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I. INTRODUCTION

"Happy families are all alike; every unhappy family is unhappy in its own way,"[1] wrote Tolstoy. Unfortunately, an increasing number of unhappy families are alike in one important way: they experience wrenching struggles between adults for the opportunity to nurture children and enjoy their affection and companionship. Those contests often find their way into the courts as families dissolve in rising numbers.

Usually the contesting adults are the child's parents. Increasingly, however, nonparents seek legal protection for their relationships with a child. They may play many roles in the child's life such as grandparent, stepparent, prospective adoptive parent, or a parent's nonmarital partner. What makes these stories different may seem to overwhelm the one element they have in common. Yet that common element is important: an adult who is not a parent seeks a legally enforceable relationship with the child against the wishes of the parent. In virtually every case, the nonparent has established an emotional bond with the child. That bond gives the adult or the child a psychological stake in continuing the relationship. Does it give them a legal stake in doing so?

When a court decides such a case, one of its most important tasks is choosing the proper legal standard. The typical choice is between the "best interests of the child" standard and one requiring something akin to parental abandonment or unfitness. Many courts believe their choice is limited to these two. Others apply an intermediate standard of some kind. For example, they may require the nonparent to show "actual detriment" to the child if the relationship with the claimant is not maintained, but not that the parent is unfit under conventional definitions of abuse or neglect. Some courts resolve the issue on the basis of jurisdiction or standing, ruling that the court lacks power to consider the nonparent's claim or that the nonparent has no legally cognizable stake in the relationship at all.

Judicial opinions often begin the analysis with a choice of standard, without considering its justification. It usually makes sense to do so, of course. A court may be bound to a particular

1. LEO TOLSTOY, ANNA KARENINA 1 (Louise & Aylmer Maude trans., Oxford Univ. Press 1990) (1918).

standard by statute or precedent. There is no need to reinvent the wheel every time a dispute over access to children must be resolved. But in a day when many of the basic assumptions of family law are being questioned and challenged, looking behind the standards is worthwhile. Underlying the standards[2] are three basic classes of interests: those of the child, the adult claimant(s) (whether parents or other adults), and the broader society. This article argues that the interaction and competition among these three classes of interests produces—or should produce—the standards used to resolve disputes over access to and custody of children. Although there is play in the linkage between interests and standards, the connection is strong and often direct.

Examining the standard applied in a given kind of case can teach much about how the competing underlying interests were, at least implicitly, weighed and valued by the court or legislature that chose the standard. Knowing how those interests are accommodated is important, for they represent basic elements of social policy.

The nonparent cases open a particularly interesting window on the connection between standards and interests for two reasons. First, they avoid the self-canceling effect of competing parental interests that, at least under the black-letter law of most jurisdictions, are legally equivalent to each other. Comparing the dissimilar interests of parent and nonparent can reveal interesting characteristics of each, particularly those of the nonparent. Second, and more important, examining the standards applied to contests between parent and nonparent in a variety of contexts provides a view of society's interest in the child-nonparent relationships in those settings.

That view will show something we already know: that serious political and ideological battles are being fought over the meaning of "family," and the "momentum for respect"[3] the inter

2. The choice of legal standard depends on the law that applies in a particular jurisdiction. On this question, as in so much of family law generally, the States tend to develop law, both statutory and judge-made, peculiar to themselves. Some of this law is constitutionally based, however, as in the rule that parental rights cannot be terminated on less than clear and convincing evidence. *See* Santosky v. Kramer, 455 U.S. 745 (1982). This article's purpose is not to identify and analyze the detailed rules of law in the different states, although it will need to refer to some of them.

3. This phrase was used to refer to the constitutional status of the parental

ests of certain individuals claiming family membership should enjoy in public policy and social values. Not all of those battles are equally visible. Those waged by some types of nonparents, such as prospective adoptive parents, or a parent's same-sex partner, tend to receive the most attention. Looking at a broad range of settings in which parents and nonparents compete over their relationships with a child, rather than focusing only on one or two political flashpoints, clarifies society's interest in family form and puts it in perspective. It shows that existing law continues to prefer and privilege child-parent relationships, particularly in the marital family, over those between children and other adults. When such families dissolve, an affirmative social interest may be found in child-nonparent relationships that attempt to repair or replicate them.

This perspective, of course, cannot account for the entire body of law governing contests between parents and nonparents. One need not look far to realize that the decisions and statutes in this area are far from consistent with one another. Some courts are deliberately breaking with tradition. Any effort, including the one made here, to look for common, underlying principles will be subject to the criticism that it fails to account for a significant part of the cases and legislation. But the effort is worthwhile nonetheless. The proposed framework helps us understand the general direction in which the law has been traveling and the choices it faces in the near future. This article uses the nonparent cases to show how the conventional social interest in the family is reflected in the law, and to voice support for the values that underlie that interest.

Parts II and III of this article consider, in formal terms, the link between legal standards governing nonparents' claims to a legally protected relationship with a child and the underlying interests at stake. Part II briefly examines the interests of child, parent, and society. Its purpose is not to explore them at length, but simply to identify them and their principal features. Part III then suggests a plausible basis for deriving the standards typically used for adjudicating disputes involving adults and children from the underlying interests. Part IV considers particular kinds of contests between parent and

interest in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

nonparent. In light of the approach to standard derivation proposed in the preceding part, it considers what the various standards actually applied by the courts in those cases imply about the content and weight of the underlying interests, particularly the social interest.

II. THREE BASIC INTERESTS

The law governing child-adult relationships is driven by basic individual and social interests. An interest, as I use the term, is a need or desire which, if met, might make one more satisfied or better off. Our culture recognizes some interests as worthy of respect in law. A typical manifestation of that respect is the granting of a right. An interest can be respected other than by creating a right, however. It can be given weight in the creation of legal standards or rules guiding the discretion of a decision-maker.[4]

Three classes of interests shape the legal relationship between a child and an adult. The first is the child's interest in being in the care of an adult who will provide the best possible protection, nurture, and upbringing. The second is the interest of an adult who seeks the custody or companionship of the child. The interests of two or more adults may conflict with one another, of course, as when parent and nonparent pursue inconsistent goals. The third is society's interest in the form and function of the family, particularly as a child-rearing institution. Consider how these three interests shape the law governing the relationships between children and adults.

4. Many interests enjoy constitutional protection. Others are reflected in only statutory or judge-made law. In this article I do not focus primarily on the constitutional status of the interests I discuss. That status is often crucial to legal analysis, of course. But for present purposes I am concerned with identifying interests that enjoy substantial cultural support, as reflected in legal protection, constitutional or not.

A. The Child's Interest

The phrase "interests of the child" or "best interests of the child" is commonplace in the law. It appears in the legislation and case law dealing with children in various legal settings, such as adoption, child protective services, and custody disputes between divorcing parents. Its deceptively smooth surface covers something quite complex for, as typically used, it refers not to one person's (i.e., a child's) interests, but to a legal standard. In unpacking that standard one finds the very collection of competing goals and interests discussed in this article.

As used here, the "child's interest" denotes something much more limited and straightforward: a child's stake in creating or maintaining a relationship with an adult. Even narrowed in that way, the concept can be difficult, of course. It may be defined either in terms of the child's own desires or by the views of adults assuming some responsibility for the child. The latter approach creates the hazard that what we call the interest of the child is, in reality, the self-interest of an adult spokesperson. Given human beings' lengthy process of cognitive, emotional, and moral development, however, requiring adults to speak for children is, to a degree, unavoidable. When children are very young it is the only way a child's interests can be usefully defined.

Viewed from the perspective of those not involved in a particular child's life, one can assume general agreement about the child's interest in relationships with adults, at least at a fairly high level of abstraction. The child needs "a close, stable relationship with an adult committed to [her] welfare."[5] Such a relationship provides the basis for a safe and fruitful passage to adulthood and the capacity to exercise autonomy. She needs love, protection, stability, nurture, discipline, and education, all modeled by the behavior of the adults in her life. This is the content of the "child's interest" as used in this article. Most adults, of course, fall short——sometimes grotesquely so——in

5. Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 461.

meeting those needs. But that is the interest that competes for attention in the setting of legal standards.

A conclusion reached by some children's advocates is that the child's interest should be represented not merely by granting it weight in the competition with other interests, but by enshrining it as a right.[6] That concept is explored in greater detail as the competing rights of adults and the state are considered.[7] But a preliminary observation is in order here.

In some settings, it may be entirely appropriate to encase a child's interest in the armor of legal rights. That is particularly true when serious harm, such as physical abuse or neglect, is threatened. In the context examined here, however--the ongoing relationship between adult and child--that move should be undertaken with caution. An intuitive reason to speak in terms of children's rights rather than interests is to counterbalance the power of the parental interest which, as discussed in the next section, has long been characterized in terms of legal rights. The better solution is to examine carefully what we mean--or should mean--by parental rights. The purpose of those rights is not primarily to make it easier for parents to get what they want, notwithstanding the child's needs. It is, more fundamentally, to protect the child-parent *relationship* from forces external to the family.[8] The constitutional status of parental rights is for the benefit of both parent and child. In contests *between* parent and child, parental "rights" are far from absolute. In that setting, the interests of parent and child are weighed against each other, neither routinely trumping the other. One can debate whether the weighing is done properly, but characterizing the parent's interests as rights does not provide a sound basis for arming the child (or her advocate) with a stable of potentially conflicting rights.

In any case, the focus here is on the child's interest, whether or not those interests are manifested as rights. This analysis is concerned with a child's stake in maintaining a relationship

6. *See, e.g.*, Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321 (1994); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children To Maintain Relationships with Parent-like Individuals*, 53 MD. L. REV. 358 (1994).

7. *See* discussion *infra* Part II.B.1.

8. *See* discussion *infra* Part II.B.1.

with an adult who performs a caregiving role. Its maintenance is much more a matter of nurturing, educating, and socializing the child, protecting her from premature exposure to the rigors of the adult world, than enabling her autonomous choices during childhood.

B. The Adult's Interest

The inevitable paradigm for the adult interested in a relationship with a child is, of course, the parent. Law and the broader culture inevitably, and properly, use the parental stake in a child's life as the baseline for evaluating the interests of other adults.

1. Parents

The parent's interest enjoys a distinguished legal pedigree, including important affirmations from the Supreme Court and other federal courts, state courts, and state legislatures. Typically framed in terms of "rights," it encompasses the custody and companionship of the child,[9] opportunities to influence the child's values and moral development through

9. The Supreme Court characterized some of its previous holdings in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), a case affirming that the interest of an unwed father in his children is constitutionally protected:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).
>
> . . . The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Id. (alterations in original).

religious training,[10] and important education and health care decisions.[11]

Characterizing the parent's, but not the child's, interest in terms of rights might suggest that the law treats the parent's interest as inherently superior to that of the child. Precisely that inference is sometimes drawn, no doubt, by key actors in the legal system.

A much better understanding is that parental rights have a dual purpose. They do recognize and protect the parent's personal interest in the care and companionship of the child, in inculcating values and perpetuating tradition. But they have the further purpose of promoting the welfare of the family as an institution. Parents have a trusteeship not only for their children as individuals, but for the family organization itself. Their "rights" exist to shield family members (particularly children) and the relationships they enjoy with one another from the sometimes corrosive effects of interference by the state or other outsiders. Within the family, a parent's interests are entitled to weight, but they are not absolute or necessarily superior to those of the child. They must accommodate the interests of other family members.[12] Nor, of course, are the

10. Although ruling against the parent (an aunt acting as guardian, to be precise), the Court spoke positively of this element of the parental interest in *Prince v. Massachusetts*, 321 U.S. 158 (1944). *Prince* affirmed the aunt's conviction for violating a statute prohibiting parents or guardians from allowing their children to sell publications in public places. The aunt and niece were selling religious literature. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court ruled in favor of Amish parents who violated compulsory education laws by withdrawing their children from school after the eighth grade. The opinion emphasized the "traditional interest of parents with respect to the religious upbringing of their children." *Id.* at 214.

11. The parental interest in authorizing medical care for children is not absolute, particularly when the child's life is at stake. *See, e.g.*, Jehovah's Witnesses v. King County Hospital, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (mem.) (upholding state statute authorizing the state guardianship of children for the purpose of authorizing emergency blood transfusions). But most states have enacted exemptions from their child protective laws for parents who objected to particular forms of medical treatment on religious grounds because federal regulations implementing the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101 (1988 & Supp. V 1993), required them to do so as a condition of receiving federal funds.

12. As one court put it: "The primary purpose of the parental rights doctrine appears to be to limit the authority of the state to interfere in family life as a means of advancing its own interests or beliefs." *In re* Santoro, 578 N.W.2d 369, 376 (Minn. Ct. App. 1998); *see also* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH.

parents' interests unqualified vis-a-vis the world outside the family. Those interests (or rights) are strong, but they must take account of the interests of the larger society.

2. Mothers and fathers

Speaking of the "parental interest" in gender neutral terms assumes that mothers' and fathers' interests are indistinguishable, or at least of equal weight. During a period ending with the last generation or so, the law was quite clearly otherwise. Especially as to younger children, mothers had a stronger claim than fathers under the maternal preference or "tender years" presumption.[13]

The modern orthodoxy, as clearly reflected in statutes governing custody upon divorce, repudiates the notion that, so far as the law is concerned, either parent should have a superior claim.[14] Nevertheless, despite its death and burial as a matter of black-letter law, the maternal preference persists, at least as an empirical matter. It is well known that many more single-parent families are headed by women than by men,[15] although the causes for that phenomenon are debatable.[16] Some

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L. REV. 463 (1983). The *Santoro* court concluded that the parental rights doctrine did not permit paternal grandparents, who had adopted the children following their parents' death, to defeat the visitation petition of the maternal grandparents.

13. As stated in Professor Clark's 1968 treatise, "the courts have adopted a rule of thumb or presumption that the welfare of a child of 'tender years' is normally best served by placing him in the custody of his mother." HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.4, at 585 (1968).

14. See sources cited in HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 19.4(a), at 799 n.20 (2d ed. 1988).

15. The 1992 Census reports that, for all races, the total number of children living with one parent is 17,578 (in thousands). Of that total, the number living with mother only was 15,396 and the number living with father only was 2,182. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES NO. P20-468, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1992, tbl. 5 (1992).

16. To the extent that arrangement is a matter of mutual agreement between parents—as it often is—it reflects acceptance of the idea that, for one reason or another, mothers are superior caregivers for children under the particular circumstances. To the extent it reflects fathers' refusal to accept responsibility for children—which is all too often true—it suggests that, even in the face of economic hardship, mothers more often than fathers will assume the parental role rather than leave their children to the care of someone else. To the extent disproportionate maternal custody is the result of judicial decrees following custody litigation, it evidences either mothers' superior preparation or abilities as caregivers for children, the covert operation of a maternal preference rule, or some combination of the two. *See generally* ELEANOR E. MACOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD:

have called for the functional equivalent of the preference under a nominally gender-neutral, primary caregiver rule,[17] or for its official restoration on the basis of a political agenda that emphasizes gender difference.[18]

The maternal preference issue raises the question whether the maternal and paternal roles are fungible. Arguments for their fungibility are undercut by the preference's stubborn refusal to disappear. The law ignores something deeper and more abiding than simple tradition if, to satisfy an egalitarian ideology, it assumes that mothers and fathers should or can routinely replicate each other's relationship with, and influence on, their children. This issue is discussed further below.[19]

The gender-neutral and gender-equal provisions of modern divorce law do not necessarily assume the fungibility of paternal and maternal roles. Those roles can be equally deserving of legal respect, though very different in substance. If so, whether the mother or the father prevails in a contest between them might involve a fact-specific inquiry, the outcome turning on how the differences in their roles relates to the particular child's needs or stage of development. Put that question aside, however, for the focus is not on contests between parents. As discussed in the following section, nonparents' interests are usually lesser than those of parents in the eyes of the law, sometimes by an order of magnitude. If that is so, then in the context of a dispute between parent and nonparent, differences in the maternal and paternal roles become relatively unimportant.

3. Nonparents and "parental" autonomy

Many adults other than parents form deep, emotional bonds with a child. Do these adults enjoy a "parental" interest in those relationships? The courts often assume that nonparents have no such interest of their own, in the sense that the word "interest" is used here—something society recognizes and affirms legally. The opinions thus often frame the question as

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SOCIAL & LEGAL DILEMMAS OF CUSTODY (1992).

17. *See, e.g.*, Pusey v. Pusey, 728 P.2d 117 (Utah 1986).

18. *See generally* MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

19. *See* discussion *infra* Part IV.E.2.

whether maintaining contact with these persons is important *to the child*. As illustrated by the cases discussed in Part IV, however, they sometimes suggest that certain adults, such as an extended family member (usually a grandparent), a stepparent, a foster parent, or a prospective adoptive parent, may enjoy a protected interest.

Such an interest may have at least two possible grounds. The first—which is particularly applicable to the child's relatives—is that the nonparent's interest is derivative of the parent's, or that it is grounded in the same respect for the biological and marital family as is the parent's interest.[20] The second is that the nonparent commenced the relationship in good faith and in a socially approved context. If the parent (or state acting as guardian) later seeks to terminate the relationship, some courts may give weight to the nonparent's interest based on its initial legitimacy.[21]

Whatever the ground for the nonparent's personal interest, if it exists at all, it is usually given less weight than a parent's interest. This is not to say that the nonparent will always lose in a dispute with a parent. On the facts of a particular case, the nonparent might prevail. But in the setting of legal standards, as shown in the cases discussed in Part IV, the parental interest is usually weightier than the analogous interest of a nonparent.

C. The Social Interest

The third interest is less often discussed or recognized as separate from the parent's interest in judicial opinions, but it is distinct. It is society's interest in the form and function of the family. In this article I refer to it as the "social interest."

Society is interested in the family because of what only the family—and no organ of the state—can do successfully. Families require and teach individuals to care for one another, to put another's needs first, to develop a sense of community. These attributes are profoundly important to the quality of our culture. The family is society's primary means of socializing children and of teaching them moral and cultural values. In a

20. The cases in which grandparents seek visitation or custody of a child often make this point. *See* discussion *infra* Part IV.A.

21. *See* discussion *infra* Parts IV.B-C.

culture infatuated with the notions of self-gratification and unbridled personal autonomy, and accepting of positive media portrayals of such vices as violence and substance abuse, families have more to contend with than ever before. The high social costs (not to mention the personal ones) of the family's inability to do so are starkly played out in crime, the consequences of children giving birth to children, and—perhaps least obvious but enormously tragic—lifetimes of missed opportunities. Beleaguered though it is, the family remains by far the best institution for imparting to children the skills and values essential to productive citizenship, while helping them avoid or overcome the many obstacles to that end.

Families have long taken a variety of forms, in addition to the traditional marital family consisting of mother, father, and children, with perhaps extended relatives sharing the family home. Recent decades have seen a significant growth in nontraditional domestic arrangements: families that have never had two parents, children living with unmarried parents, children living with one parent and the parent's nonparent partner, and foster families in which the child lives with neither parent. If these various forms are not equally successful in accomplishing the family's important care giving, teaching, and socializing functions, then society has an interest in preferring and encouraging those that work best.

The relative merits of different family forms, the stance the law should take towards them, and indeed the very concept of "family" are at the heart of an important, ongoing political debate. As discussed in Parts III and IV, traditional family law represents a collective judgment that (among other things) child-parent relationships are socially preferred, particularly in a marital family, and should be privileged over competing child-nonparent relationships. These judgments are, of course, demonstrably false in particular cases. But the law has assumed that they are true often enough to justify a nonabsolute preference in favor of the traditional family.

A number of observers challenge the assumption that the traditional family, with its three core relationships—husband-wife, mother-child, and father-child—should be socially preferred. Some do so by emphasizing the decline of the traditional family as an empirical matter, arguing that what is

dictates what ought to be.[22] Others make a more direct, ideological challenge to the traditional family form. Martha Fineman, for example, rejects the process by which the traditional family, or other family forms, are collectively approved. The process itself is premised on patriarchy, she says, and for that reason is undeserving of respect. She argues that the husband-wife bond may have private significance to its participants, but that it should not be privileged above any other intimate relationship between adults. The social and cultural concept of "family" should consist solely of the caregiver-dependent relationship, meaning, typically, mother and child. In her view, fathers generally become peripheral to the mother-child unit, which is the essential social building block deserving of protection and privilege.[23]

It matters who is right. If some family forms are better than others at helping children become good adults, and at helping all family members become good citizens, those forms deserve protection and affirmation within the legal system. This article does not attempt a broad-based discussion of the family. Its more modest goal is to consider, and to comment briefly on, one particular element of the family: the child-adult relationship. It does so by contrasting child-parent relationships, particularly in the marital family, with competing child-nonparent bonds. The comparison is instructive. It helps reveal the depth of the traditional family's privileged status in the law, and it suggests some of the reasons for that privilege.

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22. *See* Holmes, *supra* note 6, at 363 n.22 ("Given that households consisting of a husband, wife, and their children constitute the minority of families with children, it is difficult, if not ludicrous, to assume that the traditional family predominates or should continue to receive preferential treatment."). In addition to his dangerous leap from "is" to "ought," Holmes overstates his factual case by categorically excluding all but factually and legally intact families from the "traditional" category. An important distinction should be made, however, between families that, after beginning in the pattern of two married parents with their children, suffer some degree of dissolution (usually by divorce or the death of a parent), and families that, by the choice of the adults involved, never attempt to conform to that model. Families in the former situation often reconstitute themselves under the traditional pattern through remarriage, and in any event fall within the policy umbrella favoring the "traditional family" form. As discussed below, substitutional family forms such as stepparents, foster and pre-adoptive families attempt to replicate the benefits of the nuclear family on the basis of established legal and social commitments. They ought to enjoy much of the same social respect as the intact nuclear family.

23. *See generally* FINEMAN, *supra* note 18.

The social interest in the family is but one element of the law governing the relationships between children and adults. The child's and adults' personal interests are crucial parts of the mix. The next part of this article considers how these three interests work together.

III. INTERESTS, STANDARDS, AND RESULTS

The three interests are—or should be—the source of the legal standards courts apply in contests between adults over legally enforceable relationships with children.[24] Each interest invites the decision-maker to consider and give weight to certain kinds of facts. The child's interest makes relevant the resources—material, emotional, or cultural—that a particular adult offers or lacks. Continuity of care may be particularly important to the child. The adults' interests put in play their opportunities to enjoy the child's companionship and to exercise discretion in rearing, nurturing and educating the child.[25] The social interest invites consideration of the importance to society of family form and function.

Each of these interests pushes in a particular direction. In a given setting, a contest between parent and grandparent, for example, or a parent and stepparent, they combine to create a legal standard. They are, in effect, "netted out" against each other. The resulting standard is applied to the facts of a specific case. Given those facts, a grandparent or stepparent might be awarded visitation or custody over the parent's objection, notwithstanding a social interest favoring the child-parent relationship. By governing the weight given to certain kinds of facts, the standard affects, but does not predetermine, the result.

The interplay of the three interests accounts for the standards applied in the two most common settings in which an adult's relationship with a child is at stake: allegations of

24. These interests are not the immediate source of the standards applied in most of the relevant decisions. On a day-to-day basis, courts find their standards in statutes and judicial precedent. But at a deeper level these interests account for the standards found in much of the statutory or case law.

25. In past generations, when children were important sources of labor or income, parents also had a direct economic stake in child custody. That interest still exists in some families, but in most western cultures children are now financial liabilities.

parental unfitness and custody contests following parental divorce or separation. After explaining the basis for the standards applied in those two settings, the discussion turns to the derivation of standards, including the frequent appearance of an intermediate standard, in disputes between parents and nonparents.

A. The Unfitness Standard

The unfitness standard lies at one end of the spectrum of rules for decisions about the child-adult relationship. It assumes the existence of at least one child-parent relationship and attempts to define the circumstances under which that relationship is subject to disruption by the state against the will of the parent. The unfitness standard requires the child to endure serious actual or threatened harm before the state will intervene.[26]

All three interests are at work in the unfitness standard. The state, under the *parens patriae* doctrine, represents the child's interest by intervening to stop or prevent harm. If that were the only interest at stake, the level of harm or risk to the child triggering intervention would be set at some minimal level. Under typical child protective legislation, however, it is clearly not sufficient that the child merely would be better off if intervention occurred. Intervention is conditioned on proof of a specific, serious risk or harm.[27] The law's willingness to tolerate substantial harm is explained by the influence of the other two interests, which cut the other way.

The parent's interest urges restraint in intervention. State supervision of child rearing is a potentially massive intrusion into a parent's relationship with a child, even if it falls short of a change of custody. The parent's interest affects the standard by requiring a greater showing of harm before intervention is permitted.

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26. The unfitness standard usually applies to attempts by the state (as opposed to a private person) to supervise or terminate the conduct of the parent. Some statutes do give private parties standing to litigate parental unfitness, however, especially in the form of abandonment. *See, e.g.*, IOWA CODE ANN. § 600A (West 1996).

27. *See, e.g.*, IOWA CODE ANN. § 232(2)(6) (West 1994) (defining "child in need of assistance").

Likewise, the social interest in the child-parent relationship cuts against intervention. That interest is not to be confused with the state's *parens patriae* role, which looks only to the child's interest. The social interest in family form recognizes that, as a general matter, child rearing is best accomplished by parents rather than state-owned or sponsored institutions. It also assumes that disruption of existing families, even struggling ones, may itself be harmful. For these reasons, the social interest has a braking effect on intervention.

The combined effect of the parental and social interest, each working counter to the specific child's immediate interest, illuminates the unfitness standard. We take the child's interest seriously, but the other two interests are entitled to weight as well. We are concerned with more than what will advance the welfare of this child in this case.

Some argue that only the child's interests should be taken into account in this setting.[28] Current law emphatically rejects that position. It adopts the unfitness standard, which gives weight to interests in addition to the child's. When the unfitness standard is applied to particular facts, of course, the result may be either to allow or to prohibit intervention. That decision requires fact finding and the exercise of judgment. But is it clear that intervention is not justified simply because the child would be better off if it occurred.

B. The Best-Interests Standard

At the other end of the spectrum is the "best interests of the child" standard. The paradigm application is the custody contest between divorcing or separating parents. Its name suggests that the best-interests standard reflects exclusive attention to the child's interest. The decision maker decides what relationships with the two parents, and whatever new families each may have created, will best serve the child.

What has become of the other interests? Under contemporary legal principles, the parents' interests cancel each other out, effectively dropping them both from the

28. *See, e.g.*, James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1376 (1994) ("[J]udges would decide . . . conflicts [between parents and the larger community over child rearing] solely on the basis of children's welfare interests.").

analysis. The assumption is that the two parents' interests are equally weighty.[29]

What of the social interest in contests between parents? In principle it should still play a role. If one accepts the separation or divorce of the parents as a premise, however, the social interest largely drops out of the analysis. At least one of the parents has chosen to dismember the parent-parent axis of the family. Through its divorce law, the state has permitted that to happen. The dissolution not only severs the parent-parent partnership, but guarantees that at least one, and often both, child-parent relationships will be disrupted to a greater or lesser extent. The state has thus chosen not to assert the social interest.[30]

If the state chose to protect that interest, it would most obviously do so by impeding the divorce or separation itself, thus making it more difficult for either parent, or even the parents acting jointly, to prejudice the child's relationship with either of them. In fact, the now atrophied fault-based divorce system created impediments to dissolution, at least in contested cases. With the widespread adoption of no-fault divorce, the state effectively abdicated any responsibility for deciding whether a dissolution is to occur.[31] Although a few observers have suggested that the presence of children in a family should

29. As discussed above, that assumption represents a rejection of the traditional maternal preference. *See* discussion *supra* Part II.B.2.

30. In those rare instances in which parents contest each other's relationship with a child without also seeking to end their relationship with each other, the social interest may loom particularly large in the analysis, overshadowing the child's interest as the basis for the decision. In one well known case, a state supreme court ruled that the trial court should not have adjudicated a dispute between parents over which school their daughter should attend, reasoning that the family must be allowed to function autonomously in such matters. *See* Kilgrow v. Kilgrow, 107 So. 2d 885 (Ala. 1959).

31. An interesting development in divorce law is recent legislation in Louisiana giving couples the option to enter a "covenant marriage." Covenant marriages are formed as the result of a special declaration, following premarital counseling. The dissolution of such a marriage is subject to greater limitations than those imposed by the typical no-fault regime. The spouse seeking divorce must prove that the other has committed a culpable act such as adultery, a serious felony, or physical or sexual domestic abuse. Otherwise, separation without reconciliation or abandonment for prescribed periods must be proved. *See* LA. REV. STAT. ANN. § 9:307 (West 1997). It is as yet unclear whether this legislation will have a significant effect on marriage and divorce in Louisiana, or in other states that enact similar statutes.

have a bearing on the availability of divorce,[32] such proposals have not become part of the law. Meanwhile, the evidence continues to mount that dissolution exacts a terrible toll on children, not only economically, but in the loss of the child-parent relationship.[33]

With the parents' interests negating one another, and the state surrendering the social interest to the demand to privatize the dissolution decision, the child's interest remains alone as the basis for the legal standard in determining the child-adult relationship in this setting. Whatever one's views on the resurgent interest in fault-based divorce, there is an inescapable irony in the suffering the children endure in a proceeding nominally designed to serve their "best interests."

C. An Intermediate Standard

When parents contest custody with nonparents, a number of courts have applied an intermediate standard of some kind—one that requires a nonparent to show more than that legally protecting a relationship with a child is in the child's best interests, but not that the child otherwise will suffer harm at the level of abuse or neglect. Courts sometimes describe the intermediate standard in terms such as that the child will suffer "actual detriment" if the relationship in question is not protected.[34]

The courts have not always been careful about justifying an intermediate standard. The approach outlined in this article provides a rationale for such a standard in contests between parents and nonparents. An intermediate standard results from the interplay of the three basic interests.

The child's interest properly exerts its weight, as in the two contexts already discussed. That interest moves the standard

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32. *See, e.g.*, Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 87-94 (1990); Judith T. Younger, *Marriage, Divorce, and the Family: A Cautionary Tale*, 21 HOFSTRA L. REV. 1367 (1993).

33. "In the years following divorce, children experience two profound losses. One is the loss of the intact family together with the symbolic and real protection it has provided. The second is the loss of the presence of one parent, usually the father, from their daily lives." JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 290 (1989).

34. *See In re* Marriage of Allen, 626 P.2d 16, 23 (Wash. Ct. App. 1981). This case is discussed *infra* Part IV.B.

toward the best-interests end of the spectrum. The competing adults' interests also shape the legal standard. But because they are not equivalent in the eyes of the law, they do not simply eclipse one another as in the parental dissolution or separation context. Instead, the parent's interest is a net positive force, pushing the standard away from the best-interest position. If the nonparent has no legally cognizable interest, the resulting standard may move far toward the abuse and neglect test. If, as is sometimes the case, the nonparent's claim is given independent weight, the influence of the parent's interest may be weakened, though not negated.

The social interest in the child-parent relationship also plays a role. As in the child protective setting, it moves the standard toward the unfitness end of the spectrum. If there is no social interest in the child-nonparent relationship (and if the nonparent lacks a personal interest), then the case is functionally equivalent to those traditionally covered by the abuse and neglect standard, which then governs the matter. As illustrated by the cases discussed in Part IV, a number of courts have applied just such a standard to parent-nonparent cases.[35]

Depending on who the nonparent is, however, society may have an interest in supporting that person's relationship with the child. The "nonparents" in these cases encompass a broad range of individuals. The law does not, and should not, treat them all alike. Moreover, the standard may be affected by the relief sought by the nonparent. Attempts to wrest custody from a parent are generally treated differently than demands for visitation only.[36]

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35. Some courts reject the nonparent's claim not under an abuse and neglect standard, but on the ground that the claimant lacks standing to pursue the matter or the court to hear the matter. *See, e.g.*, West v. Superior Court, 69 Cal. Rptr. 2d 160 (Ct. App. 1997) (holding parent's former same-sex partner lacked standing to pursue, and court lacked subject matter jurisdiction to consider, claim for custody or visiting rights with child). As so construed, the governing statutes reflect a judgment that the nonparent's claim is not entitled to weight and/or that no social interest would be served by protecting the child-nonparent relationship.

36. As one court put it, "[c]ustody disputes and visitation disputes should be measured by their respective standards. Visitation is a considerably less weighty matter than outright custody of a child, and does not demand the enhanced protections . . . that attend custody awards." Wolinski v. Browneller, 693 A.2d 30, 40 (Md. Ct. Spec. App. 1997) (quoting Fairbanks v. McCarter, 622 A.2d 121, 126 (Md. 1993)) (applying a lower standard to grandparent seeking visitation rather than custody of child).

The next part of this article discusses some of these relationships in detail. The point is that the legal standard used to resolve the parent-nonparent dispute is influenced by whether society has an interest in the matter, and if so by that interest's strength. If it is relatively strong, it pushes the standard back towards the "best interests of the child."

The standard used reveals something about the weight that has been given (or denied) to each of the three interests. That is so even if the legislature or court devising the standard fails to realize it. The interest most often overlooked in the analysis of these cases is the social interest. Given the broad array of nonparents seeking a legal relationship with a child, it is especially important for standard-makers to focus on the implications of their choices. The next part of this article looks at some of the more common child-nonparent relationships in this light.

IV. TYPES OF CHILD-NONPARENT RELATIONSHIPS

In parent-nonparent disputes, the nature of the child's and parent's interests are relatively constant. The principal variables in setting the legal standard are the social interest in the nonparent's relationship with the child, and the nonparent's personal interest, if any. Those interests turn not on the merits of an individual case, such as whether a particular nonparent would provide important nurture, protection, or emotional continuity. Such facts, crucial to a final decision, come into play only when the relevant standard is applied to them. The standard itself is significantly affected by society's interest in encouraging and privileging an identified category of child-nonparent relationship as a general matter. It is also affected by the state's willingness to give weight to the personal interests of those in the class of nonparent to which the particular claimant belongs. In this section I consider a number of child-nonparent relationships in light of the interaction of these interests.

A. Grandparents

One is not inside or outside a "traditional family" in the way that one is inside or outside a city limit. Family relationships, whether based on consanguinity or affinity, are matters of

degree. The social interest is at its strongest at the core of the nuclear family, in the relationships between spouses, child and parent, and siblings. But important bonds also exist with family members further from the center—grandparents, aunts, uncles, cousins, and more distant relatives. Though secondary to those at the nuclear family level, the social interest in extended family relationships is substantial. Indeed, they enjoy some measure of constitutional protection.[37]

Extended family relationships contribute to the nurture and socialization of children. The role of grandparents is particularly important. One team of researchers has concluded that "the bond between grandparents and grandchildren is second in emotional power and influence only to the relationship between children and parents."[38] When parents' marriages and domestic partnerships dissolve, grandparents play an increasingly important role in rearing children, sometimes becoming the primary care givers.[39]

Legislatures and courts have increasingly opened the door to giving grandparents a legally protected role in a child's life, even over the objections of a parent. This area is heavily governed by statute, and the law varies widely among jurisdictions. But certain common features of the law are consistent with the idea of a social interest in the child-

37. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977) (plurality opinion) (footnote omitted). As one court put it, when grandparents assume the care of a child, "the child simply moves to a different location within the existing family structure." *In re* Santoro, 578 N.W.2d 369, 377 (Minn. Ct. App. 1998) (rejecting equal protection challenge to statute authorizing visitation rights for grandparents against the wishes of other grandparents who have adopted the child, but not against the wishes of unrelated adoptive parents).

38. ARTHUR KORNHABER & KENNETH WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION vii (1981). The relationship of many grandparents to grandchildren was captured nicely in the statement of a faculty colleague who, to his immense delight, had recently become a grandfather. One of his students declared that he would never bring children into this corrupt world. Replied the faculty member: "I understand your feelings. But what are you going to do for grandchildren?"

39. In 1995, 1,466,000 children were being raised by their grandparents without either parent residing in the home, up from 1,359,000 in 1994 and 1,017,000 in 1993. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES NO. P20-484, MARITAL STATUS AND LIVING ARRANGEMENTS MARCH 1995 (UPDATE), tbl. 4 (1995).

grandparent relationship. That interest ranks below the social interest in the child-parent relationship, but it still commands respect.

The relative positions of grandparents and parents are reflected in some of the more common rules governing their competing claims. For example, it is significant that the statutes typically give grandparents the possibility of only visiting rights, not custody.[40] That limitation, which would not apply if the child's best interests were the only consideration, signals a relatively greater respect for the social and parental interest in the child-parent relationship. Moreover, states often deny grandparents any legal claim to involvement in the lives of their grandchildren until the child-parent relationship itself has been disrupted, such as by death, divorce, or informal separation.[41] Until that point, the intact marital family, with its powerfully interconnecting bundle of personal and social interests, trumps the competing claims of extended family members.[42] If a disruption occurs, however, the child's

40. *See, e.g.*, N.M. STAT. ANN. § 40-9-2 (Michie 1978) (making "visitation privileges" available to grandparents under various circumstances, including a parent's death, dissolution of parents' marriage, and adoption by a stepparent); 23 PA. CONS. STAT. ANN. § 5311 (1981) (authorizing order of "reasonable partial custody or visitation rights" available to grandparents if the parent is deceased, doing so would be in the child's best interests, and the order would not interfere with the surviving parent's relationship with the child); TENN. CODE ANN. § 36-6-302 (1996) (authorizing "reasonable visitation rights" to grandparents when in child's best interests); *cf.* CONN. GEN. STAT. ANN. § 46b-59 (West 1995) (authorizing visitation rights to unspecified third persons, but "shall not be deemed to have created parental rights"). A few States make custody available to grandparents or others. *See, e.g.*, Peterson v. Peterson, 399 N.W.2d 792 (Neb. 1987) (awarding grandparents custody of child where father was physically abusive and mother mentally ill under statute interpreted to allow third-party custody claims in cases of parental unfitness or forfeiture of parental rights); Lively v. Lively, 853 P.2d 787 (Okla. Ct. App. 1993) (holding that the trial court had jurisdiction to decide whether paternal grandparents, who had been child's primary caregivers since his birth, should be awarded custody after death of their son over the mother's objection under an "abuse of parental authority" statute).

41. *See* Michael Quintal, *Court Ordered Families: An Overview of Grandparent-Visitation Statutes*, 29 SUFFOLK U. L. REV. 835, 840 n.29 (1995) (citing state statutes).

42. In *Babb v. Beginnes*, 701 So. 2d 616 (Fla. Dist. Ct. App. 1997), for example, the appellate court ordered dismissal of a grandmother's petition for custody of her granddaughter, notwithstanding that the parents' marriage had been deeply troubled, and the trial court had found the parents "were not acting in the best interests" of their daughter. To hold otherwise, the court said, "would permit a grandparent to interfere with an intact family, and would be inconsistent with a legislative policy to preserve families when possible." *Id.* at 618. The court in *West v. West*, 689 N.E.2d 1215, 1219-20 (Ill. App. Ct. 1998), reviewed the history of the Illinois grandparent

grandparents or other relatives may have an opening to a legally protected role in the child's life, whether in the form of outright custody or, more commonly, visitation.[43]

The interests underlying that role are illuminated by asking whether the grandparent's right is wholly derivative from his or her son or daughter (the child's parent). Some states do so limit it, so that the grandparent is permitted only to replace, in some measure, a missing or unfit parent, but not to displace one who is functioning and legally fit, even if divorced or separated.[44] Under this reasoning, the termination of a parent's right necessarily eliminates any claim that person's parents would have to be allowed access to their grandchild.[45] Other states, however, make clear that a grandparent may, in some circumstances, obtain access to the child, even over the objections of the grandparent's son or daughter.[46] Under this

visitation statute, noting that, except for a brief period during 1989-90, the statute has permitted visitation only if the parents' marriage has been disrupted by divorce or separation, unless one parent joins the grandparents' petition.

43. Most statutes condition a grandparent's access to a child on some kind of disruption in the child's immediate family, such as the death of a parent, a dissolution of the parents' marriage, or their separation. *See, e.g.*, Ridenour v. Ridenour, 901 P.2d 770, 772 (N.M. Ct. App. 1995) (holding that under state statute, "grandparents may file a visitation petition when one of the following threshold requirements has been met: the filing of a judgment of dissolution of marriage, legal separation, or the existence of a parent-child relationship pursuant to the Uniform Parentage Act; one or both parents are deceased; a child under six years resided with a grandparent at least three months; a child over six years resided with a grandparent at least six months; or adoption proceedings are involved"); Castagno v. Wholean, 684 A.2d 1181 (Conn. 1996) (interpreting state statute to condition grandparents' (and other nonparents') right to visitation upon disruption of the intact parent-child relationship by events such as a parent's death or parental separation); McIntyre v. McIntyre, 461 S.E.2d 745 (N.C. 1995) (interpreting state statute interpreted to limit grandparents' right to visitation to circumstances in which there is an ongoing custody proceeding or the minor child is in the custody of a stepparent or relative); *see also* Quintal, *supra* note 41, at 840 n.29.

44. *See, e.g.*, Brown v. Earnhardt, 396 S.E.2d 358, 360 (S.C. 1990) (The court rejected the view that "the visitation rights of grandparents stand on their own and should be viewed separately from such rights awarded the parents. . . . [T]his Court does not subscribe to the view that grandparents are entitled to contend for autonomous visitation privileges absent a showing of exceptional circumstances.").

45. *See, e.g.*, Simmons v. Simmons, 900 S.W.2d 682 (Tenn. 1995) (holding that the child's adoption by stepfather gave mother and adoptive father full constitutional protection against claims by nonparents including paternal grandparents).

46. *See, e.g.*, Olson v. Olson, 534 N.W.2d 547 (Minn. 1995); Rigler v. Treen, 660 A.2d 111 (Pa. Super. Ct. 1995).

view, a parent's death or loss of rights would not necessarily eliminate the grandparents' claim.[47]

Granting a grandparent's claim in such cases shows that the grandparent does not simply "inherit" the parent's legally protected interest. Other interests are at work as well. They might include the grandparent's personal interest in maintaining a relationship with the child, the child's own interest in access to the grandparent, or the social interest in the child-grandparent relationship. State recognition of the first of these—the grandparents' own interest—is questionable.[48] The second, in sharp contrast—the child's personal interest in maintaining an existing bond with grandparents—is obviously important, a point emphasized by judicial statements to that effect.[49] A few statutes go so far as to condition the

47. *See, e.g.*, Snipes v. Carr, 526 So. 2d 591 (Ala. Civ. App. 1988) (allowing paternal grandparents visitation over mother's objection following death of father and mother's remarriage); Lingwall v. Hoener, 483 N.E.2d 512, 516 (Ill. 1985) (permitting grandparents in three separate cases visitation rights after parent through whom they were related to child lost parental rights as a result of divorce and adoption by other natural parent's new spouse).

48. Grandparents were found to lack a constitutionally protected interest in the adoption of their grandchild in *Mullins v. Oregon*, 57 F.3d 789 (9th Cir. 1995). State courts have reached a similar conclusion on the basis of state law and policy. *See, e.g.*, *Olson*, 534 N.W.2d at 549 ("[W]hat is at issue in grandparent visitation cases is 'the right of the child to . . . know her grandparents,' and not the interests of the grandparents." (quoting Roberts v. Ward, 493 A.2d 478, 482 (N.H. 1985))). *But see* Lockhart v. Lockhart, 603 N.E.2d 864, 866 (Ind. Ct. App. 1992) (recognizing both "the rights of [the] parents to raise their children as they see fit and [the] rights of the grandparents to participate in the lives of their grandchildren"); King v. King, 828 S.W.2d 630, 632 (Ky. 1992) (noting, in upholding constitutional validity of grandparent visitation statute, that "[t]he grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life").

49. *See, e.g.*, *Snipes*, 526 So. 2d at 592-93 (child had enjoyed a regular and continuous relationship with grandparent); *Lingwall*, 483 N.E.2d at 516-17 ("[T]he length and quality of the relationship between grandparents and child, the child's need for continuity in his relationships with people who may have played a significant nurturing role in his life [are relevant to whether visitation is appropriate]."); Weddel v. Weddel, 553 N.E.2d 213, 214 (Ind. Ct. App. 1990) (The court found that children and maternal grandparents "functioned as an extended family and the children [had] deep, loving relationships with their grandparents which their father fe[lt was] in their best interests to maintain. [The father] concede[d] that the [grandparents] 'were their life' when his former wife was alive"); Spradling v. Harris, 778 P.2d 365, 368 (Kan. Ct. App. 1989) (finding that the grandmother had "seen or spoken to [the grandchild] every week since his birth, except that time during which her daughter refused to allow contact"); Pointer v. Pointer, 829 P.2d 1016, 1017-19 (Or. Ct. App. 1992) ("During the marriage, the grandparents had cared for the [grandchild] extensively and, when mother was away for long periods, they cared for him daily.").

grandparents' visitation rights on the child's prior residence with them.[50]

The social interest in the child-grandparent relationship is relevant too. As one court put it, "grandparents are members of the extended family whom society recognizes as playing an important role in the lives of their grandchildren, which recognition has been given added meaning in this State by the Legislature's policy judgment underlying [the grandparent visitation statute]."[51] Perhaps the clearest evidence of that social interest lies in the fact that most statutes governing nonparents' access to children over a parent's objection apply only to grandparents or privilege a grandparent's claim over that of other nonparents.[52] The implication is that grandparents, as a class, and the child-grandparent bond as a category of relationships, are particularly valued.

Given the complex mesh of interests,[53] not treated uniformly among the states, it is not surprising that the substantive standards applied by the courts vary. The statutes themselves generally say that the child's-best-interests standard governs grandparents' access to a child.[54] Yet, it is evident from the

50. See statutes cited in Quintal, *supra* note 41, at 847-48 n.54.

51. Campbell v. Campbell, 896 P.2d 635, 642-43 (Utah Ct. App. 1995) (footnote omitted) (stating that this social interest nevertheless does not automatically override the child's best interests to the contrary); *see also* Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993) (en banc).

52. A few state statutes do apparently open the door to other nonparent claimants generally. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-59 (West 1995) (authorizing court to grant visitation rights to "any person" if in best interest of child); N.C. GEN. STAT. § 50-13.2 (1997) ("An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.").

53. The New Mexico Court of Appeals enumerated the range of interests it took into account in rejecting a constitutional challenge to its Grandparent Visitation Privileges Act (GVA): "In the present case, application of the GVA is an appropriate method by which to balance the competing interests of Child, Grandparents, Mother, and the State, while promoting Child's best interests as paramount." Ridenour v. Ridenour, 901 P.2d 770, 776 (N.M. Ct. App. 1995).

54. *See* Quintal, *supra* note 41, at 836 n.6 (citing state statutes). Whether the standard is based on the child's best interests or grants a parental preference, it properly changes if the grandparents already have been made the formal custodians or guardians of the child. In such cases, courts require a parent seeking a change of custody to meet a high burden. A court in a state generally granting parental preference explained:

> Once a court has properly transferred custody from a parent to a nonparent, it does no good to apply the [parental preference] doctrine to weaken the

structure of the statutes and the conditions they impose, as discussed above, that the child's interests are not the only force at work. Moreover, apart from a statute's formal requirements, courts may interpret or apply it in such a way as moves the standard actually applied away from the best-interests standard. A court, for example, might deploy a nonstatutory presumption that a child's best interests are unlikely to be served by mandating grandparental access where the child's immediate family has not undergone dissolution or other change in status.[55] While it nominally preserves the best-interest test, the effect of such a presumption is to employ a standard quite different in fact. The standard actually applied recognizes that the social and personal interests in a child's relationship with a grandparent or other relative are less weighty than those attached to the child-parent bond.

Although the law in this area is complex and evolving, it shows both the primacy of the child-parent relationship and the secondary, yet still important, role of grandparents in the eyes of the law. That importance is due to the child's personal interest in maintaining grandparental relationships, especially during times of upheaval in the immediate family, and to the social interest in the extended family.

> substantial change requirement for modification. The proceeding that gave the nonparent custody will have enabled the parent to exercise the parental preference, and achieved the goal that leads us to treat parent-nonparent cases differently from other custody cases. Having once protected the parent's right to custody, at the risk of sacrificing the child's best interests, we should not then sacrifice the child's need for stability in its care and living arrangements more readily than in a parent-parent case.

C.R.B. v. C.C., 959 P.2d 375, 380 (Alaska 1998) (refusing to change custody from maternal grandparents to father); *see also* Freshour v. West, 962 S.W.2d 840, 842-43 (Ark. Ct. App. 1998) (applying "material change in circumstances" standard in refusing to change custody from maternal grandmother, who had been named child's legal guardian, to father).

55. *See, e.g.*, Carlson v. Carlson, 558 P.2d 836, 837 (Wash Ct. App. 1976) (concluding, notwithstanding a statutory best-interest standard for nonparent visitation rights, that "[i]n the absence of a threshold situation [such as dissolution, separation, abuse or abandonment] affecting the interests of the child with regard to the continuity of the family unit, the welfare of the child will seldom, if ever, be served by a judicially imposed overriding of parental discretion to determine whether a third person, distinct from the basic family unit, shall be permitted the privilege of visitation with the child").

B. Stepparents

The name "stepparent" evokes a broad range of images in our culture, ranging from the evil parent-figure of classic fairy tales to the kindly man or woman who cheerfully provides for the needy children of a new spouse. This article considers two separate categories of stepparent, recognizing the variety of relationships covered by each. The first is the traditional stepparent who marries, knowing that the other spouse has children from a prior relationship. The second, often not considered a stepparent at all, is the man whose wife conceives or gives birth to a child fathered by another. Such men are often legally presumed to be the fathers of children born under those circumstances. The marriage of the nonparent to the parent makes it sensible to consider these two categories together.

1. Traditional stepparents

Traditional stepparents play an increasingly important role in the lives of the nation's children.[56] The stepparent's marriage to the child's parent[57] forms a new marital family. Absent an adoption by the stepparent,[58] however, the child is not fully a part of it under the law. Only one legal child-parent relationship exists within a household with two parent figures.[59] Despite occasional suggestions to the contrary, the law allows a child only one legal mother and one legal father.[60]

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56. *See* Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445 (1995).

57. I use the term "stepparent" in the traditional sense to refer to a nonparent who has married a child's parent. A child's relationship with a parent's nonmarital partner is discussed *infra* Part IV.E.

58. Some stepparents prefer not to adopt their spouse's children. Others would quickly do so but for the other parent's protected interest in his or her relationship with the child.

59. This description assumes that the stepparent's spouse has at least primary physical care of the child. Although joint legal custody is increasingly common, true joint physical custody, in the sense that the child is equally integrated into the now separate households of both parents, is not the norm.

60. Louisiana does recognize dual paternity for purposes of child support and legitimacy. *See* Smith v. Cole, 553 So. 2d 847 (La. 1989). The Louisiana Court of Appeals has noted that "the rights and obligations which evolve from the legal fiction of dual paternity are not well defined and perhaps the whole concept should be reconsidered." Smith v. Dison, 662 So. 2d 90, 94 (La. Ct. App. 1990).

As David Chambers has pointed out, there exists no "single paradigm or model of appropriate responsibilities" for stepparents.[61] A child of divorced parents, for example, can be expected to have quite different relationships with the spouse of her custodial parent, her "residential stepparent" with whom she lives day-to-day, than with the spouse of her noncustodial parent. Moreover, child-stepparent relationships may vary widely, depending upon such things as the stage of the child's life when the stepparent enters the scene (e.g., infancy as opposed to late adolescence) and whether the noncustodial parent seeks to maintain a relationship with her.[62] It is therefore impossible to generalize safely about the nature of child-stepparent relationships. It is true, however, that "[m]ost children living with a custodial mother become much better off economically upon their mother's remarriage."[63] Undoubtedly, many stepparents also provide crucial emotional support and nurture. As long as public policy both favors the nurture of children within the marital family, yet permits its easy dissolution, society has an interest in encouraging the creation of stepparent relationships, with the child-adult bonding that often follows. That will be true especially when the noncustodial parent chooses to play little or no role in the child's life. It is consistent with that interest to give substantial weight to the continuation of that relationship when a court is called upon to reorganize a blended family legally.

Nevertheless, a stepparent usually has a weaker legal claim to a relationship with a child than does a parent. A number of jurisdictions open the door to visitation rights for stepparents following marriage dissolution, either by statute,[64] or by the exercise of inherent judicial discretion.[65] But claims for primary custodial rights are more difficult. They are often barred on

61. David Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce*, *in* DIVORCE REFORM AT THE CROSSROADS 102, 104 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

62. *See id.*

63. *Id.* at 107.

64. *See* citations in Bryce Levine, Note, *Divorce and the Modern Family: Providing* In Loco Parentis *Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, HOFSTRA L. REV. 315, 319 n.22 (1996).

65. *See, e.g.*, Shoemaker v. Shoemaker, 563 So. 2d 1032 (Ala. Civ. App. 1990); Honaker v. Burnside, 388 S.E.2d 322 (W. Va. 1989).

grounds of lack of jurisdiction or standing,[66] or subjected to the full rigors of the unfitness standard, as applied to the child's birth parent.[67]

Routinely putting a stepparent's interests on par with those of a parent would be unwise. Particularly when the noncustodial parent maintains a close, parental bond, giving anything like equal weight to the stepparent's interest would invite loyalty conflicts and confusion. Moreover, some stepparents never intend to enter a traditional child-parent relationship with their stepchildren. They assume no obligation of financial or emotional support and all members of their blended families see them as no more than the parent's spouse.

But sometimes stepparents form a bond with the child that is indistinguishable from that with a birth parent, especially when no meaningful relationship with the noncustodial parent exists. The child's interest in maintaining that bond upon marital dissolution, sometimes in the form of a custodial relationship, may be particularly compelling.

Recognizing that interest, an increasing number of courts grant standing to stepparents and adjudicate their claims under standards less onerous than the unfitness test. They make this move when the stepparent has assumed a genuine *in loco parentis* relationship with the child.[68] Some courts simply equate the stepparent's with the birth parent's interests, moving directly to the best-interests standard.[69] Others engage in a more nuanced analysis, taking careful account of the

66. *See, e.g.*, Olvera v. Superior Court, 815 P.2d 925, 928-29 (Ariz. Ct. App. 1991); Morrow v. Morrow, 345 A.2d 561, 562-63 (Conn. 1979).

67. *See, e.g.*, Schuh v. Roberson, 788 S.W.2d 740, 741 (Ark. 1990); Larson v. Larson, 384 S.E.2d 193, 194 (Ga. Ct. App. 1989); Bennett v. Jeffreys, 356 N.E.2d 277, 282 (N.Y. 1976).

68. *See* Levine, *supra* note 64, at 315.

69. *See, e.g.*, Gorman v. Gorman, 400 So. 2d 75 (Fla. Dist. Ct. App. 1981); Hickenbottom v. Hickenbottom, 477 N.W.2d 8 (Neb. 1981). A Delaware statute recently upheld by that state's supreme court against a constitutional challenge applies the best-interests standard to contests between a stepparent and noncustodial birth parent when the custodial birth parent dies or becomes disabled and the child has been living with the stepparent. *See* Tailor v. Becker, 708 A.2d 626 (Del. 1998). The court recognized the blended family of birth parent and stepparent as within the concept of family that is "deeply rooted in this Nation's history and tradition," *id.* at 629 (quoting Michael H. v. Gerald D., 491 U.S. 110, 124 (1989), and Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)), and approved of protecting the "strong familial bond that may have developed between a stepparent and child." *Tailor*, 708 A.2d at 629.

interests involved, arriving at a point more demanding than the best interests standard, but less onerous than the unfitness standard. Such an approach reflects not only the strength of the child's interest in maintaining the relationship with the stepparent, but society's affirmation of its legitimacy.

An illustrative case is *In re Marriage of Allen*.[70] Joshua, the child of Joe and Dana Allen, was born profoundly deaf. His parents soon divorced, and Joshua ended up in the custody of Dana's mother. Joe then met and married Jeannie, who had custody of her three children from a prior marriage. When he was three years old, Joshua came to live with Joe, Jeannie, and her children. Joe adopted Jeannie's children. But she never adopted Joshua, because Dana would not relinquish her parental rights.[71] It appears that Dana played no role in Joshua's life, however.

Although she did not adopt Joshua, Jeannie took a great interest in him, actively looking for ways to help him deal with his disability. Unlike Joe, whose attitude toward Joshua was "apathetic and fatalistic,"[72] Jeannie believed the boy's future was bright. She arranged for Joshua to learn sign language. She and the other three children became fluent in its use. She saw to it that Joshua received special tutoring, incurring substantial personal debt to pay for it. As a result, Joshua entered school only slightly behind schedule and soon reached "a level of intellectual development equivalent to that of hearing children his age."[73]

Joe and Jeannie began dissolution proceedings when Joshua was six years old. She sought custody of all four children. The trial court rejected Joe's argument that it lacked jurisdiction to consider, and that Jeannie lacked standing to seek, Joshua's custody. The court then awarded Jeannie the custody of Joshua (and the other children), applying the best-interests standard. Joe appealed the decision as to Joshua.

The court of appeals first decided that the trial court had properly exercised jurisdiction over Jeannie's claim to Joshua's custody. It interpreted state statutes as granting judicial power

70. 626 P.2d 16 (Wash. Ct. App. 1981).
71. *See id.* at 19 n.2.
72. *Id.* at 19.
73. *Id.*

to decide the custody of "*any child dependent upon either or both spouses.*"[74] It also found that, under state law, a stepparent intending to assume responsibility for a child (as Jeannie clearly had) had standing to seek custody as a person standing *in loco parentis*.[75]

The court then considered what legal standard applied. It agreed with Joe that the trial court erred in using the best-interests standard. "[B]etween a parent and a nonparent, application of a more stringent balancing test is required to justify awarding custody to the nonparent."[76] The result in the case was defensible, however, if another standard were used, one striking "a middle ground; to give custody to a nonparent there must be more than the 'best interests of the child' involved, but less than a showing of unfitness."[77] The court described the standard as requiring a showing of "actual detriment" to the child.[78] "Precisely what might outweigh parental rights must be determined on a case-by-case basis. But unfitness of the parent need not be shown."[79] The court had little trouble concluding that, although Joe was not unfit as a parent, Joshua would suffer an actual detriment if he did not remain in Jeannie's custody.

In its analysis in support of an intermediate standard, the court identified the three interests discussed in this article. Quoting from an earlier decision, *State v. Koome*, the court said: "[i] parental prerogatives are entitled to considerable legal deference, [but] they are not absolute and must yield to [ii] fundamental rights of the child or [iii] important interests of the State."[80]

The court emphasized that "the psychological relationship between Jeannie, her family and Joshua is equivalent to that of a natural family entity."[81] Therefore, "the reason for deferring

74. *Id.* at 20 (quoting WASH. REV. CODE § 26.09.020(1)(d) (1997)) (emphasis added).
75. *See id.* at 21.
76. *Id.*
77. *Id.* at 23.
78. *Id.*
79. *Id.*
80. *Id.* at 22 (quoting State v. Koome, 530 P.2d 260, 264 (Wash. 1975)).
81. *Id.* at 23.

to parental rights—the goal of preserving families—would be ill-served by maintaining parental custody."[82]

This statement invites close attention. By the court's own account, "preserving families" is *a* reason, though not the only one, for deferring to parental rights. As made clear in the quotation from *Koome*, "parental prerogatives" and the social importance of the family are two separate interests, to be balanced against the interests of the child. Preserving a family unit of which Joshua had become a part was a valid reason for judicial action not only because it would serve Joshua's interests, but because it protected a socially valuable institution.

The court overstates, or oversimplifies, the case when it says that granting custody to Jeannie would preserve Joshua's family unit, of course. The family was being dissolved along one of its axes by Jeannie's divorce from Joe. The custody award did preserve an existing psychological child-parent relationship, however, representing another critical axis of Joshua's family, as he perceived it.

It properly made a difference to the court that Jeannie was Joshua's stepparent, and thus neither fully a parent nor a complete stranger in the legal sense. That point is at the heart of the court's analysis on jurisdiction and standing. The deployment of those concepts is often used to signal the absence of a social interest in some categories of child-adult relationships. Jeannie's relationship with Joshua, however, enjoyed an affirmative social interest. She had made legal and moral commitments in her marriage to Joshua's father. In the state of Washington, those commitments made her legally liable for Joshua's support during the marriage.[83]

Had the court weighed only the father's interest, the boy's interest, and the social interest in the child-birth parent relationship, it would properly have arrived at the traditional unfitness standard for depriving the father of custody. By giving weight to an additional factor, society's interest in Jeannie's relationship with Joshua, the court produced an intermediate standard. Applying that standard to the facts of this case—in which not only Jeannie's extraordinary

82. *Id.*

83. *See id.* at 21.

assumption of responsibility for the boy's well-being, but Joe's inability to provide for his special needs were salient—the scales were tipped in favor of custody for Jeannie.[84]

2. Presumed fathers

A category of cases related to, but distinct from, the classic dispute between a parent and stepparent arises under paternity presumption statutes. Such legislation creates a presumption—either conclusive or rebuttable—that the husband of a woman who conceives or bears a child during the marriage is the child's father. If the presumption is conclusive, it constitutes a substantive rule of law. Otherwise it may be characterized as a rule of evidence. In either event, it reflects, among other things, a clear affirmation of the public interest in the marital family.

The United States Supreme Court grappled with the constitutional implications of an irrebuttable presumption of paternity in *Michael H. v. Gerald D.*[85] A sharply divided Court upheld the application of the statute in circumstances where there was no doubt about the child's paternity, and, during a brief period of informal separation from her husband, the mother and child had cohabited with the father. Roughly speaking, the issue was framed as a contest between the competing substantive rights enjoyed by the father and husband, and the state's interest in the marital family.[86]

I am less interested here in the constitutional implications of the case than in noting the mix of interests that lies behind paternity presumption statutes. The facts assumed by these statutes differ significantly from those in typical stepparent families. Most important, the child is born into an existing marital family, rather than experiencing the loss or absence of

84. The issue would have been different, of course, had Joshua's birth mother sought to enforce a legal relationship with him. Assuming she was not found to have abandoned him, the court would have been required to factor her interests into its analysis in creating a legal standard. That analysis would be complicated by the introduction of another adult's interests into the mix, interests which would have competed directly with those of Jeannie.

85. 491 U.S. 110 (1989).

86. The Court also considered whether the child had a constitutionally protected liberty interest in maintaining relationships with both her birth father and her presumed father. *See id.* at 130-32.

her father, followed by her mother's marriage to another man. She is unlikely to have established an emotional bond with her birth father, or he with her. Her mother's husband did not enter the marriage on the understanding that it would include a child of another man, a child for whom he might decline to assume full parental responsibility. Indeed, the husband might not even be aware that he lacks a genetic relationship with the child. The facts in a specific case might not conform to this pattern, of course,[87] but they appear to be the picture envisioned by the statutes.

The statutes may also assume a certain kind of contest: a dispute between the child's birth father, on the one hand, and her mother and the mother's husband, on the other. On such facts, the relevant interests combine to support placing a steep burden in the way of the birth father's claim. The child's interest likely calls for her to remain in an undisturbed relationship with the mother and husband, with both of whom she has an emotional, child-parent bond. The birth father's interest is entitled to no more weight than that of the birth mother. But the presumption cannot be accounted for without reference to the social interest in preserving an existing marital family. When both spouses seek to preserve that relationship, and doing so will maintain the emotional, economic, and other advantages of the marital family, the state has a serious stake in preventing its disruption. That stake, together with the individual interests of the players in these unhappy dramas, combine to justify a legal standard tilted steeply against the birth father's claim.

Presumptions, of course, especially conclusive ones, are blunt instruments. When the actual facts vary from those assumed by the statutes, the basis for the presumption may weaken or disappear. In such cases, some courts find ways to avoid the application of even a conclusive presumption.[88] Even if the presumption of paternity is rebutted, however, the

87. In *Michael H.*, for example, the child and her father did develop an emotional bond with one another.

88. For example, in *In re Melissa G.*, 261 Cal. Rptr. 894 (Ct. App. 1989), the California Court of Appeals found the statute upheld in *Michael H.* inapplicable where the mother had divorced her husband shortly after the child's birth and married the child's father. The court said the conclusive statutory rule did not govern if the mother and presumed father did not intend to raise the child jointly.

underlying facts may support a standard more solicitous of the mother's husband than a requirement that he prove the unfitness of the birth father.

Bodwell v. Brooks[89] illustrates the contest between the mother and her husband on the one hand, and the biological father on the other. The child was conceived during the spouses' separation, born shortly after their divorce, following which they married each other again. The mother's husband sought to intervene in a custody claim brought by the child's father against the mother. The father's paternity claim was conceded. Reversing the trial court's judgment, the New Hampshire Supreme Court found that the trial court had jurisdiction to hear the case and that the husband had standing to intervene. Although the married couple's concession had rebutted the presumption of the husband's paternity, the court ruled that he should be given the opportunity to contest custody. The court was not entirely clear about the substantive standard to be applied on remand, saying only that the child's best interests were to be the "primary guide."[90]

It is significant that the mother and her husband were married and not divorcing at time of the custody contest, and that they jointly resisted the father's claim. The social interest in both the mother-child and husband-wife relationship together should move the standard toward the best-interests position. As the court said, noting that stepparents may be granted custody upon divorce from a child's parent, "it would make little sense to permit stepparents to seek custody only in the event of divorce proceedings, while withholding such rights when the traditional unitary family still exists."[91] In this setting, as in the more traditional child-stepparent relationship, the social interest in the marital family plays a powerful, standard-setting role.

89. 686 A.2d 1179 (N.H. 1996).
90. *Id.* at 1184.
91. *Id.* at 1183.

C. Prospective Adoptive Parents of Voluntarily Placed Infants

Contests between birth parents and prospective adoptive parents can be particularly wrenching. In addition to disputes like the notorious "Baby Jessica"[92] and "Baby Richard"[93] cases that catch and ride the wave of media attention, similar but lesser-known dramas undoubtedly are played out all too often in county courthouses across the land.

The specifics vary widely, but a common pattern is that the child, born out of wedlock, is taken immediately after birth into the care of prospective adoptive parents, who sometime later commence proceedings to terminate the birth parents' rights and to adopt the child. These proceedings take time, and before they are completed, one of the birth parents has a change of heart or (in the case of a birth father) discovers the child's existence and whereabouts. An attempt to stop the adoption process follows. It is often pursued with fierce intensity. Consider how the three interests play out in these cases.

At one level the child's interest is clear enough. She has an interest in bonding with the set of parents most qualified to nurture and rear her. That interest is disserved if, months or even years later, a judge decides that those who actually have her in their care are not entitled to do so.[94]

As these cases are sometimes portrayed in the media, the child's interest is not only compelling,[95] but categorically trumps any competing interest. Any suggestion that the child's

92. *Ex rel* B.G.C., 496 N.W.2d 239 (Iowa 1992).

93. *In re* Doe, 638 N.E.2d 181 (Ill. 1994).

94. Some would argue that, especially if the prospective adoptive parents are of a different racial or ethnic background than the child, she has an extra interest in remaining connected with her birth parents. That notion is central to key provisions of the Indian Child Welfare Act, 25 U.S.C. § 1901-61 (1994). It is hotly debated in that and other contexts. *See generally* Symposium, *Defining Family: Adoption Law and Policy*, 2 DUKE J. GENDER L. & POL'Y 99-187 (1995).

95. When the focus is on the child's interest, public sympathy is often tilted in favor of the prospective adoptive parents. The child usually has no bond at all with the birth parents who, because of their circumstances or poor choices in life, may be unappealing as parents. Indeed, they may never have had the child in their care at all. The adoptive parents, who usually have had physical care of the child since birth, are often attractive candidates for parenthood. They have invested time, money, and hopes in preparation for the child. The longer the child stays with the adoptive parents, the more the adoptive parents emphasize the severe and long-lasting harm the child might suffer by being taken from them.

interest should not govern is characterized as treating her as "property."

The birth parents' interests are, in principle, straightforward. Until a legal basis for terminating their rights exists and is acted upon,[96] they can claim the traditional protection of the law, constitutional or otherwise. But unless they were the victims of duress or deceit, at least one birth parent (usually the mother) did set the critical train of events in motion by placing the child for adoption. Such a voluntary act, even if retracted before it ripens into termination, gives legitimacy to the opposing interests it helps create.

Do the prospective adoptive parents have an independent, parentlike interest in a relationship with the child? The law is unclear. One view, probably the predominant one, is that they do not, at least until the birth parents' rights are terminated. Until then, their claim is based entirely on the interests of the child and must stand or fall on that basis. As one court put it, "[o]nly if a ground for termination exists may the suitability and circumstances of adoptive parents, in an appropriate proceeding, be considered."[97] Once the birth parents' rights are terminated, however, some courts are more willing to recognize the independent interest of prospective adoptive parents, even before the adoption is completed.[98]

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96. Failure to maintain any interest in the child or to provide for her support, a story commonly told about unwed fathers, may provide such a basis. The Supreme Court upheld a state's right to terminate an unwed father's rights in such circumstances in *Quilloin v. Wolcott*, 434 U.S. 246 (1978). Facts such as these may put the case under the category of cases discussed *infra* Part IV.D.

97. *In re* Baby Girl B., 618 A.2d 1, 8 (Conn. 1992) (alteration in original) (quoting *In re* Juvenile Appeal, 436 A.2d 290, 294 (Conn. 1980)). The quoted statement described the prospective adoptive parents' position under state law. The court also rejected their claim that refusing to permit them to intervene denied them constitutionally protected due process. *See id.*

98. Prospective adoptive parents, who had legitimately taken a child into their home with a reasonable expectation that a permanent child-parent relationship would result, were found to have an independent, constitutional interest entitled to some weight in the decision whether to remove the child. *See* Thelen v. Catholic Soc. Servs., 691 F. Supp. 1179, 1185 (E.D. Wis. 1988) (holding that although prospective adoptive parents acquire "a limited, but not wholly insignificant, constitutionally protected liberty interest in their family unit during the initial six-month period that a child is placed in their home" prior to completing the adoption under Wisconsin law, a preremoval hearing is not constitutionally required). In *Silfies v. Webster*, 713 A.2d 639 (Pa. Super. Ct. 1998), the court concluded that prospective adoptive parents had standing to seek custody against a maternal grandparent, where the birth mother was uninvolved in the child's care and her rights were being terminated. With the

The social interest in these cases is complex. At the child's birth, society has its usual interest in protecting the child's relationship with her birth parents. When birth parents recognize that they cannot provide for a child adequately, society also has an interest in encouraging and facilitating adoption by qualified adoptive parents. The child-parent relationships at both the beginning and the end of the voluntary adoption process are socially valued. The hard part is moving from one to the other.

The greatest challenge to the formation of legal standards in this setting is that the personal interests of the child and prospective adoptive parents can change rapidly, while the state's machinery for finding and expressing its interest, and for applying the proper standard, creeps along. When the child enters the physical care of those who would adopt, bonding often occurs almost instantly. At the same time, the birth parents' emotional stake in their relationship with the child continues to endure. Meanwhile, the administrative and judicial bureaucracy that terminates the birth parents' rights and investigates the adoptive parents' fitness is, even in uncontested cases, often deliberately slow.[99] When disputes arise, the process of resolving them, with its requirements of notice, preparation for argument, and production of careful judicial opinions is, in relation to a young child's sense of time, positively glacial.

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grandmother's consent, the prospective adoptive parents had enjoyed continuing, overnight visitation with the child for a lengthy period of time. The court emphasized the nature of the claimants' position as follows:

> [P]rospective adoptive parents, unlike foster parents, have an expectation of permanent custody which, though it may be contingent upon the agency's ultimate approval, is nevertheless genuine and reasonable. Because of this expectation of permanency, prospective adoptive parents are encouraged to form emotional bonds with the child from the first day of the placement . . . . In light of the expectation of permanent custody that attends an adoptive placement, an agency's decision to remove a child constitutes a direct and substantial injury to prospective adoptive parents.

Id. at 645 (alteration in original) (quoting *In Re* Mitch, 524 Pa. 621, 623 (Super. Ct. 1989)).

99. Under Iowa law, for example, subject to certain exceptions, "[t]he adoption of a minor person shall not be decreed until that person has lived with the adoption petitioner for a minimum residence period of one hundred eighty days." IOWA CODE ANN. § 600.10 (West 1996).

Even the short period of time sometimes given birth parents to contest a termination of their rights[100] can result in sufficient bonding with adoptive parents that breaking the relationship seems harsh. The alternative of mandatory foster care until disputes are resolved is unappealing if, as many believe, the child *needs* to bond with parent figures during that time.

Prospective adoptive parents are not oblivious to the effects of delay on the child's interest. By drawing out the proceeding they weight the scales in favor of their keeping the child. This technique may be effective, at least in the court of public opinion, notwithstanding its obviousness as a "bootstrap."

Discovering what standard best represents this complex and shifting pattern of interests requires aiming at a moving target. Not surprisingly, the standards actually applied by the states vary substantially between jurisdictions. Courts dealing with this issue will sometimes select one of the standards at either end of the spectrum—unfitness or best interests. They focus on the specifics of the case before them and are understandably reluctant to devise complex schemes dealing with all possible cases.

In the notorious Baby Jessica case, for example, the Iowa Supreme Court found that Iowa's statutes required a showing of unfitness (abandonment) to defeat the father's claim to custody.[101] Dan Schmidt, the birth father, said he had believed the birth mother's statement that another man was the father of the child. Upon being told the truth shortly after the baby's birth, he promptly sought custody of his daughter.[102] On one side of the scale were the birth father's parental interest and the social interest in the child-birth parent relationship. On the other was the child's interest in maintaining her relationship

100. *See, e.g.*, IOWA CODE ANN. § 600A.9(2) (West 1996) (appeal or motion to vacate termination of birth parent's rights must be made within thirty-day period, which cannot be waived or extended).

101. The applicable statute gave the DeBoers, the prospective adoptive parents, standing to prove abandonment by Dan Schmidt, the birth father. *See* IOWA CODE ANN. § 600A.8(3) (West 1996). In this Article, I treat abandonment as a form of unfitness. Under the facts of the case, the court apparently considered this the exclusive basis on which the DeBoers might have prevailed.

102. The claim of Cara Clausen Schmidt, the birth mother, was considered in a separate proceeding. After voluntarily consenting to the termination of her parental rights, she sought to retract that consent on a variety of statutory and common law grounds.

with the persons raising her. Under the standard applied by the court, the de facto family relationship between the DeBoers (the adoptive family) and Jessica, which by the time the court decided the case had lasted virtually all of the child's two years of life, counted for nothing.[103]

In response to such cases, whether arising in their own jurisdictions or elsewhere, state legislatures sometimes develop elaborate and fine-tuned adoption regimes. The legal standard governing contests between birth parent and adoptive parent changes as the process moves forward. At the beginning of the process, the birth parents' interests are often emphasized, with the balance shifting toward the adoptive parents later on.

In Iowa, for example, the legislature reacted to the Baby Jessica case by revising an already complex statutory scheme.[104] A birth parent may not give consent to the termination of her rights earlier than seventy-two hours after the baby's birth. She is entitled to retract that consent during the first ninety-six hours after signing it. This rule gives categorical preference to the birth parent's interests in a way analogous to decisions based on standing. Thereafter, and until the petition to terminate is granted, revocation is possible for "good cause," moving the standard in the direction of the best-interests test. That an intermediate standard is intended is made clear from an explicit balancing of interests in the statute:

> In determining whether good cause, other than fraud, coercion or misrepresentation, exists for revocation, the juvenile court shall give paramount consideration to the best interests of the child and due consideration to the interests of the parents of

103. A starkly contrasting case is *In re C.C.R.S.*, 892 P.2d 246 (Colo. 1995), in which the Colorado Supreme Court applied the best-interests standard when a birth mother changed her mind about proceeding with an adoption before termination occurred. With little explanation it dismissed the line of constitutional cases establishing a parental right as relevant only to the termination of parental rights, not loss of custody (here the court granted only custody to the prospective adoptive parents), and as dealing, in any event, only with procedural protections rather than substantive parental rights. The court apparently concluded that there is no substantive weight to be given even to the child-birth parent relationship, leaving the child's interest alone as the basis of the governing standard. In my view, *C.C.R.S.* is an outlier unlikely to be followed elsewhere.

104. The statutory scheme described here reflects modifications in response to the Baby Jessica case. The Iowa courts have not yet had occasion to consider the many questions it raises.

> the child and of any person standing in the place of the parents.[105]

Once the petition is granted, and even before the adoption is final, the adoptive parents' interests, and the social interest in their relationship with the child, move the standard, as a practical matter, farther in the direction of the newly forming family. After a thirty-day period, contests by the birth parents are no longer possible.[106] Any challenge is left to the unlikely initiative of the state or other intermediary that arranged the adoption.[107]

In voluntary adoption cases, a shrinking social interest in the child-birth parent relationship competes with a growing social interest in the bond between child and adoptive parents. The interplay of the interests in the two families helps explain why the legal standard itself is unstable throughout the process. A careful statutory scheme will take account of the changing interests and require the standard to shift throughout the adoption process. The social interest is strong at both the beginning and the end of the story because each focuses on a traditional child-parent relationship.

D. Foster and Prospective Adoptive Parents of Abused and Neglected Children

Parents may lose custody not only through voluntary placement for adoption, but involuntarily because they fail to care for their children properly.[108] They then may come into

105. *See* IOWA CODE ANN. § 600A.4(4) (West 1996).

106. An appeal of, or a request to vacate, an order terminating a birth parent's rights must be made within 30 days, which period "shall not be waived or extended." *See* IOWA CODE ANN. § 600A.9(2) (West 1996). The outcome of the Baby Jessica case probably would not be different under the statutory scheme now in place in Iowa, including the provisions enacted following (and apparently in response to) that case. The birth father's rights were never terminated, by consent or otherwise, so the time limits for contesting termination would not apply to him.

107. In Iowa, legal rights to provide care for the child following termination of the birth parents' rights are held by a court-appointed guardian. *See* IOWA CODE ANN. § 600A.9(1)(b) (West 1996). In practice, the guardian is usually an adoption agency or someone selected by the person who helped arrange the adoption.

108. Loss of custody in these cases may be voluntary at the outset, as the parents agree to transfer care of their child to a foster family and to accept rehabilitative services. Such voluntary arrangements easily may become involuntary, however, if the parents decline to participate further and the state commences a child protective proceeding.

conflict with foster or adoptive parents who seek to maintain or create a legal relationship with a child. Termination of parental rights and a subsequent adoption (as opposed to mere loss of custody) may be in the cards. But the issues raised are quite different from those involved in the voluntary placement of an infant, not least because the state is a major player from the beginning.

The story begins with a contest between the state and the birth parents under the unfitness standard. The state's policy is to use "reasonable efforts" to avoid the need to remove children from their homes at all, and to return them there quickly if removal occurs.[109] Most children removed from their homes are placed in foster care.[110]

Ideally, the foster parents provide a necessary respite of comfort and stability, preparing the child to return home. Meanwhile, the parents, with services offered by the state and under the threat of losing their children permanently, put their lives in order. All too often, of course, the real diverges dramatically from the ideal. Many things go wrong. Of interest here are the implications of a contest between the foster parents and birth parents over their relationships with the child.

The foster parents' relationship with the child originates in a contract. They agree with the state, in return for a fee, to care for a child whom the state has removed from her parents. The basis for their custody, and the terms on which they exercise or lose it, is their agreement with the state. The very nature of the foster care arrangement, however—a deliberate replication of the child-parent relationship—inevitably leads to close emotional bonds between child and foster parent in many cases.

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109. State law in this area has been driven by the Adoption Assistance and Child Welfare Act of 1980, which requires the states to use reasonable efforts to achieve these goals as a condition of receiving federal funds. 42 U.S.C. §§ 671(a)(15), 672(a)(1) (1994).

110.

> Orphanages largely disappeared long ago in the United States, and there is no significant institution today for children without surviving parents or children who have been removed from their homes because of neglect, abuse or dependency, or voluntarily relinquished temporarily by their parents. Instead there is a great reliance on foster parents who care for such children with state approval and compensation.

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That bond becomes an important element in decisions about the child's future.

Take a simple case first. Suppose that an abused or neglected child is properly removed from her parents and placed in a foster home. Assume that the foster parents, though becoming emotionally attached to the child, remain legally passive. They are prepared to return her to her parents when required, or to care for her as long as the state asks them to. They are willing and able to adopt. If the birth parents seek the return of their child, any contest is between them and the state. If the birth parents never qualify to have the child returned, they have no valid claim to custody.

But suppose the birth parents make honest efforts to follow the "permanency plan" approved by the juvenile court. They improve in significant ways. After the child has been in foster care for, say, a year, the state decides that the parents have progressed to the point that the child could be returned with reasonable safety from the abuse or neglect that required the removal. Notwithstanding the birth parents' progress, however, it may well be clear that the child would be much better off remaining with the foster parents, that the child desires to do so, and that the foster parents would be willing to see that happen.

Should the child be returned? At this point, the legal standard becomes crucial. Under the best-interest standard the child would remain with the foster parents.[111] Under the unfitness standard the child returns to the birth parents. Under an intermediate standard, the decision might go either way.[112]

111. Whether to terminate the birth parents' rights or to allow them a continuing, noncustodial relationship is another question, of course.

112. A case illustrative of the issues raised here is *Sallie T. v. Milwaukee County Department of Health & Human Services*, 570 N.W.2d 46 (Wis. Ct. App. 1997). A foster mother resisted relinquishing the custody of a child who had been in her care for several years after it was determined that the birth mother had qualified to have the child returned to her. The foster mother pointed to language in the governing statute apparently requiring the use of the best-interests standard. Although the court was not clear about the precise standard used, it emphasized that the reference to the child's best interests "must be harmonized with the Children's Code's purpose to preserve 'the unity of the family.'" *Id.* at 51. It therefore rejected the foster mother's claim that, by demonstrating "that the foster parents were better parents," she should prevail. *Id.* at 53.

The prevailing norm, at least at the law's "black letter" level, is to apply the unfitness standard.[113] The use of that standard makes sense when viewed in terms of the three interests involved. The child's attachment to the foster parents is a key element of the child's interest, but that interest is countered by the birth parents' interest and the social interest, here expressly embodied in the governing state and federal statutes, in repairing and maintaining the child's tie with the birth parents. The foster parents are simply agents of the state, and under the hypothetical facts discussed here, do not assert an independent interest.

One must wonder, however, whether the state's key decision makers—child protective workers and judges—do not sometimes covertly move some distance toward the best-interests end of the scale.[114] If they do, they may indulge an implicit assumption that a social interest in the child's relationship with the foster parent exists, and possibly that the foster parents themselves enjoy an independent interest in their relationship with the child. Are these interests a legitimate part of the mix that produces legal standards?

Those questions are more likely to be brought into the open when the foster parents affirmatively seek to maintain a relationship with the child. In recent years, foster parents have gained some procedural rights in that respect by statute or administrative regulation.[115] Such rights, of course, can be ad

113. The applicable law is the statute defining the substantive unfitness grounds under which the state can place a child out of her home, together with the framework of procedural requirements governing the removal and foster placement process. For an example of the unfitness standard, developed to deal with numerous, specific kinds of abuse, neglect, or abandonment, see IOWA CODE ANN. § 232.2(6) (West 1994) (defining "child in need of assistance"). The procedural requirements surrounding the removal of a child from her parents are illustrated by IOWA CODE ANN. §§ 232.95-104 (West 1996).

114. Doing so causes its own kind of harm, however. If the parent is making progress, the state is unlikely to move affirmatively toward termination of the birth parents' rights or a permanent deprivation of custody. The state therefore remains legally committed to work for reunification of parent and child, but unenthusiastic about doing so. "Foster care drift" may result. The more common cause of foster care drift is undoubtedly the failure of the parent to qualify for the child's return, perhaps due in part to inadequate assistance from the state. But the state also may fail to terminate primarily because state agencies or judges are reluctant to take that final step. Meanwhile, the child languishes.

115. *See* 3 LEGAL RIGHTS OF CHILDREN § 29.06, at 67 (Donald T. Kramer ed., 2d ed. 1994). Sometimes foster parents are permitted to intervene in dependency or

justed or eliminated by the legislature or agency that created them, unless they also rest on a constitutional foundation. There is no clearly established basis for such constitutional protection, although one important Supreme Court decision refused to close the door completely on such claims.

In *Smith v. Organization of Foster Families for Equality and Reform*,[116] foster parents in New York claimed a denial of due process in the manner in which the state decided to remove foster children from their care. The United States Supreme Court rejected their claim. Justice Brennan's opinion for the Court decided that any constitutionally protected interest the foster parents might have was adequately respected by the procedures used. The opinion, however, carefully refrained from deciding whether such an interest exists.

The concurring opinions, especially that of Justice Stewart, approached the matter differently. He saw the foster parent's role exclusively as a matter of contract. Foster parents could have only those rights the state had agreed to give them. They had undertaken their role as foster parents on that basis and could not claim any greater rights in the name of due process.

Smith raises some basic questions about the child-foster parent relationship. Justice Stewart's analysis is by far the most analytically simple. Foster care is a creature of contract and governed by contract alone. It is intended to be short-term. A bonding of child to foster parent represents a failure to be avoided rather than a success to be protected.[117] From this per

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neglect proceedings. *See id.*

116. 431 U.S. 816 (1977).

117.

> The foster parent-foster child relationship involved in this litigation is, of course, wholly a creation of the State. New York law defines the circumstances under which a child may be placed in foster care, prescribes the obligations of the foster parents, and provides for the removal of the child from the foster home "in [the] discretion" of the agency with custody of the child. The agency compensates the foster parents, and reserves in its contracts the authority to decide as it sees fit whether and when a child shall be returned to his natural family or placed elsewhere.
>
> . . . .
>
> . . . [U]nder New York's foster-care laws, any case where the foster parents had assumed the emotional role of the child's natural parents would represent not a triumph of the system, to be constitutionally safeguarded from state intrusion, but a failure. The goal of foster care, at least in New York, is not to provide a permanent substitute for the natural or adoptive home, but to prepare the child for his return to his real parents or

spective, the only interests in play are those that produce the unfitness standard: the child's interest pitted against the parent's interest and the social interest in maintaining the child-parent relationship.

Justice Brennan's opinion for the Court hints at, but does not develop, a different view: foster parents, by virtue of the emotional bonds they form with the children in their care, acquire an independent interest in maintaining that relationship.[118]

A holding to that effect, which *Smith* is not,[119] would be remarkable. Consider the implications if an adult who formally disavows a parentlike interest beyond the limits agreed with the state, nevertheless acquires such an interest as a consequence of forming an emotional bond with the child.[120] Such bonds are formed between children and nonparents not only in the settings mentioned in this article, but in many

placement in a permanent adoptive home by giving him temporary shelter in a family setting.

Id. at 856, 861-62 (Stewart, J., concurring) (alteration in original) (citations omitted).

118. The opinion states:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. 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. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals.

Id. at 844 (alteration in original) (citations and footnotes omitted). Some scholarly commentary on *Smith* has developed this theme, suggesting that a close, emotional relationship with a child may, by itself, be adequate to create a protected interest in a nonparent. *See Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1280, 1283 (1980) (identifying "psychological support and involvement" as an attribute that, "alone or in combination" with other factors "may constitute the essence of a constitutionally protected relationship").

119. Justice Brennan's opinion took pains to make clear that the relationship between child and foster parent should not be equated with that between child and parent. *See* 431 U.S. at 845-47.

120. Such a holding would, in a sense, represent the inverse of the Court's ruling in *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding that a birth father not married to child's mother is not constitutionally entitled to notice of proceeding to terminate his parental rights in absence of an emotional relationship with child).

others. If that bond has independent constitutional significance, the legal standards governing contests between these persons and parents might look very different than they do.[121]

Yet Justice Brennan's *Smith* opinion may support an important, but much more modest principle: that there is an affirmative social interest, in the Court's view, in the child-foster parent relationship. Such an interest, while less powerful than that in the child-parent relationship, would move the legal standard away from unfitness in the direction of the child's best interests.

The argument is that, by choosing foster rather than institutional care for abused and neglected children, the state must know that bonding between child and foster parent is likely to occur.[122] We know now, if we didn't in the early days of foster care, that bonding between child and foster parent can occur quickly, especially for younger children. We know that the rehabilitation of birth parents with deficiencies serious enough to require removal of their children takes time under the best of circumstances. Given the rock-hard accretions of intergenerational child abuse and neglect against which meager social resources contend, rehabilitation may never succeed. While those efforts grind forward, the bond between child and foster parent grows.

An affirmative social interest in a continuing relationship between children and foster parents would affect the legal standard that governs contests between them and birth parents. No matter what position the state took in an individual case, the legal standard itself would be moved some distance from unfitness toward the best-interests end of the spectrum when the child-foster parent relationship came into being. An intermediate standard of some kind might become the norm. As a practical matter, parents would find it harder to

121. *Smith* addresses only procedural, not substantive, rights. But these procedural rights protect important substantive rights of birth parents under a familiar line of cases. See cases cited *supra* in notes 10-11. One should not be surprised to find substantive rights accompanying any constitutionally-based procedural rights of foster parents.

122. In a sense the state *intends* such bonding to occur, since a close child-parent relationship is at the heart of the traditional family that foster care seeks to replicate.

regain custody of their children than to retain custody in the first place.

An intermediate standard should be employed with caution for at least two reasons. First, child protective workers enjoy broad discretion under the inevitably vague standards defining abuse and neglect. In some places and at some times, children may be removed too quickly. Second, an intermediate standard might induce some foster parents to enter into their service with the intent of adopting or winning permanent custody. If the truth be told, however, an intermediate standard may represent the current state of the law as practiced, notwithstanding the law on the books. Once a child begins to bond and thrive with foster parents, returning her to her parents is hard to do. The act of removal, often undertaken in haste, may have momentous consequences.

One proposal for dealing with this problem is to abandon our assumption that a child has only one set of parents. Marsha Garrison suggests permanently depriving the birth parents of custody when required, but allowing them to retain visiting rights. The resulting set of relationships would be analogous to that experienced by children whose parents divorce and remarry.[123]

Current social policy does not consider multiple sets of parents for a child as a preferred state of affairs, nor should it. We tolerate, as an unavoidable cost of our divorce policy, multiple mother- or father-figures in different families when divorcing or separating parents do nothing to justify a termination of their rights. A similar approach may make sense in some foster care situations, particularly those involving older children. But the loyalty conflicts and anxieties created by competing sets of parents are well known.[124] Such

123. *See* Marsha Garrison, *Why Terminate Parental Rights*, 35 STAN. L. REV. 423, 474-79 (1983). Garrison's proposal is far different than a voluntarily "open adoption" in which, with the adoptive parents' consent, the birth parents maintain some degree of contact with the child.

124.

> Loyalty conflicts, sometimes flipping from one parent to the other and back again, are a common experience for children of divorce. Many children conceptualize divorce as a fight between two teams, with the more powerful side winning the home turf, and will root for different teams at different times. Even when children are encouraged not to take sides, they often feel that they must. However, when they do take sides to feel more protected,

arrangements, though sometimes necessary, should not be the goal for children placed in foster care.

The social interest in family form favors permanency for a child. By definition, foster care is intended to be temporary. Rather than flirt with the notion of treating the foster family on a par with birth or adoptive families,[125] the law should take seriously its stated objective of either returning foster children to their parents or finding adoptive placements with no unnecessary delay. A strong, potential social interest exists in both permanent solutions.

If the state decides that the child cannot be returned to her birth parents, and that the birth parents' rights must be terminated, the framework changes. To reach that point properly, the original removal on grounds of unfitness will have been judicially vindicated and rehabilitation proven unsuccessful. The social interest in a child's relationship with her birth parents under those circumstances is essentially nullified, and the birth parents' personal interests found unworthy of further legal protection. The child's and the state's interests coincide in finding a new permanent home. Prospective adoptive parents (who may well be those previously serving as foster parents) are chosen on the basis of the child's best interests alone. As discussed in Part IV.C., as the child is placed and the adoption process proceeds, a social interest in the new family grows.

E. Parents' Nonmarital Partners

With the increasing frequency of nonmarital cohabitation, many children inevitably will live with one parent and a

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> they also feel despair because they are betraying one parent over the other. If they do not take sides, they feel isolated and disloyal to both parents. There is no solution to their dilemma.

WALLERSTEIN & BLAKESLEE, *supra* note 33, at 13. The suggestion to permit more than one legal mother was made, and rejected, in the gestational surrogacy case of *Johnson v. Calvert*, 851 P.2d 776, 781 n.8 (Cal. 1993). Such a solution would do nothing to ease the pressure on the child torn between competing parent figures.

125. I do not mean to suggest that foster parents should not play an important role in assisting the state in determining what the child's interests are. Although they often feel excluded from the process, foster parents can be an invaluable source of information on that subject. Given the importance of foster care, a regime of basic procedural protections, created by statute or administrative regulations, against arbitrary disruptions of foster families is also appropriate.

nonparent adult—the parent's nonmarital partner. What is the legal significance of emotional bonds that might be formed between the child and the nonparent?[126] Consider first the common setting in which the parent and partner are of the opposite sex.

1. Opposite-sex partners

Some courts categorically refuse to recognize the claim of a parent's unmarried cohabitant, even where a close bond with the child has been established. *Ash v. Kotecki*[127] is an illustrative case. James, an unmarried, twenty-five-year-old man, agreed to allow Andrea, a seventeen-year-old young woman having trouble with her family, to live with him. She became pregnant, and although she and James had begun a sexual relationship some time after her arrival, he surmised correctly that he was not the father of her child.

Nevertheless, James was fully supportive of Andrea. He took her to the hospital and was present at the birth. He welcomed the baby into his home. He acted as a father to the little girl, bathing and feeding her, changing her diapers, buying her toys and clothing, and paying for her dance lessons and preschool tuition. This emotional and financial support continued for several years, including a period of time after Andrea moved out of his house. James voluntarily paid child support after Andrea left. He also supported Andrea directly, helping her buy groceries and pay rent.[128]

Andrea eventually married someone else and refused to give James further access to the child, who was then five years old. "[G]et on with your life," she urged him, and "have a family and children of your own."[129]

126. This case is obviously distinct from one of nonmarital cohabitation by the child's parents. In that setting each adult has an independent parental interest. The state has a social interest in preserving both child-parent relationships, even though it prefers a marital bond between the adult partners.

127. 507 N.W.2d 400 (Iowa 1993).

128. *See id.* at 401-02.

129. *Id.* at 402.

James sought visitation rights with the child,[130] successfully urging the trial court to accept an "equitable parent" doctrine. The state supreme court reversed. It noted that state statutes provided for visitation by grandparents against the wishes of a parent in certain circumstances, but that such a right was given to no other nonparent. It inferred from this statutory scheme a legislative intent not to grant such rights, and it found no common law authority to do so. The trial court therefore was without power to order the visitation it did.[131] The "standard" applied in *Ash* is effectively the same as decisions made on lack of standing grounds. A claimant in James's position could not prevail under any circumstances.

The court's opinion stressed that James's relationship with the child fell outside any of those commonly granted some form of legitimacy:

> He is not the child's biological father. He is not her adoptive father. He is not her stepfather. He is not her foster parent. He never married the child's mother. He is merely a man who lived with—and cared for—her mother, and who, understandably, became smitten with fatherhood after the child's birth.[132]

The court's emphasis on the legal relationships James did *not* have suggests that his claim failed, at least in part, because of the absence of a social interest in his relationship with the child, and because he lacked any cognizable personal interest in the relationship.[133] The court also based its decision on its view that the judiciary ought not lead out in affirming nontraditional domestic relationships.[134]

Other jurisdictions have recognized an "equitable parent" doctrine or something like it. Sometimes those doctrines are

130. He also sought a declaration of paternity. That possibility apparently was foreclosed when Andrea established the paternity of the child's birth father in a separate proceeding in another state. *See id.*

131. *See id.* at 402-05.

132. *Id.* at 404.

133. Under the court's analysis, James's lack of a legally cognizable relationship was a sufficient ground for the decision. Perhaps the court was influenced by the fact that the child now did have a formal stepfather in addition to a judicially identified birth father. Because multiple parents is not a socially preferred family form, James's relationship with the child was, from a public policy perspective, extraneous.

134. *See* 507 N.W.2d at 404; *see also* note 152, *infra*.

quite restrictive, requiring a conventional legal bond, such as stepparent status, in addition to proof of an intent to act the part of the parent. In Michigan, equitable parent status appears limited to persons who not only established an emotional bond with the child, but were married to the child's parent[135] and are willing to provide for the child's support.[136] In other places the possibility of a broader category of psychological parent is recognized. Statutes in Oregon[137] and

135. If the mother is married to the equitable parent, of course, then a presumption of paternity statute might come into play. *See* discussion *supra* Part IV.B.2.

136.

> [W]e adopt the doctrine of "equitable parent" and find that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. We hold that the husband may be considered the "equitable parent" under these circumstances. . . .

Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987).

The Michigan Court of Appeals recently refused to extend the equitable parent doctrine to cases in which the nonparent claimant had cohabited with, but was not married to, the child's parent. *See* Van v. Zahorik, 575 N.W.2d 566 (Mich. Ct. App. 1997). The court based its decision on both "public policy and judicial restraint." *Id.* at 569. The court's policy concern was that granting equitable parent status to an unmarried cohabitant might "encourage formation of such relationships and weaken marriage as the foundation of our family-based society." *Id.* at 570, (quoting Carnes v. Seldon, 311 N.W.2d 747, 753 (Mich. Ct. App. 1981) and Hewitt v. Hewitt, 394 N.E.2d 1204, 1207 (Ill. 1979). In addition, it concluded that the legislature, not the judiciary, was the proper forum for "making social policy[,] . . . especially . . . when the determination or resolution [of a case] requires placing a premium on one societal interest at the expense of another." 575 N.W.2d at 569.

137. The Oregon statute provides in part:

> (1) Any person, including but not limited to a related or non-related foster parent, stepparent or relative by blood or marriage who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child, or any legal grandparent may petition . . . for intervention with the court having jurisdiction over the custody, placement, guardianship or wardship of that child, . . . may petition the court for the county for an order providing for relief . . . .
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> . . . .
>
> (5) As used in this section:
>
> (a) "Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having

Wisconsin[138] for example, seem to grant rights to anyone who has established a parent-like relationship with a child.

The door to nonparent rights is not open as wide as the face of these statutes would suggest. The Oregon statute appears to invite nonparents to seek the full panoply of parental rights. The Supreme Court of Oregon has made clear, however, that the law grants only standing to the nonparent. The legal standard for granting substantive rights is near the unfitness end of the scale. The nonparent must show a "compelling reason" for depriving the parent of custody.[139]

The Wisconsin law does refer to a "best interest" standard, but the state supreme court has interpreted it as applying only when an action "affecting marriage" (principally divorce or separation), already exists.[140] Nonparents must therefore wait until a married parent opens the door procedurally before bringing a claim. Moreover, the nonparent is restricted to

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> physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the non-related foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 18 months.

OR. REV. STAT. § 109.119 (1997).

138. The Wisconsin statute provides:

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

WIS. STAT. § 767.245(1) (1993).

139. *See* Hruby v. Hruby, 748 P.2d 57, 66-67 (Or. 1987); *accord* Oregon *ex. rel.* Juv. Dept. v. Lauffenberger, 777 P.2d 954 (Or. 1989). Although the statute has been revised since the decisions in *Hruby* and *Lauffenberger*, the Oregon courts continue to interpret it as granting procedural rather than substantive rights. *See In re* Marriage of Sorenson, 906 P.2d 838, 842 (Or. Ct. App. 1995); *cf.* Ellison v. Ramos, No. 97-1417, 1998 WL 436057, at *6-*7 (N.C. App. Aug. 4, 1998) (holding that the father's constitutional custody preference over his former nonmarital partner was overcome, so that the best-interests standard applied, if the partner can prove he acted "inconsistent[ly] with the constitutionally protected status of a natural parent" by relinquishing the custody of the child to others, including the partner, then sending the child, who was diabetic, to live with his elderly parents who failed to provide her with proper health care).

140. *See* Holtzman v. Knott, 533 N.W.2d 419, 425-30 (Wis. 1995).

visitation under this statute, custody being dealt with in other provisions.[141]

The claims of a parent's nonmarital partner should be judged under a standard granting strong deference both to parents and to the marital family. The social interest in the stepparent relationship is lacking in nonmarital cohabitation. Notwithstanding the high incidence of divorce, there remains great significance in the presence—or absence—of a marital commitment between the adults.[142] Even if that commitment does not formally include support by one spouse of the other's children—and under some facts it does[143]—commitment to a parent generally entails commitment to a minor child.[144] By contrast, nonmarital cohabitation signals a greater likelihood that the relationship will fall apart. Focusing specifically on data on unmarried cohabitants in Canada, Professors Wu and Balakrishnan, two empirical researchers, recently observed:

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141. *See id.* at 431. Under this case, which is discussed and criticized in the following section, the Wisconsin courts may allow visitation, though not custody, to nonparents on the basis of nonstatutory authority.

142. The importance of a marriage is evident in *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995), a case decided by the Iowa Supreme Court just two years after *Ash v. Kotecki*. In *Gallagher*, a case like those discussed in Part IV.B.2 above, a husband filed for divorce and sought custody of the child, conceived and born during the marriage, who he believed was his daughter. Only after a pretrial home study recommended that the husband be given custody did the wife reveal that the child had been fathered by another man. The Iowa Supreme Court reversed the trial court's grant of summary judgment against the father. It distinguished *Ash* on the basis that the father in *Gallagher* "was no stranger, or even a mere stepfather. The facts here demonstrate how different it is when a child is born into a marriage, even though (unknown to the father) it is conceived outside it." *Id.* at 480. The court ruled that equitable parenthood may be established where the claimant is married to the mother, reasonably believes he is the child's father, establishes a parental relationship, and shows that judicial recognition of that relationship is in the child's best interest. *See id.* at 481. Note that the last three of these requirements could easily be satisfied by a parent's nonmarital partner, so the fact of the marriage is a crucial factor in the court's equitable parent doctrine.

143. *See* Johnson v. Johnson, 286 N.W.2d 886 (Mich. Ct. App. 1980) (holding that a man who married a woman knowing she was pregnant with what might be another man's child, and who acted the part of a father during the marriage, was estopped to deny paternity and escape child support obligation upon divorce several years later); M.H.B. v. H.T.B., 489 A.2d 775 (N.J. 1985) (holding that a husband who repeatedly stated and demonstrated that he intended to fill the role of father in the life of a child resulting from his wife's extramarital affair estopped to deny an obligation to pay child support after divorce) (affirming Appellate Division by an equally divided court).

144. Stepchildren often are not adopted for the sole reason that the noncustodial parent declines to relinquish his or her parental rights.

> The ephemeral nature of cohabiting relationships is apparent . . . . For women, fewer than one-third of all cohabitation relationships have survived for five years. For men, the corresponding figure is 25%. After 10 years, only 12% of the cohabitation relationships have survived for women, and 15% for men. Marital unions are much more stable than cohabiting unions. For example, in a life table analysis of the data on 9,478 first marriages collected in the [Family and Friends Survey] . . . , we found that about 90% of marital unions survived for 10 years.[145]

If the female partner brought a child fathered by another man into the relationship—the situation of particular interest here—the likelihood that the cohabitation would end by separation increased, and the likelihood that it would lead to marriage decreased.[146]

Drawing on both U.S.- and Canadian-based research, Wu and Balakrishnan concluded that "ample evidence exists to suggest that premarital cohabitation actually leads to less stable marriages. Empirically we also know that cohabiting unions are less stable than marital unions. Together these results support the argument that cohabiting unions are fragile and transient . . . ."[147] This conclusion is consistent with the United States-based findings of Larry L. Bumpas and James A. Sweet:

> Cohabitation living arrangements do not last long: within a few years most cohabiting couples have either married or separated. More will end in marriage than in separation.

145. Zheng Wu & T.R. Balakrishnan, *Dissolution of Premarital Cohabitation in Canada*, 32 DEMOGRAPHY 521, 526 (1995). The high survival rate for marriages reported by these authors may be due in part to their focus on the duration of *first* marriages. Projections based on U.S. statistics relevant to *all* marriages indicate a somewhat lower survival rate, but one that still dwarfs the longevity of unmarried cohabitation. In contrast to the dissolution percentages of 75-67% after five years, and 88-85% after ten years for unmarried cohabitation reflected in the work of Wu and Balakrishnan, "[a]t 1985 divorce rates, 18 percent [of marriages] will end in divorce before the 5th anniversary [and] 32 percent before the 10th . . . ." James A. Weed, Duration of Marriage Tables: A 1985 Update 5 (Oct. 1988) (unpublished paper presented at the October 1988 annual meeting of the Southern Demographic Association, San Antonio, Texas; on file with the *BYU Law Review*). Moreover, once a marriage survives its first ten years, the likelihood of divorce diminishes substantially. *Id.* at 4-5.

146. *See id.* at 527, 528.

147. *Id.* at 529 (citations omitted).

> Unions formed by cohabitation are also less likely to stay together than unions formed by marriage. This is particularly so while the cohabiting couple is not married, but it is also true when cohabitation is followed by marriage.[148]

The negative effect of intimate, nonmarital cohabitation on the participants' attitudes toward marriage and childbearing is reported in a recent study by William Axinn and Jennifer S. Barber. They found that, in contrast to nonintimate cohabitation arrangements, such as merely sharing an apartment, intimate cohabitation "significantly reduces young people's fertility preferences and significantly increases their tolerance of divorce. . . . The more months of exposure to cohabitation young people experienced, the less enthusiastic they were toward marriage and childbearing. . . . Cohabitation increased young people's acceptance of divorce, but other independent living experiences did not."[149]

The empirical basis for the social interest favoring the marital family over unmarried cohabitation is becoming increasingly clear. Statutes or judicial precedents granting rights to a parent's nonmarital partner should do no more than allow standing, as in Oregon. Custody or visitation should be available only upon a showing approaching unfitness.

2. Same-sex partners

The absence of a mutual commitment of marriage between a parent and partner undermines the social interest in the nonparent's relationship with the child. Sometimes, however, a legal impediment makes marriage impossible. How does such an impediment bear on the social interest?

The most common impediment is undoubtedly a prior, undissolved marriage. Others include age, consanguinity, mental capacity, and gender. Each of these obstacles has been the subject of litigation and scholarly commentary. The prohibition on same-sex marriage, however, now an important issue in the Hawaii courts and legislature,[150] has become highly

148. Larry L. Bumpas & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615, 624 (1989).

149. William G. Axinn & Jennifer S. Barber, *Living Arrangements and Family Formation Attitudes in Early Adulthood*, 59 J. MARRIAGE & FAM. 595, 608 (1997).

150. In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii

visible as a political and social issue. This subject is caught up in the broader web of questions regarding the legal status of same-sex partnerships and the social status of homosexuality in general. These matters range far beyond the scope of this article,[151] but I believe the approach taken here sheds some light on the specific question of child-nonparent relationships in this setting.

Courts are sometimes asked to rule on the legal status of a child's relationship with the parent's same-sex partner when the parent and partner separate. In most of these cases, the courts have ruled against the nonparent's claim. They have often concluded that the state legislature has precluded, or failed to provide, judicial authority to grant the relief requested, and they have emphasized the legislature's role in making complex moral and social policy.[152] A statutory bar denying the parent's partner a legally protected role in child's life probably implies a legislative judgment that a child's

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ruled that restricting marriage to persons of the opposite gender was sex discrimination under the state constitution and could be justified only under the "strict scrutiny" standard. Thus, the restriction must further "compelling state interests and [be] narrowly drawn to avoid unnecessary abridgments of constitutional rights." *Id.* at 74. On remand, the trial court ruled that prohibition against same gender marriage failed that test. *See* Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). An appeal from that ruling was pending when this article went to press. Meanwhile, the legislature approved for submission to the electorate an amendment to the state constitution restricting marriage to persons of the opposite gender. *See* Proposing a Constitutional Amendment Relating to Marriage, H.B. No. 117, 1997 Haw. Sess. Laws 1246-47. The legislature also enacted a law making available to "reciprocal beneficiaries"––which can include, but is not limited to, same-sex couples intending a marriage-like relationship––many of the legal benefits given to married persons. *See* An Act Relating to Unmarried Couples, H.B. No. 118, 1997 Haw. Sess. Laws 1211. Same-sex marriage litigation is pending in at least two other states, Alaska and Vermont. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998); Baker v. Vermont, No. S1009-97 (Vt. Super. Ct. Dec. 19, 1997), *appeal docketed*, No. 98-32 (Vt. Jan. 15, 1998).

151. A great deal has been written on the same-sex marriage issue. For analyses consistent with the social interest as discussed in this article, see David O. Coolidge, *Same-Sex Marriage?* Baehr v. Miike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1.

152. *See, e.g.*, West v. Superior Court, 69 Cal. Rptr. 2d 160 (Ct. App. 1997); Nancy S. v. Michele G., 279 Cal. Rptr. 212, 215, 219 (Ct. App. 1991); Curiale v. Reagan, 272 Cal. Rptr. 520, 522 (Ct. App. 1990); Titchenal v. Dexter, 693 A.2d 682, 684-86, 698-90 (Vt. 1997). *But see* J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996) (holding that mother's former same-sex partner had standing to seek partial custody).

relationship with the nonparent in this setting does not enjoy an affirmative social interest.[153]

In *Kulla v. McNulty*,[154] the court interpreted a statutory scheme that allowed visiting rights to nonparents as applicable to a mother's estranged same-sex partner. The court noted, however, that under the statute the partner faced a substantial burden. She was required to prove not only the existence of an emotional, child-parent bond with the child and that the child's best interests would be served by visitation, but that visitation "would not interfere with the relationship between the custodial parent and the child." Her claim foundered on this crucial element of the test which, as the court recognized, reflects a "public policy in favor of fostering the development and harmony of a family unit," and therefore justifies imposing this "stringent burden" on nonparent third parties but not on divorced or separated parents.[155]

Unlike the opinion in *Kulla*, most judicial decisions on this issue, whatever their outcome, tend to overlook the importance of the social interest. When a court ventures to make new law in this area, that failure undermines its analysis. A recent, illustrative case is *Holtzman v. Knott*.[156] Two women in a domestic partnership agreed that one of them (Knott) would become pregnant through artificial insemination, and that they would raise the child together. A son was born and, until he was five years old, both women played a parental role in his life. Holtzman provided the primary financial support for the three of them.

The relationship between the two women then deteriorated. Knott told Holtzman that the relationship was over. She soon moved out of the house they shared, taking her son with her. Some months later, she refused Holtzman any further contact with him. Holtzman's petitions in the circuit court seeking custody or visitation were dismissed. The Supreme Court of Wisconsin, granting a petition to bypass the court of appeals, reversed.

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153. The issue changes if the legislature makes adoption by the nonparent freely available. *See infra* note 173.

154. 472 N.W.2d 175 (Minn. Ct. App. 1991).

155. *Id.* at 180.

156. 533 N.W.2d 419 (Wis. 1995).

Holtzman is interesting because the state supreme court first deferred to the legislature in an entirely conventional way, then neatly avoided the implications of its own analysis. Justice Abrahamson's opinion for the court deserves attention both for what it says and for what it does not say.

A Wisconsin statute grants state courts the power to grant "reasonable visitation rights" to "a grandparent, greatgrandparent, stepparent, or person who has maintained a relationship similar to a parent-child relationship with the child."[157] On its face, the reference to persons with relationships similar to that of child and parent appeared promising to Holtzman's petition. But the court interpreted it as applying only "within the context of a dissolving marriage."[158] The statute, therefore, did nothing to remove the high barriers of the unfitness standard to Holtzman's claim for visiting rights.[159]

The court did not stop there, however. Overruling one of its 1991 decisions,[160] it found that the legislature had not intended to preclude the courts from exercising an inherent, equitable jurisdiction over adults' relationships with children in disputes between *nonmarital* partners.[161] On the basis of that jurisdiction, the court assumed authority to permit Holtzman to continue a relationship with the child over his mother's objection.

The court's conclusion that the legislature had not deprived it of the authority it claimed was strongly contested by three dissenting justices. More pertinent to the subject of this article, however, is the basis for the court's test for deciding when a court should entertain the visitation petition of a nonparent such as Holtzman.

The court's analysis rests on the premise, repeated throughout the opinion, that only two interests underlie the

157. WIS. STATS. ANN. § 767.245(1) (West 1993).

158. *Holtzman*, 533 N.W.2d at 426.

159. *See id.* at 423-24.

160. The court overruled *In re Z.J.H.*, 471 N.W.2d 202 (Wis. 1991), which denied the visitation petition of a mother's female former partner. *See Holtzman*, 533 N.W.2d at 434.

161. *See Holtzman*, 533 N.W.2d at 430-34. The court did say, however, that the legislature had preempted the field insofar as *custody* claims are concerned. *See id.* at 431.

matter of court-ordered child visitation: the parent's constitutionally protected interest in child rearing and the child's interests.[162] Nowhere does the court expressly consider the social interest in the relationships between the boy and his mother, and the boy and Holtzman. Nor does the court ask whether Holtzman had a personal, protected interest in her relationship with the child.

Nevertheless, the court's analysis and decision suggest a great deal about the social interest in the relationships of Holtzman, Knott, and the latter's son. This is most evident in the court's use of the best-interests standard for deciding whether to honor the nonparent's claim.[163] For the reasons discussed in connection with custody contests between parents, doing so suggests that each adult's claim has equal status as a matter of public policy.[164] On its face, the court's analysis appears to imply either that Holtzman or society had a strong interest in the child-nonparent relationship.

Notwithstanding its use of the best-interests standard, the court's decision does suggest that Holtzman's or society's interest in that relationship was limited in two ways. First, unlike the claim of a parent in a divorce or separation proceeding, the nonparent's rights are limited to visitation. Custody is unavailable under the court's general equity jurisdiction. Second, the court devised a threshold test to be met by a nonparent seeking visitation with a child: a "significant triggering event" must occur. That "event" requires the nonparent to have cohabited with and supported the child with the parent's consent, after which the parent denies the nonparent access to the child, and the latter seeks judicial relief within a reasonable time.[165] The test's evident purpose is to provide an analogue to the requirement under the statute on nonparent visitation (found inapplicable by the court) that there be an action affecting the marriage of a parent.

On examination, neither of these points assures that the court seriously intended to privilege the child-parent

162. *See id.* at 429-30, 435-36 ("[The court's] exercise of equitable power protects parental autonomy and constitutional rights . . . . It also protects a child's best interests.").

163. *See id.* at 435-36.

164. *See* discussion *supra* Part III.B.

165. *See Holtzman*, 533 N.W.2d at 436.

relationship in the marital family over alternative domestic arrangements. Limiting the nonparent's remedy to visitation may reflect not judicial respect for a parent's versus a nonparent's relationship with a child, but simply a recognition that the legislature had preempted the custody field by legislation.[166] The court's threshold test does prevent a casual acquaintance, such as a day-care provider or family friend, from prevailing in a visitation action. But by using its equitable jurisdiction to equate a nonmarital domestic arrangement with the marital family required by the statute, then applying the best-interests test to the nonparent's claim, the court necessarily gives equal respect to traditional families and nonmarital domestic arrangements.

If the child-parent relationship in the marital family enjoys a unique social interest, the correct standard in nonmarital families is farther toward the unfitness end of the spectrum. It would at least require some showing of detriment to the child from the denial of visitation. The court purports to be concerned solely with the child's and parent's interests, but it implicitly finds an affirmative social interest or personal interest of the nonparent in that relationship with the child. The court's failure to acknowledge or discuss that crucial point is remarkable against the backdrop of an otherwise carefully crafted analysis.

The *Holtzman* court should have considered the social interest not only in the relationship between a child and her parent's nonmarital partner generally, but in a domestic arrangement in which both parent figures are of the same sex. As a general matter, unconnected with the facts of a particular case, how should the law value such arrangements for child-rearing purposes? At least two issues are raised: the stability of the adults' relationship, and the importance to a child in being raised by parents of different genders.

Empirical data on the stability of intimate, same-sex partnerships must be interpreted with care. The relevant relationships are not casual sexual liaisons, but those in which a cohabiting couple consider themselves to be in a committed, long-term relationship. One would want to study, in particular,

166. *See id.* at 431.

the stability of such relationships in which a child of one of the partners is a member of the household. No such data involving the presence of children in the household have been located. But the data on same-sex relationships in which both partners consider themselves committed to one another suggest that, on average, these unions last only a few years.[167]

A contributing factor to the instability of particularly male homosexual relationships is pervasive sexual infidelity. Sexual encounters with outsiders are commonplace among members of male couples, including a majority of those in which infidelity is mutually regarded as improper.[168] Apologists have argued that sexual fidelity and emotional commitment can and should be separated in such relationships.[169] Empirical research suggests, however, that even when both partners agree that sexual infidelity is permissible, the fact of infidelity weakens the relationship.[170] The destruction of a relationship between

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167. The median duration of male homosexual relationships has been found to be about three years. *See* Joseph Harry, *Marriage Among Gay Males: The Separation of Intimacy and Sex*, *in* THE SOCIOLOGICAL PERSPECTIVE 330, 334 (Scott G. McNall ed., 4th ed. 1977) (reporting that the results of the author's study are consistent with those of other researchers). A survey of 7500 homosexuals by Overlooked Opinions, Inc., "a market research and opinion polling firm specializing in the gay, lesbian, and bisexual market," showed that the median years in the relationship for women is 3.5, and for men is 3.7. THE GAY ALMANAC 100-01 (1996). That survey does not hold itself out as satisfying the rigors of academic empirical research. Compare the data on married, heterosexual couples. *See supra* notes 145-148.

168. *See* Harry, *supra* note 167, at 339 ("[E]ven when *both* parties to a marital relationship were agreed on the desirability of fidelity a majority were unfaithful. This seems to mean that individuals were incapable of adapting their own behaviors to either their own desires or those of their marital partner.").

169.

> Our culture has defined faithfulness in couples always to include or be synonymous with sexual fidelity, so it is little wonder that relationships begin with that assumption. It is only through time that the symbolic nature of sexual exclusivity translates into the real issues of faithfulness. When that happens, the substantive, emotional dependability of the partner, not sex, becomes the real measure of faithfulness.

DAVID P. MCWHIRTER & ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252 (1984).

170. *See* Harry, *supra* note 167, at 338. The instability of homosexual relationships has been attributed to such factors as a general lack of social approval and positive role models, the presence of which help create standards and expectations for heterosexual couples. *See, e.g.*, *id.* at 330; MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 121 (1993). That conclusion is speculative at best. There is no evident reason to believe that, if same-sex relationships became part of the social mainstream, the strong propensity toward infidelity and short-lived relationships would be reversed.

parents because of sexual unfaithfulness seems to be particularly harmful to children.[171] The same harms may be suffered by the children in the household of same-sex partners whose relationships founder on the rocks of infidelity.

Some same-sex couples would marry if they could.[172] Perhaps some such relationships would be more stable if marriage were permitted, although that fact is presently unknowable. But even if events in Hawaii or elsewhere lead to the approval of such marriages in that state, it seems unlikely that same-sex marriage will become the national norm in the near future. The social policy favoring a legal bond between parents in child-adult relationships is simply not available to same-sex couples.[173]

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171. *See* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 855-56 & nn.115-16.

172. The facts of the case suggest that Holtzman and Knott would have married one another had they been permitted to do so. Four years before the child's birth, and after living together for a year in a jointly purchased house, the two women "solemnized their commitment to each other, exchanging vows and rings in a private ceremony." Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995).

173. A policy recognizing the importance to the child of a legal commitment between parents is inconsistent with making adoption of a child by a parent's nonmarital partner freely available. If such an adoption occurs, of course, the partner *becomes* a parent and drops out of the nonparent category that is the subject of this article. Such adoptions are sometimes approved by a state court construing a statute whose drafters did not anticipate its application in that circumstance. That was done by the New York Court of Appeals in *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *accord In re* M.M.D., 662 A.2d 837 (D.C. 1995); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. App. Div. 1995). *But see*, Adoption of T.K.J., 931 P.2d 488 (Colo. Ct. App. 1996); *In re* Angel Lace M., 516 N.W.2d 678 (Wis. 1994). From the perspective taken in this article, such a move is questionable not only as an exercise of judicial power, but also on substantive policy grounds. The majority opinion in *Jacob* expressed its "primary loyalty" to the best interests of the child. *See Jacob*, 660 N.E.2d at 399. While recognizing the importance of the child's interest, the dissent emphasized the importance, under the legislative scheme, of the marital bond between the child's parents:

> The majority minimizes the at-will relationships of the . . . couples who would be combined biological-adoptive parents . . . , but the significant statutory and legally central relevancy is inescapable.
>
> . . . The statute demonstrates that the Legislature, by express will and words, concluded that households that lack legally recognized bonds suffer a relatively greater risk to the stability needed for adopted children and families, because individuals can walk out of these relationships with impunity and unknown legal consequences.

Jacob, 660 N.E.2d at 406, 408.

If a state legislature deliberately approves such adoptions, as has occurred in Vermont, its action, while doubtless legitimate politically, fails to appreciate the risks

The restriction of marriage to persons of the opposite sex raises the second issue: *should* the state conclude that being raised by parents of different genders is of particular importance to a child? Is the gender requirement for marriage related to the social interest in child-adult relationship?

The social interests in relationships between same-sex partners and the child of one of them is part of a larger, vigorously debated political question: whether society has a stake in the intimate relationships between consenting adults—heterosexual or homosexual—and if so what that stake is. It helps to step back a pace and put the matter in a broader perspective.

By historical standards, our culture emphasizes personal autonomy and individual rights to an extraordinary degree. What that emphasis means for family law is hotly debated. It is widely accepted that family and other intimate, personal relationships fall within the ambit that most of us believe should be shielded from unbridled state scrutiny and intervention. One explanation for that protection—an explanation consistent with the perspective taken in this article—is that not all interests in intimate relationships, but specifically marital and parental interests, are protected by the law, with exceptions made primarily to prevent inequity or harm.[174] Some, however, would draw a much different conclusion: that sexual morality and intimate relationships between consenting adults should be entirely privatized and protected from state regulation. Milton C. Regan, Jr. aptly characterizes that perspective as follows:

> [T]he vessel of family shouldn't be filled with substantive moral content, but should be left empty so that individuals can use it for their own purposes. On this view, family law, like other modern liberal institutions, should remain neutral among visions of the good life, intervening only when necessary to prevent one individual from harming another.[175]

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and the message inherent to deliberately creating a second child-parent relationship in a nonmarital home. *See* VT. STAT. ANN. tit. 15A, § 1-102(b) (1997) ("If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent.").

174. *See* Hafen, *supra* note 12, at 491-547.

175. *See* REGAN, *supra* note 170, at 2. Although I join Professor Regan's criticism of that view, he and I do not fully agree on the moral content of family law.

Whatever one's views may be about the state's interest in the intimate relationships of adults as between themselves, surely the calculus changes when a child enters the picture. The public interest in child rearing is vital.

As a society we can have few greater concerns than how the next generation is raised. Our children's psychological and moral development will, perhaps more than anything else, quickly affect the quality of our cultural and economic life. A child's home environment is not the only determinant of that development, but it is surely one of the most important.

The presence of a social interest does not mean that the private interests of child and adult in a particular setting count for nothing. It means only that these important, and interconnected, interests must reach an accommodation with the generalized social interest when they compete, as they inevitably will from time to time. Each is entitled to weight in the creation and application of legal standards governing the upbringing of children.[176]

Acknowledging the existence and relevance of a social interest in relationships between children and nonparent adults does not resolve the difficult questions; it only brings them into sharper focus. In the setting considered here, the question is: Does society have a basis for preferring and privileging child rearing by opposite-sex, versus same-sex couples?

I believe traditional family law has it right in preferring that children be raised by a mother and a father, rather than by two persons of the same sex. That conclusion is not based on fears about the behavior of homosexual adults,[177] such as that they are likely to abuse or mistreat children. It rests on a belief that men and women are not fungible in relation to child rearing. They have distinct contributions to make. Arguments and evidence for that view come from a variety of sources.[178]

176. The failure to see family law as an instrument for reaching the necessary accommodations between social and personal interests leads to polarized politics and a scorched-earth, winner-take-all approach to law and social policy. The problem is outlined nicely in MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

177. Not all same-sex couples seeking to rear children will be homosexuals, of course, although it is probably safe to assume that most will be.

178. An excellent overview of the arguments is found in Coolidge, *supra* note 151, at 29, 46-50, 84-88.

Unsurprisingly it is common among many for whom religion is an important source of values.[179] Others argue for the distinctive contributions of mothers and fathers from a secular point of view. David Popenoe, for example, relying heavily on evidence from the social sciences,[180] argues that

> beyond being merely a second adult or third party,
>
> fathers—men—bring an array of positive inputs to a child, unique and irreplaceable qualities that women do not ordinarily bring. Despite their many similarities, males and females are different to the core. They think differently and act differently. Differences have universally been found in aggression and general activity level, cognitive skills, sensory sensitivity, and sexual and reproductive behavior. By every indication the expression of those differences is important for child development.[181]

This philosophy may help explain the law in the Scandinavian countries, which have gone the farthest of any

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179. For example: "[T]he institution of marriage, as the union of one man and one woman, must be preserved, protected, and promoted in both private and public realms. . . . [T]he principled defense of marriage is an urgent necessity for the well-being of children and families, and for the common good and society." National Conference of Catholic Bishops (United States), *Statement on Same-Sex Marriage, in* CATHOLIC ALMANAC 51, 51 (Felican A. Foy & Rose M. Avato eds., 1997). "[M]arriage between a man and a woman is ordained of God . . . . Marriage between man and woman is essential to His eternal plan. Children are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity." The First Presidency and Council of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World, in* THE ENSIGN OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, Nov. 1995, at 102, 102. "This Conference . . . upholds faithfulness in marriage between a man and a woman in a lifelong union . . . [and] cannot advise the legitimising [sic] or blessing of same-sex unions." *Text of Lambeth Conference [of the Anglican Communion] Resolution on Sexuality,* THE LAMBETH DAILY, Aug. 6, 1998, at 3, 3. Some argue, of course, that religiously-based or motivated views are per se illegitimate as grounds for public policy. For an insightful response to that position, see Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality,* 106 YALE L.J. 2475, 2503-04 (1997).

180. *See* DAVID POPENOE, LIFE WITHOUT FATHER 139 (1996). *See also* DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995).

181. *See* POPENOE, *supra* note 180, at 139-40. *See also* David Gutmann, *The Father and the Masculine Life Cycle, An Institute for American Values Working Paper for the Symposium on Fatherhood in America*, Publication No. W.P. 13 (Nov. 1991) ("[T]he forms of paternity and maternity are not expressions of power politics between the sexes but are evolved adaptations to the special requirements of the weak and needy human child.").

Western culture towards legitimizing homosexual relationships. They have made an important distinction where parenting is concerned. Legislation in Denmark, Norway, Sweden, and Iceland precludes adoption by same-sex couples. Some of those countries also prohibit the creation of parent-child relationships in such unions by means of reproductive technology.[182]

These arguments are contested, of course. Some believe that parenthood really can be, and ought to be, androgynous, or at least that there is no evidence of harm to children from being raised by a couple of the same sex who share an intimate relationship with one another.[183] Some argue that gender-differentiated roles in parenting are socially constructed and can be socially altered or eliminated.[184] One scholar has recently argued that the parental role is properly gendered, but that as a matter of policy the maternal role entirely eclipses the importance of the paternal. The key definition of family, therefore, is mother and child.[185]

Questions of this sort are important not just to the private participants in traditional and nontraditional families, but to the communities in which they live, and to the well-being of the nation's culture generally. Hard data alone cannot supply satisfactory answers to those questions. One must inevitably resort to nonempirical judgments about the effect of family form on children and—ultimately—to value judgments.

Judges asked to resolve disputes like that in *Holtzman* should recognize not only that the social interest is relevant, but that courts should not be the primary source of the content of that interest. The correctness of the conclusion that "children generally develop best, and develop most completely, when raised by both a mother and a father and experience regular

182. See sources cited in Wardle, *supra* note 171, at 842 & nn.298-301.

183. Much of the data supporting that proposition is suspect. *See id.* at 844-52.

184. As David Popenoe has put it,

> [a] generation of social scientists has argued that fatherhood is merely a "socially constructed" phenomenon, a "gender role," something devised and taught by each society. The implication is that, because it is devised by society, it can be changed or even dropped altogether. This argument is often extended to most male and female differences. Such differences are thought to be culturally determined, even arbitrarily so.

POPENOE, *supra* note 180, at 164. Popenoe finds this view incompatible with "our current understanding of human biology and evolution." *Id.*

185. *See generally* FINEMAN, *supra* note 18.

family interaction with both genders' parenting skills"[186] is precisely the kind of question best answered by politically accountable legislatures rather than courts. As Cass Sunstein has written, "the real forum of high principle is politics, not the judiciary—and the most fundamental principles are developed democratically, not in courtrooms."[187]

V. CONCLUSION

Contests between adults over their legal relationships with children are a source of both anguish for the persons involved, and illumination of the interests that drive this area of family law. The cases reviewed in this article reflect the importance we properly attach not only to the individual interests of children and adults, but also—and less obviously—to the interest of society in family form.

There is no question that the law has traditionally shown a strong preference for the child-parent relationship over competing child-nonparent relationships. The cultural preference for parents is part of a larger context in which the marital family is the preferred setting for rearing children. The features of the family of particular value to children are the legal bond between parents, with its tendency to enhance their emotional and other commitments to one another, and the distinctive, gender-specific contribution made by mothers and fathers. The capacity of extended family members, especially grandparents, to enrich and support this family structure are valued as well. Other arrangements, such as foster and preadoptive homes, are more or less favored in relation to their capacity to support, approximate, replicate, or repair the marital family.

A social interest anchored in the marital family does not mean that the outcome of any particular dispute is predetermined. The cultural preference for the marital family is not itself a legal standard, but an interest influencing the creation of standards. The social interest is not inconsistent with a recognition that, inevitably, many two-parent, marital families would do much worse for children than would single

186. *See* Wardle, *supra* note 171, at 860.

187. CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 7 (1996).

nonparents in unconventional domestic settings. But it also accepts the value of the marital family as a general matter. That value is reflected in standards that give a nonconclusive advantage to that family form.

The social interest preferring the traditional, marital family shapes the legal standards applied in most cases. Courts applying those standards usually do so without focusing explicitly on the social interest. As long as that interest, conventionally understood, is widely accepted, an uncritical application of existing standards flows smoothly. In recent years, however, traditional legal standards have been challenged, usually in the form of a demand that the "child's best interests" should be the primary, if not the sole, determinant. The judicial proponents of such proposed standards often overlook, or at least decline to discuss, the social interest. A change in the legal standard, however, cannot leave the social interest untouched.

Changes in legal standards governing parent-nonparent disputes—indeed standards governing family law issues generally—should not be made without taking account of such implications. If, as is now evident, the traditional legal standards based on the conventional social interest are to be called into question, the underlying social interest itself should be considered carefully. It should not simply be written out of the equation, as if it had no independent force.

The social interest in family form, as reflected in legal standards, genuinely affects individual members of society as a public affirmation of values. It may not affect a person much if a neighbor chooses to live in an unconventional domestic arrangement. But one *is* affected if the law affirms, rather than merely permits or tolerates, that arrangement. The difference between affirmation and toleration is real and important.[188] This is especially true in the family law arena, where—unlike the commercial sphere—judicial decisions affect our sense of intimate community, our collective self-definition. That definition can and, one hopes, always will include a sense of toleration for the nonconformist. But it need not be an affirmative embrace of the nonconformist's ideals.

188. See Hafen, *supra* note 12, at 545-47, 561-62.