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Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties and Parents

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CHILDREN, KIN, AND COURT: DESIGNING THIRD PARTY CUSTODY POLICY TO PROTECT CHILDREN, THIRD PARTIES, AND PARENTS

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ABSTRACT

Millions of American children are raised primarily by people other than their parents, mostly by grandparents and other kin, and millions more are raised by third parties for some period of their childhood. In most such situations, informal arrangements negotiated by family members and kinship networks effectively provide care for these children. Many cases, however, require some formal legal arrangement; third party custody orders are needed to obtain necessary services and benefits for children whose parents are absent, and to protect children in the rare but still significant instances in which a parent is abusive or neglectful.

States currently have widely varying means of adjudicating child custody disputes between parents and third parties. One Supreme Court case, Troxel v. Granville*, addresses contests between parents and third parties. While* Troxel *ruled for the parent in that particular case, it neither represents a strong parents' rights opinion nor does it provide states with clear guidance on how to shape third party custody statutes. This Article argues that states should enact child custody statutes according to three primary points. First, due to the wide range of situations in which a third party custody order may be necessary, states should permit a broad set of individuals to seek custody. Concerns that broad standing provisions would lead to a flood of meritless lawsuits are not borne out by actual data in states that have had nearly unlimited standing. Second, recognizing the constitutional primacy of the parent-child relationship, states should hold third parties to a high substantive standard, and require them to prove that parental custody would harm the child in some way. Any lesser standard—such as the best interests of the child standard applied in some states—insufficiently protects relationships between parents and children. Third, recognizing that the core parental right of the "care, custody and control" of a child is at stake, states should generally hold third parties to a clear and convincing burden of proof. Most states apply a preponderance burden or have not specified a burden. One exception should apply: When a third party has acted as a parent for a significant time and a child's birth parent has not*

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done so, then that parent's constitutional rights are diminished, society's interest in maintaining the long-term bond between the child and third party is enhanced, and a lower burden of proof should apply.

INTRODUCTION

Millions of American children live with adults other than their parents, and millions of these children are raised primarily by these adults.[1] Millions more children will, at some point, require the temporary care of a third party.[2] For the most part, children in both categories depend on extended family and kinship networks to care for them when their parents cannot or will not. These third party caregivers are essential elements of American families, especially lower income and minority families.[3]

The public has recognized the tremendous scope of third party caregiving, catalyzing the coinage of new terms, like "grandfamilies."[4] Such great numbers of third parties are rearing children that Congress has passed modest legislation to assist them. In late 2008, President Bush signed a bill into law creating "kinship navigator" programs to assist kinship caregivers in obtaining services for children in

1. *See infra* Part I.A.
2. *See infra* Part I.A.
3. *See infra* note 25 and accompanying text.
4. *See, e.g.*, AARP, Guide to Public Benefits for Grandfamilies, http://www.aarp.org/families/grandparents/raising_grandchild/public_benefits_guide.html (last visited Sept. 9, 2007). The mainstream media has repeatedly noted the scope of third party caregiving. *See, e.g.*, *Grandparents Raising Grandchildren: Skipping a Generation*, ECONOMIST, June 16, 2007, at 53; Ian Urbina, *With Parents Absent, Trying to Keep Child Care in the Family*, N.Y. TIMES, July 23, 2006, § 1, at 16; Timothy Williams, *A Place for Grandparents Who Are Parents Again*, N.Y. TIMES, May 21, 2005, at B1. Even the federal government operates a website providing advice for grandparents raising grandchildren. OFFICE OF CITIZEN SERVS. & COMMC'NS, U.S. GEN. SERVS. ADMIN., GRANDPARENTS RAISING GRANDCHILDREN, http://www.usa.gov/Topics/Grandparents.shtml (last visited Oct. 7, 2008).

their care.[5] Academics have also recognized that the complex web of attachments that millions of children have do not always lend themselves to neat categories of relationships—those that receive legal recognition and those that do not.[6] Children's relationships with their parents represent the most important relationships that children have. Recognizing that importance does not diminish the importance of protecting relationships between children and other kin and third parties, and recent scholarship has addressed how the law can recognize the preeminent status of the parent-child relationship while also protecting other important relationships.[7]

Legal frameworks for third party caregiving have not kept pace with the public's awareness of it, and the lack of legal frameworks can leave families in precarious positions. For most families, perhaps even a large majority of families, informal third party custody arrangements will suffice. But in a significant number of situations, the absence of formal legal custody leaves third party caregivers and the children they care for in legal limbo. Without legal custody orders, third parties have difficulty obtaining health care for children, enrolling them in school, and obtaining other benefits or services for the children in their care. In the most emotionally fraught situations, third parties and children can find themselves without any legal authority when disagreements arise between the third parties and parents, when the parents reappear after long absences, or when involved parents behave in a manner that the third party believes harmful to the child.

To prevent these harms, I propose that states should permit certain third parties to seek and obtain custody of children. I do not argue that third party caregivers should seek formal court custody orders in all, or even most, cases; third party custody statutes would have no effect on families that have informal third party custody arrangements that work. Nor do I argue that when third parties face legal difficulties that a court custody order is the only or best legal solution. A spectrum of options from the recently enacted "kinship navigator" programs or more formal legal documents like custodial powers of attorney,[8] could help many, and perhaps most, third party caregivers

5. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 102(a), 122 Stat. 3953 (2008).

6. *See, e.g.*, Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006); Barbara Bennett Woodhouse & Sacha Coupet, Troxel v. Granville*: Implications for At Risk Children and the Amicus Curiae Role of University-Based Interdisciplinary Centers for Children*, 32 RUTGERS L.J. 857 (2001).

7. *See, e.g.*, Huntington, *supra* note *6; Woodhouse & Coupet, supra* note 6.

8. *See, e.g.*, D.C. CODE ANN. § 21-2301 (Supp. 2008) (establishing a custodial power of attorney).

obtain the services for children and provide attractive alternatives to custody litigation. Such policy options represent an important part of a comprehensive approach to third party custody issues, but such policy options are beyond the scope of this Article. I do, however, posit that no such policies can erase the need for formal legal custody in three sets of cases: when legal custody is necessary to protect deep bonds between a child and a third party who is their primary caretaker; when legal custody is necessary to obtain essential services; and when a child is at risk of severe abuse or neglect absent the legal security of a custody order.

This Article will proceed as follows. It will first explore the extent of third party caregiving and use that data to explore which third parties need access to court to obtain child custody. It will next summarize and analyze *Troxel v. Granville*, the 2000 Supreme Court case that governs third party custody and visitation. Then, applying the lessons from those two sections, it will analyze in detail three central questions that any statute providing a means for third parties to seek custody must address:

First, who, other than a parent, ought to be able to file for custody of a child? I argue that states should permit a relatively broad set of people to file for custody due to the variety of situations that require someone other than parents to have custody of a child. Strict standing limitations pose an unacceptable risk of excluding meritorious claims from court and this risk, I will argue, is more harmful than the risk that broad standing provisions will permit too many people to file harassing or meritless suits against parents.

Second, what must those third parties prove substantively to win custody of a child? This Article will argue that third parties should only obtain custody if they prove that the parents are unable or unwilling to care for the child, or that custody with the parents would be detrimental to the child. This standard is preferable to the infamously vague best interests of the child standard and balances the primacy of the parent-child relationship with children's interests to maintain relationships with significant adults in their life.

Third, what burden of proof must third parties satisfy with their substantive evidence? This Article will argue that states should require third parties to meet a clear and convincing burden in most cases. Since the legal norm remains that parents should have custody of their children, a burden of proof that equally skews error between parents and third parties is inappropriate. However, when a third party has acted as a parent—raising children while the biological parents are absent—then the law should recognize the relationship that forms be-

tween the third parties and children and apply a preponderance of the evidence standard.

I.
THE SCOPE OF THIRD PARTY CAREGIVING AND THE NEED FOR BROAD THIRD PARTY STANDING

A. Who Needs to Be Able to Seek Custody

Nearly 14 million children live with third parties[9]—adults other than their parents—and the number of children primarily cared for by third parties has been growing.[10] Before determining which of the millions of third parties who are significantly involved in children's lives should obtain custody, one must first determine which situations commonly require custody orders and thus when third parties ought to have standing to seek custody. This section seeks to identify a set of repeating fact patterns from which policy makers can derive principles for determining who should have access to court to seek custody of a child. If states prevent individuals in these common situations from having standing to seek custody, then a significant number of legitimate cases will be excluded from court to the detriment of children. States should grant these third parties standing to seek custody, and put their evidence before a court to determine if they meet a strict substantive standard.

A third party custody order can satisfy three central needs of children and third parties, and I will explore the need for third party standing in light of these needs. First, a custody order enables a third party to obtain necessary services for a child.[11] This benefit is more practical than psychological. A custody order is often the best (and some-

9. The Census Bureau estimated that 13,851,000 children lived with third parties in 2001, excluding foster children. ROSE M. KREIDER & JASON FIELDS, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, LIVING ARRANGEMENTS OF CHILDREN: 2001 11 tbl.8 (2005), *available at* http://www.census.gov/population/socdemo/child/p70-104.pdf [hereinafter LIVING ARRANGEMENTS OF CHILDREN: 2001].

10. Estimates of the rate of growth of kinship care range as high as forty percent over a ten year period. CASEY FAMILY PROGRAMS, THE KINSHIP REPORT: ASSESSING THE NEEDS OF RELATIVE CAREGIVERS AND THE CHILDREN IN THEIR CARE 18 (2003), *available at* http://www.casey.org/Resources/Archive/Publications/KinshipReport.htm [hereinafter KINSHIP REPORT].

11. This purpose demonstrates a need for broader third party custody standing than third party visitation standing. Third parties who obtain visitation rights will not have full custody and they therefore have no need for authority to seek services or benefits for the children and will lack the ability to protect the children from abusive or neglectful primary custodians. Third party visitation protects significant existing relationships between children and third parties. To serve this goal, states need only permit third parties with existing significant relationships to seek legal visitation rights. The broader goals served by third party custody orders require policymakers to consider

times only) way of addressing issues such as consenting to health care, obtaining health insurance, obtaining approval for a larger apartment,[12] making educational decisions for a child with special needs,[13] enrolling children in school, or obtaining public benefits.[14] Obtaining services is particularly important for children raised by third parties. These children, in the aggregate, require more intensive physical and mental health services than other children,[15] and are more likely to have some identified disability.[16] Children raised by third parties are also more likely to live below the poverty line, more likely to receive some form of public assistance,[17] and less likely to have health insurance.[18]

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the need to provide a broader set of individuals in a variety of situations standing to seek custody.

12. Housing laws often require some sort of custody order to add a child to a public housing lease. *See, e.g.*, D.C. MUN. REGS. tit. 14, § 6117.2 (2007).

13. The Individuals with Disabilities in Education Act (IDEA) permits a "parent" and only a parent to seek remedies for a student's right to a "free appropriate public education." *See* The Individuals with Disabilities in Education Act, 20 U.S.C. § 1415 (2006). Although a third party "acting in the place of a biological or adoptive parent . . . with whom the child lives" can qualify as a "parent" for IDEA purposes, many of the situations described in this section can lead to confusion, especially if multiple parties assert that they are the IDEA "parent." Under IDEA regulations, a biological parent is presumed to be the IDEA parent, even if a third party is the child's primary caretaker. 34 C.F.R. § 300.30(b)(1) (2007). Only a court order can change this presumption, § 300.30(b)(2), underlining the importance of those who may be a child's primary caretaker and best able to advocate for a child's educational needs to have access to court.

14. The Social Security Administration requires a third party seeking to become the representative payee for a child to prove why they are the right person to receive the child's Social Security benefits. *See* Soc. Sec. Admin. Form SSA-11, Request to Be Selected as Payee, item 3, *available at* http://www.ssa.gov/online/ssa-11.pdf. The Social Security Administration specifically asks if the child has a court-appointed legal guardian, *id.* item 5, suggesting that third parties with a legal custody order will have a much easier time obtaining important benefits for children in their care.

15. KINSHIP REPORT, *supra* note 10, at 16.

16. Nationally, 5.5% of all children living in a parent's home have a disability. TERRY LUGAILA & JULIA OVERTURF, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CHILDREN AND THE HOUSEHOLDS THEY LIVE IN: 2000 8 tbl.3 (2004), *available at* http://www.census.gov/prod/2004pubs/censr-14.pdf. That figure rises to 7.6% for children living in a grandparent's home, 7.1% for children living in another relative's home, and 7.6% of children living in a non-relative's home (excluding foster care)—increases of about 38%. *Id.*

17. *Id.* at 14 tbl.7, 15.

18. *See* JASON FIELDS, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002 19 tbl.9 (2003), *available at* http://www.census.gov/prod/2003pubs/p20-547.pdf [hereinafter CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: 2002] (showing percentages of children with health insurance for different types of children's living situations).

Second, a custody order grants legal recognition, stability, permanence, and protection for children cared for by third parties. That legal recognition protects the relationship between a primary caregiver and a child. Given the millions of long-term third party primary caregivers,[19] this is a crucial goal, and one recognized by some leading child and family advocates, such as the Casey Foundation.[20] In many murky situations—for instance, where a third party is a child's long-term primary caretaker and at least one parent seeks to regain custody (or obtain it for the first time)—a custody order protects the child's most important relationship: that with their primary caregiver. Harming that relationship could harm the child as well.[21]

Third, a custody order can protect children from neglectful or abusive parents and from state foster care systems that can separate a child from abusive or neglectful parents *and* from other family members. Policy makers should not rely on the neglect system to serve this purpose because the neglect system is a deeply imperfect way of protecting children from abuse and neglect. In most states, only the government can open a neglect case,[22] and the government's means of determining when abuse and neglect occurs reveals much room for improvement both in failing to identify actual abuse and neglect that is occurring and in initiating cases when such abuse or neglect has not occurred.[23] Third parties in the situations described below have significantly important roles in a child's life and should have the ability

19. *See supra* note 9 and accompanying text.

20. *See* KINSHIP REPORT, *supra* note 10, at 16 ("When relatives can't afford to obtain legal custody, the family stability they are trying to maintain can be disrupted at any time by the decisions of a birth parent.").

21. *See* JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 37 (Free Press 1996) (describing the "pre-eminent[ ]" role of the primary caretaker as "demonstrably more beneficial" than the role of others involved in the child's life).

22. *See, e.g.*, D.C. CODE § 16-2305 (2001) (describing government-initiated process for filing a neglect petition). Some states do permit individuals to file private neglect cases, which can lead to third party custody. *See, e.g.*, Richardson v. Richardson, 766 So. 2d 1036, 1043 (Fla. 2000) (stating that "any concerned party may seek the initiation of [dependency] proceedings"). Opening neglect cases alongside custody cases could provide some benefits including counsel for the parties and coordination of ameliorative services for parents. *See infra* notes 92–95 and accompanying text. Whether that is a good course of action is beyond the scope of this Article.

23. For example, a federal court monitor in the District of Columbia has repeatedly questioned the District's child welfare agency's performance in investigating abuse and neglect allegations in a timely and thorough manner, CTR. FOR THE STUDY OF SOC. POLICY, PROGRESS REPORT ON *LaShawn A. v. Williams* 4–8 (2006), *available at* http://www.cssp.org/uploadFiles/DC_LaShawn_A_v_Williams_Progress_Report_to_the_Court_02_13_06web.pdf, and the quality of that agency's investigations. CTR. FOR THE STUDY OF SOC. POLICY, AN ASSESSMENT OF THE QUALITY OF CHILD ABUSE AND NEGLECT INVESTIGATIVE PRACTICES IN THE DISTRICT OF COLUMBIA 2–3 (2007).

to seek custody of a child whether or not a state's imperfect neglect system sees fit to open a neglect case. If third parties in these situations were forced to depend on the state to protect children in their care, then those children would face too great a risk of abuse or neglect.

Several important caveats are worth noting before I explore such situations. First, I do not argue that a third party in all of the below situations should always win custody. When a parent voluntarily chooses to engage third parties in shared caregiving arrangements without evidence that parental custody is harming the child—as often occurs because the parent values extended kinship networks or seeks help from third party caregivers for financial reasons[24]—even very involved third parties will not have strong claims. Rather, I argue that in these situations the bonds between a third party and a child are so great, or the risk of harm to the child without a third party able to seek custody so high that courts should consider a third party's claim. Second, I do not argue that a third party in the below situations should always seek sole legal and physical custody. In many cases, joint legal or physical custody with a parent will be the most appropriate outcome, and will be sufficient to give the third party the ability to make decisions jointly with the parent, protect the child, and obtain services for him. Third, I do not argue that a custody suit of any sort is necessary in every situation in the below categories. Many, perhaps even most, families could handle these situations outside of court, informally or through temporary power of attorney or similar agreements. However, no category of situations can always be handled out of court, necessitating laws that permit third party standing.

This section will identify four categories of third parties who states should permit to seek custody: third parties who have been long-term sole primary caretakers, third parties who have shared significant caretaking responsibilities, third parties who have suddenly become primary caretakers, and third parties who seek custody to help children avoid the neglect system. For each category, I will begin with statistics demonstrating the number of children who fall into each category,[25] and discuss common situations within each category which may trigger the need for third party custody.

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24. *See* Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 250 (2004) (describing a parent's choice to involve third party caregivers as culturally linked and as "a hedge against poverty").

25. The statistics cited will be national, but the numbers of children living with and/or being primarily cared for by third parties are not evenly spread across society. Higher proportions of minority and poor children live with third parties, a disparity

1. Long-Term Sole Primary Caregivers

The Census Bureau estimated that in 2002 a total of 2.65 million children lived without either parent; about four percent of all children.[26] Of these children, about 1.2 million children lived with a grandparent; 800,000 lived with another relative; and 575,000 lived with an unrelated third party.[27] Census data suggest that the majority of these children have lived with and been primarily cared for by a third party for a significant period of time; more than three quarters of grandparents with primary caretaking responsibilities had had those responsibilities for more than one year and more than a third of such grandparents had such responsibilities for more than five years.[28] These figures do not include children living in foster care[29]—these are children who live with third parties without the state's involvement.

To illustrate these statistics, assume a severely mentally ill or drug-addicted mother gives birth and the father is unknown or not involved. The child's maternal aunt takes the child home with her, with the mother's consent or acquiescence. The mother is generally not involved in the child's life, and the aunt raises the child. As years go by, the aunt is repeatedly confronted by demands for a custody order to obtain medical care for the child, justify a larger apartment from the public housing authorities, or convince her employer to provide insurance for the child. When the child is eleven years old, the

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that Justice Brennan noted three decades ago. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 509–10 (1977). Compared to the rate for non-Hispanic whites, Asian-American grandparents are three times more likely to live with grandchildren; American Indian, Alaska Native, black, and Latino grandparents are four times more likely; and Pacific Islanders are five times more likely. *See* TAVIA SIMMONS & JANE LAWLER DYE, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000 2 (2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-31.pdf. *See generally* KINSHIP REPORT, *supra* note 10, at 17. Among families with live-in grandparents, black, American Indian and Alaska Native grandparents are more likely to be children's primary caregivers. SIMMONS & LAWLER DYE, *supra* note 25, at 3 tbl.1 (52%, of live-in black grandparents are their grandchildren's primary caretaker, compared with 42% of live-in grandparents nationally).

26. CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: 2002, *supra* note 18, at 3. This figure excludes the 235,000 foster children listed in this report; the 2.5 million figure is the sum of the remaining numbers of children listed as living with "neither parent." *Id.* at 2 tbl.1.

27. *Id*. at 2 tbl.1.

28. SIMMONS & LAWLER DYE, *supra* note 25, at 3.

29. About 500,000 children live in foster care. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., AFCARS REPORT: PRELIMINARY ESTIMATES FOR FY 2006 (2008), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm [hereinafter AFCARS REPORT].

mother reappears and demands custody, and the child does not want to be separated from the only caretaker he has ever known.

This situation is perhaps the easiest case to decide a third party custody dispute. The child's psychological parent[30] is plainly his aunt; nobody else has taken on anything approximating a primary caretaker role. The aunt is the person who raised the child and has been his parent in everything but name. This fact pattern applies just as strongly regardless of who the third party is—a grandparent, another relative, stepparent, god-parent or anyone else.

A startling case in the District of Columbia demonstrates how long-term primary caregivers need the ability to obtain custody to protect children.[31] Bessie Lee Lewis raised her grandson, Dontayvious "Tay-Tay" Greene from birth until he turned 11. Tay-Tay visited with his mother occasionally, but he had no doubt who his primary caretaker and psychological parent was. In a letter, 11 year old Tay-Tay wrote, "My grandmother is my mother." But when Lewis sought custody of Tay-Tay to obtain a public benefit that required a custody order, Tay-Tay's mother, Luvenier Lawson, reacted with fury, threatening to burn Lewis's home. Lawson arrived at Lewis's door and demanded custody. Lewis called the police and the child welfare authorities. Unfortunately, without a custody order, the authorities would do nothing. Lewis then filed an emergency motion for custody, but the judge denied her motion and dismissed her case, ruling that because Lewis was a third party, "the court does not have the authority

30. The phrase "psychological parent" derives from the influential work of Joseph Goldstein, Albert J. Solnit, Sonja Goldstein and Anna Freud. *See, e.g.*, GOLDSTEIN ET. AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE, *supra* note 21, at 81 (asserting standard that "a child's relationship with her psychological parents . . . must not be interrupted").

31. For a summary of this case, see Arthur Delaney, *Elder Hostile: Court Decision Threatens D.C.'s Grandparent Custodians*, WASH. CITY PAPER, Dec. 6, 2006, at 13, *available at* http://www.washingtoncitypaper.com/printerpage.php?id=289. In the spirit of full disclosure, another attorney in my office and I consulted with the lead attorney representing Lewis, in her ultimately fruitless effort to regain custody of Tay-Tay. We frequently cite this case to demonstrate the need for D.C.'s third party custody statute, which was enacted in July 2007, and is discussed further below.

Other examples exist. *See Safe and Stable Homes for Children and Youth Act of 2007: Hearing on B17-0041 Before the Comm. on Human Servs. of the D.C. Council*, 17th Sess. (D.C. 2007) [hereinafter *D.C. Council Comm. B17-0041*] (testimony of Brenda Carpenter) (explaining how her grandchildren's neglectful mother forcibly regained custody before the grandmother was able to obtain legal custody). *See also D.C. Council Comm. B17-0041*, *supra* (testimony of Alice Payne) (describing how her grandson's father "dropped him off" when he was ten months old, and returned two years later and used the child to steal items from stores).

to take custody of a child away from a parent and give it to a nonparent."[32]

2. *Third Parties Who Share Significant Childrearing Tasks with a Parent*

About 11 million children live with both a third party and a parent.[33] The variety of living arrangements appears to be quite significant. Although grandparents are easily the largest number—about 6.2 million of the almost 14 million children who live with third parties live with grandparents[34]—they are far from the only category. 4.7 million children live with an aunt or uncle and 3.8 million live with some other relative.[35]

A significant number of these children are primarily cared for by the third party. In 2000, the Census Bureau measured the number of grandparents raising their children's children—and the result is astounding: 2.4 million grandparents were living with grandchildren *and* were primarily responsible for raising them.[36] Many other third parties likely share significant child rearing tasks with a parent.[37]

Court cases reveal another common pattern: children living temporarily with a third party when the parent deals with their own mental health crises or battles drug addiction and then returning to the parent.[38] In the two types of situations described above, third parties share childrearing duties, sometimes alternating with parents and sometimes sharing duties on more of a day-to-day basis.

Stepparents fit into this category as well; 4.3 million children lived with stepparents in 2000.[39] Many stepparents share child-rearing tasks with the child's parent for years. If the adult couple breaks

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32. Lewis v. Lawson, Case No. DR 3117-06, Order (docketed Oct. 31, 2006) (citing W.D. v. C.S.M., 906 A.2d 317 (D.C. 2006)). *W.D.* led to the passage of D.C.'s third party custody statute, which would presumably have led to a different conclusion for Lewis and Tay-Tay.

33. The Census Bureau estimated the 2001 figure to be 13,851,000, excluding foster parents. LIVING ARRANGEMENTS OF CHILDREN: 2001, *supra* note 9, at 11 tbl.8.

34. *Id.*

35. *Id.*

36. SIMMONS & LAWLER DYE, *supra* note 25, at 1.

37. Many third parties living with parents and children will not share significant child rearing tasks, and would not fall in this category.

38. *See, e.g.*, *In re* R.A. and J.M., 891 A.2d 564, 568 (N.H. 2005) (describing how the child had spent about half of her life in her grandmother's home and half in her mother's home).

39. ROSE M. KREIDER, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ADOPTED CHILDREN AND STEPCHILDREN: 2000 2 tbl.1 (2003), *available at* http://www.census.gov/prod/2003pubs/censr-6.pdf. Stepparents generally become involved in custody disputes with parents when their relationships end or when a parent dies and a non-

up, then the stepparent might seek custody.[40] If a parent dies, a stepparent might engage in a custody fight with the parent's former partner.[41] Other commentators have aptly described some of the intellectual acrobatics—not always convincing and not always successful—required in states without clearly defined third party custody standing for stepparents.[42]

Other common situations fall into this category. Consider same sex partners raising a child from birth or adoption[43] where only one of the partners has adopted the child or only one of the partners is the biological parent (as is the case with a child conceived through artificial insemination). If the biological parent dies or if the relationship ends, then the non-biological parent ought to have standing to seek custody.[44] Also, consider the case of a man who raises a child as his own, believing the child to be his offspring. Years later, he learns that the child was the product of an affair and is the biological child of another man. He nonetheless loves the child as his own and considers himself the father, and the child considers him his father. The father

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custodial parent demands custody. *See In re* Custody of Shields, 136 P.3d 117 (Wash. 2006).

40. *See, e.g.*, Olvera v. Superior Court, 815 P.2d 925 (Ariz. Ct. App. 1991) (stepmother sought custody of husband's biological child claiming she was the child's primary caretaker for the majority of his life).

41. *See, e.g.*, *In re* Shields, 136 P.3d 117 (Wash. 2006) (involving a custody dispute between a stepparent and the surviving biological parent).

42. *See, e.g.*, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 914–15 (1984) (describing how some courts have ignored jurisdictional barriers in stepparent custody decisions); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 476–77 (1990) (noting that although some stepparents "clearly" function as parents, they cannot attain parental legal status unless the parental rights of the noncustodial biological parent are terminated).

43. When a same-sex partner raises one of the partner's children from a previous relationship, the non-biological partner is precisely like a stepparent and should be analyzed as such.

44. In situations in which partners planned to have children together and raised the child together, the non-biological parent partner operates much like a parent—the only distinction is the sexual orientation of the partner, which, from the child's perspective, presents no difference from heterosexual parents. Such partners thus should be treated as parents, not third parties. *See, e.g.*, D.C. CODE §§ 16-831.01(1), 16-831.03 (2008) (defining such partners as "de facto parents" and instructing courts to treat them as parents in custody matters); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.03(1)(c) (Tentative Draft No. 4, 2000). A full exploration of the family law involving same sex couples is beyond the scope of this Article. It suffices for my purposes to note that current law treats non-biological parent partners as third parties and, at the very least, these people with strong roles in children's lives ought to have standing to seek custody.

in all but genetics should be able to seek custody if he and the mother break up, as might occur after the news of the child's parentage is broken.[45]

Put in psychological terms, these cases involve third parties closely bonded to the child through their significant caregiving role which has been shared with a legal parent.[46] Sharing caregiving roles places the third party in an immensely important position to the child. Depending on how the adults divide the caregiving roles, the third party can be a primary caregiver, or sometimes the sole primary caregiver. The child's bond with the third party can be as strong, or stronger, as the child's bond with the parent. Even when the third party's bond to the child is less than primary, they are part of the "full network of kin attachments" that previous commentators have encouraged the law to respect.[47] Much research on children's bonding and attachment concludes that children form significant bonds with multiple individuals.[48] Identifying the "primary" or single "psychological parent"—especially at the early, standing stage of litigation—imposes what for many children is an arbitrary label on a single person, at the exclusion of other important figures. A more accurate description of many family structures would recognize a set of significant caretakers.

Despite the importance of these third party caregivers, their role as a descriptive matter is often subordinate to a parent's. And, legally, the Constitution will presume that to be the case, as will be discussed in Part IV. But third parties with significant caregiving roles, when those caregiving roles were shared with the parents, should win custody in three general sets of situations. First, third parties should win

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45. If the father was married to the mother, some states might consider him the father regardless of biological parentage. *See* Michael H. v. Gerald D., 491 U.S. 100 (1989) (upholding California law presuming man married to mother to be her child's father). But not all states do so, and this situation could occur just as easily outside the bonds of marriage.

The American Law Institute's Draft Principles regarding custody cases would deem such a man to be a "parent by estoppel" and would give him status as a parent. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.03(b)(ii), 204–08 (Tentative Draft No. 4, 2000).

46. I do not include in this category third parties who are paid to take care of children. The bonds of family and personal relationships trump the bonds of economics; babysitters, nannies, and au pairs need not be provided standing. The District of Columbia has explicitly excluded those paid by parents to take care of children from seeking custody. D.C. CODE § 16-831.02(a)(2) (2008).

47. *See* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 350 (1996).

48. *Id.* at 354–62 (summarizing the research on how children bond with multiple individuals).

custody when their caretaking role is so primary that the child has formed significantly stronger attachments to the third party than to the parent. If a stepparent or grandparents performs nearly all the daily tasks of child rearing while a parent is largely absent, and parental custody would threaten to take the child away from that primary caretaker, then parental custody may very well harm the child and third party custody (or some more modest remedy, such as third party visitation) may be appropriate. Second, if the parent is absent when the third party needs to obtain services for the child—services that require the parent's consent—then the third party may need at least joint custody to care for the children. Third, if the parent, left with sole legal authority over the child, would abuse or neglect the child such that the harm of legal intervention represents a necessary cost to protect the child, then third party custody may be necessary. If the third party's shared caretaking role stems from some limited parenting capacity by the parent,[49] then third party custody can protect the child from neglect that may flow from that diminished capacity.

3. Third Parties Who Are Not Long-Term Caretakers, but Are Suddenly Placed in a Primary Caregiving Role

A significant percentage of third parties who are primary caretakers of children have not had that role for a significant period of time.[50] The statistics cited in Parts I.A.1 and I.A.2 represent the Census' snapshot of American families—the numbers of children who, at a specific moment, lived with third parties. The census data also indicates that the number of children who, at some point in their childhood, live with third parties is significantly greater. The census data reveals that many children primarily cared for by grandparents have had that arrangement for a relatively short amount of time. The largest proportion of children, 38.5%, had been raised by a grandparent for five years or more, but 22.9% of children primarily cared for by a grandparent had been in that grandparent's care for less than one year.[51] That such a significant percentage had been raised by grandparents for a relatively short time suggests that a large number of children may

49. I suggested above, *supra* note 38 and accompanying text, that many third parties share child rearing duties due to a parent's drug addiction or mental illness. *See* NAT'L ABANDONED INFANTS ASSISTANCE RESOURCE CTR., UNIV. OF CAL. AT BERKELEY, LITERATURE REVIEW: EFFECTS OF PRENATAL SUBSTANCE EXPOSURE ON INFANT AND EARLY CHILDHOOD OUTCOMES 2 (2006), *available at* http://aia.berkeley.edu/publications/monographs.php (noting that substance abuse may lead to primary caregiver instability) [hereinafter LITERATURE REVIEW].

50. *See* SIMMONS & LAWLER DYE, *supra* note 25, at 8.

51. *See id.*, at 3 tbl.1 ("by duration of care").

move back and forth from parent to third party (or even third party to third party) over the course of their childhood. That reality suggests, in turn, that the Census' estimation of the number of children raised by third parties at a particular moment does not account for the larger number of children raised by third parties at different points in their childhood.

When a third party has been a primary caretaker for even a short period of time, the child's needs may require them to step into that role quickly. Such situations arise in several common ways. A parent may die.[52] A parent may have a debilitating illness.[53] A parent may leave a child with the third party and disappear unexpectedly. A parent may become unable to care for children for extended periods of time, due to incarceration,[54] extended inpatient treatment,[55] or deployment abroad.[56] Third parties might also obtain custody from another third party caregiver as the initial third party caregiver ages and becomes ill. During the course of the life of a child raised by a third party, some children will live through that third party's death or

52. The death of a parent may trigger the application of probate statutes, without necessitating any new third party custody statutes. A primary caretaker parent's death may set off a dispute between a third party and the surviving parent, especially if the third party has had more involvement with the child than the surviving parent. The structures described in this Article—whether through a probate statute or elsewhere—should govern such disputes. Even where probate statutes would handle some situations, they do not handle the situations described above.

53. Some states have begun to provide tools for parents in these situations, permitting parents to identify "standby guardians" to care for their children if an illness debilitates them. *See, e.g.*, D.C. CODE ANN. §§ 16-4801 to -4810 (LexisNexis 2001).

54. *See* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 346–47 (2004) (discussing impact of incarceration on families).

55. More than 100,000 people were discharged in 2005 from long-term inpatient substance abuse treatment. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP'T OF HEALTH & HUMAN SERVS., TREATMENT EPISODE DATA SET: 2005, *available at* http://wwwdasis.samhsa.gov/teds05/TEDSD2k5TOC.htm (follow "Chapter 6. Long-Term Residential Treatment Discharges: 2005" hyperlink) (last visited Feb. 7, 2009). The average length of stay for "long-term residential" treatment was 88.4 days and some treatment stays were more than 1,000 days. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP'T OF HEALTH & HUMAN SERVS., TREATMENT EPISODE DATA SET: 2005, *available at* http://wwwdasis.samhsa.gov/teds05/TEDSD2k5TOC.htm (follow "C.1 All discharges: Average length of stay in treatment (mean), maximum length of stay, and standard deviation of the mean, by type of service: TEDS 2005" hyperlink) (last visited Feb. 7, 2009).

56. *See* ABA, REPORT OF THE WORKING GROUP ON PROTECTING THE RIGHTS OF SERVICE MEMBERS 39 (2004), *available at* http://www.abanet.org/legalservices/downloads/lamp/wgprsmreport.pdf (quoting a National Guard general's identification of child custody and visitation "the single greatest area of concern" for service members deploying to battlefields or bases abroad).

debilitating illness.[57] This reality is particularly foreseeable given the older age of many kinship caregivers,[58] an actuarial reality that is particularly striking given the millions of grandparents and other older individuals who take on a primary caregiving role.

Before the third party has established *long-term* primary caregiver status, the child might have a particular medical need. Infants and other young children, especially those born prematurely or exposed to drugs in utero,[59] may have such needs before the third party has been their caretaker long enough to be considered to have filled a parental role. This concern is particularly apt for children living with third parties, who are significantly more likely to have a disability than other children.[60] The North Carolina Supreme Court described the background facts of one such case: A mother gave birth prematurely and brought her child, who had developmental delays, home to the child's grandparents' home. Before the child turned two months old, the mother moved out, leaving the child behind. The Court ruled that the grandparents properly obtained legal custody at that point.[61]

One parent's sudden inability to care for the child may impose a burden on third parties to seek custody to prevent some harm from the other parent, especially if the other parent is violent,[62] and even more so when that violence causes the disruption. One extreme case demonstrates the point: A child was raised by his mother, who had left the child's father soon after the child's birth to escape the father's violence, which was directed at her, the child, and others. The mother was eventually murdered with the child present; all involved suspected

57. *See, e.g.*, *D.C. Council Comm. B17-0041*, *supra* note 31 (statement of Johnnie Washington) (witness in favor of the D.C. third party custody bill describing how her children's caregiver—the children's grandmother—was shot and killed, and how she was hopeful that another third party close with the children could obtain custody with her consent).

58. *See* KINSHIP REPORT, *supra* note 10, at 21 (noting the health problems of caregivers "associated with aging").

59. A recent review of various studies concluded that "in-utero substance exposure can leave children vulnerable to a number of developmental problems." LITERATURE REVIEW, *supra* note 49, at 1.

60. *See supra* note 16.

61. Adams v. Tessener, 550 S.E.2d 499, 505 (N.C. 2001).

62. Parental abuse is common, occurring hundreds of thousands of times each year. More than one quarter of substantiated reports of child abuse and neglect involve physical or sexual abuse, accounting for more than 200,000 cases annually. CHILDREN'S BUREAU, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2005 xiv–xv (2007) *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf. The vast majority of perpetrators are parents. *Id.* at 70.

the father but could not prove it. The aunt could, however, prove that the father had been violent towards her, the child's mother, and others, and that the child showed symptoms of severe trauma when in the presence of the father. To protect the child from her father's violence, the aunt sought custody.[63]

In many situations involving a need for a third party to be a short-term primary caretaker, a court custody order may be unnecessary. Policymakers should consider less intrusive means of enabling third party caregivers to obtain the services necessary to take care of the child. One option is permitting parents to sign a custodial power of attorney, authorizing a third party to rear the parent's child in the parent's absence.[64] When the parent will return at a definite point—such as after a military deployment or prison term—the parent and third party can agree on a temporary arrangement without going to court.

However, the availability of temporary arrangements does not obviate the need to permit third party caretakers access to courts. Parents may become absent without making such arrangements and, if the third party later needs legal authority to obtain an important service for the child, then custody becomes the only option. Furthermore, the ability to reach consensual arrangements with one parent does not ensure the agreement of the other parent. Indeed, some custodial power of attorney statutes are conspicuously silent on how to handle disputes between parents when one seeks to transfer some parental authority to a third party and the other seeks custody for him or herself.[65] In cases where a parent seeking custody is harmful to the children, the third party needs access to court to protect them. We can reframe the court case that ensues—a third party with the support of one parent against the other parent—as a case between two parents, each with a universally accepted constitutional role, and this reframing diminishes the analytical difficulty of third party custody.[66]

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63. Newsom v. Riley, No. 3478-02 (D.C. Sup. Ct. Mar. 11, 2004). The trial court awarded the aunt custody and the case is now on appeal; the father has challenged the trial court's jurisdiction to award the aunt custody. Appellant's Br. 05-FM-371, 20–22, (Jul. 13, 2007).

64. *See, e.g.*, D.C. CODE § 21-2301 (2007).

65. *See id.* (permitting a "parent," singular, to sign a custodial power of attorney without reference to the other parent's position).

66. The boundary between cases where one parent's designation drives the third party custody arrangement (creating more of a parent vs. parent situation) and when the parent more passively acquiesces to the third party's pursuit of custody (a third party vs. parent situation) would likely prove tricky. A full exploration of whether any such cases should be adjudicated as parent vs. parent disputes is beyond the scope of this Article.

4. *When the State Has Removed a Child from His or Her Parent Due to Parental Abuse or Neglect*

All the previous categories involve situations in which third parties should have the ability to go to court to seek custody of children with whom they have a significant connection. I now address a narrower and more difficult category, based on the relationship between the parent and the child and the state's intervention in that relationship through an abuse or neglect case. In such situations, third party standing should depend on either the parent's consent to the third party's suit or state intervention in the parent-child relationship. When a parent abuses or neglects a child and the state has justifiably removed the child from the parent's care,[67] then third party custody presents one means to protect the child and the child's family from the many problems involved in the neglect system, without returning the child to an abusive or neglectful home.[68]

When a child is in the state agency's legal custody,[69] typically termed "foster care," the state executive authorities determine where the child lives, typically in a foster home or a group home. At any given moment, about 500,000 children live in foster care.[70] Many of these children will reunify with their parents,[71] but for the children who do not reunify with their parents, the state looks to other options, leaving tens of thousands of children in state care for years.[72] While in foster care, most children are separated from family members; in

67. Significant debate exists whether state child neglect systems remove children from their parents and other primary caregivers more often than necessary. *See* Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy, Review of Elizabeth Bartholet's Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative*, 113 HARV. L. REV. 1716, 1717, 1721–23 (2000) (reviewing ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT AND THE ADOPTION ALTERNATIVE (1999)). I am sympathetic to those commentators who suggest the extremely intrusive step of removing children from parents occurs far too frequently, but that step nonetheless must occur in a significant number of cases. Determining exactly when parental misconduct is so severe as to warrant such intervention, whether through a third party custody case or through state involvement, is beyond the scope of this Article.

68. By the "neglect system," I refer to situations in which state authorities remove a child from her parents' custody due to abuse or neglect and place her in state custody with judicial approval.

69. *See, e.g.* D.C. CODE § 16-2320(a)(3)(A) (2001).

70. AFCARS REPORT, *supra* note 29.

71. Judith Wildfire, Richard P. Barth & Rebecca L. Green, *Predictors of Reunification*, *in* CHILD PROTECTION: USING RESEARCH TO IMPROVE POLICY AND PRACTICE 155, 165 (Ron Haskins, Fred Wulczyun & Mary Bruce Webbs eds., 2007) (estimating the reunification rate at forty-three percent).

72. According to the most recent federal data available, 36 percent of foster children had been in foster care for two years or more. AFCARS REPORT, *supra* note 29.

fact, less than one quarter of foster children live with kin.[73] Many neglect cases eventually lead to the child being placed permanently with a third party through adoption, guardianship or custody,[74] but the process leading to this result is often not the best means to protect children and may be far more harmful to the child, the parent, and the family than permitting a third party to sue for custody early in a neglect case. Commentators have noted the long-term goal of establishing private law alternatives to neglect cases, such as custody cases.[75] Indeed, formal or informal custody with third party kin is already a common means of avoiding the filing of a neglect case and resulting involvement of child welfare agencies.[76] States should permit broad third party standing to seek custody once a neglect case has been opened to help children and families find positive alternatives to and quick exits from the neglect system.

The neglect system—without a concurrent custody case—is problematic in several ways. Because the child is in state custody, placements generally require the approval of the state agency, which places significant power in the executive. If third party kin with existing bonds with children cannot seek custody directly in court, then insufficient checks exist on this state power. Such checks are needed because many child welfare agencies will refuse to place a child in a home that does not obtain a foster care license, and the requirements to obtain a foster care license can exclude otherwise appropriate third parties, especially those with low incomes.[77] Third parties with the

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73. *Id.*

74. *See, e.g.*, COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA CHILD WELFARE SYSTEM REFORM—A THIRD PROGRESS REPORT 18 (2006) (noting the hundreds of neglect cases closed by adoption, guardianship and custody). Many cases also lead to reunification with the parent, as I will discuss below.

75. Donald N. Duquette, *Looking Ahead: A Personal Vision of the Future of Child Welfare Law*, 41 U. MICH. J. OF L. REFORM 317, 352 (2008) (calling for development of private law and "new concept of a preventative law" approach to create legal-alternatives to neglect cases). *See also* Leigh Goodmark, KEEPING KIDS OUT OF THE SYSTEM: CREATIVE LEGAL PRACTICE AS A COMMUNITY CHILD PROTECTION STRATEGY 31–40 (Sally Small Indada ed., 2001) (describing various legal services projects that help third parties "formalize caregiving arrangements through court proceedings"); NAT'L ABANDONED INFANTS ASSISTANCE RESOURCE CTR., THE PSYCHOSOCIAL WELL-BEING OF SUBSTANCE-AFFECTED CHILDREN IN RELATIVE CARE 1, 1–2 (2006) ("[Through legal proceedings], the relatives are officially recognized as caregivers of the children, while maintaining the children outside of the child welfare system.").

76. *See* Richard P. Barth, et al., *Kinship Care and Nonkinship Foster Care: Informing the New Debate*, *in* CHILD PROTECTION: USING RESEARCH TO IMPROVE POLICY AND PRACTICE 187 (Ron Haskins, Fred Wulczyn, & Mary Bruce Webb eds., 2007).

77. Recent federal legislation may mitigate this harm. The federal government will now provide funding for kinship foster homes even when states waive certain licensing requirements, thus providing financial incentives for state agencies to apply more

ability to raise a child and with an existing bond to that child could be denied a license because their home is too small,[78] because they have a criminal record,[79] or because they fail to meet some other requirement.[80] When such a rejection occurs, the neglect system separates children not only from their parents, but from all adults with whom the child has a bond, including other family members, and forces them to live in foster care or group homes. Research shows that children prefer to live with kin, and, when they are permitted to do so, are more likely to live with siblings, less likely to be further abused or neglected, and less likely to endure multiple placement changes.[81] Children's security comes not only from a parent, "but from a familiar milieu and a network of attachments,"[82] and third party custody enables the child to maintain some significant connection to that network better than foster care which can separate children from all existing connections. Placing a child in foster care rather than third party custody with an adult to whom the child is already connected also imposes a systemic burden on neglect systems which have precious few available foster homes.[83]

Second, even when a child welfare agency will place a child with kin, the child may be forced to wait for extended periods of time in foster care before being able to live with kin. Delays occur while the third party obtains a foster care license, and can be exacerbated if the third party lives across state lines, triggering a bureaucratic process that can take months and often a year or more, imposing a weightier burden on children living in cities close to state borders.[84] This delay can lead to the same harms that longer foster placements can create.

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lenient standards to relatives seeking to become foster parents. Pub. L. 110-351 § 104(a). It remains to be seen how this new provision will affect child welfare practice. This provision only affects state and local agency behavior and does not create a judicial check on agency denial of a relative's desire to take custody of a child in state custody.

78. *See, e.g.*, D.C. MUN. REGS. tit. 29, § 6007.18 (2007) (providing square footage guidelines for foster home licensing).

79. *See, e.g.*, 42 U.S.C. § 671(a)(20)(A) (2000) (prohibiting states from giving "final approval" to a potential foster parent who has certain crimes in their background, including crimes not directly related to child rearing).

80. *See* D.C. MUN. REGS. tit. 29, § 6007 (2007) (listing multiple requirements kin must meet prior to foster care licensure).

81. Barth et. al., *supra* note 76, at 187–88.

82. Cooper Davis, *supra* note 47, at 354.

83. *See* KINSHIP REPORT, *supra* note 10, at 12 (noting decline in number of available foster homes and resulting reliance on kinship placements).

84. This process is governed by the Interstate Compact on the Placement of Children (ICPC). Article III of the Compact requires a "sending agency" to obtain the "receiving" state's approval before sending a child across state lines. ASS'N OF ADM'RS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, TEXT OF

Third, a neglect case can harm parents more severely than a custody case. Upon determining that a parent has neglected a child, a child welfare agency can place the parent on the abuse and neglect registry, which can limit job opportunities for the abusive parent.[85] When a neglect case is opened, the child welfare agency and the court oversee visitation between children and parents; as a result, parents may receive less visitation rights than might have been negotiated directly between the parents and a third party. As a neglect case proceeds, if a third party cannot assume long-term caregiving responsibilities, parental rights may be terminated permanently. In fact, strict time limits are now placed on parents' rehabilitation attempts.[86] A custody case, in contrast, will not terminate a parent's rights; continued visitation and the opportunity to modify the custody order if circumstances change will remain.[87]

Recognizing the potential harm resulting from neglect cases, state policy makers should provide families with the option of resolving the situation through third party custody arrangements. Parents may choose to consent to a third party's custody petition rather than expose

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THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *available at* http://icpc.aphsa.org/Home/articles.asp (last visited Aug. 11, 2007) [hereinafter COMPACT]. For an examination of one of the various policy harms that arise when a child requires a foster care placement across state lines, see Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. & POL'Y REV. 63, 65–66 (2006). This burden is felt particularly strongly in D.C., which is separated by state lines from all of its suburbs. CTR. FOR THE STUDY OF SOC. POLICY, LASHAWN A. V. FENTY: AN ASSESSMENT OF THE DISTRICT OF COLUMBIA'S CHILD WELFARE SYSTEM 7–8 (2007). Similar problems are likely to occur in other metropolitan areas that sit on state lines, including New York City, Philadelphia, Memphis, St. Louis, Kansas City, Texarkana, and Cincinnati. Custody cases should provide an exception to Interstate Compact requirements. ICPC Article III(a) applies the compact to foster care and adoptive placements only; private custody suits are seemingly exempt. *See* COMPACT, *supra*. But some courts have extended the Compact's reach. *See In re* T.M.J., 878 A.2d 1200, 1202 n.2 (D.C. 2005) (holding that application of Compact provisions to a custody case filed within the context of a neglect case was "indisputably correct."). To permit a custody case to protect children from the harms of an ongoing neglect case, the Compact should be limited to the plain language of its text.

85. *See, e.g.*, D.C. CODE § 4-1302.03 (2001) (provision related to limited employment opportunities for individuals placed on the "Child Protection Register").

86. 42 U.S.C. § 675(5)(E) (Supp V. 2005) (requiring states, in most cases, to seek to terminate parental rights of individuals whose children have been in foster care for 15 of the previous 22 months). According to the U.S. Department of Health and Human Services, parental rights to more than 70,000 were terminated in each of the years reported, either through termination of parental rights motions or adoptions. DEP'T OF HEALTH & HUMAN SERVS., TRENDS IN FOSTER CARE AND ADOPTION, FY 2002 – FY 2007 (2008), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends_02-06.pdf.

87. D.C. CODE §§ 16-831.10 to .11 (Supp. 2008).

themselves and their children to the harms described above. Indeed, some courts have recognized parents' constitutional right to have a strong voice in where their child lives, even when the child is removed from their custody due to their own conduct.[88] The state should investigate potential kinship placements when it determines that removal is necessary.[89] When an appropriate kinship placement is available, the state should inform that kin of his or her legal options. That kin—if state law permits—could then file for custody, sparing the child and the family the difficulties of the neglect system. Some state welfare agencies already engage in this practice,[90] and have identified particular customs, such as family group conferences, that can facilitate third party custody in lieu of an open neglect case.[91]

The state may maintain an important mediating role in such cases. If the state has reason to believe that custody arrangements between a parent and a third party place the child in harm's way, either through a third party incapable of adequately raising the child, or through a third party who will return the child to a harmful parent, then the state can seek to prosecute a neglect petition or seek an alternative disposition to the parent's choice of third party custodian. The state, of course, would have to marshal sufficient evidence to prove that the parent's choice of caretaker is inadequate. Because custody is not state-managed foster care, the state could not argue against third party custody on the grounds that the third party could not obtain a foster care license for reasons unrelated to child safety.

State involvement can also provide two crucial benefits that private custody cases, absent a concurrent neglect case, do not: many and perhaps most states provide legal representation to parents when the state opens a neglect case,[92] and state neglect systems must provide service coordination to aid reunification with parents. Legal representation for a parent is particularly important when a third party seeks to break up that parent's existing custodial relationship with his or her

88. *See In re* T.J., 666 A.2d 1, 11 (D.C. 1995) (holding that "unless it is established that the parent is not competent to make such a decision . . . a parent's choice of a fit custodian for the child must be given weighty consideration").

89. 42 U.S.C. § 671(a)(15) (2000) (outlining federal requirement to make reasonable efforts to identify kin).

90. *See, e.g.*, KARIN MALM & ROB GREEN, THE URBAN INST., WHEN CHILD WELFARE AGENCIES RELY ON VOLUNTARY KINSHIP PLACEMENTS 2 (2003) ("Central to caseworker practice in Alabama is an agency philosophy that keeping families out of the system is better for them . . . .").

91. *Id.*

92. Leslie Starr Heimov et al., *The Rise of the Organizational Practice of Child Welfare Law: The Child Welfare Office*, 78 U. COLO. L. REV. 1097, 1099–1100 (2007). *See also*, D.C. CODE § 16-2304 (2001 & Supp. 2008).

child on the basis of the parent's alleged abuse or neglect, rather than previously-established bonds to the third party or the third party's existing significant caregiving role. The real-world value of an attorney provided by neglect systems may not be great,[93] but there can be little doubt that the presence of counsel for parents can protect the parent-child relationship from an overzealous third party and/or an overzealous state agency.

Neglect cases also include mandatory state-provided services, such as mental health and addiction recovery services, and as a result, many children reunify with their parents.[94] Such services do not justify keeping a neglect case open; parents should have access to necessary services for themselves and their children, regardless of the child's legal status or the existence of a neglect case. Neglect cases represent an extremely cost-inefficient means of providing services, and the neglect system often cannot force other agencies to provide services beyond what the parent would be eligible for absent the neglect case.[95] The crucial piece that the neglect system will add is a social worker required to assist the parent in obtaining necessary services, court oversight to help ensure that the social worker does so, and legal pressure to encourage the parent to comply with such services.

How to balance the potential harms and benefits of a neglect case varies from situation to situation. Policymakers, however, should follow the following generalization: When a parent consents to a third party's custody suit or when the state has determined that it must open a neglect case, then a significant risk exists that the neglect system will do more harm to the child than good, and states should open the

93. Professor Peggy Cooper Davis, a former family court judge, described the quality of parents' legal representation in blunt terms: "Parents are pathetically represented. People barely conscious were standing before me representing parents." *Caught by Good Intentions*, LAW SCH. (N.Y.U. Sch. of Law, New York, N.Y.), Autumn 2007, at 48.

94. "For the youngest children, parental participation in parenting support services increases the relative rate of reunification sevenfold, suggesting that there are available mechanisms for addressing some of the achievement of permanency." Judith Wildfire, Richard P. Barth & Rebecca L. Green, *Predictors of Reunification*, *in* CHILD PROTECTION: USING RESEARCH TO IMPROVE POLICY AND PRACTICE 155, 166 (Ron Haskins, Fred Wulczyun & Mary Bruce Webbs eds., 2007). A recent survey of eleven states estimated that reunification was achieved in forty-three percent of cases, with significant variation from state to state. *Id.* at 165. In addition, 215 cases were closed due to parental reunification in D.C. in 2005. COUNCIL FOR COURT EXCELLENCE, *supra* note 74, at 18.

95. *See In re G.G.*, *667 A.2d 1331* (D.C. 1995) (holding that a neglect judge lacks authority to order agencies to do anything beyond their existing authorities, such as provide immediate housing assistance to a particular family).

door to third parties who offer a quick exit from that system. Although the government, as a party to a neglect case, can lend its support or opposition to any custody complaint filed, the neglect system poses a sufficient risk that states should permit third parties to seek custody in those situations.

B. Translating Demographic Data and Common Situations into Policy

It is helpful to distill the above discussion into provisions that will provide standing for all of the common situations discussed above. Legislatures and courts should permit third parties to seek custody in the following situations:

(a) The third party has lived with and taken on a significant, though not necessarily primary, caretaking role for the child, for 6 of the previous 12 months;

(b) Either parent consents to the third party's complaint;

(c) The third party lives with and has taken on a primary caretaking role for the child at the time of filing; or

(d) The state has removed the children from the parents' custody through a neglect case.

II.
TROXEL V. GRANVILLE[96]

In the Supreme Court's most recent and most relevant family law opinion, a parent successfully appealed a trial court order granting her child's grandparents expanded visitation rights.[97] Although the Court ruled in the parent's favor, *Troxel* is not a strong parents' rights opinion, and has not led states to limit third parties' access to court. Few states have changed their laws in its aftermath, and some of those who have—including Washington (whose law was at issue in *Troxel*) and California, both discussed below—have done so in ways favorable to third parties and close to what I advocate in this Article. Even in the realm of third parties' rights to visit children over parents' objections—the specific issue raised before the Supreme Court—"*Troxel* has induced no startling or radical changes with respect to third-party visitation."[98]

96. Troxel v. Granville, 530 U.S. 57 (2000).

97. *Id.*

98. John DeWitt Gregory, *The Detritus of Troxel*, 40 FAM. L.Q. 133, 144 (2006). Gregory's conclusion is that the "detritus of *Troxel*" is, essentially, "not very much," at least in terms of actual changes in law and practice in the states. *See id.* at 147 (noting the lack of "significant changes in the legal landscape"). At least one post-

Despite its limited impact, *Troxel* provides the constitutional framework for disputes between third parties and parents, and thus the framework for turning the demographic data and case studies discussed in the previous section into constitutional policy. Further, the various *Troxel* opinions include important lessons for setting such policies. Specifically, as developed further below, the various *Troxel* opinions recognized the ability of states to protect the interests of third parties and children with significant relationships so long as states grant parents a substantive presumption that they act in their children's best interests. *Troxel* involved a petition for visitation filed under a Washington statute by the paternal grandparents, Jenifer and Gary Troxel, of two children who lived with their mother, Tammie Granville. The statute allowed anyone to sue for visitation rights and only required them to establish that such rights would serve the child's best interests.[99] After the children's father—the petitioners' son—died, Granville limited the grandparents' visitation and the grandparents sought expanded visitation.[100] The trial judge determined that expanded visits served the children's best interests and ruled for the Troxels.[101] The Supreme Court, in a split decision, ruled the visitation rights statute unconstitutional as applied. Justice O'Connor wrote the lead opinion for the Court on behalf of herself, Chief Justice Rehnquist, Justice Ginsburg and Justice Breyer. Justices Souter and Thomas each wrote concurring opinions, and Justices Stevens, Scalia and Kennedy dissented.

O'Connor's plurality opinion began with an important and often-overlooked recognition of a strong state interest in supporting and protecting children's relationships with third parties, especially as the frequency of family arrangements involving third parties increases. O'Connor noted that "[t]he demographic changes of the past century make it difficult to speak of an average American family."[102] With literally millions of third parties building strong relationships with children nationally, the Court recognized that states have a strong and legitimate interest in "protecting the relationships those children form

Troxel petition for certiorari to the Supreme Court has noted continuing divide among states in the standards applied to visitation disputes between third parties and parents. Petition for a Writ of Certiorari, Fausey v. Hiller, No. 06-863, at 11–20 (2006), *available at* http://www.law.virginia.edu/pdf/supct/fausey_cert.pdf, *cert denied*, 127 S. Ct. 1876 (2007).

99. WASH. REV. CODE § 26.10.160(3) (1994).

100. *Troxel*, 530 U.S. at 60–61.

101. *Id.* at 61.

102. *Id.* at 63.

with such third parties."[103] Justice Stevens' opinion took this proposition further, suggesting children have a right to maintain significant relationships.[104] Justice Kennedy also noted the large numbers of third parties significantly involved in children's lives and how they might have rights "not necessarily subject to absolute parental veto."[105] Stevens would have also recognized the state policymakers' ability "to assess in the first instance" to balance the "conflicting interests" in disputes between third parties, parents, and children.[106] Taken together, the plurality, Justice Stevens and Justice Kennedy represented six votes that, at the very least, recognized that states have some interest in protecting children's connections to third parties with whom they have significant relationships, and presumably that states could enact an appropriately tailored statute to protect these relationships.

O'Connor also reiterated the well-established constitutional right of parents "to make decisions concerning the care, custody, and control of their children."[107] The question, then, was whether the statute as applied appropriately balanced the state's interest in protecting the relationships between children and third parties with parents' rights to control access to their children. The trial court erred, O'Connor explained, because the "parent's decision that visitation would not be in the child's best interest [wa]s accorded no deference."[108] The Court concluded that states must "accord at least some special weight" to a parent's position and apply a "presumption that a fit parent will act in the best interest of his or her child."[109] Rather than wrestle with this presumption, the trial court's decision reflected a "mere disagreement" with Granville's parenting choice "and nothing more."[110]

The plurality then declined to decide whether the Constitution requires third parties to prove that the child would be harmed without visitation, leaving that constitutional question and other decisions to future case-by-case adjudication.[111]

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103. *Id.* at 64.
104. *Id.* at 88–89 (Stevens, J., dissenting).
105. *Id.* at 98 (Kennedy, J., dissenting).
106. *Id.* at 90 (Stevens, J., dissenting). The plurality opinion voiced some sympathy for permitting states to develop standards in family law, noting that "much state-court adjudication in this context occurs on a case-by-case basis," and thus not making per se decisions about standards that must be applied. *Id.* at 73 (O'Connor, J., plurality opinion).
107. *Troxel*, 530 U.S. at 66.
108. *Id.* at 67.
109. *Id.* at 69.
110. *Id.* at 68.
111. *Id.* at 73.

The *Troxel* Court's "presumption that a fit parent will act in the best interest of his or her child" raised the question of which substantive standard to apply to rebut this presumption and leads to two conclusions.[112] First, a fit parent can lose a case to a third party—a fit parent is only entitled to a rebuttable presumption. Second, implicitly, an unfit parent may be entitled to no presumption.[113] Accordingly, a third party can defeat a parent by proving *either* that the parent is unfit, or by meeting some other, less clearly delineated standard.

O'Connor made clear that the trial court's application of the wrong substantive standard—and only that error—sustained the Court's ruling.[114] O'Connor noted that Washington state's nonparental visitation statute, which permitted anyone to sue for visitation at any time, was "breathtakingly broad."[115] This oft-quoted phrase,[116] however, did not form the basis for O'Connor's decision, which turned instead on the substantive standard applied under this statute. Professor Martin Guggenheim, a leading parents' rights advocate has concluded that "the overbreadth of the law, as applied, had nothing to do with who could sue."[117] Instead, "the fatal defect in the application of the statute was the *substantive basis* upon which the trial court was permitted to order visitation over a parent's objection."[118]

Finally, the plurality granted final judgment for Granville, declining to remand the case for further proceedings.[119] The plurality noted "the burden of litigating a domestic relations proceeding," a burden which Granville had already borne in the Washington court system and the Supreme Court, as one reason not to force Granville to litigate the case further.[120] This statement arose in the context of the Court's decision not to remand the case; the plurality, however, said nothing

112. *Id.* at 69.

113. *See id.* at 68 (noting that the Troxels made no claim that Granville was unfit, and this fact "is important, for there is a presumption that fit parents act in the best interests of their children").

114. *Id.* at 69 ("The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests.").

115. *Id.* at 67.

116. LEXIS searches reveal 119 articles and 88 cases discussing *Troxel* that quote the "breathtakingly broad" phrase. (LEXIS searches were performed on Aug. 23, 2008).

117. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 22 (2005).

118. *Id.* at 23.

119. *Troxel*, 530 U.S. at 75.

120. *Id.*

about whether the burden of litigating might affect any analysis about who might have standing to file suit.

Justice Souter concurred separately, stating that he would have upheld the decision that the statute's broad standing coupled with the best interests standard rendered the visitation statute unconstitutional.[121] Souter's opinion does not, however, directly condemn either the statute's standing provision or its substantive standard. It instead found that the interaction of the two made the statute unconstitutional. Justice Souter left open the question whether, for instance, a statute with broad standing but a stricter substantive standard would satisfy the Constitution.

Justice Stevens dissented. Without focusing on the particular facts of the case and instead addressing the facial holdings of the Washington Supreme Court, Stevens would have found the statute facially sound despite the challenges to its standing provision and substantive standards.[122] Regarding standing, Stevens noted that even though anyone could sue, strangers to a child would not likely sue. "[T]here are plainly any number of cases—indeed, one suspects, *the most common to arise*—in which the 'person' among 'any' seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent."[123] Accordingly, a facial challenge would not be appropriate, even under Stevens' relatively broad view of when such challenges are appropriate.[124] Stevens went on to delineate when he thought that the constitutional rights of parents applied, at least in their strongest manner. "A parent's rights with respect to her child have . . . never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to

121. *Id.* at 76–77 (Souter, J., concurring).

122. *Id.* at 81 (Stevens, J., dissenting).

123. *Id.* at 85 (emphasis added).

124. *See id.* ("I believe that a facial challenge should fail whenever a statute has 'a plainly legitimate sweep'") (quoting Washington v. Glucksberg, 521 U.S. 702, 739–40 & n.7 (1997) (Stevens, J., concurring). Justice Stevens compares his more lenient standard for facial challenges with "the far more stringent demands" enunciated by the majority in United States v. Salerno, 481 U.S. 739, 745 (1987), which requires that "no set of circumstances exists under which the Act would be valid." *Troxel*, 530 U.S. at 85 & n.6 (quoting *Salerno*). Professor Guggenheim cites Stevens' citation to *Salerno* to suggest that the only reason the majority did not declare the Washington statute's standing provision to be unconstitutionally overbroad in *Troxel* was due to the Court's narrow grounds for permitting facial challenges. *See* GUGGENHEIM, *supra* note 117, at 22–23 & n.31. The *Glucksberg*, "plainly legitimate sweep" standard is Stevens' preferred, looser standard and under it, Stevens would not respect the facial challenge in *Troxel*. The four Justices in the plurality did not analyze the case facially, creating a majority of the Court that, contrary to Guggenheim's conclusion, would not find the statute's standing provision unconstitutionally overbroad.

the presence or absence of some embodiment of family."[125] When a parent's relationship to his or her child is weaker, or where the parent is not a part of the "family" raising the child, the parent's rights are not so strong as to absolutely trump what is best for children. Children, Stevens added, "have fundamental liberty interests . . . and so, too, must their interests be balanced in the equation."[126]

Justice Kennedy dissented, arguing that third parties ought not be required to demonstrate harm. Particularly outside the context of traditional nuclear families, requiring a showing of harm might grant parents too many rights in comparison with a third party who has developed a significant relationship with a child.[127] Kennedy also noted "that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated."[128] Kennedy did not say whether he believed the unlimited standing provision itself rendered the statute unconstitutional. Rather, he stated that he would have remanded the case for a new determination regarding the substantive standard, leaving the standing question for another day.[129]

Finally, Justices Thomas and Scalia each issued individual opinions demonstrating their contrarian view of substantive due process cases, but without impacting the subsequent legal and policy debates.[130]

125. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).
126. *Id.*
127. *Id.* at 97–98 (Kennedy, J., dissenting).
128. *Id.* at 101.
129. *Id.* at 94–95.
130. Thomas, concurring, suggesting that state judges might not be empowered to enforce unenumerated rights, such as parental rights, but noting that neither party raised the issue so the issue, in his view, remained undecided. *Id.* at 80 (Thomas, J., concurring). Scalia dissented and indicated the parties' decision not to raise that issue would not stop him from deciding it. He would have ruled for the Troxels because, in his view, parental rights were located in the Ninth Amendment (not substantive due process) and that judges lacked authority to enforce such rights. *Id.* at 91–92 (Scalia, J., dissenting). Thomas did also note that he would apply strict scrutiny to the statute at issue because it affected fundamental constitutional rights. *Id.* at 80.

III.
STANDING: WHY STATES SHOULD PERMIT BROAD ACCESS TO THE COURTS TO SEEK CUSTODY OF A CHILD

The law of third party standing in child custody cases is, in the words of one commentator, "overwhelmingly confused."[131] Nearly every state permits some third parties to seek custody of a child.[132] Although the scope and public awareness of third party caregiving has increased, courts have adjudicated custody disputes between third parties and parents for many decades.[133] But decades of litigation and policy-making have not led to a standard approach; states vary considerably in who they permit to seek custody of a child. The standing question—more so than the substantive standard addressed in *Troxel* or the burden of proof addressed in other Supreme Court cases involving parental rights[134]—divides states' laws regarding third party custody. To resolve this divide, states with narrow standing rules should broaden them.

This section will first explore the divide among states regarding third party custody standing and critique their varying viewpoints. It will then argue the first essential doctrinal point—that the Constitution does not prevent states from permitting anyone to file for custody at any time. This section will then, following the discussion in Part I, explore the policy arguments supporting broad standing provisions and rebut the counterarguments.

131. Polikoff, *supra* note 42, at 508.

132. By my count, only Wyoming does not permit third parties to seek custody. The other forty-nine states and the District of Columbia do so via statutes or case law, and are all cited in the text and footnotes, Part III.A *infra*. A full exploration of the varied statutes, cases interpreting those statutes, and common law provisions in those fifty jurisdictions is well beyond the scope of this Article. I will instead note some key statutes and cases to identify the variety and general approach of those fifty jurisdictions.

133. For example, the District of Columbia Court of Appeals cited a string of custody cases involving third parties over more than a century. W.D. v. C.S.M., 906 A.2d 317, 325 n.17 (D.C. 2006). One case common to many law school curricula, Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966), also involved a third party custody claim. Accordingly, it is incorrect to say that custody cases "were always fights between legally recognized parents." MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 117, at 102.

134. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 746 (1982) (holding that a State must support its allegations by clear and convincing evidence before severing the rights of parents in their natural child).

A. The Divide Among States

A brief survey of the wide variety of standing provisions among the states demonstrates a lack of uniformity in approaching this issue, and how some states' limitations vary, sometimes dramatically, from the needs of children and families discussed in Part I. Despite my effort to categorize states in the sections that follow, it must be noted that some states overlap categories; some states, for instance, may limit who can file to certain relatives at certain times.[135]

1. States That Permit Essentially Unlimited Standing

Several states essentially permit anyone to file for custody of a child, whether by statute or case law. California, in a statute enacted after *Troxel*, authorizes courts to grant custody to "any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child."[136] Virginia grants standing to any "person with a legitimate interest," instructing courts to construe that term "broadly . . . to accommodate the best interest of the child," and two other states have similarly broad language.[137] In Washington, a third party can seek custody if the child does not live with either parent, or the third party "alleges that neither parent is a suitable custodian."[138] In Maryland, the courts have often either placed no limitations on third-party standing, or failed to address the issue at all.[139] Other states provide similarly.[140]

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135. *See, e.g.*, MICH. COMP. LAWS SERV. § 722.26c(1)(b) (2002 & Supp. 2008) (limiting third party standing to a broad set of relatives when the biological parents did not marry each other and the custodial parent has died or gone missing).

136. CAL. FAM. CODE § 3040(a)(3) (Deering 2004).

137. VA. CODE ANN. § 20-124.1 (2004). *See also* MINN. STAT. §§ 257C.01(Subd. 3)(a), 257C.03(Subd.7)(a) (2005) (permitting an "interested third party" to seek custody); VT. STAT. ANN. tit. 14, § 2645 (2002 & Supp. 2007) (permitting "a person interested in the welfare of the minor" to seek custody in certain situations).

138. WASH. REV. CODE § 26.10.030(1) (2005). By requiring third parties to allege the grounds on which they would be entitled to custody, Washington thus introduces a pleading requirement. As discussed *infra* note 218 and accompanying text, such pleading requirements can provide one modest check against frivolous suits.

139. *See, e.g.*, McDermott v. Dougherty, 869 A.2d 751, 788 (Md. 2005). *See also* Street v. Street, 731 So. 2d 1224 (Ala. 1999) (adjudicating custody dispute involving grandparents without discussing any limits on third party standing); Richardson v. Richardson, 766 So. 2d 1036, 1043 (Fla. 2000) (holding, despite voiding a third party custody statute, that "any concerned party may seek the initiation of proceedings to protect the well-being of the child"); Ogden v. Rath, 755 A.2d 795 (R.I. 2000) (adjudicating custody dispute between grandparent and parent without discussing any limits on third party standing).

140. DEL. CODE ANN. tit. 13, § 721(e) (1999) (permitting custody cases between a parent and "any other person"); HAW. REV. STAT. § 571-46(2) (2006) (permitting custody to "be awarded to persons other than the father or mother"); IND. CODE ANN.

2. States That Limit Standing to Certain Relatives

Some states have chosen to permit only certain relatives to seek custody of children. Typically, these states identify stepparents and grandparents as individuals who can seek custody. For instance, New York has enacted a statute permitting grandparents, and only grandparents, to assert "extraordinary circumstances," including the fact that they, and not the child's parents, have been raising the child, to justify granting custody to the grandparent.[141] Texas permits a grandparent to seek custody of a child at any time.[142] New Hampshire law permits grandparents and stepparents to seek custody.[143] Other states have similar provisions.[144]

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§ 31-17-2-3(2) (2006) (permitting "a person other than a parent" to petition for custody); LA. CIV. CODE ANN. art. 133 (1999) (permitting custody to "any other person able to provide an adequate and stable environment" for the child); ME. REV. STAT. ANN. tit. 19-A, § 1653(2)(C) (1998 & Supp. 2007) (stating that the court may award parental rights to a third person); MISS. CODE ANN. § 93-5-24(1)(e)(ii) (West 2007) (permitting "any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child" to be awarded custody); MO. REV. STAT. § 452.375(5)(5)(a) (2000 & Supp. 2006) (permitting "any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child" to obtain custody); NEV. REV. STAT. ANN. § 125.480(3)(d) (2007) (permitting the court to grant custody "[t]o any other person or persons whom the court finds suitable and able to provide proper care and guidance for the child"); N.J. STAT. ANN. § 9:2-9 (West 2002) (permitting "any person interested in the welfare of such child to institute an action" for custody); N.D. CENT. CODE § 14-09-06.1 (2004) (providing for custody to "a person" who meets the substantive standard); OKLA. STAT. ANN. tit. 10, § 21.1(A)(6) (West 2007) (permitting "[a]ny other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child" to seek custody); *In re* Marriage of Reschly, 334 N.W.2d 720, 721 (Iowa 1983) (listing various types of third parties who can obtain custody under common law).

141. N.Y. DOM. REL. LAW § 72(2) (2008). New York case law, however, speaks more broadly of suits for custody between parents and all third parties. That case law imposes substantive requirements on what a third party must prove to prevail, but no limitations on *who* may file. Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976). A non-grandparent third party might still be able to use common law causes of action to seek custody.

142. TEX. FAM. CODE ANN. § 153.432 (2006).

143. *See* N.H. REV. STAT. ANN. § 461-A:6(V) (2006); *In re* R.A. and J.M., 891 A.2d 564, 577 (2005) (holding that petitions for custody are limited to stepparents and grandparents and noting that New Hampshire has avoided creating broad rules allowing for people with close, personal relationships to petition for custody).

144. Pennsylvania permits grandparents to seek custody when they have "assumed the role and responsibilities of the child's parent" for twelve months. 23 PA. CON. STAT. § 5313(b) (2006). Illinois also permits stepparents who have taken care of children for a certain amount of time to seek custody in some circumstances. 750 ILL. COMP. STAT. ANN. 5/601(3) (2006). Arkansas permits grandparents who have been children's primary caregiver for one continuous year (or six months if the child is under one year old) to intervene in custody disputes between parents and seek custody for themselves. ARK. CODE ANN. § 9-13-101(a)(2)(B) (2006). Idaho permits a grand-

On a political level, one can see the logic behind such choices. These groups represent the largest categories of third parties living with and caring for children, as discussed above.[145] And it would be politically difficult to take a stand against grandparents.[146] Grandparents have proven repeatedly that they "have significant clout in the state legislatures."[147] "One group stated that it would treat grandparents differently—permitting them greater access to court than any other third party—for obvious reasons."[148]

On a policy or philosophical level, however, limiting standing to grandparents only (or to any specified relative) makes little sense. According to the census numbers listed above, more than 1.3 million children live alone with third parties other than their parents,[149] and millions more live with their parents and third parties who are the children's primary caregivers.[150] States that permit only certain relatives to seek custody exclude some portion of those millions of children from the scope of their third party custody statutes. If a legislature wanted to favor grandparents, it could do so by instructing courts to prefer grandparents over other third parties seeking custody, without fully excluding other third parties.[151] Even this method of

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parent with whom "the child is actually residing . . . in a stable relationship" to seek custody with "the same standing as a parent." IDAHO CODE ANN. § 32-717 (2008).

145. *See supra* notes 26–27 and accompanying text.

146. Some politically powerful groups have stepped in to support grandparents in particular. This support extends beyond the custody arena to other burgeoning state efforts to support third party caregivers. For instance, the District of Columbia established a novel program providing financial support to grandparents who are primary caregivers to their grandchildren. D.C. CODE §§ 4-251.01 to .07 (2007). The local chapter of the American Association of Retired Persons strongly endorsed the bill. *See* AARP.org, District Council Passes Much Needed Grandparent Caregiver Subsidy, http://www.aarp.org/family/grandparenting/articles/district_council_passes_muchneeded_grandparent_car.html (last visited Aug. 23, 2007). The Grandparent Caregivers' Pilot Program, as its name suggests, limits its benefits to those it defines as grandparents. D.C. CODE § 4-251.01 (2007).

147. GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 117, at 17. Professor Guggenheim notes the slippery slope down which many state legislatures slide—permitting first grandparents to sue, then other relatives, and then third parties more broadly. *Id.* at 17–18. That slope is not a bad thing—it is the inevitable result of drawing standing lines that are not based on principled distinctions.

148. *American Academy of Matrimonial Lawyers Model Third-Party (Non-Parental) Contact Statute (with commentary)*, 18 J. AM. ACAD. MATRIM. LAW. 1, 6 (2002) [hereinafter *Academy*].

149. CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: 2002, *supra* note 18, at 13 tbl.10.

150. *Supra* notes 33–37 and accompanying text.

151. *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 21.1(A) (West Supp. 2008) (ranking in order of preference who may seek custody, with parents followed by grandparents, followed by other relatives, and, finally, other third parties).

favoring grandparents—while less harmful than excluding non-parents from court—is ill-advised. It seems impossible to conclude that all grandparents should be favored over all other third parties without considering the particular abilities and limitations of each grandparent and the nature of any existing relationship between a child and grandparent, and comparing those factors with the other individuals in the child's life.

States should treat all third parties alike regardless of what formal relationship they have with a child; such approach is consistent with constitutional law. Under the Constitution, one is either a parent or not; no Supreme Court case has distinguished the particular rights, if any, held by a grandparent, aunt, uncle, godparent, or others. Indeed, although *Troxel* cited some statistics unique to grandparents, Justice O'Connor explicitly recognized states' interest in protecting children's substantial relationship with "third parties," not just grandparents.[152] In other words, between grandparents and other third parties, all are equally non-parents to the child. Their precise familial relationship does not distinguish them.

Some states which determine standing by familial relationship lessen its harm by permitting a particularly broad set of relatives to sue. Georgia, for instance, permits a third party who is a "grandparent, great-grandparent, aunt, uncle, great aunt, great uncle [or] sibling" to seek custody of a child.[153] An Ohio statute permits a court to grant custody to a relative of a child when neither parent is appropriate, excluding only stepparents, godparents and other unrelated individuals.[154] When a parent has died, Michigan permits third parties to sue if, among other criteria, they are "related to the child within the fifth *degree*."[155] This broader approach is far more appealing than a "grandparents only" approach, but nonetheless fails because an individual's familial relationship (or lack thereof) does not connect with the reasons third party custody is important, discussed in Part I. Individuals who have a strong caregiving bond with a child or who are best-situated to step up and care for the child due to a parent's absence may not have a formal familial relationship.

152. Troxel v. Granville, 530 U.S. 57, 64 (2000).

153. GA. CODE ANN. § 19-7-1(b.1) (Supp. 2008).

154. OHIO REV. CODE ANN. § 3109.04(d)(2) (West Supp. 2008).

155. MICH. COMP. LAWS SERV. § 722.26c(1)(b)(iii) (West Supp. 2008) (emphasis added). *See also* WIS. STAT. ANN. §§ 767.41(3)(a), 767.41(1)(a) (West 2007) (permitting a court to grant custody to "relatives" and suggesting third parties, related or not, with physical custody might have a separate cause of action).

The converse of this criticism is also true. Permitting all grandparents (or all aunts and uncles or any other category of relative) to seek custody will permit some individuals with no substantial relationship to the child to seek custody. Securing a child's relationship with an individual with whom they do not have a relationship does not serve any goal of third party custody discussed in Part I.B. Nor is securing such relationships the province of the courts. As Martin Guggenheim has written, "[t]here are few adults in American society who would even attempt to advance the claim that a child's right includes developing a substantial relationship with a particular nonparent."[156] States should avoid the politically palatable pitfall of granting standing to particular relatives.

3. States That Limit Standing to Existing Long-Term Caretakers

Another set of states permit third parties who have taken on a role analogous to a typical parent's role to seek custody. In Arizona, third parties may seek custody in certain circumstances if they have been acting "in loco parentis,"[157] a term defined as "a person who has been treated as a parent by the child and who has formed a meaningful parental relationship with the child for a substantial period of time."[158] Other states limit third party standing to those who have similarly formed a "parent-like" or "child-parent" relationship.[159]

As Arizona's statute suggests, these states define third parties who have established parent-like relationships quite narrowly. In addition to the Arizona language quoted above, Montana defines a "child-parent relationship" as one "in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education and discipline and which relationship continues or existed on a

156. GUGGENHEIM, *supra* note 117, at 118.

157. ARIZ. REV. STAT. ANN. § 25-415(A)(1) (2006).

158. ARIZ. REV. STAT. ANN. § 25-415(G)(1) (2006).

159. *See* Fish v. Fish, 939 A.2d.1040 (Conn. 2008). To have standing under Connecticut law, a third party seeking custody must show a "parent-like relationship" with the child. *Id.* at 1053. The plaintiff in *Fish*, who the Connecticut Supreme Court held satisfied the "parent-like relationship" standard, had cared for the teenage child for extended portions of two years. *Id.* at 1044–45. Other states use language similar to *Fish's*. *See* MONT. CODE ANN. § 40-4-211(4)(b) (2007) (a third party who "has established a child-parent relationship with the child" may seek custody); OR. REV. STAT. § 109.119 (2007) (permitting a third party "who has established emotional ties creating a child-parent relationship" to seek custody); S.D. CODIFIED LAWS § 25-5-29 (2006) (permitting a third party who has "served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship" to seek custody).

day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child's psychological needs for a parent as well as the child's physical needs."[160] Oregon uses a similar definition, adding that the relationship must have existed for six months.[161] Kentucky is even stricter, requiring the third party to have been the "primary caregiver" and "financial supporter" of a child for at least one year.[162] The American Law Institute has suggested an even stricter standard for third party standing, proposing that standing should only be granted to third parties who have lived with the child for two years and have been the primary caretaker due to a "complete failure or inability of any legal parent" to do so.[163] In other words, the parents would have to be "absent, or virtually absent, from the child's life."[164] One commentator proposed granting party status only to adults whose primary caretaking status arose with the clear consent of the parent or under court order.[165]

Of the various means of limiting standing surveyed thus far, the parent-like relationship test is the most appealing. It avoids arbitrary limitations by type of familial relationship. By focusing on the child's relationship with the third party, the relationship test aligns itself with the state interest in preserving a child's significant relationships.[166]

Nonetheless, limiting standing to those who have formed parent-like relationships with children is far too narrow. The definitions just cited would exclude many third parties with significant relationships with children. Take the millions of children who live with a parent and a third party, especially the millions of such children who are primarily cared for by that third party.[167] The parent's presence might prevent the child from "treat[ing the third party] like a parent," in Arizona's language, or from fully forming a "child-parent relationship" in Montana and Oregon's language. The latter states give courts the added difficulty of determining what specific actions constitute the vague terms of "interaction, companionship, interplay, and mutuality."

160. MONT. CODE ANN. § 40-4-211(6) (2007).
161. OR. REV. STAT. § 109.119(10)(a) (2007).
162. KY. REV. STAT. ANN. § 403.270(1)(a) (LexisNexis 2007). Kentucky's time period for children under three years old is shorter—only six months. *Id.*
163. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(c)(i)–(ii)(B) (Tentative Draft No. 4, 2000).
164. *Id.* at cmt. c, pt. iii.
165. *See* Bartlett, *supra* note 42, at 946–48 (proposing three criteria—six months of physical custody, "mutuality" or "genuine care and concern for the child," and that the relationship have originated from parental consent or under court order).
166. *See Troxel*, 530 U.S. 57, 64 (noting state interest in protecting children's existing significant relationships).
167. *See supra* notes 33–45 and accompanying text.

Put another way, these states' terminology suggests a binary world—either a third party is like a parent or the third party is excluded from court. This black and white approach covers the easy cases—where a third party has been raising a child alone for years or where a third party has no connection at all to a child—but fails to account for the full "network of attachments" that children form[168] and the significant role third parties play in millions of children's lives. Put another way, these states' terminology does not adequately analyze common murky situations. Consider a parent whose severe mental health or drug problem makes him or her an inconsistent figure. When the parent is missing (physically or otherwise), the third party steps in and takes responsibility for the child. When the parent is present, the third party remains an important part of the child's life but defers to the parent. This situation, I believe, presents a fairly easy case for third party standing—many third parties in this situation will legitimately need custody to obtain services for the child when the parent is missing or to protect the child from the real harm caused by the parent's problems, especially if their illness or addiction takes a turn for the worse.[169] Yet in this situation, the third party might not qualify as a parent-like figure and thus might be excluded from court. These complicated situations might prove to be especially difficult cases, but that difficulty is precisely why the parties should have the opportunity to present evidence and arguments to a judge, rather than be summarily shown the courthouse door.

Other flaws exist in the relationship language. Focus on psychological bonds—particularly apparent in Montana and Oregon's definitions[170]—will be harder to show for very young children, especially infants. Such children are, of course, particularly vulnerable if their parent is incapable of caring for them and are often particularly in need of services arranged by a legal custodian. Courts therefore ought to be particularly open to suits by third parties who have a view to whether the parent has been caring for the child adequately.

Some states have drafted broader relationship language than what Arizona, Montana, and Oregon have. South Dakota has adopted relationship language that permits a broader set of individuals to seek cus-

168. Cooper Davis, *supra* note 47, at 354.

169. The harms of parental drug use on children—not present in every situation involving parental drug use, but significant in many—is well documented. *See* LITERATURE REVIEW, *supra* note 49. The potential harms of severe parental mental illness are also an acknowledged "risk factor" for child neglect. CHILD MALTREATMENT 2005, *supra* note 62, at 98.

170. OR. REV. STAT. § 109.119(10)(a) (2006); MONT. CODE ANN. § 40-4-211(6) (2006).

tody. Primary caretakers and "parental figure[s]" may sue for custody in South Dakota, and so can third parties who have "otherwise formed a significant and substantial relationship."[171] The phrase "significant and substantial relationship" may not be self-defining, but its listing separate from third parties who have been primary caretakers and parental figures suggests that one can have a significant and substantial relationship with a child while falling short of the high bar of a parent-like relationship. Other states establish timelines—for instance, the District of Columbia's statute provides that a third party who has lived with a child for four of the last six months and has primarily assumed parental responsibilities can seek custody.[172]

The American Academy of Matrimonial Lawyers issued a model third party visitation statute in 2002.[173] Although the Academy addressed visitation and not custody,[174] it adopted an approach similar to the third party custody statutes in the states just discussed. The Academy would limit standing to third parties who have established a "parent-like relationship with the child" or to grandparents "with a significant relationship with the child."[175]

4. *States That Grant Standing to Any Third Party When the Child Is Not Living with a Parent*

Some states permit third parties to seek custody when the child does not live with either parent. A third party may seek custody of a child in Illinois "only if [the child] is not in the physical custody of one of his parents," except in the case of stepparents or when one

171. S.D. CODIFIED LAWS § 25-5-29 (2006).

172. D.C. CODE § 16-831.02(a)(1)(B)(i) (2008). D.C. establishes a shorter timeline—the majority of an infant's life—for babies under six months old. Colorado requires physical care of a child for at least 6 months and permits third parties to seek custody when a child does not live with either parent. COLO. REV. STAT. § 14-10-123(1)(b)–(c) (2006). Pennsylvania's timeline—applicable to grandparents only—is twelve months. 23 PA. CONS. STAT. § 5313(b)(3) (2006).

173. *Academy*, *supra* note 148, at 1.

174. The Academy itself noted that it did not purport to "address claims for custody, conservatorship, guardianship, or joint or shared custody." *Id.* at 2. I address the Academy's recommendations regarding *visitation* because they coincide with some states' approach to *custody*, and the Academy's detailed explanations provides a useful aide to exploring those states' approach. Differences between third party visitation and custody statutes might support broader standing for those seeking custody. The Academy described the purpose of third party visitation cases as "principally about a child's right to maintain relationships that already exist." *Id.* at 1. Visitation cases are not about creating new relationships—such a purpose would interfere too much onto a parent's prerogatives—and they are not about ensuring safety for the child (because visitation is insufficient to protect a child from an abusive or neglectful parent). Custody cases, in contrast, can sometimes be about promoting child safety.

175. *Id.* at 2.

parent is deceased.[176] A third party may seek custody of a child in Arizona "only if the child is not in the physical custody of one of the child's parents."[177] Colorado's statute is similar: a third party may seek custody "but only if the child is not in the physical care of one of the child's parents."[178] New Mexico requires that the child live with the third party (and without the parent) for at least ninety days before the petition is filed, and the parent with legal custody of the child must be unwilling or unable to care for the child.[179]

This approach has some legal appeal. When a child is already not living with either parent, the parent's interest may be weaker. Their claim to "retain" custody of their child weakens when they do not have physical custody of the child.[180]

Nonetheless, this approach fails to take into account millions of children and families. As noted previously, approximately 14 million children live with third parties in addition to their parents.[181] Millions of those children are primarily cared for by the third party.[182] When the third party has played such a significant role, it is morally questionable to exclude that third party from seeking custody of the child. Limiting standing to cases when the parents do not live with the child would exclude these millions of children.

Just as bad, limiting standing to situations in which the child does not live with either parent excludes the millions of stepparents caring for children.[183] Consider, for instance, a twelve year old girl who was primarily raised by her stepmother after her father remarried when she was three. Her father lived in the home but was a less significant

176. § 750 ILL. COMP. STAT. ANN. 5/601(b)(2) (LexisNexis 2008). Kentucky permits "de facto custodians" to seek custody, defining that category to include individuals who have been children's primary caretaker for one year, or, for children under three, for six months. KY. REV. STAT. ANN. § 403.270(1)(a) (LexisNexis 2007).

177. ARIZ. REV. STAT. ANN. § 25-401(B)(2) (2006). Arizona also permits third parties who stand "in loco parentis" to seek custody, if parental custody would be "significantly detrimental to the child," and if the parents are either unmarried, divorcing, or if one parent has died. *See* ARIZ. REV. STAT. ANN. § 25-415(A) (listing two of the three statutory requirements).

178. COLO. REV. STAT. § 14-10-123(1)(b) (2006). Colorado also permits a third party who has "had the physical care of a child" for at least six months to seek custody. COLO. REV. STAT. § 14-10-123(1)(c) (2006).

179. N.M. STAT. ANN. § 40-10B-8(B)(3) (LexisNexis 2003).

180. *See infra* Part V and text accompanying notes 287–305 regarding the different standards of proof for retaining or regaining custody.

181. *Supra* note 9 and accompanying text.

182. *Supra* notes 26–29 and accompanying text.

183. *See* Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights—And Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719, 746 (2005) (discussing cases involving stepparents and the "not in the physical custody of a parent" test).

figure in her life. Her stepmother was her primary caretaker for 9 years but never adopted her. When the girl's stepmother and father divorce, the stepmother seeks custody on the grounds that she was the girl's primary caretaker, is more closely bonded to her and better able to raise her than her father.[184] This stepmother, who has a plausible claim to custody, would be barred from court because the child has always lived in her father's home.[185]

5. States That Limit Third Party Custody Actions to Divorce or a Parent's Death

A number of states limit when a third party can sue for custody, providing that they can do so in the context of a divorce proceeding, or if one parent has died. These states provide that third parties (limited, or not, in the manner discussed in the previous four sections) can be awarded custody "[i]n an action for divorce."[186]

Such requirements impose a legal significance to marriage that, for better or for worse, bears little resemblance to modern family structures. Parents need not be married to have rights to the custody of their children and marriage should similarly not impact third parties' rights. Even the ALI's suggested standing provisions—which are, in my view, far too narrow—suggest that state laws other than those regarding "family dissolution" may be available for third parties seeking custody.[187]

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184. *See* Olvera v. Superior Court, 815 P.2d 925 (Ariz. Ct. App. 1991).

185. Indeed, the Arizona court held that a stepmother lacked standing to seek custody of a child in a divorce case, even if she was more closely bonded with the child than the biological father. *Id.* at 927 ("If one of the parents has physical custody of the child, a non-parent may not bring an action to contest that parent's right to continuing custody under the 'best interest of the child' standard.") (citation omitted). The court required the stepmother to prove that the father's parenting fell "short of the minimum standard of the community at large." *Id.*

186. ARK. CODE ANN. § 9-13-101(a)(1)(A)(i) (2008); IDAHO CODE ANN. § 32-717(1) (2006); S.C. CODE ANN. § 20-3-160 (2005). *See also* ALASKA STAT. § 25.24.150(a) (2007) (allowing for a third party custody suit "[i]n an action for divorce or for legal separation or for placement of a child when one or both parents have died . . . ."); KAN. STAT. ANN. § 60-1610(a)(5)(C) (2006) (providing for third party custody if the court determines it appropriate "during the proceedings" under the divorce statute); OHIO REV. CODE ANN. § 3109.04(A) (West 2005) (allowing for a third party custody suit "[i]n any divorce, legal separation or annulment proceeding . . . ."); TENN. CODE ANN. § 36-6-101(a)(1) (2006) (allowing for a third party custody suit "[i]n a suit for annulment, divorce or separate maintenance . . . ."); W. VA. CODE § 48-9-103(b) (2006) (providing that third parties may intervene in existing custody cases).

187. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.21 cmt. c, illus. 5 (Tentative Draft No. 4, 2000) (noting that third parties

B. States Can Constitutionally Adopt Broad Standing

No principle of constitutional law poses a barrier to broad standing. *Troxel* found no constitutional problem with the standing of a third party to petition for visitation under an entirely unlimited third party standing statute.[188] Of all the various *Troxel* opinions, only Justice Souter's suggested that the unlimited standing provision "subject only to the State's particular best interests standard" posed constitutional problems.[189] Justice Kennedy noted that litigation itself (which could be prevented by limiting standing) might impose a burden on parents, but did not state whether the unlimited standing provision at issue in *Troxel* was constitutionally void.[190]

The New York Court of Appeals recently endorsed the interpretation that *Troxel* mandates a substantive preference for parental custody, but no limitation on standing.[191] "The problem in *Troxel* was . . . not that the trial court intervened," that is, not that a third party could sue, "but that [the trial court] failed to employ" the correct substantive standard.[192] The Washington Supreme Court—which had issued the decision which led to *Troxel*—upheld the Washington statute permitting anyone to file for custody of a child,[193] rejecting an argument that *Troxel* required it to limit standing.[194]

The Supreme Court, in *Moore v. City of East Cleveland*, established that the Constitution does recognize the rights and interests of extended family members to live together.[195] Ruling that Inez Moore could not be criminally liable for living with her son and grandchil-

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without standing under family dissolution laws could consider "the state's guardianship law or its laws governing child abuse or neglect.").

188. Troxel v. Granville, 530 U.S. 57, 69 (2000) ("The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight to Granville's determination of her daughters' best interests.").

189. *Id.* at 76–77.

190. *Supra* note 128 and accompanying text.

191. E.S. v. P.D., 863 N.E.2d 100, 105 (N.Y. 2007).

192. *Id.*

193. WASH. REV. CODE ANN. § 26.10.030 (West 2005) (permitting "a person other than a parent" to commence a child custody proceeding).

194. Shields v. Harwood, 136 P.3d 117, 124 (Wash. 2006) (rejecting the parent's claim that the stepparent lacked standing to seek custody and imposing a "heightened legal standard" instead of a standing requirement).

195. Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977) (extending the constitutional protection afforded to the nuclear family under the Due Process Clause of the Fourteenth Amendment to extended family members by striking down a city ordinance that excludes a grandmother and her grandson from the definition of family).

dren (one of whom lived without either parent[196]), the Court noted that the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition" as the rights of nuclear families.[197] Citing a string of parents' rights cases,[198] the court recognized the interests of extended family members to live together. *Moore* did not put extended family members on equal planes as parents, but it does show that the Constitution recognizes that extended family members who have lived with children have a significant interest in remaining together.

Taken together, the lack of any votes in *Troxel* for a constitutional rule limiting standing, the respect shown for third party caregivers such as extended family members in *Moore*, and the lack of any other suggestion by the Supreme Court that respecting parents' rights requires limiting the standing of others lead to the conclusion that the Constitution does not impose any limitations on which third parties can sue for custody.

C. Why States Should Adopt Broad Standing Provisions

Opponents of broad third party custody statutes complain that letting too many people file for custody will lead to frivolous, burdensome, and harassing litigation.[199] The criticism is not that these third parties will actually win custody of a child—such concerns refer to the substantive standard that third parties must satisfy to win. The criticism, rather, articulates a significant interest on behalf of potential defendants in avoiding lawsuits. Custody cases are draining affairs,

196. *Id.* at 496–97 (explaining that Ms. Moore lived with her son, Dale Moore Sr., Mr. Moore's son, Dale Jr., and with another grandson, John Moore, Jr., the son of an absent son of Ms. Moore's).

197. *Id.* at 504.

198. *Id.* at 499 (citing Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Wisconsin v. Yoder, 406 U.S. 205, 231–33 (1972); and Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

199. The criticisms received by the District of Columbia when introducing its bill are instructive. After a third party custody bill that provided for unlimited standing was introduced, one legal services provider described the bill as "radical" because it would permit anyone to sue for custody at anytime. "[T]his bill could aptly be titled the 'Universal Custodial Standing and Intervention Act of 2007.'" *D.C. Council Comm. B17-0041*, *supra* note 31 *(testimony of Eric Angel, Legal Dir. of the Legal Aid Soc'y of D.C.)*. *See also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. c (Tentative Draft No. 4, 2000) ("The requirements are strict, to avoid unnecessary and inappropriate intrusion into the relationships between legal parents and their children.").

emotionally and financially, and are perhaps particularly so for *pro se* litigants.

This concern, particularly as applied to poor families, was present in debates regarding the District of Columbia's third party custody statute. The District's Family Court is largely populated by those living in relative poverty. Everyone involved understood the third party custody statute in the District to affect mostly lower income families. Some of these families could find pro bono attorneys but most would not have attorneys.[200] The concern of the effect of frivolous litigation on defendants was particularly acute—without a lawyer to help dispose of meritless claims early, these claims would lead to litigation that would last years, and force parents and even children to endure stressful court proceedings where immense matters were at stake.

More broadly than the District of Columbia debate, critics of broad standing also caution that custody litigation can harm the child in addition to burdening the parent. Joseph Goldstein, Anna Freud, and Albert Solnit's influential works on family law discuss the harm caused to children by the intervention of someone other than a psychological parent: "[c]hildren," they wrote, "react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control."[201] The Academy relied on this general principle to justify its limits on standing in visitation cases.[202] Anyone working in this field must recognize the strong bonds that exist between the vast majority of parents and children; these bonds could be harmed if the child understood the parent's role to face a severe legal threat.

Critics' arguments for limited standing requires another step: not only must one accept that custody litigation could pose a harm by itself to families, but one must also accept that there is a substantial risk of individuals with weak claims to custody subjecting families to such litigation. Critics have raised the specter that without standing limitations, "disgruntled nann[ies]," "ideologue[s] who disagree with the parents' childraising decisions," or "relatives with no relationship

200. The largest number of individuals who sought assistance from the District of Columbia's Family Court Self-Help Center, which serves *pro se* parties, did so regarding custody cases. RUFUS G. KING, III, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, FAMILY COURT 2007 ANNUAL REPORT 99 (2008), *available at* http://www.dccourts.gov/dccourts/docs/family/family_annualreport2008.pdf.

201. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 25 (1979).

202. *See Academy*, *supra* note 148, at 4 (quoting GOLDSTEIN, ET. AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE, *supra* note 201, at 25).

with" children will sue for custody and disrupt family life.[203] These claims also implicitly assert that the harm caused by the predicted meritless claims is greater than the harm caused by any meritorious claims that would be screened out.

These calls for standing limitations are not convincing. They fail to consider the harm posed by excluding legitimate cases from court and they assert risk of meritless claims without empirical support to establish that this risk has any likelihood.[204] Further, these concerns do not address the strong policy and constitutionally-cognizable interests of children and families who could be excluded from court and from obtaining custody orders by limited standing requirements. One cannot legislate perfect standing requirements—those that allow all meritorious plaintiffs to sue and none others. The question is how to skew the errors in the best—or perhaps the least harmful—manner. To answer this question, one needs to evaluate the comparative likelihood of significant numbers of frivolous claims being filed under a broad standing regime versus that of significant numbers of children and families being harmed by limited standing. This analysis requires both an empirical evaluation and a value determination—whether one family excluded from court is equal to one family unfairly subjected to litigation.

My argument will proceed on two tracks. First, I will argue that the best available evidence empirically demonstrates that broad standing provisions do not hurt families the way critics predict. Additionally, a third party custody statute and a family court system can include various provisions and structures to minimize the harm of meritless third party custody cases. This empirical reality contrasts with the empirical data and common fact patterns discussed in Part I, which demonstrates the significant numbers of third parties with legitimate reasons to seek custody who would be excluded from court if

203. Letter from Jonathan Smith, Executive Director, Legal Aid Society of the District of Columbia, et al., to Tommy Wells, Chairperson, Committee on Human Services (Jan. 31, 2007) (on file with author). The specter of "disgruntled nannies" suing for custody led the D.C. Council to include a provision banning individuals employed by parents to provide child care duties from seeking custody. D.C. CODE 16-831.02 (2008).

204. Nancy Polikoff reached a similar conclusion when addressing the issue with a focus on the standing and custody rights of same sex couples. She concluded that "[j]urisdictional hurdles do not serve the best interests of children because they limit those who may request custody or visitation on the basis of their legal status, regardless of their functional status." Polikoff, *supra* note 42, at 510–11. Polikoff suggested a solution roughly in line with mine: "permit anyone to seek custody or visitation, but to impose a heavy substantive burden on those who try to overcome a parental preference." *Id.* at 510.

states adopted strict standing limitations. Second, I will argue that the harms to children whose custody cases are excluded from court are more severe than those caused by meritless litigation.

1. *Existing States with Unlimited Standing Provisions Suggest that the Concern with Clearly Meritless Litigation Is a Small One*

Several states permit anyone to file for custody of a child. Those states include California, Washington, Maryland, Virginia, and others noted above.[205] A review of the case law reveals no evidence that these states have seen an influx of clearly meritless third party custody cases—that is, cases filed by individuals with no significant connection to the child or with no proof of some significant harm to the child caused by parental custody. Professor Guggenheim notes that despite the "breathtakingly broad" statute at issue in *Troxel*, Washington courts had not seen people seek visitation who had no relationship with the child.[206] Justice Stevens made the same point in his *Troxel* dissent, disputing the notion that suits by people without a significant connection to the child would be common.[207]

The lack of reported cases involving attenuated petitioners without colorable claims to custody may have two explanations. First, few such cases may be filed. Second, attenuated third parties may file cases only to lose them (how quickly is unclear) in trial courts.[208] However, a review of D.C.'s experience with effectively unlimited standing reveals that only the first proposition is most likely true. Although D.C.'s custody laws have since been changed by the enactment of a third party custody statute,[209] prior to its enactment,[210] third par-

205. *See supra* notes 136–40 and accompanying text. I base the conclusions asserted in this paragraph on a review of case annotations to these statutes. Those annotations do not reveal large numbers of cases involving attenuated petitioners with no colorable claim to custody.

206. GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 117, at 32 ("[T]here is no evidence that the statute has ever been used in this way. Certainly, there are no reported cases involving such attenuated petitioners.").

207. *See supra* note 123 and accompanying text.

208. To more fully test which of these two propositions is true would require more empirical research than currently exists. A comprehensive study of such claims filed in jurisdictions with various standing requirements would advance the debate regarding third party standing significantly. Such a study does not exist, however, and states currently must use what information is available to make a policy determination.

209. D.C. CODE § 16-831.01 to .13 (LexisNexis Supp. 2008).

210. Common law governed custody disputes involving third parties prior to enactment of this statute. That common law was far from clear. The right of any third party to seek custody was litigated over many years, with the D.C. Court of Appeals

ties routinely were permitted to seek custody in court.[211] The courts simply did not see cases of attenuated third parties seeking custody. Rather, the courts saw people in the categories listed in Part I.B. seeking custody.[212] Critics have raised troubling hypothetical cases of various harms posed by broad standing, but these concerns are purely hypothetical and are not based in fact. One critic testified to the Council that abusive boyfriends of mothers would harass them by filing for custody of their children, but when questioned by a Council member, that critic could not think of a single case in which that fact pattern occurred.[213] Contrary to these critics, the factual record shows that third parties with attenuated connections to children simply are not inclined to seek the awesome responsibility of raising those children.

This conclusion addresses just one of the concerns with broad standing—that individuals would sue without legitimate cases, no significant connection to the child or no indication that parental custody would harm the child. It does not address concerns that third parties with some legitimate claims but not enough to deserve custody will seek custody and impose on parents and children the burden of litigation and the risk of an erroneous judgment. I will next address how to balance those concerns against the harm to children who could face harm if third parties who should win custody are excluded from filing suit.

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once noting that third parties' right to do so "is not at all obvious." A.J. v. L.O., 697 A.2d 1189, 1191 n.5 (D.C. 1997).

211. *See D.C. Council Comm. B17-0041*, *supra* note 31 (letter from Eric H. Holder, Jr. to Tommy Wells, Chair of the D.C. Council Comm. Subcomm. on Human Servs., (Jan. 31, 2007)) ("During my tenure as a judge, the right of non-parents to file for custody was not in question and these cases were litigated as a routine practice."); Diane M. Brenneman & Linda J. Randin, Domestic Relations Manual for the District of Columbia, § 8.04[5], 8-30 to 8-31 (2005) (discussing substantive standards in custody disputes between parents and third parties).

212. *See D.C. Council Comm. B17-0041*, *supra* note 31 (testimony of Judith Sandalow, Executive Dir. of The Children's Law Ctr.). In addition, Avi Sickel worked for six years as an attorney at the Pro Se Project in the Montgomery County, Maryland, Circuit Court. Maryland has unlimited third party custody standing and Sickel reported to the author that attenuated third parties with clearly meritless claims did not burden families with litigation. Such third parties simply did not file for custody. Most third parties seeking custody were, instead, existing long-term caretakers or individuals who had shared significant child rearing duties with parents and had increasing concerns about the parent's ability to raise the child.

213. *See D.C. Council Comm. B17-0041*, *supra* note 31 (testimony of Su Sie Ju).

2. *Overly Restricting Standing Will Cause Greater Harm to Children*

To justify limits on standing beyond what I have proposed, one must argue that either those meritless cases can be effectively screened out without excluding meritorious cases, or that it is acceptable to screen out meritorious cases because the harm to children and families of screening out such cases is less than the harm of permitting frivolous cases. Neither argument is supportable.

First, a significant number of meritorious cases would be excluded from court through any of the commonly used standing limitations. All means of limiting standing will inappropriately exclude some valid cases, as will be discussed further in Part III.A.

Second, excluding families from the courthouse can severely harm children and families, while the threat of harm from frivolous litigation, as discussed above, is minor due to the scarcity of such frivolous suits. Children can lose the custodians who are best for them and be forced instead to live with parents whose custody is demonstrably harmful to the child. Loss of the proper custodian—perhaps for their entire childhood—imposes a greater harm on children than the temporary doubts raised by litigation. Children in need of particular services or benefits may go without if their third party caretaker cannot obtain a custody order necessary to navigate the red tape to obtain those services and benefits.[214] Other, more complicated forms of harm to children can occur. Children could be diverted to the neglect system, which, as discussed above, could be significantly more harmful to the children and costly to the state than a custody case.

It must also be noted that the general description of harm to children by litigation questioning their parents' authority is greatly lessened when third party standing is limited to individuals who have some significant connection to the child in question. The general concerns raised by the Academy and Goldstein above[215]—that children may be harmed when litigation questions the authority of their parents or their relationship with their parents—are less intense when the parent has already ceded some or most of that authority in practice by permitting a third party to build significant relationships with a child. However, those concerns may even point in the opposite direction.

214. The obstacles faced by low income individuals obtaining services and benefits are well documented. *See, e.g.*, DANIEL K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 230 (2005) ("Blessed are the poor who have lawyers on their side" to navigate unfriendly bureaucracies).

215. GOLDSTEIN, ET.AL., BEFORE THE BEST INTERESTS OF THE CHILD, *supra* note 201 and accompanying text.

When a parent in biology but not in practice seeks to infringe the authority of a third party who has been a parent in practice, the child may be more harmed by the third party's inability to stand up for his or her relationship with the child. The "parental autonomy" that Goldstein, Freud and Solnit trumpeted[216] is only worth trumpeting when the parent-child relationship has built up that autonomy.

D. Reducing the Potential Harm of Broad Standing

I do not advocate turning a blind eye to the costs of broad standing noted above: the burdens of litigation and, worse, erroneous decisions. Meritless litigation does, as critics suggest, impose a cost on parents and children who are forced to endure and respond to it. Those costs are especially great for poor families, who do not have a right to an attorney,[217] and face the stress of court proceedings without assistance.

As a result of these costs, state policymakers should create checks designed to protect families and courts against these harms, without closing the courthouse doors to children and families who need them open. Such checks can impose a self-selection process on third parties; before filing a case and triggering court processes, policymakers can establish a process for which third parties are forced to consider the merits of their claim. Ideally, any third party custody law should be structured to ensure that only those suits with allegations serious enough to warrant depriving a parent of custody can go forward. Third parties with other claims should be discouraged from filing and, when such third parties do file, their suits should be dismissed quickly so as to provide legal stability to the parent and child and protect them from unnecessary litigation. This goal, however, cannot adequately be achieved with the blunt tool of limiting standing. Fortunately, some alternative means of reducing harm from frivolous litigation exist.

The law should require third parties to satisfy strict pleading requirements. Third parties should describe in detail what facts justify their plea for custody, and, indeed, several states have imposed such

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216. *Id.* at 24.

217. The Supreme Court has ruled that no absolute constitutional right to counsel exists in termination of parental rights cases, let alone custody cases. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981). Third party custody statutes do not generally provide for appointed counsel. *See, e.g.*, D.C. CODE § 16-831.06(c) (2008) (permitting a court to appoint counsel for parents, third parties and children, but neither requiring the court to do so nor providing funding to do so).

pleading requirements on third parties seeking custody.[218] Such pleading requirements should be grounds for third parties without strong claims to pause before filing for custody. And they will enable courts to promptly dismiss those complaints that do not state a claim sufficient to satisfy the substantive standard (which I will discuss in the next section). Second, courts should similarly use pretrial hearings to determine if third parties will have sufficient evidence to prove their allegations. Without such evidence, courts should grant summary judgment to the parents.

Court systems should focus on implementing and enforcing pleading and pretrial hearing procedures, especially in cases involving pro se litigants who may not actively pursue pretrial motions to dismiss or for summary judgment. There is no substitute for a highly qualified judiciary, knowledgeable in the law, attuned to the reality of pro se litigation, and able to weed out frivolous cases. Courts can establish processes to treat pro se litigants fairly and respectfully.[219] Court systems can also provide services to pro se litigants which can serve multiple purposes. Offices like a Family Court self-help center[220] can help third parties decide whether to seek custody and can help parents determine whether they can seek dismissal of a claim promptly.

Courts should also be forced to make decisions quickly; if a case must be litigated, it at the very least ought not drag on for years. Legislatures can set specific timelines. The District of Columbia's 2007 third party custody statute provides a limited model: whenever a court grants pre-trial relief—that is, whenever a court grants temporary custody pending litigation to a third party—the parties are entitled to a trial date within 120 days from the temporary custody order.[221] Such deadlines can limit, at least temporally, the stress and disruption caused by custody litigation.

Recognizing the potential harm of custody litigation, states should reduce incentives for third parties to seek custody orders. First, states can create out-of-court means for third parties and parents to

218. *See, e.g.*, D.C. CODE § 16-831.02(a)(1)(C) (2008) (requiring third parties basing standing on "exceptional circumstances" to plead those facts with specificity); WASH. REV. CODE § 26.10.030(1) (2006) (requiring third parties to allege that a child's parents are not "suitable" custodians).

219. *See, e.g.*, Jonathan M. Smith & Eric Angel, *Reform of the Superior Court is Necessary to Achieve Judicial Neutrality*, WASH. LAWYER 30, 30–34 (Oct. 2007) (proposing court reforms to improve handling of pro se cases).

220. *See, e.g.*, Family Court Self-Help Center, http://www.dccourts.gov/dccourts/superior/family/selfhelp.jsp (last visited Aug. 26, 2008).

221. D.C. CODE § 16-831.09(b)(1) (Supp. 2008).

reach legally enforceable agreements about the care of children. States can provide, for instance, for a custodial power of attorney.[222] Second, states through legislation and regulations can ensure that a custody order is not necessary to obtain services and benefits for children.[223] This task—both legislative and administrative—can reduce the number of situations in which families must make a detour to court to obtain services and benefits for children.

IV.
THE SUBSTANTIVE STANDARD: PARENTAL PRESUMPTION REBUTTABLE BY HARM TO THE CHILD

While millions of children have a third party as primary caregiver and millions more have a third party significantly caring for them, the norm remains that one or two parents have the full legal and physical custody of their children.[224] Parents have fundamental constitutional rights to the care and custody of their children[225] and the children, in turn, have a constitutionally cognizable interest in their relationship with their parents.[226] I have discussed the wide variety of situations in which third party custody is necessary to protect children's relationships with third parties and to protect the children from harm, justifying wider standing provisions than many states currently allow. Once admitted to court, however, courts must provide close scrutiny to third parties' cases to ensure that the desired custody order is really necessary to prevent the alleged harm to the child.

A. A Harm Standard Is More Appropriate than a Best Interests of the Child Standard

There can be no doubt that the Constitution requires states to apply a parental preference. The Court states in *Troxel* that states must accord "some special weight" to the parent's desires for his or her child and recognizes the presumption that a parent will act in his or

222. *See* D.C. CODE § 21-2301 (Supp. 2008).
223. *See, e.g.*, Safe and Stable Homes for Children and Youth Amendment Act of 2007, D.C. Act 17-70 § 3 (amending D.C. CODE § 4-251.03 (2007) by removing legal custody requirement for the Grandparent Caregivers Pilot Program).
224. While 2.9 million children do not live with either parent, more than 60 million live with at least one parent. CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: 2002, *supra* note 18, at 2 tbl.1.
225. Troxel v. Granville, 530 U.S. 57, 66 (2000).
226. *See* Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 1999) ("Parents and children have a well-elaborated constitutional right to live together without governmental interference.").

her child's best interests.[227] To rebut this presumption, states should require third parties seeking custody to prove that parental custody would impose some affirmative harm on the child, either by severing some particularly strong attachment with the third party or by some harm that will befall the child in the parent's custody. A best interest of the child standard—which asks judges to determine which individual would "best" serve a child's "interests"—does not provide sufficient "special weight" to the parent-child relationship.[228]

The best interest of the child standard is notoriously vague, a quality which leads to unpredictable and subjective judicial decision making, leading judges to consider factors such as "who offer[s] a better neighborhood, better schooling, more financial capability, or more stability."[229] It instructs judges to make subjective decisions about "the interaction and interrelationship of the child" with potential adult caregivers and the "sincerity" of the adults.[230] Wide segments of the legal community view the best interests of the child standard as providing, in the words of the New Jersey Supreme Court, a "judicial opportunity to engage in social engineering in custody cases."[231] The vagueness of the best interest of the child standard too often "invites the judge to rely on his or her own values and biases to decide the case," rather than a more principled basis.[232] A vague, subjective standard may lead to inconsistent rulings from court to court, and permit individual judges to make custody decisions (in favor of either a parent or a third party) without strict guideposts. It is true that courts could interpret a best interests of the child standard narrowly to satisfy constitutional concerns,[233] but using the standard itself signals to judges that they have the authority to decide a child's fate based on their own subjective evaluation of what is "best" for that child.

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227. *Troxel*, 530 U.S. at 70.

228. *See infra* note 231.

229. McDermott v. Dougherty, 869 A.2d 751, 808 (Md. 2005).

230. D.C. CODE §§ 16-914(a)(3)(C), 16-914(a)(3)(N) (2001).

231. *See* Watkins v. Nelson, 748 A.2d 558, 567 (N.J. 2000) (relying on other state courts' decisions criticizing the best interest standard as dependent more on judicial opinion of parents than on the rule of law (citing Turner v. Pannick, 540 P.2d 1051, 1054 (Alaska 1975) and *In re* B.G., 523 P.2d 244 (Cal. 1974)). *See also* Polikoff, *supra* note 42, at 511–16 (describing troublesome best interest analyses in several cases).

232. GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 117, at 40.

233. *See, e.g.*, *Troxel*, 530 U.S. at 84 n.5 (Stevens, J., dissenting) (noting the common use of the best interests standard in Washington statutes and court decisions "as if the phrase had quite specific and apparent meaning.").

One iconic family law case read frequently in law school courses illustrates the danger of applying a best interests of the child standard. In *Painter v. Bannister*, the Iowa Supreme Court applied a best interests of the child standard in its decision regarding a custody dispute between a child's father and grandparents.[234] The Court's reasoning illustrates the subjective considerations that a best interests analysis permits, as the Court awarded custody to the grandparents due to the Court's concerns about the father's "Bohemian" lifestyle.[235] None of the reasons cited by the Iowa Supreme Court address the three core benefits of a third party custody order discussed in Part I.B.

The vagueness and subjectivity of the best interests of the child standard raise constitutional problems when it is applied in a contest between parties on unequal constitutional footing. Following *Troxel*, judges must give "special weight" to the parent-child relationship.[236] A best interest of the child standard leaves too much room for individual judges' value judgments to render that "special weight" meaningless. The Maryland Court of Appeals explained this point well: "The best interest of the child standard is axiomatically, of a different nature than a parent's fundamental constitutional right."[237] States should reserve the best interest of the child standard, if at all, for legal contexts between individuals standing on an equal plane, such as one parent suing another for custody.[238] In contrast to the best interest of the child standard, the harm or detriment standard finds its roots in Supreme Court cases describing the contours of rights within a family. For more than sixty years, the Court has stated that parents' rights to do as they please regarding their children reach their limits when a serious risk of "psychological or physical injury" arises.[239] As a result, until harm to a child's physical or mental health is posed, the

234. Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966).

235. The Iowa court did not analyze the relationship between Harold Painter and his son Mark or Mr. Painter's ability to meet his son's needs. Instead, it contrasted the "stable, dependable, conventional, middle-class, middlewestern background" of Mark's grandparents (the Bannisters) with the "romantic, impractical and unstable" life that would result from his father's "Bohemian approach to finances and life in general." In short, during the middle of the 1960s, the court approved more of Mark's straight-laced grandparents than his "political liberal" father. *See id*. at 154–55.

236. *Troxel*, 530 U.S. at 70.

237. McDermott v. Dougherty, 869 A.2d 751, 808 (Md. 2005).

238. *See id.* ("In cases *between fit natural parents* who both have the fundamental constitutional rights to parent, the best interests of the child will be the ultimate, determinative factor.") (emphasis in original, quotation omitted).

239. *See* Parham v. J.R., 442 U.S. 584, 603 (1979) (noting the state's power to limit parental discretion "when [children's] physical or mental health is jeopardized"). *See also* Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972) ("To be sure, the power of the parent . . . may be subject to limitation under *Prince* if it appears that parental deci-

Constitution would likely prevent a judicial decree limiting a parent's right to custody. *Troxel* left that conclusion in some doubt, however, by declining to rule whether a third party must establish harm to the child to defeat a parent's opposition to visitation.[240] However, as the impact on a parent's rights is greater when custody is at stake than when visitation is at stake, the argument that a harm standard is constitutionally justified is stronger.

The constitutional roots of the harm standard signals to judges that they must make the presumption required by *Troxel* meaningful; they must require third parties to provide some significant proof of why a child's parents cannot be trusted to raise the child. Sending this signal to judges will add meaning to the checks on frivolous litigation discussed in the previous section and will help limit third party custody lawsuits to situations involving third parties significantly bonded to children or seeking to protect children from a significant harm.[241] If third parties must plead in detail the grounds of their lawsuit and judges, at an early stage in the litigation, measure those details against a harm standard (as opposed to a best interests standard), then third parties who clearly will not prevail can be more easily prevented from burdening parents and children with litigation. One reason that broad standing is acceptable is that the presence of a high substantive standard (especially when coupled with pleading requirements enforced by a high-quality judiciary) can reduce the harm posed by unmeritorious litigation.

Put another way, a harm standard tethers custody litigation to the three central needs of children and caregivers discussed in Part I.B. If the child needs a service and the parent is unavailable to consent to it, then (at least for some services, such as certain types of medical care), the child will face harm if the third party lacks authority to consent to that service.[242] If the parent is severely abusing or neglecting the child, parental custody would be harmful.[243] Finally, if the child has strongly bonded with the third party, to a significantly greater degree than the child has bonded with the parent, and the parent would sever the third party bonds, then parental custody would be harmful. Evidence short of these situations—especially the sort of subjective evidence that the best interest of the child standard—would not suffice.

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sions will jeopardize the health or safety of the child, or have a potential for significant burdens."); Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

240. *Troxel,* 530 U.S. at 73.

241. *See supra* text accompanying notes 218–23.

242. *See supra* notes 11–18 and accompanying text.

243. *See supra* note 21 and accompanying text.

Holding third parties to a harm standard helps to ensure that courts fairly adjudicate cases involving low income families, especially minority families that embrace extended kinship networks to help raise children. As explained in Part I.A. the large and increasing numbers of third party caregivers are especially prevalent within certain racial and ethnic groups as well as among low income families.[244] Given the large number of situations in which third parties are significant caregivers—including situations in which parents are largely absent, abusive, or neglectful—I have argued that it is important for third parties to have access to court if they believe a legal custody order is necessary.[245] But there is another side to this coin—the prevalence of third party caregiving also reflects the choice of many parents to engage an extended kinship network to help raise their children due to financial, cultural, and other factors.[246] This choice does not harm children in the least, so policymakers must craft substantive standards to ensure that merely taking on a significant role in a child's life does not entitle a third party to custody. Critics have charged that psychological theories relating to bonding and attachment as interpreted by the flexible and discretionary best interests of the child standard turns such theories and laws into "a weapon against low-income families of color."[247] A harm standard allows both the parties and the courts to shift the focus toward more appropriate questions.

Take a situation in which a third party has shared some significant childrearing duties with a parent; I have argued that such third parties should have standing to seek custody. But applying a harm standard makes clear that taking on significant child rearing duties is not, by itself, grounds for obtaining custody. Some other fact must be present. For example, as a result of being raised exclusively by the third party, the child's attachment to the third party may be so much greater than to the parent as to make parental custody harmful. Or the third party may have taken on child rearing duties because the parent is somehow incapable of taking care of the child adequately. Or perhaps the child needs a particular and important service and the parent is unavailable to provide consent. A harm standard demands that third

244. *See supra* note 25.

245. *See supra* Part I.

246. *See* Cooper Davis, *supra* note 47, at 350 (describing the "network of kin attachments" that many children form). *See also supra* note 25 (describing socioeconomic variations in third party caregiving, which suggest financial and cultural factors which lead to significant third party involvement).

247. *See e.g.*, GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 117, at 250 (describing harm to such families in neglect cases, which typically involve one form or another of a "best interest of the child" standard).

parties establish evidence of this sort. A best interests of the child standard, however, would lead some judges to evaluate qualitatively the third party's caretaking versus the parent's caretaking, without giving sufficient deference to the parent. Such subjective evaluations would be prone to far too many unjustified and arbitrary decisions. In situations in which a parent shares significant child rearing duties with a third party because the parent values extended kinship networks or "as a hedge against poverty,"[248] a harm standard would protect families against unwarranted judicial decrees.

B. A Harm Standard Is More Appropriate than an Unfitness Standard

An alternative substantive standard which states might consider would require a third party to prove that a parent is not fit to raise the child in question. An unfitness standard focuses on the parent's abilities: whether the parent has the minimum ability necessary to raise the child in a fit manner, rather than the effects of a custody decision on the child.

In most situations, there will be no functional difference between a harm standard and an unfitness standard. If a third party lives with a child and has tried but failed to find the child's parent for an extended time such that the third party cannot obtain important services for the child, then the parent's absence may amount to abandonment. Even if the parent's conduct falls short of abandonment, it may have been neglectful to the point of unfitness to have left the child in another person's care without providing some means to obtain important services. If a third party lives with a child and the child's parent and sues for custody to protect the child from the parent's abuse, that abuse renders the parent unfit.

However, in certain narrow circumstances, a harm to the child standard will differ from an unfitness standard. Such situations include third parties serving as long term primary caretakers, who are involved in custody disputes with parents, who at the time of the dispute, are fit.[249] Other situations may include those described in Part

248. Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 250 (2004).

249. *See* Bennett v. Jeffreys, 356 N.E.2d 277, 280 (N.Y. 1971) (applying a substantive standard other than the unfitness standard, using the terms "prolonged separation" between parent and child; such a separation might establish "extraordinary circumstances" that would justify granting a third party custody over a fit parent's objection). *See also* Martin Guggenheim, *Rediscovering Third-Party Visitation Under the Common Law in New York: Some Uncommon Answers*, 33 N.Y.U. REV. OF L. & SOC. CHANGE (forthcoming 2008) (discussing *Bennett*).

I.B.3–4 in which the third party has not been the child's primary caretaker for long and in which the parent may not have been away from the child long enough to have legally abandoned the child.[250] Yet the child may need a particular service in that time, and will be harmed if the third party cannot provide it.

In these situations, a harm to the child standard focuses the parties and the decision maker on the most important relationships involving the child. In reality, parents are not the only adults to have significant or even primary relationships with children; millions of children have such relationships with third parties.[251] A harm to the child standard recognizes the interests of children and third parties in such relationships and security in their living arrangements. Thus, a harm standard signals to courts that they must consider the child's existing relationship with the third party and whether that relationship is so great that custody with anyone else would harm the child. Additionally, there are significant numbers of children who have been away from their parent's care and in the care of a third party for a relatively short period of time.[252] Such children have important needs that should not go unmet for arbitrary time periods.[253]

One example demonstrates both the difference between a harm standard and an unfitness standard and why that difference is important. Consider a parent who recognizes that her drug addiction and severe mental illness prevents her from adequately caring for her newborn daughter. Wanting the best life possible for the child, she arranges for her sister, the child's aunt, to take care of her while she seeks to conquer her addiction and treat her illness. Relapses mark this effort, and the aunt cares for the child for years. During that time, the child's mother is a sporadic presence in her child's life. When the child is eleven, the mother reappears, sober, with her mental illness treated and managed. The mother is now unarguably fit to raise children, and she demands custody of her daughter and will not permit a

250. *See, e.g.*, D.C. CODE § 16-2316 (2008) (imposing a four month timeline on parental abandonment).

251. *See supra* Part I.A.

252. *See supra* note 51 and accompanying text.

253. This is not to say that any service a third party custodian wants to provide should be grounds for granting custody. A court should engage in some analysis into the importance of providing that service at that particular time rather than waiting for the parent's return or for the third party to have been a primary caretaker for a longer period of time. They should still inquire whether the lack of the particular service at the particular time will amount to a sufficient harm to the child to warrant a legal change in custody. And, absent a *present* service need, children away from their parents for a short period of time—too short to develop bonds equivalent to parent-child bonds—likely face no harm from the absence of a third party custody order.

continuing connection to the aunt. A fitness standard, as at least one court has interpreted it, would compel acquiescence to the mother's demand.[254] The harm or detriment standard would not automatically lead to that result. It would instead evaluate not only the parent's current status and functioning, but the entire history of the child's relationships with significant caretakers, including the effect transferring custody to the mother would have on the child and whether that would significantly harm the child by severing his bonds with his aunt.[255] Because the harm standard recognizes the preeminence of the parent-child relationship, the parent may still prevail in this case, especially if the aunt can maintain her role in the child's life and the child can be transitioned to the mother's care without harming the child. But those are large conditions. The harm standard gives the aunt the opportunity to prove that they will not be satisfied and to obtain legal recognition of the parental role she has taken on over the child's lifetime.

A harm standard treats fairly a parent who has willingly allowed a third party to develop a strong parent-like bond with the parent's child. Professor Martin Guggenheim, a leading critic of policies and legal doctrines developed in the name of "children's rights," has written convincingly on the subject of parents who ask a third party to take on a parental role:

> There is hardly anything unfair in saying to a parent who voluntarily invited someone else to share parenting and to develop a significant parent-child relationship with his or her children that the parent must allow the logical consequences of that choice to play themselves out. It is wrong both for parents and children to encourage the disruption of significant bonds for the sole reason that the biological parent prefers such a disruption.[256]

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254. *See* Clark v. Wade, 544 S.E.2d 99, 103 (Ga. 2001) (describing how under a since-revoked fitness standard, the courts had to focus on "the parents present fitness"). One could parse the term "fit" to declare the mother unfit to raise this particular child, given the years of absence. But the facts of real cases are often more complicated. The mother could very easily have been involved in the child's life just enough so that a state's definition of abandonment is not met. For instance, the District of Columbia defines abandonment as having "made no reasonable effort to maintain a parental relationship with the child for a period of at least four (4) months." D.C. CODE § 16-2316(d)(1)(C) (2008).

255. I note that the answers to these questions depend on the facts of each case, as does the ultimate result—full parental custody, full third party custody, or some form of joint custody. Even with such a long absence, parental custody might not harm the child. That conclusion is more likely if the parent has been significantly involved in the child's life, and the aunt and the child can develop a transition plan and continued contact with the aunt.

256. GUGGENHEIM, *supra* note 117, at 126.

The harm standard thus balances a child's relationship with his parent alongside his relationship with a longstanding third party primary caregiver better than the unfitness standard. This balancing is supported by *Troxel* and other Supreme Court cases that came before it.[257]

Troxel empowers states to balance a parent's fundamental right with the value of a child's relationship with a third party.[258] A state seeking to remove a child from a parent and place the child with strangers in foster care stands in a fundamentally different situation regarding the family than a third party who has raised a child for years seeking to continue that role and obtain formal legal custody. The same balancing should be applied when a third party is rearing a child in the parent's absence and that individual needs to obtain important services for the child. As explained above, *Troxel* frees policymakers to engage in this sort of analysis.[259] Six justices recognized a strong interest of children in maintaining significant relationships with third parties.[260] *Troxel* pointedly does not require that a third party prove that a parent is unfit, explicitly holding that a fit parent may lose a visitation case to a third party.[261] *Troxel* refused to even demand that a harm standard be applied in all cases between third parties and parents, leaving states to sort out such questions.[262]

A harm standard balances the right of the parent and child to maintain their relationship with each other with the child's relationship with a significant third party. Such balance is especially important in a private suit between one person closely connected to a child and a parent of that child. This basic nature of a custody case—a battle between private individuals each claiming a significant connection to the child—separates private custody cases from those situa-

257. *See* Troxel v. Granville, 530 U.S. 57, 69, 73 (2000) (requiring state courts to apply "some special weight" to a parent's preference but declining to rule whether the harm standard was required and giving no hint that an unfitness standard was appropriate).

258. *Supra* note 103 and accompanying text.

259. *See* Barbara Bennett Woodhouse & Sacha Coupet, *Troxel v. Granville: Implications of at Risk Children and the Amicus Curiae Role of University-Based Interdisciplinary Centers for Children*, 32 RUTGERS L.J. 857, 870 (2001) ("For now, experimentation with the proper balance between the interests of the state, those of parents, and those of other family members, is left to the laboratory of state legislatures and state courts, with Supreme Court oversight as an outer limit, to be provided as the case law evolves.").

260. *See Troxel*, 530 U.S. 57.

261. *See id.* at 68 (noting that the Troxels made no claim that Granville was unfit, and this fact "is important, for there is a presumption that fit parents act in the best interests of their children").

262. *Id.* at 73.

tions in which the fitness standard arose. To intervene in a family, a state must prove parental unfitness.[263] But state intervention through a neglect case represents a different sort of intervention. State intervention in a family finds its basis in the state's *parens patriae* role vis-à-vis all children. But the state never has a strong, significant, existing caretaking role with children that third parties who seek custody have. The six *Troxel* justices recognized that in disputes between parents and third parties, policymakers may choose to balance the relationships between parents and children with the relationships children have with those third parties. The parent-child relationship is preeminent, of course, but the third party-child relationship has value as well.

Even prior to *Troxel*, significant support for a harm standard existed both in Supreme Court case law and the prevailing understanding of child development. The Court's precedents provide constitutional recognition to third parties who serve as children's primary caretakers, suggesting the appropriateness of the harm standard's balancing of such third parties' interests with parents' interests. The Supreme Court's seminal family rights cases apply equally to parents and third parties who raise children. *Pierce v. Society of Sisters* provides that constitutional rights, at least against the state, lie in both "parents and guardians."[264] The rights described in *Pierce* apply not just to parents. Rather, all "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[265] *Prince v. Massachusetts* even involved a third party caretaker—Sarah Prince "was the aunt and custodian of Betty M. Simmons, a girl nine years of age."[266] Ms. Prince challenged the provision of a child labor law to her supervision of three children—her niece Betty and two of her own children—in their efforts to proselytize. The Court's analysis—beginning with Prince's right "to bring up the child" as Prince saw fit[267]—did not differ between the three girls. Citing *Prince*, Justice Brennan wrote for the Court in *Smith v. Organization of Foster Families for Equality and Reform* that "[t]he scope of these rights extends beyond natural par-

263. Stanley v. Illinois, 405 U.S. 645, 658 (1972).

264. Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925). *Meyer v. Nebraska*, commonly cited as the first parents' rights case, does not mention parents in its famous list of rights protected by constitutional due process. Those rights include the right "of the individual to . . . establish a home and bring up children." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (describing "the liberty of parents *and guardians* to direct the upbringing and education of children under their control") (emphasis added).

265. *Pierce*, 268 U.S. at 535.

266. Prince v. Massachusetts, 321 U.S. 158, 159 (1944).

267. *Id.* at 164.

ents. The 'parent' in *Prince* itself, for example, was the child's aunt . . . ."[268]

Smith does establish that some due process rights exist in long-term third party caretakers.[269] This conclusion flowed from Justice Brennan's explanation that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association . . . as well as from the fact of blood relationship."[270] *Smith* gave one example where a third party would have some constitutionally-recognized rights:

> At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it 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.[271]

Surely that same conclusion applies to a child raised from birth for several years by a third party. Indeed, such a third party has a greater claim to constitutionally-recognized interests than foster parents. Unlike foster parents, third parties caring for children through private arrangement do not seek custody to preserve "a foster family which has its source in state law."[272] Rather, these third parties seek to vindicate "a relationship having its origins entirely apart from the power of the State," which, *Smith* strongly suggested, was of a higher constitutional order, reflecting "intrinsic human rights."[273]

Echoing *Smith*, some lower courts have recognized constitutional interests that attach to long-term third party-child relationships. The Second Circuit Court of Appeals has recognized that extended family members who have raised children in their physical custody for several years have a "substantial" constitutionally recognized interest.[274] Other courts have followed suit, writing, for instance, that "grandpar-

268. Moore v. City of E. Cleveland, 431 U.S. 816, 843 n.49 (1977) (citing *Prince*, 321 U.S. at 159).

269. *Smith* did not decide the question whether foster parents have constitutionally-protected liberty interests in the custody of foster children. *Id.* at 847 (explaining that it is possible to resolve the case on narrower grounds). But, as the text explains, it makes clear that some third parties do have constitutionally-protected liberty interests.

270. *Id.* at 844.

271. *Id.*

272. *Id.* at 845 (suggesting there is a lesser liberty interest where the relationship between child and foster parent is created by the state). *See also id.* at 857 (Stewart, J., concurring).

273. *Id.* at 845.

274. Rivera v. Marcus, 696 F.2d 1016, 1024–25, 1027 (2d Cir. 1982).

ents who have a long-standing custodial relationship with their grandchildren such that they constitute an existing family unit do possess a liberty interest in familial integrity and association."[275]

Pierce, *Prince*, and *Smith* all involved cases balancing a state's *parens patriae* interest against an individual's due process rights. A third party custody case differs: it balances the third party's interests (which, as I have just argued, sometimes rise to constitutional dimension) against the due process rights of parents.[276] But when a parent has not been a child's primary caretaker for some long period of time, the weight on the parents' side of that scale is significantly lessened. In the years subsequent to *Smith*, the Court explained that the strength of parental rights depends on the relationship between the parent and child.[277] In the Court's oft-quoted passage, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[278] Even *Stanley* framed the parental right at issue as a father's "interest in *retaining* custody of his children," not in regaining custody surrendered voluntarily or obtaining custody for the first time.[279] *Lehr* held that a parent who failed to seize his opportunity interest in his child could lose all parental rights to that child.[280]

I submit that the power of a court to determine that a parent has forfeited his or her constitutional status entirely can include the lesser power to determine that a third party's primary role and a parent's concomitant secondary role affects the balance of power between the third party and parent. For third parties who establish their long-term primary caretaker *bona fides*, the law should balance their role with the parent's role by only requiring the third party to prove that paren-

275. Osborne v. City of Riverside, 385 F. Supp. 2d 1048, 1054–55 (C.D. Cal. 2005) (quotations omitted) (citing Mullins v. Oregon, 57 F.3d 789, 794, 796 (9th Cir. 1995)). The Seventh Circuit has also suggested that third parties who have acted "as custodians" for a significant period of time have some due process rights. Ellis v. Hamilton, 669 F.2d 510, 513–14 (7th Cir. 1982).

276. *See Rivera*, 696 F.2d at 1024 (noting the "unavoidable tension between protecting the liberty interests of the natural parents while also extending familial rights" for foster parents).

277. The Court did so in a trio of cases exploring the constitutional rights of unwed fathers, beginning with *Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978), and continuing with *Caban v. Mohammed*, 441 U.S. 380, 394 (1979), and *Lehr v. Robinson*, 463 U.S. 248, 267–68 (1983). The Court's focus on unwed fathers appears quaint, but its reasoning remains applicable in various family law contexts.

278. *Lehr*, 463 U.S. at 260 (quoting *Caban*, 441 U.S. at 397) (quotations omitted).

279. Stanley v. Illinois, 405 U.S. 645, 652 (1972).

280. *Lehr*, 463 U.S. at 262–63 (noting that the child of a father who had failed to seize his opportunity interest in his parental rights could be adopted without receiving notice or an opportunity to be heard).

tal custody would harm the child, rather than proving that a parent is unfit to care for the child. Applying this conclusion would not erase the rights of such parents, as a *Lehr* finding would; the parent would still benefit from the presumption that custody is in the child's best interests, but the third party could win custody by proving the strength of his or her attachment with the child and the harm that severing that bond would cause to the child. This argument is rooted in some of the same principles that underlay legal protections for the parent-child relationship: stable relationships with caretakers are crucially important. Simply interfering with those relationships harms children, and we must guard against unwarranted intrusions on such relationships.[281]

The harm standard may also lead to different results than an unfitness standard when a third party who has not been a long-term primary caretaker seeks custody. When a third party seeks custody to obtain a service for a child before the third party has been raising the child for a long time—that is, before the parent has been absent long enough to be deemed unfit—then the third party's claim should rest on the importance of the service at issue. Without having raised the child for a significant time, the third party will not have evidence regarding the child's attachment to him or her. But that does not render irrelevant the third party's primary caretaking role at the time the third party seeks custody. Solely by having custody of the child, even for a short time, the third party's status has increased. The parent would then seek to regain custody, rather than retain it, a distinction the Supreme Court's jurisprudence suggests has significance.[282] And that difference, I argue, permits state policymakers to focus on the needs of the child, not only on whether the parent's conduct sinks to the level of unfitness.

C. State Laws

Twenty-two of the fifty states that permit third party custody follow the approach that I advocate. Only about a dozen states require a showing of parental unfitness, and some of those states do not even use the term "unfit."[283] On the other end of the spectrum, seventeen

281. *See* GOLDSTEIN, ET.AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE, *supra* note 21, at 19–40 (explaining that "placement decisions should safeguard the child's need for continuity" with the child's primary caretaker).

282. *See supra* notes 278–79 and accompanying text.

283. DEL. CODE ANN. tit. 13, § 721(e)(1) (2006) (requiring a finding that the child "is dependent or neglected"); ME. REV. STAT. ANN. tit. 19-A, § 1653(2)(C) (2007) (requiring a third party to establish "jeopardy" to the child, which is defined as "serious abuse or neglect" by ME. REV. STAT. ANN. tit. 22 § 4002(6) (2008)); MASS. ANN. LAWS ch. 209C §10(d) (2007) (providing that third parties can prevail if the parents

states provide that a third party may obtain custody via a best interests showing, although after *Troxel* even these states would have to start with a presumption that parental custody serves a child's best interests.[284] The balance of states has adopted an approach akin to what I endorse.[285] The Maryland Court of Appeals (Maryland's highest

consent or if the parents "are unfit to have custody"); MISS. CODE ANN. § 93-5-24(1)(e) (2007) (permitting a grant of custody to a third party if the parents have abandoned the child or "are mentally, morally or otherwise unfit to rear and train the child"); N.M. STAT. ANN. § 40-10B-8(B)(3) (2007) (parent is "unwilling or unable to provide adequate care"); OKLA. STAT. ANN. tit. 10, § 21.5(A) (2007) (requiring a showing of parental death, consent or that the parent is "unfit or unable to exercise parental rights and responsibility"); VT. STAT. ANN. tit. 14, § 2645(2) (2007) (requiring third party to show that the parent is "incompetent or unsuitable to have the custody of the person of the minor"); Street v. Street, 731 So. 2d 1224, 1225 (Ala. Civ. App. 1999) ("[T]he court must find . . . that the parent is so unfit for custody"); *In re* Marriage of Reschly, 334 N.W.2d 720, 721 (Iowa 1983) (requiring third parties to show that a parent is unsuitable); *In re* Marriage of Nelson, 125 P.3d 1081, 1086 (Kan. Ct. App. 2006) (noting that absent waiver or agreement by at least one parent, a parent "who has not been found to be an unfit person" cannot lose custody); Henderson v. Henderson, 568 P.2d 177, 181 (Mont. 1977) (holding that third parties must demonstrate abuse or neglect to prevail); Clifford K. v. Paul S., 217 S.E.2d 138, 160 (W. Va. 2005) (noting unfitness requirement).

284. *See generally* ARK. CODE ANN. § 9-13-101(a)(1)(B) (2006) (explaining that when a court order holds that an award of custody to a grandparent is in the best interests of the child, a grandparent's sex ought not to be considered); HAW. REV. STAT. § 571-46(2) (2006); IDAHO CODE ANN. § 32-717(1) (2006) (codifying that the best interests of the children should be considered before and after judgment in divorce proceedings); § 750 ILL. COMP. STAT. 5/602 (2006); IND. CODE ANN. § 31-17-2-8 (LexisNexis 2006); KY. REV. STAT. ANN. § 403.270(b)(2) (LexisNexis 1999) (providing for best interests standard once a third party has established "de facto custodian" status); LA. CIV. CODE ANN. art. 131 (2006); MICH. COMP. LAWS ANN. § 722.23 (West 2006); NEB. REV. STAT. § 42-364(1) (2006). *See also* NEV. REV. STAT. ANN. § 125.480(1) (2006) (determining custody when child resides with party found to be perpetrator of domestic violence is domain of court and should be based solely on the best interests of the child); N.C. GEN. STAT. ANN. § 50-13.2(a) (West 2006); OHIO REV. CODE ANN. § 3109.04(D)(1)(d)(2) (West 2006); 23 PA. STAT. ANN. § 5313(b) (West 2006) (codifying that a grandparent has standing to petition for custody of a child); TENN. CODE ANN. § 36-6-101(a)(1) (2006) (codifying that a court should award custody "as the welfare and interest of the child or children may demand"); VA. CODE ANN. § 20-124.2(B) (2006); Ogden v. Rath, 755 A.2d 795, 799 (R.I. 2000) (remanding case for custody determination based upon best interests considerations); Tuckey v. Tuckey, 649 P.2d 88, 90 (Utah 1982) (holding that a court should apply a best interests standard when making child custody determinations, with a presumption in favor the natural parents).

285. ARIZ. REV. STAT. ANN. § 25-415(A)(2) (2006) ("significantly detrimental to the child"); CAL. FAM. CODE § 3041(a) (West 2004) ("detrimental to the child"); CONN. GEN. STAT. ANN. § 46b-56b (2006) ("detrimental to the child"); D.C. CODE ANN. § 16-831.07(a)(2) (LexisNexis 2001) ("detrimental to the physical or emotional well-being of the child"); MINN. STAT. ANN. § 257C.03(7)(1)(ii) (West 2005) ("physical or emotional danger"); MO. REV. STAT. § 452.375(5)(5)(a) (2006) ("unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires," distinguishing "welfare of the child" from "best interests"); N.Y. DOM. REL. LAW § 72(2)(a) (McKinney

court), surveying the states, concluded that the "majority approach" was to first recognize a presumption of parental custody, rebuttable by a showing of harm, detriment, or unfitness, and to then evaluate whether third party custody was in the child's best interests.[286] The American Law Institute has similarly proposed a harm standard for a third party to obtain custody of a child over a parent's objection.[287]

The large number of states with a best interests of the child standard poses a concern. That standard is not constitutionally rooted, does not signal courts to apply close scrutiny to third parties' claims, and permits too much variation from one courtroom to another. These states should consider changing their substantive standard to harm or detriment to the child.

2008) ("extraordinary circumstances," such as "[a]n extended disruption of custody"); OR. REV. STAT. § 109.119(4)(a) (2006) ("detrimental to the child" is one of several factors); S.D. CODIFIED LAWS § 25-5-29(4) (2006) ("extraordinary circumstances exist which . . . would result in serious detriment to the child"); TEX. FAM. CODE ANN. § 153.433(2) (Vernon Supp. 2008) (parental custody "would significantly impair the child's physical health or emotional well-being"); WIS. STAT. ANN. § 767.41(3)(a) (West 2007) (parents cannot "care for the child adequately," a phrase distinguished from "fit"); Evans v. McTaggart, 88 P.3d 1078, 1082–83 (Alaska 2004) (summarizing cases establishing that a third party must prove parental unfitness or "that parental custody would clearly be detrimental to the child"); *In re* E.L.M.C., 100 P.3d 546, 549 (Colo. App. 2004) (upholding third party custody order because parental custody would have risked "emotional harm," without deciding whether harm was a required showing); Richardson v. Richardson, 766 So. 2d 1036, 1038, 1043 (Fla. 2000) (permitting third parties to obtain custody only by initiating "dependency proceedings" and noting that any third party custody statute must require "proof of a substantial threat of significant and demonstrable harm to the child"); Clark v. Wade, 544 S.E.2d 99, 107 (Ga. 2001) (requiring third parties to prove "that parental custody would harm the child" prior to a best interest analysis); McDermott v. Dougherty, 869 A.2d 751, 808–13 (Md. 2005) (requiring the third party to prove "extraordinary circumstances" which include factors such as time away from parent's home); *In re* R.A. & J.M., 891 A.2d 564, 578 (N.H. 2005) (holding that unfitness is not required but that "some exceptional circumstances" are); Watkins v. Nelson, 748 A.2d 558, 563–64 (N.J. 2000) ("unfitness, abandonment, gross misconduct, or 'exceptional circumstances,'" which include "the probability of serious psychological harm"); Moriarty v. Bradt, 827 A.2d 203, 205 (N.J. 2003) (holding that third party must demonstrate "harm to the child" to be granted visitation); Patzer v. Glaser, 368 N.W.2d 561, 563 (N.D. 1985) (holding that "exceptional circumstances" required to grant third party custody); Camburn v. Smith, 586 S.E.2d 565 (S.C. 2003) (requiring third party to prove parental unfitness or compelling circumstances); Toms v. Toms, 98 S.W.3d 140, 145 (Tenn. 2003) ("substantial harm"); *In re* Custody of Shields, 136 P.3d 117, 118 (Wash. 2006) ("actual detriment").

286. McDermott v. Dougherty, 869 A.2d 751, 783 (Md. 2005).

287. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.21(1)(a)(ii) (Tentative Draft No. 4, 2000).

V.
BURDEN OF PROOF

The final question state policy makers must answer is what burden of proof a third party must satisfy. I advocate a bifurcated approach: generally, the law should require third parties to present clear and convincing evidence. Such an elevated burden reflects the constitutional rights of parents to the care and custody of their children, and the concomitant rights (or at least interests) of children to their relationship with their parents. Given the norm of parents raising children, the law should skew any error in custody cases in favor of parent-child relationships. But in cases where the third party has raised the child for some significant amount of time, parental rights are lessened. When facts establish that the parent-child norm has not existed, the law ought not skew error in favor of individuals who have not been primary caretakers.

The Supreme Court has established the purpose of a burden of proof:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctess of factual conclusions for a particular type of adjudication."[288] *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.[289]

In light of this purpose and the fundamental nature of the parent-child relationship, a clear and convincing evidence standard is most appropriate. The law and social norms expect parents to raise children, and especially when a third party seeks to remove a child from a parent's physical custody, the courts should skew the risk of error in favor of the constitutionally-recognized relationship. But when the third party has been the child's primary caregiver for a lengthy period of time, when the parent's relationship with the child does not involve "some embodiment of [a] family," then the parent's rights have been diminished.[290] The child's interest in maintaining their current

288. Santosky v. Kramer, 455 U.S. 745, 754–55 (1982) (citing Addington v. Texas, 441 U.S. 418, 423 (1979)) (quoting *In re* Winship, 397 U.S. 358, 370 (1970)) (Harlan, J., concurring).

289. *Santosky*, 455 U.S. at 756.

290. *See* Troxel v. Granville, 530 U.S. 57, 88 (1999) (Stevens, J., dissenting).

caregiver relationship shifts the balance; between the parent and the third party, there is no need to skew error in either direction.

As with the substantive standard, the burden of proof signals to the court how to treat third party custody cases. The elevated clear and convincing standard instructs courts to hold third parties to a high burden, and if it appears they cannot meet that burden, to grant summary judgment to the parent or otherwise quickly dispose of the case. At the same time, providing a preponderance of the evidence standard for longstanding primary caregivers signals to courts that in such cases, the child and third party's relationship is one that approaches the parent-child relationship in legal standing. The court, therefore, needs to consider carefully the bonds that have formed between the third party and child and the effect on the child of severing those bonds.

California comes close to the bifurcated standard that I advocate. Third parties in California generally must prove that parental custody would be detrimental to the child by clear and convincing evidence.[291] But, if the third party is "a person who has assumed on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection and who has assumed that role for a substantial period of time,"[292] then the elevated burden of proof does not apply. Indeed, merely proving that the third party is such a person shifts the burden to the parent to prove that parental custody would not be detrimental.[293] By actually placing the burden of proof on parents, California has gone one step further than I advocate. And by establishing a vaguely worded standard without objective measures (such as "at least twelve months" instead of a "substantial period of time"), judges may interpret California's statute more broadly or narrowly than I would support. But California's recently-enacted statute[294] does recognize the essential difference between long-term primary caregiver third parties and others, and other states should follow suit.

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291. CAL. FAM. CODE § 3041(b) (West 2004).

292. CAL. FAM. CODE § 3041(c) (West 2004).

293. CAL. FAM. CODE § 3041(d) (West 2004). Hawaii, like California, shifts the burden of proof to parents when the third party "has had de facto custody of the child in a stable and wholesome home and is a fit and proper person." HAW. REV. STAT. § 571-46(2) (2006). Such third parties are entitled prima facie to custody, effectively shifting the burden to parents. *Id.* In Kentucky, once a third party proves by clear and convincing evidence that they are "a de facto custodian," then no burden of proof is stated, meaning a preponderance burden likely applies. KY. REV. STAT. ANN. § 403.270 (LexisNexis Supp. 2007).

294. The relevant portions of California's statute were enacted in 2002, two years after *Troxel*. Assem. B. No. 1938, 2002 (Cal. 2002).

Beyond California, most other states apply a preponderance of the evidence standard,[295] or do not specify a standard, in which case the preponderance of evidence standard applies.[296] A minority require clear and convincing evidence in all cases.[297]

Some state courts have justified a preponderance of the evidence standard in every third party custody case, and have done so through troubling, superficial analysis. The District of Columbia Court of Appeals, for instance, has held that "for statutes terminating only some of a parent's rights to his or her child, the preponderance of the evidence standard does not violate the Constitution's due process requirements."[298] In the view of that court, although a parent would lose the care, custody and control of a child, residual rights—such as the right to visit the child, to choose the child's religion, or to consent or not to the child's marriage—made the custody issue sufficiently minor as to not warrant an elevated burden of proof. The Maryland Court of Appeals has similarly held that, unlike parental rights termination and

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295. *See, e.g.*, *In re* A.D.C., 969 P.2d 708, 710 (Colo. App. 1998) (applying preponderance standard to third party custody case); Fish v. Fish, 939 A.2d 1040, 1066 (Conn. 2008) (holding "that the proper standard of proof is a fair preponderance of the evidence" in a third party custody case); Shurupoff v. Vockroth, 814 A.2d 543 (Md. 2003) (holding that the trial court, in applying a preponderance of the evidence standard to a third party custody case, applied the correct standard and that a clear and convincing evidence standard is neither required nor appropriate); Moriarty v. Bradt, 827 A.2d 203, 205 (N.J. 2003) (applying preponderance standard to third party visitation cases). *See also* OR. REV. STAT. § 109.119(3)(a) (2006); TEX. FAM. CODE ANN. § 153.433(2) (Vernon 2006).

296. The following states' statutes do not specify the burden of proof to apply: Arkansas, Delaware, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wisconsin.

297. ARIZ. REV. STAT. ANN. § 25-415(B) (2006); D.C. CODE ANN. § 16-831.06(b) (2005); MICH. COMP. LAWS SERV. § 722.25(1) (2008); MINN. STAT. ANN. § 257C.03(Subd. 7)(1) (2007); N.M. STAT. ANN. § 40-10B-8(C) (2003) (carving an exception only for the federal Indian Child Welfare Act where the burden of proof is proof beyond a reasonable doubt); VA. CODE ANN. § 20-124.2(B) (2006); Street v. Street, 731 So. 2d 1224, 1225 (Ala. Civ. App. 1999); Evans v. McTaggart, 88 P.3d 1078, 1079 (Alaska 2004); Clark v. Wade, 544 S.E.2d 99, 100 (Ga. 2001); Stockwell v. Stockwell, 775 P.2d 611, 613 (Idaho 1989) (explaining that Idaho case law has held that non-parents need to show "clear, satisfactory, or convincing evidence" (citation omitted)); *In re* R.A. & J.M., 891 A.2d 564, 580 (N.H. 2005); Adams v. Tessener, 550 S.E.2d 499, 503 (N.C. 2001); Toms v. Toms, 98 S.W.3d 140, 145 n.5 (Tenn. 2003).

298. *In re* A.G., 900 A.2d 677, 680 (D.C. 2006). *A.G.* involved D.C.'s guardianship statute—a third party custody statute regarding children in the neglect system—but its language would, on its face, apply to any "statute[ ] terminating only some of a parent's rights." *Id.* The D.C. Council opted to require third parties in custody cases to prove their case by clear and convincing evidence. D.C. CODE § 16-831.06(b) (2008).

adoption, in which clear and convincing evidence is required,[299] a custody case would leave parents with certain residual rights. A custody order could be modified at a later date and, more importantly, parents would retain the right to visit and communicate with the child.[300] Other parental rights may also remain after a third party custody order, such as reciprocal inheritance rights and the right to determine the child's religion.[301]

These courts' analyses do not withstand scrutiny. A parent's residual rights after losing a third party custody case are just that—residual. A parent's right to visitation and similar rights are important to both the parent and the child, but they are peripheral to the core of a parent's rights. When parents lose custody, they lose the care, custody and control of their child—the fundamental elements of the parent-child relationship recognized by repeated Supreme Court cases.[302] The modifiability of custody orders does not obviate the need for an elevated burden. *Santosky* itself noted that many "reversible official actions" require an elevated burden.[303] Seeking modification is a daunting task—the parent would have the burden of proving, for example, "that there has been a substantial and material change in circumstances" and that modifying custody "is in the best interests of the child."[304] Particularly after time has passed—time in which a third party has raised the child and formed stronger bonds with the child which a change in custody could damage—the slim prospect of modification provides little solace to a parent who has lost custody.

Accordingly, in disputes between most third parties and parents—especially parents protecting their existing custody of a child—the law should hold third parties to a heightened burden of proof. When the parents could lose the core of their parental rights, such a burden is generally constitutionally mandated.

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299. *See* Shurupoff v. Vockroth, 814 A.2d 543, 549 (Md. 2003).

300. *See id.* at 552.

301. *See, e.g.*, D.C. CODE § 16-831.10 (Supp. 2008) (listing parental rights that remain after a third party custody order); *Shurupoff*, 814 A.2d at 552 (noting reciprocal inheritance rights).

302. *E.g.*, *Troxel*, 530 U.S. at 66.

303. *See Santosky*, 455 U.S. at 759. The *Santosky* court noted that if some reversible actions received an elevated burden of proof, then surely an irreversible termination of parental rights decision should receive an elevated burden. *Id.* For present purposes, my point is merely that the reversibility or modifiability of a custody order does not alone justify a preponderance burden of proof.

304. D.C. CODE § 16-831.11(a) (2008).

A. *Preponderance of the Evidence for Long-Term Caretakers*

The general rule just described should differ when the third party has been the child's primary caretaker, and when the parent seeks to regain (or obtain for the first time) rather than retain physical custody. In such cases, the law should only hold third parties to a preponderance of the evidence burden of proof, for reasons similar to those that justify a harm to the child rather than unfitness of the parent standard.[305] Just as the harm standard balances the role of long-term primary caretaker third parties with the role of parents, so does a preponderance of the evidence burden of proof. Once a third party has established that he or she has been the child's primary caretaker by clear and convincing evidence, then the law should only require that individual to meet his or her burden of establishing that parental custody would harm the child by a preponderance of the evidence.

B. *Connection to Standing and Substantive Standard*

The burden of proof structure for which I have argued—preponderance of the evidence for long-term primary caregivers and clear and convincing evidence for everyone else—should not affect any debates regarding who ought to be able to file for custody of a child. There is relatively little controversy that longstanding primary caregivers—the only set of third parties who I argue should receive the preponderance of the evidence burden of proof—ought to be able to seek legal custody of a child. Debates regarding standing relate to who, other than longstanding primary caretakers, ought to be able to seek custody—and under the approach I advocate, those individuals would need to meet their substantive burden with clear and convincing evidence.

CONCLUSION

Third party caregivers are essential elements of life for millions of families. Millions of children live with third parties, often without clear legal relationships governing the relationships between third party caregivers and children. The result can be particularly chaotic disputes between third parties and parents over custody; unnecessary family disruption through the child welfare system; and, even when the third party's custody is undisputed, difficulties obtaining services and benefits to raise children—a disproportionate number of whom live in poverty or have a disability and thus particularly need access to

305. *See supra* Part IV.B.

services and benefits. State custody law regarding third parties, however, varies greatly, especially regarding which third parties are permitted to seek custody of a child. States should revise their laws to follow three core recommendations. First, states should permit a broad set of third parties to seek custody. States should check the small risk of meritless litigation through pleading requirements, assistance to pro se litigants, and removal of custody requirements. Second, states should require third parties to prove that parental custody is or would be harmful or detrimental to the child's physical, mental or emotional well-being. Third, in most cases, states should hold third parties to a clear and convincing evidence burden of proof. A preponderance of the evidence burden is appropriate only when third parties are a child's long-term primary caregivers.

Some states are close to these standards; California and the District of Columbia provide two good examples. But many are not. Many states limit who can seek custody too narrowly, leaving some children and their families left out of legal protection even when necessary to protect them from harm. On the other end of the spectrum, many states do not hold third parties to a sufficiently high burden, permitting them to prove their case by a flexible best interests of the child standard or by a minimal preponderance of the evidence burden of proof.

State policy makers should reconsider their third party custody laws in line with my suggestions above. The result, I believe, will be the provision of important legal options for the millions of children who are cared for by third parties, and more rigorous and consistent adjudication of difficult custody cases.