IN FAMILY LAW, LOVE'S GOT A LOT TO DO WITH IT: A RESPONSE TO PHILLIP SHAVER

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I. INTRODUCTION

Phillip Shaver and his co-authors succinctly encapsulate contemporary psychological theory on interpersonal attachment—primarily parent-child attachment and its role in creating lifelong attachment patterns—and seek to outline the relevance of such research for both social policy and law. They direct our attention to three areas: adult relationship conflict, including both domestic violence and divorce; criminal behavior, particularly among juveniles; and foster care, with a special emphasis on removal of the children of incarcerated mothers.

In each of these areas the proposed diagnosis is essentially the same: insecure attachment patterns, both avoidant and anxious, are associated with dysfunctional coping patterns and negative behaviors, toward intimates (as in domestic violence), others (as in criminal or anti-social behavior), or the self (as in substance abuse). Thus, Shaver *et al.* assert that insecure attachment patterns are an under-recognized cause of legal-system involvement.[1] More, they imply that legal system can influence

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[1] *See* Phillip R. Shaver et al., *What's Love Got to Do with It? Insecurity and Anger in Attachment Relationships*, 16 VA. J. SOC. POL'Y & L. 491 (2009) (manuscript at 29, on file with author). It is worth noting Shaver et al.'s causal language. I do not understand them to be asserting that insecure attachment patterns are the sole (or even the primary) cause of the negative outcomes they describe. *See, e.g., id.* (manuscript at 5) (citing longitudinal studies showing that lack of a "safe haven" or "secure base" is *correlated* with poor outcomes); *id.* (manuscript at 10) (citing "association" between avoidant attachment and anger suppression among males with history of violence). They do, however, appear to be arguing something well beyond simple correlation. *See, e.g., id.* (manuscript at 9) (asserting that insecure attachment patterns "contribute to relationship conflict and sometimes lead to domestic violence"), *id.* (manuscript at 24) (and are "responsible for" drug and alcohol abuse). Arguing for a causal contribution, even a small one, for insecure attachment is not uncontroversial.

the development of secure or insecure attachment patterns among those properly before it, such as minor children whose parents are in conflict, unavailable, or unfit.

Also constant across these domains is the cure they preach: attachment-oriented treatment plans.[2] When seeking to help abused persons stay out of destructive relationships, their review suggests, we ought to understand that anxious attachment patterns pose a particular challenge for some and warrant direct attention. So too with hostile former spouses working toward viable child support and custody arrangements, incarcerated persons addicted to alcohol and drugs, children removed from incarcerated parents, juveniles placed in detention, and foster parents struggling to provide adequate support for the children they take in. If in those situations we could identify the impact of insecure attachment patterns and better tailor treatment plans to reshape such patterns, they urge, we might have a positive impact on the affected persons' future relationships, anti-social behaviors, and capacity for healthy self-care.

It's a compelling case and an ambitious program. It is also relatively clear how the diagnosis and prescription could shape social policy. Many of the hopeful examples to which Shaver *et al.* point[3] implicate social welfare spending, encouraging public and private investment in, for example, comprehensive counseling programs for perpetrators and victims of domestic violence, as well as in meaningful therapeutic interventions within prisons, jails, and juvenile detention facilities. They also counsel more thoughtful programmatic choices within social service provision—for example, designing the screening and training of foster parents so as to better enable them to provide healthy attachment opportunities for children. Such spending and programming choices are obviously enormously important. It is not immediately clear from Shaver *et al.*'s account, though, how their attachment perspective might shape *law*, including *family* law, beyond shaping the content of the counseling-and-family-support elements that often are packaged into family-law outcomes and that may sometimes accompany incarceration.

In this Comment I explore the possible legal implications of attachment theory, with a focus on the specific family law domains

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See, e.g., Everett Waters & Donna M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Things for the Wrong Reasons*, 12 N.Y.U. REV. L. & SOC. CHANGE 505, 510-12 (1983-84).

[2] *See* Shaver et al., *supra* note 1 (manuscript at 24-25, 27, 28, 30).

[3] *See id.* (manuscript at 19) (parenting workshops); *id.* (manuscript at 27) ("attachment-focused interventions" with "high-risk parents"); *id.* (manuscript at 28) ("'Attachment and Biobehavioral Catch-up' intervention program[s]").

discussed by Shaver *et al.* I show that many areas of family law—particularly the legal framework for foster care, adoption, and post-divorce custody of minor children—already seek to cultivate and reward attachment. But attachment is not and cannot be the sole—or even, perhaps, the most important—factor driving most legal determinations. Recognizing the importance of secure attachment does not answer difficult questions about how best to achieve it, particularly within the context of competing claims. In fact, taking an attachment perspective in isolation might lead to normatively bad outcomes. However, there are instances in which an attachment focus should be legally determinative, for it may sometimes illuminate outcomes that are all upside and no downside. The Comment concludes by offering some thoughts about law-relevant social policy implications.

II. ATTACHMENT AND FAMILY LAW: A STARTING POINT, NOT AN ANSWER

A child's attachment—or lack of attachment—to significant adults in her life has long been recognized as an important factor in legal determinations as to establishment of parental rights, post-divorce custody and visitation, foster care, adoption, and the rights of non-parents to maintain contact with children.

To be sure, legal decision-makers generally have not undertaken to distinguish between different types of insecure attachment, nor have they used the psychoanalytically-based language popularized by Bowlby. But though their rhetoric does not map precisely onto that of psychologists, it maps rather closely. As legislatures and courts have moved past the property-law concepts that once dominated the legal treatment of children[4] they have spoken in broader terms about emotional bonds, attachments, and consistency of care and support. The Supreme Court has, for example, cited with approval the states' desire to preserve a child's "family ties whenever possible,"[5] relied heavily on the impact of substantive adult-child "relationships,"[6] and acknowledged the importance of "emotional attachments that derive from the intimacy of

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[4] *See* Robert J. Levy, *Custody Law and the ALI's Principles: A Little History, a Little Policy, and Some Very Tentative Judgments*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 67, 68 & n.6 (Robin Fretwell Wilson ed., 2006) (citing HOMER H. CLARK, 2 LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 496 (2d ed. 1987)).

[5] Stanley v. Illinois, 405 U.S. 645, 652 (1972) (quoting Ill. Rev. Stat., c.37, § 701-2).

[6] Caban v. Mohammed, 441 U.S. 380, 397 (1979) (stating that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.") (Stewart, J. dissenting).

daily association."[7] Such adult-child emotional bonds are valued not in the abstract, but because they are thought necessary to the healthy psychological development of children.[8] These concepts track the core concepts of attachment theory.

If the role of healthy adult-child attachment historically was largely implicit in family law, particularly its child welfare aspect, its importance came into much sharper focus following the 1973 publication of the influential (if sometimes controversial) *Beyond the Best Interests of the Child*.[9] That volume introduced the concept of the "psychological parent," defined as an adult who "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs."[10] A psychological parent is, in other words, a secure attachment figure.[11] Several features of the psychological parenting theory articulated in *Beyond the Best Interests of the Child* are noteworthy. First, its authors—Goldstein, Solnit, and Freud—detailed the concomitants of healthy adult-child attachment more extensively than had prior efforts within the legal literature. Second, they proposed that such attachment was possible with *any* person sufficiently present for and invested in the child's life—not just a biological parent, and certainly not just the mother. Third, they positioned protection of a child's attachments as not just *an* important factor but *the most* important factor in legal determinations. Finally, they tied their theory to a detailed set of specific legislative recommendations, a number of which would have worked a substantial change in the family law of most states. It is difficult to overstate the influence of these ideas over the last thirty years. They "have had an impact on the law governing child welfare decisions that would exceed any academicians' wildest expectations," and "every subsequent proposal for reform of the child welfare system

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[7] Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977).

[8] *See, e.g.*, Bennett v. Jeffreys, 356 N.E.2d 277, 286 (1976) (Fuchsberg, J., concurring) (stating that "[s]ecurity, continuity and 'long-term stability' . in an on-going custodial relationship . . . are vital to the successful personality development of a child").

[9] *See* JOSEPH GOLDSTEIN *ET AL.*, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

[10] *Id.* at 98.

[11] *See* Shaver et al., *supra* note 1 (manuscript at 4) (primary caregivers are referred to as attachment figures in attachment theory). *But see* GOLDSTEIN ET AL., *supra* note 9, at 19-20 (acknowledging that children can have strong emotional attachments to unhealthy adults and still "progress emotionally within this relationship").

has drawn its vocabulary and central ideas"[12] from *Beyond the Best Interest of the Child* and its sequel.[13]

Thus, the notion that child welfare determinations should be made—at least in part—on the basis of protecting and encouraging secure attachment relationships between children and the important adults in their lives has been both firmly ensconced and specifically articulated in our law for some time. This focus unquestionably has been strengthened in recent decades, but the post-1973 shift has been one primarily of degree rather than of kind.[14] Healthy attachment is now better understood by legal decision-makers, it is more thoroughly explained in legal dispositions, and its legal status has been elevated.

However, a clear commitment to the notion that consistent, emotionally supportive adult-child bonds are to be sought and respected has not resulted in stable doctrine. Legal decision-makers can take quite different views of the persons or types of persons with whom children are likely to have such bonds; the family-care arrangements most likely to encourage such bonds; and the degree to which those bonds may influence the adult's legal status vis-à-vis the child. To grant an important role to attachment gives little guidance on how to weigh it against important rights with which it may be in tension. Further, the extent to which law should inquire into the existence and quality of adult-child attachments may differ dramatically depending on the legal posture.

First, family law is bedeviled by issues of competing attachments. Consider cases in which biological fathers have sought parental rights to children born outside of a marriage relationship with the mother. The Supreme Court has declined to hold that the biological bond is irrelevant,

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[12] Nadine Taub, *Assessing the Impact of Goldstein, Freud, and Solnit's Proposals: An Introductory Overview*, 12 N.Y.U. REV. L. & SOC. CHANGE 485, 485 (1983-84) (citing for the latter proposition Marsha Garrison, *Why Terminate Parental Rights?* 35 STAN. L. REV. 423, 446-47 (1983)). *See, e.g.*, Guardianship of Phillip B., 139 Cal. App. 3d 407, 420, 422 (Ct. App. 1983) (adopting concept of psychological parenthood despite claim that it relied "on such nebulous factors as 'love and affection'"; "[o]ur law recognizes that children generally will sustain serious emotional harm when deprived of the emotional benefits flowing from a true parent-child relationship" characterized by "bonding and attachment").

[13] JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTEREST OF THE CHILD (1979).

[14] The focus on children's emotional lives arose in the early 20th century as part of the same social reform movement leading to establishment of a separate juvenile justice system to identify and "cure" delinquency. *See, e.g.*, Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) (detailing the rise of the child-saving Progressive movement).

but has evinced a strong inclination to prioritize only those genetic fathers who have undertaken to create an ongoing, substantial, and supportive relationship with their children.[15] But acknowledging that an attachment relationship means *something* does not determine "the relative weight to be accorded biological ties and psychological ties."[16] Most problematically, the biological father's attachment with the child—even if proven—can come into conflict with attachment claims of perhaps equal or greater import in the child's life, as where the child is living with another father figure to whom attachments have formed.[17] Thus, father-child attachment is necessary but not sufficient for attainment of parental status, and the sufficiency of other considerations (including other adult-child attachments) cannot be determined solely by reference to attachment theory.

The difficult issue of competing attachments has also shaped the law of foster care. In the now-classic case of *Smith v. OFFER*, the Supreme Court was asked to determine the legal relevance of children's attachments to foster parents.[18] In that case, foster parents sought greater recognition of their relationships with children in their care by seeking to force the state to follow more stringent procedures before removing those children from foster homes, and to justify any such removal. Given the reality that foster children "often develop deep emotional ties with their foster parents," ought foster parents have the right to protest their

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[15] *See* Lehr v. Robertson, 463 U.S. 248, 256, 259-60 (1983) (extolling the "intangible fibers that connect parent and child" and noting Court's "distinction between a mere biological relationship and an actual relationship of parental responsibility"); Caban v. Mohammed, 441 U.S. 380, 392-94 (1979) (construing N.Y. Domestic Relations Law); Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (construing Georgia law); Stanley v. Illinois, 405 U.S. 645, 654-55 (1972) (construing Illinois law).

[16] *Lehr*, 463 U.S. at 262 n.18.

[17] *Id.* at 262, 263 n.19 (like *Quilloin*, this case involved biological father's objection to adoption of child by mother's new husband, with whom the child lived as part of "a family unit already in existence"). *See also* Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (rejecting idea that "a liberty interest is created by biological fatherhood plus an established parental relationship" in context implicating "the historic respect" accorded to "relationships that develop within the unitary family"). The point is not that the Court's decisions in the cases are normatively correct, but that valuing secure attachment does not (and cannot) on its own resolve such cases.

[18] 431 U.S. 816 (1977) (foster parents' challenge to adequacy of New York's pre-removal procedures). For a comprehensive account of the case, including an assessment of its effects, *see* David L. Chambers & Michael S. Wald, *Smith v. OFFER*, *in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 67 (Robert H. Mnookin ed., 1996).

removal and thus preserve the relationship, and what weight should be given to the length of the foster placement?[19]

Attachment theory provided an important starting point for the Court's analysis. Adopting the "psychological parent" theory, the Court declared that no one

> would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship. . . . [I]t is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.[20]

But consensus on that starting point did not produce unanimity, nor did it result in a holding entirely in favor of the foster parents. The fact that they may have become secure attachment figures for the child does not exist in a vacuum; as the Court noted, the relationship is intended to be temporary, and one should not be able to acquire emotional "squatter's rights in another's child."[21] Prior to *Smith v. OFFER* some state courts had gone so far as to hold that a foster parent's creation of an attachment relationship was actually a basis to terminate the placement, as such attachments are bound eventually to be ruptured and may "hinder the child's ultimate adjustment in a permanent home."[22] The *Smith v. OFFER* Court (rightly) refused to go that far, but the inherent tension in the enterprise—how to provide foster children with just enough attachment to serve the temporary purposes of foster care and still position the child for a return to old attachments (with the original caregivers) or development of new, permanent ones?—led it to defer heavily to the state's choices.

There simply is no easy way out of this predicament. Call it wrong in one direction by giving no respect to foster attachments, and children are subjected to both a rupture from the parent and a tentative and emotionally unfulfilling relationship with a detached temporary caretaker—perhaps a series of them—which virtually guarantees severe attachment issues. Call it wrong in the other, and parents who have become both available and fit will be unable to reclaim their children

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[19] *Smith*, 431 U.S. at 836.

[20] *Id.* at 844.

[21] *Id.* at 847 n.54 (quoting Bennett v. Jeffreys, *supra* note 8, at 552 n.2).

[22] *Id.* at 862 (Stewart, J., concurring) (citing approvingly to In re Jewish Child Care Ass'n (Sanders), 5 N.Y. 2d 222 (1959)); *see also* 431 U.S. at 836 n.40 (pointing to that and similar cases as examples of the "intrinsic ambiguity of foster care").

because the system is unwilling to disrupt what has matured into a full-fledged attachment with the foster parent.

A similar balancing act perennially plagues adoption law. The Adoption and Safe Families Act of 1997, for instance, was motivated in large part by the idea that children's attachment needs were being harmed by an undue focus on and unsuccessful attempts toward biological family reunification.[23] But the Act has been criticized by some children's advocates for—to name just one such complaint—inadequately prioritizing genuine reunification efforts that could preserve adequate attachment relationships.[24] Recognizing the primacy of secure attachment reveals the tension; it does not resolve it.

Second, questions of decision-making allocation as between parent and state also may come into conflict with attachment concerns. The recent high-profile "grandparent visitation" case, *Troxel v. Granville*,[25] makes that clear. At common law, non-parents had no right to compel visitation with minor children to whom they were emotionally attached. In recognition of the important and supportive role that grandparents can play in children's lives, many states in the 1980's and 1990's passed legislation to alter that rule and gave grandparents a right to seek visitation.[26] In upholding one such law in Washington State, the *Troxel* trial judge cited with approval that the grandparents in question were part of a "large, loving family" and reflected nostalgically on the nurturing he had received from his own grandparents as a child.[27] The Supreme Court reversed. While acknowledging that in "an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren," the Court held that parents, not the state, should make the judgment as to whether, how, and when those attachments would be created and maintained.[28] Justice Kennedy, in dissent, made an impassioned plea for protecting those attachments through legal coercion. He cited to the foster-care and parental-identity cases for the principle that "persons who have a strong attachment to the

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[23] Pub. L. No. 105-89, 111 Stat. 2115 (1997).

[24] Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem that Too Many Children Are Not Being Adopted Out of Foster Care or that Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141 (1999).

[25] 530 U.S. 57, 61 (2000).

[26] Some such laws concerned only limited situations, such as those in which the grandparents' child was deceased and the surviving parent sought to prevent ongoing contact between the grandchildren and her former in-laws; some reached more broadly. Moreover, some laws (such as the one at issue in *Troxel*) gave petition rights to persons other than grandparents. *See* WASH. REV. CODE § 26.10.160(3) (1994).

[27] *Troxel*, 530 U.S. at 61.

[28] *Id.* at 70.

child" and "the concomitant motivation to act in a responsible way to ensure the child's welfare" ought sometimes to be allowed to petition for visitation, as "where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child."[29]

The existence of this debate shows the limits of the attachment perspective. All sides agreed that it is better for children to enjoy the consistent, competent support of loving adults such as grandparents. To this degree, the attachment perspective is useful; it provides common ground and identifies shared values. But whether the state or parent should be the gatekeeper to such attachments is a different question. The majority would leave that decision to a presumptively fit parent in all instances. They would do so not because of a judgment that parents are best positioned to know which other adults are secure attachment figures; their authority to curtail contact, based in parental autonomy, includes the right to cut off competent, loving adults and thus harm their children's attachments. In contrast, certain of the dissenters (including Kennedy) would allow the state to weigh in when a judge determines that the non-parent plays an important and healthy role. If one thinks the encouragement of adult-child attachment to be the paramount goal, the latter approach is clearly preferable. However, few would dispute that parental autonomy is due some significant consideration. Such issues cannot be answered solely by appeal to empiricism about attachment.[30]

Third, the proper methods of promoting attachment are subject to legitimate debate. The law of post-divorce custody and visitation, which has at different points in time adopted very different tactics, illustrates this well. Historically, resolution of custody disputes between opposite-sex biological parents reflected rigid *ex ante* judgments as to which parent was most likely to be a source of secure attachment.[31] Most states deemed the mother the presumptive primary caregiver,[32] to whom

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[29] *Id.* at 99 (Kennedy, J., dissenting) (quoting *In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998) in part).

[30] *See generally* Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279.

[31] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 665 (1972) (Burger, J., dissenting) ("[A] State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter."). Of course, the law also reflected rigid ideas about the nature of family, as reflected in laws severely disadvantaging children born out of wedlock. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Gomez v. Perez, 409 U.S. 535 (1973) (per curiam); Levy v. Louisiana, 391 U.S. 68 (1968).

[32] Attachment theory equates "primary caregiver" with attachment figure. Shaver et al., *supra* note 1 (manuscript at 4).

physical custody therefore would be given.[33] Such laws also reflected strong ideas about the time frame within which the statutorily-privileged attachment was most important, as seen in the once-ubiquitous "tender years" presumption.[34] The underlying notion was not just that biological mothers were in fact the primary attachment figures but that, as a child-development matter, they should be.[35] With societal shifts in various attitudes about families, including the role of fathers, these categorical rules eventually gave way to the now well-known "best interest of the child" standard.[36] Though much criticized—primarily for its indeterminacy and the ease with which it lends itself to state overreaching[37]—the "best interest of the child" standard theoretically allowed custody decisions to be made on the basis of individualized consideration of the availability, track record, and nurturing qualities of competing potential caregivers.

"Best interest of the child" has not been the final word, however; the proper way to cultivate and reward secure attachment after a break in the parents' relationship remains subject to debate. Joint custody arrangements came into vogue in part on the theory that they would best facilitate healthy attachment with both parents.[38] Courts also have experimented with awarding primary custody to the parent judged most

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[33] *See* Levy, *supra* note 4, at 68 & nn.7-10.

[34] *See id.* Query, though, whether certain of Shaver et al.'s research suggests the legitimacy of the tender years presumption. If it is true that attachment patterns are observable at twelve to eighteen months and "tend to persist," we would want to particularly prioritize secure attachment during that period. Shaver et al., *supra* note 1 (manuscript at 5). However, we would still need to know more about whether attachment during early infancy needs to be with a mother figure, and to what extent unhealthy patterns necessarily "persist" or can be significantly altered later in childhood (or life) by specific interventions (as Shaver et al. appear strongly to suggest).

[35] Elizabeth S. Scott, *Pluralism, Parental Preference and Child Custody*, 80 CAL. L. REV. 615, 630-33 & n.47 (1992); *see also* Everett Waters & Donna M. Noyes, *Psychological Parenting v. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Thing for the Wrong Reasons*, 12 N.Y.U. REV. L. & SOC. CHANGE 505, 508-510 (1983-84). Sometimes referred to by the misleadingly broad label "attachment theory," this legal regime presumed that children had only one primary attachment relationship, that with the mother. In later years the concept of multiple attachments became more popular.

[36] *See, e.g.*, Uniform Marriage and Divorce Act § 402 (amended 1973).

[37] *See, e.g.*, Martin Guggenheim, *The Political and Legal Implications of the Psychological Parenting Theory*, 12 N.Y.U. REV. L. & SOC. CHANGE 545, 549-53 (1983-84).

[38] *See* Levy, *supra* note 4, at 69 & nn.14-17 (asserting the theory, which has been disputed, that "if divorced fathers are not deprived of authority over their children they will continue to support them and stay emotionally attached to them, to the child's developmental advantage").

likely to allow the child's continued relationship with the other parent, a strategy—referred to as the "friendly parent" rule—that might maximize attachment opportunities.[39] Another theory—the "approximation standard"—has now acquired a significant following. First urged by Elizabeth Scott in 1992, "approximation" seeks to conform post-divorce parenting to pre-divorce patterns.[40] Rather than presume attachment patterns based on a parent's gender or enforce an ideal of the child's equal attachment to both parents, this approach "seeks to gauge the strength of existing bonds and to perpetuate them through the custody arrangement."[41] Emotional continuity, it is thought, is best attained by literally continuing the emotional investment patterns to which the child is accustomed. This approach has been adopted by the American Law Institute in its *Principles of the Law of Family Dissolution*[42] as well as by certain states.[43]

Every single one of the above variants of custody law has been justified by recourse to attachment theory. Thus, there is widespread agreement over the benefits of parent-child attachment, but legitimate debate over how best to achieve it. Indeed, Shaver *et al.* point to evidence suggesting that no particular legal scheme for post-divorce custody is necessarily tied to better attachment outcomes. If "good parenting," particularly by mothers, moderates the association between divorce and attachment problems for the children, and if "dysfunctional family dynamics" rather than the divorce itself account for the differences,[44] then perhaps any custodial arrangement is fine if executed by parents who know how to foster secure attachment patterns, and no custodial arrangement can make up for parents who don't. If this is so, perhaps we are better off focusing our energy on direct intervention to improve parenting skills—something that is best achieved through policy, education, and counseling initiatives—rather than mandating particular custodial schemes.

To sum up thus far: secure adult-child attachments are vital to healthy child development, a fact the modern law of parental rights, custody and visitation, foster care, and adoption seeks to acknowledge and reflect. Encouraging and rewarding such attachments is a worthy

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[39] *See id.* at 71-74 (describing the "friendly parent" rule).

[40] Scott, *supra* note 35, at 637-43 (1992).

[41] *Id.* at 632; *see also* Levy, *supra* note 4, at 74-78.

[42] AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 180-248 (2002). *See also* Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles on the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 35-41 (2002).

[43] *See, e.g.*, W.VA. CODE § 48-9-206 (2008) ("Allocation of custodial responsibility").

[44] Shaver et al., *supra* note 1 (manuscript at 20-22).

goal, and to the extent that family law now elevates it above the property-rights concepts of the past, the law has improved. But valuing attachment provides no obvious answers to how such attachments are best achieved, does not resolve tensions among competing interests, and does not clearly indicate when law—as opposed to social policy, education, or psychoanalysis—ought to accommodate that value.

III. THE VALUE OF ATTACHMENT THEORY FOR FAMILY LAW

But perhaps this encapsulation gives attachment theory unduly short shrift. It may be possible to isolate instances in which a strong commitment to attachment theory ought to tip the legal balance in a particular direction. There are, indeed, situations in which focusing on children's attachments is lopsidedly positive, and it is in those situations that the insights are most usefully invoked.

First, though, one could challenge the assertion that the dilemmas posed in the previous section demonstrate the limits of attachment theory's utility for law. It may be the case not that an attachment focus is inadequate to answer the tough questions but, rather, that legal decision-makers have been unwilling to give attachment its due. Tepid commitment to the principle could be the source of the perceived tension. This arguably was the position taken by Goldstein, Solnit, and Freud, who believed that a proper understanding of psychological parenthood necessarily drove specific child-welfare reforms. They urged us to wholly embrace the child's perspective, to look at the available options through the lens of the child's emotional life and to use the child's accelerated concept of time, not that of adults or the notoriously slow legal system—and they promised that if we did, we would understand how our child welfare law needed to change.[45] Perhaps, then, we should resolve all these thorny legal issues by measuring which of all possible outcomes is most likely to provide the child with the greatest number of fully secure attachment relationships in her life.

But this goes too far. Fostering secure attachments cannot serve as a sole (or primary) justification for state intervention—such as removing a child from the home or subjecting the family to state supervision. Parents may be anxious or avoidant ones and may inculcate those patterns in their children, but this does not render them unfit.[46] Though child

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[45] *See* GOLDSTEIN, *supra* note 9, at 31-52.

[46] This observation is relevant to Shaver *et al.*'s concern about entrusting children of incarcerated women to the kinship care of their grandmothers, as those grandmothers may have been responsible for the mothers' attachment issues and will have the same effect on the grandchildren. *See* Shaver et al., *supra* note 1 (manuscript at 27). Even assuming (likely counterfactually, in my view) that all incarcerated women with children have significant attachment

welfare law should protect children from privation—environments in which they have *no* opportunity to form *any* minimally acceptable attachment—to further police the psychological relationship between parent and child is a step we may implement only through non-coercive means. The pull toward intervention is harder to resist if we start measuring parenting not by the dichotomous fit/unfit classification but by a continuum concept of attachment. It is easy enough to state that within the universe of fit parents there are those whose attachments with their children are sufficiently insecure as to create future psychological difficulties, perhaps even severe ones, but that the individual and social harm of removing children from those imperfect families outweighs any benefit. Unfortunately, this premise is stronger in theory than in practice. Attachment has been invoked to justify state intervention in essentially fit, if profoundly imperfect, families.[47] We do a poor job of internalizing the concept of "good enough" where child welfare is concerned; and particularly where enticing alternatives—such as psychologically better-adjusted alternative caregivers—dangle nearby, we can lose sight of the broader principle.

The issue is, however, potentially quite different where attachment is used not to justify otherwise questionable state intervention but to inform the treatment of persons already properly subject to state power. Where divorcing parents seek a judicial determination of custody and support, where children are legitimately in foster care and must be cared for, returned to their parents, or freed for adoption, or where adults seek

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issues, and assuming (perhaps counterfactually) that those issues were caused by the grandmothers, it is not obvious why this would lead to a legal concern about kinship placement; the children are going to learn poor attachment patterns from either mother or grandmother. If the mother is minimally fit, it is preferable for her to continue caring for the child—not because the grandmother (like her) is going to inculcate insecure attachment, but because the additional stress of separation from the mother is additionally harmful to the child. Thus, Shaver *et al.* are correct that their concerns lean in the direction of avoiding maternal incarceration. But if the mother is not minimally fit or the offense is too serious for her to escape incarceration, and if prisons do not radically reform their potential for in-house childcare, the child must be placed with someone; and a kinship placement with a fit grandparent is more likely than a stranger placement to preserve some existing attachment, even if its patterns reflect anxiety or avoidance.

[47] Guggenheim, *supra* note 37, at 551 (arguing that courts have "seized upon the psychological parenting phenomenon" as an easy solution, with the result that "a politically neutral theory about human behavior works untold harm in actual practice"). Goldstein *et al.* have defended themselves against charges that their view weakens commitment to family non-intervention, as they explicitly stated that preservation of existing families was paramount. GOLDSTEIN, *supra* note 9, at 7-8; *Interview with Joseph Goldstein*, 12 N.Y.U. REV. L. & SOC. CHANGE 575, 575 (1983-84).

a legal status commensurate with their emotional role, perhaps law should promote and reward secure attachment above all other interests.

This, too, likely goes too far, for—as the previous section demonstrated—other important interests often are at stake. Even jurisdictions using the "approximation" approach to custody contain an exception for situations in which "the child would be harmed because of a gross disparity in the quality of the emotional attachments between each parent and the child."[48] In the foster care and adoption contexts a myopic focus on attachment favors a competent immediate caregiver, especially where the separation from an earlier caregiver has been prolonged and even where the initial separation was unfair or unavoidable. This is particularly so if the original attachment figure is just good enough, while the new one is very good indeed.[49] Attachment simply cannot be the trump card.

But where a child's welfare or a family's fate already properly is subject to legal regulation, there are some instances in which a focus on healthy attachments generates significant benefits without a downside, and in those instances law should strongly reflect attachment theory.

Courts and legislatures should not, for example, dismiss legitimate attachment concerns in favor of rigid, status-based, and discriminatory judgments. One historical example is now-invalidated statutes divesting unmarried fathers of any parental rights, no matter their relationship with their children. In *Stanley v. Illinois*, the Supreme Court invalidated a state law excluding unmarried fathers from the definition of "parent."[50] The result of that law was that a biological father who had functioned as a parent and formed attachments with his children was barred from retaining custody after their mother died; they became wards of the state.[51] As the Court correctly determined in that case, it is illogical to disrupt legitimate attachment relationships because of adherence to a particular, rigid view of unmarried fathers.[52]

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[48] W.VA. CODE § 48-9-206(a)(4) (2008).

[49] *See* Bennett v. Marrow, 399 N.Y.S.2d 697, 699 (N.Y. App. Div. 1977) (upholding order granting custody to foster mother over biological mother on basis of child's attachment to former, supporting the trial court's conclusion that though biological mother was fit and provided for child's needs, she had not "begun to respond to Gina Marie's emotional needs," resulting in "an emotional void . . . between mother and daughter").

[50] 405 U.S. at 658.

[51] Once common, such a rule also had the effect of freeing an unmarried father from the parental obligations of providing for his children's welfare.

[52] *Stanley*, 405 U.S. at 652-53 (though many unmarried fathers may be uninvolved or unfit, Stanley was not, and "the State spites its own articulated goals when it needlessly separates him from his family"). Conversely, it is

A more contemporary example is that of non-biological gay and lesbian parents. Many courts and state legislatures have recognized the parental rights of gay and lesbian persons who function as psychological parents (often referred to in this context as "de facto" parents), either to children born to the other partner or to those absorbed into the family through surrogacy, foster care, and adoption.[53] In reaching these determinations, legal decision-makers have relied heavily on the emotional attachments such parent figures form with their children. This is normatively desirable, as to deny those bonds would be to elevate discriminatory societal attitudes about sexual orientation above the value of providing for the well-being of children.[54] Unfortunately, some states and courts have taken a different path, dismissing attachment concerns in favor of discriminatory, status-based determinations. In *Lofton v. Sec'y of Dep't of Children and Family Services*, for instance, the 11th Circuit upheld a Florida statute that bars gay and lesbian persons from adopting children (though not from serving as foster parents).[55] Among the plaintiffs was a gay couple that had provided long-term foster care for a number of HIV-positive children. One child, for whom they had cared for years, was legally freed for adoption and they then sought to adopt him. While acknowledging the "deeply loving emotional bonds" between the child and his would-be parents, affirming that parental influence shapes "their children's psychology, character, and personality for years to come," and purporting to promote "the best interest of the child," the court nonetheless upheld the state's weak and discriminatory rationales for barring the adoption.[56] The court reached this result in the

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perverse to deny all rights to men who have acted as secure attachment figures and later are discovered not to be the biological parent. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); Sean H. v. Leila H., 783 N.Y.S.2d 785 (Sup. Ct. 2004). Attachment theory would counsel a different result. *See* ALI PRINCIPLES, *supra* note 42, at § 2.03 (1) (classifying such a person as a "parent by estoppel").

[53] For an overview, see Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 934 (2000).

[54] Those issues have also been raised in determinations as to whether a gay or lesbian parent may retain custody of or visitation with his or her biological children despite a former partner's objection. There are many such cases. *See, e.g.*, C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004). Proper respect for attachment counsels the route that some states and courts have taken: rather than disadvantage the non-biological partner because of sexual orientation, her claims should be evaluated with the same criteria applicable to any divorce or separation case involving heterosexual couples in which a significant attachment relationship with the child has formed.

[55] 358 F.3d 804 (11th Cir. 2004) (upholding 1977 Fla. Laws, ch. 77-140, § 1, Fla. Stat. § 63.042(3) (2002)).

[56] *Lofton*, 358 U.S. at 815, 819, 810 (expressing fear that plaintiffs' position would create family rights in "any collection of individuals living together and

face of uncontroverted evidence that the plaintiffs were the only attachment figures the child had ever known or had any reasonable prospect of knowing. Florida's law, which fortunately stands alone in the United States,[57] values condemnation of gay and lesbian persons more than it values the attachment needs of adoptable children (not to mention all the other benefits of legally-recognized parenting, such as child support and inheritance rights). Adequate appreciation of attachment would have led the 11th Circuit to invalidate it.[58]

Attachment theory lends itself to other all-upside applications. In *Smith v. OFFER*, for example, the Court correctly recognized the potentially dispositive nature of attachment where the state seeks not family reunification but transfer of a child to another foster home.[59] If the foster parent-child attachment is minimally secure, even if perhaps more anxious or avoidant than the ideal, the state should have to articulate a very compelling reason to trade it out for another temporary placement. Thus, in that case respect for existing attachment rightly was invoked to halt the harmful practice of shuffling placements.] And while in post-divorce custody disputes there is no substitute for good parenting, solid research may indicate which types of arrangements pose the fewest obstacles to good parenting or create the best buffer against poor parenting. If one type of arrangement appears clearly to fit that bill,

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enjoying strong emotional bonds" and upset the result of *Smith v. OFFER*). Perversely, Florida was content to allow the child to remain as a foster placement, and even offered the would-be parents the option of serving as "legal guardians," but would not legitimize the parent-child relationship.

[57] Unfortunately, some states are now attempting to reach the same result with an approach less obviously aimed at gay and lesbian persons: they have chosen to bar adoption by unmarried cohabitating persons. This category necessarily includes all cohabitating homosexual couples, who are in those states barred from marrying and from obtaining recognition for marriages lawfully entered into elsewhere. *See, e.g.*, Cole v. Arkansas, No. CV-2008-14284, *available at* http://www.aclu.org/pdfs/lgbt/cole_v_arkansas_complaintv2.pdf (challenging "An Act Providing That an Individual Who Is Cohabiting Outside of a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less Than Eighteen Years Old," approved by statewide ballot measure in Nov. 2008).

[58] A Florida trial judge recently ruled the adoption ban unconstitutional for precisely this reason. *See In re* Adoption of Doe, 2008 WL 5006172, at *20 (Fla. Cir. Ct., Nov. 25, 2008) (noting that a "child in need of love, safety and stability does not first consider the sexual orientation of his parent. . . . John and James . . . were removed from an environment perilous to their physical, emotional and educational well being. Their biological parents relinquished them to the State, which in turn placed them into an environment that allowed them, eventually, to heal, and now flourish.").

[59] *Smith*, 431 U.S. at 852-53 (distinguishing between interest of, and procedure due, foster parents when removal sought for placement of child in different foster home rather than for return to natural parents).

the law should encourage it. If, as is more likely, different types will work for different families, the law should facilitate sound choices. Again, the goal is not optimal attachment; we must be comfortable with some level of imperfection. But if particular schemes clearly maximize possibility and minimize harm it would be foolish not to favor them.

One final all-upside legal approach is suggested by Shaver *et al.*'s contribution. They note that emotional attachments between former spouses persist after divorce and that these ongoing attachments underlie the intense conflict and contradictory push-pull impulses that all too often characterize post-divorce legal battles.[60] In addition to the hopeful psychological interventions they mention,[61] changes in family law may encourage better post-divorce collaboration in support of mutual goals. Clare Huntington has argued convincingly for recognition of such ongoing commitments, moving away from a family law system that "freezes" the relationship at the moment of rupture.[62] While the precise contours of such a reinvented system are not yet delineated, they likely would include greater reliance on mediation and collaborative decision-making models. There is no reason not to pursue such options, and every reason to do so.

IV. THE IMPORTANCE OF SOCIAL-SERVICE PROGRAMMING THAT REFLECTS ATTACHMENT NEEDS

Finally, it is important to note that not all law-relevant changes need take the shape of law reform. The social-services aspect of law matters enormously. To the extent that our existing legal regime can become more responsive to the psychological needs of those who use and rely upon it, we all benefit. It is not quite accurate to say that such social welfare investment has no downside, for it costs money. But in many instances we are spending money regardless and could simply be spending it better; in others the downstream benefit more than justifies the cost.

In their contribution, Shaver *et al.* outline at least two such situations. First, pointing to an argued connection between juvenile delinquency and insecure attachment, they cite a study indicating that detained juveniles fare better when they are able to form secure attachment bonds with staff members.[63] On this basis, they assert that "establishing security enhancing relationships should receive top priority

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[60] *See* Shaver et al., *supra* note 1 (manuscript at 17-19).

[61] *Id.* (manuscript at 19-20).

[62] *See* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245 (2008).

[63] *See* Shaver et al., *supra* note 1 (manuscript at 24) (suggesting that attachment avoidance is associated with juvenile delinquency and describing studies on juveniles in residential treatment).

in rehabilitation programs."[64] I agree. We ought to, though, have a healthy skepticism about the promise of detained adolescents' attachments to legal authority figures, for such a focus has dangers. It is reminiscent of the rhetoric invoked in the earliest days of juvenile justice, when the juvenile judge was imagined to be a "wise and merciful father."[65] At that time it was presumed that any child committing an offense was being poorly parented and that bonding with the judge and probation officer, who would function as (superior) parental stand-ins, would lead wayward youth back to psychological health and law-abiding behavior. While the juvenile system shaped by adherence to this model was infinitely superior to treating children like adult criminals (a state of affairs to which we are, sadly, fast returning), it led to extreme state overreaching and interference with the rights of both juveniles and parents.[66] But so long as we can agree that the state never should haul young people into its juvenile jurisdiction because of parent/child attachment problems and that the existence of such problems cannot justify greater restrictions on the young person than otherwise would be fair, if a young person nonetheless is subject to state control it is to everyone's benefit to provide opportunities for secure attachment formation. Particularly given the appalling conditions present in so many juvenile facilities today, and the extraordinary neglect and abuse many juveniles suffer at the hands of staff members,[67] a re-commitment to actual rehabilitation is in order, and encouraging true mentorship, emotional support, and guidance from staff would be a most welcome development.

Second, Shaver *et al.* point to research detailing the contribution of insecure attachment patterns to domestic violence. It appears from their discussion that either an anxious or avoidant attachment pattern can contribute to domestic violence, as a perpetrator or victim.[68] It is difficult

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[64] *Id.* (manuscript at 25).

[65] Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

[66] *See, e.g., In re* Gault, 387 U.S. 1 (1967).

[67] *See* Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005).

[68] Shaver et al., *supra* note 1 (manuscript at 11-16). I understand Shaver *et al.* to assert that an anxious pattern might create excessive fear of abandonment, resulting in violence against a partner who seeks to leave or withdraw affection, see *id.* (manuscript at 14-15), but possibly also leading to inability to leave an abusive partner, *see id.* (manuscript at 16). They also assert that those with avoidance patterns are more likely (presumably as compared with securely attached persons) to engage in domestic violence and revenge-seeking behavior, *see id.* (manuscript at 12), but that avoidance is also associated with victimhood, *see id.* (manuscript at 16). Therefore, I understand the claim to be that any non-secure pattern can contribute to either perpetration or victimhood, though for different reasons.

to say how such an insight might materially affect domestic violence laws. From a criminal law perspective, so long as a perpetrator is minimally sane and voluntarily commits an assaultive act with the requisite *mens rea*, he may be punished, regardless of psychodynamic factors that may have contributed to his actions. Though those factors could be taken into consideration at sentencing, to do so in cases of domestic violence—and not other types of crimes—would be met with swift protest, regarded as a throwback to the bad old days when family violence was deemed an understandable aspect of heterosexual relationships. But if we care about prevention and rehabilitation, we ought to care about identifying the contributors to domestic violence and investing in programs—both within and outside the criminal justice system—that can uncover and redirect them. Similarly, if we care about providing effective victims' services, we should invest in similar programs for potential and actual victims. Our system often purports to do just these things; however, our commitment to such programs—particularly for perpetrators—is fickle, often fading at the first hint of non-negligible short-term budgetary impacts.[69] The research synopsized by Shaver *et al.* is a reminder that turning our back on such social policies comes at a cost.

V. CONCLUSION

From Shaver *et al.*'s contribution, it is apparent that attachment patterns, strongly shaped by childhood experiences, are a vital aspect of the people we become. These patterns may well influence the extent to which our actions open us to state intervention, as well as the shape such intervention should take. As this Comment has shown, our law already seeks to take such considerations into account, and in some instances respect for attachment may be legally determinative. But as a general matter, family law is enriched, not determined, by an adequate appreciation of attachment concerns.

There is much we still do not know. The legal relevance of the attachment perspective would benefit, for example, from more information about the plasticity of attachment patterns. If, as Shaver *et al.* suggest, many negative patterns are observable at twelve to eighteen months and tend to persist, but later-in-life treatment programs have been shown to be successful in altering them, such patterns must be at least somewhat plastic.[70] How might law best exploit that capacity? Also relevant would be research on the number of primary attachment

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[69] This same point pertains to Shaver *et al.*'s recommendations regarding treatment programs for persons incarcerated in prisons and jails, particularly those with substance abuse disorders. *See* Shaver et al., *supra* note 1 (manuscript at 24).

[70] Shaver et al., *supra* note 1 (manuscript at 5, 30).

relationships from which a child can benefit. Is there, for example, any good reason to continue to limit the number of possible parents to two?[71]

Our family law, and the social services with which it frequently comes bundled, undoubtedly will benefit from the answers to such questions. Though we cannot look to attachment theory for all of our answers, we can use it to arrive at some.

[71] The ALI Principles impose no cap on the number of possible parent figures (legal parents, parents by estoppel, and *de facto* parents) a child may have.