programs is contrary to the societal good of keeping children with their families.

66. Gleeson et al., *supra* note 61, at 804.

67. Courtney, *supra* note 62, at 88 (noting that this figure includes costs such as "investigations, casework services, foster care, and adoption assistance").

68. *Id.* at 89. Courtney notes the financial impact created when children are moved into foster care because foster care costs more than welfare. It follows that the state interest is different for the less expensive (or even free) guardianship alternative. *See id.*

69. Zwas, *supra* note 34, at 359.

70. *Id.*

71. Gleeson et al., *supra* note 61, at 803.

percent had between four and nine children at home under the age of eighteen.[72]

It may also be difficult to control whether or not an abusive or otherwise dangerous parent has unsupervised visits with the child when the child is placed with a relative.[73] The caseworker therefore loses a certain degree of control over what should be supervised visitation. Additionally, some kinship foster parents may actually reject state services and thus go unmonitored.[74] This is especially relevant because agency caseworkers are not as diligent with kinship foster placements as they are with stranger foster placements.[75] Perhaps this is due to the view that families are inherently more likely to take better care of related children than they are of children who are strangers.[76]

Permanency has become the focus of many child welfare proceedings.[77] It is defined in prevailing models as either return to natural parents or adoption.[78] While kinship care has been touted as promoting stability for children,[79] children in such placements are less likely to be reunited with their parents.[80] This may be due to bureaucracy, financial issues and a lack of involvement in services by kinship foster parents.[81] Return to parents has traditionally been a permanency option. Regarding adoption, one study noted that kinship foster parents were "reluctant" about adoption.[82] "The most common reasons given for their reluctance were general ambivalence and apprehension about adoption, the hope that the biological parents would be able to regain custody of the children, an unwillingness to consider adoption because the child 'was already a blood relative,' and an unwillingness to replace the biological parents."[83]

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72. *Id.* at 810. In the same study, seventy percent of the kinship caregivers were female and they ranged from twenty-five to seventy-two years of age. *Id.* The median age was fifty years old. *Id.*

73. Zwas, *supra* note 34, at 360.

74. O'Laughlin, *supra* note 48, at 1452-53.

75. *Id.* at 1452; *see also* Berrick, *supra* note 39, at 78 (charting the disparities in areas such as income, education and health between kinship and non-kinship caregivers).

76. *See* Zwas, *supra* note 34, at 344.

77. This focus is mainly due to the writings of Joseph Goldstein, Anna Freud, and Albert J. Solnit in Before the Best Interests of the Child (1979) [hereinafter, Goldstein et al., Before the Best Interests], Beyond the Best Interests of the Child (1973), and In the Best Interests of the Child (1986). *See also* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

78. Gleeson et al., *supra* note 61, at 804.

79. *See supra* Part I.B.

80. Leslie et al., *supra* note 44, at 317.

81. Gleeson et al., *supra* note 61, at 813.

82. *Id.*

83. *Id.*

The child welfare system, however, is not blind to these problems. The Child Welfare League of America ("CWLA") recommends certain standards for kinship foster placements. According to the CWLA, the following areas should be evaluated:

> [r]elationship between child and relative; [a]bility and desire of relative to protect the child from the parent; [s]afety and nurturing environment of home; [w]illingness of family to accept child; [a]bility of parent to meet child's developmental needs; [r]elationship between birth parent and relative; [f]amily dynamics in kinship home related to abuse or neglect of the child; [p]resence of substance abuse; [w]illingness to cooperate with the agency; [e]xisting support systems; [n]umber of children in the home and their status (e.g., HIV or other medical conditions, drug use); [h]ealth status of kinship caretakers; [a]ge of kinship caretakers in light of the child's long-term needs; and [t]he possibility that family members will pressure the child to recant any allegations of abuse.[84]

These factors can aid an agency in the determination of whether a particular kinship placement is appropriate.

Kinship foster care has both positive and negative aspects. On the one hand family preservation is a societal good and remaining with relatives is easier on the child. These arrangements, however, are often under-subsidized and poorly monitored. This raises the question of the appropriate level of governmental involvement in kinship care. The next part will examine whether kinship foster parents and their foster children have a constitutionally protected right to family association.

II. THE LIBERTY INTEREST

In *Rodriguez v. McLoughlin*,[85] the Second Circuit found that a stranger foster family did not have a protected family privacy interest.[86] In this case the foster child, Andrew, lived with the foster parent, Sylvia Rodriguez, from the age of thirteen days.[87] He was removed at age four.[88] Rodriguez had previously signed an agreement indicating her intent to adopt him.[89] She disputed the child's removal from her home, alleging she did not have an adequate opportunity to be heard before the removal and attacking the denial of visitation rights in the period before Andrew was returned to her. The court found that Rodriguez did not have a protected interest when the child was removed.[90] However, the court stated that the discussion applied

84. Davis & Chiancone, *supra* note 13, at 104.
85. 214 F.3d 328 (2d Cir. 2000).
86. *Id.*
87. *Id.* at 331.
88. *Id.* at 331-32.
89. *Id.* at 331.
90. *Id.* at 337.

to a "*biologically unrelated* foster family."[91] Therefore, this decision did not foreclose the possible liberty interests of kinship foster parents and their foster children. The emphasis in *Rodriguez* and other cases[92] on the lack of a biological relationship in foster families implies that a foster family who is biologically related may have a protectable interest.

This part will discuss the possible liberty interest at stake for kinship foster parents and the children in their care. It will begin with a discussion of family and parental rights in general.[93] Next, it will examine the rights of stranger foster parents. Finally, this part will address the rights of kinship foster parents and their foster children.[94]

A. *Due Process*

The Due Process Clause of the Fourteenth Amendment provides that a state will not deprive "any person of life, liberty or property, without due process of law."[95] It has two dimensions—procedural and substantive.[96] Procedural due process refers to the methods used to protect rights, not to the rights themselves.[97] The requirements to prove a violation are that "(1) you were deprived of a 'liberty' or 'property' interest; (2) the [government] *intended* to deprive you of your liberty or property interest; and (3) that you were deprived of a liberty or property interest 'without due process of law.'"[98]

"Substantive due process protects you against random and unfair deprivations of fundamental rights, including liberty, by state officials."[99] In *Griswold v. Connecticut*, for example, the Supreme Court found that there was a constitutional right to use contraception.[100] Writing for the majority, Justice Douglas based his finding on a right to privacy running throughout the Constitution.[101] In his concurrence, Justice Harlan stated that the test to determine if a right is fundamental is whether that right is "implicit in our concept of ordered liberty" as evidenced by our history and traditions.[102] If a right is fundamental, the government action must pass a strict scrutiny

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91. *Id.* (emphasis added).
92. *See infra* notes 156-74 and accompanying text.
93. *See infra* Part II.A.
94. *See infra* Part II.E.
95. U.S. Const. amend. XIV.
96. Excerpts from A Jailhouse Lawyer's Manual (5th ed.), *in* 31 Colum. Hum. Rts. L. Rev. 305, 319 (2000) [hereinafter Lawyer's Manual].
97. *Id.* at 320.
98. *Id.* (citing Sandin v. Conner, 515 U.S. 472 (1995)).
99. *Id.* at 319.
100. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).
101. *Id.* at 482-86.
102. *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

test.[103] If it is not a fundamental right, the government action must be rationally related to a legitimate government interest.[104]

Modern substantive due process has evolved. The case law has recognized other spheres of life, besides contraception, into which the government may not intrude. There is a fundamental right to an abortion[105] and to marry,[106] among others. As *Moore v. City of East Cleveland*[107] displays by granting an extended family the right to live together, family privacy has been held to be a fundamental right, and, therefore, is accorded strict scrutiny analysis.[108]

B. *Parental Rights and Family Privacy: A Constitutional Background*

To assert a liberty interest, one must first determine that there is, in fact, a constitutional right at stake.[109] A court will then examine the procedures in place to protect that right.[110] The adequacy or inadequacy of the procedures will determine whether a violation has occurred.[111] Parents' liberty interest in their children is one of the oldest rights recognized in the American tradition of substantive due process.[112] The theme of family privacy runs throughout the Supreme

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103. Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

104. Roe v. Wade, 410 U.S. 113, 152-55 (1973).

105. *See id.* at 164.

106. *See* Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

107. 431 U.S. 494, 503 (1977).

108. *But see* David D. Meyer, *The Paradox of Family Privacy*, 53 Vand. L. Rev. 527, 528 (2000). Meyer suggests that while the Supreme Court purports to use a fundamental rights analysis when dealing with issues of family privacy, it is actually using a more flexible framework. Formalizing this lesser standard would embrace a broader range of families and accord more protection to "non-traditional" relationships.

109. Harley *ex rel.* Johnson v. City of New York, 36 F. Supp. 2d 136, 140 (E.D.N.Y. 1999).

110. *Id.*

111. *Id.*; *see also supra* Part II.A. (discussing due process).

112. Troxel v. Granville, 530 U.S. 57, 65 (2000); *see also* Santosky v. Kramer, 455 U.S. 745, 768 (1982) (finding the use of the "fair preponderance" standard violative of parental rights in termination proceedings); Parham v. J.R., 442 U.S. 584, 604 (1979) (finding constitutional Georgia's procedures for admission of children to mental hospitals and stating that parents "retain a substantial, if not the dominant, role in the decision [to commit the child]" and that parents "retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment"); Quilloin v. Walcott, 434 U.S. 246, 249, 256 (1978) (finding no violation of natural father's rights where he had not acted as a parent for eleven years and custody was granted to stepfather); Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (finding it unconstitutional to require Amish parents to send their children to public school past a certain age); Stanley v. Illinois, 405 U.S. 645, 658-59 (1972) (finding an unwed father was entitled to hearing on his parental fitness after the death of children's natural mother); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (finding it acceptable for a guardian to bring her niece to proselytize with her); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (invalidating a statute requiring public school attendance to the exclusion of private school instruction); Meyer v. Nebraska, 262 U.S. 390, 402 (1923)

Court's jurisprudence. In *Meyer v. Nebraska*,[113] the Court first recognized parental rights.[114] The Court found that a statute prohibiting the teaching of any language but English in public schools invaded the rights of parents to raise their children.[115] This ruling affirmed that freedom under the Fourteenth Amendment means more than just unconstrained bodily movement. The Court held that allowing the statute to stand would violate parents' substantive due process rights in their children.[116]

In *Wisconsin v. Yoder*,[117] Amish parents challenged the constitutionality of a Wisconsin statute that required public school attendance until the age of sixteen.[118] The Court ruled for the parents under both the First and Fourteenth Amendments.[119] The Court stated that the "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[120]

Two years later, in *Pierce v. Society of Sisters*[121] the Court continued this theme and ruled that a state could not mandate that children attend public school instead of private school.[122] To do so would "unreasonably interfere[] with the *liberty* of parents and guardians to direct the upbringing and education of children under their control."[123] The Court further noted that "[t]he 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 additional obligations."[124] Likewise, the court in *Prince v. Massachusetts* recognized a parental right over a child's non-

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(finding a statute disallowing instruction in any language other than English to be an unconstitutional invasion of parental rights).

113. 262 U.S. 390 (1923).

114. *Id.* at 399.

115. *Id.* at 401 ("Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution . . . .").

116. *Id.* at 402.

117. 406 U.S. 205 (1972).

118. *Id.* at 207.

119. *Id.* at 234.

120. *Id.* at 232.

121. 268 U.S. 510.

122. *Id.* at 534-35.

123. *Id.* at 534-35 (emphasis added). Note that this quote includes the rights of guardians and the rights of parents. While the Court may not have been equating the two, it does seem to recognize here that guardians have some sort of family privacy right in relation to the children they care for, but query the economic factor. Guardians generally take financial responsibility for the child whereas kinship foster parents receive a subsidy. Economics definitely enters this debate. *See* Courtney *supra* note 62.

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

educational activities, finding it acceptable for an aunt acting as her niece's guardian to allow the child to accompany her while she was proselytizing.[125]

The most recent Supreme Court pronouncement on parental rights was made in the grandparent visitation case of *Troxel v. Granville*.[126] Petitioners' son, Brad Troxel, had two children with Tommie Granville.[127] After the couple separated, the Troxels continued to see their granddaughters when their son brought the girls to their home on regular visits.[128] Brad committed suicide in May 1993 and, though the visits continued regularly at first, in October 1993 Granville notified the Troxels that she would limit the visitation to once a month.[129] Under a Washington state statute permitting anyone to petition for visitation rights whenever "visitation may serve the best interest of the child" petitioners requested to visit their grandchildren.[130] The children's mother opposed their request of two weekends of visitation every month and two weeks of visitation each summer.[131] The Court held that the Washington statute violated the mother's due process rights to "make decisions concerning the care, custody, and control of her two daughters."[132] Justice O'Connor, writing for the plurality, noted that the liberty interest of parents in the upbringing of their children is one of the oldest interests recognized by the Supreme Court.[133]

The contours of this liberty interest, however, are not easily defined. The interaction between the parent, the child and the state in family law creates competing interests. In the early cases of *Pierce* and *Meyers*, the rights were framed in terms of parental rights versus state power.[134] This is not, however, the only relevant relationship recognized. One jurist framed the rights in terms of parental rights versus children's rights. A parental right is "a dwindling right which the courts will hesitate to enforce against the wishes of the child, the

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125. Prince v. Massachusetts, 321 U.S. 158, 170-71 (1994) (finding it acceptable for a child to proselytize with her guardian in keeping with their faith as Jehovah's Witnesses). Notice again that the Court is recognizing a right for a guardian. The child in question was being raised by her aunt who was found to have a constitutionally protected interest in controlling her upbringing.

126. 530 U.S. 57 (2000).

127. *Id.* at 60.

128. *Id.*

129. *Id.* at 60-61.

130. *Id.* at 61.

131. *Id.*

132. *Id.* at 72.

133. *Id.* at 65. *But see id.* at 99 (Kennedy, J., dissenting) ("Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare.").

134. David DeGroot, *The Liberal Tradition and the Constitution: Developing a Coherent Jurisprudence of Parental Rights*, 78 Tex. L. Rev. 1287, 88 (2000).

older he is."[135] Traditionally, however, the law has concentrated on duties children owed to their parents with respect to the assignment of rights in the parent-child relationship. This was due to a sentiment that parental rights arose from nature.[136] Modern law no longer retains this emphasis, but instead centers on child welfare in relation to parental rights.[137]

C. *The Full Analysis: Privacy as a Family Right and Not Just an Individual Entitlement*

The Supreme Court has recognized that there is, in fact, such a thing as a "right to family privacy."[138] This doctrine "recognizes a parent's fundamental right to the care, custody and companionship of her or his child as well as the right to make decisions affecting the welfare of the child free from government interference, except in compelling circumstances."[139] These rights were defined using the traditional substantive due process standard, described in Justice Harlan's concurrence in *Griswold*, as rights "implicit in the concept of ordered liberty" as evidenced by our traditions.[140] Although it has couched this right in terms of the individual, the Court has extended this interest beyond the nuclear family to the extended family.[141]

The separation between what the state can intrude upon and what is inviolable indicates when it is appropriate to characterize a right as fundamental, whether parental rights are fundamental, and what the breadth of those rights are.[142] Query who holds these rights and whose interests should be the focus of this analysis. There are many peoples' rights at issue in a privacy analysis. A concentration on parental rights exclusively would deny the child any power in determining his or her own future.[143] One commentator has noted that "[r]ather than seeking to provide adults for children who need

135. Bernard M. Dickens, *The Modern Function and Limits of Parental Rights*, *in* Child Law 167 (Harry D. Krause ed., 1992) (quoting Lord Denning M.R.).

136. *Id.*

137. *Id.* at 168.

138. Pierce v. Soc'y of Sisters, 268 U.S. 510, 518 (1925). The need for family privacy is not just a legal interest, but a policy one as well. For the most part the parent-child relationship should exist free from state intervention and, if state intervention is ever justified, the child's well-being must govern. Goldstein et al., Before the Best Interests, *supra* note 77, at 4-5.

139. Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 Alb. L. Rev. 405, 406 (1988) (concentrating on sexual privacy issues and family rights).

140. Griswold v. Connecticut, 381 U.S. 479, 500-01 (1965) (quoting Palko *v.* Connecticut, 302 U.S. 319, 325 (1937)).

141. Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977) (striking down a zoning ordinance that would prohibit certain family members from living in the same home based on degree of relation).

142. Francis Berry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 Ga. L. Rev. 975, 980 (1988).

143. Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 Wm. & Mary L. Rev. 995, 1001 (1992).

them, [current law] seems intent on securing children for adults who claim them."[144] Even if not expressly acknowledged, children have some rights.

The breadth of the parental liberty interest is therefore limited by the interests of the child and, by extension, the state acting in the interests of the child. The state has authority to mandate compulsory education, intervene in neglect situations and regulate child labor, to name a few areas.[145] It follows that parents are not the final arbiters in every aspect of their child's life. The balancing of the many interests involved is only one aspect of the full analysis. Whatever formulation one chooses and however one interprets these relationships, our legal system is built upon the idea that these rights are held by adult individuals.[146] Children's rights and legal interests are not part of this traditional formulation.

A related dialogue centers around redefining what it means to be a "parent." The title can transcend biological connotations and embrace a wider variety of relationships.[147] For example, one commentator has suggested that parenthood could be viewed as "[r]esponsibility [w]ithin [r]elationship."[148] This type of analysis is based on the particular relationships in question.[149] The "responsible person" would not only attend to his defined roles, but would also pay attention to the desired outcome in a certain situation.[150] "Responsibility, in other words, is a self-enlarging, open-ended commitment on behalf of another."[151] This reasoning broadens the definition of who is a parent by demonstrating that a parent is one who is concerned about what happens to the child in his care.[152] Parenthood is not just an accident of biology.[153] Another commentator has suggested a broad view of family rooted in ties of intimacy.[154] These types of expansive definitions of what it means to

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144. Mangold, *supra* note 9, at 839-40 (2000) (citing Woodhouse, *supra* note 1, at 1812).

145. McCarthy, *supra* note 142, at 977-78.

146. Pamela Scheininger, *Legal Separateness, Private Connectedness: An Impediment to Gender Equality in the Family*, 31 Colum. J.L. & Soc. Probs. 283, 283 (1998).

147. *See supra* notes 138-45 and accompanying text.

148. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 Yale L.J. 293, 298 (1988).

149. *Id.* at 299.

150. *Id.*

151. *Id.*

152. Obviously this is an extremely subjective standard but it often seems difficult to avoid such subjectivity in the family law context.

153. Parental rights are not purely rooted in marriage, either. *See* Stanley v. Illinois, 405 U.S. 645 (1972) (finding that an unmarried natural father, who lost custody of his children under an Illinois law mandating that children of unwed fathers become wards of the state at their mothers' death, was entitled to a custody hearing).

154. Susan L. Brooks, *The Case for Adoption Alternatives*, 39 Fam. Ct. Rev. 43, 47 (2001) (citing Susan L. Brooks, *A Family Systems Paradigm for Legal Custody Decision Making Affecting Child Custody*, 6 Cornell J.L. & Pub. Pol'y. 1 (1997)

be a "parent" allow the recognition of non-traditional parent-child bonds.[155]

D. *The Rights of Non-Kinship or Stranger Foster Parents*

It is well-settled in Supreme Court jurisprudence that natural parents have a constitutionally protected right to family privacy.[156] This includes the right to decide how children are raised and the kind of education they should receive.[157] These cases all have a common thread—biological relationships.[158] Several cases, however, have examined the rights of other kinds of caregivers.

In *Smith v. Organization of Foster Families for Equality and Reform* ("OFFER"),[159] an organization of foster families and individual foster parents brought an action contesting the pre-removal features of New York state law, contending that the procedures violated their procedural due process rights.[160] Because the agency that places the child with the foster parents technically retains custody of the child, it retains the right to remove him from the home for various reasons.[161] While the Supreme Court recognized that "traditional" families have a due process right to family association, the Court distinguished the foster family based on three factors: the lack of a blood relationship,[162] the origin of foster families in state and contract law,[163] and the tension between protecting the liberty interests of the natural parents while also extending familial rights to foster parents.[164] Writing for a unanimous court, Justice Brennan queried whether "the relation of foster parent to foster child [is] sufficiently akin to the concept of 'family' recognized in our precedents to merit similar protection [to that of natural families]?"[165]

The Court, in deciding that the pre-removal procedures[166] were sufficient to protect any "interests" that may exist, distinguished

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(describing and applying family systems theory)); *see also*, Waldfogel, *supra* note 24, at 111 (noting that extended families may even be resources to provide support to parents that could help to prevent abuse and neglect at the outset).

155. Goldstein, Freud and Solnit also offer an expansive definition of parent: "Parents are Adults who have the right and responsibility, in law, to make decisions for their Child.... Longtime Caretakers are presumed to be Parents." Goldstein et al., Before the Best Interests, *supra* note 77, at 188-89.

156. *Supra* note 112 and accompanying text. However, it is important to note that this family privacy right has emerged in a piecemeal fashion and it is difficult to point to a standard set of rights. Meyer, *supra* note 108, at 528.

157. Meyer, *supra* note 108, at 528.

158. *See supra* notes 113-125 and accompanying text.

159. 431 U.S. 816 (1977).

160. *Id.*

161. *Id.* at 829.

162. *Id.* at 843.

163. *Id.* at 845-46.

164. *Id.* at 846.

165. *Id.* at 842.

166. The pre-removal review process called for the following features:

between a foster family and a natural family.[167] It did not, however, address the question of what the exact "interests" were. In addition, it did not pinpoint the legal boundaries of what constitutes a "family" for purposes of the rights analysis. While the Court acknowledged that it is more than biology that defines a family, it stressed the difference between the blood relationship, which is founded in nature, and the foster family relationship, which is founded in state contract law.[168] This does not mean, however, that foster parents are completely without rights with regard to their foster children. It simply means that whatever rights they do have were sufficiently protected by the pre-removal procedures that were in place.[169] While some courts have used *OFFER* to protect a "*very* long term foster relationship," it has usually been relied on to deny any rights to foster parents.[170]

This is not to say that foster parents are completely devoid of legal rights and remedies. Foster parents have legal standing to assert whatever liberty interest they may have in their foster families.[171] Some states give foster parents a right to notice and a pre-removal hearing.[172] Foster parents may also have the additional right to

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> (1) the review is heard before a supervisory official who has had no previous involvement with the decision to remove the child; (2) both the foster parents and the agency may be represented by counsel and each may present witnesses and evidence; (3) all witnesses must be sworn, unless stipulated otherwise, and all testimony is subject to cross-examination; (4) counsel for the foster parents must be allowed to examine any portion of the agency's files used to support the proposal to remove the child; (5) either a tape recording or stenographic record of the hearing must be kept and made available to the parties at cost; and (6) a written decision, supported by reasons, must be rendered within five days and must include a reminder to the foster parents that they may still request a post-removal hearing under N.Y.C.R.R. § 450.14.

Id. at 849 n.56 (quoting Org. of Foster Families for Equal. and Reform v. Dumpson, 418 F.Supp. 277, 285 (S.D.N.Y. 1976)).

167. *Id.* at 847-850.

168. *Id.* at 843-46.

169. *Id.* at 855.

170. David L. Chambers and Michael S. Wald commented:

> States that did not afford foster parents any pre-removal conferences or hearings were put on notice that their process might be unconstitutional. . . . The OFFER decision has been cited by a few courts as a basis for protecting a *very* long-term foster relationship, although most of the ten to fifteen published opinions that have cited the case, for more than a passing reference in a string citation, have used it to deny foster parents any rights.

David L. Chambers & Michael S. Wald, "Smith v. OFFER" *in* In the Interest of Children 114-117, *reprinted in* Mnookin & Weisberg, *supra* note 37, at 542.

171. 59 Am. Jur. 2d *Parent and Child* § 77 (1987).

172. Mark Hardin & Josephine Bulkley, *The Rights of Foster Parents to Challenge Removal and to Seek Adoption of Their Foster Children*, *in* The Rights of Foster Parents 17 (1989); *see also* Brown v. County of San Joaquin, 601 F. Supp. 653 (E.D. Cal. 1985) (finding that foster parents are entitled to procedural due process in relation to a pre-removal hearing); Christina K. v. Superior Court, 229 Cal. Rptr. 564 (1986) (finding that when foster parents are *de facto* parents they have standing in

intervene in proceedings to terminate parental rights.[173] The message seems to be that whatever rights foster parents may have, there are procedural safeguards in place to protect them.[174]

Consider, however, the Fifth Circuit case of *Drummond v. Fulton County Department of Family & Children's Services*.[175] The court balanced the competing interests of the state and foster parents, but found that the adoption agency had struck an acceptable compromise.[176] This case involved a biracial child who was placed with white parents for temporary foster care at the age of one month.[177] Within one year the foster parents requested to adopt him and the state denied their request. The foster parents asserted that they had formed a "psychological family" with the child, and that while he lived with them, "mutual feelings of love and dependence developed which are analogous to those found in most biological families."[178] However, the court rejected this argument, finding that a relationship based in state law could not be equated with one founded in biology.[179] *Drummond* is just one example, but this and other state and federal courts have sent the message that stranger foster parents do not have a liberty interest in their foster families.[180]

E. *The Rights of Kinship Foster Parents*

The right to family privacy in general and family association in particular has been extended beyond the nuclear family. In *Moore v. City of East Cleveland*, for example, the Supreme Court found unconstitutional an ordinance making it a crime for a family consisting

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hearings); *In re* C.O.W., 519 A.2d 711 (D.C. App. 1987) (holding that a statute allowing a comparison between a child's natural and foster parents does not violate due process); *In re* Michael W., 508 N.Y.S.2d 124 (App. Div. 1986) (holding that when a child is living in a foster home and a petition to terminate an order of placement is filed, the foster parents may participate in the proceedings).

173. *See, e.g., In re* Diana P., 424 A.2d 178 (1980) (finding long-term foster parents had right to intervene in hearing to terminate parental rights). *But see* Webster v. Ryan, 187 Misc. 2d 127 (N.Y. Fam. Ct. 2001) (finding stranger foster parent did not have a right to intervene in hearing to determine parental fitness); *In re* Kimberly J., 595 N.Y.S.2d 146 (App. Div. 1993) (finding foster parents did not have right to intervene in termination of parental rights hearings).

174. *See e.g.*, note 169 and accompanying text.

175. 563 F.2d 1200 (5th Cir. 1977).

176. *Id.* at 1210-11.

177. *Id.* at 1203.

178. *Id.* at 1206.

179. *Id.* at 1206. Furthermore, as in *OFFER*, the court found that even if there had, arguendo, been an interest, the Georgia state procedures provided sufficient protection. *Id.*

180. *Cf.* Kyees v. County Dep't of Pub. Welfare, 600 F.2d 693 (7th Cir. 1979) (finding that foster parents and child were not entitled to due process protections before removal); Sherrard v. Owens, 484 F. Supp. 728 (W.D. Mich. 1980) (finding acceptable the procedure to revoke a foster home license in Michigan). However, stranger foster parents are not completely devoid of any rights in relation to their foster children. *See supra* notes 167-68 and accompanying text.

of a grandmother, her son and grandson, and an additional grandson to live together.[181] It is not, then, only so-called "traditional" families that are accorded constitutional protections. "Kinship" foster parents and their foster children appear to fit into the non-traditional conception of family.[182]

Unfortunately, it is still unclear what definitely falls into the protected family privacy realm. "[T]he Court has been content to let strands of doctrine emerge piecemeal."[183] In fact, the holdings of *Pierce*[184] and *Meyer*[185] are currently viewed by many as based on rationales other than due process.[186] This confused tradition of substantive due process rights in the family privacy area makes it difficult to formulate one coherent standard.

A Second Circuit case, *Rivera v. Marcus*,[187] provides yet another interpretation of these due process interests and an interesting comparison with *OFFER* and *Rodriguez*. The *Rivera* court found that a half sister had due process rights in relation to her half brother and sister for whom she was a foster parent.[188] The court noted that the *OFFER* Court had left open the possibility that "long term" foster parents may have certain protections due to the family ties and relationships that develop.[189] In *Rivera*,[190] Betty Jean Ross and her two children moved in with Rivera in 1968.[191] Rivera was a blood relation because she had the same biological father as the two children.[192] During this time, they lived together as a family and she acted as a "surrogate mother" due to Ross's psychological issues.[193] When Ross was committed to a mental institution, Rivera became the children's foster parent.[194] The children were removed in 1974.[195] During the time they were not in her care, Rivera was not able to talk to her half brother and sister or to learn their whereabouts.[196] In determining Rivera's due process interest, the court noted that such interests are not limited by the text of the Constitution.[197] The court then stated

181. Moore v. City of East Cleveland, 431 U.S. 494 (1977).
182. Or perhaps the lesson is that there is no "model" for what defines a family!
183. Meyer, *supra* note 108, at 528.
184. For a discussion of *Pierce, see supra* notes 121-24 and accompanying text.
185. For a discussion of *Meyer, see supra* notes 113-16 and accompanying text.
186. Meyer, *supra* note 108, at 534 (stating that these holdings may have been based on the First Amendment idea that "the State may not . . . contract the spectrum of available knowledge" or that they may have been aimed at protecting minorities).
187. 696 F.2d 1016 (2d Cir. 1982).
188. *Id.*
189. *Id.* at 1024.
190. 696 F.2d 1016 (1982).
191. *Id.* at 1017.
192. *Id.* at 1018.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 1021.

that "[t]he constitutional conception of 'family' has evolved ... to include relationships among members of what has commonly become known as the 'extended family.'"[198] It then noted the significance of biological connections in extending the constitutional protections for parent and child to other types of bonds.[199] The court distinguished *Rivera* from those cases in other circuits denying such a right for other foster parents on the basis of biological relationship.[200] Rivera was found to possess a liberty interest in her association with her half brother and sister.[201]

One may ask why, post-*Rivera*, an analysis of the liberty interests of kinship foster parents is necessary. While *Rivera* appears to grant a liberty interest to kinship foster parents, it has little subsequent history.[202] Indeed, it has rarely even been cited.[203] Kinship foster parents are not lining up in front of family court to vindicate their rights and keep their families intact. Why is this? One possible answer is that the facts of *Rivera* entail an extremely intense kind of kinship relationship. One child came to live with Rivera during infancy and the other was born while his natural mother resided in her home.[204] The natural mother lived with all three as a family until she was committed to a mental institution.[205] In fact, she asked Rivera to become the primary caregiver.[206] While it is certainly possible that other families are in this situation, these facts display the kinship foster mother acting as a primary caregiver almost from the time of the children's birth. The opinion is broad, however, in the sense that while it discusses biological ties as determinative, there are no standards set.[207] It does not limit the type of relationship or biological tie that must exist or set out an analytical framework to determine what type of relationship is enough.

198. *Id.* at 1022.
199. *Id.*
200. *Id.*; *see also* Rodriguez v. McLoughlin, 214 F.3d 328 (2d Cir. 2000) (holding, post-*Rivera*, that stranger foster parents do not have a liberty interest); Kyees v. County Dep't of Pub. Welfare, 600 F.2d 693, 695 (7th Cir. 1979) (same); Drummond v. Fulton County Dep't of Family and Children's Servs., 563 F.2d 1200, 1207 (5th Cir. 1977) ("[The foster family] has never been recognized as equivalent to either the natural family or the adoptive family by any court . . . ."); Sherrard v. Owens, 484 F. Supp. 728 (W.D. Mich. 1980) (holding that foster parent had no liberty interest protected by due process).
201. *Rivera,* 696 F.2d at 1025.
202. *See* Whalen v. County of Fulton, 126 F.3d 400, 405 (2d Cir. 1997) (distinguishing *Rivera*); *In re* A.W.R., 17 P.3d 192 (Colo. Ct. App. 2000), *cert. denied,* 2001 Colo. LEXIS 52 (Jan. 22, 2001) (declining to follow *Rivera*).
203. *See Whalen*, 126 F.3d at 405 (distinguishing *Rivera*); In re *A.W.R.*, 17 P.3d at 196, (declining to follow *Rivera*).
204. *Rivera*, 696 F.2d at 1017.
205. *Id.* at 1018.
206. *Id.*
207. *See id.* at 1022.

Perhaps kinship foster parents just are not challenging these decisions. The problem may be self-correcting in that where the facts are as strong as they were in *Rivera*, caseworkers are less likely to remove the children. Another explanation, however, is a lack of legal services.[208] Foster parents may not be entitled to representation in removal situations and there are few alternatives for those who want to contest a removal but do not have the resources to hire an attorney.[209] Additionally, there are not even that many requests for pre-removal hearings.[210] In fact, one objection to extending a liberty interest to kinship foster parents is that there may be a huge backlog of cases when these kin start asserting their rights.

Possibly, there is a lack of requests because removals usually occur in an acceptable manner due to agencies adhering to state regulations.[211] The answer may also be that foster parents simply do not think they have any chance at the hearing so they do not even bother to request one.[212] Many foster parents may not be aware that they even have a right to a hearing.

Another factor limiting the precedential value of *Rivera* is that the procedures at issue in that case offered much less protection than did the procedures in *Rodriguez*.[213] In *Rodriguez*, the Second Circuit found that a biologically unrelated foster mother's rights were not violated by the removal of her foster child.[214] However, when defective procedures "create a potential for erroneous deprivation [of a constitutional right]" it is easier to find a violation.[215] If there were a definitive liberty interest, there would be a much higher bar for the procedures in question because state action would be subject to strict scrutiny instead of rational relationship analysis. *Rivera* is still good law in the Second Circuit, but it has not been challenged and it is

208. *See e.g.*, 18 N.Y. Comp. Codes R. & Regs. tit. 18 § 443.5 (2001) (granting foster parents procedural rights including the right to appear with a lawyer, but declining to direct the court to provide one free of charge).

209. *See id.* Natural parents may be entitled to an attorney when their children are removed. *See, e.g.*, N.Y. Fam. Ct. Act § 261 ("Persons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society . . . and therefore have a constitutional right to counsel in such proceedings.")

210. Chambers & Wald, *supra* note 170, at 543.

211. *See id.*

212. *Id.*

213. Under the Connecticut regulations at issue in *Rivera*, the foster parent could not bring an attorney to the hearing or participate in any meaningful way. In fact, he or she could not be present in the courtroom except as a testifying witness. Additionally, no written opinion was required and the decision could not be appealed. *Rivera*, 696 F.2d at 1027-28. The New York procedures in *Rodriguez* permitted foster parents to intervene in custody proceedings and to petition for adoption, and gave preference to foster parents in adoption proceedings. *Rodriguez v. McLoughlin*, 214 F.3d 328, 340 (2d Cir. 2000).

214. *Rodriguez v. McLoughlin*, 214 F.3d 328 (2d Cir. 2000).

215. *Rivera*, 696 F.2d at 1027.

unclear whether or not it could withstand such a challenge. The Supreme Court has yet to rule on whether or not kinship foster parents should be accorded family privacy rights.

In *Rivera*, the due process interest asserted was based on the Constitution. A due process interest may also, however, arise from the laws of the states.[216] For an interest to arise under a statute or regulation, the language in question must create more than a "unilateral hope"[217] and must be more than an "abstract need or desire."[218] Basically, there is a protected liberty interest where a "State . . . place[s] substantive limitations on official discretion."[219] A state could do this through any number of foster care regulations. For example, it could give an automatic option to adopt to kin after a certain amount of time passes. This means that there are predicates to govern what is decided and that certain scenarios mandate prescribed results.[220] In this way an expectation is created and, consequently, an interest. However, this has not been a successful argument in cases asserting the rights of foster parents.[221]

In his concurrence in *Rivera*, Judge Kaufman noted that children's rights were implicated by the decision and that it was not just about parental rights.[222] As the next part argues, a good step would be an expansion of the right recognized in *Rivera* to embrace the children's right dimension. As discussed earlier, any recognition of a liberty interest for a kinship foster parent is really the recognition of a family

216. Ky. Dep't of Corrs. v. Thompson, 490 U.S. 454, 460 (1989) (quoting Hewitt v. Helms, 459 U.S. 460, 466 (1983)).

217. *Id.* (citing Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)). There must be a "legitimate claim of entitlement" to the right, not just a flimsy wish that the right exists. *Id.*

218. *Id.* (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). A party cannot just expect to receive the right, but must have a "legitimate claim" to it. *Roth*, 480 U.S. at 577.

219. *Thompson*, 490 U.S. at 462 (citing Olim v. Wakinekona, 461 U.S. 238, 249 (1983)).

220. *Id.*

221. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 846, 849 (1977) (stating that state laws demonstrate the legal expectations of the parties and that the procedures set up by the state in this case were sufficient); Rodriquez v. McLoughlin, 214 F.3d 328, 341 (2d Cir. 2000) (acknowledging that a liberty interest may arise from state law, but finding no such liberty interest); Rivera v. Marcus, 696 F.2d 1016, 1026 (2d Cir. 1982) (finding a liberty interest based on the familial relationship and not on expectations founded in state law).

222. *Rivera*, 696 F.2d at 1029 (Kaufman, J. concurring). Kaufman remarked:

> It is beyond peradventure that the nuclear family is not the only constitutionally protected family unit. . . . [I]t has become a commonplace to encounter families whose members include stepparents, half-brothers and -sisters, aunts and uncles and others. . . . [T]he emotional ties which bind such families are no less significant or deep than those which exist within the traditional nuclear structure. [I want to] *emphasize that the constitutional rights of children are directly and vitally implicated in custody termination proceedings.*

Id. (emphasis added).

right.[223] It cannot be held by the individual alone, but must take into account the interests of all who are involved. This balance must include the interests of the child. The next part will argue that, considering such a balance, kinship foster parents have a liberty interest in their foster families.

III. KINSHIP FOSTER PARENTS HAVE A LIBERTY INTEREST IN THEIR FOSTER FAMILIES

This part will argue that, as the *Rivera* court found, kinship foster parents have a liberty interest in their foster families. This will proceed under both a constitutional and policy analysis. As John Hart Ely remarked, "'[i]t remains to ask the hardest questions. Which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental or whathaveyou [sic] to be vindicated by the Court against other values affirmed by legislative acts? And how is the Court to evolve and apply them?'"[224] Do we, as a society, place enough importance on the extended family for it to qualify for a right of association? This part will begin with a discussion of the need to view tradition and family broadly. It will then suggest that, in defining family privacy rights, the analysis should focus on the relationships between people and not just on individual status. Next, the argument will focus on the need to alter the view that adoption is the best way to provide a child with permanency. Finally, this part will argue that there should be a rebuttable presumption that kinship foster parents have rights akin to those of natural parents.

A. *American Society Has Many Traditions and Models of "Family"*

Liberty interests are not just pulled from the Constitution but they reflect our communal values and traditions. The right cannot be evaluated in a vacuum, but must be examined in relation to what it would add to a "society of ordered liberty."[225] The formal recognition in both law and theory of familial relationships outside the immediate family is a natural extension of the Supreme Court's recognition of constitutional protections for family units other than the "traditional" family.[226] It is not simply mother, father, children and cocker spaniel

223. *See supra* Part II.C.

224. John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5 (1978) (quoting Alexander Bickel).

225. DeGroot, *supra* note 134, at 1289. Justice Harlan described the standard for a liberty interest as "implicit in the concept of ordered liberty" as evidenced by our traditions in *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

226. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (noting that "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns").

that is protected as a unit because it is "implicit in [our] concept of ordered liberty."[227] Other formulations of the family unit have been recognized and protected.[228] Justice Powell expressed these values clearly in the majority opinion in *Moore*:[229] "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[230]

The Court, however, often refers to the idea of "traditional" society when it rules that a particular family relationship is not protected.[231] Yet, even more than when Powell wrote for the majority in *Moore*, in today's society it is difficult to point to a single model of family.[232] Approximately twenty-seven percent of families with children under the age of eighteen are single-parent households, just under twenty-five percent of children reside in or will reside in step-families during their childhood, and almost four million children live with their grandparents.[233]

Using tradition as a source of fundamental rights can be problematic for other reasons as well. First, this approach could make rights analysis a static area of legal thought.[234] This would chill the development of the law. Any relationship that is "non-traditional" would be unprotected. Second, it raises the issue of whose or what traditions are determinative.[235] In the United States where many different cultures coexist, it is difficult to define a singular norm.

Many traditions have histories of caring for relatives' children in times of need. For example, "[p]arenting by kin has historically been

227. *Griswold*, 381 U.S. at 500 (quoting *Palko*, 302 U.S. at 325).

228. *See e.g.*, *Moore*, 431 U.S. at 506 (finding unconstitutional a zoning ordinance that would disallow a grandson from residing with his grandmother).

229. *Id.*

230. *Id.* at 504; *see also* Troxel v. Granville, 530 U.S. 57, 63 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family.").

231. Meyer, *supra* note 108, at 562-63; *see also* Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (stating that parental rights case law is based on "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family").

232. *Troxel*, 530 U.S. at 63.

233. Kimberly R. Willoughby & Sherilyn Rogers, *Legal Protection of Children in Nontraditional Families*, 29 Colo. Law. 79, 79 (2000) (raising the additional issue of biological engineering as further confusing the idea of what a family will be in the future). But consider this—isn't this all a moot discussion because haven't grandparents, aunts, uncles, etc. been caring for children in their families in times of need for the whole of human history? Perhaps a kinship foster home is a "traditional" family after all.

234. McCarthy, *supra* note 142, at 984.

235. *Id.*

a survival strategy used by many African American families."[236] This cultural reality may explain why families in the African American community often use kinship care.[237] "Many Latino and Asian families involve grandparents, godparents, and others in the care of children and in decision making and planning in [sic] behalf of these children."[238] These and many other traditions are part of American society and must be considered in the analysis. In order to be "culturally competent," the child welfare system should be a complex of "'systems, agencies, and practitioners that have the capacity, skills, and knowledge to respond to the unique needs of populations whose cultures are different than that which might be called dominant or mainstream American.'"[239] A step in this direction would be to explore the possibilities of concurrent adoption and subsidized guardianship in the jurisdictions that have these options.[240] This would recognize the importance of the extended family in the African American community, which represents a large percentage of kinship foster families.[241]

Cultural differences are especially important in family law because of the vague "best interest of the child"[242] standard that is the current test for many child welfare proceedings. When used at the placement stage, this standard does not provide much guidance as to where decision makers should look to determine who or what will be in any one child's best interest.[243]

236. Leslie, *supra* note 44, at 331; *see also* Outcome & Performance Indicators: New York City Administration for Children's Services 81 (June 1998), *available at* http://www.ci.nyc.ny.us/html/acs/pdf/rpindrep.pdf (last visited Mar. 31, 2001). This chart indicates that in 1997 seventy-one percent of the foster care population in New York City was black, twenty-four percent was Hispanic, three percent was white, and two percent was other. *Id.* These statistics demonstrate why different cultural backgrounds must be considered in foster care policies.

237. Leslie, *supra* note 44, at 331.

238. Gleeson et al., *supra* note 61, at 802.

239. Brooks, *supra* note 154, at 48 (citing Lori Klein, *Doing What's Right: Providing Culturally Competent Reunification Services*, 12 Berkeley Women's L.J. 20 (1997) (quoting Terry Cross)).

240. *See supra* notes 28-29 and accompanying text.

241. *See* Brooks, *supra* note 154, at 49.

242. It has been theorized that the "best interests" standard is unworkable because it does not provide a predictable standard for what the best interests will be. "A judge would need masses of information pertaining to each child . . . as well as the future homes and communities, to justify substituting his or her judgment for that of the [custodian] . . . . [T]he judge is left with vast discretion . . . lead[ing] to inevitable appellate deference to trial judges." Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. Louisville J. Fam. L. 1, 42 (1995).

243. "So long as the child is part of a viable family, his own interests are merged with those of the other members. Only *after* the family fails in its function should the child's interests become a matter for state intrusion." Goldstein et al., Before the Best Interests, *supra* note 77, at cover page (suggesting that the family should be proven dysfunctional before the state has any legitimate right to intervene). As long ago as 1888, it was recognized that the child's interests must be the determining factor in custody decisions. G.W. Field, Parent and Child 64 (Fred B. Rothman & Co. 1981)

B. *The Relationship Between Child and Caregiver Should be Considered in a Family Privacy Analysis*

Despite its shortcomings, the best interest standard is certainly superior to one that concentrates solely on parental rights, and it is the prevailing one used in family courts today.[244] This standard demonstrates that a child's interest is being considered in these proceedings. Other interests could be more heavily weighted. The parents' interest in maintaining their nuclear family or the government's interest in cost-effectiveness could be the center of analysis. This is especially true because three groups of people may be seen as having such a claim—the biological parents, the state as *parens patriae*, and the daily caregivers, whether they be kinship or stranger foster parents.[245] When one balances these often conflicting interests, the importance of the interest as a shared one emerges. Not only do these adults have interests, the child also has a stake in the outcome.[246] The very wording of the standard as one in the child's best *interest* implies that the child is not a voiceless party.[247]

The interests in family law, thus, are not only those of the parent and his or her wants and needs. The choice of which interests to favor will have a great impact on the child as well. The family privacy cases are, however, generally framed in terms of the intrusion of the state into an individual's private affairs, though the issues involved are

(1888).

244. Bartlett, *supra* note 148, at 302 (noting that the best interests standard "represents a considerable ideological and rhetorical advancement over child custody standards that focus on the parents' interests"); *see* Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 Cal. W. Int'l L.J. 193, 240 (1994) (noting the need for a shift from the view of the family as a private institution so that children's rights are not viewed just as derivative of parents' rights but are seen as rights children enjoy on their own). *But see* Troxel v. Granville, 530 U.S. 57, 100 (2000) (Kennedy, J., dissenting) (suggesting that the "best interests" standard may be too vague).

245. *See* Mangold, *supra* note 9, at 836.

246. *See* Carol A. Crocca, Annotation, *Continuity of Residence as Factor in Contest Between Parent and Nonparent for Custody of Child Who Has Been Residing with NonParent—Modern Status*, 15 A.L.R. 5th 692 (1993). This is an appendix of cases in which the effect of continuity of residence on a child was considered as a factor in placement/custody hearings. Kinship foster parents would, presumably, provide greater continuity than stranger foster parents. *But see* Child Welfare Revision: Testimony Before the Subcomm. on Social Security and Family Policy of the Senate Comm. on Finance, 105th Cong. (1997), *available at* 1997 WL 10572021 (quoting Gary J. Stangler, Director of the Missouri Department of Social Services who states that many kinship foster parents are unwilling to adopt). However, query if adoption is as important in the kinship care context (as in the traditional foster care model) where biological ties already exist. Also, there may be financial reasons why kinship foster parents prefer not to adopt.

247. This is especially true for older children who are learning values and life skills that will aid them in their transition to adulthood. Mangold, *supra* note 9, at 841 (discussing the need, especially for older children, for a varied group of adults to serve as role models as they enter adulthood).

usually more than just a struggle for power between the state and the individual.[248] In fact, the entire American legal system is structured to consider individual rights and does not really make allowances for an idea such as "family rights" or rights based on "mutual interaction."[249] "Fundamental to this system is the fact that in every legal proceeding, it attaches responsibility or liability to one individual."[250]

Perhaps, rather than the traditional emphasis on individual rights in substantive due process case law, a more useful analysis is an examination of the *relationships* between the parties as opposed to their rights against the state or even each other.[251] After all, family privacy is an area that affects people as groups and not just as individuals. There are a wide variety of roles and relationships that can be viewed as parent-child. Therefore, identity in relation to the child and human relationships in general should inform how we analyze family privacy rights.[252] A right to family privacy could attach to a *family* as an entity, and need not be divided among parents, children, relatives and whoever else thinks they deserve a piece of the pie. At least one court has found that "[c]hildren of custodial relatives . . . possess a liberty interest in preserving the stability of their family, and . . . are entitled to due process protections when the state decides to remove them from the family environment."[253]

C. *Rethinking Permanency*

As discussed above, there is an interest in the permanency of a placement for a child.[254] Prevailing models define permanency as adoption or return of the child to his home.[255] This definition has been reinforced by the passage of the Adoption and Safe Families Act ("ASFA").[256] ASFA "places great emphasis and financial incentives

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248. Meyer, *supra* note 108, at 552.

249. Brooks, *supra* note 154, at 47-48.

250. *Id.* at 48.

251. *See* Katharine B. Silbaugh, Comment, Miller v. Albright: *Problems of Constitutionalization in Family Law*, 79 B.U. L. Rev. 1139, 1148 (1999) (theorizing that while Supreme Court jurisprudence generally recognizes the individual as right holder, in family law it may be more effective to examine the parent-child relationship).

252. *See* Naomi R. Cahn, *Models of Family Privacy*, 67 Geo. Wash. L. Rev. 1225, 1240-41 (1999).

253. Harley *ex rel.* Johnson v. City of New York, 36 F. Supp. 2d 136, 140 (E.D.N.Y. 1999) (finding that foster parent had due process rights before foster children were removed, but the caseworkers still had cause to remove the children). This case raises the issue of the subjective nature of the caseworker in removal situations. If there is a due process right, can it ever really be protected if caseworkers can remove children whenever they decide that there is an emergency? And if they could not, wouldn't that endanger many children? There is an inherent tension here.

254. *See supra* notes 77-82 and accompanying text.

255. *See* Gleeson et al., *supra* note 61, at 804.

256. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. (1997)).

on adoption as the primary avenue to permanency."[257] There are financial incentives only for adoption and not for other types of permanency.[258] ASFA may not expressly rule out other permanency options, but it certainly discourages them.[259] This is a direct response to the perceived failures of the previous legislation, the Adoption Assistance and Child Welfare Act of 1980 ("AACWA").[260]

Perhaps the goal needs to be redefined. One study defined permanency as "the child's safe return to live with a family member, adoption by a relative or non-relative, or transfer of legal guardianship to a relative or other adult willing to rear the child until the age of majority."[261] Under this analysis, many kinship foster parents who are unwilling to adopt may still be able to provide permanency. Other alternatives to adoption, including subsidized guardianship,[262] cooperative adoption[263] and private guardianship, should be considered. One study, however, showed that caseworkers were reluctant to discuss the private guardianship option with kinship foster parents because they would receive a considerably lower subsidy.[264] The same study, however, demonstrated that kinship foster

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257. Brooks, *supra* note 154, at 45; *see also*, Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. Pa. J. Const. L. 112, 119 (1999) ("[T]he government's shift toward promoting adoption for children in foster care fails both in theory and practice to address the child welfare system's fundamental problem—the placement of too many children in substitute care.").

258. Brooks, *supra* note 154, at 45; *see also* Courtney *supra* note 62, at 92 (noting the fear in the child welfare community that "the combination of fixed funding streams for . . . direct services to children and their families, but open-ended federal support for out-of-home care, creates an incentive for public agencies to place children in out-of-home care rather than offering services that could keep their families intact").

259. *See* Brooks, *supra* note 154, at 45.

260. Pub. L. No. 96-272, 94 Stat. 500 (1980); David J. Herring, *The Adoption and Safe Families Act-Hope and its Subversion*, 34 Fam. L.Q. 329, 330 (2000). AACWA subordinated other "permanent" outcomes in favor of reunification with biological parents. Herring, *supra*, at 330. It focused, overall, on moving children into permanent homes more quickly. *Id.* at 332. This emphasis, however, was not accomplished because while actors in the child welfare system conformed with AACWA in form, they "failed to comply with AACWA in any substantive way." *Id.* at 336. This subverted the goals of permanency for children and led to Congress' passage of ASFA. *Id.* at 335.

261. Herring, *supra* note 260, at 335.

262. Brooks, *supra* note 154, at 51 ("[Subsidized] [g]uardianship creates a permanent relationship between guardian and ward, but appointment of a guardian over a child does not require the formal termination of parental rights, so a relationship between child and parent can continue. . . . The subsidy . . . allows potential guardians to give a child a permanent home who could not afford to do so otherwise.").

263. *Id.* ("Cooperative adoption refers to an adoption in which the parties agree to allow some element of continuity between the birth family and the adoptive family. The continuity may range from exchanging information and photographs to ongoing contact.").

264. Gleeson et al., *supra* note 61, at 814.

parents were not "substantially involved in permanency planning for the child."[265] Perhaps some kinship foster parents would be willing to pursue other options if they were advised of the different sets of rights that correspond with each category. They may not even be aware that these options exist. "[B]asic principles of client self-determination require that caseworkers present all permanency options to family members and assist them in making choices, rather than making decisions for these families without presentation of all options."[266] Continuity of care is not only a legal interest, it also has a large impact on a child's psychological health.[267] Living with the same adults over time and developing relationships with these caregivers is important to a child's development.

Permanency can thus mean many different things in the foster care context.[268] It can be just as harmful to a child to break bonds formed with a foster parent as it can be to sever the ties to a natural or adoptive one.[269] "[T]hese familial bonds need not depend upon the technicality of the biological... relationship between a child and an adult."[270] The ties of kinship would cause these bonds to develop quickly and to grow very strong. The biological tie between kinship foster parents and their foster children has been emphasized throughout the case law.[271] The foster parent becomes the "psychological" parent in the mind of the child and these ties need and deserve protection.[272] This means that the relationship is not perceived as one of temporary caregiving, but as a permanent parent-child bond. In these cases, permanency would most effectively be described as a relative willing to raise the child to the age of majority (if the caregiver is willing to do so), and adoption should not be required.

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265. *Id.* at 819.

266. *Id.* at 821.

267. Goldstein et al., Before the Best Interests, *supra* note 77, at 40 (defining continuity of care as "an unbroken relationship with at least one adult who is and wants to be directly responsible for [the child's] daily needs").

268. Berrick, *supra* note 39, at 77 (noting that that idea of a "permanent home" has been expanded to include kin).

269. "[Note] the importance of the psychological ties that develop over time between a child and the adults who continuously provide for his day-to-day care." Goldstein et al., Before the Best Interests, *supra* note 77, at 40; *see also* Claire Sandt, *Considering Children's Attachment in Placement Decisions—A Conversation with Dr. Jay Belsky*, *in* What I Wish I'd Learned In Law School, *supra* note 13, at 97 (defining attachment in terms of "[t]he affection and emotional ties that exist between the child and parent [as they] reflect the extent that the child expects and has confidence his or her parent will be available and responsive to his or her desires, especially those of an emotional nature").

270. Goldstein et al., Before the Best Interests, *supra* note 77, at 40.

271. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 846, 849 (1977); Rodriguez v. McLoughlin, 214 F.3d 328 (2d Cir. 2000); Rivera v. Marcus 696 F.2d 1016 (2d Cir. 1982).

272. *See* Goldstein et al., Before the Best Interests, *supra* note 77, at 42.

Biology is not the only reason, however, that the right should be granted. Another reason to recognize rights for kinship caregivers is to encourage potential kinship foster parents to enter into these arrangements and to take an active role in the placement of their relatives. In a recent case, two boys, Clarence and Ernest Wright, were hospitalized after their mother was indicted for assaulting them and leaving them so bruised and battered that when their father saw one of his sons, he thought he had been burned in a fire.[273] The former foster parent, a great-aunt, stated that she had warned the Administration for Children's Services that the boys would be in danger if returned to their mother.[274] It is unclear whether or not she requested a hearing or even knew if she had a right to do so. Perhaps if there had been a hearing the children would have been protected and other relatives in similar situations would be encouraged to come forward in times of need. Clearly this is an extreme case and not every relative will be in a good position to determine what is in a child's best interests, but this situation certainly could have been avoided. Relatives may have important input into which placements are appropriate and should be informed of their rights regarding the removal of children in their care.

D. *Defining Kinship and The Rebuttable Presumption Standard*

One issue this discussion raises is how close do the biological ties need to be for a relationship to qualify as "kin"? For instance, query the legal standing of a spouse of a blood relation, a fourth cousin or the family friend who has always been like a second mother to the child. There are no bright line tests for this, and, thus, it appears that the analysis must proceed on a case by case basis. State statutes have kept the definitions broad and do not give much guidance as to what "kin" is.[275] We are wading into murky waters when we allow courts to define what relationship is "important" or "close" enough to be family. Unfortunately, there does not appear to be an alternative.

The *Rivera* court listed factors to use as a guide to determine the interests of a foster parent.[276] These are "(1) the biological relationship between the parties; (2) the expectation of the parties at the time the relationship was commenced; and (3) the age and previous living experience of the children prior to entering the foster

273. Nina Bernstein, *Loyalty and Distrust of System Keep Abuse Hidden*, N.Y. Times, Feb. 3, 2001, at B1.

274. *Id.*

275. *See, e.g.*, Kan. Stat. Ann. § 38-1502(t) (1996) (defining kin as "the child's relative" or "another adult with whom the child or the child's parent already has a close emotional attachment"); N.Y. Fam. Ct. Act § 1017(1) (McKinney 1983 & Supp. 1993) (describing a preference for "a suitable person related to the child with whom such child may appropriately reside").

276. *Rivera*, 696 F.2d at 1025.

care environment."[277] The use of these factors would accord the parties due process because it sets a reasonable standard to use. It does so, however, while retaining the flexibility needed to act in the child's best interest. An extension of the *Rivera* court's analysis creates a rebuttable presumption in favor of the right and not simply a blanket entitlement.

This presumption would give kinship foster parents the same rights as natural parents and would be rebutted by evidence of abuse, neglect or other unfitness. This is not an absolute right but a preference in favor of keeping children with their biological families. In essence, this is what natural parents have. It is assumed that natural parents have the right to keep their families together unless the state deems it necessary to intervene in cases of abuse or neglect. Kinship foster parents should enjoy the same presumption, but the bar to rebut it should be lower than that applied to natural parents.

It is socially advantageous to society as a whole to encourage its citizens to engage in altruistic behavior.[278] No matter what cultural background we take into account, most would agree that this is a positive endeavor. What greater good can one do than to help a child in need? We should encourage families to care for foster children, especially when they share biological ties with the children in question. Families who remain strong units can only strengthen a community and the courts should do their part, consistent with the Constitution, to support and strengthen the ties that bind.

CONCLUSION

Family privacy is a theme that runs throughout the jurisprudence of the Supreme Court. This group of rights guarantees, among other things, that parents have the right to control their children's education and that extended families have the right to live together. When it is necessary to remove a child and place him into foster care, however, the concern necessarily shifts to what is in the best interests of the child. Children deserve continuity and security. In order to guarantee these necessities to children, kinship foster parents and their foster children should enjoy a due process right of family association. This is not a right to be free from interference from the state or from other

277. *Id.* (quoting Sherrard v. Owens, 484 F. Supp. 728, 739-40 (W.D. Mich. 1980)).

278. As Jill Deurr Berrick commented:

> [K]inship caregivers have no absolute obligation to care for their relatives' children, and the state cannot compel them to rear their relatives. If one of the goals of public policy is to promote behaviors among citizens that might not otherwise occur, the development of special services and supports designed to assist the unique circumstances of kinship caregivers might be recommended.

Berrick, *supra* note 39, at 84.

individuals. It is a right held by the family to stay together as one unit and is derived from the Fourteenth Amendment to the Constitution.