A RIGHT TO ADOPT AND PARENTAL LICENSING

Scott Altman*

No court recognizes the right to adopt a child. By contrast, we embrace family formation rights and protect choices about whether to marry, procreate, and rear biological children. These rights are needed because families play a key role in society, and family formation is central to a happy and self-directed life. For similar reasons, we should recognize the right to adopt and stop aggressively screening adoptive parents in ways we would not tolerate for biological parents.

Some advocates of child-centered morality think we should equalize the treatment of adoptive and biological parents in the opposite way—scrutinizing biological parents' homes like adoptive homes and requiring people to get licenses before rearing children.

I argue against these positions. Parental licensing would exacerbate the discrimination in our child welfare system, prevent too many nonabusive parents from forming families, and harm more children than it helps. Aggressive adoption screening is wrong for the same reasons: it discriminates, deprives many prospective parents of a chance to form families, and harms more children than it helps. Arguments to the contrary based on child-centered morality or practical differences between adoption and procreation are unpersuasive.

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INTRODUCTION

Imagine a first-come, first-served adoption policy. The first person to put in a claim for an adoptee gets the child. No background check, no in-home visits, no letters of reference. Presumably nobody wants that *. . . . So why not screen biological parents for the same reasons why we screen adoptive parents?*

CHRISTOPHER FREIMAN[1]

All who want to become adoptive parents [should] be presumed fit . . . . [T]he standards for assessing minimal fitness should be adapted from those used to decide when children can be removed from blood-linked parents . . . . Prospective parents . . . would be served on a first-come, first-served basis.

ELIZABETH BARTHOLET[2]

1. Christopher Freiman, *Against Parental Licensing*, 53 J. SOC. PHIL. 113, 113 (2022).

2. ELIZABETH BARTHOLET, FAMILY BONDS 78–79 (1993).

No court recognizes the right to adopt a child[3] (or be adopted).[4] We view adoption as providing children with good homes and treat adoptive parents as incidental beneficiaries. By contrast, we protect people's rights to procreate and rear biological children because control over family formation is central to a happy and self-directed life. For similar reasons, we should recognize a right to adopt. Although minimal background checks should precede adoption, the standards for approval should be low, much like the standards we apply when reviewing the fitness of biological parents.

Part I of this Article reviews how U.S. law impedes adoption and contrasts this approach with legal rules for procreation. Part II examines moral arguments for including adoption in family-formation rights. Adoption rules deprive prospective adoptive parents of important opportunities for intimacy and invade their privacy in ways we would not tolerate if applied to procreation. They also discriminate based on procreative capacity and facilitate other objectionable forms of discrimination.

Part III considers arguments that parents have too many rights. According to this view, we should equalize the treatment of adoptive and biological parents in the opposite way this Article suggests—scrutinizing biological parents' homes as aggressively as prospective adoptive homes and requiring people to get licenses to rear children. I reject this position and urge that the reasons for rejecting it should lead us to recognize the right to adopt.[5] My argument should appeal to people even if they do not believe in parental rights. Parental licensing and adoption scrutiny harm children. Licensing schemes would remove many more children from competent parents than the few children who would be rescued from bad parents. Adoption scrutiny has the same effect, consigning many children to institutions and long-term foster care by rejecting competent parents and discouraging others from seeking to adopt.

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3. Mullins v. Oregon, 57 F.3d 789, 794 (9th Cir. 1995); Lofton v. Sec'y of the Dep't of Child. & Fam. Servs., 358 F.3d 804, 811 (11th Cir. 2004). Courts have struck down discriminatory adoption rules based on equal protection without finding that adoption is protected as a fundamental right. *See, e.g.*, Campaign for S. Equal. v. Miss. Dep't of Hum. Servs., 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016). Prospective adoptive parents who have received a child into their home have liberty interests in retaining custody that create rights to notice and a hearing. *See, e.g.*, Adoption of Baby Girl B., 87 Cal. Rptr. 2d 569, 575 (Cal. Ct. App. 1999).

4. *See* Barbara Bennett Woodhouse, *Waiting for* Loving*: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 319–20 (2005); Mark R. Brown, *Closing the Crusade: A Brief Response to Professor Woodhouse*, 34 CAP. U. L. REV. 331, 333–34 (2005); David D. Meyer, A *Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 895 (2006). For an earlier proposal to remove most screening from the adoption process (albeit not based on rights claims), see BARTHOLET, *supra* note 2, at 78–85.

5. Others have argued that we should treat adoptive and biological parents similarly when scrutinizing homes, though usually they do not reach the conclusion that we should forego aggressive adoption screening. *See, e.g.*, Carolyn McLeod & Andrew Botterell, *Not for the Faint of Heart*, *in* FAMILY-MAKING: CONTEMPORARY ETHICAL CHALLENGES 151, 152 (Francoise Baylis & Carolyn McLeod eds., 2014) [hereinafter McLeod & Botterell, *Faint of Heart*].

Part IV considers arguments that differences between procreation and adoption justify protecting procreation while scrutinizing adoptions. For example, adoption screening might prevent harm more often than parental licensing or cause fewer enforcement problems. Part V discusses how recognizing adoption rights would change adoption practice. Part VI addresses objections.

I. BACKGROUND

People condemn how children become available for adoption in the United States.[6] We terminate parental rights without sufficient evidence of neglect or abuse, make inadequate efforts at reunification, and impose these injustices disproportionately on families of color. Voluntary adoption placements may not always be well-informed or fully voluntary, especially in transnational adoptions, where exploitation and coercion of birth mothers are thought to be widespread. Nothing in this Article questions these critiques. My inquiry is about the right to adopt children who are appropriately available for adoption, a question that would remain important if we cured current injustices. Admittedly, making adoption easier could affect how often parental rights are terminated, making it hard to separate these topics. I return to this objection in Part VI.[7]

Adoption procedures vary by state and context. About 40% of domestic U.S. adoptions are private (outside the public welfare system). About half of these are stepparent adoptions, with the remainder being independent and private agency adoptions.[8] Adoptions by relatives, including unopposed stepparent adoptions, often involve low costs and minimal oversight.[9]

Those seeking to adopt infants often rely on private placements; they pay for help finding a pregnant woman who plans to give up an infant for adoption.[10] Typically, they undergo private screening to convince the birth mother that the child will be well cared for and accommodate her preferences about the family who will raise the child. After placement, the government screens the adoptive home before

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6. There are also abuses in our adoption system that exploit prospective adoptive parents. They can be lured into spending money to adopt children who do not exist or are not available for adoption. *See* Erika Celeste, *A Woman Spent Years Tricking Thousands of Adoptive Parents into Thinking She Had a Baby for Them. I Was One of Her Victims*, INSIDER (Mar. 6, 2020, 11:40 AM), https://www.insider.com/gabby-watson-adoption-scam-tricked-adoptive-parents-2020-3 [https://perma.cc/NF29-MF87].

7. For an argument that the issues cannot be separated, see generally Ashley Albert & Amy Mulzer, *Adoption Cannot be Reformed*, 12 COLUM. J. RACE & L. 557 (2022).

8. In 2019, the number was 43%, while in 2020 it was 42%. Eun Koh et al., *Adoption by the Numbers*, NAT'L COUNS. FOR ADOPTION 1, 5 (2022), https://adoptioncouncil.org/wp-content/uploads/2022/12/Adoption-by-the-Numbers-National-Council-For-Adoption-Dec-2022.pdf [https://perma.cc/M6A7-9DRN].

9. For a helpful overview of adoption practice, see generally JOAN H. HOLLINGER, ADOPTION LAW AND PRACTICE (2012).

10. By one estimate, about two-thirds of healthy infant adoptions in the United States are done independently. *Id.* § 1.05, n.50. About one-quarter of nonrelated adoptions in the United States were of infants in 2014. Jo Jones & Paul Placek, *Adoption by the Numbers*, NAT'L COUNS. FOR ADOPTION 1, 33 (2017), https://indd.adobe.com/view/4ae7a823-4140-4f27-961a-cd9f16a5f362 [https://perma.cc/X3UN-LQCB].

an adoption can be approved. There is also a significant but declining number of infants adopted in the United States. from other countries.[11]

Most noninfant adoptions (other than by stepparents) occur through public agencies or private charities licensed by the state. These can be less expensive than private placements but require state investigation before placement or adoption approval and time-consuming parenting classes. Children in the public system have often been removed from their parents' homes and placed in foster homes because of abuse or neglect. Some foster parents adopt the children in their care. Sometimes they become foster parents hoping to adopt a child if reunification with birth parents fails. This process is called foster-to-adopt or concurrent planning.[12]

State laws regulating adoption eligibility are less restrictive than in the past. Single individuals and (in almost all states) unmarried couples can adopt.[13] State laws banning adoption by LGBTQ people have been enjoined by recent litigation.[14]

Despite these changes, adoption remains difficult. Adoption usually requires a criminal background check. In some states, any criminal conviction, including drug use by a nonparent household member, can be a reason to deny an adoption.[15] Additionally, criteria for selecting adoptive homes (adoption suitability rather than eligibility) create barriers. For example, although no state currently enforces rules prohibiting LGBTQ people from adopting children, many states lack rules forbidding such discrimination in discretionary portions of the placement process. They also license private agencies to place children in foster or adoptive homes knowing that the agencies discriminate based on sexual orientation.[16]

Discretion about adoption suitability makes it more difficult to adopt. States can deny adoption based on whether the prospective parents are emotionally

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11. In 2020, there were about 1,600 adoptions in the United States of children from other countries, compared to approximately 55,000 children adopted through public adoption and 39,000 through private adoption. Koh et al., *supra* note 8, at 5–6.

12. *See e.g.*, Amy D'Andrade et al., *Concurrent Planning in Public Child Welfare Agencies: Oxymoron or Work in Progress?*, 28 CHILD. & YOUTH SERVS. REV. 78, 79 (2006).

13. *But see, e.g.*, NEV. ADMIN. CODE § 127.240(2)(c) (2022); UTAH CODE ANN. § 78B-6-117(3) (West 2022). For a discussion of marital status discrimination in English adoption law, see Ursula Kilkelly, *In re P: Adoption, Discrimination and the Best Interests of the Child*, 22 CHILD & FAM. L. Q. 115, 120–23 (2010).

14. *See* Campaign v. Miss. Dep't of Hum. Servs., 175 F. Supp. 3d 691, 710, 711 (S.D. Miss. 2016); Jasmine Hanasab Barkodar, *Gay Marriage Is Legalized, Now What?: Discriminatory Adoption Regulations*, 26 S. CAL. REV. L. & SOC. JUST. 131, 140 (2017).

15. *See, e.g.*, 606 CODE MASS. REGS. 5.10(6)(c)(2) (2023); OHIO ADMIN. CODE 5101:2-48-10(C) (2023).

16. For a recent review, see generally Frank J. Bewkes et al., *Welcoming all Families: Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children*, CTR. FOR AM. PROGRESS 1 (2018), https://americanprogress.org/wpcontent/uploads/2019/01/WelcomingAllFamilies1.pdf [https://perma.cc/47LD-5ZD9]. Some states exempt from their rules against adoption discrimination religious organizations and biological parents who place children for adoption. *See, e.g.*, MICH. COMP. LAWS §§ 722.957(2)–(3) (2023).

mature[17] or morally fit[18] without specifying criteria for evaluating these characteristics. They also allow adoption denial based on the applicant's physical or mental health[19] or because prospective parents are insufficiently religious,[20] inadequately adjusted to their infertility,[21] disabled,[22] low socioeconomic status ("SES"),[23] or high SES.[24] Other reasons for rejection include having too few

17. *See, e.g.*, S.C. CODE ANN. § 63-9-520(A)(1)(a)(ii) (2023) (requiring preplacement investigations to consider "how the emotional maturity, finances, health, relationships, and any other relevant characteristics of the prospective adoptive parent affect the parent's ability to accept, care, and provide a child with an adequate environment as the child matures").

18. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-105(F) (2023) (requiring inquiry into the moral fitness, financial condition, religious background, and physical and mental health of the applicant).

19. *See, e.g.*, COLO. REV. STAT. §19-5-207(2)(a) (2023) (requiring that home studies report on "[t]he physical and mental health, emotional stability, and moral integrity of the petitioner and the ability of the petitioner to promote the welfare of the child.").

20. Lee Hedgepeth, *This Alabama Librarian Wanted to Adopt a Child. Her Lack of Religion Became a Barrier*, CBS 42, https://www.cbs42.com/news/this-alabama-librarian-wanted-to-adopt-a-child-her-lack-of-religion-became-a-barrier/ [https://perma.cc/73MQ-JGBE] (Apr. 21, 2022, 3:59 PM) (discussing a private agency that purported to fulfill the preference of birth parents for a religious placement).

21. *When You Are Turned Down as an Adoptive Parent*, FAM. EDUC., https://www.familyeducation.com/life/social-workers/when-you-are-turned-down-adoptive-parent [https://perma.cc/8555-4AUU] (last visited Sep. 26, 2023). Some states forbid basing adoption placement on the fertility status of the prospective parents but nonetheless allow consideration of how fertility affects the family's reason for adopting. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(e) (2023) ("An adoptive applicant may not be rejected for adoption because of his, her or their fertility (capacity to have biological children). The significance of fertility and/or infertility as it relates to the desire to adopt shall always be explored in the adoption process, but applicants shall not be required to provide proof of infertility.").

22. *See* Blake Connell, *Some Parents Are More Equal than Others: Discrimination Against People with Disabilities Under Adoption Law*, 6 LS. 15, 15 (2017).

23. Some states forbid adoption denial based on low income. However, even these states include some income factors in assessing a placement. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18 § 421.16(j) (2023) ("No applicant shall be rejected on the basis of low income, or because of receipt of income maintenance payments. The adoption study process shall evaluate an applicant's ability to budget his resources in such a way that a child placed with him can be reasonably assured of minimum standards of nutrition, health, shelter, clothing and other essentials."). Michigan law incorporates a similar tension. It forbids denying adoption based exclusively on income levels. MICH. COMP. LAWS § 722.957(1) (2023). Nevertheless, it mandates that home studies collect information about assets, income, and debts. *Id.* § 710.23f(5)(e).

24. *See* Erika Weissinger, Reasons for Attrition Among Public Adoption Seekers (Fall 2013) (Ph.D. dissertation, University of California, Berkeley), https://escholarship.org/uc/item/6g3108t1 [https://perma.cc/7GPT-ZYLK]. Weissinger documents social workers who do not want to place children with higher income parents, who are seen as too demanding. *Id.*

bedrooms,[25] failing to take small safety precautions in the house,[26] or being perceived as having unreasonably high expectations for the child's later academic achievement.[27]

Procedural details also make adoption difficult. Adoption from public agencies usually requires a detailed application followed by parenting classes and a home study. Prospective parents must provide financial and health records, undergo screenings for psychological health, and answer any other inquiries the evaluator deems relevant to their suitability for parenting.[28]

Rules for procreation differ from adoption in most respects. We do not condition the right to procreate on excluding from the household anyone with a prior criminal conviction, convincing a state agency that one's motives for procreating are sensible and mature, or having reasonable expectations for the child's later academic success. Nor do we condition procreative rights on submitting to invasive questions and inspections of our homes or to the subjective evaluation of outsiders about whether we are prepared to parent well.

Adoption placement rules would change if would-be adoptive parents had rights comparable to biological parents.[29] The right to adopt would not require states to provide anyone with a child on demand any more than marriage rights entitle people to spouses. Nor would it permit unfit custodians to adopt, just as unfit biological parents lose the right to rear the specific children they abuse and neglect (if reunification services do not give hope for improvement). However, such a right might restrict governments from treating adoptive parents differently from biological parents, limit the reasons governments can invoke for not placing a child

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25. In Mississippi, foster and adoption approval requires showing that a child over 18 months will not share a bedroom with an adult, and a child over three years old cannot share a bedroom with another child of the opposite sex. *See* MISS. DEP'T OF HUM. SERVS., RESOURCE FAMILY LICENSURE POLICY 4514 (2007), https://sos.ms.gov/ACProposed/00014700b.pdf [https://perma.cc/466A-FGSR].

26. Weissinger documents questions about allowing knives on a visible magnetic knife holder on the wall. *See* Weissinger, *supra* note 24, at 76.

27. Weissinger documents social workers not wanting to place a child with high income parents because they have inappropriately high expectations for the child's later academic accomplishments. *See id.* at 103. A similar account is given in Julie Selwyn, *Applying to Adopt: The Experience of Rejection*, 15 ADOPTION & FOSTERING 26, 27 (1991) (stating that parents were denied adoption and told that "they were a family of achievers and that, therefore, an adopted child would have difficulty fitting in").

28. For example, an Alaska statute instructs agencies doing home studies to gather information about 15 topics, including motivation for adoption or guardianship; current residence and the suitability of the family to provide a safe and healthy living environment for a child as compared to community standards; physical, mental, and emotional health status of all persons living in the home; quality of marital and family relationships; attitude of the extended family and friends regarding adoption or guardianship; and applicant's feelings about the applicant's childhood and parents, including any history of abuse or neglect and the applicant's resolution of such experience. ALASKA ADMIN. CODE tit. 7, §§ 56.660(b)(1)–(15) (2023).

29. In Part V, I review likely changes.

in an adoptive home, and constrain the procedural barriers they can impose on adoption.

One might wonder if altering these rules would change adoption placements. Might children who most need adoptive homes—children who are older, have special needs, or are not white—still not be adopted if agencies removed substantive or procedural barriers to adoption? If families do not adopt these children because they prefer other children, reduced screening might not change preferences and thus might not change outcomes. Additionally, adoption rules might be thought not to exclude very many people. These two sources of doubt are understandable. However, I think they are mistaken.

The first concern arises because many prefer adopting a healthy, white infant. However, people with this preference often say they are willing to adopt older children, children of different races, or children with special needs.[30] Although not everyone who expresses such willingness will follow through, expanding the pool of available parents would also expand the absolute number who are, in fact, willing to adopt children most in need of adoption.[31]

Regarding the second concern, exclusion remains a problem for two reasons. Although eligibility rules are broader now than before, discretion about suitability prevents people from adopting. Workers in government offices or private agencies may regard prospective adoptive parents as nonideal based on sexual orientation, marital status, or other personal characteristics.

Furthermore, placement denials are not the only problem. The screening process deters potential adoptive parents from pursuing adoption, leading them to abandon (or not initiate) the adoption process.[32] People abandon efforts to adopt (or never initiate the process) for varied reasons, including costs, intrusiveness, or the prospect of being denied or never matched. More people would apply, and more of them would persist in the application process, if screening were faster and less

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30. *See generally* Devon Brooks et al., *Preferred Characteristics of Children in Need of Adoption: Is There a Demand for Available Foster Children?*, 76 SOC. SERV. REV. 575 (2002).

31. Researchers and professionals working in adoption agencies seem to agree that increased recruitment and retention of prospective adoptive parents is an important goal in the system and that agency procedures are one key barrier to that goal. *See, e.g.*, Dana J. Sullivan et al., *Identifying Barriers to Permanency: The Recruitment, Selection, and Training of Resource Parents*, 35 CHILD & YOUTH SERVS. 365, 371 (2014).

32. Amanda Helm et al., *Understanding the Antecedents to Recruiting Foster Care and Adoptive Parents: A Comparison of White and African American Families*, 23 HEALTH MKTG. Q. 109, 124 (2006); Erika Weissinger, *supra* note 24, at 74–78. In a 2017 study of 200 families seeking to adopt children from foster care, the outcomes included 98 adoptions, 5 families who left the process before finishing orientation, 27 who abandoned their efforts before completing the training and home study, 53 who quit the program after being approved but before any placement, and 17 who quit based on disruption after a child was placed in their home. None of these applicants was denied approval. Amy Chanmugam et al., *Agency-Related Barriers Experienced by Families Seeking to Adopt from Foster Care*, 20 ADOPTION Q. 25, 34 (2017).

burdensome.[33] Empirical studies support this conclusion. For example, after states stopped excluding LGBTQ couples, more children were adopted. Additionally, the time required to place children fell.[34]

Although reducing adoption scrutiny would expand the pool of adoptive parents and increase adoptions, it is impossible to know the size of this change. The need for change, however, is clear. In the U.S. public system in recent years, about 120,000 children typically await adoption at any time; only about half of them are adopted in any year.[35] Each year, a significant, albeit declining, number age out of foster care never having been adopted.

II. THE RIGHT TO FORM A FAMILY

Philosophers,[36] courts,[37] and human rights declarations[38] defend the right to establish family relationships, including the right to marry, procreate, and rear one's children. Although varied in their bases and details, they share the idea that, for many people, forming lasting and loving relationships is central to a well-lived life.

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33. *See generally* Julie Boatright Wilson et al., *Listening to Parents: Overcoming Barriers to the Adoption of Children from Foster Care* (Harv. Univ. John F. Kennedy Sch. Bus. Working Paper No. RWP05-005, 2005). For arguments against discriminatory agency discretion used to deny adoptions, see Jehnna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 170 (1997); J. Savannah Lengsfelder, *Who is a "Suitable" Adoptive Parent?*, 5 HARV. L. & POL'Y REV. 433, 435, 448 (2011).

34. Netta Barak-Corren et al., *Examining the Effects of Antidiscrimination Laws on Children in the Foster Care and Adoption Systems*, 19 J. EMPIRICAL LEGAL STUD. 1003, 1008 (2022) (estimating that the effect of "antidiscrimination rules is equivalent to 15,525 additional children finding permanent homes and 360,000 additional children finding foster homes, nationwide, over a period of 20 years").

35. U.S. DEP'T HEALTH & HUM. SERVS., THE AFCARS REPORT 1 (June 28, 2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf [https://perma.cc/98UG-PPFE].

36. *See e.g.*, Anca Gheaus, *The Right to Parent and Duties Concerning Future Generations*, 4 J. POL. PHIL. 487, 487 (2016); John Harris, *The Right to Found a Family*, *in* CHILDREN, PARENTS AND POLITICS 133, 151–52 (Geoffrey Scarre ed., 1989); Colin M. MacLeod, *Parental Competency and the Right to Parent*, *in* PERMISSIBLE PROGENY?: THE MORALITY OF PROCREATION AND PARENTING 227, 228–29 (Sarah Hannan, Samantha Brennan & Richard Vernon eds., 2015); Aleardo Zanghellini, *Is There Such a Thing as a Right to Be a Parent?*, 33 AUSTL. J. LEGAL PHIL. 26, 26, 58–59 (2008).

37. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); Maynard v. Hill, 125 U.S. 190, 211 (1888) ("[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the liberty protected by the constitution includes the right "to marry, establish a home and bring up children").

38. *See generally* G.A. Res. 217 (III) (Dec. 10, 1948) (outlining a "Universal Declaration of Human Rights"). For a discussion of court cases rejecting a right to adopt based on the human right to form a family, see generally George Letsas, *No Human Right to Adopt?*, 1 UNIV. COLL. LONDON HUM. RTS. REV. 135 (2008).

Philosophical theories about parental rights divide into two main camps.[39] Child-centered accounts rely exclusively on child welfare while dual-interest accounts supplement child welfare arguments with concern for the parents' interests. According to child-centered arguments, we respect parental rights because young children benefit from being reared by a few individuals who make long-term commitments and have broad authority to control their upbringing, free from significant external intrusion.[40]

Dual-interest theories embrace the idea that children benefit from parental rights and add that parental rights are further justified because many adults pursue important interests through parenting. These interests include intimacy;[41] creative self-extension;[42] and the chance to nurture, counsel, and educate.[43] According to dual-interest theories, parental rights advance the interests of parents and children in forming lasting, loving relationships.

Such dual-interest justifications extend easily to adoption. Suppose parental rights exist to give parents and children access to lasting, loving relationships and give parents valuable opportunities for intimacy, self-expression, or nurturing. In that case, they should also extend to people who cannot (or do not want to) procreate. They, too, might seek lasting, loving relationships with similar opportunities. We can see how important such relationships are from the grief people can experience from infertility and the efforts they expend on becoming parents through adoption and assisted reproductive technology.

The same conclusion might rely on child-centered grounds. The rules and procedures currently applied to adoptive parents discourage or prevent potential parents from adopting a child. In part for this reason, too many children remain in temporary foster placements or institutional care. Parental rights that derive from serving children's interests might warrant a right to adopt on this basis.[44]

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39. Not all philosophical discussions fall neatly along this divide. Some philosophers justify parental rights based exclusively on natural law theories and parental duties. *See, e.g.*, Melissa Moschella, *Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 NOTRE DAME J. L., ETHICS, & PUB. POL'Y 397, 404–09 (forthcoming 2023).

40. *See, e.g.*, Peter Vallentyne, *Rights and Duties of Childrearing*, 11 WM. & MARY BILL RTS. J. 991, 995–96 (2003).

41. According to Harry Brighouse and Adam Swift, the intimacy of a parent–child relationship contributes to human flourishing for many adults in a way that other forms of intimacy cannot replace. HARRY BRIGHOUSE & ADAM SWIFT, FAMILY VALUES: THE ETHICS OF PARENT–CHILD RELATIONSHIPS 86–111 (2014). They describe parents as having an interest in being in a distinctive fiduciary relationship. *Id.* at 91–92. A similar view is expressed in Sarah Hannan & Richard Vernon, *Parental Rights: A Role-Based Approach*, 6 THEORY & RSCH. EDUC. 173, 185 (2008).

42. MacLeod, *supra* note 36, at 234–36.

43. Scott Altman, *Parental Control Rights*, *in* PHILOSOPHICAL FOUNDATIONS OF CHILDREN'S AND FAMILY LAW 209, 221–26 (Elizabeth Brake & Lucinda Ferguson eds., 2018).

44. *See* Woodhouse, *supra* note 4, at 300–03. Alternatively, even without positing parental rights, the policy prescriptions I advocate, such as reduced scrutiny of adoptive

Of course, biological and adoptive parents are not identical. Biological parents have an ongoing relationship with a specific child. In contrast, some prospective adoptive parents merely have an interest in rearing a child. Having a child taken from one's home harms parents beyond depriving them of the experience of childrearing. Furthermore, because children benefit from maintaining stable relationships and avoiding the trauma of transitions, we might not remove them from homes where we would not initially place them. These differences suggest that biological and prospective adoptive parents (and their children) have different interests in parenting, which might justify differential treatment.

A minor problem with this argument is that it does not divide people in the same way as our current practices. Prospective adoptive parents often already care for children as foster parents. If continuity is important, we should treat them with the same deference as biological parents.[45] We also do not scrutinize biological parents who seek to procreate with assisted reproduction.[46] They have no ongoing relationship with the child they hope to create.

More important than this inconsistency, the argument does not justify denying rights to prospective adoptive parents. Biological parents and their children lose more by having a child taken away than adoptive parents who are denied access to a child not yet in their care. Even so, losing the chance to rear a child remains a significant harm. The overwhelming majority of Americans report wanting to have children.[47] When asked about the most important sources of meaning in their lives, Americans emphasize time with family more than any other topic, including large numbers referring to time with children and grandchildren.[48] Being denied access to this important source of meaning is a significant loss for many people.

Another distinction between adoptive and biological parents that might justify different treatment is that adoptive parents lack a genetic connection to their children.[49] One can dispute the importance of genetic connections and even the

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homes, might be justified on child-centered grounds, either as a right to be adopted or as desirable policies that advance child welfare without positing any rights.

45. One might argue we should grant adoption rights to foster parents who have established bonds with their foster children even if we do not create rights for all prospective adoptive parents.

46. For an argument that we should license intending parents who hire surrogates, see Christine Overall, *Reproductive 'Surrogacy' and Parental Licensing*, 29 BIOETHICS 353, 358–59 (2015).

47. Frank Newport & Joy Wilke, *Desire for Children Still Norm in U.S.*, GALLUP (Sept. 25, 2013), https://news.gallup.com/poll/164618/desire-children-norm.aspx [https://perma.cc/FD58-L4AT].

48. *Where Americans Find Meaning in Life*, PEW RSCH. CTR. (Nov. 20, 2018), https://www.pewresearch.org/religion/2018/11/20/where-americans-find-meaning-in-life/ [https://perma.cc/ZV58-CQJN].

49. Edgar Page, *Parental Rights*, 1 J. APPLIED PHIL. 187, 198, 201 (1984); S. MATTHEW LIAO, THE RIGHT TO BE LOVED 155–60 (2015); Moschella, *supra* note 39, at 408. For a rebuttal, see generally Christian Barry & R.J. Leland, *Do Parental Licensing Schemes Violate the Rights of Biological Parents?*, 94 PHIL. & PHENOMENOLOGICAL RSCH. 755 (2017).

existence of a right to procreate.[50] However, many people value genetic connections. This is evident from the urgency many people attach to procreating and the efforts of some adopted people to reconnect with their birth families. Perhaps we should accept as important the interest in rearing genetically related children or being reared by genetic parents.

Even granting this assumption, the argument is just a specific version of the prior argument that procreators have an interest in rearing a specific child, and the replies are similar. There is the small matter of inconsistency—we do not scrutinize stepparent adoptions or those who hire surrogates to carry a genetically unrelated child.[51] And there is the larger question of having an important additional interest. That biological parents have two childrearing interests while adoptive parents have only one does not negate the claim that adoptive and biological parents share a strong interest in childrearing that is worthy of protecting.

Those opposed to adoption rights can reply to these arguments in two ways. They might reject moral claims to family formation rights based on a child-centered view of morality. We should continue scrutinizing adoptive homes to protect children and extend this practice to biological parents by requiring a license to procreate. I address this argument in Part III. Alternatively, they might argue that adoptive and biological families differ in key respects (other than the two just discussed) that justify treating them differently, scrutinizing adoptive but not biological parents. I address these claims in Part IV.

III. AGAINST A RIGHT TO ADOPT: DENYING PARENTAL RIGHTS AND LICENSING ALL PARENTS

People who deny that parents have a moral right to rear their children[52] sometimes argue that we should allocate children to whichever adults best advance the children's interests, whether the child's biological parents or someone else.[53]

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50. *See generally* Neil Levy & Mianna Lotz, *Reproductive Cloning and a (Kind of) Genetic Fallacy*, 19 BIOETHICS 232 (2005). Some people think we should deter procreation so more people adopt children who need homes. *See generally* Daniel Friedrich, *A Duty to Adopt?*, 30 J. APPLIED PHIL. 25 (2013). *See also* Jurgen De Wispelaere & Daniel Weinstock, *Privileging Adoption over Sexual Reproduction? A State-Centered Perspective*, *in* PERMISSIBLE PROGENY?: THE MORALITY OF PROCREATION AND PARENTING 208, 214–22 (Sarah Hannan et al. eds., 2015) [hereinafter De Wispelaere & Weinstock, *Adoption over Sexual Reproduction*]; Tina Rulli, *The Ethics of Procreation and Adoption*, 11 PHIL. COMPASS 305, 306–09, 311 (2016); Sarah Hannan & R.J. Leland, *Childhood Bads, Parenting Goods, and the Right to Procreate*, 21 CRITICAL REV. INT'L SOC. & POL. PHIL. 366, 380, 381 (2018).

51. Not scrutinizing stepparent adoptions might be justified because the child will be living with the stepparent whether or not the adoption is permitted.

52. David Archard, *Child Abuse: Parental Rights and the Interests of the Child*, 7 J. APPLIED PHIL. 183, 183 (1990) ("[I]nsofar as the best interests of the child are of paramount importance the supposed rights of parents and of families should count for little or nothing."). *See also* Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 5 (2015); Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 113 (2021).

53. Anca Gheaus, *The Best Available Parent*, 131 ETHICS 431, 434 (2021); James G. Dwyer, *Deflating Parental Rights*, 40 L. & PHIL. 387, 413, 417 (2021). For a review and

These best-available-parent advocates reject adoption rights for the same reasons they reject biological parents' rights.

Best-available-parent advocates argue that because children need care and lack decision-making capacity, parents and the state have fiduciary duties to consider only child welfare when deciding who will rear a child. Furthermore, we should not prioritize the interests of biological parents. Any alleged right to rear a biological child is offset by the competing right of a would-be adoptive family to raise that same child.[54] To be clear, they do not think most children should be removed from their biological parents. Children may benefit from connections to their biological parents and be bonded to them in ways that make transfer harmful. However, these advocates deny the validity of custody claims based on an adult's interest in family formation.

Some scholars think we should require biological parents to get licenses, treating them like prospective adoptive and foster parents. We screen adoptive parents for skills, knowledge, disposition, and resources to protect children from harm and help them thrive.[55] The same reasons counsel that we screen biological parents.[56] If it is acceptable to screen adoptive parents, it must also be acceptable to screen biological parents.[57]

Licensing proponents embrace varied plans, some more radical than others.[58] The most extreme would impose reversible sterilization on any adult

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rebuttal, see generally Scott Altman, *Why Parents' Interests Matter*, 133 ETHICS 271 (2023) [hereinafter Altman, *Parents' Interests*]. *See also* Liam Shields, *Won't Somebody Please Think of the Parents?*, 133 ETHICS 133, 136 (2022).

54. This argument is offered as a challenge to parent-centered theories in Anca Gheaus, *The Right to Parent One's Biological Baby*, 20 J. POL. PHIL. 432, 435–36 (2012) [hereinafter Gheaus, *Right to Parent*]. In that article, Gheaus concludes that the birth parent's interest in caring for a baby to whom they have bonded justifies a different outcome. *Id.* at 451–53. Gheaus later changed positions, rejecting the legitimacy of the birth parent's interest but maintaining that the child's interest based on having bonded with a birth mother will often be a reason against redistributing children. Anca Gheaus, *supra* note 53, at 457–58.

55. Hugh LaFollette analogized parenting to driving and practicing medicine, which we license because they require skill and have the potential to harm people. *See* Hugh LaFollette, *Licensing Parents*, 9 PHIL. & PUB. AFF. 183, 183–84 (1980) [hereinafter LaFollette, *Licensing Parents*]; Hugh LaFollette, *Licensing Parents Revisited*, 27 J. APPLIED PHIL. 327, 328 (2010) [hereinafter LaFollette, *Licensing Parents Revisited*]. Those opposed to licensing have questioned this analogy. *See, e.g.*, Jurgen De Wispelaere & Daniel Weinstock, *Licensing Parents to Protect our Children*, 6 ETHICS & SOC. WELFARE 195, 198 (2012) [hereinafter De Wispelaere & Weinstock, *Licensing Parents*].

56. We would not need to treat the cases identically for this argument to succeed. For example, a licensing scheme for biological parents would need to address unlicensed childbearing. The law might not remove a child from a marginally competent parent who procreated without a license. Conversely, it might take a different view of a similarly competent prospective adoptive parent on the ground that removing a child from its home after it is born is more harmful to the child than not placing it in a prospective home.

57. LaFollette, *Licensing Parents Revisited*, *supra* note 55, at 336.

58. Licensing advocates differ in what level of skill to demand for a license and how that skill should be measured. *See, e.g.*, Mark Vopat, *Parent Licensing and the Protection*

lacking a parenting license or remove children from any parent lacking a license.[59] More moderate plans would not remove children from unlicensed parents. Instead, their proponents hope to deter unlicensed people from procreating until they gain the skills, knowledge, and resources to become good parents. When deterrence fails (because of accidental pregnancy, ignorance of legal rules, or unwillingness to comply), the state would monitor the children of unlicensed parents closely and offer supportive services until the parent qualified for a license.[60]

These two views—best available parent and parental licensing—treat biological parents like prospective adoptive parents. They recommend that we investigate biological parents preemptively (as we now do for adoption) rather than wait for problems to arise. In the remainder of this Part, I argue for two conclusions. First, we should not license biological parents and should reject arguments against biological parents' rights. Second, many reasons for these conclusions suggest we should stop aggressive adoption screening.

A. Parental Licensing

Licensing biological parents is an academic idea; no popular movement supports it, no legislature has considered it,[61] and aggressive versions would be unconstitutional.[62] Nevertheless, the academic debate has produced theoretical and practical insights. Among these are three problems with licensing biological parents that apply equally to aggressively screening adoptive parents: discrimination, false positives, and government overreach.[63]

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of Children, *in* TAKING RESPONSIBILITY FOR CHILDREN 73, 73–74 (Samantha Brennan & Robert Noggle eds., 2007).

59. MICHAEL MCFALL & LAURENCE THOMAS, LICENSING PARENTS: FAMILY, STATE, AND CHILD MISTREATMENT 122, 124 (2009).

60. Vopat, *supra* note 58, at 85, 92. Even less aggressively, some advocates favor voluntary licenses encouraged by financial incentives. LaFollette, *Licensing Parents Revisited*, *supra* note 55, at 338–39.

61. One exception (though not from a democracy) might be China's one-child policy. Exceptions to the one-child rule were available, though they did not rely on individualized licensing. *See, e.g.*, Susan Short & Zhai Fengying, *Looking Locally at China's One-Child Policy*, 29 STUD. FAM. PLAN. 373, 376–77 (1998).

62. Restrictions on procreation have occasionally been upheld. *See, e.g.*, State v. Oakley, 629 N.W.2d 200, 210–12 (Wis.), *opinion clarified on denial of reconsideration*, 635 N.W.2d 760 (Wis. 2001) (upholding nonprocreation as a condition of probation for a father of nine children convicted of felony child nonsupport. The court reasoned that the defendant would have been unable to procreate had he served his sentence in prison and so preventing procreation as a condition of probation did not interfere with his right to procreate).

63. Opponents of parental licensing occasionally comment that the reasons against licensing counsel rethinking our approach to screening adoptive parents. *See, e.g.*, De Wispelaere & Weinstock, *Licensing Parents*, *supra* note 55, at 204 (noting that in light of arguments against licensing, we should reconsider probing adoptive and foster homes). *See also* Jurgen De Wispelaere & Daniel Weinstock, *State Regulation and Assisted Reproduction: Balancing the Interests of Parents and Children*, *in* FAMILY-MAKING: CONTEMPORARY ETHICAL CHALLENGES 131, 147 (2014) (urging a similar conclusion). *But see* De Wispelaere & Weinstock, *Adoption over Sexual Reproduction*, *supra* note 50, at 218 (scaling back this conclusion, urging instead that states remove administrative and other obstacles to adoption

1. Discrimination

Parental licensing would have discriminatory effects, burdening low-income families and families of color. Advocates for parental licensing often brush aside this concern as a detail that can be addressed with better practices.[64] However, social service agencies disproportionately investigate, remove children from,[65] and terminate parental rights of parents of color.[66] Scholars disagree about whether these differences merely reflect differences in danger to those children.[67] However, there is widespread suspicion that some of this difference stems from stereotypes about families of color and cultural insensitivity.[68] Things have gotten so bad that some people think we should abolish child-protective agencies, equating their treatment of Black families to the structural racism of police abuse and mass incarceration.[69]

These racially disparate outcomes occur under standards that purport to protect parents. Our laws forbid states from terminating parental rights unless parents are unfit and reunification efforts fail. We should expect even more inequity toward low-income parents and parents of color under schemes that offer fewer protections, such as those that would terminate parental rights merely because a better home is available or the parents fail a licensing exam.[70]

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but continue to scrutinize adoptive parents to assure a greater level of adequacy than demanded of biological parents).

64. *See* Carolyn McLeod & Andrew Botterell, *Parental Licensing and Discrimination*, *in* THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF CHILDHOOD AND CHILDREN 202, 207, 211 (2018) (suggesting continued licensing for adoptive homes, with more emphasis on avoiding discrimination) [hereinafter McLeod & Botterell, *Licensing and Discrimination*]. *See also* LaFollette, *Licensing Parents Revisited*, *supra* note 55, at 338 ("[A]doption programs favour rich, white Christians, yet I am not tempted to scupper them . . . . I would prefer to alter adoption policies to avoid ignorance, bias, and hanky-panky. We should do the same with a general parental licensing program.").

65. *See generally, e.g.*, Frank Edwards et al., *Contact with Child Protective Services is Pervasive but Unequally Distributed by Race and Ethnicity in Large U.S. Counties*, 118 PROC. NAT'L ACAD. SCIS. 30 (2021).

66. *See* Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32, 37–38 (2020).

67. Richard P. Barth et al., *Research to Consider While Effectively Re-Designing Child Welfare Services*, 32 RES. SOC. WORK PRAC. 483, 486 (2022). *See also* Sarah A. Font, Lawrence M. Berger & Kristen S. Slack, *Examining Racial Disproportionality in Child Protective Services Case Decisions*, 34 CHILD & YOUTH SERV. REV. 2188, 2198 (2012); Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37 CHILD ABUSE & NEGLECT 33, 42 (2013).

68. By age 18, "one in eight U.S. children will have a state-confirmed maltreatment report. The figure for Black children—one in five—is the highest for any racial group . . . . That comparison takes on a different meaning when we take into account how racism shapes the entire process that produces confirmed maltreatment reports." DOROTHY ROBERTS, TORN APART 83 (2022).

69. *Id.* at 258; S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1121, 1128 (2022).

70. *See* McLeod & Botterell, *Licensing and Discrimination*, *supra* note 64, at 203–04, 206.

Some licensing advocates think we could avoid discrimination by using objective criteria, which might be less subject to implicit or explicit bias than the current discretionary standards.[71] However, the criteria they propose—including minimum income levels—might lead to disparate outcomes and would likely be ineffective screens for detecting future child abuse.[72]

Licensing advocates might say we should protect children even if doing so produces racially disparate outcomes.[73] We should work to reverse the unjust social institutions that place children of color at greater risk of abuse. However, children should not remain at risk while we seek justice in other realms. On this view, parental licensing would resemble other imperfect institutions—such as criminal justice, education, and health care—which produce disparate outcomes based on race but serve necessary functions.

People might disagree with the premise of this argument. They think we could reduce racially biased outcomes and help children by keeping more children with their birth parents and better supporting them there. No matter what one concludes about child protective services, we should not accept the "protect-children-even-if-it-discriminates" argument as applied to parental licensing. As described below, we lack adequate tools to forecast which parents will endanger their children. As a result, a licensing scheme that protected some children from abuse would remove many children from homes where they would not have been endangered, harming the children and their parents. Imposing this unnecessary harm disproportionately on families of color should be intolerable. It would destroy families and reinforce oppressive social policies that recall and perpetuate longstanding practices of racially targeted family destruction.[74]

The same racially disparate effects already plague adoption screening.[75] Black families are deterred from adopting children because income and related rules

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71. One minimal test relying on objective standards was proposed by Marc Vopat, who would base licensing on whether the parent passes a drug test, proves income, has a high school diploma, passes a domestic violence background check, and agrees not to abuse children. Vopat, *supra* note 58, at 84.

72. Measuring discrimination in predictive tools raises complex issues. For a review, see generally Brian Jenkins, *Measuring the Equity of Risk Assessment Instruments Used in Child Protection*, 131 CHILD & YOUTH SERV. REV. 1 (2021). One common complaint is that predictive tools incorporate poverty and its correlates into the predictive models. *See, e.g.*, Hélène Vannier Ducasse, *Predictive Risk Modelling and the Mistaken Equation of Socio-Economic Disadvantage with Risk of Maltreatment*, 51 BRIT. J. SOC. WORK 3153, 3162 (2021).

73. Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 932 (2009).

74. *See, e.g.*, MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 82 (2014); WILMA KING, STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH CENTURY AMERICA 232 (2d ed. 2011).

75. Freiman disagrees that we have as much reason to worry about discrimination in adoption as we do in parental licensing. Because the scope of parental licensing would be so much larger, interest groups favoring discrimination would be drawn to parental licensing based on the effect they could have. Freiman, *supra* note 1, at 122.

disqualify them (or make them feel they will not qualify or be well-treated).[76] As a result, placing Black children into permanent homes often requires cross-racial placements, which many believe do not serve their interests as well as same-race placements. It also contributes to the disproportionate number of Black children in long-term foster care. If adoption were a right and screening were minimal, more families of color would adopt children, reducing the need for cross-racial placements and the number of nonwhite children lacking permanent homes.

As I will argue below, the adoption rules producing these racially disparate outcomes harm more children than they protect, much as they would if we instituted parental licensing.

2. False Positives

Licensing parents based on tests to predict who will abuse children would produce far too many false positives.[77] The false positives arise partly from having inadequate tools to predict child abuse. However, even with better predictive tools, false positives would be high because few parents commit serious child abuse.[78] With a low base rate of abuse, even a highly effective test would remove far more children from nonabusive parents than it would protect children from abuse. These parents would be wrongly deprived of a chance to rear children, and their children would be unnecessarily harmed by being taken away from loving families.[79]

The simple math behind this idea was described more than 20 years ago by Michael Sandmire and Michael Wald:

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76. *See generally, e.g.*, Creasie Finney Hairston & Vicki Gardine Williams, *Black Adoptive Parents: How They View Agency Adoption Practices*, 70 SOC. CASEWORK: J. CONTEMP. SOC. WORK 534 (1989); Cynthia G. Hawkins-Leon & Carla Bradley, *Race and Transracial Adoption: The Answer is Neither Simply Black or White nor Right or Wrong*, 51 CATH. U. L. REV. 1227, 1260 (2002).

77. Wrongly identifying parents as likely abusers has traditionally been referred to as a false positive in this literature, based on the idea that parenting tests are testing for abusers. *See, e.g.*, Michael J. Sandmire & Michael S. Wald, *Licensing Parents—A Response to Claudia Mangel's Proposal*, 24 FAM. L. Q. 53, 57–60 (1990).

78. Rates of child abuse are difficult to establish. One study based on a 2011 national household survey in the U.S. estimated that over a lifetime, 5.7% of children experience physical abuse. Of these, 29% involved injuries (meaning 1.7% of children experienced injury). The vast majority of these involved small bruises. David Finkelhor et al., *Child Maltreatment Rates Assessed in a National Household Survey of Caregivers and Youth*, 38 CHILD ABUSE & NEGLECT 1421, 1424–25 (2014). A study based on child abuse investigations found that physical abuse is alleged in about 11.5% of households over the course of a child's life, though it is substantiated in a far lower percentage. No breakdown was provided to separate more or less serious abuse. Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among U.S. Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017). A household survey in England found lifetime exposure to parental violence in 7% of children. Lorraine Radford et al., *The Prevalence and Impact of Child Maltreatment and Other Types of Victimization in the UK: Findings from a Population Survey of Caregivers, Children and Young People and Young Adults*, 37 CHILD ABUSE & NEGLECT 801, 806, 808 (2013).

79. Sandmire & Wald, *supra* note 77, at 55–56, 62–63. *See also* De Wispelaere & Weinstock, *Licensing Parents*, *supra* note 55, at 200–01.

> [I]f actual abuse occurred in one out of every 100 homes, then even a screening instrument which correctly identified 90 percent of the actual abusers (this is called sensitivity) and 95 percent of the actual nonabusers (this is called specificity) would still produce a group labeled as abusers with 85 percent of these judgments being wrong. In other words, if one examined a sample population of 1,000 families with a prevalence of 1 percent abuse, then of the 1,000 families, ten would be abusive. A test with the above levels of sensitivity and specificity would identify nine of these ten abusers (90 percent), but at a cost of falsely labeling another fifty families as abusive.[80]

Their illustration understates the percentage of children who would be wrongfully removed because we certainly lack a test this accurate.[81] Using more realistic (but optimistic) estimates, suppose we had a test correctly identifying 70% of future abusers and 80% of nonabusers in a population where 1% of parents committed abuse. Using that test, we would need to prevent 208 families who would not have committed abuse from rearing children to stop 7 cases of abuse. Despite having a fairly accurate predictive tool, 97% of the children removed would not have been abused. Statisticians call this the false discovery rate.[82]

Of course, the 1% base rate might be too low. Some studies suggest that over one-third of children are neglected or abused during childhood.[83] However, employing such high base rates when discussing parental licensing is inappropriate. To the extent licensing rules would not deter procreation by unlicensed parents, they would lead to removing children from their homes. Because children suffer from disrupted family bonds, it would not improve their lives to remove them from homes where they suffer moderate neglect. Instead, it makes sense to view children rescued

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80. Sandmire & Wald, *supra* note 77, at 60 (cleaned up).

81. Many tools for predicting child abuse have been developed and tested in recent years. Although some of them appear to differentiate likely abusers from likely nonabusers fairly well, even the best tools continue to have very high false discovery rates. For a review, see generally Claudia E. van der Put et al., *Predicting Child Maltreatment: A Meta-Analysis of the Predictive Validity of Risk Assessment Instruments*, 73 CHILD ABUSE & NEGLECT 71, 84 (2017).

82. Some articles in this literature refer to this as the "false-positive rate." *See, e.g.*, Jessica H. Daniel et al., *Child Abuse Screening: Implications of the Limited Predictive Power of Abuse Discriminants from a Controlled Family Study of Pediatric Social Illness*, 2 CHILD ABUSE & NEGLECT 247, 247, 253 (1978). The term "false-positive rate" is usually reserved for a different idea: the number of nonabusers wrongly identified as abusers divided by all nonabusers: FP/(FP+TN). The false discovery rate is the number of nonabusers wrongly identified as abusers divided by the total number identified as abusers: FP/(FP+TP). *See* Yoav Benjamini & Yosef Hochberg, *Controlling the False Discovery Rate: A Practical and Powerful Approach to Multiple Testing*, 57 J. ROYAL STAT. SOC. SERIES B (METHODOLOGICAL) 289, 291 (1995).

83. Kim et al., *supra* note 78, at 278.

from serious physical abuse as the main potential beneficiaries of parental licensing. Likely, such abuse occurs in under 3% of homes.[84] On this assumption, false discovery rates over 80% are realistic.[85]

Advocates for parental licensing dismiss this false positive concern, noting that all licensing schemes are imperfect; our current licensing rules mistakenly prevent competent people from driving or practicing law or medicine. False positives are inevitable, they say, and we should not worry much about them outside the context of criminal punishment.[86]

However, the analogy to other licensing schemes is mistaken.[87] Most licensing schemes do not look for traits with extremely low base rates. As a result, they do not exclude vast numbers of competent people to identify a small group lacking skills.[88] If we allowed anyone to practice medicine or law, the base rate of malpractice would probably not be low.[89] To avoid causing harm, doctors and lawyers need skills and knowledge that most people lack. One can debate the value of requiring a licensing exam for those who have already graduated from accredited schools. Indeed, licensing requirements for graduates of law and medical schools have been criticized as discriminatory and undiagnostic.[90] However, we need some

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84. I did not include sexual abuse in this base rate. Including sexual abuse would significantly increase the figure of children harmed by serious abuse. However, I am unaware of any predictive test that can be used on the general population to predict sexual abuse. The available predictive tests are used to predict sexual abuse recurrence among known abusers. *See, e.g.*, Samantha L. Pittenger et al., *Predicting Sexual Revictimization in Childhood and Adolescence: A Longitudinal Examination Using Ecological Systems Theory*, 23 CHILD MALTREATMENT 137, 137 (2018).

85. For example, if the sensitivity was 70% and specificity was 80%, for a 3% base rate of abuse, we would get a 91% false discovery rate. If we assume a base rate of 10%, we still get a false-discovery rate of 72%.

86. LaFollette, *Licensing Revisited*, *supra* note 55, at 335.

87. Another distinction between parenting and other licensed activities is sometimes emphasized. Parenting is alleged to be a nonsubstitutable good, whereas there are adequate substitutes for driving (such as ride-shares and public transportation) and practicing medicine (such as other socially beneficial careers as caregivers). De Wispelaere & Weinstock, *Licensing Parents*, *supra* note 55, at 198.

88. Insofar as licensing exams produce false positives, they can avoid causing long-term harm because people can study for and retake the exam, often passing on the second attempt. This might not be possible for parenting licensing exams insofar as some criteria for passing cannot easily be changed.

89. Some scholars believe markets could address this problem and that we should abolish all requirements for the practice of law. *See, e.g.*, Clifford Winston & Quentin Karpilow, *Should the U.S. Eliminate Entry Barriers to the Practice of Law? Perspectives Shaped by Industry Deregulation*, 106 AMER. ECON. REV. 171, 174–76 (2016). Similar arguments have been made about medicine. *See, e.g.*, Shirley Svorny, *Licensing Doctors: Do Economists Agree?*, 1 ECON J. WATCH 279, 293 (2004).

90. Evidence for the limited value of bar exams has been found in states that have a diploma privilege, allowing graduates of local law schools to practice law without further testing. *See, e.g.*, Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 199 (2022); Eura Chang, *Barring Entry to the Legal Profession: How the Law Condones Willful Blindness to the Bar Exam's*

screening for professional practice (such as educational requirements or apprenticeships) because most people lack the skills and knowledge to practice law and medicine.

Consider an example showing how unreasonable licensing rules are for detecting low base rate problems. Imagine we develop a low-cost genetic test to identify people with epilepsy, which causes sudden seizures. One percent of the population has this illness, and the test correctly classifies sufferers 70% of the time and nonsufferers 80% of the time. If we denied a driver's license to everyone identified with this gene, we would stop 7 seizure-suffering people from driving for every 1,000 tested. However, we would deny an additional 208 licenses to people who do not have the disease. Given the other risks we currently allow to protect driving freedom, we would never consider denying licenses on this basis.[91] We would be particularly wrong to do so if the test disproportionately identified people of color as having this gene.

Licensing advocates could offer a stronger response to the base rate problem. I assumed a low base rate for licensing because only serious child abuse would justify removing children from their parents' homes. Licensing advocates could respond that because some prospective parents would abide by licensing rules, the rules would deter or delay procreation and thus would not remove children from their homes. For parents who disobeyed the rules, we could adopt a gentler version of licensing by monitoring those parents and offering support rather than removing children. If these steps worked, we would not need to remove children from their homes. For this reason, we should analyze the proposal by assuming a higher base rate of harm. This would weaken the false positive objection.

I see four problems with this view. First, the false positive problem would remain large even with this gentler version of licensing. We lack good tests that can identify which parents will neglect children. So even assuming a higher base rate, licensing schemes would deter or delay people from procreating and subject others who would not have neglected children to invasive monitoring. Second, it is unclear whether feasible aggressive monitoring (short of a panopticon) would reduce child neglect. To the extent it would require aggressive enforcement, child removal threats might be necessary. Third, aggressive monitoring harms parents and children whose

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Racially Disparate Impacts, 106 MINN. L. REV. 1019, 1022, 1067 (2021); Scott Johns, *Putting the Bar Exam on Constitutional Notice: Cut Scores, Race & Ethnicity, and the Public Good*, 45 SEATTLE U. L. REV. 853, 867 (2022). For a parallel debate about medical licenses, see generally Julian Archer et al., *The Medical Licensing Examination Debate*, 11 REGUL. & GOVERNANCE 315 (2017).

91. As a point of comparison, in California, genetic markers that indicate a potential for illnesses causing lapse of consciousness are not relevant to getting a driver's license. People with known illnesses causing lapse of consciousness (not genetic markers predicting the illness) can have licenses if their illness is under control. *See Lapse of Consciousness Consolidated Table*, *Physical and Mental Conditions Guidelines*, CAL. DEP'T OF MOTOR VEHICLES, https://www.dmv.ca.gov/portal/file/lapse-of-consciousness-consolidation-table-pdf/ [https://perma.cc/E55A-LG8U] (last visited Sept. 27, 2023).

family lives may be less intimate due to regular intrusions.[92] Finally, deterrence and monitoring would exacerbate inequalities if the licensing scheme correlated with race and income.

The problem of poor predictive tools and low base rates also applies to adoptive homes. Children are abused less often by adoptive than biological parents.[93] Admittedly, we do not know whether aggressive screening (rather than other factors) makes adoptive homes safer. However, even if screening contributes to safety, serious abuse has a low base rate. So, screening to prevent dangerous placements deprives many more people of the chance to adopt who would not have abused children and prevents placing many children into homes where they would not have been abused. Adoption screening harms parents and children through two mechanisms—the unnecessary rejection of competent parents and the deterrent effect of aggressive scrutiny that leads people not to apply or persist with their applications. The disproportion of children protected to children deprived of homes (and innocent parents deprived of expanded families) calls into question the wisdom and justice of these choices.

3. Autonomy and Government Overreach

In addition to concerns about discrimination and false positives, parental licensing and adoption scrutiny raise an additional concern: licensing exceeds legitimate government authority by intruding unreasonably on autonomy and privacy.[94]

Family formation rights protect individual autonomy. The government should not dictate our most important choices about how to live. Among these is whether to form families. Family formation rights also protect informational privacy. The government should not, without good reason, gather data about our financial and psychological stability or interrogate our motives for procreating before deciding whether we can have children. Family formation rights also protect us from the arbitrary discretion of government agents. The government should not make key decisions about our lives based on unpredictable and potentially corruptible or biased discretion.

Licensing advocates deny that licensing violates family formation rights because parents have no right to form families in ways that harm children. Perhaps if we had tools to identify parents likely to abuse children without excessive false positives and discrimination, we might agree that the restriction on family formation

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92. *See, e.g.*, Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOC. REV. 610, 614 (2020); Charlotte Baughman et al., *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 527 (2021).

93. Evidence that children are less often abused in adoptive homes is limited. *See* Jessica A.K. Matthews, *Maltreatment of Adoptees in Adoptive Homes*, *in* THE ROUTLEDGE HANDBOOK OF ADOPTION 321, 322 (Gretchen Miller Wrobel et al., eds., 2020); Marinus H. van IJzendoorn et al., *Elevated Risk of Child Maltreatment in Families with Stepparents but Not with Adoptive Parents*, 14 CHILD MALTREATMENT 369, 370 (2009).

94. *See* De Wispelaere & Weinstock, *Adoption over Sexual Reproduction*, *supra* note 50, at 211.

was appropriate. However, given the real-world limitations, autonomy and privacy concerns should limit how governments can control our most important decisions.

These concerns apply to prospective adoptive parents. Aggressive screening hinders their efforts to form a family, exposes their private lives to governmental inquiry, and subjects them to the whims of discretionary choices. Like parental licensing, it discriminates and harms more children than it protects.

B. Best Available Parent

Opponents of parental rights sometimes say we should subordinate parental interests whenever they conflict with child welfare because parents (and society) have fiduciary duties to children. Furthermore, the rights of other potential caretakers offset any alleged parental rights.

I disagree with arguments for strict fiduciary duties for parents. When making decisions for people incapable of deciding for themselves, we try to decide as they would if they had the ability. However, we need not focus only on their narrow, self-regarding interests. Instead, we may also consider other matters they would include when deliberating. People often prefer to make reasonable decisions rather than protect their narrow self-interest.[95]

Children might not want the best available parent in all cases. Rather, they would prefer to be reared by good parents if efforts to provide better parents required objectionable discrimination.[96] If they were rational, they also might accept a system that provided them with merely good parents if that system increased the chance that they would grow up able to rear their children rather than have their children reallocated. As others have noted, because most people want to rear biological children, it might be irrational to prefer a system that places us with the best possible parents if that system also creates a significant risk that we will not be able to rear our own children.[97] This is especially so if the system of placing children makes many errors in selecting parents.

These considerations suggest that children would not want a system that assigned all children to the best available parent, required parental licensing, or made adoption difficult. Of course, specific children might benefit from parental licensing[98] or aggressive adoption scrutiny. For example, a child needing adoption and not currently bonded to a foster parent might get a better home because agencies scrutinize potential homes. Nevertheless, if children harmed by aggressive scrutiny far outnumber those who benefit, a rational child, not knowing whether she will be

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95. Altman, *Parents' Interests*, *supra* note 53, at 284; Scott Altman, *Are Parents Fiduciaries?*, 42 L. & PHIL. 411, 420 (2023) [hereinafter Altman, *Parents Fiduciaries?*].

96. For a more detailed version of this argument, see Altman, *Parents' Interests*, *supra* note 53, at 278–83.

97. *See* MATTHEW CLAYTON, JUSTICE AND LEGITIMACY IN UPBRINGING 76 (2006); Altman, *Parents' Interests*, *supra* note 53, at 279.

98. A particular child might benefit from parental licensing because they are rescued from very bad parents by the system or because they are placed in a somewhat better home and could also benefit in the future from a licensing scheme. This future benefit could take place because they do not want to procreate or are declared the best available parent.

harmed or benefited, would prefer a system that did not aggressively scrutinize potential homes.

Furthermore, the fiduciary parenting model does not fit our actual practices and would be unappealing if applied broadly. We often do not weigh only children's interests in making important decisions affecting child welfare. When allocating public budgets, we balance children's needs with other important goals. We allow parents to save for their retirements rather than devoting all financial resources to children. And we spend tax dollars on priorities other than child welfare. It is not obvious why we should take a different view when deciding who should raise a child.[99]

Consider an example. Imagine we implemented a parental licensing scheme, and everyone complied with its rules. Child abuse rates fell, though, of course, not to zero. A state must allocate a fixed budget between two programs. One program protects current children from abuse (by hiring child abuse investigators or offering services to parents whose children are at risk). The other program hires people to teach parenting classes for childless people who want to qualify for licenses. Must the state allocate 100% of the budget to preventing abuse by families with children? Or could it spend some money helping adults to become qualified parents, even if doing so risks some preventable abuse to existing children? In this case, it seems reasonable that a government might allocate some money to parenting classes rather than devoting all funds to protecting existing children. It would balance child and adult welfare, just as it does with other funding choices. Why should we select parents for children exclusively based on child welfare if that norm does not apply to government spending decisions with comparable effects?

We should also reject the offsetting rights claim made by best-available-parent advocates. They discount biological parents' rights because similar interests of alternative prospective parents offset them. However, in most circumstances, biological parents and prospective adoptive parents are not similarly situated regarding a specific child. Both may desire a family. However, biological parents typically have spent months anticipating and planning the child's arrival. They may also be deeply invested in their biological connection to the child and the role of this connection in family tradition. Moreover, the mother who gives birth to the child will have invested (and sacrificed) physically in nurturing the child before birth. One need not regard children as property to see the importance of this bond.[100] Thus biological parents typically have two strong interests in rearing the child they produce—interests in family formation and rearing the specific child—while prospective adoptive parents have only one of these interests at stake.[101]

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99. For an attempt to answer this question based on the limited scope of fiduciary duties, see Dwyer, *supra* note 53, at 409. For a response to this argument, see Altman, *Parents Fiduciaries?*, *supra* note 95, at 418–20.

100. *See* Gheaus, *Right to Parent*, *supra* note 54, at 450.

101. Additionally, children have reasons to be grateful toward the parents who created them if those parents want to rear them. This provides a reason to think children would prefer placement with parents (whether or not biologically related) who create children and wish to rear them. Altman, *Parents' Interests*, *supra* note 53, at 280.

Furthermore, interests do not offset each other in the way this argument supposes. Even if it were true that biological parents and prospective adoptive parents have equally strong interests in rearing a particular child, this would not mean they have equal claims. You might need a kidney transplant and want one of my kidneys. That need, without more, would not justify the state taking my kidney and giving it to you—and not only because this would require an invasive procedure. To suppose otherwise would treat me merely as a means for satisfying your goals. Similarly, treating the adoptive couple's desire for a child as a reason for taking a child from its biological parents treats their procreative capacity as a mere means for satisfying the adoptive couple's goals. The idea is not that children (or kidneys) are property but that treating biological parents as having no claim to rear their children regards their procreative capacities as tools for other people to use.

Not everyone will accept my arguments against child-centered morality and parental fiduciary duties. Nevertheless, we should reject parental licensing and aggressive adoption scrutiny even on a purely child-centered account. Parental licensing would harm many more children than it would help. The same is true of aggressive scrutiny. Most adoptable children will benefit from the increased chance of permanent placement despite the increased chance of poor placement. Even if one rejects dual-interest theories of parental rights, one can still oppose parental licensing and support a right to adopt (or to be adopted) on purely child-centered grounds.

IV. DISTINGUISHING BIOLOGICAL AND ADOPTIVE PARENTING

I argued above that we should not license biological parents because of discrimination, false positives, and concerns about autonomy and privacy. For similar reasons, we should not intensively scrutinize prospective adoptive parents.

People might reject these claims. They might think better rules can solve discrimination and false positive problems. Alternatively, they might regard discrimination and false positives as acceptable prices for protecting children from abuse and believe that scrutinizing parents protects children. Nevertheless, they might oppose licensing biological parents for reasons not applicable to adoptive homes.

Two arguments for this conclusion have been common.[102] We should investigate adoptive but not biological parents because adoption screening prevents harm more often, or causes fewer enforcement problems, than parental licensing. Although these arguments have some merit, they do not undermine this Article's core claim. If these concerns were the only reasons not to license biological parents,

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102. A less-common argument differentiating biological and adoptive parents says that we should regulate adoptive parents because it protects specific children from abuse. Insofar as licensing biological parents protects children by deterring unlicensed parents from procreating, the state does not protect any person from abuse, since the child who would have been abused does not exist and therefore cannot be benefitted. *See* Freiman, *supra* note 1, at 115. Many people will be unpersuaded by this claim. Even if no specific child benefits from parental licensing, the benefit of reducing the number of children abused seems valuable. Additionally, insofar as parental licensing removes children from the homes of unlicensed parents, or monitors them in those homes, it might benefit specific children in the same way as adoption licensing.

we would change how we manage many current issues. Because we do not want to make these changes, we must oppose parental licensing on some of the grounds discussed above, suggesting we should not screen adoptive parents aggressively.

A. Adoptive Screening Prevents Harms More Effectively

We might support adoption screening but not parental licensing because adoption screening is better tailored to prevent harm. Arguments for this conclusion take two forms. First, because adoption screening can prevent bad placements, it can prevent harm without the disruption of removing a child from a stable environment or breaking established bonds. Second, scrutinizing adoptive homes benefits children more than parental licensing because adopted children are at greater risk of harm.

1. Benefits Without Disruption

I claimed above that adoption screening faces a false positive problem, like parental licensing, due to the low base rate of serious child abuse. I used a low base rate because removing children from their homes is often worse than mild neglect, and even without removal, monitoring might do more harm than good. However, adoption nonplacement need not involve removing children from their homes or extensive monitoring after final placement. So, we should evaluate adoption screening based on a higher base rate of neglect.

This view has merit for a subset of adoptions. Applying adoption screening only to that subset might be impractical and objectionable. For most children, placement decisions do not involve choosing among multiple homes. Some are already in foster homes, bonded with foster parents who now seek to adopt. Like children living with biological parents, they are likely better off remaining with their foster parent (and being adopted), even if this risks some chance of neglect. Other children will remain in institutions or temporary foster settings if not adopted. Because child abuse and neglect are more common in institutions and foster care than in adoptive homes, these children are better placed in an adoptive home than the next best alternative if reunification is impossible.[103]

What about a child lacking a bond to a potential adoptive parent who might be placed in several available homes? If we had an effective screening test, using it could protect them from neglect and abuse.[104] In one sense, scrutinizing these homes would conform to the way we treat biological parents. When two biological parents have equal claims to child custody, we resolve their claims based on the child's interest and often scrutinize aspects of each parent's life. If we believed prospective adoptive parents have rights to children, we might think the competing adoptive homes (with no connection to the child) resemble competing biological parents. Their equal rights justify focusing only on child welfare.

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103. Kristin Turney & Christopher Wildeman, *Adverse Childhood Experiences Among Children Placed in and Adopted from Foster Care: Evidence from a Nationally Representative Survey*, 64 CHILD ABUSE & NEGLECT 117, 121 (2017).

104. Because most healthy infants are placed by private agencies, they are often living with their adoptive families for some time before state agencies conduct a home study. *See* HOLLINGER, *supra* note 9, at §§ 1.05(b), 1.05(b) n.61. This practice would need to change in order to effectively screen homes before any attachments develop.

Although this analogy has merit, scrutinizing prospective adoptive homes in this circumstance might not be practical for several reasons. Many children in this category are healthy infants whose adoptive homes are selected by their birth parents and then approved by the state. Unless we imagine that the state would regularly override birth parent choice to find a better home (a topic addressed below), aggressive scrutiny in these cases would have little effect. For the small group of healthy infants placed by the state, efforts at aggressive scrutiny might be counterproductive. Many prospective adoptive parents begin the process hoping to adopt a healthy infant. Aggressively screening them all would replicate the status quo, deterring prospective parents from adopting and depriving many children of homes. It is unclear whether we could implement aggressive screening only for those matched with healthy infants (or whether the mere prospect of that screening would deter people from adoption). Additionally, children with several available adoptive homes are often healthy, white infants. Scrutinizing only these homes might be symbolically objectionable. We would seek the best possible homes for racially privileged infants and accept lesser homes for less privileged children.[105]

2. Adoptive Homes Are More Dangerous

Parental licensing opponents might support scrutinizing adoptive homes because we have more reason to suspect them of inadequate parenting, either because more adopted children have special needs or because of the presumed greater devotion of biological parents.

These arguments are not persuasive. There is little evidence that adoptive parents are less loving than biological parents.[106] Moreover, child abuse and neglect appear to be no more common in adoptive than in biological homes.[107] While this might be due partly to effective screening, there are reasons to think adoptive homes (even without much screening) would be safer than biological homes.[108] Additionally, as others have noted, if biological connection predicted loving

105. *See* BARTHOLET, *supra* note 2, at 81.

106. Sociobiological theories might suggest that parents will favor genetic offspring. Although data show that stepparents may underinvest in stepchildren, studies suggest the opposite about adoptive parents, who seem to expend more energy on their adoptive children than their biological children when both are present. *See* Kyle Gibson, *Differential Parental Investment in Families with Both Adopted and Genetic Children*, 30 EVOLUTION & HUM. BEHAV. 184, 187 (2009). *But see* Anne Case, I-Fen Lin & Sara McLanahan, *How Hungry is the Selfish Gene?*, 110 ECON. J. 781, 783 (2000) (finding lower food expenditures by families with adopted than with genetically related children).

107. *See* van IJzendoorn et al., *supra* note 93, at 373–74.

108. Adoptive parents are older on average than biological parents. According to the CDC, "[a]bout one-half of adoptive mothers are between ages 40-44 years (51%) compared with 27% of mothers who have not adopted. Conversely, only 3% of adoptive mothers are between ages 18-29 years compared with 27% of biological mothers." Jo Jones, *Who Adopts? Characteristics of Women and Men Who Have Adopted Children*, NAT'L CTR. FOR HEALTH STAT. 2 (2009), https://www.cdc.gov/nchs/data/databriefs/db12.pdf [https://perma.cc/58HQ-6THP]. This is partly a feature of screening. But it is also a feature of the reasons for adoption, which often include infertility. This happens more often among those who delay having children and takes time to manifest. Additionally, adoption is an intentional act, whereas pregnancy is sometimes accidental. This means that families do not adopt children before they regard themselves as ready.

relations, we would scrutinize people who create children through assisted reproduction with donor sperm and ova.[109] Furthermore, stepparents (whether or not they adopt) pose a greater danger to children than parents who adopt in other contexts.[110] Nevertheless, we do not screen stepparents, and we investigate stepparent adoptions less intrusively than stranger and foster parent adoptions.[111]

Adopted children can have special needs because they feel rejected by their biological parents or because of trauma in their original homes, the separation process, or earlier foster placements. However, whether these needs justify scrutinizing adoptive but not biological parents is unclear. We do not have good tests to detect a parent's ability to address an adopted child's special emotional needs. Furthermore, children reared by their biological parents also have special needs, sometimes far more demanding than the distinctive needs of adopted children. These include physical, mental, and emotional disabilities. Nevertheless, we do not license biological parents who rear such children. Although biological parents often do not know in advance that they will have a child with special needs, we could require training and licensing after children with those needs arrive and impose monitoring on any parent of a special-needs child who failed to obtain a license.

We might justify treating adoptive and biological parents differently based on the risk of adoption disruption. Adoptive parents sometimes return their children to the agency before the adoption is finalized. This outcome has no obvious counterpart for procreation. Adoption screening might prevent disruption.

The adoption-disruption argument faces problems. First, adoption disruption seems to have a low base rate,[112] suggesting that scrutiny and nonplacement to prevent disruption may do more harm than good. Second, although we have some data on which children are most at risk for disruption, we cannot easily predict which homes for those children are more likely to suffer disruption.[113] Evidence suggests that placement with relatives or foster parents can reduce the likelihood of disruption[114] and that educating families and offering support has a larger effect on reducing disruption than screening.[115]

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109. McLeod & Botterell, *Faint of Heart*, *supra* note 5, at 164.

110. *See* van IJzendoorn et al., *supra* note 93, at 373–74.

111. On the heightened risks of living with a stepparent, see generally Jean Giles-Sims, *Current Knowledge About Child Abuse in Stepfamilies*, 26 MARRIAGE & FAM. REV. 215 (1998).

112. For a range of estimates and a discussion of why the exact rate is hard to determine, see generally Jennifer F. Coakley & Jill D. Berrick, *Research Review: In a Rush to Permanency: Preventing Adoption Disruption*, 13 CHILD & FAM. SOC. WORK 101 (2007).

113. *Id.* at 102–09; *see also* Gail M. Valdez & J. Regis McNamara, *Matching to Prevent Adoption Disruption*, 11 CHILD & ADOLESCENT SOC. WORK J. 391, 395 (1994); Elaine Farmer & Cherilyn Dance, *Family Finding and Matching in Adoption: What Helps to Make a Good Match?*, 46 BRIT. J. SOC. WORK 974, 975 (2016).

114. Susan Livingston Smith et al., *Where Are We Now?*, 9 ADOPTION Q. 19, 38–39 (2006); Coakley & Berrick, *supra* note 112, at 107.

115. *See generally* RICHARD P. BARTH & MARIANNE BERRY, ADOPTION AND DISRUPTION: RATES, RISKS, AND RESPONSES (James K. Whittaker ed., 1988)

B. Enforcement Differences

Four differences in the consequences of enforcement might justify licensing adoptive but not biological parents. First, if procreating required a license, unlicensed pregnant women might feel coerced into seeking an abortion or hiding their pregnancies and risking harm from poor prenatal care. If abortions were unavailable, licensing might compel them to carry a child to term that they could not keep.[116] Adoption screening does not produce these outcomes. Second, because women experience the challenges of pregnancy and childbirth, licensing parents might disproportionately burden women, which is not the case for licensing adoption.[117] Third, procreation and adoption happen on vastly different scales. In 2019, about 120,000 children were adopted in the United States, and nearly 4 million children were born.[118] There are too many biological parents for us to screen adequately. Also, if we removed children from all unlicensed biological parents, we would not have enough adoptive homes and would need to institutionalize them.[119] This scale problem does not apply to adoptive placements. Finally, legal doctrines create incentives to investigate adoptive homes that do not apply to biological parents. Governments are less likely to be financially liable when they fail to protect children from their biological parents than when they place them in a dangerous foster or adoptive home.[120] For this reason, the state must take great care in adoption placements, while it need not monitor biological parents as closely.

These arguments do not justify our practices of screening adoptive but not biological parents. First, it is unclear whether all the objections would apply (or have as much force) if unlicensed procreation led to monitoring rather than child removal. Second, as others have noted, if concern about coerced abortion or hidden pregnancy were the reason not to license parents, we would extend licensing to parents who use assisted reproduction.[121] We could require a license before hiring a surrogate

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116. De Wispelaere & Weinstock, *Adoption over Sexual Reproduction*, *supra* note 50, at 211–12; Daniel Engster, *The Place of Parenting Within a Liberal Theory of Justice: The Private Parenting Model, Parental Licenses, or Public Parenting Support?*, 36 SOC. THEORY & PRAC. 233, 247–48 (2010).

117. Engster, *supra* note 116, at 248–49.

118. On births, see Joyce A. Martin et al., *Births: Final Data for* 2019, NAT'L VITAL STATS. REPS, at 1, 2 (Mar. 23, 2021), https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-02-508.pdf [https://perma.cc/8Q6L-LEZS]. On adoptions, see *Trends in U.S. Adoptions: 2010–2019*, CHILD.'S BUREAU at 4 (April 2022), https://www.childwelfare.gov/pubPDFs/adopted2010_19.pdf [https://perma.cc/F6QM-K5UJ].

119. De Wispelaere & Weinstock, *Licensing Parents*, *supra* note 55, at 202; Engster, *supra* note 116, at 249–51; Freiman, *supra* note 1, at 120.

120. *See* DeShaney v. Winnebago Cnty. Dep't. Soc. Servs., 489 U.S. 198, 201 (1989).

121. No state conducts individualized investigations before allowing someone to use artificial insemination, IVF, or surrogacy (with donated genetic materials or otherwise). Some states prohibit surrogacy. But none allows surrogacy for a restricted class of intended parents (such as married parents). No state forbids IVF or artificial insemination by single or unmarried people. However, some states grant paternity presumptions to the consenting spouse of a married woman (and protect sperm donors from parental status) but deny those benefits to unmarried partners or single parents. For a recent review, see generally Thomas

mother or using artificial insemination or in vitro fertilization ("IVF"). Since no one ever becomes accidentally pregnant using these methods, we would not have to worry that licensing requirements lead to coerced abortion or incentives to hide a pregnancy. As to discrimination, it seems surprising that we would reject parental licensing based on concern for gender discrimination if we are not also concerned about race- and class-based discrimination from adoption screening. If we care about the discriminatory impact of our child placement systems, we should oppose parental licensing and aggressive adoption screening. If the scope of biological parenting is the problem, we could select a subgroup of parents for licensing requirements, perhaps emphasizing those most at risk for committing abuse.[122] Unless we are persuaded by discrimination or false positive concerns, our inability to screen all biological parents is not a good reason to screen none. As to legal liability, the argument is unsatisfactory. The government could satisfy any plausible duty to protect children from danger with much less intrusive scrutiny. Having satisfied that minimal obligation, it would not have any liability-based reason to scrutinize adoptive families more than their biological counterparts.

In summary, this Part considered whether people who reject anti-licensing arguments based on discrimination and low base rates might oppose parental licensing and support adoption scrutiny. I noted arguments for this view, all with some merit. However, upon inspection, these arguments do not justify scrutinizing adoptions but not biological parents.

V. HOW SHOULD ADOPTION PRACTICE CHANGE?

If adoption were a right, our rules would need to change, though the details are hard to predict. As noted earlier, the right to adopt would not imply a duty to make children available for adoption or to provide any prospective parent with a child, just as the right to marry does not obligate anyone to make themselves available to become my spouse.

Governments might presume all prospective adoptive parents have a right to adopt, just as we presume most biological parents have parenting rights.[123] Nevertheless, we would not allocate available children based exclusively on the application order, as Elizabeth Bartholet suggested. Basic adoption screening seems necessary to protect children from serious and avoidable harm, and few people would object that it discriminates or interferes with fundamental rights. Without screening, people might adopt children for evil purposes, such as sexual abuse or labor trafficking. If the government can reduce these outcomes through limited

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B. James, *Assisted Reproduction: Reforming State Statutes After* Obergefell v. Hodges *and* Pavan v. Smith, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 261 (2019).

122. Of course, licensing only some parents might rely on criteria that correlate with race or income. However, if discrimination is the basis for rejecting licensing, we should also worry about adoption screening.

123. Many states do not assign parenting rights to unwed fathers who fail to show commitment to their children or establish relationships with them. Unlike mothers and fathers who demonstrate commitment to the child, their rights can be terminated without showing unfitness based on a finding that termination is in the child's best interest. *See, e.g.*, CAL. FAM. CODE § 7664(c) (West 2023); Lehr v. Robertson, 463 U.S. 248, 262 (1983).

criminal background checks, interviews, or reference checks, it should do so.[124] Such screening would be less expensive and intrusive (and subject to less discretion) than inquiries about the quality of an applicant's marriage or psychological health.

Adoption rights pose challenging questions about equality: must we treat all minimally fit applicants equally? An alternative would be to prioritize placement based on parental need (as we do with the distribution of organs). We might prefer placing children into childless homes on the theory that those who wish to be parents but already have children need the adoption placement less than those with no children. If we prioritize these prospective parents, we must decide whether to prefer infertile people over those who choose not to procreate. These issues are too complex for treatment here.

Although the right to adopt would apply to everyone who is not demonstrably unfit to parent, the consequences of this right would depend on whether the adopting parent was a stranger, foster parent, or stepparent and whether the adoption took place via private placement or government agency. It also would depend on empirical questions (such as whether screening rules benefit children) and comparisons to regulating biological parents with similar interests.[125] A few examples are explored below.

A. Adoption by Strangers with No Prior Relationship

Appropriate screening for adoptive parents with no connection to the child depends on empirical questions and treating adoptive parents comparably to similarly situated biological parents. I argued above that the false discovery rate is far too high to warrant parental licensing. However, the question is less clear for stranger adoption when the adoptive parent has no relationship with the child. Whether screening makes sense depends on how predictive our tests are; the appropriate base rate for abuse and neglect; whether more scrutiny unduly reduces the pool of prospective parents; and whether other families would adopt the child if a specific adoptive parent is rejected. I also noted practical and symbolic problems with a system that screens adoptive placements to protect healthy, white infants while not providing similar protection to other children.

These concerns might lead us to conclude that screening for potential neglect is unwarranted. If so, we would screen stranger adoptions to exclude those with a known history of child abuse.[126]

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124. BARTHOLET, *supra* note 2, at 78–79. In the context of international adoptions, the failure of adequate investigations has been alleged to produce such outcomes. *See* Georgia Gebhardt, *Hello Mommy and Daddy, How in the World Did They Let You Become My Parents?*, 46 FAM. L. Q. 419, 422–23 (2012).

125. The legal rules might also depend on whether a right to adopt arose from equal protection, due process, or statutory change.

126. Excluding known child abusers from those eligible to adopt would not suffer from the serious false positive problems noted with parental licensing tests. Recidivism rates among those who sexually abuse children are high. *See* Robert A. Prentky et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & HUM. BEHAV. 635 (1997). So, there is not a similar low base rate issue. As well, predictive tools for recidivism are reasonably good. *See* Jill S. Levinson & John W. Morin, *Risk Assessment in Child Sexual Abuse Cases*, 85 CHILD WELFARE 59 (2006).

Moreover, whatever screening we do for stranger adoptions should extend to all parents who use assisted reproduction. Before hiring a surrogate mother or beginning IVF or artificial insemination, biological parents have no relationship with the potential child. Indeed, the case for screening biological parents who use assisted reproduction is stronger than for adoption screening. Unlike adoptable children, who might be stuck in foster care or institutions if not placed, potential children who are never conceived due to screening do not suffer. If we are unwilling to extend screening to assisted reproduction, the under inclusion might constitute discrimination against infertile people or a failure to take the right of family formation seriously.

One exception to treating adoption and assisted reproduction similarly might be screening to prevent adoption disruption. This is a problem not much faced by biological parents. If we had effective ways to predict adoption disruption, we might screen adoptive parents for children at substantial risk for adoption disruption if several homes were available.

B. Adoption by Relatives or Current Foster Parents

Prospective adoptive parents bonded to children resemble biological parents. This group includes foster parents, many stepparents, and other relatives who adopt. Concerns for false positives and discrimination suggest that we should not screen them very much beyond background checks for a history of sexual abuse or violence toward children. We would find such intrusions unwarranted in the case of biological parents.

Depending on how we resolve questions about stranger adoptions, we might see significantly more vetting of stranger adoptions than adoptions by current foster parents. This outcome could lead to changes in foster care. If states could vet foster parents more aggressively before placement than in anticipation of adoption, they might increase foster parent scrutiny. Additionally, foster-to-adopt programs might become less common. This consequence might be desirable since foster-to-adopt programs might undermine reunification efforts.[127]

C. Private Adoption Placements

Birth parents (usually mothers) often prefer to place their children in homes that match their values. They might prefer open adoption, religious families (sometimes specific religions), or married or opposite-sex couples. Birth parents' abilities to effectuate these goals vary, and their remedies for breached promises are limited. If adoption were a right, would birth parents be unable to impose these conditions or vet potential adoptive parents before agreeing to terminate their parental rights?

This topic is too complex for a full treatment here. However, I do not think adoption rights would limit birth parents' placement choices. Adoptive parents cannot demand that a specific child become available for adoption. If a birth parent

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127. For a general discussion, see generally Amy C. D'Andrade, *The Differential Effects of Concurrent Planning Practice Elements on Reunification and Adoption*, 19 RSCH. ON SOC. WORK PRAC. 446 (2009).

does not want to surrender parental rights without assurances about their child's placement quality, a right to adopt need not undermine the birth parent's claim.

People might think birth parents have no right to make choices about the future of children they choose not to parent. They give up their parental rights by giving up their parental role. On this account, we should not allow birth parents to exercise any control over the placement of their children unless we do so for practical reasons, such as persuading them to agree to adoption in circumstances where adoption seems like the best outcome.

Others disagree with this account. Biological parents arguably have duties to care for their children by rearing them or arranging for others to take on that responsibility. We might think that parents who rear children deserve the right to control their children's upbringing because they need such rights to fulfill their parental duties. Parents who place children for adoption also need the right to select a placement so they can fulfill their duty to give the child the best possible home. If adoption placement is a loving parental act—often the parent's final loving act—rather than an act of abandoning parental duties, then it deserves protection.

D. Special Problems of Discrimination

Adoption placement decisions implicate equality and antidiscrimination norms. Although recognizing a right to adopt might affect these issues, I believe it would not affect them very much.

1. Cross-Racial Adoption

One area of overlap between adoption and discrimination is the placement of children of color, including Native American children.[128] These issues are complex and highly regulated.[129] Opponents of cross-racial placements worry that too many children of color are removed from their families, insufficient efforts are made at reunification, and more families of color would adopt children if they were better treated in the adoption process. They believe that cross-racial placements often harm children of color, who may feel disconnected from their identities and poorly prepared to cope with discrimination. They also worry that cross-racial placements harm the communities from which these children are removed.

Those who favor cross-racial placements reject claims that children suffer when placed with parents of a different race, regard racial matching as a form of

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128. *See, e.g.*, RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 498–99 (2003); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 42 (1993); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 938 (1998); Elizabeth Bartholet, *Private Race Preferences in Family Formation,* 107 YALE L.J. 2351, 2351 (1998); Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755, 1787 (2022).

129. The Supreme Court preserved the constitutionality of the Indian Child Welfare Act. Brackeen v. Haaland, 599 U.S. 255, 278–80 (2023). The Multiethnic Placement Act regulates cross-racial placements not involving Native American children. 42 U.S.C. § 1996(b).

race discrimination, and believe efforts to racially match children harm the intended beneficiaries by denying or delaying their access to permanent placements.

These debates reflect important questions. However, they would not look much different if we regarded adoption as a right. Those who favor cross-racial placements already assert that rules against these placements count as race discrimination and that we lack sufficient evidence that cross-racial placements harm children. If courts agree with these claims, they will reject race matching even if adoption is not a right. If they reject the discrimination claims, they will likely approve of race matching even if adoption were a right. Admittedly, recognizing adoption as a right might strengthen arguments for cross-racial adoption. The Supreme Court sometimes hints that claims based on equal protection and substantive due process mutually reinforce each other. However, this line of doctrine has not been well established and may disappear.[130]

Recognizing a right to adopt might affect cross-racial placements in one way. It might undermine efforts to screen cross-racial placements for racial literacy or other skills needed to rear a child of a different race. For example, in *DeWees v. Stevenson*, white foster parents appealed when they could not adopt their multi-racial foster child because the government thought they lacked the necessary attitudes and sensitivity.[131] The couple told social workers that race had no impact on the child, that they would do nothing special to prepare the child to cope with discrimination, and that their lack of friends of different races was unimportant. In upholding the adoption denial, the court said the parents had not been discriminated against based on race; the decision was based on their skills and attitudes.[132]

If adoption were a right, decisions like this might not be possible.[133] We would never remove a multi-racial child from the child's biological parents because they had attitudes like those in the *DeWees* case. Indeed, we would find it unreasonably intrusive for the state to ask biological parents to explain their views on these topics as a condition for procreating or retaining custody.

2. Adoption Agency Free Exercise Claims

A second intersection between adoption placement and antidiscrimination norms concerns free exercise claims advanced by religious agencies that do not want to place children with unmarried or same-sex couples or prefer to place children with religious people or members of particular faiths.[134]

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130. *See* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015); Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1331–32 (2017).

131. 779 F. Supp. 25, 27 (E.D. Pa. 1991).

132. *Id.*

133. It is possible that decisions like *DeWees* already violate federal laws such as the Multiethnic Placement Act.

134. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (finding a free exercise violation when Philadelphia refused to contract with Catholic Social Services, which would not certify unmarried couples or married same-sex couples for foster care placements); Alexander Dushku, *The Case for Creative Pluralism in Adoption and Foster*

These issues, which connect to broader demands to accommodate religiously motivated discrimination, are immensely important. However, they already invite heightened scrutiny because they pit free exercise claims against antidiscrimination rules. Adding a claim that religiously motivated placement discrimination violates family formation rights is unlikely to change the outcome. Suppose religious freedom includes the right of religious organizations to discriminate in placing children in foster or adoptive homes. In that case, it will equally entitle them to restrict the family formation rights of adoptive families. If equality norms preclude religiously motivated discrimination, family formation rights are unnecessary to vindicate adoptive parents' rights.

3. Birth Parent Discriminatory Placement Preferences

As noted above, the right to adopt need not interfere with accommodating birth parent preferences. Does it affect whether we must accommodate discriminatory birth parent preferences? This topic has received less attention than agency discrimination or accommodating adoptive parents' preferences.[135]

Birth parents sometimes seek to implement discriminatory preferences in selecting adoptive homes—such as preferences about religion, race, or sexual orientation. As with agency preferences, there is a conflict between antidiscrimination norms and contrary rights. In this case, the contrary rights are the birth parents' parenting or free exercise rights. The approach to resolving these conflicts would not change if we viewed adoption as a right.

The right to select an adoptive home for one's child might include a right to discriminate. We generally permit discrimination in private realms (like choosing a spouse or a dinner guest) and forbid it in public areas (such as housing, employment, and voting). There are plausible arguments for treating private adoption placements either way. We might equate choosing a new family for your children with choosing a spouse, a largely private matter. Alternatively, we might think the state is deeply implicated in adoption choices. Even when they are made privately, they require state approval. Approving discriminatory adoption placements thus resembles enforcing a racially restrictive covenant.

The correct answer to this question is not obvious. However, like several earlier problems, the answer might not change if we regard adoption as a right. If discriminatory parental preferences should be accommodated because the wrong of discrimination is less serious than the infringement of parental placement rights, we should defer to these preferences. The outcome would not change if we regarded adoption as a right.

Care, 131 YALE L.J. F. 246, 247–48 (2021); Gloria Rebecca Gomez, *New Law Shields Religious Foster, Adoption Agencies from Discrimination Lawsuits*, AZ MIRROR (Apr. 7, 2022, 2:17 PM), https://www.azmirror.com/2022/04/07/new-law-shields-religious-foster-adoption-agencies-from-discrimination-lawsuits/ [https://perma.cc/R3UT-2EAB].

135. Teri Dobbins Baxter, *Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children*, 67 RUTGERS U. L. REV. 905, 914–15 (2015).

VI. OBJECTIONS

A. Exacerbating Racial Bias in Parental Rights Terminations

I have argued that our system of aggressive adoption scrutiny harms children who need adoptive homes and undermines the family formation rights of prospective adoptive parents. However, correcting this injustice might exacerbate problems elsewhere in the adoption system. As I noted earlier, critics of our child welfare system think we too often remove children from fit parents, terminate parents' rights without adequate reunification efforts, and disproportionately impose this harm on families of color.

If reducing adoption scrutiny increases the number of adoption placements (as I predict), it could exacerbate these problems with child removal and reunification. Some states consider a child's adoptability as among the criteria for terminating parental rights after a finding of neglect or abuse.[136] If more adoptive homes become available, more children will be seen as adoptable, which might lead to more parental rights terminations. Additionally, since younger children are viewed as more adoptable, a system focused on adoption might prioritize early termination of parental rights over extended efforts at reunification.

It would be unfortunate if the only way to prevent the deterioration of an already broken child welfare system is to maintain a broken adoption system. There are better alternatives. Critics of the current child welfare system have offered many suggestions, such as prioritizing reunification processes and relaxing the standards for relatives to become foster parents.[137]

B. The State's Special Duties

Aggressive screening of adoptive but not biological parents might be justified because states have special duties when placing children in foster and adoptive homes. Perhaps we must be more careful when acting than refraining from acting, or when changing a child's placement compared to not changing it.[138] These action–inaction distinctions face well-known problems.[139] To avoid these difficulties, special-duty advocates might focus on a duty not to make victims worse off than we find them. For the large subset of adopted children who are removed from their biological parents because of abuse and neglect, the state must ensure their adoptive homes are better than the homes from which the state rescued them.

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136. *See, e.g.*, CAL. WELF. & INST. CODE §§ 366.26(c)(1)–(3) (West 2023).

137. *See, e.g.*, Ana Beltran & Heidi Redlich Epstein, *The Standards to License Kinship Foster Parents Around the United States: Using Research Findings to Effect Change*, 16 J. FAM. SOC. WORK 364, 380–81 (2013); Catherine A. LaBrenz et al., *The Road to Reunification: Family–and State System–Factors Associated with Successful Reunification for Children Ages Zero-to-Five*, 99 CHILD ABUSE & NEGLECT 104251, 104252 (2020).

138. For an overview, see generally McLeod & Botterell, *Faint of Heart*, *supra* note 5.

139. *See generally* Fiona Woollard & Frances Howard-Snyder, *Doing vs. Allowing Harm*, *in* STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta & Uri Nodelman eds., 2022), https://plato.stanford.edu/archives/win2022/entries/doing-allowing/ [https://perma.cc/9ZPN-BQS6].

The duty not to harm those we try to rescue is appealing.[140] However, even those who embrace this view should support reduced scrutiny in adoption placement. Suppose the state has a duty not to place children in homes that are as bad as, or worse than, their biological parents' homes. States cannot knowingly place a child into such a home and must take reasonable steps to avoid such placements. However, the state cannot guarantee that a foster or adoptive home will be better than living with their biological parents. Such a standard could not be met.

Does this reasonable-effort duty demand high scrutiny of adoptive homes? I believe not. If reducing scrutiny expands the pool of adoptive parents and places many more children into permanent homes, some children will be placed in less good homes (perhaps even some in homes worse than the ones they were removed from). However, more children will be placed in safe, permanent, loving homes who otherwise would be in institutions or long-term foster care (where their safety is even less assured). This trade-off—slightly increased risk for a few to facilitate dramatically lower risk for many—should satisfy our duty to protect vulnerable children, including those we rescue.[141]

C. The Parens Patriae *Analogy*

When the state removes children from parental custody, places them in foster or adoptive homes, and approves adoptions, it is said to act in its capacity of *parens patriae*, or parent of the nation. Simply naming this doctrinal category cannot, of course, resolve the questions posed by this Article. Nevertheless, the analogy suggests an objection. Unless we plan to prevent biological parents from screening potential adoptive homes before giving up their rights, why should the state, acting as a parent to the child, not have the same power? If we think it natural or admirable that a caring biological parent would seek the best possible home for a child before agreeing to adoption, should we not want the state to exhibit the same loving attitude when making parallel decisions?

Although this objection cannot be taken lightly, I see several reasons for treating parents and states differently. First, allowing biological parents to select or set conditions on adoptive homes might be desirable if some not-good parents prefer to keep their children rather than make placements without this power. Disallowing their choice might be bad for their children. Second, most children placed privately are infants. Unlike aggressive screening by the state in the public setting, we have less reason to worry that private screening deprives any child of a home (by deterring

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140. *See* Dov Waisman, *Negligence, Responsibility, and the Clumsy Samaritan: Is There a Fairness Rationale for the Good Samaritan Immunity?*, 29 GA. ST. U. L. REV. 609, 637–38 (2013).

141. This argument resembles the justification for Good Samaritan legal immunity. Laws in most states immunize doctors who provide emergency rescues from negligence liability. They do so partly because we are better off if more doctors try to rescue victims, even if sometimes carelessly, than if doctors are deterred from rescue by fear of liability for inept rescues. *See* Patricia H. Stewart et al., *What Does the Law Say to Good Samaritans?: A Review of Good Samaritan Statutes in 50 States and on US Airlines*, 143 CHEST 1774, 1775–76 (2013).

applicants) or deprives parents of an opportunity to rear a child.[142] By contrast, when the state scrutinizes adoptive parents, it deters potential parents from applying or persisting with their applications. It thus reduces the pool of available homes, leaving some children unnecessarily unplaced and some prospective parents unnecessarily without a child to rear. Finally, if parents cause some harm to third parties when selecting the best possible home for their child, perhaps this is forgivable. We allow parents to favor their children when making some decisions. They need not always consider what is best for society. However, the government is not supposed to benefit one child under its care in ways that harm many other children for whom it has similar responsibilities.

D. The Constitution Provides No Basis for a Right to Adopt

A right to adopt might be rejected as lacking any legal basis.[143] Of course, even if there were no constitutional or human rights grounding for this right, a statute could create a right to adopt. However, even without a statute, the U.S. Constitution might justify the right. Equal protection might support adoption rights for LGBTQ people[144] and unmarried couples.[145] Similar arguments might justify striking down other restrictive adoption rules as discriminating based on disability because they deny parenting opportunities to people incapable of procreating.[146]

An alternative strategy would rely on fundamental constitutional rights. Courts extol the virtues of family life, connecting family formation rights to privacy, association, dignity, and ordered liberty.[147] There is currently little hope for

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142. If biological parents prefer placement in homes with other children, perhaps their preference will reduce the number of parents who have a chance to rear at least one child.

143. For a review of reasons to reject a constitutional right to adopt on both due process and equal protection grounds, see generally Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J. L. & FAM. STUD. 345 (2003).

144. Ann M. Reding, Lofton v. Kearney*: Equal Protection Mandates Equal Adoption Rights*, 36 U.C. DAVIS L. REV. 1285, 1295, 1300 (2003).

145. Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 329–30, 334–35 (2006). Equal protection has been used to oppose racial matching in adoption placement. *See, e.g.*, Drummond v. Fulton Cnty. Dep't of Fam. & Child.'s Servs., 563 F.2d 1200, 1205–06 (5th Cir. 1977) (upholding use of race in adoption decision against equal protection challenge).

146. On discrimination and infertility as a disability, see generally David Orentlicher, *Discrimination Out of Dismissiveness: The Example of Infertility*, 85 IND. L.J. 143 (2010).

147. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (describing marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association . . . for as noble a purpose as any involved in our prior decisions"); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause."); Obergefell v. Hodges, 576 U.S. 644, 666 (2015) (" The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.") (internal citation omitted).

expanding federal privacy-based constitutional rights in the United States, particularly given the Supreme Court's emphasis on tying unenumerated rights to historical practice.[148] Nevertheless, in theory, due process could support a family formation right that includes adoption.[149]

Some family formation cases (concerning contraception, sterilization,[150] and the federally defunct right to abortion) include language referring to family life. Nevertheless, these precedents might be understood narrowly not to protect a general right to family formation. Instead, they protect rights to avoid government monitoring of intimate settings and to control bodily integrity, genetic material, and sexual activity. Other cases (such as the series of unwed father cases)[151] might be read narrowly to protect only family relationships that include genetic ties.[152]

Stronger support for a constitutional right to adopt might be found in aspects of parent–child law that de-emphasize genetic connection.[153] For example, the long history of treating a mother's husband as the child's father, even if he lacks genetic connection to a child, suggests that the law recognizes some rights of nongenetic parents.[154] Additionally, once children are adopted, the adoptive parents

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148. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2260 (2022).

149. For an argument that agency discrimination in adoption placement is unconstitutional, see Constance J. Miller, *Best Interests of Children and the Interests of Adoptive Parents: Isn't It Time for Comprehensive Reform*, 21 GONZ. L. REV. 749, 776–78 (1986).

150. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 540–41(1942).

151. *E.g.*, Stanley v. Illinois, 405 U.S. 645, 658 (1972) (finding an unwed father who lived with children before mother's death could not be deprived of parental status unless shown to be unfit); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (finding an unwed father who never lived with child, shouldered any responsibility, or sought to legitimate child could not prevent stepparent adoption and need not be treated equally with the birth mother); Caban v. Mohammed, 441 U.S. 380, 394 (1979) (finding it violated equal protection to allow mothers to prevent a child's adoption but not grant the same rights to fathers in a case where the unwed father lived with and provided support to the child); Lehr v. Robertson, 463 U.S. 248, 267–68 (1983) (finding an unwed father who did not register his status in registry was not entitled to notice of child's adoption. Unlike the father in *Caban*, the father in this case did not come forward in a timely way to participate in rearing his child).

152. In *Lehr*, the Court said:

> 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.

463 U.S. at 262.

153. *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 316–17, 356 (2020).

154. *See* Michael H. v. Gerald D., 491 U.S. 110, 129–32 (1989). However, this history of statutory protection does not seem to have constitutional status, since states that seek to remove protections from husbands and grant them to genetic parents have succeeded in that effort. After the *Michael H.* decision, California amended its statutes to permit paternity challenges when the father of a child born to a married woman has welcomed the

have the same constitutional rights as genetic parents to direct their children's upbringing and not have parental rights terminated absent unfitness. This equivalence suggests that protected interests in being a parent can exist without any genetic bond. However, both examples protect formal institutions (marriage and adoption) and rely on longstanding historical precedents. The informal relationship of being a prospective adoptive parent might not fit these categories.

The strongest precedent for adoption as part of a family formation right comes from marriage cases.[155] The right to marry protects entry into new relationships, not merely ongoing relationships, and does not depend on genetic connections or bodily integrity. In these ways, it resembles adoption.

Some people might deny that adoption can be a constitutionally protected right because it is a positive liberty (not usually protected by the U.S. Constitution) or because it is a state-created status to which no one is entitled. In the former version, associational and family formation rights are purely negative. The state may not sterilize citizens involuntarily or criminalize consensual intimacy, but it need not facilitate or fund procreation or any other means of child acquisition.[156] In the latter version, states have no obligation to bestow state-created statuses.

Both arguments face challenges. Negative and positive liberties are difficult to separate when the state monopolizes access to a good or activity. For example, if the government blocked all communication via the phone, mail, internet, satellite, radio, and television but never punished anyone for speech, we would not say it respected the negative liberty of speech. Rather, the state would inhibit the negative liberty of speech by controlling all effective communication channels. The state's monopoly on foster placement and adoption approval is not this extreme. However, it too calls into question the distinction between negative and positive liberty.

No one is entitled to rear a child or to the genetic material to create one. However, because the state monopolizes final approval of placements, declarations of parental status, and (at least for public adoptions) the selection of homes for children needing rearing, it must provide those seeking an opportunity for childrearing a fair system for distributing that scarce resource. In some ways, the problem resembles what organ distribution might look like if the state dictated the process. The state need not provide everyone needing a transplant with a new heart.

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child into his home and held the child out as his own. This revision would have protected the biological father in *Michael H*. *See* CAL. FAM. CODE § 7610 (West 2014).

155. *See* Loving v. Virginia, 388 US 1, 11–12 (1967) (striking down an anti-miscegenation statute); Zablocki v. Redhail, 434 U.S. 374, 390–91 (1978) (striking down a Wisconsin law prohibiting noncustodial parents from marrying if they were behind on child support payments or their children were at risk of needing public support); Turner v. Safley, 482 U.S. 78, 97 (1987) (striking down Missouri ban on inmate marriages); Obergefell v. Hodges, 567 U.S. 644, 680–81 (2015) (striking down ban on same-sex marriages). As Barbara Woodhouse argued, these cases recognize a fundamental right to establish a "legally sanctioned family bond and the liberty to be free of . . . discrimination in forging one's most intimate relationships." Woodhouse, *supra* note 4, at 300.

156. *See* Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 25–26, 29 (2014).

However, if only the state distributes organs, people who need them are entitled to a distribution system that fairly considers their interests.[157] Children are not like organs; they have rights that must be respected. However, the organs example suggests that fairness constraints apply in distributing scarce opportunities regulated by the government, even if one thinks the government has no duty to supply them.

The second argument (that people cannot have rights in state-created statuses) must contend with the counterexample of marriage.[158] The state does not create marital intimacy or religious marriage. However, legally sanctioned marriage is a state-created institution. Nevertheless, marriage recognition has been held to be a right (requiring feasible access and nondiscrimination). The reason we recognize a right to participate in a state-created institution connects to the argument about positive liberties. By asserting monopoly power to declare which intimate relationships deserve state sanction, the state facilitates intimacy for some people and inhibits it for others through material and dignitary benefits. Perhaps the state could withdraw from regulating marriage and then have no further duties to provide anyone access to the benefits of marital status.[159] However, once it monopolizes the status, it owes people a duty of fair distribution.

Arguably, the status of being a legal parent resembles the status of being a spouse.[160] They are similar in being state-created institutions. In this regard, marriage as a right undermines the claim that adoption cannot be a right because it is state created.

In summary, although constitutional cases can be read narrowly to avoid positing a family formation right, a natural and appealing interpretation includes protecting such a right. The moral justification for protecting marriage, procreation, and parent–child association seems broader than sexual autonomy, genetic ties, and bodily integrity. It relies on families' important and distinctive role in our lives. These moral ideas, widely recited by judges, provide reasons for interpreting legal doctrine as supporting a right to be a parent. Those who cannot procreate have interests in association and autonomy like those underlying biological parents' rights to rear children.

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157. *See* Thomas Gutmann & Walter Land, *The Ethics of Organ Allocation: The State of Debate*, 11 TRANSPLANTATION REVS. 191, 199 (1997); Benjamin Mintz, *Analyzing the OPTN Under the State Action Doctrine—Can UNOS's Organ Allocation Criteria Survive Strict Scrutiny?*, 28 COLUM. J. L. & SOC. PROBS. 339, 339–40, 342 (1995).

158. Several of the *Obergefell* dissents suggested that constitutional protections for liberty should be restricted to negative liberties and for this reason should not extend to marriage. Justice Thomas said: "Whether we define 'liberty' as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it." 576 U.S. at 728 (Thomas, J., dissenting). Chief Justice Roberts commented: "Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment." *Id.* at 701 (Roberts, C.J., dissenting). However, the dissenters did not seem inclined to question other marriage cases involving opposite-sex couples.

159. *But see* Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1263 (2015).

160. *See* Meyer, *supra* note 4, at 910–11; Woodhouse, *supra* note 4, at 308.

CONCLUSION

Although biological and prospective adoptive parents are not similar in all ways, their interests in family formation are similar and equally entitled to legal protection. We should not achieve this equality by scrutinizing biological parents as aggressively as we now screen adoptive homes. Parental licensing and aggressive adoptive screening lead to discrimination. They also harm many more children than they help. Arguments for rejecting all parental rights are unpersuasive and even if accepted, do not justify the harm to children caused by adoption scrutiny and parental licensing. Instead, we should recognize adoption rights as part of the right to make decisions about family formation.