

## The Tie That Binds: the Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals

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# THE TIE THAT BINDS: THE CONSTITUTIONAL RIGHT OF CHILDREN TO MAINTAIN RELATIONSHIPS WITH PARENT-LIKE INDIVIDUALS

GILBERT A. HOLMES\*

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WE ARE GUILTY  
 OF MANY ERRORS AND MANY FAULTS  
 BUT OUR WORST CRIME  
 IS ABANDONING THE CHILDREN,  
 NEGLECTING THE FOUNTAIN OF LIFE.  
 MANY OF THE THINGS WE NEED  
 CAN WAIT. THE CHILD CANNOT.  
 RIGHT NOW IS THE TIME  
 HIS BONES ARE BEING FORMED, HIS  
 BLOOD IS BEING MADE, AND  
 HIS SENSES ARE BEING DEVELOPED.  
 TO HIM WE CANNOT ANSWER  
 "TOMORROW."  
 HIS NAME IS "TODAY."<sup>1</sup>

## INTRODUCTION

Children are the most important foundation of every society. As the sole source of tomorrow's leaders and participants, children are the link between the past, the present, and the future. They are the tools by which each culture perpetuates its way of life. Children preserve a society's legacy—its heritage, culture, history, and folklore.<sup>2</sup> Because children play this vital role, their transition to adulthood is an essential component of a society's preservation. To ensure that its culture and values will endure from generation to generation, a society should adopt policies that positively affect the

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1. *In re S.L.H.*, 342 N.W.2d 672, 681 (S.D. 1984) (Henderson, J., concurring in part and dissenting in part) (quoting Gabriela Mistral, Nobel Laureate of Chile).

2. For an insightful discussion of children and families as the agents for the transmission of heritage, culture, traditions, beliefs, and folklore, see HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 3-44 (1976).

raising, nurturing, and education<sup>3</sup> of children.

In the past four years, courts have confronted an increasing number of disputes involving children and their familial relationships that raise perplexing legal, social, and psychological questions. For example, in 1989, the United States Supreme Court decided that the biological father of a child born into an adulterous relationship with a married woman did not have a right to maintain a relationship with the child.<sup>4</sup> In 1991, the New York Court of Appeals held that a member of a dissolved same-sex family lacked standing to seek visitation with a child that her partner conceived via artificial insemination during the relationship.<sup>5</sup> In the same year, the Wisconsin Supreme Court refused to enforce a coparenting agreement executed by the members of a dissolved same-sex family and denied standing to one member of the family to pursue visitation of the child despite a statute authorizing standing.<sup>6</sup> In 1992, a Florida court decided that a minor could commence a proceeding to terminate his birth mother's parental rights so that his foster parents could legally adopt him.<sup>7</sup> In 1993, the Michigan Supreme Court ruled that Michigan did not have jurisdiction to issue a custody order contrary to an Iowa order issued two years earlier awarding custody of a child in a preadoptive placement to the birth father, who never consented

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3. The term "education" encompasses more than formal schooling. Education includes the transformation of "uninitiated and seemingly alien beings [children] into robust trustees of [society's] own resources and ideals." JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 12 (1916).

4. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). For further discussion of the competing issues in and the importance of *Michael H.*, see Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585 (1991).

5. *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991). For further discussion of *Alison D.*, see Kimberly P. Carr, *Alison D. v. Virginia M.: Neglecting the Best Interests of the Child in a Nontraditional Family*, 58 BROOK. L. REV. 1021 (1992); Note, *New York Court of Appeals Refuses to Adopt a Functional Analysis in Defining Family Relationships—Alison D. v. Virginia M.*, 105 HARV. L. REV. 941 (1992) [hereinafter Note, *Defining Family Relationships*].

6. *In re Z.J.H.*, 471 N.W.2d 202, 209 & n.12 (Wis. 1991). The statute provided in pertinent part:

Upon petition by a grandparent, great-grandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.

WIS. STAT. ANN. § 767.245 (West 1987).

7. *In re Kingsley*, No. JU 90-5245, 1992 WL 551484 (Fla. Cir. Ct. Oct. 21, 1992), *aff'd in part & rev'd in part sub nom Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

to the adoption.<sup>8</sup>

All of these cases involved delicate, complex, and troubling questions of social policy, legal doctrine, and psychological data on child-rearing, and all of them scrutinized the significance of the child's biological, actual, and perceived relationships. Their respective resolutions have stirred public debate about the definition of "family" and the effect of current public policy in family-relationship-dispute resolution.<sup>9</sup>

A common deficiency in all of these cases, however, is the courts' utilization of an adult-centered approach to resolve disputes that affect primarily the lives and development of children. By refusing to permit an "adulterous" unwed father to visit his child,<sup>10</sup> recognizing another unwed father's right to challenge his child's adoption,<sup>11</sup> refusing to allow visitation between a child and an unrelated adult who has functioned as the child's parent,<sup>12</sup> and requiring the termination of all parental rights to free a child for adoption,<sup>13</sup> courts perpetuate the exclusivity accorded the relationship between the child and the legal parent. Child-rearing is an important community effort—parents, teachers, religious leaders, legislators, judges, social workers, and children themselves have a significant impact on a child's transition to adulthood.<sup>14</sup> Traditional jurisprudence, however, grants exclusive child-rearing authority to the legal

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8. DeBoer v. Schmidt, 502 N.W.2d 649, 659 (Mich. 1993).

9. See, e.g., Tony Bizjak, *Family Images Focusing in on New Definitions*, SACRAMENTO BEE, June 28, 1992, at A1; Susan Canfield, *Defining Family Becomes More Flexible*, SEATTLE TIMES, June 14, 1993, at E3; *Gay Families Deserve Equality*, PHOENIX GAZETTE, July 28, 1989, at A13; Peggy O'Crowley, *New Ties That Bind in the Home, Tradition Gives Way to Diversity*, NORTHERN N.J. REC., Mar. 25, 1990, at 101; Clarence Page, *Partnership is what Marriage is About*, OREGONIAN, Oct. 10, 1989, at B06; Kathleen Parker, *Women are at the Core of Family Values Debate*, ORLANDO SENTINEL, Aug. 28, 1992, at E1; Leslie Phillips, *Family Ties: New Meanings; Cities Recognizing Non-Traditional Living Arrangements*, USA TODAY, July 12, 1989, at 03A; Tom Schaefer, *Readers Divided on Family Values and What Makes a Family*, WICHITA EAGLE, Sept. 5, 1992, at 8C; Linell Smith, *'Family Values': What Are They? The Meanings Are Varied*, BALT. SUN, Aug. 26, 1992, at 1G; *YWCA Redefines the Family*, ATLANTA CONST., June 3, 1992, at B3; *What Is Family?*, WASH. POST, July 13, 1989, at A22.

10. Michael H. v. Gerald D., 491 U.S. 110 (1989).

11. See DeBoer v. Schmidt, 502 N.W.2d 649 (Mich. 1993).

12. See Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); *In re Z.J.H.*, 471 N.W.2d 202 (Wis. 1991).

13. See *In re Kingsley*, No. JU 90-5245, 1992 WL 551484 (Fla. Cir. Ct. Oct. 21, 1992), *aff'd in part & rev'd in part sub nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

14. There is an African proverb that teaches that it takes an entire village to raise a child.

parents,<sup>15</sup> particularly with respect to governing the child's relationships with other adults.<sup>16</sup> This approach creates an all-or-nothing resolution of familial conflicts, one that is particularly inadequate when the dispute is between an adult who has both a legal and an actual relationship with the child and an adult who has only an actual relationship with the child. As a general rule, the former will prevail and the latter will lose all access to the child.<sup>17</sup> In applying the current approach, courts focus on the adult's status and legal relationship with the child, but ignore the importance of the personal relationship to the child.<sup>18</sup>

This Article uses recent cases to illustrate the inadequacy of the adult-centered approach to reconciling the rights of children with those of adults.<sup>19</sup> It argues that the law should accord children an independent liberty interest in their relationships with both "legal parents"<sup>20</sup> and "nonlegal parents"<sup>21</sup> irrespective of biological ties. The Article analyzes (a) the development of children's constitutional

15. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court attempted to define the rights protected by the liberty provision of the Fourteenth Amendment, noting:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.* at 399. In acknowledging the parents' child-rearing role, the Court also has observed that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

16. *Alison D.*, 572 N.E.2d 27; *Z.J.H.*, 471 N.W.2d 202; Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984).

17. *See, e.g., Alison D.*, 572 N.E.2d at 29 ("Petitioner concedes that she is not the child's 'parent'. . . . Rather she claims to have acted as a 'de facto parent'. . . . Therefore, she claims to have standing to seek visitation rights. These claims, however, are insufficient . . .").

18. *See infra* Part III (discussing the psychological studies indicating the relative importance of noncustodial parental relationships to children).

19. The rights of legal parents to the custody and care of their children are protected under the liberty clause of the Fourteenth Amendment.

20. As used in this Article, "legal parent" means an adult who is related to a child by conception, birth, or adoption. A legally related adult includes both a legal parent and any other person whose relationship with the child is recognized by a statute according that individual a right to maintain the relationship. *See, e.g.,* N.Y. DOM. REL. LAW § 72 (McKinney 1988) (grandparents); WIS. STAT. ANN. § 767.245 (West 1993) (stepparents).

21. A nonlegal parent is an individual who does not have a legal relationship with the child, but who has served as a parent to the child. *See infra* Part IV.A.1 (describing the criteria for identifying individuals with whom a child would have a liberty interest in maintaining relationships).

rights; (b) recent statutory changes expanding the categories of individuals who have standing to pursue visitation; (c) empirical studies recognizing a child's need to maintain relationships with parent-like figures; and (d) the impact that a child-centered approach would have on the parents' constitutional right to control and care for their children. This Article advocates the recognition of children's liberty interest in familial relationships and suggests a model for conducting a child-centered analysis. Finally, it proposes a test for identifying nonlegal parents with whom children could maintain protected relationships.

## I. CURRENT LAW AND JURISPRUDENCE

### A. *Constitutional Protection of the Child-Parent Relationship*

Courts have repeatedly invoked the United States Constitution to protect the parent-child relationship. Although this protection has been extended to the full range of familial relationships, the jurisprudence generally does not address a variety of "nontraditional"<sup>22</sup> relationships that exist in today's society. Thus, the case law provides guidance with respect to the "traditional" parent-child relationship, but leaves many questions unanswered in the nontraditional realm. More important, the jurisprudence is silent with respect to the children's interest in maintaining certain relationships.

The Supreme Court initiated the constitutional protection of family relationships in *Meyer v. Nebraska*<sup>23</sup> and *Pierce v. Society of Sisters*,<sup>24</sup> placing the parent-child relationship within the private autonomy paradigm of the Constitution.<sup>25</sup> In both cases, the Court

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22. The term "traditional family" is extremely misleading. Generally, it has been applied to a family consisting of married parents with children born from the marriage. This definition assumes that families come in one dominant style and designates all other types "nontraditional." Recent census data refutes this assumption. In 1988, so-called "traditional families" represented only 27% of households with minor children. See Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 n.1 (1991) [hereinafter Note, *Family Resemblance*]. By 1991, "traditional families" comprised only 22% of the households with children. See Jennifer L. Heeb, Note, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 349 n.11 (1993). Given that households consisting of a husband, wife, and their children constitute the minority of families with children, it is difficult, if not ludicrous, to assume that the traditional family predominates or should continue to receive preferential treatment.

23. 262 U.S. 390 (1923).

24. 268 U.S. 510 (1925).

25. See *Meyer*, 262 U.S. at 400; *Pierce*, 268 U.S. 534-35 (both cases involved the exercise of parental control over their children's education). Although the Constitution does not expressly delineate parental rights, these rights comprise a portion of the "liberty"

acknowledged that the liberty provision of the Fourteenth Amendment<sup>26</sup> limits a state's ability to interfere with parents' child-rearing and education decisions.<sup>27</sup> In these initial discussions, the Court did not clearly indicate that parents' right to control family decision-making was a fundamental liberty interest.<sup>28</sup> Subsequently, however, the Court clarified that the liberty interest in family relationships was

guaranteed to "persons" throughout the document. As Professor Tribe summarized: [R]ights have been located in the "liberty" protected by the due process clauses of the fifth and fourteenth amendments. They have been cut from the cloth of the ninth amendment—conceived as a rule against cramped construction—or from the privileges and immunities clauses of article IV and of the fourteenth amendment. Encompassing rights to shape one's inner life and rights to control the face one presents to the world, they have materialized from the "emanations" and "penumbras"—most recently dubbed simply the "shadows"—of the first, third, fourth, and fifth amendments. They elaborate the "blessings of liberty" promised in the Preamble, and have been held implicit in the eighth amendment's prohibition against cruel and unusual punishments.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-3 (2d ed. 1988) (footnotes omitted). For an insightful discussion of family privacy and autonomy, see Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 *MARQ. L. REV.* 569 (1992). For a discussion of the history and development of parents' constitutional rights, see Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 *GA. L. REV.* 975 (1988).

26. U.S. CONST. amend. XIV, § 1. In pertinent part, the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

27. In *Meyer*, the Court proclaimed that "without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . ." *Meyer*, 262 U.S. at 399. In *Pierce*, the Court announced that compulsory public schooling "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35. For an in depth discussion of the role of *Meyer* and *Pierce* in the birth of constitutional theory applicable to the relationships between the child, parent, and state, see Barbara B. Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 *WM. & MARY L. REV.* 995 (1992).

28. The Court had not yet developed its tripartite constitutional analysis involving strict scrutiny, rational basis, and the middle tier tests when it decided *Meyer* and *Pierce*. Therefore, the Court did not need to resolve the issue of whether or not the parents' liberty interest was fundamental. See *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965) (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942) as authority for the proposition that strict scrutiny analysis is required when fundamental rights are in danger). For a discussion of the standards of review that apply when a statute or policy is challenged on constitutional grounds, see JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 11.4 & 14.3 (4th ed. 1991).



indeed fundamental and granted the highest constitutional protection to the family decision-making process.<sup>29</sup>

The Court affirmed the protection of the parent-child relationship in subsequent related cases. In *West Virginia State Board of Education v. Barnette*,<sup>30</sup> the Court held that the state could not require school children to recite the Pledge of Allegiance against parental objection.<sup>31</sup> Because the state could not demonstrate a compelling interest in such a requirement,<sup>32</sup> the Court upheld the parents' freedom to refuse—and to permit their children to refuse—to endorse official dogma under the Establishment Clause of the First Amendment.<sup>33</sup>

In *Prince v. Massachusetts*,<sup>34</sup> however, the Court permitted the state to prohibit a parent from allowing her ward to proselytize their

29. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (declaring parents' liberty interest in the "care, custody and management" of their children to be fundamental and requiring states to prove parental unfitness sufficient to terminate those rights by clear and convincing evidence); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the state's interest in compulsory education was not sufficiently compelling to overcome parents' fundamental right to raise their children).

30. 319 U.S. 624 (1943).

31. *Id.* at 642.

32. The State asserted that it had the right to "condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child." *Id.* at 630-31. The Court answered the State's assertion of this power by proclaiming that

[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

*Id.* at 642.

33. *Id.* Although the majority opinion did not expressly analyze the parents' liberty interest in child-rearing, the Court in *Prince v. Massachusetts*, 321 U.S. 158 (1944), characterized *Barnette* as a decision that "respected the private realm of family life which the state cannot enter." *Id.* at 166. In *Prince*, the Court explained:

The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in *West Virginia State Board of Education v. Barnette*. Previously in *Pierce v. Society of Sisters*, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in *Meyer v. Nebraska*, children's right to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

*Id.* at 165-66 (citations omitted).

34. 321 U.S. 158 (1944).

religion on the grounds that those activities violated the state child labor laws.<sup>35</sup> Despite its prior holdings protecting parental discretion over a child's secular and religious training in *Meyer*, *Pierce*, and *Barnette*, the Court in *Prince* found that the state's compelling interest in the child's health outweighed Ms. Prince's constitutionally supported right to direct the upbringing of the child.<sup>36</sup> Notwithstanding this conclusion, the majority recognized that the parents have a constitutionally based right to raise their children.<sup>37</sup>

In *Wisconsin v. Yoder*,<sup>38</sup> the Court again acknowledged the existence of the parents' child-rearing authority and underscored the importance of protecting familial relationships against governmental intrusion.<sup>39</sup> The Court declared a state policy requiring children to attend school until they were sixteen years old unconstitutional as applied to Amish children, because it violated both the parents' rights under the Free Exercise Clause of the First Amendment and their liberty interest under the Fourteenth Amendment.<sup>40</sup>

In the preceding cases, the parents' liberty interest in child-rearing served as a shield against governmental intrusion when there was no compelling state interest in the intrusive policy or action. The jurisprudence safeguarding family autonomy springs from the constitutional protection of individual decisions regarding intrafamily relationships.<sup>41</sup> Interestingly, although it is often a factor in the Court's analysis, the Court has never required marriage as a prerequisite to the Constitutional protection of the parent-child relationship.

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35. *Id.* at 168-69. Massachusetts's Child Labor Law section 69 provided: "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place." *Id.* at 160-61 (quoting MASS. GEN. L. ch. 149, § 69 (1939)).

36. *See id.* at 166, 170. The Court stated:

[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.

*Id.* at 166 (citations omitted).

37. *See id.* at 171. It is interesting to note that the Court used the parental autonomy analysis even though Ms. Prince was not the biological mother of the child. In fact, she was the child's aunt and custodian. *Id.* at 159.

38. 406 U.S. 205 (1972).

39. *Id.* at 213-14.

40. *Id.* at 233-34.

41. *See McMullen, supra* note 25, at 575 ("As social reforms began to protect children and other workers, the American idealized image of the independent individual continued to develop. Courts adjusted their reasoning to gradually create a rhetoric of family autonomy and 'parental rights' which could be limited only by significant state interests.").

The clearest examples of the minimal impact of the existence or absence of a marital relationship appear in cases that recognize unwed fathers' liberty interests in maintaining relationships with their children.<sup>42</sup> Although the Court has limited the class of unwed fathers who can assert their constitutional rights<sup>43</sup> and has distinguished unwed fathers' rights from those of mothers,<sup>44</sup> it has accorded unwed fathers who establish actual relationships with their children constitutional protection of the parent-child relationship. The unwed father cases demonstrate that the liberty interest in family relationships is personal and is dependent not only upon a biological tie, but also upon the manifestation of an actual parent-child relationship.<sup>45</sup>

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42. Compare *Caban v. Mohammed*, 441 U.S. 380 (1978) and *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing an unwed father's liberty interest in his relationship with his children) with *Lehr v. Robertson*, 463 U.S. 248 (1983) and *Quilloin v. Walcott*, 434 U.S. 246 (1978) (denying constitutional protection to unwed fathers' relationships with their children because they had not established an actual relationship with the children). In *Lehr*, the Court explained that

[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.

*Lehr*, 463 U.S. at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 389 n.7, 392 (1979)). For a discussion of the development of unwed fathers' liberty interests, see Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313 (1984).

43. An unwed father's constitutional right to maintain a relationship with his child is dependent upon both a biological connection and the maintenance of a relationship. See *Lehr*, 463 U.S. at 261 (stating that constitutional protection of a parental relationship stems not just from a biological link but also from a continuing interaction with the child); *Quilloin*, 434 U.S. at 255 (determining that a biological father who never established a relationship with his child cannot prevent the child's adoption); *Caban*, 434 U.S. at 393 (stating that an unwed father should not be treated differently than an unwed mother when he has established a relationship with his children and admitted paternity).

Although Justice Stevens believed that the Court had not denied unwed fathers a liberty interest in their children, see *Lehr*, 463 U.S. at 261, others viewed the Court's limitation of unwed fathers' procedural rights as a denial of constitutional protection. *Id.* at 276 (White, J., dissenting) (characterizing the failure to provide an unwed father notice and a hearing before his child's adoption as a violation of the Due Process Clause). See generally Buchanan, *supra* note 42.

44. See *Lehr*, 463 U.S. at 263-64 & n.20; *Caban*, 441 U.S. at 404-07 (Stevens, J., dissenting).

45. Justice Stevens has promoted the concept that a parent's liberty interest requires both a biological and an actual relationship with the child. The mother's actual relationship arises during the pregnancy and childbirth, but the father's actual relationship requires additional effort. Thus, in *Caban v. Mohammad*, he explained:

The Court also has refused to adopt a rigid definition of "family" that would obstruct constitutional protection of other important interpersonal relationships. For example, in *Moore v. City of East Cleveland*,<sup>46</sup> the Court prohibited the state from applying its single family zoning statute to exclude Ms. Moore's family—which consisted of her son, his child, and another grandchild—from an area zoned for single family occupancy.<sup>47</sup> The Court applied the constitutional protection of family relationships articulated in *Meyer v. Nebraska*<sup>48</sup> and *Pierce v. Society of Sisters*<sup>49</sup> to Ms. Moore's family even though it did not consist of the traditional parent-child relationship.<sup>50</sup> The Court recognized that the historical and traditional foundations of the Constitution required a flexible definition of family.<sup>51</sup>

Likewise, in *Smith v. Organization of Foster Families for Equality and Reform*,<sup>52</sup> the Court acknowledged that constitutional protection of family relationships is not limited to relationships based on blood,

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Both parents are equally responsible for the conception of the child out of wedlock. But from that point on through pregnancy and infancy, the differences between the male and the female have important impact on the child's destiny. Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. In many cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person. If during pregnancy the mother should marry a different partner, the child will be legitimate when born, and the natural father may never even know that his 'rights' have been affected. *Caban*, 441 U.S. at 404-05 (Stevens, J., dissenting) (citations omitted). Writing for the majority in *Lehr*, Justice Stevens continued his biological tie-actual relationship requirement:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

*Lehr*, 463 U.S. at 262.

46. 431 U.S. 494 (1977). For further discussion of the definition of family in the application of constitutional doctrine, see Note, *Family Resemblance*, *supra* note 22.

47. *Moore*, 431 U.S. at 496.

48. 262 U.S. 390 (1923).

49. 268 U.S. 510 (1925).

50. *Moore*, 431 U.S. at 503-06.

51. *Id.* Justice Powell explained that "our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. . . . Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Id.* at 503-04 (citations omitted).

52. 431 U.S. 816 (1977).

marriage, or adoption.<sup>53</sup> Specifically, the Court reasoned that

the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship.<sup>54</sup>

Despite its permissive definition of a family, the Court refused to extend constitutional protection to the Smiths' foster family because a foster family is a creation of the state. The Court reasoned that the foster parents' interest "derives from a knowingly assumed contractual relation with the State, [and] it [thus] is appropriate to ascertain from state law the expectations and entitlements of the parties."<sup>55</sup> Consequently, foster families are bound "by the limited recognition accorded to [them] by the [state] statutes."<sup>56</sup> Furthermore, the Court was aware that extending constitutional protection to foster families would transgress the legal parents' liberty interest in their children.<sup>57</sup>

The jurisprudence protecting family relationships presents substantial difficulties. It leaves open the question of whether a birth mother can deny an unwed father his substantive due process rights by refusing him access to the child<sup>58</sup> or by failing to advise him of

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53. *Id.* at 843-44.

54. *Id.* at 844 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)). For a discussion of the need to recognize a different definition of "family," see Mary P. Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91 (1990-91).

55. *Smith*, 431 U.S. at 845-46.

56. *Id.* at 846.

57. *See id.* The state can provide constitutional protection to the foster family relationship only by terminating the legal parents' parental rights and authorizing the adoption of the children by the foster parents. Because this process transforms the foster family into a "legal family," it requires according the legal parents due process. *See Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

58. *See Lehr v. Robertson*, 463 U.S. 248, 268 (1983) (White, J., dissenting) (framing the issue in terms of whether denying a putative father notice and an opportunity to be heard in an adoption proceeding when his whereabouts are known is consistent with due process); *In re Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992) (declaring unconstitutional a statutory provision that permitted an unwed mother to consent to her child's adoption shortly after the child's birth and before the father had an opportunity to establish an actual relationship with the child). *See generally* Buchanan, *supra* note 42.

her pregnancy or the birth of the child. It also leaves unanswered the question of whether substantive due process rights are implicated when adults, rather than the state, consensually create family relationships without the benefit of marriage. Moreover, the Court sends conflicting messages by failing to define "family" adequately and failing to identify specifically the class of adults who are entitled to maintain a relationship with the child.<sup>59</sup> Most importantly, however, the courts have remained silent regarding the question of whether children have an independent liberty interest in their own familial relationships. As will be discussed below, this silence presents a major deficiency in the jurisprudence.

### B. *Deficiencies in the Jurisprudence*

1. *Case Law.*—In the cases that have examined constitutional rights in family relationships—involving traditional families, unwed fathers, or other family-type relationships—the courts have not addressed the *children's* interest in maintaining the relationships. Several recent cases, discussed below, demonstrate this troubling oversight.

a. *Controversy Between a Birth Parent and an Unrelated Adult with a Significant Parental Relationship.*—In *Michael H. v. Gerald D.*,<sup>60</sup> Michael, the birth father, sought to continue his relationship with Victoria, his biological child, whose birth mother was Gerald's wife, Carole.<sup>61</sup> Victoria also sought to maintain her relationship with Michael, relying on the Fourteenth Amendment to the United States Constitution.<sup>62</sup> Gerald, who was married to Carole at the time of Victoria's conception and birth, acknowledged Victoria as his daughter, but did not dispute that Michael was her biological father.<sup>63</sup>

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59. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court held that a state cannot terminate constitutional parental rights absent evidence of unfitness. *Id.* at 658. In *Quilloin v. Walcott*, 434 U.S. 246 (1978), however, the Court found that biology alone was insufficient to create a liberty interest in familial relationships and did not address the notion of unfitness. *See id.* at 255. Justice Marshall hinted, however, that states could not terminate parental rights absent a showing of unfitness. *See id.* at 251. Finally, in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), Justice Brennan indicated that a parental liberty interest can exist even absent a biological relationship. *Id.* at 842-43.

60. 491 U.S. 110 (1989).

61. *Id.* at 113-14.

62. *Id.* at 130.

63. *Id.*

Michael also acknowledged Victoria as his child, lived with her, supported her, held her out to the world as his daughter, and sought to be her custodial parent.<sup>64</sup> These factors satisfied the Supreme Court's previously articulated prerequisites for permitting an unwed father to maintain a relationship with his child.<sup>65</sup> In opposing Michael's custody claim, Gerald and Carole relied on the fact that California recognized Gerald as Victoria's legal father under an evidentiary presumption of legitimacy<sup>66</sup> and argued that California permitted only the legal mother or father to challenge that presumption.<sup>67</sup>

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64. *Id.* at 114.

65. *See supra* notes 42-45 and accompanying text (explaining that an unwed father must have both a biological and an actual relationship with a child in order to maintain the relationship).

66. Under California evidentiary rules, the California courts declared Gerald to be Victoria's father because of his marriage to Carole at the time of Victoria's birth. *Michael H.*, 491 U.S. at 115. The Court relied on a California statute that stated, in pertinent part:

(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

(b) Notwithstanding subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7, are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be filed . . . not later than two years from the child's date of birth by the husband. . . .

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) Subdivision (b) shall not apply to any case coming within Section 7005 of the Civil Code, or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.

(g) Subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.

CAL. EVID. CODE § 621 (West Supp. 1989), *repealed by* Act effective Jan. 1, 1994, ch. 162, § 8, 1992 Cal. Legis. Serv. 412 (West). This section was moved and recodified at CAL. FAM. LAW CODE § 7540-41 (West 1994) (codifying former Evidence Code § 621(a) at Family Law § 7540 and codifying former § 621(b)-(g), with modifications, at Family Law § 7541).

67. *Michael H.*, 491 U.S. at 120; *see* CAL. EVID. CODE § 621(c), (d), (West Supp. 1989) (permitting the husband or the mother of the child to request blood tests), *repealed by* Act effective Jan. 1, 1994, ch. 162, § 8, 1992 Cal. Legis. Serv. 412 (West); *supra* note 66 (quoting the pertinent portion of the statute).

The Supreme Court dismissed Michael's claim, reasoning that California was entitled to adopt a public policy that gave a priority to one potential father over another.<sup>68</sup> The Court distinguished Michael's claim from those of the unwed fathers in other cases<sup>69</sup> on the grounds that Michael was an "adulterous father."<sup>70</sup> According to the Court, Michael's claim did not seek to protect a relationship "deeply rooted in this Nation's history and tradition"<sup>71</sup> and, therefore, did not warrant constitutional protection.<sup>72</sup>

Victoria also sought to have *both* relationships protected under the Due Process Clause, with Michael as her biological father and Gerald as her legal father.<sup>73</sup> Her claim was separate and distinct from Michael's claim and did not seek to create a priority for either father.<sup>74</sup> Although the Court did not rule out the possibility of a claim by a child like Victoria, it rejected her claim without addressing or analyzing its legal basis.<sup>75</sup> The Court did not even discuss whether Victoria had a constitutional right to maintain her relationship with either Michael or Gerald.<sup>76</sup> Furthermore, assuming,

68. *Michael H.*, 491 U.S. at 129-30. Carole and Gerald argued, and the Court agreed, that Michael's paternity was immaterial. Implicit in the Court's reasoning is the view that a biological relationship was insufficient to preserve Michael's constitutional right, and therefore, that it did not provide the essential component of a parent-child relationship that could be protected by the Due Process Clause. *Id.* at 125-27.

69. *See supra* notes 43-45 (describing other unwed father cases).

70. *Michael H.*, 491 U.S. at 130.

71. *Id.* at 124 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

72. *Id.* at 129-30.

73. *Id.*

74. *Id.*

75. *Id.* at 130-31. The Court stated:

We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, Victoria's claim must fail. Victoria's due process challenge is, if anything, weaker than Michael's. Her basic claim is not that California has erred in preventing her from establishing that Michael, not Gerald, should stand as her legal father. Rather, she claims a due process right to maintain filial relationships with both Michael and Gerald. This assertion merits little discussion, for, whatever the merits of the guardian ad litem's belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country. Moreover, even if we were to construe Victoria's argument as forwarding the lesser proposition that, whatever her status vis-a-vis Gerald, she has a liberty interest in maintaining a filial relationship with her natural father, Michael, we find that, at best, her claim is the obverse of Michael's and fails for the same reasons.

*Id.*

76. *Id.* Victoria's constitutional right to maintain relationships with family members would emanate from her status as a person under the Constitution and from her liberty interest, protected by Fourteenth Amendment substantive due process.



*arguendo*, that Victoria had a constitutional right, the Court identified no state interests sufficiently compelling to overcome that right. The Court did not even address whether Victoria's status as a minor justified limiting her share of the constitutional rights traditionally afforded adults in their family relationships.<sup>77</sup> As a result of the Court's decision, neither Michael nor Victoria could maintain a legally recognized relationship with each other.

Several state courts also have confronted claims involving nontraditional families where disputes arose between a birth parent and an adult with a significant parental relationship. In *Alison D. v. Virginia M.*,<sup>78</sup> the New York Court of Appeals decided that Alison, a member of a dissolved lesbian partnership, was not entitled to maintain a relationship with A.D.M., a child born to her partner during the partnership.<sup>79</sup> Although Alison was not A.D.M.'s biological mother, she claimed that she was a psychological parent,<sup>80</sup> a de facto parent,<sup>81</sup> and an equitable parent<sup>82</sup> to A.D.M.<sup>83</sup> She maintained that she and her partner, Virginia, mutually decided to bring A.D.M. into the world, and that she (Alison) had provided financial and emotional support to A.D.M. during the two and one-half years in which the parties lived together and after they separated.<sup>84</sup> The essence of Alison's claim was that she, Virginia, and A.D.M. constituted a "family" under New York law.<sup>85</sup>

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77. See *supra* text accompanying notes 23-59 (discussing the development of jurisprudence acknowledging individuals' liberty interest in their family relationships); *infra* note 171 (discussing cases limiting the constitutional protection accorded children because of their special status as minors, or because of the need to balance their rights against their parents' and society's interests).

78. 572 N.E.2d 27 (N.Y. 1991).

79. *Id.* at 29. Alison and Virginia had all the appearances of a traditional family, except that the adults were of the same sex and were unmarried. After living together for three years, they decided to add children to the family. *Id.* at 28. Virginia underwent artificial insemination and gave birth to A.D.M. *Id.*

80. See Bartlett, *supra* note 16, at 946 ("Psychological parents are adults who provide for the physical, emotional, and social needs of the child . . .").

81. Most jurisdictions have defined a de facto parent as an individual who fulfills the child's physical and psychological needs on a daily basis. *E.g.*, *In re Hirenia C.*, 22 Cal. Rptr. 2d 443 (Cal. Ct. App. 1993); *In re Baby Girl B.*, 618 A.2d 1 (Conn. 1992); *In re L.W.*, 613 A.2d 350 (D.C. App. 1992); *In re Dependency of J.H.*, 815 P.2d 1380 (Wash. 1991); *In re B.G.*, 523 P.2d 244 (Cal. 1974).

82. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 483-86 (1990) (discussing equitable parenthood).

83. *Alison D.*, 572 N.E.2d at 29.

84. *Id.* at 28.

85. *Id.* at 28-29. See *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989) (adopting a functional definition of "family" under state rent control law). See also CARMEL, N.Y., CODE

In rejecting Alison's claim, the court stated that although she may have an "understandable concern for and interest in the child," Alison was not a "parent" within the meaning of the statute governing visitation.<sup>86</sup> Because she was not a parent under the statute and because the court declined to extend the definition of parent to include "functional" or "psychological" parents, the court concluded that Alison lacked standing to seek visitation rights.<sup>87</sup> Like the Supreme Court in *Michael H.*, the New York Court of Appeals used the state policy embodied in a statute to exclude an adult with a significant parental relationship from access to the child. The fact that Michael was a birth parent while Virginia was not was irrelevant in each court's emphasis on the legal rather than the actual relationship. The New York Court of Appeals did not address whether A.D.M. had a right to maintain his relationship with Alison.<sup>88</sup> Unlike the Court in *Michael H.*, however, the New York court was not directly presented with any claims on behalf of the child.

In *In re Z.J.H.*,<sup>89</sup> the Wisconsin Supreme Court also was confronted with custody and visitation issues arising from a dissolved

§ 63-7 (1983) (defining family as "[t]wo (2) or more persons related by blood, marriage or legal adoption, or five (5) unrelated adults living together as a single housekeeping unit"). Alison and Virginia lived in Carmel, New York.

86. *Alison D.*, 572 N.E.2d at 29. Specifically, New York law provides that:

(a) Where a minor child is residing within this state, either *parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either *parent* for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. . . .

N.Y. DOM. REL. LAW § 70 (McKinney 1994) (emphasis added); *see also* Ronald FF v. Cindy GG, 511 N.E.2d 75 (N.Y. 1987) (denying visitation rights to a heterosexual male partner in an unmarried family unit who was legally unrelated to the child).

87. *Alison D.*, 572 N.E.2d at 29. The court acknowledged the undisputed facts that Alison participated in the decision to conceive A.D.M., that she treated A.D.M. in all respects as her child, and that Virginia consented to Alison's sharing in A.D.M.'s upbringing. *Id.* Alison's and Virginia's behavior comports with the definitions of psychological parent, de facto parent, and equitable parent, and the doctrine of *in loco parentis*. *In loco parentis* applies when a person undertakes the care and control of another in the absence of such supervision by that person's natural parents and in the absence of formal legal approval; it is a temporary relationship that is not to be likened to an adoption, which is permanent. BLACK'S LAW DICTIONARY 787 (6th ed. 1990). *Cf.* Ray v. Ray, 1989 WL 150825 (Ohio Ct. App. Dec. 14, 1989) (granting custody to a stepfather over the birth mother pursuant to the doctrine of *in loco parentis*).

88. Some commentators have asserted that the New York court missed an opportunity to declare that children's rights stand on the same footing as parents' rights. *See, e.g.*, Carr, *supra* note 5, at 1024; Note, *Defining Family Relationships*, *supra* note 5, at 942, 943.

89. 471 N.W.2d 202 (Wis. 1991).

lesbian relationship. Wendy Sporleder and Janice Hermes lived together in a committed relationship for eight years.<sup>90</sup> After an unsuccessful attempt to add a child to the relationship through the artificial insemination of Sporleder, they agreed that Hermes would adopt a child.<sup>91</sup> In March 1988, the child, Z.J.H., was placed in the couple's home for a six-month preadoptive placement.<sup>92</sup> During this time, Sporleder provided the primary care for the child and Hermes worked.<sup>93</sup> Sporleder and Hermes executed a coparenting agreement, which provided, *inter alia*, for mediation to determine the physical placement of Z.J.H. and for liberal visitation for the non-placement party, in the event the parties separated.<sup>94</sup> Shortly thereafter the parties did separate.<sup>95</sup> Subsequently, Hermes formally adopted Z.J.H. and refused Sporleder access to the child.<sup>96</sup>

In affirming the dismissal of Sporleder's petition to obtain custody or visitation rights and to enforce the coparenting agreement, the Wisconsin Supreme Court determined that Sporleder had no standing to acquire custody, that she was not entitled to visitation rights, and that the coparenting agreement was unenforceable.<sup>97</sup> The court reached this result even though the Wisconsin legislature had recently enacted a liberal visitation statute providing individuals like Sporleder standing to seek visitation rights.<sup>98</sup> The court's interpretation of the statute was consistent with Wisconsin case law that denied standing to individuals such as Sporleder.<sup>99</sup> This case law, however, predated the liberal revision of the statute.<sup>100</sup> The

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90. *Id.* at 204.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 208-10. The applicable statute provided:

*Visitation Rights of Certain Persons:* 1) Upon petition by a grandparent, great-grandparent, step parent, or *person who has maintained a relationship similar to a parent-child relationship with the child*, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.

WIS. STAT. § 767.245(1) (West 1993) (emphasis added).

99. *In re Z.J.H.*, 471 N.W.2d at 210; see *In re Soergel*, 453 N.W.2d 624, 627 (Wis. 1990) (predicating the applicability of the visitation rights statute on the existence of an underlying proceeding affecting the family unit). The *Z.J.H.* court determined that because Sporleder was not legally related to Z.J.H. and did not have standing to seek custody, she could not commence a proceeding affecting the family unit or take advantage of the liberal language of the statute. *In re Z.J.H.*, 471 N.W.2d at 205.

100. See *In re Z.J.H.*, 471 N.W.2d at 209-10.

Wisconsin Supreme Court, therefore, employed a restrictive construction of the old version of the statute to circumvent the clear mandate of the liberal revision.<sup>101</sup>

*b. Controversy Between Natural Parents and Adoptive Parents.*—In *In re B.G.C.*,<sup>102</sup> Cara Clausen gave birth to a child without informing the child's natural father, Daniel Schmidt.<sup>103</sup> Immediately after birth, Cara, an Iowa resident, surrendered the child for adoption to Jan and Roberta DeBoer, a Michigan couple.<sup>104</sup> Cara signed a release of custody, as did Scott Seefeldt, whom Cara had falsely identified as the child's father.<sup>105</sup> The DeBoers named the child Jessica<sup>106</sup> and prepared to adopt her at the end of the six month waiting period mandated by Iowa law.<sup>107</sup>

Shortly after she executed the adoption consent, Cara revealed the fact of Daniel Schmidt's paternity and sought to vacate her consent.<sup>108</sup> Simultaneously, Daniel petitioned the court to intervene in the adoption proceeding.<sup>109</sup> The trial court ordered a blood test,

101. In essence, the *Z.J.H.* court's interpretation of the new statute would bestow standing upon a "person who has maintained a relationship similar to a parent-child relationship," WIS. STAT. § 767.245(1) (West 1993), only when there also is litigation that affects the adult relationships in the family unit, such as a divorce proceeding between the child's parent and a stepparent.

102. 496 N.W.2d 239 (Iowa 1992) ("B.G.C." stands for Baby Girl Clausen).

103. *Id.* at 241.

104. *Id.* at 240-41.

105. *Id.* at 241. It is unclear whether Scott Seefeldt knew that he was not the child's father. Because Cara was dating Scott when she learned that she was pregnant, he may have believed that he was the father. *Id.* at 246. Certainly, Cara represented to Scott and to the court that he was the father. *Id.* at 241.

106. Lucinda Franks, *The War for Baby Clausen*, THE NEW YORKER, Mar. 22, 1993, at 57. The Schmidts subsequently named the child Anna. *Id.* at 62. This Article will refer to the child as Jessica/Anna.

107. *Id.*; see IOWA CODE ANN. § 600.10 (West 1993) ("The adoption of a minor person shall not be decreed until that person has lived with the adoption petitioner for a minimum residence period of one hundred eighty days.").

108. *In re B.G.C.*, 496 N.W.2d at 241.

109. *Id.* at 241. Daniel challenged the adoption under an Iowa statute that provides: An adoption petition shall not be filed until a termination of parental rights has been accomplished except in the following cases: (a) No termination of parental rights is required if the person to be adopted is an adult. (b) If the stepparent of the child to be adopted is the adoption petitioner, the parent-child relationship between the child and the parent who is not the spouse of the petitioner may be terminated as part of the adoption proceeding by the filing of that parent's consent to the adoption.

IOWA CODE ANN. § 600.3(2) (West 1993). Daniel claimed that the adoption petition was invalid because his parental rights had not been terminated and because he had not abandoned the child. *In re B.G.C.*, 496 N.W.2d at 241.

which confirmed that Daniel was the birth father.<sup>110</sup> Thereafter, the trial court denied Cara's petition to vacate her consent to the adoption, but granted Daniel's petition to dismiss the adoption proceeding.<sup>111</sup> The court reasoned that because paternity was established in Daniel's favor, there was no factual or statutory basis upon which to terminate his paternal rights.<sup>112</sup> On appeal, the Supreme Court of Iowa affirmed the award of custody to Daniel and remanded the denial of Cara's petition.<sup>113</sup>

Undaunted, the DeBoers refused to return the child to Daniel and Cara and commenced a proceeding in Michigan to modify the Iowa courts' determinations.<sup>114</sup> The trial court granted the DeBoers's petition and awarded them custody.<sup>115</sup> The Michigan Court of Appeals, however, reversed and reinstated the custody decision of the Iowa courts.<sup>116</sup> The Michigan Supreme Court affirmed the Court of Appeals in a lengthy opinion.<sup>117</sup> The United States Supreme Court declined to stay the enforcement of the Michigan Supreme Court decision,<sup>118</sup> and in an emotionally charged climax to the litigation, the DeBoers returned Jessica to Daniel and Cara, who subsequently named her Anna.<sup>119</sup>

*c. Controversy Between Birth Mother, Foster Parents, and Child.*—In *Kingsley v. Kingsley*,<sup>120</sup> Rachel Kingsley placed her son, Gregory, with the Orange County, Florida, Department of Health and Rehabilitative Services in an attempt to ensure that he would receive adequate

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110. See *In re B.G.C.*, 496 N.W.2d at 246 (discussing the trial court's analysis of the attempt to terminate Daniel's parental rights). The trial court opinion is sealed and unavailable.

111. See *id.* at 241.

112. See *id.* at 246.

113. *Id.* at 241. On remand, the district court restored Cara's parental rights. While the appeal had been pending, Daniel and Cara were married. Franks, *supra* note 106, at 67. The court reasoned that, because Daniel had been awarded custody, "[i]t would be ludicrous not to [award custody] to the mother." *Id.* at 72.

114. See *In re Clausen*, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993).

115. See *id.* at 195-96.

116. *Id.* at 198.

117. *In re Clausen*, 502 N.W.2d 649, 651-52 (Mich. 1993). The court found that the Michigan courts did not have jurisdiction to entertain the DeBoers's petition and were obligated to enforce the Iowa Supreme Court's decision. *Id.* at 652.

118. *DeBoer v. Schmidt*, 114 S. Ct. 1 (1993).

119. See Maryanne George, *DeBoers, Supporters Share Pain, Anger*, DETROIT FREE PRESS, Aug. 5, 1993, at 1B; *Sobbing Toddler Returned to Her Biological Parents*, LOS ANGELES TIMES, Aug. 3, 1993, at A10.

120. 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

care.<sup>121</sup> While Gregory was in foster care, Rachel did not maintain significant contact with him,<sup>122</sup> and he quickly became dissatisfied with his life as a foster child.<sup>123</sup> When his last foster family, the Russes, appeared to provide a happy and safe environment, Gregory expressed a desire to join the foster family legally.<sup>124</sup>

On June 25, 1992, Gregory filed a petition to terminate his mother's parental rights along with a complaint for declaration of rights and adoption by his foster parents.<sup>125</sup> The trial court granted

121. *In re Kingsley*, No. JU 90-5245, 1992 WL 551484, at \*2 (Fla. Cir. Ct. Oct. 21, 1992), *aff'd in part & rev'd in part sub nom.* *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). See also Sarah Tippit, *I've Got the Family I Always Wanted*, LADIES HOME J., Apr. 1993, at 150. "[Rachel] placed her two older sons in foster care twice; Gregory lived first with foster families, then in the Lake County Boys Ranch, a group home for abused and neglected boys." *Id.* at 204.

122. *In re Kingsley*, 1992 WL 551484, at \*2.

Gregory Kingsley . . . [was] placed in foster care in September, 1989. [He] remained in foster care until the following August. [He] remained with the natural mother only two months before she again placed [him] in foster care. Many services were provided to her during this period and she failed to take advantage of these services in order to keep [Gregory] in her home.

*Id.* See also Phil Long & Susan Bloodworth, *Family Ties Are Put to Test as Boy's 'Divorce' Case Opens*, MIAMI HERALD, Sept. 24, 1992, at 1A, 11A ("Gregory has lived with his mother only seven months out of the past nine years.")

123. See Tippit, *supra* note 121, at 204.

124. *Id.*

125. *Kingsley v. Kingsley*, 623 So. 2d 780, 782 (Fla. Dist. Ct. App. 1993). He filed the petition in the juvenile division of the circuit court and the complaint for adoption in the civil division of the circuit court. *Id.* The adoption complaint subsequently was transferred to the juvenile division by court order. *Id.*

Unless parental rights have been terminated, parental consent is required for an adoption under Florida law. See FLA. STAT. ANN. § 63.062(1) (West 1993). Although Gregory's father consented to the adoption, Rachel refused to consent; thus, Gregory sought to terminate her parental rights under Florida law. See FLA. STAT. ANN. § 39.464 (West 1993). Section 39.464 provides, in pertinent part:

The department, the guardian ad litem, or a licensed child-placing agency may petition for the termination of parental rights under any of the following circumstances:

. . . .

(3) Severe or continuing abuse or neglect.—The parent or parents have engaged in conduct towards the child or towards other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life or well-being of the child regardless of the provision of services. Provision of services is evidenced by having had services provided through a previous performance agreement, permanent placement plan, or offer of services in the nature of a case plan from a child welfare agency. A current performance agreement or permanent placement plan need not be offered to the parent or parents, and the petition may be filed at any time before a performance agreement or permanent placement plan has been accepted by the court.

*Id.*

Gregory the right to commence the termination proceeding, but did not rule on his standing to file an adoption petition.<sup>126</sup> Subsequently, both Gregory's *guardian ad litem* (the County Department of Health and Rehabilitative Services) and the Russes filed petitions to terminate Rachel's parental rights.<sup>127</sup> The Russes also filed an adoption petition.<sup>128</sup> After hearing from the various parties, the trial court granted the petitions to terminate Rachel's parental rights and the Russes's petition for adoption over Rachel's objection.<sup>129</sup> The Florida District Court of Appeal reversed the trial court's determination that Gregory had standing to terminate Rachel's parental rights, but upheld the termination sought by the other two petitions on the grounds that abandonment had been established.<sup>130</sup>

Although the media touted Gregory as a child seeking to "divorce" his parents,<sup>131</sup> the case simply was a termination of parental rights proceeding based on parental unfitness.<sup>132</sup> The trial court employed the same legal analysis and the same statute that it would apply in an ordinary termination of parental rights proceeding.<sup>133</sup> The only difference between *Kingsley* and other termination proceedings was that Gregory—instead of the state foster care system or his foster parents—initiated the proceeding.<sup>134</sup> This difference was

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126. *In re Kingsley*, 1992 WL 551484, at \*5. See also *Kingsley*, 623 So. 2d at 782; Ike Flores, *Boy, 11, Can File Suit to "Divorce" Parents; Judge OKs Action in Adoption Case*, S.F. EXAMINER, July 10, 1992, at A10.

127. *Kingsley*, 623 So. 2d at 783.

128. *Id.* at 782-83.

129. *Id.* at 783.

130. *Id.* at 790; see also *A Boy's "Divorce" Is Upheld in Court*, N.Y. TIMES, Aug. 20, 1993, at A21; *Court Voids Boy's "Divorce" from Mom; Adoption Out*, CHI. TRIB., Aug. 19, 1993, at 18; *Court Reverses Boy's "Divorce" from Mother*, L.A. TIMES, Aug. 19, 1993, at A16.

131. See *supra* notes 121-122, 126, 130 (citing articles discussing Gregory's case).

132. See *Kingsley*, 623 So. 2d at 790 (Harris, C.J., concurring in part and dissenting in part) ("This rather ordinary termination of rights case was transformed into a *cause celebre* by artful representation and the glare of klieg lights.")

133. *In re Kingsley*, No. JU 90-5245, 1992 WL 551484, at \*1-\*5 (Fla. Cir. Ct. Oct. 21, 1992), *aff'd in part & rev'd in part sub nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

134. Most states charge public and private agencies with responsibility for reuniting foster children with their families or seeking termination of the legal parents' rights so that the children can be adopted. See, e.g., CAL. WELF. & INST. CODE § 361.5 (West 1994), FLA. STAT. ANN. § 409.145 (West 1993), N.Y. FAM. CT. ACT § 1055 (McKinney 1994). Florida, like many states, also permits foster parents to file a petition to terminate the legal parents' rights when the foster care agencies are unable or unwilling to do so. See FLA. STAT. ANN. § 39.454 (1987); see also 42 U.S.C. §§ 620-628, 670-687a (1988 & Supp. III 1991) (requiring states to implement a plan making reasonable efforts to reunite families).

neither unique<sup>135</sup> nor a factor in the court's decision.<sup>136</sup>

2. *Common Threads and Fallacies.*—Although the above cases arose from dissimilar controversies, they uniformly failed to recognize that children have an independent right to maintain or sever family relationships. The courts in each of these cases achieved results arguably consistent with the “best interests of the child” doctrine,<sup>137</sup> but the individual decisions, in reality, were inconsistent with that doctrine because each focused on the adults’—rather than the child’s—status and rights in the relationship. As a result, the courts in these cases in many respects victimized, rather than protected, the children by denying them a voice in resolving questions of and access to relationships with important parent figures.<sup>138</sup>

These cases demonstrate the courts’ attitude toward the issue of whether children have a constitutional right to maintain family relationships. First, the courts viewed the “families” in these cases as falling outside the constitutional protection of the liberty interest because they were comprised of individuals who were not legally

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135. *In re Appeal in Pima County Juvenile Severance Action No. S-113432, No. 2 CA-JV 93-0003, 1993 WL 339248* (Ariz. Ct. App. Sept. 9, 1993); see also Joe Salkowski, *Ariz. Court Upholds Children's Right to "Divorce" Parents*, ARIZONA DAILY STAR, Sept. 14, 1993, at 1 (“[J]udges preside over one or two cases each year in which children ask that custodial rights of one or both of their parents be severed.”) (quoting the Presiding Judge of the Pima County Juvenile Court).

136. Even though the trial court determined that Gregory had standing to commence the proceeding, it decided the case based on its determination of Rachel's unfitness as defined in the statute, and not on Gregory's “rights” in the relationship. See *Kingsley*, 623 So. 2d at 790.

137. The “best interests of the child” doctrine refers to the standard utilized in determining child custody. See, e.g., Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 488-89 (1987). In applying the doctrine, “the primary goal of courts is to secure the best interests of the child.” Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 433 (1990); see also UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987) (listing factors that courts must consider). The doctrine, which “emerged as a reform aimed at mitigating the possessive, patriarchal model of children as property,” Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1756 (1993), has had various definitions over time. For a discussion of the various definitions, see Crippen, *supra*, at 432-35; O'Kelly, *supra*, at 495-532; Harvey R. Sorkow, *Best Interests of the Child: By Whose Definition?*, 18 PEPP. L. REV. 383 (1991).

138. See *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (1989) (Brennan, J., dissenting); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting); *In re Z.J.H.*, 471 N.W.2d 202, 214 (Wis. 1991) (Bablitch, J., dissenting); *In re Clausen*, 502 N.W.2d 649, 668 (Mich. 1993) (Levin, J., dissenting). Arguably, in *In re Kingsley*, Gregory's mother was not an “important” figure, and the court could have denied the continued relationship on that basis.



related.<sup>139</sup> In other words, the courts refused to extend constitutional protection to nontraditional families, implicitly advancing a very narrow view of the personal liberty interest attendant to family relationships. A majority of the Supreme Court has rejected this narrow view of the liberty interest.<sup>140</sup>

Second, to the extent that these decisions acknowledged the child's claim, they linked it to an adult's claim.<sup>141</sup> This approach subordinates the child's rights to the adult's rights and is inconsistent with current jurisprudence in other areas of the law that recognize children's constitutional rights.<sup>142</sup> Moreover, this approach improperly limits the constitutional examination of family relationships to a parent-centered model, despite the Supreme Court's expansion of this model in prior cases.<sup>143</sup>

Finally, these decisions reduce the child to an object instead of treating the child as a person.<sup>144</sup> The child becomes a nonentity and is not accorded any rights, consideration, or value. As the dissent in *Z.J.H.* aptly concluded:

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139. In *Michael H.* and *In re Z.J.H.*, the courts specifically invoked this view. See *Michael H.*, 491 U.S. at 130-31; *In re Z.J.H.*, 471 N.W.2d at 211-12. In *Alison D.* and *In re B.G.C.*, the courts arguably adopted this view by default, by failing to consider the liberty interests of anyone other than the birth parents. In *In re Kingsley*, the court similarly incorporated this view by failing to consider Gregory's liberty interest in his relationship with his mother, although this failure is understandable because Gregory himself sought to end the relationship.

140. Writing for the plurality in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), Justice O'Connor, along with Justices Kennedy and Souter, specifically rejected the restrictive definition of the personal liberty interest in family relationships adopted by Justice Scalia in *Michael H.*, stating that "such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 2805. In *Michael H.*, Justices O'Connor and Kennedy, Stevens, Brennan, Marshall, and Blackmun, and White all rejected Justice Scalia's view. See *Michael H.*, 491 U.S. at 133 (O'Connor, J., concurring); *id.* (Stevens, J., concurring); *id.* at 137 (Brennan, J., dissenting); *id.* at 157 (White, J., dissenting).

141. See, e.g., *Michael H.*, 491 U.S. at 131 ("[W]e find that, at best, [Victoria's] claim is the obverse of Michael's and fails for the same reasons."); *In re Clausen*, 502 N.W.2d at 665 ("It is true that children, as well as their parents, have a due process liberty interest in their family life. However, in our view those interests are not independent of the child's parents.").

142. See *infra* Part II.A. (discussing jurisprudence recognizing children's constitutional rights).

143. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) (applying the constitutional protection of family relationships to a family unit consisting of a grandmother, her son, and her two grandsons); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 843 (1977) (acknowledging that constitutional protection of family relationships can apply to members of family units who are not related by blood).

144. See *In re Z.J.H.*, 471 N.W.2d 202, 215 (Wis. 1991) (Bablitch, J., dissenting).

[T]he majority opinion[] focus[es] solely on the rights of the adults in this non-traditional relationship that is dissolving. Lost in . . . the majority opinion [is] the interests of at least [an] equal if not paramount concern: the interests of the child . . . .

The majority denies him any legal significance. He is a nonentity in this battle between two parents. Because this is a non-traditional parental relationship, the result of the majority's decision is that the child's interests will not even be considered. It is as if he does not even exist.<sup>145</sup>

This attitude toward the children is painfully obvious when one observes that courts rarely refer to a child by name<sup>146</sup> and that statutes often refer to the child as "it."<sup>147</sup> This treatment of the child is reminiscent of the time when constitutional rights were afforded only to a privileged few.<sup>148</sup>

The real tragedy of these cases, however, is that the rationale used for denying the claim of the "nonlegal" parent, whether based

145. *Id.*

146. *See, e.g., Klipstein v. Zalewski*, 533 A.2d 1384 (N.J. Super. 1988):

He has not shown why a residential relationship with *the child* for a period of only one year, during which *the child* maintained a good relationship with her natural father, is of such great importance to *this child* that we should compel visitation over the objections of not only both natural parents but, equally important, of *the child* herself.

*Id.* at 1388 (emphasis added). In *Alison D.*, the court found it unnecessary to refer to any of the parties by name, noting that:

*Petitioner* and *respondent* agreed to a visitation schedule whereby *petitioner* continued to see *the child* a few times a week. . . . By this time, *the child* had referred to both *respondent* and *petitioner* as "mommy". *Petitioner's* visitation with *the child* continued until 1986, at which time *respondent* bought out *petitioner's* interest in the house and then began to restrict *petitioner's* visitation with *the child*. In 1987 *petitioner* moved to Ireland to pursue career opportunities, but continued her attempts to communicate with *the child*. Thereafter, *respondent* terminated all contact between *petitioner* and *the child*, returning all of *petitioner's* gifts and letters.

*Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991) (emphasis added).

147. *See, e.g., N.Y. DOM. REL. LAW § 70* (McKinney 1994) ("In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote *its* welfare and happiness, and make award accordingly." (emphasis added)).

148. In *Scott v. Sanford*, 60 U.S. 393 (1856) (the Dred Scott case), the Supreme Court remarked:

Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; . . . yet they are citizens.

*Id.* at 422. Although minors still cannot vote, the Supreme Court now accords them more rights than those recognized, or more specifically, ignored, in 1856. *See infra* Part II.A. (discussing children's constitutional rights).

on legal presumptions,<sup>149</sup> a lack of biological ties, or the adults' legal status,<sup>150</sup> usually is irrelevant to a child's interest in protecting important family relationships. A child takes no part in creating the "legal" barriers that prevent a parent-like adult<sup>151</sup> from maintaining the relationship. Victoria did not commit the adultery that ultimately precluded her relationship with her biological father.<sup>152</sup> Neither A.D.M. nor Z.J.H. had any say in determining whether the parties who decided to bring them into their respective families were heterosexual, married, or otherwise possessed a biological or legal tie to them. Jessica/Anna did not cause Daniel and Cara to be unmarried at the time of her conception and birth, nor did she cause Cara to place her for adoption and then seek her return or cause the DeBoers to resist her return.<sup>153</sup> Gregory did not participate in Rachel's decision to place him in foster care. Yet these children were profoundly, and arguably detrimentally, affected by these factors because the courts focused on them in analyzing the cases.

There are two sides to a child-parent<sup>154</sup> relationship—the parent's and the child's. Yet courts have applied the Constitution to protect only the parent's interest in the relationship. Because the courts' analysis of the traditional liberty interest in child-parent relationships is parent-centered, it overlooks any liberty interest the child may have in preserving the relationship.<sup>155</sup> A child-centered

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149. See *supra* text accompanying notes 66-72 (discussing how the *Michael H.* Court applied the presumption of legitimacy to reject a biological father's liberty interest in his relationship with his daughter).

150. See *supra* text accompanying notes 78-101 (discussing how lack of biological ties and appropriate legal status foreclosed standing in *Alison D.* and *Z.J.H.*).

151. For a definition of "parent-like adult," see *infra* Part IV.A.1.

152. In *Michael H.*, Justice Scalia distinguished Michael's claim from the unwed father's claims in *Stanley v. Illinois*, 405 U.S. 645 (1982), *Caban v. Mohammed*, 441 U.S. 380 (1979), and *Lehr v. Robertson*, 463 U.S. 248 (1983), because Michael was an "adulterous father." *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24, 128-29 (1989).

153. *In re Clausen*, 502 N.W.2d 649, 653 (Mich. 1993).

154. The traditional nomenclature for this relationship is "parent-child." This term denotes absolute dominance by the parent and the subservience of the child. In many respects this dominance is appropriate: the parent provides the child with food, clothing, shelter, nurturing, and education. But the focus on the absolute dominance of the parent obscures the fact that the child's view of the world is relevant to his or her best interests. See generally Woodhouse, *supra* note 137. By describing the relation herein as "child-parent," I am attempting to use the child to focus and define the relationship for liberty interest analysis—something the law has rarely done.

155. An analysis of the child's liberty interest must extend to children the privileges and immunities accorded "persons" under the Constitution or must provide an acceptable rationale for excluding children from this constitutional protection. As one commentator has noted:

approach<sup>156</sup> to constitutional analysis of child-parent relationships, on the other hand, assumes that the child is the focal point of the relationship and defines the scope of constitutional protection according to a child-centered view.<sup>157</sup>

By concentrating on the flaws in the adult's claims, the courts have neglected to examine the possibility and reality of a loving and caring relationship between a child and a legally unrelated adult and to preserve that relationship by employing a child-centered approach. Instead, the courts have terminated important relationships in a child's life, denied the child a chance to enhance his or her psychological and sociological development, and missed an opportunity to further the child's dignity judicially.<sup>158</sup> This result is detrimental to the child and certainly does not advance his or her best interest.

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Under traditional constitutional analysis, a statute that infringes fundamental rights can survive judicial scrutiny only if the government can show that the statute is both necessary and narrowly drawn to serve a compelling state interest. Given that children are persons under the Constitution, logic would seem to demand such strict scrutiny for infringements not only of adult's rights, but of children's rights as well.

Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1169 (1984) (citations omitted) (discussing the development of a compelling state interest in statutes or policies infringing on children's constitutional rights under the strict scrutiny test).

156. The analysis offered in this Article places the liberty interest of children in family relationships on par with the parents' liberty interest in their companionship with their children. See *infra* text accompanying notes 216-269 (discussing children's liberty interest as a right of companionship). Therefore, I could have easily termed this approach "child right equalization" rather than "child-centered." I chose to use the term "child-centered" because it promotes a greater recognition of the child's view of the world as a basis for analysis. For an interesting general discussion of the child's perspective as a basis of analysis, see Woodhouse, *supra* note 137.

157. The recognition of children's liberty interest embodies a jurisprudence and social policy that identifies children as persons who need protection. The liberty interest of children rests philosophically on the need to facilitate the transition of developing citizens from childhood to adulthood and doctrinally on the recognition of children as persons under the Constitution. For an insightful discussion of the jurisprudence and social policy that identifies children as individuals needing protection, see Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255 (1979).

158. For an intriguing discussion of the child's dignity and constitutional doctrine, see Charles R. Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 139 SYRACUSE L. REV. 1293 (1988).

## II. LEGAL SUPPORT FOR CHILDREN'S LIBERTY INTERESTS IN CHILD-PARENT RELATIONSHIPS

### A. *Children's Constitutional Rights*

The recognition of children's liberty interests in familial relationships logically follows from existing jurisprudence protecting children's constitutional rights. The Supreme Court has recognized children's constitutional rights in several contexts and has announced that children are entitled to both procedural and substantive due process.<sup>159</sup> Additionally, a number of Supreme Court cases have been interpreted as supporting children's liberty interests in areas other than family dispute litigation.<sup>160</sup>

In *In re Gault*,<sup>161</sup> the Supreme Court held for the first time that children are "persons" under the Constitution.<sup>162</sup> As a result, the *Gault* Court recognized that children have a right to due process in juvenile proceedings.<sup>163</sup> Subsequent cases have expanded procedural due process rights to apply in other proceedings involving juveniles.<sup>164</sup> The Court also has found that children have constitutional rights to obtain abortions<sup>165</sup> and contraceptives<sup>166</sup> and to the free-

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159. See *infra* notes 161-174 and accompanying text (discussing the cases identifying children's procedural and substantive due process rights).

160. See *infra* notes 216-269 and accompanying text (discussing cases recognizing children's constitutional rights to companionship).

161. 387 U.S. 1 (1967).

162. *Id.* at 30-31.

163. *Id.* at 21. In *Gault*, an Arizona juvenile court adjudicated 15-year-old Gregory Gault a juvenile delinquent and ordered him confined to a detention facility until he reached age eighteen. Because the Arizona legislature had characterized juvenile proceedings as civil in nature, rather than criminal, the proceedings did not include any procedural due process protection. *Id.* at 4-6. Specifically, the complainant did not appear at the proceeding, the juvenile's parents did not receive notice of the proceeding, the juvenile was not represented by counsel, the juvenile was permitted to make damaging admissions, and a transcript of the proceeding was not maintained. *Id.* The absence of these constitutional guarantees was critical to the Court's analysis and application of the Fourteenth Amendment. See *id.* at 18 ("Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.").

164. See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (concluding that school officials' search and seizure of a student's purse had satisfied the applicable due process requirements); *Parham v. J.R.*, 442 U.S. 584, 616 (1979) (stating that civil commitment procedures met due process requirements); *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (holding that school suspensions without a hearing violated procedural due process).

165. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2832 (1992) (recognizing a minor's right to obtain an abortion subject to parental consent or court authorization); *Belotti v. Baird*, 443 U.S. 622, 647 (1979) ("every minor must have the opportunity . . . to go directly to a court without first consulting or notifying her parents"); *Planned Parenthood v.*

dom of expression.<sup>167</sup>

In applying the Constitution to children, courts have sought primarily to protect them from arbitrary state action,<sup>168</sup> insensitive government policies,<sup>169</sup> and their own folly.<sup>170</sup> While courts have afforded children's constitutional rights only limited protection in comparison to adults, they usually restricted children's rights to preserve the corresponding rights of the adults who take care of them or to promote the children's best interests.<sup>171</sup> Courts have analyzed children's constitutional rights in institutional settings analogous to the familial setting.<sup>172</sup> While children spend much of their child-

Danforth, 428 U.S. 52, 74 (1976) (ruling that a minor's liberty interest in the abortion decision precludes a parental veto).

166. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (holding that restrictions on distribution of contraceptives to minors violated their substantive due process rights).

167. *See* Board of Educ. v. Mergens, 496 U.S. 226, 247 (1990) (holding that public school officials cannot restrict extra-curricular activities based on content); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (allowing public schools to limit school-sponsored speech, but only on legitimate pedagogical grounds); *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (holding that public schools cannot arbitrarily remove books from the school library); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that public schools cannot restrict private speech unless it disrupts school activities); *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 807 F. Supp. 444, 465 (N.D. Ill. 1992) (holding that school officials cannot restrict students' distribution of religious material before and after school, nor can officials establish a particular location for such distribution during school hours without violating the students' First Amendment rights), *aff'd in part and vacated in part*, 9 F.3d 1295 (7th Cir. 1993) (upholding the prohibition of restrictions on free speech, but permitting certain limitations on the place and manner of the speech).

168. *See* *Island Trees*, 457 U.S. at 873; *Tinker*, 393 U.S. at 513.

169. *Casey*, 112 S. Ct. at 2832; *Bellotti*, 443 U.S. at 647; *Carey*, 431 U.S. at 694; *Hedges*, 807 F. Supp. at 465.

170. *See, e.g., Carey*, 431 U.S. at 695-96 (taking judicial notice of the high incidence of sexual activity among minors and the "frequently devastating" consequences).

171. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (weighing students' Fourth Amendment rights against school officials' interests); *Tinker*, 393 U.S. at 511 (limiting students' right to freedom of expression in the school context). *See also* Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 377 (1986) (observing that "each time a child's rights have been considered less expansive than those of an adult, it has been based on a view that the restriction was in the best interest of the child"); Wendy D. Bowie, *Multiplication and Division—New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 DICK. L. REV. 155, 172 (1990) (commenting that because "a child's rights are often less extensive than an adult's, a frozen embryo's rights may be less extensive than a child's"); Peter L. Scherr, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U.J. URB. & CONTEMP. L. 163, 191 (1992) (proposing that the Supreme Court apply the intermediate scrutiny test to infringements of minor's fundamental rights).

172. *See, e.g., Tinker*, 393 U.S. 503 (symbolic speech in school); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (printed speech in school); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (religious content of speech in school); *Parham v. J.R.*, 442 U.S. 584 (1979) (due process in mental hospital admissions); *In re Gault*, 387 U.S. 1 (1967) (due

hood in various institutions, such as schools, hospitals, psychiatric centers, and the juvenile justice system, they spend their entire childhood in families.<sup>173</sup> Like families, these institutions seek to promote children's best interests. Extending the children's constitutional rights to the familial setting, as in other institutional settings, will limit the courts' ability to deny children constitutional rights merely because they are in the protective institution of the family. As with schools and other institutions, the protective nature of the family should not insulate the child from receiving the guarantees of the Constitution.<sup>174</sup>

### *B. Expanding Legal Protection to Other Adult-Child Relationships*

With a few minor exceptions, the common law of the United States limited the scope of legal protection that is accorded adult-child relationships to legal parents, guardians, and their children and wards.<sup>175</sup> In 1966, New York initiated a movement to expand the category of individuals who were entitled to pursue the continuation of familial relationships by enacting the first grandparent visitation statute.<sup>176</sup> Many states followed suit by expanding and codifying the legal protection accorded to nonlegal parents' visitation claims.<sup>177</sup>

process in juvenile justice system); *T.L.O.*, 469 U.S. 325 (search and seizure in school).

173. See William S. Geimer, *Juvenileness: A Single-Edged Constitutional Sword*, 22 GA. L. REV. 949, 951 (1988) (arguing that because juveniles "live, work, and learn in places owned by others," their constitutional rights necessarily conflict with adult views and orthodoxy).

174. See, e.g., *Gault*, 387 U.S. 1; *Tinker*, 393 U.S. 503; *Belotti*, 444 U.S. 669.

175. For example, only the child's legal parents and guardians had standing to pursue the continuation of the child-parent relationship when the government or an individual threatened to interrupt it. See *supra* notes 23-59 and accompanying text (discussing cases in which parents and guardians have sought constitutional protection of the child-parent relationship).

176. The statute provides: "Where either or both of the parents of a minor child . . . is or are deceased, or where circumstances show that conditions exist [in] which equity would see fit to intervene, a grandparent or the grandparents of such child may apply for a writ of habeas corpus to have such child brought before such court . . ." N.Y. DOM. REL. LAW § 72 (McKinney 1992).

177. Forty-nine of the fifty states have statutes that permit relatives at least as close as grandparents to seek visitation. Many of these permit others to petition as well.

The thirty-four jurisdictions that permit grandparents to petition for visitation include: Alabama, ALA. CODE § 30-3-4 (1989); California, CAL. CIV. CODE § 197.5 (1982); Colorado, COLO. REV. STAT. ANN. § 19-1-117 (West 1988 & Supp. 1993); Delaware, DEL. CODE ANN. tit. 10, § 950 (1975 & Supp. 1992); Florida, FLA. STAT. ANN. § 752.01 (West 1993); Georgia, GA. CODE ANN. § 19-7-3 (1993); Idaho, IDAHO CODE § 32-1008 (1983); Indiana, IND. CODE ANN. § 31-1-11.7-2 (Burns 1993); Iowa, IOWA CODE ANN. § 598.35 (1993); Kansas, KAN. STAT. ANN. § 38-129 (1993); Kentucky, KY. REV. STAT. § 405.021 (Baldwin 1993); Maine, ME. REV. STAT. ANN. tit. 19, § 1003 (West 1993); Maryland, MD. CODE ANN., FAM. LAW § 9-102 (1993); Massachusetts, MASS. GEN. LAWS ANN. ch. 119, § 39D (West

By the end of the 1980s, only Washington and the District of Columbia had not enacted expansive visitation statutes. By expanding their visitation statutes to include grandparents, great-grandparents, stepparents, siblings, and others, state legislatures announced a new policy that promotes the best interests of children by encouraging the continuation of meaningful familial relationships. This policy arguably elevates children's constitutional rights in familial relationships to the same level as parents' constitutional rights.

### III. EMPIRICAL SUPPORT FOR CHILDREN'S LIBERTY INTERESTS IN CHILD-PARENT RELATIONSHIPS

Child-parent relationships have been the subject of significant social science research and legal discourse.<sup>178</sup> Social scientists have closely examined the effect of the dissolution of the family unit on a minor's well-being.<sup>179</sup> For example, studies have shown that high

1993); Michigan, MICH. COMP. LAWS ANN. § 722.27b (West 1993); Mississippi, MISS. CODE ANN. § 93-16-3 (1993); Missouri, MO. ANN. STAT. § 452.402 (Vernon 1993); Montana, MONT. CODE ANN. § 40-4-217 (1993); Nebraska, NEB. REV. STAT. ANN. § 43-1802 (1988); Nevada, NEV. REV. STAT. ANN. § 125A.330 (1993); New Hampshire, N.H. REV. STAT. ANN. § 458:17-d (1992); New Mexico, N.M. STAT. ANN. § 40-9-2 (Michie 1993); New York, N.Y. DOM. REL. LAW § 72 (McKinney 1993); North Carolina, N.C. GEN. STAT. § 50-13.2 (1987); Oklahoma, OKLA. STAT. ANN. tit. 10, § 5 (West 1994); Oregon, OR. REV. STAT. § 109.121 (1994); Rhode Island, R.I. GEN. LAWS § 15-5-24.3 (1993); South Carolina, S.C. CODE ANN. § 20-7-420 (Law. Co-op. 1993); South Dakota, S.D. CODIFIED LAWS ANN. § 25-4-52 (1992); Tennessee, TENN. CODE ANN. § 36-6-301 (1991); Texas, TEX. FAM. CODE ANN. § 14.03 (West 1986 & Supp. 1994); Vermont, VT. STAT. ANN. tit. 15, § 1013 (1989); West Virginia, W. VA. CODE § 48-2B-2-6 (1993); and Wyoming, WYO. STAT. § 20-7-101 (1993).

The six jurisdictions that permit both grandparents and great-grandparents to petition for visitation include: Arizona, ARIZ. REV. STAT. ANN. § 25-337.01 (1993); Arkansas, ARK. CODE ANN. § 9-13-103 (Michie 1991); Minnesota, MINN. STAT. ANN. § 257.022 (West 1992 & Supp. 1994); North Dakota, N.D. CENT. CODE § 14-09-05.1 (1993); Pennsylvania, PA. CONST. STAT. § 5311-13 (1993); and Wisconsin, WIS. STAT. ANN. § 767.245 (West 1993).

Two jurisdictions permit grandparents and siblings to petition for visitation, including: Louisiana, LA. REV. STAT. ANN. § 9:344 (West 1994); and New Jersey, N.J. STAT. ANN. § 9:2-7.1 (West 1993).

Illinois allows grandparents, great-grandparents, and siblings to petition for visitation. ILL. REV. STAT. ch. 750, para. 5/607 (Smith-Hurd 1993).

Utah allows "grandparents and other immediate family members" to petition for visitation. UTAH CODE ANN. § 30-5-2 (1993).

Alaska and Ohio permit a grandparent or other person to seek visitation. ALASKA STAT. § 25.24.150 (1993); OHIO REV. CODE ANN. § 3109.05.01 (Anderson 1992).

Connecticut, Hawaii, and Virginia permit any person to seek visitation. CONN. GEN. STAT. ANN. § 46b-59 (West 1986); HAW. REV. STAT. § 571-46 (West 1993); VA. CODE ANN. § 16.1-278.15 (1993).

178. For an in-depth review of the psychological studies of divorce on children, see Joan B. Kelly, *Current Research on Children's Post Divorce Adjustment: No Simple Answers*, 31 FAM. & CONCILIATION CTS. REV. 29 (1993).

179. *Id.* at 36-42.



self-esteem and respect for authority are instrumental to child development<sup>180</sup> and that both parents' participation in the child-parent relationship fosters the child's ability to acquire these traits.<sup>181</sup> One of the earliest long-term studies demonstrated that during the first five years of a child's separation from his or her parent, "the relationship between the child and *both* original parents did not diminish in emotional importance to the child . . . ."<sup>182</sup> Other longitudinal studies make similar observations and offer varying explanations.<sup>183</sup> Subsequent studies also have identified other factors affecting children's development.

Recent studies, however, have found that continued contact with the noncustodial parent is less relevant to child development than previously believed,<sup>184</sup> making classifying the factors that influence the development of post-divorce children more complex and unpredictable.<sup>185</sup> Notwithstanding this disagreement over the extent of the impact of the child-noncustodial parent relationship on the child's development,<sup>186</sup> the current consensus remains that children

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180. See, e.g., Joseph M. Healy, Jr. et al., *Children and Their Fathers After Parental Separation*, 60 AM. J. ORTHOPSYCHIATRY 531 (1990) (recognizing the correlation between the frequency of father-child visitation and the child's self-esteem).

181. See *id.*; see also JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 307 (1980) (finding that the self-image of children from divorced families was "firmly tied to their relationship with both parents and [the children] thought of themselves as children with two parents who had elected to go their separate ways.").

182. WALLERSTEIN & KELLY, *supra* note 181, at 307 (emphasis added).

183. See, e.g., Lise M. C. Bisnaire et al., *Factors Associated with Academic Achievement in Children Following Parental Separation* 60 AM. J. ORTHOPSYCHIATRY 67, 92 (1990) (recognizing that maintaining a relationship with the noncustodial parent improves the child's academic performance, but identifying other factors, such as the noncustodial parent's income and ability to work less, that also may affect the child's academic performance).

184. See, e.g., James L. Peterson & Nicholas Zill, *Marital Disruption, Parent-Child Relationships, and Behavior Problems in Children*, 48 J. MARRIAGE & FAM. 295, 306-07 (1986) (identifying parental conflict and the custodial parent's sex and remarriage as factors influencing children's post-divorce behavior).

185. See Thomas E. Smith, *Parental Separation and Academic Self-Concepts of Adolescents: An Effort to Solve the Puzzle of Separation Effects*, 52 J. MARRIAGE & FAM. 107, 113-14 (1990) (noting that the child's age, race, and gender and the parents' pre- and post-divorce marital conflict all complicate the effect of divorce on children).

186. See Janet R. Johnston et al., *Ongoing Post Divorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576, 588 (1989) (concluding that a continued child-noncustodial parent relationship does not enhance the child's well-being); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 116-18 (1979) (explaining that strengthening the custodial parent's role and minimizing, if not eliminating, the noncustodial's parent's role enhances the child's well being). But see Frank F. Furstenberg, Jr. & Christine W. Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. MARRIAGE & FAM. 893, 899 (1985); WALLERSTEIN & KELLY, *supra* note 181, at 142-44 (concluding that a child's relationship with a noncustodial parent is

benefit from continued contact with noncustodial parents.<sup>187</sup>

Based on this consensus, the law must recognize the importance of child-parent relationships in the resolution of familial disputes. By taking these relationships into account, the law will enrich children's lives and soften the harmful effects of familial dissolution. Although the empirical and psychological studies do not prove that all children will benefit from maintaining all of their child-parent relationships, the studies support the view that it is better to inquire into the nature of the relationship to determine whether it is beneficial than it is to prohibit the relationship altogether.

Using psychological studies to support children's liberty interest in maintaining relationships with nonlegal parents has its drawbacks. One criticism of the argument is that the psychologists studied children who had lived in legally recognized marriages prior to the divorce.<sup>188</sup> Notwithstanding this limitation, the studies provide observations relevant to this Article in that they have found generally that marital blood relationships do not appear to be key factors in the importance of the parental relationship to the child. Rather, the key factor in the child-parent relationship is the emotional bond forged by the child's continuous cohabitation with the parents before divorce.<sup>189</sup> In short, these studies support the proposition that parental influence is not limited to or defined by biology.<sup>190</sup> Therefore, a functional definition of parent is more appropriate to an analysis of policies addressing the impact of family dissolution on children.

#### IV. SPECIFICS OF CHILDREN'S LIBERTY INTERESTS IN CHILD-PARENT RELATIONSHIPS

Adopting a child-centered analytic structure presents two basic issues: first, who qualifies as the "parent" in the relationship?; and second, what is the nature and extent of the right being protected? Each issue will be addressed below.

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important and meaningful to the child).

187. Kelly, *supra*, note 178, at 39; FURSTENBERG & NORD, *supra* note 186, at 899; WALLERSTEIN & KELLY, *supra* note 181, at 142-44.

188. Divorce proceedings records are a social scientist's primary source of dissolving families. Because only traditional marriages are entitled to divorce as a means of dissolution, dissolving nontraditional families are absent from the records.

189. See WALLERSTEIN & KELLY, *supra* note 181; see also Woodhouse, *supra* note 137.

190. Courts also have adopted this observation. See, e.g., *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) ("No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship.").

### A. Definition of "Parent"

Current jurisprudence limits constitutional protection of adult-child relationships to cases in which the adult is statutorily defined as a legal parent.<sup>191</sup> The recognition of a legal child-parent relationship is wholly dependent on the actions of the adults. If the adults biologically conceive the child, marry before or after the birth of the child, or adopt the child, then the resultant adult-child relationship will receive constitutional protection.<sup>192</sup> When the adult has not established a relationship with the child in the legally correct manner, however, the relationship generally is not entitled to constitutional protection.<sup>193</sup> Therefore, in order to assure that the child's liberty interest in his or her relationship with a nontraditional or legally unrelated parent figure will be protected, it is necessary to expand the definition of "parent."

Because children do not participate in the formation of their biological or legal child-parent relationships, they are wholly blameless for the shortcomings of their relatives—legal, biological, or otherwise. This innocence absolves them of responsibility for any moral objection attached to the nontraditional child-parent relationship. For example, it is easy, although not necessarily appropriate, to limit or deny constitutional protection to adults whose behavior does not

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191. See *supra* text accompanying notes 23-59 (discussing the constitutional protection of child-parent relationships).

192. Current jurisprudence protects the traditional child-parent relationship. See *id.* This, however, does not mean that the deficiencies created by the adult-centered analysis are inapplicable to these relationships, however. For example, in adoption proceedings, the Constitution bestows procedural and substantive due process rights upon legal parents in order to protect their rights. See GOLDSTEIN ET AL., *supra* note 186, at 22 ("Legal adoption cancels out the legal rights of the biological parents. To safeguard their interests, even in cases where these run counter to the child's interests, either parental consent or abandonment is generally an essential preliminary to adoption in present-day law.") (citations omitted). But the constitutional analysis of adoption proceedings has never considered the child's liberty interest in the terminated child-parent relationship. A fair application of such an analysis would lend constitutional support for "open" adoptions, which allow the child to continue his or her relationship with the biological parent even though the legal tie has been severed. For a detailed discussion of open adoptions, see Carol Amadio & Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children to 'Stay in Touch' with Blood*, 22 J. FAM. L. 59 (1983); Laurie A. Ames, *Open Adoptions: Truth and Consequences*, 16 LAW & PSYCHIATRY R. 137 (1992); Joseph R. Carrieri, *The Open Adoption: Parental Visitation After Adoption*, in THE FOSTER CHILD 1989: FROM ABANDONMENT TO ADOPTION, at 313 (PLI Litig. & Admin. Practice Course Handbook Series No. 151, 1989); Michael Spry, *Open Adoption*, 1 KY. CHILDREN'S RTS. J. 13 (1991).

193. See *supra* Part I.B. (discussing the deficiencies of the current jurisprudence constitutionally protecting child-parent relationships).

meet prevailing social norms.<sup>194</sup> Unmarried individuals and same-sex partners in nontraditional families represent easy targets for policies that seek to promote a "standard" way of life.<sup>195</sup> Yet children play no part in the creation of their families; they merely participate in, and are the beneficiaries of, the relationships that arise out of the families.

Therefore, a child-centered approach necessarily must recognize both the children's innocence and participation in child-parent relationships and not deprive them of these important relationships solely because of the adult's behavior or status. Accordingly, an expanded definition of "parent" should include not only individuals who are legally related to the child under the appropriate state statutes,<sup>196</sup> but also individuals who are not legally related to the child but have voluntarily assumed parenting responsibilities,<sup>197</sup> and

194. Social norms are constantly changing, pressuring the courts to address the changes. When the law responds to changing social values, caution generally is advisable to avoid repression in the name of progress. As one commentator stated:

Society alters, some say evolves. Values change. Majorities grow more complacent; factions rigidify. Locked into frozen configurations, legislators may either ignore sound opportunities for progress, or opt for novelty without adequate thought of consequences. An unchecked spiral of change ultimately entails the same danger threatened by the most stubborn opposition to change. Either possibility can impart a teleology to positivist lawgiving which may equal legislated perpetual conformity.

TRIBE, *supra* note 25, at 1308. Using social acceptability to limit the application of constitutional doctrine, therefore, threatens our pluralistic society.

195. Occasionally, courts expressly promote the standard way of life. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (stating that "the facts of this case are, *we must hope*, extraordinary") (emphasis added). More often, courts implicitly adopt a standard way of life by denying nontraditional families the same privileges and immunities they accord traditional families. Compare *Michael H.*, 491 U.S. 110 (denying constitutional protection to an unwed father who established an actual relationship with his daughter because the mother was married and living with her husband) and *In re Z.J.H.*, 471 N.W.2d 202 (Wis. 1991) (refusing to permit visitation by an unrelated lesbian family member) with *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (extending constitutional protection to a family consisting of a grandmother, her son, and her two grandsons) and *In re D.M.M.*, 404 N.W.2d 530 (Wis. 1987) (extending visitation statute, which prescribed grandparent and great-grandparent visitation, to a great-aunt).

196. See e.g., ILL. ANN. STAT. ch. 705 para. 405/1-3(11) (Smith-Hurd 1993) (defining a "parent" under the Juvenile Court Act of 1987 as "the father or mother of a child [including] any adoptive parent").

197. Parenting responsibilities are the daily responsibilities of caring for a child. Although general in nature, parenting responsibilities are child-specific and, therefore, elude precise definition. One of the major qualities of a parent-like individual is the voluntary assumption of parenting responsibilities. The relationship, however, need not be created in a voluntary manner. Individuals can become parents involuntarily, whether through unintended conception or through the illness, death, or irresponsibility of the birth parents. The important criterion is that they assume the responsibilities that have

who either have resided with the child or were barred from residing with the child by the child's custodian. The list of parent-like individuals should include foster parents, stepparents, second-parents,<sup>198</sup> other relatives of the child, or other adults who have lived with the child and acted as parents for a significant period of time. The requirement that a parent-like individual voluntarily assume parenting responsibilities precludes a person who has contracted to care for the child for payment from asserting the claim of a parent-like individual.<sup>199</sup>

1. *A Test for Identifying Parent-Like Individuals.*—The parent-like individual can be identified through a two-part test: (1) an individual who has (a) participated in the act or decision to create a family unit that included the child;<sup>200</sup> or (b) executed written acknowledgement of the child or had his or her name placed on the birth certificate of the child; or (c) executed an irrevocable written provision for the child's future *and*, (2) who has (a) lived with the child while assuming daily child-rearing responsibilities for a significant period of time; or (b) provided significant, regular support for and attempted to maintain consistent contact with the child when continued cohabitation with the child was prevented by the legal custodian. Individuals satisfying both parts of this test would be considered "parents" in a child-parent relationship. And children could protect their relationship with these "parents" by claiming liberty interests in the relation-

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been thrust upon them. Whether the parenting responsibilities are undertaken voluntarily or involuntarily, it is the *continued* assumption of responsibilities that must be voluntary for the individual to qualify as "parent-like."

198. A second-parent is someone who has lived with the child and his or her legal parent, but unlike a stepparent, is not married to the child's legal parent. A second-parent who adopts the child becomes the child's "legal parent." See Carrie Bashaw, Comment, *Protecting Children in Nontraditional Families: Second Parent Adoptions in Washington*, 13 U. PUGET SOUND L. REV. 321 (1990).

199. At first glance, it might appear that foster parents are paid to assume parenting responsibilities. The foster parent stipend, however, covers only the child's expenses and often is insufficient to meet those expenses. See *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 824-28 (1977) (describing the role of foster parents). Clearly, the stipend does not compensate foster parents for their child-care. Regardless of whether the stipend is reimbursement or compensation, the full-time nature of the foster parents' commitment distinguishes them from the *au pair*, nanny, or other child care provider whose commitment is supplemental to that of the individual who actually and legally exercises parental responsibilities.

200. Creation of the family unit includes the marriage or cohabitation of individuals, one of whom has a child from a different relationship, the addition of a child to an existing family unit *via* the adoption or by artificial insemination of one of the adults, or any similar voluntary consensual act of the adults in forming a family that includes children.

ships. In contrast, such individuals would not meet the traditional definition of "parent" unless they were related to the child as a result of conception, birth, or adoption.<sup>201</sup>

This definition of parent-like individuals addresses several important issues in the analysis of the child's liberty interest in preserving a child-parent relationship. First, the definition limits the group of individuals with whom the child may have a constitutionally protected relationship. One major objection to the creation of new categories of individuals who can exert control over or affect the lives of children is that there must be a limit on who might have standing to seek to preserve a relationship. The concern is that opening the door to a new category of persons who are not related to the child in a manner presently recognized will undermine the family and place the legal parents at the mercy of anyone wishing to claim a relationship with the child.<sup>202</sup> This concern raises legitimate issues because neither judges, lawyers, child development experts, nor parents wish to see an increase in family-relationship litigation, nor do they want to undermine the legal parents' liberty interest by opening the door to frivolous claims.<sup>203</sup>

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201. Parent-like individuals who are not legally related to the child would not qualify to preserve the child-parent relationship through their own liberty interest claim. This limitation, while supporting the current jurisprudence and avoiding the difficulties of increasing the number of individuals who can assert conflicting constitutional claims, requires further examination. *See supra* text accompanying notes 23-59 (discussing the current jurisprudence providing constitutional protection to relationships between legal parents and their children); *infra* text accompanying notes 202-205 (discussing the concern of unnecessarily increasing the number of individuals who can claim a liberty interest in their relationship with a child); *see also* Bartlett, *supra* note 16, at 944-51 (discussing a policy according parent-like individuals legal parental status).

202. The archetypal objection to a new policy according a liberty interest to an unrelated or third party adult is that it would prompt visitation claims by discharged babysitters, nannies or *au pairs*, concerned teachers, neighbors, relatives, or friends. The general argument against such visitation claims is that they compromise the parents' liberty interest to determine with whom the child will associate.

The importance of child-adult relationships, however, already has led to statutes and decisions that expand the categories of individuals who can litigate claims to maintain adult-child relationships. *See supra* Part II.B. Legislative initiatives and lawsuits by grandparents for visitation exemplify this expansion. Only three states and the District of Columbia have not enacted a statute granting grandparents standing to seek visitation. *See infra* notes 176-177 and accompanying text (setting forth and discussing the grandparent visitation statutes). Some states have permitted grandparents to seek and obtain visitation rights even when both parents are living with the child and object to the visitation. *See, e.g.,* Tufano v. Tufano, 556 A.2d 1036 (Conn. App. 1989); King v. King, 828 S.W.2d 630 (Ky. 1992).

203. This concern may be overstated. At least two states presently permit "any person" to seek visitation and permit courts to grant visitation if the applicant demonstrates that it would be in the child's best interests. *See* CONN. GEN. STAT. ANN. § 46b-59 (1986); HAW.

These concerns, however, should not prevent children from asserting their right to maintain important relationships. The child's liberty interest in family relationships should be paramount, not concerns about the parents' liberty interest or an increase in meritless claims.<sup>204</sup> Moreover, recognizing a *child's* liberty interest in a child-parent relationship would not expand the category of *adults* who could assert a liberty interest in that relationship<sup>205</sup> because only children or individuals acting on their behalf could seek protection of the child-parent relationship.

Second, the definition of a parent-like individual also would assist judges in determining who could initiate litigation on behalf of the child. The petitioner in custody and visitation litigation is often someone other than the child. Furthermore, children are often, if not always, represented by others when they assert their constitutional rights.<sup>206</sup> In cases where a child asserts a liberty interest in a child-parent relationship, the parent-like individual could serve as the child's *guardian ad litem* and present the claim to the court. Any individual whom the court deems to have the interests of the child at heart and who is capable of representing and protecting the child's interests can assert the child's claim.<sup>207</sup> In determining whether an

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REV. STAT. ANN. § 571-46 (1993) (limiting "any person" to those who have had "de facto custody of the child"). The research for this Article has not uncovered any dismissals of cases in these jurisdictions because of the frivolous nature of the claim.

204. This approach also fails to distinguish between a person's standing to bring a claim and subsequent review of the merits of the claim. Although the best interests of the child are important, if not paramount, to a determination of the merits of any claim for custody or visitation, that standard is not a sound basis for rejecting standing to a party seeking to assert a claim for the right to visitation.

205. See generally Bartlett, *supra* note 16; Polikoff, *supra* note 82.

206. In all of the major children's constitutional rights cases, the child's claim was presented by a guardian acting on the child's behalf. See, e.g., Board of Educ. Westside Comm. Sch. v. Mergens, 496 U.S. 226 (1990) (parents asserted that a public school violated children's First Amendment rights by refusing students permission to form a Christian club on campus); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (father asserted that public school violated his son's First Amendment rights by suspending him because of the content of a nominating speech he made in a student government election); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (fathers asserted that public school violated students' First Amendment rights in suspending them for wearing a black arm band in protest of the Vietnam war); Brown v. Board of Educ., 347 U.S. 483 (1954) (parents asserted that board of education violated students' Fourteenth Amendments rights by maintaining a segregated school system); Hedges v. Wauconda Community Unit Sch. Dist., 807 F. Supp. 444 (N.D. Ill. 1992) (parents asserted that principal and public school board violated their daughter's First Amendment rights by prohibiting distribution of religious material written by nonstudents), *aff'd in part and vacated in part*, 9 F.3d 1295 (7th Cir. 1993).

207. See HARRY D. KRAUSE, FAMILY LAW 1034 (1976) (defining *guardian ad litem* and his or her responsibilities).

individual meets the criteria, a court could apply the parent-like individual test to distinguish a total stranger from a legal stranger.<sup>208</sup>

On the other hand, a court may appoint an independent law guardian or a *guardian ad litem* to represent the child's interest precisely because it might be inappropriate for the nonrelated adult who is the subject of the proceeding to assert the child's interest. The appointment of an independent guardian, however, presents one difficulty. The guardian may decide to withdraw the proceeding based on the guardian's subjective determination that the asserted child-parent relationship is unsuitable. One safeguard against this problem could be a requirement that the guardian seek judicial approval of a decision to withdraw the proceeding and provide notice to the parent-like individual.

The guardian's decision to cut off the proceeding should receive judicial approval only upon a showing that continuation of the relationship with the parent-like individual would actually harm the child, a standard similar to the one employed to limit or terminate visitation in a case involving a child and a legal parent.<sup>209</sup> Absent such a showing, the court should not permit the guardian's value judgment to substitute for a determination on the merits of the claim asserted based on the liberty interest of the child.

2. *Standing*.—Recognizing the child's liberty interest in child-parent relationships and expanding the definition of "parent" mandates an examination of the role of standing in family-relationship litigation and the correlation between standing and substantive due process. The Supreme Court has held unconstitutional state statutory schemes that do not accord standing to individuals who have substantive due process rights in family relationships.<sup>210</sup> Thus, if the

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208. Courts generally prefer to select a family member over a total stranger when appointing a *guardian ad litem* because of the concern that family members generally have for their relatives. See, e.g., *In re Klein*, 538 N.Y.S.2d 274 (1989) (denying the petition of a total stranger seeking appointment as the *guardian ad litem* for a comatose adult when her husband was also seeking appointment as the *guardian ad litem*), *appeal denied*, 539 N.Y.S.2d 298 (1989). Although a parent-like individual is technically a legal stranger rather than a "family" member, by definition he or she would have a greater relationship and a stronger concern for the child's interest than a total stranger.

209. See *Zummo v. Zummo*, 574 A.2d 1130 (Pa. 1990) (holding that restrictions on visitation require a showing of a "substantial threat" of present or future "physical or mental" harm).

210. E.g., *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (stating that an unwed father has a liberty interest in his relationship with his children and declaring a statute prohibiting his assertion of that interest unconstitutional); *Caban v. Mohammed*, 441 U.S. 380, 393-94 (1979) (stating that Mr. Caban, an unwed father, had established a liberty interest in his



Supreme Court recognized a child's liberty interest in a child-parent relationship, it also would be forced to recognize the child's substantive due process right in the relationship. As a result, other courts would have to grant children standing in family-relationship disputes and correspondingly strike down as violative of substantive due process any state statute that failed to accord children standing to assert their claims. In response to any recognition of a child's liberty interest, states would be compelled to amend their statutes to accord children standing to assert their claims.<sup>211</sup>

As the unwed father cases demonstrate, states are empowered to limit the class of people who may raise a visitation claim, but these limits may not interfere with family members' substantive due process rights absent a compelling state interest.<sup>212</sup> Although the unwed father cases permit states to prescribe the conduct that is required before a person can assert a liberty interest, states may not prevent entirely an individual from raising a liberty interest claim.<sup>213</sup> The test for a parent-like individual enumerated above<sup>214</sup> provides a method by which states can evaluate the conduct of individuals who are the subject of the child's liberty interest claim, without eliminating the child's ability to raise the claim. Therefore, an expanded definition of "parent" that includes parent-like individuals places limits on the child's liberty interest in a child-parent relationship and creates a constitutionally-based test for standing to initiate claims based on the child's liberty interest. Finally, an expanded definition of "parent" allows the courts to address the most important question—the best interests of the child—without the artificial restrictions found in the current jurisprudence.<sup>215</sup>

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relationship with his children and declaring a statute that did not afford him an opportunity to protest his children's adoption unconstitutional).

211. The history of the New York statute regarding parental consent for adoption serves as an excellent example of the impact that recognizing a liberty interest in family relationships has had on legislative enactments. In 1980, in response to *Caban v. Mohammed*, 441 U.S. 380 (1978), the New York Legislature amended § 111(1) of the New York Domestic Relations Law to add sub paragraphs (d)-(f), which require the consent of unwed fathers who maintain substantial and continuous or repeated contact, or live with, the child, before an adoption can take place. See N.Y. DOM. REL. LAW § 111(1)(d)-(f) (McKinney 1988 & Supp. 1994).

212. See *supra* notes 42-45 and accompanying text.

213. See *id.*

214. See *supra* text accompanying notes 200-201.

215. See *Alison D. v. Virginia M.*, 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting) (noting that the majority proclaimed that it was powerless to consider the child's interests); *In re Z.J.H.*, 471 N.W.2d 202, 214-15 (Wis. 1991) (Bablitch, J., dissenting) (explaining that the result of the majority's opinion "is that the child's interest will not even be considered").

### B. *Establishing a Right of Companionship*

Although the Supreme Court has constitutionally protected the right of companionship,<sup>216</sup> the Court has yet to decide whether children have a liberty interest in the companionship of their parents. There are indications, however, that the Court would recognize such an interest.

In *Stanley v. Illinois*,<sup>217</sup> the Court acknowledged parents' liberty interest in the "companionship, care, custody, and management of their children,"<sup>218</sup> and in *Roberts v. United States Jaycees*,<sup>219</sup> the Court noted that the right to maintain a family relationship through "cohabitation with one's relatives" is entitled to constitutional protection.<sup>220</sup> The substantive right of companionship in familial relationships has been recognized in two contexts. The first context is the family dissolution cases involving marital and nonmarital children and their parents.<sup>221</sup> The second context is the cases brought under 42 U.S.C § 1983<sup>222</sup> for deprivation of substantive due

216. See *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

217. 405 U.S. 645 (1972).

218. *Id.* at 651.

219. 468 U.S. 609 (1984).

220. *Id.* at 619. *Roberts* is generally regarded as supporting the proposition that the right of freedom of association under the First Amendment cannot justify discrimination based on gender. See, e.g., Gerald L. Edgar, Note, *Roberts v. United States Jaycees: Does the Right of Free Association Imply an Absolute Right of Private Discrimination?*, 1986 UTAH L. REV. 373; Ann H. Jameson, Note, *Roberts v. United States Jaycees: Discriminatory Membership Policy of a National Organization Held Not Protected by First Amendment Freedom of Association*, 34 CATH. U. L. REV. 1055 (1985). The *Roberts* Court did identify a freedom of "intimate association" attributable to families and similar groups that are small and selective, however, and acknowledged that this aspect of freedom of association protects family relationships. See *Roberts*, 486 U.S. at 620. See also William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 80-83 (1986) (criticizing the Court's suggestion that some private organizations may enjoy the freedom of "intimate association"); William Buss, *Discrimination by Private Clubs*, 67 WASH. U. L.Q. 815, 839-41 (1989) (discussing the Court's analysis of the freedom of "intimate associations").

221. E.g., *Stanley v. Illinois*, 405 U.S. 645, 658-59 (1972) (holding that unwed fathers have a constitutional right to a hearing to determine their fitness before they are denied custody of their children); *May v. Anderson*, 345 U.S. 528, 535 (1953) (establishing that a mother's right to custody is personal and that, accordingly, the courts must possess proper jurisdiction over her before adjudicating that right).

222. 42 U.S.C § 1983 (1988) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

process rights in family relationships.<sup>223</sup>

1. *The Substantive Right of Companionship in the Family Dissolution Context.*—The right of companionship was an essential part of the family dissolution cases discussed earlier in this Article. In *Michael H.*, Victoria and Michael sought but did not receive constitutional protection of their companionship relationship with each other.<sup>224</sup> Similarly, in *Alison D.*, Alison sought protection of a companionship relationship with A.D.M., but the New York State Court of Appeals denied her application.<sup>225</sup> Likewise, in *Z.J.H.*, the Wisconsin Supreme Court refused to protect Wendy Sporleder's companionship relationship with Z.J.H.<sup>226</sup> And in *B.G.C.*, although the DeBoers sought custody of Jessica/Anna, they were generally interested in maintaining contact and involvement with her.<sup>227</sup> Finally, in *Kingsley*, Rachel fought to maintain a relationship with her son Gregory even though he was living with his foster parents.<sup>228</sup> All of these cases could have had different outcomes if the courts had taken into account the children's liberty interest rather than focusing on the adults' liberty interest. The courts could have constitutionally protected only the child's companionship right and not the adult's custodial right. In this way, the courts would have afforded the child the right to maintain a visiting relationship with the parent-like adult with minimal impact on the liberty interest of the legal parent. Thus, these courts could have recognized at least the visitation rights of Victoria with Michael, A.D.M. with Alison, Z.J.H. with Wendy, Gregory with Rachel, and Jessica/Anna with the DeBoers even though the adults ultimately may have desired a stronger legal relationship than one protecting only visitation rights.

2. *The Substantive Right of Companionship in the 42 U.S.C. § 1983 Context.*—Both parents and children have asserted a similar substantive right of companionship in familial relationships in cases arising under 42 U.S.C. § 1983.<sup>229</sup> In these cases, almost all federal courts have

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*Id.*

223. See *infra* note 230 (citing cases protecting family relationships).

224. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

225. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991).

226. *In re Z.J.H.*, 471 N.W.2d 202, 204 (Wis. 1991).

227. See Franks, *supra* note 106, at 72.

228. *In re Kingsley*, No. JU 90-5245, 1992 WL 551484 (Fla. Cir. Ct. Oct. 21, 1992), *aff'd in part & rev'd in part sub nom.* *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

229. See *supra* note 222 (setting forth the pertinent language of § 1983).

recognized the *parents'* right to assert a liberty interest in the continued association and companionship of their children in certain circumstances.<sup>230</sup> Additionally, in *Smith v. City of Fontana*,<sup>231</sup> the United States Court of Appeals for the Ninth Circuit held that the parents' constitutional interest in their familial companionship "logically extends to protect *children* from unwarranted state interference with their relationships with their parents."<sup>232</sup> In so holding, the court concluded that a child whose father was killed by police officers has an interest that "is sufficiently weighty by itself to constitute a cognizable liberty interest."<sup>233</sup> Indeed, the court reasoned that a child's loss of the support, society, and companionship of a parent presents a *stronger* case for recovery than that of a parent who seeks to recover for the loss of a child.<sup>234</sup> The court emphasized that even in the context of claims made by parents, such claims are not based on any custodial interest, but rather arise solely from the familial relationship.<sup>235</sup> As support for this proposition, the *Fontana* court noted that in *Strandberg v. City of Helena*,<sup>236</sup> parents were allowed to assert a companionship claim under § 1983 after their twenty-two-year-old son committed suicide while incarcerated.<sup>237</sup>

Some federal courts have also implicitly recognized children's substantive due process rights to the companionship of their parents

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230. *E.g.*, *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186, 1189 (10th Cir. 1985) (recognizing a mother's and a sister's interest in their relationship with their son and brother who had died in jail); *Bohn v. City of Dakota*, 772 F.2d 1433, 1434 (8th Cir. 1985) ("The privacy and autonomy of familial relationships . . . are unarguably among the protectible interests which due process protects."), *cert. denied*, 475 U.S. 1014 (1986); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1245-46 (7th Cir. 1984) (finding that the father of a man killed by a police officer possessed a liberty interest in the companionship of his son); *Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979) (holding that a mother whose child was transported to Germany by county officials had a constitutionally protected interest in her relationship with her son), *cert. denied*, 445 U.S. 962 (1980); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (stating that a mother whose children were taken from her by city welfare officials had a liberty interest in the care and companionship of her children); *see also* *Logan v. Hollier*, 711 F.2d 690, 691 (5th Cir. 1983) (acknowledging that courts have upheld the constitutional protection of familial relationships), *cert. denied*, 466 U.S. 936 (1984).

231. 818 F.2d 1411 (9th Cir.), *cert. denied*, 484 U.S. 935 (1987).

232. *Id.* at 1418 (emphasis added).

233. *Id.* at 1419.

234. *Id.*

235. *Id.*

236. 791 F.2d 744 (9th Cir. 1986).

237. *Fontana*, 818 F.2d at 1419 (citing *Strandberg*, 791 F.2d at 748). The *Strandberg* trial court had reasoned that the parent's right of companionship was separate from the right of custody and that parental control did not terminate when the child was emancipated. *Strandberg*, 791 F.2d at 748 n.1.

in contexts other than the parents' death. In *Duchesne v. Sugarman*,<sup>238</sup> for example, the plaintiffs asserted a deprivation of liberty interest in the unlawful removal of children from their mother by local welfare officials.<sup>239</sup> In remanding the case for trial, the United States Court of Appeals for the Second Circuit noted that the right "to the preservation of family integrity encompasses the reciprocal rights of both parent[s] and children."<sup>240</sup> The court emphasized that, with respect to children, the right is in "not being dislocated from the 'emotional attachments that derive from the intimacy of daily association' with the parent."<sup>241</sup>

In *Franz v. United States*,<sup>242</sup> a birth father brought a claim to enforce his visitation rights with his child who had been placed in a witness protection program without the father's consent.<sup>243</sup> In determining that the trial court had jurisdiction to hear the claim, the United States Court of Appeals for the District of Columbia noted that "[a] child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsive, reliable adult."<sup>244</sup>

Even when children have brought unsuccessful § 1983 claims, the courts have recognized that the Constitution protects children's companionship relationships with family members. These courts, however, generally dismissed the cases because the plaintiffs were unable to establish that the state action intentionally caused the deprivation of the companionship relationship. For example, in *Ortiz v. Burgos*,<sup>245</sup> the United States Court of Appeals for the First Circuit held that a plaintiff may assert a violation of a Fourteenth Amendment liberty interest only if the state action was aimed directly at the child-parent relationship.<sup>246</sup> The court determined that prior Supreme Court cases invoking substantive due process protection for the family relationship fit into two categories.<sup>247</sup> First, the court noted that some cases prevent government interference in "particular-

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238. 566 F.2d 817 (2d Cir. 1977).

239. *Id.* at 821.

240. *Id.* at 825.

241. *Id.* (quoting *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977)).

242. 707 F.2d 582 (D.C. Cir. 1983).

243. *Id.* at 585.

244. *Id.* at 599.

245. 807 F.2d 6 (1st Cir. 1986).

246. *Id.* at 8.

247. *Id.* at 7-8.

ly private family decisions.”<sup>248</sup> Second, the court identified other cases holding that due process requires strict scrutiny<sup>249</sup> of procedural protections whenever the state, “in furtherance of a legitimate state interest,” seeks to interfere with the child-parent relationship.<sup>250</sup> Thus, when presented with a claim by a stepfather and siblings of an adult inmate killed by prison guards, the court affirmed the dismissal of the claim on the grounds that the deprivation was only incidental to the relationship.<sup>251</sup> Significantly, the court’s dismissal of the claim was not based on the absence of a protected relationship.

Similarly, in *Manarite v. City of Springfield*,<sup>252</sup> the court rejected a claim brought by the daughter of a detainee who committed suicide while in protective custody.<sup>253</sup> Citing *Ortiz*, the court reasoned that in failing to prevent the suicide, the city was not directly interfering with a child-parent relationship and thus “*only the person toward whom the state action was directed, and not those incidentally affected, may maintain a § 1983 claim [for a violation of the familial association right].*”<sup>254</sup>

These cases establish that courts have recognized children’s liberty interest in the companionship of their family members. They are distinguishable from *DeShaney v. Winnebago County Department of Social Services*,<sup>255</sup> wherein the Supreme Court found that the state officials’ failure to intervene in the family life of a child, Joshua, did not constitute a denial of his substantive due process rights.<sup>256</sup> In that case, social services officials received information that Joshua’s father may have physically abused him.<sup>257</sup> The officials conducted several investigations and even removed Joshua from the home for a period of time.<sup>258</sup> They also directed Joshua’s father to take parent-

248. *Id.* at 8 (citing *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

249. *See supra* note 28 (referring to the standards of review utilized when a statute or policy is challenged on constitutional grounds).

250. *Ortiz*, 807 F.2d at 8 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982); *Little v. Streater*, 452 U.S. 17 (1981); *Stanley v. Illinois*, 405 U.S. 645 (1972)).

251. *Id.* at 10.

252. 957 F.2d 953 (1st Cir.), *cert. denied*, 113 S. Ct. 113 (1992).

253. *Id.* at 960.

254. *Id.* (quoting *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir. 1991) (emphasis and alteration in *Manarite*)).

255. 489 U.S. 189 (1989). For an in depth discussion of *DeShaney*, see Laura Oren, *The State’s Failure to Protect Children and Substantive Due Process: Deshaney in Context*, 68 N.C. L. REV. 659 (1990).

256. *DeShaney*, 489 U.S. at 201.

257. *Id.* at 192-93. The officials obtained the information from the mandatory reports of the doctors and hospitals that had treated Joshua. *Id.*

258. *Id.*

ing classes and to remove his paramour from the home, and assigned a caseworker to monitor Joshua's condition.<sup>259</sup> The caseworker made several visits to Joshua's home and reported that several times she was denied access to Joshua because he was "ill," that the girlfriend was still living in the home, and that Joshua's father had not taken the parenting classes.<sup>260</sup> Subsequently, Joshua was admitted to the hospital suffering from massive and permanent brain damage resulting from physical blows to his head.<sup>261</sup> Joshua's father was tried and convicted of child abuse.<sup>262</sup> Joshua's mother commenced an action against the county under § 1983, seeking damages for the county's deprivation of Joshua's constitutional rights, including his right of companionship with her.<sup>263</sup> The Supreme Court affirmed the dismissal of this claim on the grounds that the state's failure to intervene did not constitute a state action affecting Joshua's constitutional rights.<sup>264</sup> His father had caused the injuries, not state action.<sup>265</sup>

In the cases that have recognized the substantive right of companionship, the specific acts creating the harm were committed by state officials.<sup>266</sup> Thus, the only question in these cases was whether or not the acts directly impaired any substantive due process rights. In *Smith* and *Franz*, the courts found a deprivation and, accordingly, granted relief.<sup>267</sup> Conversely, in *Ortiz* and *Manarite*, the courts found no direct deprivation and dismissed the proceedings.<sup>268</sup> Combined with prior Supreme Court pronouncements protecting family relationships arising out of intimate associations, or

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259. *Id.* at 192.

260. *Id.* at 193.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 203.

265. *Id.*

266. *Manarite v. City of Springfield*, 957 F.2d 953 (1st Cir.) (adjudicating a claim against the city and its police chief for failing to prevent the suicide of a man detained in jail), *cert. denied*, 113 S. Ct. 113 (1992); *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir.) (involving the use of excessive force by police officers), *cert. denied*, 484 U.S. 935 (1987); *Strandberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986) (adjudicating an action against the city and its police officers by the parents of a son who committed suicide in jail); *Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1986) (deciding a suit brought against prison guards for beating an inmate to death); *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983) (involving a claim against the United States for separating a child from his father as part of a witness protection program); *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) (adjudicating a mother's claim against a city child welfare bureau).

267. *Smith*, 818 F.2d at 1420, 1424; *see Franz*, 707 F.2d at 610.

268. *See Ortiz*, 807 F.2d at 10; *Manarite*, 957 F.2d at 959-60.

arising by blood or marriage,<sup>269</sup> these cases support, if not compel, the recognition of children's liberty interest in companionship relationships with parent-like adults.

*C. The Effect of Recognizing Children's Liberty Interests in Child-Parent Relationships*

1. *A Constitutional Basis for Visitation.*—Recognizing a child's liberty interest in a companionship relationship would affect litigation in nontraditional family-relationship disputes in two significant ways. First, as already discussed, it would eliminate the court's ability to use the status of the unrelated adult as a barrier to seeking judicial intervention.<sup>270</sup> Second, it would establish a constitutional basis for visitation rights between the child and the parent-like individual. This would require courts to grant applications to maintain child-parent relationships unless there was a narrowly tailored, compelling state interest that supported the denial of visitation.<sup>271</sup> Recognizing the child's liberty interest would require the court to balance the liberty interest of the child, the liberty interest of the legal parent, and the state's interest in the welfare of the child. Thus, in order to deny visitation between the child and the parent-like adult, it would be necessary to show a compelling state interest identical to the state interest that would sustain a denial of visitation between the child and the legal parent.

The manner in which the recognition of the child's liberty interest could affect family dispute resolution in nontraditional family settings can be illustrated by applying this approach to the cases discussed at the beginning of this Article. In *Michael H. v. Gerald D.*,<sup>272</sup> the Supreme Court declined to recognize that the Constitu-

269. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-55 (1977) (explaining that the Constitution implicitly recognizes the tradition of family, which extends beyond the nuclear family); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (holding that constitutional protection of the family encompasses relationships that "ste[m] from the emotional attachments that derive from the intimacy of daily association . . . as well as from the fact of a blood relationship").

270. See *supra* text accompanying notes 210-215 (discussing the relationship between substantive due process rights and standing).

271. The jurisprudence governing granting, reviewing, modifying, and denying visitation rights is well established. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 19.4(g) (2d ed. 1988). This jurisprudence supports a liberal view of visitation and favors awarding visitation unless it would seriously harm the child. *Id.* § 19.4(h); see also *Zummo v. Zummo*, 574 A.2d 1130, 1141 (Pa. Super. Ct. 1990) (holding that restrictions on visitation rights require a showing of a "substantial threat" of present or future "physical or mental" harm).

272. 491 U.S. 110 (1989).



tion afforded protection to Michael's relationship with his daughter Victoria.<sup>273</sup> Although the Supreme Court's analysis of Michael's liberty interest raises serious questions,<sup>274</sup> the Court's decision concerning his liberty interest should not have affected its recognition of Victoria's liberty interest in her relationship with her father.<sup>275</sup> In fact, the recognition and protection of Victoria's liberty interest would have provided a better mechanism by which the trial court could consider Victoria's petition and declare unconstitutional any California statute or policy that prohibited her from presenting her claim.<sup>276</sup> The trial court would apply the best interests of the child standard to consider the propriety of Victoria's petition and would appraise the benefit and harm to Victoria associated with continuing the relationship. Absent a demonstration of harm to Victoria, the court would grant Victoria visitation rights with Michael.<sup>277</sup>

The recognition of Victoria's liberty interest would not require the state to recognize the multiple fatherhood concept rejected by Justice Scalia.<sup>278</sup> Rather, it would compel the court to protect Victoria's significant child-parent relationship not only with Gerald and Carole, her legal parents, but also with Michael, a parent-like individual.<sup>279</sup> Because Victoria's child-parent relationship with Michael would entitle her to a visitation right only and would not interfere with her legal parents' custody right, the current policy of granting certain priorities to legal parents would be preserved.

Similarly, in *Alison D. v. Virginia M.*<sup>280</sup> and *In re Z.J.H.*,<sup>281</sup> recognition of A.D.M.'s and Z.J.H.'s liberty interests would not have influenced the denial of Alison's or Wendy's petition, nor mandated the acceptance of a functional definition of parent for the purpose of granting parental rights to legally unrelated adults. Recognizing the

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273. *Id.* at 127-30.

274. See *supra* note 140 and accompanying text (discussing the Court's subsequent rejection of the liberty interest analysis proffered by Justice Scalia in *Michael H.*).

275. See *supra* text accompanying note 205, 224-229 (discussing the possible effects of limiting the child's liberty interest to the child's claim and not applying it to an adult claim).

276. See *supra* text accompanying notes 210-215 (explaining that statutes denying standing to parties with a substantive due process claim are unconstitutional).

277. See CLARK, *supra* note 271, § 19.4(h).

278. See *Michael H. v. Gerald D.*, 491 U.S. 110, 130-31 (1989).

279. Michael qualifies as a parent-like individual because he participated in the act of begetting Victoria, lived with Victoria, and assumed daily child-rearing responsibilities for Victoria. See *Michael H.*, 491 U.S. at 113-14; *supra* Part IV.A.1. (describing the criteria for identifying a parent-like individual).

280. 572 N.E.2d 27 (N.Y. 1991).

281. 471 N.W.2d 202 (Wis. 1991).

children's liberty interests, however, would have required the trial courts to permit either Alison and Wendy or a *guardian ad litem* to present a claim on behalf of the children. Moreover, the courts would be obliged to declare unconstitutional any state statute or policy that prohibited the children from presenting their claims.<sup>282</sup> In both *Alison D.* and *Z.J.H.*, the courts would apply the best interests of the child standard to consider the merits of the children's petitions and to assess the potential harm in continuing the relationships. Absent a showing of harm to the children, the court would grant the children visitation rights with the parent-like individuals.<sup>283</sup>

At the same time, a court that recognized a child's liberty interest in maintaining a relationship with a parent-like individual would not be forced to treat the parent-like individual as the child's legal parent. Rather, the courts would apply the criteria for ascertaining parent-like individuals<sup>284</sup> in determining the qualifications of the unrelated adults. This result would provide constitutional protection for nontraditional consensual relationships and would promote the constitutional policy of honoring individual autonomy in family decision-making.<sup>285</sup>

If the *B.G.C.* court<sup>286</sup> had recognized Jessica/Anna's liberty interest, the outcome also may have been different. If the court had applied the approach advanced in this Article, it would have been obliged to consider the DeBoers's petition for custody as an application on behalf of Jessica/Anna for visitation.<sup>287</sup> If the court then found such visitation to be in the best interests of the child, the court could have protected Jessica/Anna's relationship with both the Schmidts, her legal parents, and the DeBoers, her nonlegal parents. Had the Iowa courts utilized this approach, rather than the traditional

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282. See *supra* text accompanying notes 210-215 (explaining that statutes denying standing to parties with a substantive due process claim are unconstitutional).

283. See CLARK, *supra* note 271, § 19.4(h).

284. See *supra* Part IV.A.1. (describing the criteria for identifying a parent-like individual). In their respective child-parent relationships, Alison was a parent to A.D.M. and Wendy was a parent to Z.J.H. under the parent-like individual test. Alison participated in the decision to beget A.D.M. through the artificial insemination of Virginia and supported him for several years. *Alison D.*, 572 N.E.2d at 28. Similarly, Wendy participated in the decision to add Z.J.H. to the family *via* adoption and lived with and supported him during the preadoption placement. *In re Z.J.H.*, 471 N.W.2d at 204.

285. See *supra* note 25 and accompanying text (discussing the protection of child-parent relationships as a part of the private autonomy paradigm of the Constitution).

286. 496 N.W.2d 239 (Iowa 1992).

287. The court would not be obliged to grant the DeBoers's petition for custody, however, because the child's liberty interest only supports the child's claim for visitation, not custody.

approach, the protracted litigation arising from this case may have been avoided.<sup>288</sup>

*In re Kingsley*<sup>289</sup> illustrates the dilemma of applying the child's liberty interest when the child clearly expresses a desire to sever the child-parent relationship.<sup>290</sup> In considering this issue, it is important to remember that *Kingsley* is different from the other cases discussed in this Article because it involved a termination of parental rights rather than the granting of custody or visitation. This difference is significant because a proceeding to terminate parental rights examines the fitness of a parent to continue in that status and, with a finding of unfitness, transforms a legal parent into a legally unrelated individual. A termination proceeding also permits the creation of a legal relationship—protected even from interference by the former legal parent—between the child and previously legally unrelated adults. In the custody and visitation cases, however, the parent-like individual's fitness was not at issue and the determination does not substitute one legal relationship with another.<sup>291</sup>

In *Kingsley*, Gregory, who was represented by counsel, had articulated his desire to terminate his relationship with Rachel, his biological mother.<sup>292</sup> Gregory's claim challenges a fundamental assumption underlying the thesis of this Article—that protecting the child's liberty interest mandates the continuation of the child-parent relationships through visitation, unless visitation would harm the child. That challenge materializes, however, if the analysis of the child's liberty interest only applies when there is an expressed preference by the child.

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288. Such a decision may have facilitated the early transfer of the child back to the Schmidts, averted the two years of bonding between Jessica/Anna and the DeBoers, and prevented the child's painful removal from a home she had known for two years. See Sandra G. Boodman, *Uprooting Jessica: Psychiatrists Say Childhood Loss Can Have a Lifelong Impact*, WASH. POST, Aug. 10, 1993, at Z07 (discussing the harm children may suffer from early separation from their parents); *Jessica: Legal Struggle Offers Lessons on Love and Law*, DETROIT FREE PRESS, July 28, 1993, at 10A (noting the increasing harm to Jessica from the protracted litigation).

289. No. 90-5245, 1992 WL 551484 (Fla. Cir. Ct. Oct. 21, 1992, *aff'd in part & rev'd in part sub nom.* Kinglsey v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

290. Gregory Kingsley sought to sever his relationship with his birth mother. *Id.* The parental figure, however, could just as easily have been a parent-like individual in a nontraditional family.

291. See, e.g., *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992). Although the DeBoers alleged that Daniel Schmidt should not receive custody of Jessica/Anna because he was an unfit parent, *id.* at 246, the Schmidts did not contest the DeBoers's fitness. In fact, the courts did not need to reach that question because the case turned on the determination that the Schmidts's parental rights had never been terminated in the first place.

292. See generally *Kingsley*, 1992 WL 551484.

Such a limitation is unjustified because it unduly restricts the assertion of the liberty interest to cases in which the child is capable of expressing his or her wishes. Although there is profound value in acknowledging children's familial desires,<sup>293</sup> at most ages between birth and majority, children's statements regarding familial relationships tend to be incomprehensible or unreliable.<sup>294</sup> Thus, if courts allowed only children who are mature enough to make complicated choices about familial relationships and articulate these choices clearly to assert their liberty interests, the liberty interest of most children in child-parent relationships would remain unprotected. In short, courts would continue to disregard the liberty interests of most children because most children would not be able to articulate an opinion about their interest in their child-parent relationships. On the other hand, categorically ignoring the statements of children unable to make independent decisions would minimize the court's ability to recognize dangerous situations and perhaps would allow unfit parent-like individuals to assert a child's "liberty interest" as a ploy for achieving something denied them. Striking a balance between these legitimate but opposing concerns will require the same sensitive inquiry that so often is a part of family law.

Striking this balance in *Kingsley* would not have prevented the trial court from terminating Rachel's parental rights. Rachel, or a *guardian ad litem*, could request a visitation arrangement based on Gregory's liberty interest in the child-parent relationship despite his expressed desire to terminate the legal parent-child relationship. Rather, striking the balance would have allowed the court to implement a visitation relationship between Gregory and Rachel, provided that such a relationship would not cause Gregory harm and even though the court may have been powerless to force Gregory to see Rachel.<sup>295</sup>

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293. See generally Woodhouse, *supra* note 137, at 829-41.

294. See Albert J. Solnit, Truth Telling: The Child as Witness (June 11, 1993) (unpublished paper presented at North American Conference of the International Society of Family Law).

295. Once a child reaches a certain age, neither courts nor custodial parents can force the child to visit a noncustodial parent. Some courts have even acknowledged that, in some cases, forced visitations may not be in a child's best interests. See, e.g., *Stringfellow v. Stringfellow*, 553 So. 2d 1161, 1162 (Ala. Civ. App. 1989) (acknowledging that visitation rights may be discontinued "where adverse psychological damage would result and no good would result from forced visitation"); *Hagler v. Hagler*, 460 So. 2d 187, 189 (Ala. Civ. App. 1984) (explaining that in rare cases, if it is in the best interest of the child, a court may discontinue visitation rights if the child refuses to visit the parent).

2. *Custodial Parent Status for Parent-Like Individuals.*—The lack of a constitutional basis for a custody or visitation claim by a parent-like individual does not completely preclude the parent-like individual from raising such a claim. Although the legal parent's liberty interest is paramount to that of the parent-like individual,<sup>296</sup> in the event the legal parent were to lose the superior custody claim,<sup>297</sup> the parent-like individual's claim would become viable.<sup>298</sup>

In the absence of a legal parent's superior claim, awarding custody to a parent-like individual also would be consistent with the current trend in custody jurisprudence toward continuity of care and permanency planning.<sup>299</sup> Awarding custody to a parent-like individ-

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296. See Bartlett, *supra* note 16; Polikoff, *supra* note 82 (discussing the jurisprudence granting a priority to legal parents' liberty interest claims).

297. The principal reason legal parents lose their custody claims is their abuse, neglect, or abandonment of the child. See, e.g., N.Y. FAM. CT. ACT § 1022(a)(ii) (McKinney 1994) (specifying that parents may be temporarily deprived of custody upon a finding of neglect and abuse); N.Y. SOC. SERV. LAW § 384-b(4)(b), (c) (McKinney 1992) (specifying that parental rights may be terminated upon a finding of neglect and abuse); ILL. ANN. STAT. ch. 705, para. 405/2-23 (Smith-Hurd 1992) (specifying that children may be removed from their parents' custody upon a finding of neglect and abuse); see also Bennett v. Jeffreys, 356 N.E.2d 277, 280 (N.Y. 1976) (holding that "[t]he State may not deprive a parent of his child's custody absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances").

A third party's claim may also gain viability when the legal parent is unavailable due to illness or death. See, e.g., *In re Carey*, 544 N.E.2d 1293, 1300 (Ill. App. Ct. 1989) (stepmother granted custody of child over noncustodial natural mother upon natural father's death), *appeal denied*, 550 N.E.2d 554 (1990); *Nabstedt v. Barger*, 121 N.E.2d 781 (Ill. 1954) (relying on a statute listing the parents' mental illness as a ground for their child's adoption by a third party); see also N.Y. SOC. SERV. LAW § 384-b(4)(b) (McKinney 1992) (authorizing termination of parental rights due to parent's mental illness).

298. See *Bennett*, 356 N.E.2d 277 (establishing parental abandonment, neglect, or abuse of the child as a prerequisite for applying the best interests of the child doctrine in granting custody to a third party over a birth parent); *In re J.C.*, 608 A.2d 1312 (N.J. 1992) (requiring parental unfitness or the lack of a child-parent relationship before terminating parental rights based on the bond between the child and the foster parent); *In re K.L.F.*, 608 A.2d 1327, 1333-34 (N.J. 1992) (refusing to award custody of children in foster care to the Commissioner of Social Services without proof of neglect, abuse, or abandonment of the children).

299. Both continuity of care and permanency are emerging concepts in the jurisprudence. Continuity of care has been applied in custody determinations as an important factor for promoting stability in a child's life. See *Smith v. Smith*, 615 So. 2d 926, 930-31, 935 (La. Ct. App.) (explaining that continuity of care is a polestar consideration in child custody cases), *cert. denied*, 617 So. 2d 916 (La. 1993); *Delzer v. Winn*, 491 N.W.2d 741, 743 (N.D. 1992) (holding that maintaining stability and continuity in the child's life is a compelling consideration in child custody cases); *In re L.W.*, 613 A.2d 350, 357 (D.C. 1992) (explaining that continuity of care must be considered in determining the best interest of the child). In the foster care context, courts strive toward achieving permanency and stability in a foster care placement. See generally THE NEW YORK TASK FORCE ON

ual when the legal parents are unqualified is also consistent with the best interests of the child and with the continuity of care doctrine. In short, if courts were to recognize the child's liberty interest in a child-parent relationship, they would be promoting stability and fostering the continuation of relationships that are beneficial to the child.

### CONCLUSION

The recognition of a child's independent liberty interest in continuing a child-parent relationship through visitation would protect the relationship from both the parent's and the child's perspective. Granting the child a right to visitation, however, also raises complicated questions concerning the applicability of other legal obligations attendant to the relationship.<sup>300</sup>

Although this Article favors granting parent-like individuals greater consideration than the current jurisprudence affords,<sup>301</sup> it does not seek to secure for them a full liberty interest in the child-parent relationship. When parent-like individuals have lived with a child for a significant period of time, however, they probably should have the opportunity to seek custody of the child in the event of a dissolution of the family. Recognizing the liberty interest of such parent-like individuals should follow as a proper consequence of recognizing and protecting their children's liberty interest<sup>302</sup> and would further legally solidify the relationships. Such a limited recognition of the parent-like individuals' liberty interest would not necessarily open the door to frivolous claims because the definition of parent-like individuals could be sufficiently narrow to minimize the number of claims.<sup>303</sup>

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PERMANENCY PLANNING FOR CHILDREN IN FOSTER CARE, STATE OF NEW YORK UNIFIED COURT SYSTEM, PERMANENCY PLANNING: A SHARED RESPONSIBILITY (1986).

300. For example, questions arise concerning whether the parent-like individual would have an obligation to support the child while enjoying the benefits of visitation of the child and whether a child could inherit from a parent-like individual and vice versa.

301. *See supra* Part I.B. (discussing the deficiencies of the current jurisprudence affecting child-parent relationships).

302. Just as children's liberty interest arose as a reciprocal right of the parents' liberty interest, courts could recognize parent-like individuals' liberty interest as a reciprocal right of the children's liberty interest. *See supra* text accompanying notes 216-269 (discussing children's substantive due process right to the companionship of their parents).

303. *See supra* text accompanying notes 196-201 (setting forth a test for identifying parent-like individuals). And, if that test is not sufficiently narrow, limiting custody claims to parent-like individuals who lived with the child for a significant period of time would further minimize claims for custody.

The approach adopted in this Article would allow individuals to choose freely the family type appropriate for them and would protect all families regardless of their social acceptance. It would protect both traditional and nontraditional families and would permit courts to fashion equitable remedies in complex family disputes. Finally, according children a right to maintain important family relationships would legitimize the efforts of a growing number of nontraditional families to provide for the development of our most valuable future resource—our children. To ignore these efforts or to sanction the manipulation of children's lives based solely on the adult's status serves neither our children's, nor our future's, best interests.