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BREAKING UP A FAMILY OR PUTTING IT BACK TOGETHER AGAIN: REFINING THE PREFERENCE IN FAVOR OF THE PARENT IN THIRD-PARTY CUSTODY CASES

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I. INTRODUCTION

Case 1: A grandmother becomes concerned that neither her daughter nor her son-in-law is capable of caring properly for her grandson. They are getting a divorce. The child's father abuses alcohol, and the mother never seems to have any money. The mother is living in a shabby, cramped apartment with no yard in which the boy can play. The grandmother intervenes in her daughter's divorce case and requests that the court award custody to her.

Case 2: A widower with an infant son marries a woman when his child is less than a year old. Although the boy knows that his "real mother is in heaven," he calls his stepmother "Mom." The stepmother does not adopt her husband's child, but she is the boy's primary caretaker. After ten years, the husband and wife decide to divorce. Both seek custody. The father claims that he should prevail based on his wife's lack of a biological connection to the child.

Case 3: After her parents are divorced, a child lives with her mother, stepfather, and half-siblings for several years. Her biological father visits with her regularly and pays all of his child support on time. The child's mother dies suddenly, and her father seeks custody from the stepfather.

Case 4: A mother voluntarily entrusts her two young boys to a family member who lives several hundred miles away while she enrolls in a substance abuse program. The whole process takes over a year, but she recovers and gets a secure job. The mother asks for her children back, but the family member refuses. The mother pursues the matter in court.

Case 5: A young mother places her infant up for adoption, never having told the baby's father that she was pregnant. He discovers that fact many months after the adoption and goes to court to reopen it. After two years of litigation, the appeals court finally vacates the order terminating his parental rights. The father has never met his daughter, but he wants her to live with him. He files for custody from the couple who tried to adopt the girl and with whom the child has been living for more than two years.

These situations sample the variety of life stories that give rise to "third-party" custody cases, child custody disputes between a biological or legally adoptive parent and anyone else who is neither.[1] These disputes present courts and legislatures

1. In this Article, the term "parent" refers only to biological parents and individuals who have adopted a child through appropriate legal channels, if the adoption is

with issues more complex than the questions raised in custody cases between two biological parents with equal status as "parent."[2] Third-party custody cases challenge both policymakers[3] and decisionmakers to reexamine the very definition of "parent"[4] and to determine the significance of status[5] and biology in the custody decision.[6] These cases also force a choice between custody decisions based on the needs of the child and outcomes based on the conduct of the parent.[7] Certain of these cases highlight the often conflicting societal values of providing nurturing and safe homes for children and leaving parents free to raise

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final. "Parent" does not include "psychological parents" or any other caregivers. The term "nonparent" includes grandparents, other members of the child's extended family, and all "biological strangers," regardless of their level of emotional attachment to the child. Legally, their status as nonparent is the same. Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209, 212 n.19 (1978).

2. Some doctrines distinguish between parents on the basis of gender, such as the tender-years presumption that young children should remain with their mother or the theory that, all other things being equal, a court should give custody to the same-sex parent. For a discussion of such theories, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

3. Throughout this Article, the term "policymakers" refers both to legislatures and courts. In some states, statutes establish the standard for deciding third-party custody cases, while in other jurisdictions, decisional case law sets the standard.

4. *See, e.g.*, Janet L. Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733 (1992).

5. Status is

> grounded in inexorable truths (e.g., the truths of biological process). Within a universe of status, the obligations and rights that define relationships flow automatically and inevitably from the fact of the relationship. Thus, for instance, parents are expected to love and provide for their children, not because they have agreed to do so, but simply because they are parents.

Janet L. Dolgin, *The Family in Transition from* Griswold *to* Eisenstadt *and Beyond*, 82 GEO. L.J. 1519, 1526 (1994). Status may "sanction[] significant inequities" among the members of a family and between family members and individuals outside the family, but it also "provid[es] for enduring relationships." *Id.* at 1571.

6. In this way, third-party custody cases are really a subset of cases within a larger debate about the role of biology in the parenting process. The total number of such cases continues to grow as medical technology expands the possible ways in which humans can procreate. *See* John L. Hill, *What Does It Mean To Be a "Parent?" The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991).

7. *See, e.g., infra* notes 377-78 and accompanying text.

their children in their own way, without intrusion.[8]

A majority of jurisdictions emphasize the importance of parenthood status and thus require courts to decide third-party custody cases differently from parent-versus-parent custody cases.[9] Most states give the parent some sort of preference in a custody dispute with a nonparent, usually by creating a rebuttable presumption in favor of the parent.[10] Few jurisdictions define this presumption with much specificity, particularly with respect to the kind of evidence that rebuts it.[11] Cases rarely discuss the choice from the point of view of the child.

As the representative stories illustrate, the broad category of third-party custody cases sweeps together several types of cases that courts and legislators can and should distinguish in important ways. The most basic distinction is whether the child is living with the parent at the time that the case arises. If the child is living with her[12] parent, the court faces a "removal" case; it must decide whether to remove the child from her family.[13] If the child has already been in the care of someone other than her parent for a period of time, the case involves "reunification"; the court must decide whether to reunite the child with her parent.[14] Further variations distinguish among the reunifi-

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8. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297 (1988). Bartlett suggests that several types of family cases reflect the tension of these conflicting values. She proposes a method for reshaping the debate about parenthood, emphasizing parental responsibility rather than rights, and applies her model to three types of cases: claims by unmarried women seeking "motherhood by choice," *id.* at 306-15, claims by single women seeking to place their children up for adoption over the objection of the father, *id.* at 315-26, and claims by "surrogate" mothers who have changed their minds about giving up their children, *id.* at 326-37. Her theory enriches the discussion of third-party custody cases as well.

9. *See infra* part II.B.1.

10. *See infra* notes 80-82 and accompanying text.

11. The Connecticut statute is a typical example. Only a "showing that it would be detrimental to the child to permit the parent to have custody" rebuts the presumption. CONN. GEN. STAT. ANN. § 46b-56b (West Supp. 1995).

12. For ease of reference, all hypothetical examples refer to the child as female and the parent as male, unless otherwise specified. By no means does this choice suggest that the standards would vary in any way based on the gender of either the child or the parent.

13. Because of differences in standing rules and other jurisdictional considerations, some states do not allow third-party custody removal cases. *See infra* notes 87-91 and accompanying text.

14. In a small percentage of cases, the decision may actually be whether to

cation cases.[15] The most fundamental difference in reunification cases is the reason that the parent and child became separated: whether the parent's conduct and capability to care for his child were at the root of the existing separation between parent and child.[16]

Courts and legislatures tend to consider third-party custody disputes in the aggregate and create one standard for all manner of custody disputes between a parent and a nonparent.[17] Of course, any decisional standard for a range of cases as wide as the situations illustrated must be general and broad. The trial judges must then define for themselves how to balance the needs of all the parties, what factors to consider, and how to weigh them.

The failure to distinguish among cases based on differing equitable considerations has resulted in a muddled debate about the appropriate decisional standard for third-party custody cases.[18] It has also caused a lack of clarity in discussions about the effect of any preferential rule in favor of the parent.[19] In addition, the courts remain confused about what type of evidence is truly relevant in these cases.[20]

"unite" parent and child for the first time. *See infra* part II.A.2.b.

15. *See infra* notes 45-61 and accompanying text.

16. *See infra* notes 48-55 and accompanying text.

17. For a discussion of the exceptions to this rule, see *infra* part II.B.2. Some commentators address only one variety of cases, such as reunification cases. *See, e.g.*, James G. O'Keefe, *The Need To Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077, 1081 n.30 (1991).

18. *See infra* notes 68-86 and accompanying text.

19. For differing views on the effect of the preference, without any acknowledgement of the variety of case types, compare Richards, *supra* note 4 (arguing for a balancing of the rights of society, the parent, and the child) with Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody Is Constitutionally Protected?*, 20 GA. L. REV. 705 (1986) (asserting that the parental rights standard is unconstitutional) and Eric P. Salthe, Note, *Would Abolishing the Natural Parent Preference in Custody Disputes Be in Everyone's Best Interest?*, 29 J. FAM. L. 539 (1990-1991) (calling a natural parent preference "archaic" and "harmful").

20. Compare the evidence on which the court focused in two cases in which parents sought to regain custody from grandparents. In Perez v. Perez, 561 A.2d 907 (Conn. 1989), the court did not let a strained relationship between the parent and the child prevent the parent from prevailing, *id.* at 909, 916. The court primarily discussed the effect that the custody change would have on the child's emotional development. *Id.* at 916. In Painter v. Bannister, 140 N.W.2d 152 (Iowa), *cert. denied*, 385 U.S. 949 (1966), the court focused on the alternative lifestyle chosen by

This Article first recommends a definitional system for the various types of third-party custody cases. The system groups case types according to factors relevant to the process of choosing a decisional standard. The Article then surveys the relevant constitutional principles that shape, inform, and sometimes limit the choice of a standard for deciding these cases. Finally, it proposes standards for resolving each category within the wide spectrum of third-party custody cases. The standards reflect a strong bias in favor of viewing the custody choice through the eyes of the child. Nonetheless, the Article suggests that a preference in favor of the parent rather than a best-interests-of-the-child test is appropriate for all types of third-party custody cases, with one limited exception. This Article then suggests that the use of a presumption, often with vaguely defined standards for its rebuttal, is an ill-advised and confusing method of expressing the preference.

The best method of defining the parameters of the preference given in each kind of case is to articulate directly the circumstances under which a court should separate the parent and child in a removal case and the conditions under which the court should not restore custody to the parent in a reunification case. In removal cases, the court should focus only on the capability of the parent to provide the child with her basic needs. In reunification cases, the court should ignore the parent's responsibility or "blameworthiness" for creating the separation and look only to the psychological impact that a change in custody will have on the child. The effect of the preference is that, unless one of a set of identified conditions exists, the court should award custody of the child to the parent. To respond to the fundamentally different controversies presented by removal and the several types of reunification cases, the recommended standards include the type and quantum of evidence that should be necessary to overcome the preference.

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the parent, with the judges clearly disapproving, *id.* at 154.

II. DEFINING THE CONTEXT

A. *The Categories of Third-Party Custody Cases*

In all third-party custody cases, someone other than the child's legal or biological parent competes against one or both such parents for custody of the child.[21] A broad range of family problems and situations may result in a claim by a relative or family friend to raise the child.[22]

The reality today is that many children do not grow up in the traditional construct of a family—two natural parents, a full sibling or two, a dog, a cat, and a minivan.[23] An increase in the percentage of parents with serious problems results in an increase in abuse and neglect petitions and also affects the number of third-party custody cases.[24] In particular, the number of children raised by their grandparents has increased markedly in recent years.[25] Studies indicate that teenage pregnancy, sub-

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21. *See supra* note 1 and accompanying text.

22. *See, e.g.*, cases 1-5 described *supra*.

23. The living patterns of children have changed over the last three decades. The traditional nuclear family, in which children live with both biological parents and only full siblings, is a decidedly less frequent situation. David Popenoe, *American Family Decline, 1960-1990: A Review and Appraisal*, 55 J. MARRIAGE & FAM. 527, 531 (1993). According to a U.S. Census Bureau report of children's living arrangements in the summer of 1991, approximately 48 million children under the age of 18 lived in the following types of households: 50.8% lived with two biological parents in a traditional nuclear family; 72.8% lived with two "parents," defined to include biological, step, adoptive, and foster parents; 24% lived with one "parent"; 2.7% lived with neither "parent"; 7.2% lived with at least one grandparent, 23.2% of whom had no parent with them in the grandparent's home. STACY FURUKAWA, U.S. DEP'T OF COMMERCE, THE DIVERSE LIVING ARRANGEMENTS OF CHILDREN: SUMMER 1991 (Current Population Report, Series P70, No. 38, 1994). These living pattern statistics only begin to demonstrate the degree to which formal and informal alternative parenting arrangements exist in America. Research suggests that the family structure has a strong impact on a child's psychological development, well-being, and likelihood of future behavioral problems and delinquency. *See, e.g.*, R. Jean Haurin, *Patterns of Childhood Residence and the Relationship to Young Adult Outcomes*, 54 J. MARRIAGE & FAM. 846 (1992).

24. A third-party custody suit is simply another procedural mechanism by which a nonparent who is concerned about a parent's ability to care for a child may seek to assume the daily care of that child.

25. Nationwide, three million grandparents are raising their grandchildren. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1315 n.1 (1994) (citing GRANDPARENTS: NEW ROLES

stance abuse, AIDS, child abuse and neglect, and parental incarceration are the major causes of parental incapacity that has resulted in a rise in grandparent custody.[26] Economic hardship, caused by unemployment or nonpayment of child support, may have also increased the number of parents with children forced to move back into the grandparents' household. Such scenarios can cause friction and possibly a custody dispute when the parent is ready to live independently with his child.[27]

The increase in the divorce and remarriage rate creates yet another common spawning ground for third-party custody disputes. Children raised in "blended" families consisting of nonparents, stepparents, and half- and step-siblings inevitably form strong emotional bonds with those people. A challenge to the integrity of this second family or its breakup may well result in difficult custody choices.

Finally, medical breakthroughs in reproductive technology have stretched the usual definitions of parenthood and can result in the formation of families that do not share traditional biological connections.[28] If the family splits, courts face interesting and sometimes novel questions.[29]

The very definition of a third-party custody case—a contest in which one of the participants lacks parental status—emphasizes the most basic of issues in all of these cases: in deciding who should raise the child, how important is the biological connection

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AND RESPONSIBILITIES, A BRIEFING BY THE CHAIRMAN OF THE SUBCOMMITTEE ON HUMAN SERVICES OF THE SELECT COMMITTEE ON AGING, HOUSE OF REPRESENTATIVES, COMM. PUB. NO. 102-876, 102d Cong., 2d Sess. 39 (1992) (statement of Danylle J. Rudin)). A million of them are doing so without help from the children's parents. *Id.* The number of children living with relatives other than their parents has increased by 40% in the last decade. *Id.*

26. *See, e.g.*, Muriel Banquer et al., Grandparents Raising Grandchildren: A Needs Assessment (1994) (unpublished study by the Elderly Program of the Consultation Center, New Haven, Connecticut) (on file with Author). These problems also may result in foster care placement, but grandparents increasingly assume care. *Id.*; *see supra* note 25.

27. *See, e.g.*, Barstad v. Frazier, 348 N.W.2d 479 (Wis. 1984) (denying custody to a child's grandmother who had originally assumed responsibility for the boy at the request of the teenaged mother).

28. For a thorough discussion of the effects of advances in medical technology on family law issues, see Hill, *supra* note 6.

29. *See, e.g.*, *infra* note 41.

between a natural parent and child or the legally accorded connection between an adoptive parent and child? The answer may vary depending on the kind of case, but the question is there, waiting to be addressed, in every third-party situation.

Every case, whether removal or reunification, will also require the court to decide whether to remove the child from the home in which she is now living. Any move would be at the expense of the existing bond between the child and her caretaker, whether a parent or nonparent. The proper weight to accord the child's interest in maintaining continuity with her present caretaker is therefore a second major issue present in every third-party custody case. The corollary issue—the proper weight to accord the caretaker's interest in remaining with the child—is also omnipresent.

Beyond these factors common to all third-party cases are a variety of other considerations. Who is seeking to remove custody from the parent? Have the parent who seeks custody and the child ever lived together before? How did the parent and the child come to be separated in the first place? How long has the child lived with the nonparent caretaker? Rather than create one broad test that applies to all these situations, courts should divide the cases into groups according to the most salient and important commonalities. Some variables are nothing more than descriptive details with no bearing on the test that the court should use to choose the custodian;[30] others may not affect which test the court selects but will be very significant to the ultimate custody choice.[31] Still others go to the very heart of what measure the court should adopt to decide the case.[32]

The most fundamental variable is whether the child is living with the parent at the time that the custody dispute arises.[33]

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30. For example, whether the nonparent is related to the child is a factual variation that should not affect a case's result.

31. In a reunification case, the child's age at the time she went to live with the nonparent is a key factor in the custody decision. *See In re* Jacqueline D., Nos. N87-128 & 82341, 1992 Conn. Super. LEXIS 1037, at *8-10 (Conn. Super. Ct. Apr. 15, 1992). This Article does not categorize cases on the basis of the variations in the age of the child.

32. For example, this Article divides all third-party cases into two groups based on whether the child is already living with the nonparent.

33. An important caveat qualifies this apparently simple rule. In a reunification

The answer to this question serves as a major dividing line between the two major types of cases. All third-party cases will fit within one or the other of these categories, with more or less ease.

1. Removal Cases

a. Classic Cases

A removal case involves a claim that a court should remove a child from the care of her parent.[34] It arises when a nonparent seeks custody of the child, typically by alleging that either parent, or both, is not a fit custodian. Sometimes, however, the allegations actually hide little more than the nonparent's disapproval of a parent's lifestyle choices.[35] The grandmother in the first of the introductory examples intervened in her daughter's divorce to seek custody because she was concerned that neither of her grandson's parents were capable of caring for him. She thereby precipitated a classic removal case.

All removal cases present a common issue: what conditions justify separating a parent and child? In this way, removal cases are identical to abuse and neglect proceedings initiated by a state child protection agency. This similarity requires policymakers to ask whether a different standard should apply

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case, the child must be living with the nonparent as a result of a court order or under circumstances in which the parent originally consented to the arrangement. In cases in which the parent originally agreed to allow the nonparent to care for the child, the parent obviously has withdrawn his consent. A kidnapping or custodial interference case is obviously a very different matter not covered under the terms of a third-party custody case.

In order to qualify as a reunification case, the child also must have been living with the nonparent in excess of six months. If the case involves any lesser time period, the court should decide the dispute under the rules for a removal case, even if the child continues to stay with the nonparent while the action is pending.

34. For example, in Foster v. Devino, No. 0110479, 1994 Conn. Super. LEXIS 1161 (Conn. Super. Ct. May 5, 1994), grandparents intervened in a custody action between an unmarried couple pursuant to the state's intervention statute, CONN. GEN. STAT. ANN. § 46b-57 (West 1986). Similarly, in Lewelling v. Lewelling, 796 S.W.2d 164 (Tex. 1990), grandparents intervened in their son's divorce action, requesting to be named the "managing conservator" of their grandchild.

35. Richards, *supra* note 4, at 734; *see, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995) (involving a grant of custody to a grandparent, at least in part due to the grandmother's disapproval of the mother's lesbian lifestyle).

when a private individual rather than the state forces the question. Should the conditions that justify removal depend on the entity requesting the removal?

In some jurisdictions, no answer to this question is necessary. The standing and procedural rules prohibit the initiation of third-party custody removal cases. These states deny nonparents access to the courts, whether by initiation of their own suits or by intervention in an existing dispute between the natural parents, unless the child is already out of her parents' home.[36] In these jurisdictions, a nonparent who is concerned about a child's safety or the quality of her care is limited to making a complaint to the appropriate child protection agency or initiating a guardianship proceeding. If the nonparent's concerns are less serious than safety or quality care, he would have no recourse.

b. A Special Kind of Case

The broad definition of a third-party custody case gathers within its net one kind of case that is fundamentally different from the others. In these situations, both adults have acted as "parents" to the child simultaneously, and have themselves ignored the lack of a biological or legal connection between the child and one of the adults.[37] These cases are, however, technically speaking, custody disputes between a parent, usually biological, and a nonparent.

Consider the example of the widower father and child who lived for a significant period of time with the stepmother, creating a nuclear family unit.[38] When the father and stepmother

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36. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 401(d)(2), 9A U.L.A. 550 (1973). Courts refused standing to nonparents in *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich.), *stays denied*, 114 S. Ct. 1, *and* 114 S. Ct. 11 (1993), and *In re* Custody of Peterson, 491 N.E.2d 1150 (Ill. 1986).

37. These examples assume that the non-biologically related adult did not legally adopt the child. If she had done so, the status of the two parents would be legally identical.

38. Traditionally, a nuclear family is a "conjugal household," consisting of a husband and wife and their dependent children. Katharine T. Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879 n.1 (1984). The children may be either the parents' biological issue or their legal adoptees. The nonparent may or may not be of the same gender as the parent, and the existence of any

subsequently separated, the child faced removal from one or the other adult, both of whom enjoyed a caretaking role in the child's life and both of whom the child loved.[39] A similar situation may arise if one partner in a homosexual relationship becomes the biological progenitor of a child that the couple intends to raise together.[40] Similarly, if one partner in a heterosexual relationship has a fertility problem, the couple may choose surrogacy or sperm or egg donation, so that only one of the adults will actually have a biological link to the child.[41] If either of these couples separates, the child's custody becomes an issue.

In all other third-party custody cases, the court must decide which of two separate families should care for the child.[42] The nonparent is an "outsider" to the family and is seeking to disrupt the integrity of the parent-child relationship. In this special kind of case, however, the court must choose which adult will live with the child after a single family unit dissolves. The dispute does not involve a claim for custody by a person outside of the nuclear family unit.[43] Rather, the biological parent has intentionally created a family with the "nonbiological parent" and has encouraged the strong attachment between the child and the

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marital relationship between the two adults is irrelevant. It matters only that they form a household with the intent to create a family with two adult members.

39. These examples assume that the other biological parent is not a party to the custody dispute.

40. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

41. *See, e.g.*, Haftel v. Haftel, No. FA-91-0060834-S, 1994 Conn. Super. LEXIS 1892 (Conn. Super. Ct. July 20, 1994). From birth, the child lived with his biological father and the father's wife, whom the child believed to be his biological mother. *Id.* at *1-2. In fact, however, the child was the offspring of a woman artificially inseminated with the father's sperm because of the wife's fertility problem. *Id.* at *1. The wife did not adopt the child. When the husband and wife divorced, the father claimed a superior right to custody solely because of his genetic link to the child. *See id.* at *2.

42. *See supra* note 34.

43. This category does *not* include cases in which the parent and child both lived with a grandparent, other relative, or a friend. The dynamics of a multigenerational extended family or communal household are not the same as a nuclear family. The parent does not share authority with or change the status of the nonparent simply by living in a group including that individual. One commentator argues for the development of "co-guardianship" for caretaking grandparents. Czapanskiy, *supra* note 25, at 1319.

other adult. This kind of case has much more in common with a traditional parent-versus-parent custody dispute. To the child involved, the family split and the custody quandary will feel the same as if both adults were her natural parents. Her family, as she has known it, has ceased to exist.

Moreover, this kind of case also differs from other third-party cases because it has elements of both a removal and a reunification case. Although the nonparent seeks to remove the child from the parent's custody, the parent is simultaneously attempting to remove the child from the nonparent's care.[44]

2. Reunification Cases

Reunification cases arise as the result of a broader variety of situations than removal cases; however, they all share some common and significant traits. In all such cases, a person other than the parent cares for the child. Although a relationship of great affection and emotional connection may still remain, the close day-to-day relationship between the parent and the child already has been interrupted. Presumably, the child has developed a close emotional bond with the nonparent.[45] Consequently, every reunification case presents the issue of the weight to be accorded the bond between the child and the nonparent. Reunification cases are precipitated by a parent's request to have custody restored to him.[46] Without exception, the states have proce-

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44. Inclusion of this scenario in the category of removal cases highlights the key question presented: when two adults have raised a child together in the context of a nuclear family setting, should the court attach any significance to the nonexistence of a biological or legal connection between the child and one of the "parents?" Advocates for children's rights answer this question with a resounding "no." Barbara B. Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 B.Y.U. J. PUB. L. 321, 335 (1994).

45. However, such bonds do not always exist. If the child is old enough to express herself and says that she wants to live with the parent, the courts tend to consider the child's preference, assuming the parent is fit. *See* Sheppard v. Hood, 605 So. 2d 708, 712 (La. Ct. App. 1992); Merritt v. Merritt, 550 So. 2d 882, 890 (La. Ct. App. 1989); Venable v. Venable, 445 N.E.2d 1125, 1130 (Ohio Ct. App. 1981).

46. If the state's standing rules permit it, a nonparent might be the moving party in a reunification case. For example, if the parent has withdrawn his consent to an informal and voluntary arrangement, the nonparent may win the race to the courthouse to file for formal custody, seeking to add the imprimatur of a court order to his informal arrangement.

dures for a parent to initiate a reunification case through a writ of habeas corpus or another procedural mechanism.[47] No state denies a parent standing to bring such a case.

a. The Cause of the Separation

Despite the similarities in all reunification cases, significant factual variations exist. There are two major classes of reunification cases. They differ with respect to the cause of the separation between parent and child.

In the first category of reunification cases, the key factor is that some condition on the parent's part caused the separation (a "parental condition" case). The parent's conduct or condition prevented him from caring for the child in an adequate manner. The conduct may be of the sort to which society traditionally attaches fault or blame labels, such as substance abuse or illegal activity resulting in incarceration. The condition need not be something over which the parent had any control, however, such as a mental or physical illness. It may be just that the parent is too young to be willing and able to take on the responsibility of parenthood.[48]

Some of these reunification cases arise as the second stage to a court-ordered removal, after the parent has rehabilitated himself and returned to court for a modification of custody.[49] Others result from the actions of a parent trying to undo a private and voluntary custody arrangement[50] gone awry.[51] In such a

47. *See, e.g.*, Root v. Allen, 377 P.2d 117 (Colo. 1962) (en banc) (habeas corpus case filed by a parent); Perez v. Perez, 561 A.2d 907 (Conn. 1989) (modification action initiated by a parent).

48. *See, e.g.*, Barstad v. Frazier, 348 N.W.2d 479 (Wis. 1984) (third-party custody dispute involving a boy born to a teenaged mother).

49. *See, e.g.*, Busa v. Busa, 589 A.2d 370 (Conn. App. Ct. 1991).

50. This variety of case may also involve a parent so overwhelmed that he agrees to place his children for adoption but then changes his mind.

51. Stell v. Stell, 783 P.2d 615 (Wash. Ct. App. 1989). A parent's socioeconomic status and his tendency to use voluntary placements during a crisis may well correlate. Professor Guggenheim posits that, if a parent has a problem, the State is more apt to seize children from poor and minority families than from middle- or upper-class families. A middle- or upper-class parent will have family resources to assist them or financial resources to hire help, so the State will never know about the family crisis. Martin Guggenheim, *The Political and Legal Implications of the Psychological Parenting Theory*, 12 N.Y.U. REV. L. & SOC. CHANGE 549, 549-50

situation, the reunification case represents the first time that the parties have come before any court. A mother sending her children to a distant family member while she is in a substance abuse treatment program illustrates a typical "parental condition" case.

The example of the custodial mother and her child who lived with the stepfather after divorce and remarriage illustrates the second class of reunification cases, a "second family" case.[52] The dispute arose when the father pursued custody from the stepfather after the mother's death.[53] In such cases, no underlying parental problem interfered with the parent's capability to care for his children. Instead, the child came to live with the nonparent as a consequence of the custody decision between two biological parents and the subsequent formation of a new living arrangement by the custodial parent.[54]

The cause of the separation is a defining feature, not necessarily because it will make a difference in the result,[55] but because it forces policymakers to confront a basic question: should a parent's responsibility or lack of responsibility for the separation make a difference in the custody decision?

(1983-1984); *see also* Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 432-33 (1983) (claiming that the foster system is used predominantly by and against the poor). Professor Guggenheim also suggests that, once the State has intervened in a family, the child is less likely to return home. *See* Guggenheim, *supra*, at 550.

While state intervention is undoubtedly a serious action, in some cases private arrangements may be more dangerous to the goal of reunification. A state typically uses an imperfect system to intervene, but statutorily mandated safeguards protect the parent. Unless courts construe third-party custody cases similarly, a voluntary placement arrangement gone awry will give the parent *fewer* safeguards and thus *less* certainty that his child will ever come home again.

52. The nonparent may also be any relative or a person to whom the custodial parent is not married.

53. Root v. Allen, 377 P.2d 117 (Colo. 1962) (en banc), is the archetype of this category.

54. Because the best-interests-of-the-child custody standard applies only between two parents, the noncustodial parent may lose custody without any finding of a limitation on his parenting skills. *See, e.g., id.* at 121. No inference of poor parenting is appropriate. *Id.*

55. This factor does, however, affect the analysis of the constitutionality of the various approaches. *See infra* notes 227-29 and accompanying text.

b. The Absence of a Prior Custodial Relationship

Most reunification cases involve parents who lived with their children at some point prior to their separation.[56] This fact need not always be true, however. In some cases, the parent and the child may have never previously lived together. In these situations, the term "reunification" may technically be a misnomer, but such scenarios share common elements with other reunification cases. As in all reunification situations, the child is in the care of a nonparent and the parent wants custody.

A parent who has never previously lived with his child may wish custody under several circumstances. Perhaps the parents of a child never lived together or separated prior to the child's birth. If the custodial parent dies or otherwise leaves the child with a nonparent, the noncustodial parent may file for custody. This scenario would be nothing more than a variant of the second group of reunification cases, in which the dispute is the result of the custodial parent's formation of a "second family" and not a consequence of the noncustodial parent's incapacity.

Reunification cases resulting from a "parental condition" may also include cases in which the parent and child have never before lived together. The most notorious situation is the "failed" or "rescinded" adoption case of an infant.[57] In these cases, the child usually has been in the custody of the prospective adoptive parents for a significant period[58] by the time the courts finally decide on the validity of the adoption.

A rescinded adoption case fits well within this definition of the "parental condition" type of reunification case.[59] The custo-

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56. *See supra* notes 48-51 and accompanying text.

57. *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich.), *stays denied*, 114 S. Ct. 1, *and* 114 S. Ct. 11 (1993). Although the reasons that parents place their children for adoption are too numerous and personal to catalog, they all fit roughly within the "parental condition" category.

58. In the well-known "Baby Jessica" case, the father first filed to halt the adoption when she was six weeks old. *Id.* at 652. The child did not go to live with her biological parents until she was two and one-half years old.

59. Jurisdictions vary with respect to whether they define a rescinded adoption case as a third-party custody case. For example, once the Iowa court denied the DeBoers' petition to adopt "Baby Jessica," the fight in the Michigan courts became a third-party custody case between the parents and the nonparent custodians. *Id.* at 653. Because third parties have no standing to bring a custody case in Michigan,

dy dispute between the parent and the prospective adoptive parent involves a claim for continued custody by a nonparent outside of the biological family unit. It presents the same factual and equitable considerations as do other reunification cases. The court must consider the protected rights of the parent, but must do so in light of the child's emotional attachment to the nonparent. Thus, if the adoption is vacated, the court must still decide, as a separate issue, where the child should live.[60] The third-party custody category offers a ready-made method for considering all the parties' interests.

In either type of reunification case, the noncustodial parent seeking custody from the nonparent may never have had anything more than a visiting-parent relationship.[61] This circum-

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the court dismissed the DeBoers' custody request. *Id.* at 668.

Some states consider the issue of physical custody a matter separate from the issue of legal custody. *See, e.g.*, *In re* Custody of C.C.R.S., 872 P.2d 1337, 1341-42 (Colo. Ct. App. 1993), *aff'd*, 892 P.2d 246 (Colo. 1995). Other jurisdictions deem the return of the child to follow automatically from the decision not to terminate the parent's rights. *See, e.g.*, *In re* Baby Girl B., 618 A.2d 1, 8-9 (Conn. 1992). The teenage mother in that case changed her mind about giving up her infant. *Id.* at 4-6. The court reopened and vacated the judgment terminating her parental rights and returned the child to her. *Id.* at 21.

60. A child is "not a misaddressed parcel that, once the error is discovered, should be shipped to the correct recipient." Joan H. Hollinger, *A Failed System Is Tearing Kids Apart*, NAT'L L.J., Aug. 9, 1993, at 17-18.

One commentator strongly recommends that all states consider failed adoptions as third-party custody cases, criticizing the practice of automatically sending children to live with their biological parents if the adoption is not made final. Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1330 (1994). Korn reports on the Vermont case of "Baby Pete," in which the natural father successfully challenged the termination of his parental rights, but then settled the custody issue with the prospective adoptive parents so that the child remained with them, and the father had visitation. *Id.* at 1285.

61. In some limited situations, the parent seeking custody may not have any relationship at all with his child. The father whose child was placed for adoption without his knowledge is such an example. *See, e.g.*, *Clausen*, 502 N.W.2d 649. As long as the father pursued his rights immediately upon learning of the existence of the child, he may bring a third-party action for custody.

Courts should not construe this narrow opportunity for a parent in a disputed adoption case to allow a biological father who has expressed no prior interest in his child to surface years later and seek custody from either the other parent or a nonparent. In many jurisdictions, such a delay would justify the termination of parental rights due to the lack of an ongoing parental relationship. *See, e.g.*, CONN. GEN. STAT. ANN. § 17a-112(b) (West Supp. 1995). It certainly should serve to cut off the

stance should not exclude automatically the noncustodial parent from consideration, nor should it necessarily preclude the parent from enjoying the benefit of a parental preference. If, however, the absence of the prior custodial relationship is to affect the ultimate result—make the parent less likely to prevail—then the challenge is to create a standard that permits the trial judge to take this factor into account.

B. Existing Approaches for Deciding Third-Party Custody Cases

1. Overview of Standards

Children historically have been viewed as the property of their parents.[62] Even into the early twentieth century, courts in the United States held almost uniformly that a father had the right to custody of his children as a matter of property law or title.[63] Courts gradually began to recognize, however, that these property rights were not absolute. They based their earliest decisions holding that children had the right to be free from neglect and abuse on the notion of *parens patriae*, the common-law right and responsibility of the king and feudal lords to intervene in a family to protect children at risk of injury.[64] This over-arching right

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father's entitlement to a preference in any custody action.

62. *See* Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195 (1978). According to Blackstone, fathers in ancient Rome had absolute power of life or death over their children. 1 WILLIAM BLACKSTONE, COMMENTARIES *440. In Puritan New England, parents could have a stubborn or rebellious son put to death. John R. Sutton, *Stubborn Children: Law and the Socialization of Deviance in the Puritan Colonies*, 15 FAM. L.Q. 31, 31 (1981); *see also Deuteronomy* 21:18-21 (directing parents to have stubborn and rebellious sons stoned). The book of Deuteronomy probably was the basis of the Puritan laws. Sutton, *supra*, at 39.

63. *See, e.g.*, Campbell v. Wright, 62 P. 613, 614 (Cal. 1900) (stating that a father's right to custody is a property right). *See generally* Paul Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 675 (1942) (explaining the historic interpretation of custody as a property interest).

64. *Parens patriae* means "parent of the country." BLACK'S LAW DICTIONARY 114 (6th ed. 1990). English Chancery courts first used the term to refer to the rights of lords to profit from wards. Custer, *supra* note 62, at 195-96. It later evolved into the doctrine authorizing and obligating the state as "supreme guardian" to intervene in families to protect infants, lunatics, and idiots. *Id.* at 196-201; McGough & Shindell, *supra* note 1, at 209 n.2; *see also In re* Gault, 387 U.S. 1, 16 (1967) (challenging the historic foundations of the phrase); Michael B. Thompson, *Child Custody Disputes Between Parents and Non-Parents: A Plea for the Abrogation of the Paren-*

evolved into the modern American view that the State's interest in protecting children[65] requires courts to apply the best-interests-of-the-child standard when deciding custody cases, at least in disputes between parents.[66] Once children ceased to be viewed as chattel, of either the throne or their parents, states also had to create an approach to the custody disputes that arose between parents and nonparents. States have adopted standards for deciding these custody disputes either by case law or by legislation.[67] Some jurisdictions apply the same standard to third-party custody disputes as they would to parent-versus-parent custody disputes.[68] Most apply different standards.[69] The standards applied by the states can be grouped into three categories: (1) a parental rights test, (2) a preference in favor of the parent, and (3) a best interests test.[70]

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tal-Right Doctrine in South Dakota, 34 S.D. L. REV. 534, 551-54 (1989) (explaining the feudal origins of the phrase). In some early cases, the Chancellor removed children from abusive or drunken "blasphemous" parents. *See, e.g.*, Skinner v. Warner, 21 Eng. Rep. 473 (Ch. 1792) (issuing a restraining order to prevent a father from asserting his superior guardianship right to remove a child from her mother and her school). In the United States, the most well-known early child abuse case was the Mary Ellen Wilson case of 1874. McGough & Shindell, *supra* note 1, at 210 & n.7; *see also* Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 681-86 (1966) (providing an overview of statutes protecting children from abuse).

65. The State's authority to intervene in a family actually comes from two distinct sources. *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198 (1980) [hereinafter *Developments*]. The first is the State's inherent police power to prevent citizens from harming one another and to promote community and public welfare. *Id.* at 1198-99. The second is the paternalistic power to protect incompetents and to ensure the individual incompetent's best interest. *Id.* at 1199. For a thorough discussion of the two sources of the State's authority, their origins, and their application, see *id.*

66. McGough & Shindell, *supra* note 1, at 221. States also developed gender-neutral statutes giving custody and guardianship rights to both parents rather than just to fathers. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-606 (West 1993).

67. *See* CONN. GEN. STAT. ANN. § 46b-56b (West Supp. 1995) (providing an example of a legislatively prescribed standard); *In re* Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976) (providing an example of a judicially created standard).

68. *See* Haynie, *supra* note 19, at 721 n.58 (listing the states that apply a "best interests" test).

69. *Id.* at 708-21.

70. *See id.* at 706. It is not feasible to set forth definitively the standard that each state has adopted. A full tracking of each state's custody law, statutory and decisional, would be necessary. Further, some states have not really enunciated a standard. McGough & Shindell, *supra* note 1, at 214-15 n.24. Several authors have

The parental rights standard requires courts to award the parent custody unless the nonparent shows that the parent is unfit.[71] Unless extraordinary circumstances exist as a threshold matter, a parental rights standard prevents a trial court from even considering the nonparent as custodian.[72] Some parental rights jurisdictions view this standard as a matter of policy;[73] others consider it a constitutional mandate.[74]

On the other end of the continuum, the best-interests-of-the-child test focuses solely on the interests of the child and treats the legal status of the putative custodians as irrelevant.[75] States applying this standard use it in both parent-versus-parent and parent-versus-nonparent custody disputes.[76] A best interests test defines the relative benefits to the child of being with one or the other party.[77] It requires the court to compare

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attempted to assign a standard to each state and have reached different conclusions. *Compare id.* at 213 (finding that most states apply the best interests standard) *with* Haynie, *supra* note 19, at 711 (claiming that a majority of states apply the parental preference standard). Some authors have simply made mistakes. The Haynie article counts Connecticut as a best interests state, *id.* at 725, based on McGaffin v. Roberts, 479 A.2d 176 (Conn. 1984), *cert. denied*, 470 U.S. 1050 (1985). The author missed that, in 1985, the state enacted a statute specifically overruling *McGaffin*. CONN. GEN. STAT. ANN. § 46b-56b (West Supp. 1995).

71. Haynie, *supra* note 19, at 708.

72. Extraordinary circumstances in New York are abandonment, abuse, neglect, or parental unfitness. Bennett v. Jeffreys, 356 N.E.2d 277, 280 (N.Y. 1976); *see also* Blackburn v. Blackburn, 292 S.E.2d 821, 825 (Ga. 1982) (requiring clear and convincing evidence of *present* unfitness before terminating parental rights).

73. *See, e.g.*, *Bennett*, 356 N.E.2d at 285; *see also* Thompson, *supra* note 64 (discussing the parental rights standard in South Dakota).

74. The Kansas Supreme Court ruled the best interests test unconstitutional in third-party custody cases. Sheppard v. Sheppard, 630 P.2d 1121 (Kan. 1981), *cert. denied*, 455 U.S. 919 (1982). *But see* McGough & Shindell, *supra* note 1, at 244 (positing that the parental rights test is unconstitutional in the third-party context).

75. HAW. REV. STAT. § 571-46(2) (Supp. 1992).

76. For example, Hawaii has adopted a best interests test by statute and even gives a presumption favoring the award of custody to a nonparent with whom the child has been living:

> Custody may be awarded to persons other than the father or mother whenever the award serves the best interests of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall be entitled prima facie to an award of custody . . . .

Id.

77. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 257-61 (1975).

the total package of attributes of the two potential custodians—their homes, their larger environments, and their relationships with the child.[78] The two adults start on a level playing field. Any one factor, even a small one, can tip the scale in either direction.[79]

Between the best interests and parental rights tests is the hybrid standard that attempts to strike a balance between the rights of the parent and the needs of the child. The basis of this approach lies in the principles that the parent has a right to rear his child, the child has a right to be reared by her parent, and that these rights ordinarily converge.[80] The courts thus assume that the child and the parent belong together, but recognize that circumstances other than parental unfitness may render the parent's custody inappropriate. The majority of the states use some variation of this parental preference approach.[81] This intermediate standard usually takes the form of a presumption in favor of the parent, with the third party permitted to rebut that presumption.[82]

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78. Scholars have criticized the best interests test as being too broad because it gives too little guidance to judges and as being too narrow because the child's interests are not the only factors considered. *See, e.g.*, Chambers, *supra* note 2, at 478. Some states have best interests statutes that do enumerate specific factors to guide judges. *See, e.g.*, COLO. REV. STAT. § 14-10-124 (1987); VA. CODE ANN. § 20-124.3 (Michie 1995). The Uniform Marriage and Divorce Act enumerates the following factors as relevant to a consideration of the child's best interests:

> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community; and
> (5) the mental and physical health of all individuals involved.
> The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1973).

79. For example, courts could make custody decisions based on the relative quality of school systems, whether one party smokes, or whether one parent uses a day care center for child care.

80. Santosky v. Kramer, 455 U.S. 745, 760 (1982).

81. The variations and evolving case law make an exact count difficult. However, one recent author counts 29, even while overlooking Connecticut. Haynie, *supra* note 19, at 711 n.22.

82. For example, Connecticut and Texas have presumption statutes. CONN. GEN.

In some states that have adopted the parental preference approach, the burden of persuasion is always on the nonparent,[83] while other jurisdictions allow the procedural posture of the case to dictate which party has the burden.[84] States also vary with respect to whether they require clear and convincing evidence[85] or a preponderance of evidence[86] to rebut the presumption.

Not all struggles by a parent to retain custody or to regain custody from a nonparent constitute third-party custody cases in every state.[87] How the case arises, who may bring it, and which court must hear the case are all considerations with significant impact. The resolution of these issues is a function of each state's rules regarding the subject matter jurisdiction of its various courts, the standing of nonparents to initiate custody cases, and the range of other types of child protection provisions available.[88] Cases involving claims of parental unfitness are most likely to arise in juvenile court as abuse and neglect proceedings. Some states also have a separate guardianship process.[89] There may be a choice of several remedies for any given family dilemma.[90] Where such overlap occurs, courts and legislatures must consider the consequences of a lack of uniform procedures and standards, including the potential for forum-shopping.[91]

STAT. ANN. § 46b-56b (West Supp. 1995); TEX. FAM. CODE ANN. § 14.01(b)(1) (West Supp. 1995).

83. *See, e.g.*, McCubbins v. Dawson, 743 S.W.2d 459, 461 (Mo. Ct. App. 1987).

84. *See, e.g.*, Perez v. Perez, 561 A.2d 907, 915 (Conn. 1989).

85. *See, e.g.*, Bryan v. Bryan, 645 P.2d 1267 (Ariz. Ct. App. 1982). A higher standard of proof increases the amount of evidence required to rebut the presumption and thus the chance that the parent will prevail.

86. *See, e.g.*, *Perez*, 561 A.2d at 915; Comer v. Comer, 300 S.E.2d 457 (N.C. Ct. App. 1983).

87. For example, a nonparent seeking custody in Connecticut must file a guardianship petition in Probate Court. CONN. GEN. STAT. ANN. § 45a-614 (West 1993). He may also seek custody in Superior Court by intervening in a pending action between the parents. *Id.* § 46b-57.

88. Virtually every state has a child protection agency and juvenile court procedures for identifying children at risk of harm, removing them from their parents when necessary, and placing them in foster care. *See, e.g., id.* §§ 17a-90 to -113.

89. *See id.* §§ 45a-603 to -624; UNIF. PROB. CODE § 5-209, 8 U.L.A. 518 (1969).

90. Practitioners must be familiar with the range of possibilities in the state in which they practice. Because of the wide variation in family law provisions among the states, an attorney takes a risk if she follows precedent from other states' cases without making a careful review in her own state.

91. For a detailed discussion of these issues in Connecticut, see Carolyn Wilkes

2. Distinguishing Between Removal and Reunification Cases

Most states apply the same standards in removal and all variations of reunification cases.[92] Judges too often borrow language and reasoning from one type of case to the other without analyzing the differences between them.[93] Yet the equities are vastly different. An approach that may make sense in one context may be entirely inappropriate in the other.

When the issue is whether to remove a child from the care of her parent, a "parental rights" stance, focusing only on the fitness of the parent, is reasonable. In some reunification cases, however, that same approach can lead to results that are unnecessarily callous and harmful to the child's interests. Returning a child to a parent who is a virtual stranger to the child just because the parent is fit ignores the reality of the child's life and all other competing factors.[94] Conversely, a best interests test may, arguably, be the appropriate standard in some reunification cases, but it can lead to absurdly unfair results in a removal situation. If the court compares the parenting skills or financial resources of the competing custodians, parents will risk losing custody of children for reasons that would form a completely inadequate basis for placing a child in foster care, for example. Parents of lower socioeconomic status are at particular risk if courts apply the best interests test in a removal case.

Some jurisdictions do distinguish between removal and reunification cases. In New Jersey, the courts have recognized the differences between removal and reunification and thus have

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Kaas, *Determining Detriment to the Child in Third-Party Custody Cases in Connecticut*, 17 W. NEW ENG. L. REV. 205 (1995).

92. For example, Connecticut has one statutory standard that applies in both removal and reunification cases. Kansas had a separate test for reunification cases until the state supreme court overruled *In re* Criqui, 798 P.2d 69 (Kan. Ct. App. 1990), and reaffirmed a parental preference doctrine in all third-party custody cases, *In re* Williams, 869 P.2d 661 (Kan. 1994).

93. O'Keefe analyzes a series of Arkansas cases to demonstrate how courts can misapply concepts and quote them out of context. O'Keefe, *supra* note 17, at 1090-92.

94. *See* Root v. Allen, 377 P.2d 117 (Colo. 1962) (en banc) (declining to return a preteen girl to her father). *But cf. In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich.), *stays denied*, 114 S. Ct. 1, *and* 114 S. Ct. 11 (1993) (returning a toddler to parents whom she had never met).

created a separate test for each situation.[95] A New Jersey appeals court has construed a removal case as equivalent to a termination of parental rights proceeding and required the use of a fitness standard.[96] For reunification cases, the court has adopted a best interests comparison test.[97]

Some states have adopted an approach that carves out only certain types of reunification cases for different treatment. Those states have a strong preference for the parent, but the preference disappears completely under certain circumstances.[98] If the parent has abandoned the child to a nonparent,[99] or if the court has previously removed the child because of the parent's unfitness, the court applies a best interests test.[100] This approach suggests that certain kinds of conduct serve as a waiver of parental rights. The parent at "fault" for the separation no longer deserves a preference.

Another approach requires courts to distinguish between the two categories of cases through the application of standing rules. Under the Uniform Marriage and Divorce Act,[101] a nonparent has no standing to bring a third-party custody case unless the child is not living with her parent.[102] In jurisdictions that have adopted this rule, there can be no third-party removal cases. If the nonparent has standing because the child is not residing with the parent, the court decides the case under the same best interests test applied in parent-versus-parent cases.[103] If the child is living with her parent, the nonparent may not initiate a custody proceeding.[104] Instead, the nonparent is limited to the

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95. Zack v. Fiebert, 563 A.2d 58, 63 (N.J. Super. Ct. App. Div. 1989).

96. *Id.* at 59, 63.

97. *Id.* at 63.

98. Alabama is an example of such a jurisdiction. *See* ALA. CODE § 26-18-7(b) (1992).

99. Not every voluntary placement with a nonparent is an abandonment. If the parent has remained in contact with the child and contributed financially to her support, no court would find such a situation to constitute abandonment.

100. *Ex parte* Terry, 494 So. 2d 628 (Ala. 1986).

101. Eight states have adopted the custody provisions of the Uniform Marriage and Divorce Act and thus have this same approach. They are Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington.

102. UNIF. MARRIAGE & DIVORCE ACT § 401(d)(2), 9A U.L.A. 550 (1973).

103. *Id.* § 401 cmt.

104. *Id.*

procedures and the much stricter standards of the Uniform Juvenile Court Act.[105] One Illinois court has acknowledged that the purpose and effect of this approach is to protect the superior rights of the natural parent.[106] Only nonparents with standing may compete for custody without having to establish the parents' unfitness.[107]

Yet another method of distinguishing between the two types of cases creates a preference for maintaining the status quo. Professor Richards recommends that courts recognize a presumption in favor of the parent, but she redefines "parent" to include anyone currently acting as the child's current caretaker.[108] Under her approach, the courts must have a significant reason for moving a child, regardless of the parental status of the person with whom she is living.[109] This approach is a variation of the statutorily prescribed test in Hawaii.[110] The Hawaii custody statute provides that the court must decide removal cases on the basis of the child's best interests but establishes a presumption in favor of the

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105. Under the Uniform Juvenile Court Act, a "deprived child" means a child who:
(i) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of his parents, guardian, or other custodian;
(ii) has been placed for care or adoption in violation of law; or
(iii) has been abandoned by his parents, guardian, or other custodian.
UNIF. JUV. CT. ACT § 2(5), 9A U.L.A. 6 (1968) (providing two alternative definitions). Once the court finds a child deprived, on the basis of clear and convincing evidence, it may permit the child to stay with his parents, guardians, or custodians under any conditions that the court prescribes or may transfer temporary custody to any appropriate person or agency. *Id.* §§ 30, 47. Such an order continues in force for two years. *Id.* § 36(c).

106. *In re* Carey, 544 N.E.2d 1293, 1297 (Ill. App. Ct. 1989).

107. *Id.*

108. The proposed legislation includes this definition: "For purposes of determining custody, 'parent' includes natural parents, adoptive parents and other persons who have acted as a parent to the child and who have established a parent-child bond. Persons receiving money for their services to the child may not be considered parents." Richards, *supra* note 4, at 765. This definition would exclude a foster parent, regardless of a close bond between the child and the foster parent.

109. *Id.* at 764.

110. *See* HAW. REV. STAT. § 571-46(2) (Supp. 1992).

nonparent in reunification cases.[111]

III. THE CONSTITUTIONAL CONSIDERATIONS IN FORMULATING A STANDARD

The United States Supreme Court has never prescribed the standard by which state courts must decide a custody dispute between a parent and a nonparent.[112] It has, however, considered numerous cases involving parents that defined the rights of parents, foster parents, and children.[113] These cases suggest that it is constitutionally permissible for a state to prefer parents in both removal and reunification third-party custody disputes.[114]

A. The Rights of the Parties

1. The Rights of Parents

At the root of the constitutional protection of parents' rights are two types of interests: the broad interest of each family member in insulating the family from outside intervention[115]

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111. *Id.*

112. The Supreme Court recently declined to decide such a case. *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich.), *stays denied*, 114 S. Ct. 1, *and* 114 S. Ct. 11 (1993).

113. Initially, the Supreme Court cases appear inconsistent regarding the primacy of any one of the factors. Constitutional scholars may track the opinions in terms of shifting membership of the Court. An equally viable approach, however, focuses on the role of the Court and the process by which it "makes law." The Court is not a legislature free to state its view of the best approach in terms of social policy. Rather, the Court must react only to actual "cases and controversies" that parties bring to it. In those cases, the Court rules on the constitutionality of the state legislative action or judicial holding that happens to be before it. The results take on a semblance of rationality when viewed merely as sporadic road signs, marking only the outer limits of what states can do.

114. Various courts and commentators have addressed the constitutionality of all three standards for third-party custody cases. *Compare* Sheppard v. Sheppard, 630 P.2d 1121 (Kan. 1981) (declaring the best interests test unconstitutional), *cert. denied*, 455 U.S. 919 (1982) *with* Haynie, *supra* note 19, at 736 (arguing that only the best interests test is constitutional).

115. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (acknowledging a "private realm of family life which the state cannot enter"); *Developments*, *supra* note 65, at 1313. The child also has an interest in protecting her family from attack, as long as the family is capable of caring for her. *See* Santosky v. Kramer, 455 U.S. 745, 760

and the interest of "the parent in protecting his or her relationship with and authority over the child."[116] Maintaining the integrity of the family also furthers the interests of the child.[117] Any analysis of parental rights is actually a consideration of the scope of the protection afforded to the parent-child relationship.[118] Although the State has an interest in protecting children by whatever means necessary, including removing them from their parents,[119] it also has an interest in protecting family autonomy. This state interest converges with that of the family itself because autonomy enhances "warm, enduring and important" familial bonds[120] and ensures childrearing.[121]

The first Supreme Court cases to hold that parent-child relationships have the status of a fundamental liberty did so in the context of challenges to state interference with intact nuclear families. In *Meyer v. Nebraska*,[122] the Court struck down a statute that forbade the teaching of foreign languages to children, holding that the Fifth and Fourteenth Amendments to the United States Constitution give parents the liberty and the right to "marry, establish a home and bring up children."[123] This right includes the freedom of parents to control their children's

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(1982).

116. *Developments*, *supra* note 65, at 1313 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

117. *Santosky*, 455 U.S. at 760.

118. Traditionally, the law has accorded the family special treatment, considering it a unit, not just a collection of individuals. Dolgin, *supra* note 5, at 1537-46.

119. *See Santosky*, 455 U.S. at 766-67.

120. Stanley v. Illinois, 405 U.S. 645, 652 (1972); *Developments*, *supra* note 65, at 1313-14.

121. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that the parents' "primary function and freedom include preparation [of the child] for obligations the state can neither supply nor hinder"). However, the State sometimes must initiate intervention in a dysfunctional family, such as in the case of child abuse or neglect. *See id.* at 167 ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare. . . ."). Further, family members often invite the State to step in when divorce fractures the family unit.

122. 262 U.S. 390 (1923).

123. *Id.* at 399.

education.[124] In *Pierce v. Society of Sisters*,[125] the Court employed similar reasoning to invalidate an Oregon law requiring children to attend public school.[126]

Two decades later, in *Skinner v. Oklahoma*,[127] the Supreme Court reaffirmed that the right to marriage and procreation is "one of the basic civil rights of man."[128] In *Prince v. Massachusetts*,[129] the Court echoed that concept, holding that the right of "custody, care and nurture of the child reside first in the parents."[130]

Although the Court first identified the rights articulated in *Skinner* and *Prince* as rights of intact, traditional families, more recent decisions indicate that these rights inhere in individuals as well.[131] These cases extend the reasoning of the earlier cases

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124. *Id.* at 399-403; *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (finding that a compulsory school attendance clause violated the free exercise rights of a religious minority).

125. 268 U.S. 510 (1925).

126. *Id.* at 534-35. *Meyer* and *Pierce* form the beginning of the Court's recognition that the "ultimate basis of protection" of individual and family rights "is the doctrine of substantive due process." *Developments*, *supra* note 65, at 1162. These two cases were "decided at a time when the due process clauses were thought to provide substantive protection for a broad panoply of rights" that no longer receive such protection. *Id.* However, the Court has expanded, not abandoned, the rights established in *Meyer* and *Pierce*. *See infra* notes 130-32 and accompanying text.

127. 316 U.S. 535 (1942).

128. *Id.* at 541. *Skinner* involved a statute requiring sterilization of certain convicted felons. *Id.* at 536-37. Although an equal protection case, *Skinner* further defined the scope of the rights that the Court deemed constitutionally protected. *Id.* at 541.

129. 321 U.S. 158 (1944).

130. *Id.* at 166. The Court upheld the conviction of a guardian for violating child labor laws by allowing a ward to distribute religious literature. *Id.* at 171. The Court noted that the right of a parent to give a child religious training and to encourage religious belief deserves protection. *Id.* at 165-66. The parental figure was the child's aunt and legal guardian. *Id.* at 159. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court continued its protection of the fundamental nature of family and marital privacy by finding unconstitutional a state statute forbidding the use of contraceptives, *id.* at 485; *see* Loving v. Virginia, 388 U.S. 1 (1967) (holding that the right to marry is fundamental); *see also* Zablocki v. Redhail, 434 U.S. 374 (1978) (same). One commentator has suggested, however, that the Supreme Court has equivocated on the issue of whether parental rights enjoy "fundamental rights" status or are simply "ordinary" rights. Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 985-92 (1988).

131. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down on equal protection grounds a state law barring the sale or gift of contraceptives to unmarried people); *see also Developments*, *supra* note 65, at 1164 (citing Roe v. Wade, 410

and recognize that individual parents and extended families enjoy some protection of their rights.[132]

Against this backdrop, the Supreme Court decided a series of cases involving the rights of unwed fathers, defined the standard for terminating parental rights, and considered whether the Constitution protects the rights of foster families.[133] These later cases illuminate the extent to which the biological basis or status of parenthood triggers constitutional protection.

Stanley v. Illinois[134] was the first decision in a line of unwed father cases. Courts often cite *Stanley* for the broad principle that a parent's interest in having an ongoing relationship with his child "undeniably warrants deference and, absent a powerful countervailing interest, protection."[135] This language seemed to invite its citation as support for a strong "parental rights" stance. Subsequent cases, however, have narrowed this interpretation.[136] Careful attention to the factual context of the case thus becomes important.

Mr. Stanley was the natural father of three children.[137] Although not married to the children's mother, he had lived intermittently with her and the children for eighteen years.[138] After the mother died, the State removed the children from the father, without a hearing, and placed them in foster care, all under

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U.S. 113 (1973) (establishing a woman's right to an abortion)). Although *Eisenstadt* looked like an incremental extension of the *Griswold* holding, it was in fact a very significant change in direction. *Griswold* indicated that the family was a separate entity with its own zone of privacy. *Griswold*, 381 U.S. at 485-86. The Court in *Eisenstadt* defined the family as nothing more than a group of individuals with their own autonomous rights. *Eisenstadt*, 405 U.S. at 453. The opinion has been called "revolutionary" in its treatment of the family, considered an entity with rights separate from those of its individual members since feudal times. Dolgin, *supra* note 5, at 1545-46.

132. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (reaffirming *Eisenstadt*'s holding that individuals also have a right to procreative choice); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (holding that a grandmother and two grandsons who were cousins were a "family" with a fundamental right to privacy sufficient to invalidate a restrictive zoning ordinance).

133. *See infra* notes 134-96 and accompanying text.

134. 405 U.S. 645 (1972).

135. *Id.* at 651.

136. *See infra* notes 141-77 and accompanying text.

137. *Stanley*, 405 U.S. at 646.

138. *Id.*

color of state law that presumed an unwed father unfit to care for his children.[139] Mr. Stanley challenged the state law as a denial of equal protection. The Supreme Court agreed, concluding that an unmarried family unit often enjoyed just as strong a bond as a family within a formal marriage and holding that an unwed father's fundamental right to care for his children was no different from that of a mother or divorced father.[140]

The subsequent cases of *Quilloin v. Walcott*,[141] *Caban v. Mohammed*,[142] and *Lehr v. Robertson*[143] helped to define the limits of the constitutional protection afforded biological parents. All three cases involved unwed fathers attempting to block or vacate the adoption of their children by the husbands of the children's mothers.[144] Each of the three fathers faced termination of his parental rights,[145] the most severe and irrevocable of all actions that a state can take against a parent. Significantly, in all three cases, the children would have remained in the care of their mothers whether or not the courts terminated the fathers' rights.[146]

In the *Quilloin* opinion, written by Justice Marshall, the Court held that the Constitution would not permit Georgia to use a best interests test when deciding whether to allow the adoption of a child over her father's objection.[147] The Court distinguished *Stanley* because Mr. Quilloin had never exercised any parental responsibility and because the adoption would not disrupt an existing family.[148] Use of the best interests test would have given the father the opportunity to be heard, but because, unlike Mr. Stanley, he had not taken the opportunity to estab-

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139. *Id.* at 646-47.
140. *Id.* at 651-59.
141. 434 U.S. 246 (1978).
142. 441 U.S. 380 (1979).
143. 463 U.S. 248 (1983).
144. *Id.* at 250; *Caban*, 441 U.S. at 382-83; *Quilloin*, 434 U.S. at 247.
145. *Caban*, 441 U.S. at 383-84; *see Lehr*, 463 U.S. at 253; *Quilloin*, 434 U.S. at 247.
146. *See Lehr*, 463 U.S. at 264 n.22; *Caban*, 441 U.S. at 383-94; *Quilloin*, 434 U.S. at 256.
147. *Quilloin*, 434 U.S. at 254-55.
148. *Id.* at 255. The mother and child were not living with the father. Rather, the child already had been living with his mother and his stepfather for more than six years. *Id.* at 247.

lish an actual relationship with his child, the Court concluded that his biological relationship did not warrant that protection.[149]

A year later, in *Caban*, a five-member majority of the Court agreed with the father's equal protection challenge to a New York statute allowing unwed mothers, but not fathers, to withhold consent to an adoption.[150] The statutory schemes in *Quilloin* and *Caban* operated in a similar manner.[151] The key fact that seemed to account for the difference in the results of these two cases was that Mr. Caban, like Mr. Stanley, had already established a substantial relationship with his children.[152]

In *Lehr*, the Court again emphasized the actual relationship between the parent and the child as a significant factor.[153] The Court denied Mr. Lehr's claim that New York's adoption law violated his rights to due process and equal protection.[154] The law did not provide all unwed fathers with notice of the adoption of his child by the mother's husband.[155] Because *Lehr* and *Stanley* both involved challenges to statutes that failed to give notice to unwed fathers, their factual differences lie in stark contrast.[156] In a decision written by Justice Stevens, the six-member majority in *Lehr* focused on the failure of the father to support financially or to form a relationship with his child.[157] The "intangible fibers that connect parent and child" are evidently only "sufficiently vital to merit constitutional protection in *appropriate* cases."[158]

The overwhelming message from this quartet of cases is that the right of a parent to a relationship with his children is very important, but not absolute. The Court seems to have taken the

149. *Id.* at 256.
150. *Caban*, 441 U.S. at 394.
151. *Id.* at 385; *Quilloin*, 434 U.S. at 248.
152. *Caban*, 441 U.S. at 393-94. The father had shared joint custody with the mother for several years. *See id.* at 382.
153. Lehr v. Robertson, 463 U.S. 248, 261-63 (1983).
154. *Id.* at 265, 268.
155. *Id.* at 251-52.
156. The fact that Mr. Lehr's child was only two years old when the mother's husband adopted the child, *id.* at 250, illustrates the full extent to which the Court in *Lehr* actually retreated from the position taken in *Stanley*. The Court's opinion thus denied Mr. Lehr the chance to develop a relationship.
157. *Id.* at 261-63.
158. *Id.* at 256 (emphasis added).

position that protecting the rights of natural parents is appropriate only when they have undertaken their corollary parental responsibilities.[159] These cases appear to establish the rule that the Constitution will protect all biological parent-child relationships as long as they also involve the exercise of responsibility and the existence of actual psychological ties.[160]

However, in *Michael H. v. Gerald D.*,[161] yet another case involving the rights of a father not married to his child's mother, the Supreme Court suggested that, under certain circumstances, a close relationship and commitment to the responsibilities of parenthood are not enough to protect the rights of the parent.[162] The status of the legal relationship between the parents is also a factor in defining the scope of constitutional protection.[163] Justice Scalia's plurality opinion in *Michael H.* echoed the Court's earlier decisions[164] recognizing that the root of parental rights is the interest of the family unit in remaining intact.[165]

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159. The Court does not protect biological links alone or even inchoate relationships. "Parental rights do not spring full blown from the biological connection between parent and child. They require relationships more enduring." *Id.* at 260 (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)). This position is consistent with Professor Bartlett's recommendation that courts should decide which party will prevail not on the basis of biology, property, or exchange theories, but rather in a manner that gives priority to demonstrated responsibility and commitment. Bartlett, *supra* note 8, at 336.

160. Justice Brennan found that the theme of these four cases was that a biological link between father and child coupled with a substantial parent-child relationship will guarantee constitutional protection. Michael H. v. Gerald D., 491 U.S. 110, 142-43 (1989) (Brennan, J., dissenting). This "commitment [to the responsibilities] of parenthood . . . is why Mr. Stanley and Mr. Caban won; [and] why Mr. Quilloin and Mr. Lehr lost . . . ." *Id.* at 143 (Brennan, J., dissenting).

161. 491 U.S. 110.

162. *Id.* at 123-24.

163. *Id.*

164. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Quilloin v. Walcott, 434 U.S. 246 (1978).

165. In effect, this opinion represents a return to the premise that family units, not only the individuals in them, possess rights. *See supra* notes 99-106 and accompanying text. One commentator suggests that this opinion inadvertantly succeeds in viewing the dispute through the child's eyes by assuming that the child needs and wants an intact family more than a second father. Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1858 (1993). Professor Woodhouse's conclusion comes more from the real-life sequel to the story than from the formal positions of the parties during the litigation. She

In *Michael H.*, the Supreme Court let stand a California law creating the presumption that a child born to a married woman cohabitating with her husband is the husband's child.[166] The child's mother had engaged in an extramarital affair.[167] Blood tests confirmed to a ninety-eight percent probability that her lover was the biological father of the child born to her during her marriage.[168] The mother and the child lived intermittently with the husband and with the biological father, and the child had a caring relationship with both men.[169] When the mother and her husband reconciled, the mother rebuffed the biological father's attempts to continue visiting with the child.[170] When he pursued the matter in court, the California law denied him the opportunity to establish his paternity,[171] and the court denied his request for visitation.[172] The Supreme Court found no constitutional infirmity in these actions.[173]

The foregoing group of five cases illustrates that, for the Constitution to protect the rights of parents, biology alone is not enough. "[P]arental rights are not solely a function of one's status as a genetic progenitor."[174] These cases also show that a close, responsible relationship between parent and child is important but not necessarily determinative when recognition of their relationship would erode an existing family unit that includes the other parent.[175] The Supreme Court has sent the

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reports that Mr. H. has continued to try to contact his daughter, who now regards him as the "crazy man from California who thinks he's my father." *Id.* at 1865.

166. The law allowed the mother or her husband to challenge the child's paternity but did not give such a right to the outsider, the biological father. *Michael H.*, 491 U.S. at 115 (citing CAL. EVID. CODE § 621(c)-(d) (West Supp. 1989)). After this decision, the California legislature amended its statute to allow a putative father to rebut the presumption that the mother's husband had fathered the child by bringing a motion within two years of the child's birth. Dolgin, *supra* note 5, at 1569-70.

167. *Michael H.*, 491 U.S. at 113.

168. *Id.* at 114.

169. *Id.* The child called her biological father "Daddy," and he had contributed to her support. *Id.* at 143-44 (Brennan, J., dissenting).

170. *Id.* at 114.

171. *Id.* at 115.

172. *Id.* at 115-16.

173. *Id.* at 132.

174. Hill, *supra* note 6, at 380.

175. The presence of the other parent allows the Constitution to bow out of the equation. The Court takes the position that the custodial parent knows what is best

message that jurisdictions have significant latitude in protecting the existing functional or "unitary" family[176] from external attack, at least when one of the child's parents is a member of that family.[177]

States, however, may not ignore all genetic ties between parent and child.[178] The Court has continued to take a very firm stand in protecting the rights of natural parents, especially when the family involved is no longer intact because the parents have had trouble living up to their responsibilities. In *Santosky v. Kramer*,[179] a New York judge terminated the rights of both parents of several children, finding that the State had proven by a preponderance of the evidence that the children were "permanently neglected."[180] The Supreme Court[181] held that the preponderance of the evidence standard was insufficient and that a state must prove its case by clear and convincing evidence before terminating parental rights.[182] In an opinion written by Justice Blackmun, the five-member majority observed that the "fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[183] The *Santosky* opinion also stressed that the purpose of a termination proceeding is not

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for the child. Thus, the Court will not prevent the custodial parent from obliterating the child's relationship with the other parent.

176. The plurality opinion in *Michael H.* purports to dismiss the idea that the mother's marriage to her husband gives the relationship protection. *Michael H.*, 491 U.S. at 128-30. Justice Brennan points out in his dissent, however, that nothing else can reconcile the result in *Michael H.* with the other four unwed father cases. *Id.* at 142-44 (Brennan, J., dissenting). The unwed father in *Michael H.* had the same close, loving, and responsible relationship with his child that the other cases found key. *Id.*

177. If faced with a challenge to a state law that allowed a putative natural father to rebut the presumption that the mother's husband is the legal father, the Court most likely would let such a law stand. Hill, *supra* note 6, at 380-81.

178. *See supra* notes 134-40, 160 and accompanying text.

179. 455 U.S. 745 (1982).

180. *Id.* at 747-52.

181. The Court stressed the irrevocability of the state action, the high risk of error, and the ability of the State to shape the nature of the relationship between the parent and the child once the child is in foster placement. *Id.* at 763-66.

182. *Id.* at 769-70.

183. *Id.* at 753.

to compare whether the natural parent or the foster parent can provide the better home.[184]

The message of *Santosky* is that biology and a previous relationship still trigger significant protection, even when only tenuously linked to a once intact family. The outcome in that case also suggests that, when court action would sever the link between the child and both parents, placing her in a new home with neither parent, the parents' interests are due the highest protection.

2. *The Rights of Nonparents*

As a further piece in the mosaic, the Court also has made clear the limits of constitutional protection for developed, emotional relationships between an adult and a child in the absence of biological or adoptive ties. In *Smith v. Organization of Foster Families for Equality & Reform*,[185] foster families challenged the constitutionality of New York statutes that allowed the State to remove foster children from their homes without a full adversarial hearing.[186] The plaintiffs argued that the foster family was a psychological family and thus had a liberty interest in maintaining itself as a family unit.[187] The Court disagreed[188] and upheld the statutes by a six-to-three vote.[189] The majority did acknowledge that a family is not defined solely by "the fact of blood relationship,"[190] noting that the importance of a familial relationship "stems from the emotional attachments that

184. *Id.* at 759. The benefits of a foster parent's home are only a permissible consideration at the later dispositional phase of the case. *Id.* at 761.

185. 431 U.S. 816 (1977).

186. *Id.* at 823-33.

187. *Id.* at 839.

188. The Court's precise holding was that the procedural due process that the New York statutes afforded the foster families was sufficient even if the foster family had a constitutionally protected family privacy interest. *Id.* at 847-56. Justice Stewart concurred in the result but took a firm position that foster families had no such interest. *Id.* at 857-58 (Stewart, J., concurring).

189. *Id.* at 856. Justice Brennan wrote the opinion, *id.* at 818, and three members of the Court concurred, *id.* at 856 (Stewart, J., concurring, joined by Burger, C.J., and Rehnquist, J.).

190. *Id.* at 844.

derive from the intimacy of daily association."[191] However, the Court justified its decision to uphold the statute by emphasizing the State as the contractual source of the foster family relationship.[192] In contrast, the biological family's liberty interest derives from intrinsic human rights, not state law.[193] The majority in *Smith* also asserted that the biological family's right to reunification weakened any right of the foster family to remain together.[194]

The *Smith* majority opinion demonstrates that parental status and biological ties continue to play a major role in the constitutional rights analysis. The Court does not define the family solely in terms of how it functions on a daily basis. Indeed, the Court has only allowed the rights of a family other than the original family to subordinate the interests of a natural parent when the second family includes the other natural parent.[195] The constitutional protection of the family reaches its peak when the child is at risk of losing all connection to her biological family. At that point, the Court stresses the importance and intrinsic nature of the biological relationship between parent and child.[196]

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191. *Id.*

192. *Id.* at 845; *see also id.* at 863 (Stewart, J., concurring) ("The family life upon which the State 'intrudes' is simply a temporary status which the State itself has created.").

193. *Id.* at 845-46; *see also* Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (emphasizing the natural order of extended families).

194. The Court stated that, even if foster families have some rights sufficient to trigger procedural due process protections, they do not necessarily have substantive fundamental rights equal to those of biological parents. *Smith*, 431 U.S. at 846-47. The Court left open the issue of whether the Constitution protects the first foster family against a child's removal to a second foster family. The Justices did not criticize the State's practice of removing children when the foster parents became too emotionally attached to them. *See id.* at 836 n.40. The Court also did not reject the State's avowed intention for foster homes to provide a transitional arrangement, leading either to the reunion of the child with her natural parents or to the child's transfer to a permanent adoptive home. *Id.* at 833-38.

195. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Quilloin v. Walcott, 434 U.S. 246 (1978).

196. *See supra* notes 178-84 and accompanying text.

3. *The Rights of Children*

Despite social scientists' pleas that courts act solely in the child's interests,[197] remarkably few cases recognize broad, individual rights of children independent of their rights as members of families.[198] The Supreme Court has recognized children's rights against the State and other outsiders[199] more readily than it has found that children have a right to act in direct conflict with their parents' wishes.[200]

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197. *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (rev. ed. 1979).

198. *See* Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?*, 17 OHIO N.U. L. REV. 543, 547-49 (1991). Although some change has occurred in the way that the Court describes the rights of adult family members, the same evolution has not taken place in the discussion of children's rights. Dolgin, *supra* note 5, at 1561. The Court now describes adult family members as a collection of individuals, *id.* at 1560-61, but still discusses the rights of children in terms of the relationship between adult and child, treating the family as a unit, Gill, *supra*, at 548.

199. In the case of *In re* Gault, 387 U.S. 1 (1967), the Court cited past authority indicating that a child is a person for the purposes of deciding the extent of certain constitutional protections, *id.* at 13 (quoting Haley v. Ohio, 332 U.S. 596, 601 (1948)). The Court in *Gault* awarded due process protection to juveniles. *Id.* at 33-57. In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court held that students have a First Amendment right to free expression, *id.* at 506. The Court declared unconstitutional a school regulation prohibiting the wearing of armbands to protest the Vietnam war. *Id.* at 514. In Carey v. Population Services International, 431 U.S. 678 (1977), the Court found that minors have the right to contraceptives, similar to the right of adults, *id.* at 693-94.

200. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court ruled unconstitutional a Missouri law requiring minors to obtain parental permission for abortions during the first 12 weeks of pregnancy, *id.* at 72-75. However, later cases demonstrate that minors' liberty and privacy rights are not absolute. States may place reasonable restrictions on a minor's right to an abortion by requiring parental notice and consent if they provide judicial bypass procedures and other safeguards. *See, e.g.*, Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 510-19 (1990) (upholding the constitutionality of an Ohio statute preventing a physician from performing an abortion on an unmarried dependent minor without first providing notice to the minor's parents); Hodgson v. Minnesota, 497 U.S. 417, 496-97 (1990) (plurality opinion) (upholding the constitutionality of a state statute's 48-hour waiting period following parental notification); Planned Parenthood v. Ashcroft, 462 U.S. 476, 505 (1983) (plurality opinion) (upholding the constitutionality of a provision requiring parental or judicial consent); H.L. v. Matheson, 450 U.S. 398, 407-13 (1981) (upholding the constitutionality of a Utah law requiring physicians to notify the parents of a minor seeking an abortion, if possible). *But see, e.g.*, Belotti v. Baird, 443 U.S. 622, 633-39 (1979) (striking down a Massachusetts statute requiring parental consent due to the lack of a judicial bypass option).

The Supreme Court has not recognized an independent right of children to maintain a relationship with any party other than the reciprocal right to a relationship with the biological parent.[201] The majority in *Smith* recognized that for the child, the foster family may "hold the same place in the emotional life of the child as [the] natural family,"[202] but the Court did not find that this reality gave the child any right to remain with her psychological family at the expense of her parent's right to reunification with his child.[203] The child has so few independent rights that even when she wishes to maintain a relationship with one of her biological parents, her right to do so may be subordinated to the interests of the adults and the interest of the State in preserving her other parent's family unit. In *Michael H.*, the daughter raised due process and equal protection arguments that she had the right to a continuing relationship with both her biological father and her mother's husband, presumed by law to be her father.[204] The Court rejected both arguments, finding that no child had a right to multiple fathers[205] and that the State had a rational basis for refusing to allow a child to rebut the presumption of her own legitimacy.[206] Further, although the State has the right to intervene in a family to protect a child, the child does not have a reciprocal right of a

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In Parham v. J.R., 442 U.S. 584 (1979), the Court refused to declare unconstitutional procedures that allowed a parent to commit his child to a mental institution without a full adversarial hearing, *id.* at 620-21. The Court reaffirmed that a parent presumably acts in his child's best interests. *Id.* at 602. The Court's ruling indicates that it did not equate the parent's action with the state action for which *Gault* required due process safeguards.

201. *See, e.g.*, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977).

202. *Id.* at 844.

203. The theory that a child has an interest in being with her natural parent is so well-accepted that the court-appointed lawyers for the foster children in *Smith* did not argue that the children had a right to remain with their "psychological" families. *See id.* at 839. The children's counsel instead opposed the foster parents' requests for additional hearings prior to removal. *Id.* The Supreme Court overturned the district court's finding that the foster child, not the foster parent, has the right to a hearing before suffering the "grievous loss" of the foster family. *Id.* at 840.

204. Michael H. v. Gerald D., 491 U.S. 110, 116 (1989).

205. *Id.* at 130-31.

206. Because the mother and the husband had regained harmony in their marriage, the State had a rational basis for choosing to protect that union. *Id.*

guarantee of safety and may not sue the State for failing to protect her.[207] Children thus do not even have an absolute right to safety from abuse.[208]

B. Implications for Third-Party Custody Cases

The interests at stake in a third-party custody case have much more in common with the issues addressed in *Stanley*, *Santosky*, and *Smith* than with the questions posed by the other unwed father cases. Most third-party custody cases do not present the issue of whether the wishes of one biological parent to bring the child into the parent's new family and sever the daily link with the other parent can override the rights of the other parent.[209] Rather, most types of removal and reunification cases involve situations in which the bond between the child and her one remaining parent or both of her parents is at risk.[210] If

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207. In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 201 (1989), the Court refused to find that the State has a constitutional duty to guarantee a child's safety. That case involved a child who was not removed from his father's home, despite clear signs of abuse. *Id.* at 191-93. After the child sustained permanent brain damage requiring institutionalization, his mother brought suit. *Id.* at 193. The Court would not recognize a cause of action, holding that the Constitution did not affirmatively require the defendant to protect the child. *Id.* at 197.

208. The Supreme Court has not yet decided a case like Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993), *appeal denied*, 634 So. 2d 625 (Fla. 1994). In *Kingsley*, a Florida boy sought to have his parents' rights terminated so that his foster parents could adopt him. The Florida trial court found that the child had the capacity to initiate the termination proceeding, but an appellate court reversed the decision. *Id.* at 783. Because other parties to the action had filed separate termination petitions, the error was harmless. *Id.* at 785.

This case was not as revolutionary as the popular press made it seem. *See, e.g.*, Helene Cooper, *Judge Is Asked If Children Have Right To Sue on Their Own Behalf*, WALL ST. J., June 17, 1992, at B10. The only novel aspect was that the child initiated the action, seeking a court determination of the traditional concepts of parental fitness. The case did not raise any new issues regarding the right of a child to choose a nonparent over the objection of a fit parent. Dolgin, *supra* note 5, at 1564 n.208.

209. Such a severance was one of the main issues in *Michael H.*, 491 U.S. 110; Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); and Quilloin v. Walcott, 434 U.S. 246 (1978).

210. In Root v. Allen, 377 P.2d 117 (Colo. 1962) (en banc), one parent sought to reestablish his bond, *id.* at 118. In *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich.), *stays denied*, 114 S. Ct. 1 *and* 114 S. Ct. 11 (1993), both parents united in their attempt to regain custody of their child from nonparents, *id.* at 650-51.

the nonparent prevails, the court will place or leave the child with a new family group that does not include either parent. Third-party custody cases thus usually invoke the strongest right of parents to continue their relationship with their children. This fundamental right requires the State to adopt standards for third-party custody cases that protect the relationship between parent and child. Even if strongly attached to the child, the nonparent has no right even close to the right of the parent. Similarly, the child has no independent right to remain with the nonparent.

Although third-party custody cases do not require courts to make decisions that will dissolve forever the legal bond between parent and child,[211] they nonetheless require states[212] to wrestle with all of the competing factors identified in termination cases. Removing custody from a parent is a very serious step. It "destroys any pretense of a normal parent-child relationship and eliminates nearly all of the natural incidents of parenthood including the everyday care and nurturing which are part and parcel of the bond between parent and child."[213] Losing custody often reduces the parent to nothing more than a court-sanctioned visitor in the child's life.[214] Recognizing this effect, several courts have equated a parent's loss of custody of his child to a nonparent with the termination of a parent's rights.[215]

1. Removal Cases

If the standard for deciding a removal case is a best-interests-of-the-child test, the court is free to compare all aspects of the environments that the competing custodians have to offer.[216]

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211. Custody decisions are not irrevocable, and the noncustodial parent most likely will retain the right to visit the child. *See, e.g., In re* Custody of C.C.R.S., 892 P.2d 246, 255 (Colo. 1995).

212. A state acts through its legislature, its courts, or both. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1, at 452 (4th ed. 1991).

213. Zack v. Fiebert, 563 A.2d 58, 63 (N.J. Super. Ct. App. Div. 1989).

214. In fact, the parent can become almost an intruder. Barstad v. Frazier, 348 N.W.2d 479, 483 (Wis. 1984).

215. *Zack*, 563 A.2d at 63; *Barstad*, 348 N.W.2d at 483.

216. *See* 1 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 4.06, at 226-27 (2d ed. 1993).

Neither adult comes to the case with an advantage.[217] A judge may well conclude that it is "best" for a child to have the biggest home or the best school or to live with the most well-educated adult, regardless of whether the child is really in any danger at home or whether the parent is incapable of caring adequately for the child.

In the usual removal cases,[218] the nonparent seeking custody is not a member of the same nuclear family as are the parent and the child.[219] When establishing the decisional standards for these removal cases, legislatures and courts must recognize that the family is intact.[220] The interests of the child and the parent to remain together continue to converge until the point at which the child is not safe at home.

A best interests test that allows removal for a lesser reason and ignores any advantage to the parent is unconstitutional because it fails to give sufficient weight to the interests of family integrity.[221] Affirming the right of intact, albeit imperfect, families to stay together, Justice Stewart has concluded that

> [i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter."[222]

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217. *See* statutes cited *supra* note 78.

218. When the nonparent seeking custody of the child is not an "outsider" to the child's nuclear family, the constitutional protections do not apply. *See* 1 HARALAMBIE, *supra* note 216, § 10.03, at 539. No intact family is at risk of intrusion and thus no deference of a constitutional magnitude is required.

219. In Schult v. Schult, No. FA-91-03-50-59S, 1994 Conn. Super. LEXIS 429 (Conn. Super. Ct. Feb. 16, 1994), the maternal grandmother intervened in the parents' divorce action to seek custody. She had not lived with either parent and child as a family unit prior to the three-way custody battle. *See also* Martin v. Sand, 444 A.2d 309 (Del. Fam. Ct. 1982) (involving a custody dispute between the child's babysitter and both of his parents).

220. A family entitled to constitutional protection exists so long as one parent and one child reside together. *See* 1 HARALAMBIE, *supra* note 216, § 10.12, at 551-53.

221. Haynie posits that the best interests test is constitutional. Haynie, *supra* note 19, at 742-43. However, her article focuses mainly on reunification cases. *See, e.g.*, *id.* at 713.

222. Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816,

In abuse and neglect cases, the Constitution already requires courts to balance carefully the need to protect children with the strong obligation to protect family autonomy.[223] The family's need for significant protection is as high in a removal case as in any child abuse or neglect case. The fundamental nature of the rights of the family at stake is the same. In both, an outside entity seeks to interfere with the parent-child relationship. They each reduce to the same essential issue: Should the court exercise its *parens patriae* authority to separate this parent and this child? It simply does not matter whether the case was initiated by a child protection agency or a private third party.[224]

2. Reunification Cases

In all variations of reunification cases, circumstances have already separated the parent and child.[225] Their relationship suffers from a lack of the intimacy of day-to-day contact. The emotional needs of the parent and the child may very well diverge, particularly if the child is fully integrated into the nonparent's family. The question thus becomes whether this difference between removal and reunification cases renders the use of a best interests test constitutional.

In the reunification context, a best interests test would allow the court to compare all of the attributes of the two custodians

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862-63 (1977) (Stewart, J., concurring) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). Chief Justice Burger and then-Justice Rehnquist joined in the concurrence. *Id.* at 856. Although Justice Stewart was speaking in terms of a state-initiated proceeding, no discernible, significant difference distinguishes cases initiated by an agent of the State and cases started by private disputants.

223. There is a high degree of tension between the fear of "violat[ing] a family's integrity before intervention is justified and the fear of . . . [waiting] until it may be too late to protect the child whose well-being is threatened." Joseph Goldstein, *Anna Freud*, 92 YALE L.J. 219, 226 (1982) (quoting JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 133-34 (1979)).

224. The only exception is the aforementioned "special" case, in which the third party is a member of the child's nuclear family, upon whom one parent has bestowed parental status.

225. In Perez v. Perez, 561 A.2d 907 (Conn. 1989), a parent sought to regain custody from grandparents, *id.* at 909, while Root v. Allen, 377 P.2d 117 (Colo. 1962) (en banc), involved a parent's claim for custody of a child who had been living with her stepfather for many years, *id.* at 118.

and select the one who offers the child the most stable upbringing and the most advantages. It would also permit the court to decide to maintain the status quo solely because the child is well-cared for and performing well in the nonparent's home.[226]

a. "Parental Condition" Cases

For those reunification cases in which the child has been living with the nonparent due to the parent's incapability, the best interests test fails to offer sufficient protection to scattered family members. The test does not start with the premise that the parent can regain custody if he rehabilitates himself in a reasonably timely manner. Under the reasoning of *Santosky*, the Constitution requires states to offer reasonable protection to the distressed biological family's right to reunification.[227] Although the Court has not established a parent's absolute right to be with his child, it has also never endorsed the position that the parent's rights are so ethereal that a state may deny the reunification of the natural family just because the nonparent caretaker can do a better job raising the child. As Justice Stevens has observed, "[n]either [state] law nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education."[228] Thus, in reunification cases in which the parent's own history of problems has separated him from his child, a state may not deny the rehabilitated parent's request for reunification based simply on the superior parenting capabilities of the nonparent caretaker.[229] Because the best interests test would permit such a result, it is a constitutionally infirm approach in this context.

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226. The best interests test, based on a general policy against disrupting a child's stability and continuity, is the traditional standard in most modification of custody actions between two parents. Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 757 (1985).

227. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).

228. *In re* Baby Girl Clausen, 114 S. Ct. 1, 2 (Stevens, J.) (denying application for stay), *stay denied*, 114 S. Ct. 11 (1993).

229. *See* Bartlett, *supra* note 38, at 928.

b. "Second Family" Cases

For the second group of reunification cases, resulting from one parent's formation of a new family with the child, the constitutional analysis is quite different. The Constitution will probably permit a state to use the best interests test in this type of case. The dynamics of these cases bear a strikingly close resemblance to the interests involved in *Michael H.* and, to a lesser extent, the other unwed father cases. The custodial parent has formed a second family with the child, somewhat at the expense of the child's relationship with the noncustodial parent.[230] Following the absence of the custodial parent, the noncustodial parent challenges the nonparent, effectively disrupting the family that the now absent parent created for and shared with the child.[231] As the unwed father cases and *Smith* illustrate, the Supreme Court accords heightened status to a parent and child's "second family," which the absent parent undoubtedly intended as the child's permanent home.[232] This intended permanence renders the "second family" far different from a foster parent or other caretaker, whose purpose was to care for the child temporarily.[233] As a result, the Constitution does not require a state to protect the relationship between the child and her noncustodial parent with any process greater than a best interests analysis.

Neither does the Constitution proscribe the use of a parental preference for this second group of reunification cases. The unwed father cases do not mean that the second family's interests *must*, in every case, outweigh the interests of the noncustodial parent. Rather, the Constitution allows each state a wider range of choice in selecting the appropriate standard for this category of cases.

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230. For example, in Root v. Allen, 377 P.2d 117 (Colo. 1962) (en banc), the mother and child had been living with the child's stepfather for years, *id.* at 118. The child knew her biological father only to be a "friend of the family." *Id.*

231. The death of the custodial parent has not necessarily dissolved that family in its entirety.

232. *See also* Bailes v. Sours, 340 S.E.2d 824 (Va. 1986) (involving a child who lived with a stepparent after his parent's death and faced a sudden and wrenching change in residence when his surviving parent sought custody).

233. Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 833 (1977).

IV. CHOOSING THE STANDARD

A. *Why the Preference for the Parent?*

A standard that prefers the parent is undoubtedly a constitutionally valid approach for a state to choose for resolving both removal and reunification third-party custody disputes. Of the three possible approaches,[234] the parental preference is the most consistent with the Supreme Court's emerging message that biology is an important, but not the exclusive, mark of parenthood.[235] The preference standard is the one approach that allows a court both to recognize and to evaluate the biological and emotional ties between a parent and his child without blinding itself to other factors. A court still may weigh the parent's level of responsibility and commitment to the child,[236] consider the strength of the emotional bond between the child and her nonparent caretaker, and evaluate the effect of a custody change on the child.

In addition to expressing the social policy choice to favor one candidate for custody over another, preferences also advance the cause of judicial economy.[237] The existence of a preference would increase consistency and predictability in custody decisions.[238] Predictability has the benefit of discouraging the filing of groundless cases and encouraging the settlement of pending cases.[239] Moreover, a preference would limit the trial judge's discretion, restraining a decision based on disapproval of a parent's lifestyle or values.[240]

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234. *See supra* part II.B.1.

235. *Smith*, 431 U.S. at 843.

236. Professor Bartlett proposes that courts, legislators, and legal scholars "re-direct the law applicable to disputes over parental status toward a view of parenthood based on responsibility and connection." Bartlett, *supra* note 8, at 295. She suggests that discussions of the issues in terms of competing and individuated rights is inappropriate and counterproductive because it encourages possessive and self-centered behavior in parents. *Id.* at 294. Instead, she advocates a focus on the parent-child relationship, which she concludes will reinforce generosity and "other-directedness." *Id.*

237. Richards, *supra* note 4, at 760.

238. *Id.* at 737.

239. *Id.* at 760.

240. *Id.*; *see, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (clearly disapproving of the mother's homosexuality).

1. Removal Cases

a. The Classic Case

A preference for the parent in a removal case would reject explicitly a best interest or comparison approach that starts with the two adults on equal footing.[241] Instead, it begins with the assumption that the child should remain with the parent.[242]

Constitutional protection of the rights of parents requires courts to use a preference standard. There are other compelling reasons as well. The similarity between removal custody cases and abuse and neglect proceedings is a persuasive basis for rejecting a best interests approach for removal cases. Cases that raise the same issues deserve consistent standards. Although an abuse and neglect case may arise through a procedurally different route than a removal case, no logical basis exists for adopting a standard for removal cases that differs from the test used in abuse and neglect cases. Without a uniform basis for deciding when to separate a parent and child, a serious risk of contradictory results arises. In turn, this possibility will lead to forum-shopping.[243] A nonparent should not be able to affect the outcome of a case by manipulating jurisdiction and dictating the court in which it will arise.[244] The parent and child have no

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Professor Richards argues that a best interests test in third-party custody cases is overly broad, but also acknowledges that, in reunification cases, a presumption approach may be overly restrictive. *See* Richards, *supra* note 4, at 760. For a discussion of her recommendation, see *infra* part IV.B.2.

241. This rule applies in all removal cases except the limited exception identified *infra* part II.A.1.b.

242. Richards, *supra* note 4, at 736.

243. *See* Association of Westinghouse Salaried Employees v. Westinghouse, 348 U.S. 437, 456 (1955) (noting that different outcomes may lead to forum-shopping).

244. For example, a nonparent concerned with the safety of a child may choose to notify a child protection agency, triggering an abuse or neglect proceeding. If the appropriate grounds exist, the State will remove the child from the parent and place her in foster care. In many states, the State may choose a relative as the foster parent. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-129(d) (West Supp. 1995). In some jurisdictions, a concerned nonparent may initiate a third-party custody case or intervene in a pending custody dispute between two parents. *See, e.g., id.* § 46b-57. Because the same concern for the child's safety is at the root of the nonparent's action, the result—whether or not the court removes the child—should be the same as in an abuse or neglect proceeding. It may be different, however, if the court de-

less an interest in remaining together simply because the court jurisdiction rules allow the nonparent to bring the case in a court that applies a less stringent standard.[245]

Courts and commentators have advised against using a best interests test, especially in parent-grandparent disputes:

> When a parent is young, the physical, financial and even emotional factors may often appear to favor the grandparents. One cannot expect young parents to compete on an equal level with their established older relatives. So the "best interest" standard cannot be the test. If it were we would be forced to conclude that only the more affluent in our society should raise children. To state the proposition is to demonstrate its absurdity.[246]

One commentator has suggested that, even in the early cases that purport to apply a best interests test, the courts used "innocent sleight-of-hand in juggling legal concepts" to avoid awarding custody to a nonparent.[247] The courts declined to construe the best interests test as one requiring them to award custody "to a person other than a parent merely because that person was of high character, entertained real affection for the child, or could give the child much greater cultural and educational advantages (because he had more money) than could the parents."[248]

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cides the custody case under the best interests standard used in a custody dispute between two parents.

245. The *Santosky* decision stresses the unlimited nature of the State's resources as one basis for adopting an elevated burden of proof in termination proceedings. Santosky v. Kramer, 455 U.S. 745, 763 (1982). Similarly, a family member with greater financial resources than the parent can bankroll a protracted legal battle. Even a little disparity in resources between the parties can skew the result.

246. Barstad v. Frazier, 348 N.W.2d 479, 483 (Wis. 1984); Richards, *supra* note 4, at 734-35. Mnookin proposes a hypothetical that also illustrates that the effect of a best interests test can be unjust. Mnookin, *supra* note 77, at 257-61.

247. Sayre, *supra* note 63, at 677 n.33.

248. *Id.* at 677. The problem with "juggling" to make the case come out "right" is that such an approach strains the logic of the definitions. A true best interests test is a comparison test. If courts should not base their choice of nonparents as custodians solely on the nonparents' ability to offer the child more advantages, then they should have a rule that rejects a comparison approach outright. Reliance on the courts to figure out that "best interests" does not really mean that the court should choose the "best" environment is risky. Policymakers cannot expect judges to turn

Finally, the preference for the parent in a removal context is consistent with psychological principles of child development. The preference embodies the uncontroverted recognition that a close emotional bond most often develops between a parent and his child and that the child will suffer psychological harm if the court removes her from her parent's care. Removal cases require the court to balance the possibly conflicting needs of the child: safety, basic physical and emotional care,[249] and a continuous emotional attachment with the parent.[250] Most psychologists agree that separating a child from her parents creates psychological pain for the child. Every child needs "unbroken continuity of affectionate and stimulating relationships with an adult."[251] Psychoanalytic theory suggests that, once a child bonds with her caretaker, separation is very damaging to her future healthy development.[252] Consequently, removal is appropriate only in those extreme cases in which it is the "least detrimental available alternative for safeguarding the child's growth and development."[253]

For all these reasons, the preference test is an appropriate test for a classic removal case. The child never benefits from removal from a marginal yet adequate home, based simply on the fact that the nonparent offers a home with more physical comforts or a more skillful caretaker. Accepted wisdom holds that the pain of the separation far outweighs the material ad-

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themselves inside out construing the concept so that it means something other than what it appears to say.

249. The public's interest also requires that children be raised well and in a healthy environment.

250. "So long as a child is a member of a functioning family, his paramount interest lies in the preservation of his family." GOLDSTEIN ET AL., *supra* note 223, at 5.

251. GOLDSTEIN ET AL., *supra* note 197, at 6.

252. Other psychological theories similarly stress the importance of parent-child bonds, but they do not consider separation quite as destructive as psychoanalytic theories do. For example, supporters of the "attachment theory" suggest that children can form multiple attachments and that other factors can mitigate the harm of separation. Everett Waters & Donna M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Things for the Wrong Reasons*, 12 N.Y.U. REV. L. & SOC. CHANGE 505, 510-12 (1983-1984). Nonetheless, psychologists supporting the attachment theory also assert that courts and social agencies should be very cautious about removing children from their parents. *Id.* at 513.

253. GOLDSTEIN ET AL., *supra* note 197, at 53.

vantages that the nonparent can provide.[254] Instead, courts should prefer the parent, granting custody to the nonparent only when the child's need for safety or basic care leaves the court with no other alternative.[255]

b. The Exception to the Rule: The Special Removal Case

In the special type of removal case, the parent and nonparent have cared for the child together. The parent has consciously created a family based on the model of a traditional conjugal family. He has encouraged the formation of a close parent-child relationship between his child and the nonparent partner and has ignored completely the lack of a biological or legal link between the child and nonparent. Having done so, he has raised the standing of the nonparent to the equivalent of a parent in the eyes of his child.[256]

The parent's action raises the nonparent's status in the eyes of the law as well. The principles of the *Michael H.* case suggest that, as in a "second family" reunification case, a best interests test is constitutionally permissible in this situation.[257] Because this custody dispute is not the result of an attack from the outside, the biological or legal parent does not deserve any deference greater than that provided by a best interests test.

Preferring the parent in this case would give exaggerated significance to the existence of the biological connection between the parent and the child by rewarding the fortuity of one party's physiological capability or willingness to procreate. A more logical resolution would treat these types of cases as identical to the custody cases between two biological parents that they so closely resemble.

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254. *See* GOLDSTEIN ET AL., *supra* note 223, at 5.

255. *See id.* at 59-109 (discussing certain circumstances when the child's needs would require state intervention).

256. In contrast, if the parent and child had gone to live with a grandparent or another person, the standard for a classic removal case should apply. *See supra* note 43.

257. Michael H. v. Gerald D., 491 U.S. 110 (1989). The result would be strange indeed if the custodial parent's formation of a new family was significant enough to dilute the noncustodial parent's interests, but not those of the parent who formed the second family in the first place.

The biological parent must live with the consequences of his action. Courts and legislatures should protect his child's expectations when the family has dissolved. The courts should not recognize the biological parent's claim of a superior right to custody. Instead, they should treat these cases as any other custody dispute between two parents and apply the traditional best interests test.[258]

2. Reunification Cases

In the context of a reunification case, the court must decide whether it is appropriate to disrupt the bond between the child and the nonparent. The preference approach instructs the court to start with the premise that the child should return to the parent.[259] It translates into the affirmative policy that, under certain circumstances, a court may reunite a capable parent with his child, even if the nonparent has taken superb care of the child.[260] Therefore, as in a removal case, the preference in favor of the parent requires the court to reject a comparison approach. The court is not to view the case as a clean slate and select the better caretaker or decide the case in favor of the nonparent because the child is doing well under the current custody arrangement.[261]

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258. This latter approach is consistent with Katharine Bartlett's theory that a court should decide custody disputes by examining the parent-child relationship and measuring the level of responsibility that the parent figure has demonstrated, rather than on the basis of biology or other possessory concepts. Bartlett, *supra* note 8, at 297-306. Professor Woodhouse achieves a similar result by advocating that courts define the family and decide custody disputes according to the child's view of her family. Woodhouse, *supra* note 44, at 333-35.

Although some parties have alleged equitable estoppel, this argument has not been very successful because courts have rigidly required the parties to prove fraud or false dealings. *See In re* Halvorsen, 521 N.W.2d 725, 728 (Iowa 1994); *see also* Polikoff, *supra* note 40, at 491-533 (discussing the estoppel argument in lesbian parenting cases).

259. Richards, *supra* note 4, at 736.

260. Indeed, this factor can have an ironic effect. If the child's caretaker has taken a higher level of care, the child more likely will have the emotional strength to adjust to yet another move. *See* Garrison, *supra* note 51, at 458-59 (discussing psychological research that suggests that the quality of pre- and post-separation care has a significant impact on the ability of the child to adjust to the separation); Waters & Noyes, *supra* note 252, at 512.

261. When two parents engage in postjudgment litigation over modifications in

The preference approach is not the equivalent of a parental rights stance. Under a preference standard, a fit parent may not always regain custody of his child.[262] The preference allows the court to take into account the reality that, with each passing day, the bond between the child and the nonparent grows more firm.[263] This standard does not cut off the court's inquiry after the parent has established his fitness.[264]

A parental rights rule is inappropriate in a reunification case. In all reunification cases, the child may have an interest in reuniting with her biological family *and* an interest in preserving the family unit of which she is now a part. Depending on many variables, one or the other interest may be stronger. Psychologists suggest that young children in particular define their families in terms of emotional ties, not biology.[265] As a consequence, psychologists generally caution that courts must think seriously before reuniting families when doing so would remove a child from her long-term caretaker.[266]

a. "Parental Condition" Cases

The Constitution requires courts to give a preference to parents whose incapability to care for their children has caused the

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custody, the traditional approach disfavors moving the child, in order to maintain continuity.

262. Richards, *supra* note 4, at 742-56.

263. *See id.* at 742-46.

264. *Id.* at 742-56.

265. Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development. . . . What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.

GOLDSTEIN ET AL., *supra* note 197, at 12-13.

266. Professors Goldstein, Freud, and Solnit argue that, once the child is removed from her parent and forms a bond with her new caretaker, the child will suffer if any disruption of that bond occurs. GOLDSTEIN ET AL., *supra* note 223, at 39-40. They recommend that the court adopt a bright-line test for deciding whether to return children to their parents, based primarily on the duration of the separation. *Id.* at 39-57; *see also infra* note 383 (describing their recommendations). In contrast, attachment theory supports a view that family ties are so enduring that children can return to their parents without upset. *See* Waters & Noyes, *supra* note 252, at 512-14. Others also criticize Goldstein, Freud, and Solnit for overemphasizing the continuity factor. Garrison, *supra* note 51, at 457-59.

separation between the parent and child.[267] Other policy considerations also support a preference approach over a best interests comparison test.

A preference approach tells the parents that they get a second chance. Hopefully, this standard will encourage parents with problems to seek help and strive to rehabilitate themselves. The preference should also reassure a parent that he need not fear placing his child with a good and loving caretaker. If a parent believes that he has no chance to compete with the caretaker under the best interests approach, he may be less apt to agree voluntarily to recognize his problems and settle his child with someone capable and familiar to the child. Alternatively, if the court removes the child, the parent who faces an unfavorable comparison with the caretaker may be inclined to give up any hope of reunification and lose the drive to keep up contact with his child.[268]

To the extent that the preference approach encourages parents to act responsibly, society at large benefits.[269] It is also good for the children.[270] Not every child has a good alternative home, even when the third party is a family member.

By adopting a preference test, policymakers would also acknowledge that, to parents and children who love one another, the loss of custody comes very close to a termination of parental rights. This outcome is especially likely if hard feelings between the adults involved trap the child in the middle of a bad situation that will cease only upon the reunification of the parent and the child.[271] The preference approach is also consistent with

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267. This conclusion is the logical extension of the Supreme Court's holding in Santosky v. Kramer, 455 U.S. 745 (1982), that courts must apply a clear and convincing evidence standard when deciding whether to terminate parental rights, *see supra* note 182 and accompanying text.

268. This development would have a negative effect on children. Psychological studies indicate that most children do better if they remain in contact with their parents, even if the children are never going to live with them again. Garrison, *supra* note 51, at 455-69. The support for this notion is so strong that Garrison has challenged the traditional assumption that permanency planning for children removed from their parents must necessarily take the form of termination of parental rights and the cessation of all contact between the parent and the child. She proposes permanent custody or guardianship with continued visitation. *Id.*

269. Bartlett, *supra* note 8, at 301.

270. *Id.* at 302-04.

271. If the nonparent loses custody, he probably would be entitled to visitation.

the probability that, in this category of cases, the child may well have every expectation that her separation from home is a temporary condition.[272]

When a parent with a history of problems seeks custody, the trial judge may well have questions and perhaps a healthy bit of skepticism. Hopefully, the judge will also wonder about the child's emotional well-being. These possibilities do not inevitably suggest that a preference for the rehabilitated parent is a misguided test. Rather, the court's inquiry into the conditions that overcome the preference must focus on the factors that address the judge's legitimate concerns.

b. "Second Family" Cases

The Constitution places few limits on the choice of a standard for those reunification cases in which the child is living with a nonparent as a result of the formation of a second family and the subsequent absence of the biological parent.[273] This type of case is one of the few third-party custody cases in which a best interests approach is constitutionally permissible. Under that test, the parent would prevail only if the parent and child were very close, the child was not thriving with the nonparent, or the parent offered far greater parenting skills and material advantages.

In "second family" cases, the parent's condition did not contribute at all to the parent-child separation. Applying a best interests test for the "second family" group of cases may cause the parent with problems in "parental condition" cases to prevail more easily under a *less* stringent test. This effect runs counter to the argument that the parent deserves a stronger preference

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Hopefully, the bad feelings between the parties would decrease once the power struggle was over.

272. Of course, this expectation will not necessarily exist in every case. If the child was an infant when she went to live with the nonparent or if the parent originally intended to allow the nonparent to adopt the child, the child may have no such expectation.

273. This conclusion is the logical extension of the Supreme Court's decision in Michael H. v. Gerald D., 491 U.S. 110 (1989), that legislative policy, rather than constitutional law, should determine whether the State can presume a woman's husband the father of her child, *see supra* note 173 and accompanying text.

in the "second family" case. In "second family" cases, the parent seeking reunification has not abandoned his child nor is he directly responsible for the formation of the second family.[274] Yet a "second family" case most likely involves a child who is completely settled into a life away from the noncustodial, visiting parent. From the time she formed a second family with the now absent parent, she may well have harbored no expectation that she would one day live again with her noncustodial parent.[275]

The adoption of a preference approach best addresses the tension between these positions. As in all other reunification cases, the court would begin by assuming that the child will live with her remaining parent. The judge will then have ample opportunity to inquire into the circumstances and decide whether this particular child should stay with her nonparent.

B. Why Not a Presumption?

Most states express the preference for the parent as a presumption in favor of the parent.[276] Although common, the presumption is not a wise choice as the mechanism for implementing the standard in third-party custody cases. It fails to provide the shorthand guidance to the trial courts for which the policymakers were undoubtedly hoping. Unless painstakingly defined, presumptions leave more procedural and substantive questions than they answer.

1. What Is a Presumption?

The term "presumption" has several varied meanings.[277] Indeed, legal scholars have called the term one of the "slipperiest member[s] of the family of legal terms."[278] Discerning the

274. The case of Bailes v. Sours, 340 S.E.2d 824 (Va. 1986), vividly illustrated the problems that may arise when one parent consents to the other parent's having custody and later faces the hurdle of challenging a stepparent for custody when the custodial parent dies.

275. In *Bailes*, for example, the child appeared to have made such an assumption, even though he visited with his natural mother on a regular basis. *Id.* at 825-26.

276. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56b (West Supp. 1995).

277. One author has identified eight meanings that courts have given the term "presumption." Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196-209 (1953).

278. MCCORMICK ON EVIDENCE § 342, at 578 (John W. Strong et al. eds., 4th ed.

effect of a presumption is often a confusing endeavor because of the imprecise and different ways that both courts and legislatures use the term.[279]

At the most basic level, the presumption is "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[280] Presumptions are based on the logical probability that the existence of one fact renders another fact to be true.[281] Courts and legislatures create presumptions when one fact is particularly difficult to prove[282] or when social or economic policies dictate that one side should receive the favor of a presumption.[283] At the root of the presumption, however, is the nexus of probability: when one fact is true, the other usually follows.[284]

In some contexts, a presumption is used to prove a fact in a manner that makes it no more powerful than a permissive inference.[285] The presumption allows the fact finder to infer one fact from the existence of another.[286] Commentators have soundly criticized this definition as too narrow an approach, for it merely permits the fact finder to make the connection and does not compel the inference of the presumed fact.[287]

The most widely used definition of a presumption is one that compels the fact finder to find a particular fact unless the other side produces evidence to rebut or meet the presumption.[288]

1992).

279. *Id.* § 344, at 586. The editors of *McCormick on Evidence* consider the results of courts' attempts to define the term a "judicial nightmare of confusion and inconsistency." *Id.*

280. *Id.* § 342, at 578.

281. *Id.* § 343, at 580. For example, if a piece of mail is properly addressed, stamped, and mailed, the law presumes that the recipient actually received it. *Id.* § 343, at 581.

282. *Id.* § 343, at 580. Because of proof difficulties, the law presumes that a bailee's negligence caused damage to goods originally delivered in good condition. *Id.* § 343, at 581.

283. *Id.* § 343, at 580.

284. *Id.*

285. *Id.* § 342, at 578-79.

286. *Id.*

287. *Id.*

288. *Id.* § 344, at 582-83. This theory derived from Thayer's work, JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE (1898), and gained acceptance from Wigmore, 9 JOHN H. WIGMORE, EVIDENCE § 2491, at 305 (James H. Chadbourn rev.

Known as the "bursting bubble" theory, this approach shifts the burden of producing evidence to the party against whom the presumption operates.[289] The effect of the presumption is gone—the bubble bursts—once that party produces contrary evidence.[290] Under this approach, the presumption would have no effect on the final decision, except in the unlikely event that the party against whom it runs introduces no evidence at all tending to rebut it.[291]

The bursting bubble theory has been subject to extensive criticism as giving presumptions "an effect that is too 'slight and evanescent.'"[292] To correct this weakness, many scholars advocate giving presumptions the effect of assigning the burden of persuasion to the party against whom the presumption operates.[293] They argue that public policy often provides the basis for establishing presumptions.[294] Thus, if a presumed fact is "worthy of the name 'presumption,'"[295] it "ought to be good enough to control a finding when the mind of the trier is in equilibrium."[296] Under this definition, the presumption may well affect the ultimate outcome of the case because it requires that the party contesting the existence of the presumed fact as-

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1981). The Federal Rules of Evidence have also adopted this view:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301.

289. MCCORMICK ON EVIDENCE, *supra* note 278, § 344, at 582-83.

290. *Id.*

291. *Id.* In effect, the presumption allows the favored party to survive a motion for directed verdict, but does no more. *Id.* Under this theory, presumptions are "like bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts." *Id.* § 344, at 582 (quoting Mackowik v. Kansas City, St. J. & C.B.R. Co., 94 S.W. 256, 262 (Mo. 1906) (Lamm, J.)).

292. *Id.* § 344, at 583 (quoting Edward M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937)).

293. UNIF. R. EVID. 301(a), 13A U.L.A. 130 (1986); MCCORMICK ON EVIDENCE, *supra* note 278, § 344, at 586.

294. MCCORMICK ON EVIDENCE, *supra* note 278, § 344, at 586-87.

295. *Id.* § 344, at 586.

296. EDWARD M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 81 (1956).

sume the burden of persuasion.[297]

These approaches vary decidedly with respect to the strength and duration of the presumption's effect.[298] What they all share, however, is a probative link between two facts.[299] The confusion over the operation of a presumption peaks when there is *no* logical connection between the fact presumed and the fact from which it purports to follow, as when the presumption arises solely from social policy reasons.[300] In that situation, the presumption can amount to a substantive rule of law rather than a procedural mechanism for proving certain evidentiary facts.[301] Commentators suggest eliminating the use of the term "presumption" in this context and point to the "presumption of innocence" as an example.[302] The law "presumes" a criminal defendant innocent not because courts always believe that the individual is, factually speaking, most probably innocent. Rather, for social policy reasons, the law strives to protect those persons who are truly innocent by placing the burden of persuasion on the State and by requiring a high level of proof.[303] Because the "presumption" really has nothing to do with presuming one fact from another, commentators suggest calling it instead the "assumption of innocence" and thus avoiding confusion between its meaning and the meaning of true evidentiary presumptions.[304]

2. *Presumptions in Third-Party Custody Cases*

The problems that plague presumptions in general also confuse the effect of presumptions in favor of parents in third-party custody cases. The presumptions vary widely with respect to the facts presumed, the evidentiary effect of the presumption, and

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297. MCCORMICK ON EVIDENCE, *supra* note 278, § 344, at 586. The editors of *McCormick on Evidence* have called this latter approach the better use of the term "presumption." *Id.* Several states and the Uniform Rules of Evidence have adopted this approach. *Id.* § 344, at 587-88.

298. *See id.* § 344 (describing the Thayer and Morgan approaches to presumptions).

299. *See id.* § 343, at 580.

300. *See id.* § 344, at 588-89 (describing the effects of social policy on the operation of presumptions).

301. *Id.*

302. *Id.* § 343, at 579-80.

303. *Id.*

304. *Id.*

the evidence relevant to rebut the presumption. The presumption thus becomes a poor and unreliable guide for trial courts faced with custody battles between parents and nonparents.

Some states presume that the parent is fit[305] but allow rebuttal through a showing that the parent is unfit or otherwise lacks the characteristics of a parent.[306] Other jurisdictions couch the presumption in different terms, asserting that the best interests of the child require her to be with the parent.[307] Some states mandate that, in order to rebut the "best interests" presumption, the nonparent must show that the child's best interests dictate that custody be awarded to the nonparent.[308] Other states express the rebuttal standard in terms of a showing of harm or detriment to the child.[309] Yet another approach creates a presumption that is met and disappears when the nonparent produces any evidence in his favor.[310] The burden is then on the nonparent to prove which custodial arrangement would serve the child's best interests.[311] The net effect of this test is that the parent prevails only if all other considerations are equal.[312] These substantive and evidentiary variations push the presumption standard toward one or the other type of

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305. *See* Schuh v. Roberson, 788 S.W.2d 740, 741 (Ark. 1990); Durkin v. Hinich, 442 N.W.2d 148, 152-53 (Minn. 1989); Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982).

306. For example, the Utah Supreme Court has stated that the nonparent rebuts the presumption only by showing that the parent generally lacks: (1) a strong mutual bond with the child, (2) a demonstrated willingness to sacrifice his welfare for the child, *and* (3) the sympathy for and understanding of the child generally characteristic of parents. *Hutchison*, 649 P.2d at 41.

307. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56b (West Supp. 1995).

308. Bryan v. Bryan, 645 P.2d 1267, 1271 (Ariz. Ct. App. 1982); Patrick v. Byerly, 325 S.E.2d 99, 101 (Va. 1985). The nonparent bears both the burden of production and the burden of persuasion. Haynie, *supra* note 19, at 716.

309. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56b (West Supp. 1995); Richards, *supra* note 4, at 742-43.

310. *See* Comer v. Comer, 300 S.E.2d 457, 459-60 (N.C. Ct. App. 1983) (awarding custody to a child's paternal aunt and uncle because an award of custody to the natural mother would not serve the child's best interests).

311. *See id.*

312. Salthe, *supra* note 19, at 539-40. Commentators have described this approach as the "tie-breaker" rule. *Id.* Parenthood only enters the best interests equation when the court determines that both parties are equally competent to care for the child. *Id.* at 540.

standard—the best interests test or the parental rights test.[313]

The presumption that the parent is fit may be proper from the standpoint of probability and statistics: most parents are fit. To rebut the presumption of fitness, the nonparent must produce evidence of parental unfitness.[314] This particular presumption does little, however, to state a comprehensive standard for deciding all types of third-party custody cases. It provides the court with no guidance for weighing the other factors, once the court finds the parent is fit. Does the presumption mean that, if the parent is fit, he should get custody of the child, regardless of all other considerations, or is the presumption merely an evidentiary mechanism for finding just one of several necessary elements in the case? If the former view prevails, then the fitness presumption is no different than the parental rights standard. For reunification cases in particular, it is a woefully incomplete decisional standard.

The other common presumption provides that the court must begin by presuming that the best interests of the child require her parent to have custody.[315] This presumption is an attempt to address more completely the ultimate issue before the court—the child's welfare.[316] For this reason, it is probably a better and more useful guide for the trial courts than is the presumption of fitness. It has its own problems, however.

First, the probative strength of the "best interests" presumption favoring parents is not evident in all types of third-

313. *Id.* All of these rules have a significant impact on the formation of strategies by counsel. The attorney must consider whether her client takes on the burden of persuasion by filing suit, whether her client benefits by bringing suit in one jurisdiction rather than another, the effect of inevitable litigation delays, with whom the child lives and continues to bond during those delays, and whether any or all of these considerations tend to push people to self-help. *See* Dickson v. Lascaris, 423 N.E.2d 361, 364 (N.Y. 1981) (holding that delays caused by legal proceedings should not affect custody rights); Lewelling v. Lewelling, 796 S.W.2d 164, 168 n.9 (Tex. 1990) (same).

314. Whether the nonparent also bears the risk of nonpersuasion depends on whether the jurisdiction has a Thayerian "bursting bubble" view of presumptions or takes the approach recommended in *McCormick on Evidence*. *See* MCCORMICK ON EVIDENCE, *supra* note 278, § 344 (analyzing the effect of the two views of presumptions in civil litigation).

315. *See, e.g.*, Dickson v. Lascaris, 423 N.E.2d 361, 363 (N.Y. 1981).

316. *Id.*

party cases. The psychological evidence suggests that maintaining continuity with the current caretaker usually serves the child's best interests.[317] Under this definition of "best interests," only the use of the presumption in removal cases rests on probability. In a reunification case, it may run counter to certain psychological principles.[318]

Second, the best interests presumption raises the serious question of what evidence is necessary to rebut it. Although the presumption places the burden of rebuttal on the nonparent, the type of evidence required for rebuttal remains unclear. If the nonparent may rebut the presumption with any sort of evidence that parental custody would not serve the child's best interests, then this test is nothing more than a procedurally contrived best interests test. Any minor factor in the nonparent's favor will rebut the presumption. Its effect of preferring the parent is illusory, especially if the presumption "bubble" bursts as soon as the nonparent produces any evidence.[319]

Problems remain, however, if the nonparent must rebut the presumption with something other than evidence regarding the child's best interest, such as proof of substantial harm or detriment to the child.[320] This approach serves the purpose of creating a test that actually prefers the parent, but it strains the basic construction of a presumption. If the law presumes a particular fact, then, logically, the other party should be able to counter it with evidence showing that the presumed fact is not

317. *See* GOLDSTEIN ET AL., *supra* note 197, at 6-7.

318. *Id.* at 6.

319. *See* MCCORMICK ON EVIDENCE, *supra* note 278, § 344, at 582-83.

320. Rebutting a presumption becomes even more complicated when the legislature defines the standard for rebuttal in ambiguous terms. For example, *Black's Law Dictionary* defines "detriment" as "[a]*ny* loss or harm suffered in person or property." BLACK'S LAW DICTIONARY, *supra* note 64, at 451 (emphasis added). A "plain language" or dictionary definition construction of the statutory provision suggests that a showing of any harm to the child occasioned by awarding custody to the parent would establish "detriment" sufficient to rebut a parental presumption. Can rebuttal really be that easy? If detriment to the child means *any* harm, no matter how minimal or short-term, then the rebuttable presumption, once again, dissolves into a best interests test. *See* CONN. GEN. STAT. ANN. § 46b-56b (West Supp. 1995) (providing for an example of a statutory presumption with "detriment" as the standard for rebuttal); *see also* Kaas, *supra* note 91, at 237-41 (discussing the meaning of detriment under Connecticut law).

actually true.[321] Requiring the party against whom the presumption operates to rebut the presumed fact with proof of a wholly different fact undermines the probability nexus upon which the presumption mechanism rests.[322]

The preference in favor of a natural parent does not serve as a mere procedural device for relieving the parent of the need to prove certain facts. Rather, it is a substantive rule of law, favoring family integrity and encouraging responsible behavior on the part of parents. The preference may or may not accord with traditional notions of the child's "best interests." It may only rarely rest on the need to find one fact from the existence of another. It is more like an "assumption,"[323] with the law choosing, for purely policy reasons, to start with the notion that a child belongs with her parent.

For these reasons, the presumption is an awkward and ill-designed device for expressing the parental preference. Presumptions carry with them a century of disagreement over their proper evidentiary effect[324] and require courts to squeeze a policy statement into the language of an evidentiary fact-finding tool. Even considering the presumption in its strongest sense, as a device that shifts the burden of persuasion, fails to resolve the dilemma in a third-party custody case. Knowing which party bears the burden of persuasion is, indeed, an important consideration, but policymakers could more easily meet such a narrow objective by explicitly assigning the burden of proof.

In the hardest cases, there are no questions of fact as to which person could better raise the child. Nor are they cases in which the burden of persuasion is the decisive factor because the trier's mind is "in equilibrium."[325] The tough removal cases present fact patterns in which the parent hovers on the line of minimal

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321. MCCORMICK ON EVIDENCE, *supra* note 278, § 343, at 580.

322. *See id.* (discussing the role of probability in the formulation of presumptions).

323. In this context, the preference operates quite like the "presumption" of innocence. *See supra* notes 302-04 and accompanying text.

324. *See* MCCORMICK ON EVIDENCE, *supra* note 278, § 344 (discussing various applications of presumptions in civil cases).

325. Still, the issue of which party bears the risk of nonpersuasion is not unimportant. For example, if a case involves contested and controversial allegations of fact, such as parental drug use, the custody outcome may well depend on whether the party with the burden of persuasion proved or disproved the allegation.

adequacy, while the nonparent is financially and emotionally stable. The difficult reunification cases involve children who are, without any doubt, happy and well-adjusted in the nonparent's home and for whom a move will not be easy.

What the court and the parties need in both of these cases is a clear statement of the effect of the preference and the conditions under which the preference is overcome.[326] Under any of its various definitions, a presumption does not provide these definitive and substantive standards. The policymakers have not done their job when they create an elusive and murky presumption, straining its limited function with a task for which presumptions were never designed and then leave the courts to decide its effect. A far better approach is to avoid altogether the mechanism of the presumption.[327] Policymakers should acknowledge their preference in terms of an assumption that children should be in the custody of their parents. They then should define the strength of their preference by expressing directly which factors will overcome it. Courts need explicit standards that define the limited circumstances under which they may acceptably remove a child from her parent, and in which they may appropriately decline to return the child to the parent.

C. Overcoming the Preference

Policymakers cannot tell trial judges only that they must prefer a parent when deciding a third-party custody matter. With nothing more, this statement gives no indication of the strength of the preference or of the type of evidence that is permissible and relevant. An examination of the type of evidence and how much of it overcomes the preference reveals the true impact of the preference in favor of parents. If the preference is overcome by a wide spectrum of factors, then it functions as

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326. Many guardianship statutes use this approach. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-610 (West 1993).

327. A presumption is an attempt to do through a "legal fiction" what courts should do directly. MCCORMICK ON EVIDENCE, *supra* note 278, § 344, at 588 (citing Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 NW. U. L. REV. 892 (1982); Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843 (1981)).

little more than a best interests test. If only the most extreme set of facts suffices, then the test becomes the equivalent of a parental rights standard.[328] Creating a test that lies in the middle of these two extremes requires carefully defined standards that limit the trial court's focus, but that also leave the court enough discretion to respond to the individual variations of each case. The guidelines for setting these standards come from the constitutionally prescribed rights of the parties, psychologically sound principles of a child's physical and emotional needs, the need to encourage responsible behavior by parents, and the goal of creating standards consistent with other child removal provisions.

1. Removal Cases

a. An Examination of Parental Fitness

In a case in which a nonparent seeks to remove a child from the custody of a parent, the challenge is to decide under which conditions the court should interfere with and disrupt the daily parent-child relationship. The court's task is not to select the best caretaker.[329] Rather, judges must identify those parents who are simply incapable of taking adequate care of their children.[330] Only in those cases do the child's care needs outweigh the confusion, upheaval, and hurt that she will undoubtedly suffer from being removed from her parent.

Deciding when a situation requires removal is not new or unique to third-party custody cases. Courts in every state face this issue when acting on abuse and neglect petitions brought by child protection agencies.[331] In all states, the standards for re-

328. *See* Salthe, *supra* note 19, at 539-41 (discussing the best interests and parental rights tests).

329. Once again, cases in which the parent and nonparent cared for the child together represent the only exception to this test in removal situations.

330. The court in a removal case should consider strongly "whether the child can be protected from the specific harm(s) justifying intervention if left in the home." Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 650-51 (1976). The court should first vigorously examine whether services short of removal are "adequate to ensure that the child will not be injured again." *Id.* at 651.

331. Recognizing that other judges often have to make such decisions does not

moval focus on the parent's ability to provide the child with a minimum level of care and safety.[332]

First and foremost, this minimum needs test defers to the interests of family integrity, while providing a mechanism for ensuring that children receive safe and adequate care. It also achieves harmony and uniformity with other child removal statutes that already exist. In abuse and neglect cases, the family's problems do not give the court license to go searching for the best possible person to raise the child.[333] Likewise, they should not do so in third-party removal cases.

In a removal case, the court's inquiry must focus solely on the parent's fitness as a parent. The court should examine the parent's present[334] characteristics, but only to the extent that those characteristics have an impact on the child's well-being.[335] The court should consider whether the parent presently has the necessary emotional commitment and capability to fulfill his child's[336] basic needs for: (1) love and affection, (2) food, clothing, and medical care, (3) adequate residential arrangements, (4) social and educational guidance, and (5) freedom from physical harm.[337]

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mean that the choices are routine or easy. Custody decisions are traumatic for judges because they are so important and are seldom clear-cut. Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 2 (1987).

332. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-717(f) (West 1993).

333. Rather, before considering any separation of the parent and the child, the court's task is to inquire into the parent's minimum fitness.

334. The focus is on the parent's *present* capability. Past behavior, including past abuse, may be relevant, but only to the extent that it illuminates a parent's present characteristics. Past conduct is not an automatic indicator of current conduct.

335. This caveat is also found in the Uniform Marriage and Divorce Act's best interests statute. *See supra* note 78. The court should only consider parental conduct that affects his relationship with his child. *See supra* note 78.

336. The result may vary slightly depending on the individual needs of each child. For example, a child with particularly challenging problems may need a parent with more sophisticated knowledge of the care that she needs.

337. *See* Wald, *supra* note 330, at 649-50. Trying to define a standard for removal that goes beyond one of preventing only physical abuse always presents a danger. Once the standard begins to address concepts such as neglect and a child's psychological needs, it invites subjective and arbitrary enforcement. Guggenheim, *supra* note 51, at 554. The potential for class bias and cultural stereotyping is a real problem. *Id.* at 549-50. Yet courts cannot completely ignore the emotional needs of the child. Judges must be aware of the power that they possess and attempt to wield it fairly, without punishing poor families for their poverty.

In deciding whether to remove the child, the court should not consider the potential third-party custodian in any way. The attributes and parenting capabilities of the nonparent are completely irrelevant to the determination of whether the parent can care for his child. The court also cannot appropriately consider the type and nature of the relationship between the child and the nonparent.

Removal cases often involve claims by nonparents who are members of the child's extended family and whom the child knows and loves.[338] Often, the nonparent seeking custody is a grandparent.[339] The temptation therefore arises to create a "sliding scale" test for removal cases: the closer the emotional ties between the child and the nonparent, the less cause the court must find before it can remove the child. After all, when a grandparent seeks custody, the consequences of removal seem less dire. The court does not send the child to live with a stranger, as may happen in a foster care placement.

This approach, however, would be a serious and dangerous encroachment on the family's need for autonomy. The removal decision must remain a rigidly separate consideration from the question of where the child would live if removed.[340] The availability of extended family members as alternative caretakers does not make removal a trouble-free solution to a nuclear family's problems. Placing the child with family members or

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The third-party custody standard may not be any better at solving these problems than are other approaches, but judges can apply it in an equally effective manner. For example, a judge should not require parents to provide their children with a predetermined level of financial comfort. Further, courts should not automatically remove the children of homeless parents simply on the basis of their homelessness; adequate, albeit minimal, residential arrangements should include temporary shelters and other dependence on public assistance. In some cases, judges can appropriately examine the circumstances of a parent's homelessness. For example, if a substance abuse problem is interfering with a parent's ability to procure and maintain adequate shelter, the parent is not likely to meet many of the child's other needs, and removal may be warranted. If, however, the parent's unemployment has caused the family's homelessness, removal is cruel and unwarranted. In such a case, the court should focus on keeping the family together and providing support.

338. *See, e.g.*, Comer v. Comer, 300 S.E.2d 457 (N.C. Ct. App. 1983).

339. Richards, *supra* note 4, at 734-35.

340. These issues are separate in abuse and neglect proceedings resulting in foster placement or the termination of parental rights. Santosky v. Kramer, 455 U.S. 745, 748 (1982).

friends will not erase the pain of the child's separation from her parent. This approach also invites family meddling and intergenerational conflicts[341] and underestimates the emotional investment of the nonparent in sabotaging the parent-child relationship.[342] Because of the difficulties inherent in later returning children to the parent's home, a court should not enter lightly into a removal case and thereby invite the more complex conflicts of a reunification case at some future point.

Grandparents and other family members or friends who are willing and able to take on the responsibilities of raising a child deserve commendation. When the court *must* remove a child from her parent, the presence of a familiar caretaker will undoubtedly soften the shock to the child. However, the court must guard against confusing the availability of a good, alternative home for the child with the very grounds for removal. Improper comparisons between the parent and the nonparent become too easy and may slip into a best interests inquiry. A parent may decide for himself to ask a grandparent or other person to care for his child, perhaps before his problems reach crisis level. That decision is his choice. When the proceeding is contested, however, the court must decline to dilute the minimum fitness standard.

In deciding whether to remove a child, the court need not consider why the parent cannot fulfill the child's basic needs. Whether a parent is "at fault" for his problems or incapable because of mental illness, mental disability, or substance abuse is irrelevant to the basic question of whether the parent can care for the child. Sympathy for the parent cannot outweigh the child's need to live in a safe environment. Once the court has

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341. Richards, *supra* note 4, at 734-35.

342. Intrafamilial custody disputes often arise from battles over other family grievances. Some of the ugliest stories involve parents engaged in custody battles with their own parents. *See* Schult v. Schult, No. FA-91-03-50-59S, 1994 Conn. Super. LEXIS 429 (Conn. Super. Ct. Feb. 16, 1994); *In re* Jacqueline D., Nos. N87-128 & 82341, 1992 Conn. Super. LEXIS 1037 (Conn. Super. Ct. Apr. 15, 1992). The literature warns child placement workers about the difficult dynamics involved in such placements. Joseph R. Carrieri, *The Legal Handbook of Foster Care, Termination of Parental Rights and Adoptions, in* CHILD ABUSE, NEGLECT, AND THE FOSTER CARE SYSTEM 1993, at 7 (PLI Litig. & Admin. Practice Course Handbook Series No. C-166, 1993).

granted custody to the nonparent, however, the cause of the parent's present unfitness often becomes important. It is germane to the question of what visitation orders are appropriate and whether the parent can ever gain or regain the capacity to care for the child. The origin of the parent's problems will shape the court's ultimate ruling and will have an impact on the entry of orders subsidiary to the custody decision. It should not, however, inform the central question of custody.

b. Support from Existing Case Law

Many states already have gravitated toward a fitness inquiry in third-party custody removal cases.[343] In most of these states, the parental preference is expressed in terms of a presumption.[344] However, in the course of discussing whether the nonparent has rebutted the presumption, the courts tend to identify the relevant factors, doing so in terms quite like those identified above.[345]

In Texas, the third-party custody statute provides that a third party can rebut the natural parent presumption by showing that granting custody to the parent "would significantly impair the child's physical health or emotional development."[346] In *Lewelling v. Lewelling*,[347] the Supreme Court of Texas gave further definition to the standard, reversing a trial court's award of custody to paternal grandparents.[348] The child was residing with the mother after his parents' separation when the paternal

343. *See, e.g.*, Lewelling v. Lewelling, 796 S.W.2d 164, 166 (Tex. 1990). A look at the various state court decisions can be misleading unless one is careful to note the standard that the state has adopted. Another important consideration is that most appellate courts view their role as determining whether the evidence supports the trial court's decision, not whether the appellate judge would have assessed the evidence in the same way. For that reason, the end result of any particular case is not necessarily the best barometer of the strength of the parental preference in any given state. Most appellate courts affirm trial court custody decisions.

344. *See, e.g., id.*

345. *See, e.g., id.* at 167-68.

346. TEX. FAM. CODE ANN. § 14.01(b)(1) (West Supp. 1995). This subsection of the Texas statute has not changed since the 1990 *Lewelling* decision. *Id.* § 14.01 Historical & Statutory Notes.

347. 796 S.W.2d 164.

348. *Id.* at 168-69.

grandparents sought custody.[349] The court construed the statute as requiring the court to decide the level of dysfunction that would render the mother capable of causing significant harm to her child.[350] The court was quite emphatic when it defined the task before the trial court as *not* simply a search for the better custodian.[351] In reversing the trial court's decision, the court concluded that living with a mother who was unemployed, who had undergone periods of psychiatric treatment, and who was the victim of spousal abuse would not impair the child.[352]

Virginia also has a preference, defined by case law, favoring parents in third-party custody cases. In *Bottoms v. Bottoms*,[353] the Supreme Court of Virginia stated that a parent's rights should be respected if at all consonant with the child's best interests. Like the Texas Supreme Court in *Lewelling*, the Virginia appellate court had rejected the notion that the trial court's job was "to consider whether a third party might be better able to care for a child,"[354] even when the parental level of care is only "marginally satisfactory."[355] Rather, the test is whether the parent's behavior "poses a substantial threat of harm to a child's emotional, psychological, or physical well-being."[356]

In *Bottoms*, the Virginia appellate court had found no evidence that the mother's living arrangement and lesbian relationship would harm her son emotionally or psychologically.[357] The Virginia Supreme Court reversed, finding that the trial

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349. *Id.* at 165.
350. *Id.* at 166.
351. *Id.* at 167.
352. *Id.*
353. 457 S.E.2d 102 (Va. 1995).
354. Bottoms v. Bottoms, 444 S.E.2d 276, 280 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102 (Va. 1995).
355. *Id.*
356. *Id.* at 282.
357. *Id.* at 283-84. The court first reversed the trial court's decision that the mother's homosexuality rendered her an unfit parent per se. *Id.* at 282-83. The court then cited with approval the state supreme court's conclusion in Doe v. Doe, 284 S.E.2d 799 (Va. 1981), that "children who are raised with a loving couple of the same sex are [no] more disturbed, unhealthy, or maladjusted than children raised with a loving couple of mixed sex." *Bottoms*, 444 S.E.2d at 283 (quoting *Doe*, 284 S.E.2d at 806). The dissenting opinion in the supreme court decision also stressed the absence of any evidence that the mother's homosexual conduct had an adverse effect on the child. *Bottoms*, 457 S.E.2d at 109 (Keenan, J., dissenting).

court had sufficient evidence of parental neglect to rule for the grandmother.[358] The court also concluded that, in some cases, a parent's homosexual conduct can impose the unacceptably heavy burden of "social condemnation,"[359] making it a factor to consider.

Other nonparents have prevailed under this type of fitness test.[360] In *Hunt v. Whalen*,[361] an Indiana court affirmed a grant of custody to grandparents.[362] The court held that the grandparents had rebutted the parental presumption with clear and convincing evidence[363] that the mother was unable to provide adequate nutrition for the child, had failed to follow specific

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358. *Bottoms*, 457 S.E.2d at 108.

359. *Id.* The majority criticized the appellate court for not confining its inquiry to the appropriate appellate scope. *Id.* at 107. The court found and recited numerous examples of parental incapacity, quite apart from the mother's lesbianism, in the trial record. *Id.* at 108. These facts arguably called into question the mother's ability to provide an adequate home for her son. The majority overlooked, however, that the trial court relied principally on the homosexual conduct of the mother, not these other factors. *Bottoms*, 444 S.E.2d at 282. To the extent that this case suggests that, with no proof of harm to the child, parental sexual conduct is relevant to the question of removal, it is not an example of a parental fitness inquiry as defined in this Article.

360. The parental preference requires a judge to consider more than just the choice of a custodian. The policy favoring family preservation also places a responsibility on the trial judge to protect actively the bond between the parent and the child. Active protection includes expediting cases in the court system. Horror stories about judicial delays abound, but few are as incredible as the Baby Jessica case. *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich.), *stays denied*, 114 S. Ct. 1, *and* 114 S. Ct. 11 (1993). The natural father first filed to nullify the adoption when the baby was only six weeks old. *See id.* at 652. The court cases dragged on for more than two years, thus increasing the risk that the natural parent would lose simply because of the passage of time and assuring extreme trauma to the child when the natural parent eventually prevailed. *Id.* at 669 (Levin, J., dissenting) ("[E]very expert testified that there would be serious traumatic injury to the child.").

If removal is necessary, the court should articulate clearly its basis for finding that the parent lacked the capability to care for his child. The decision should state exactly what the parent must do to regain custody. The court also should order the parties, including the child, to participate in counseling whenever even arguably appropriate. Finally, the court should order the maximum amount of visitation between the parent and the child that is appropriate, including overnight visits, so that the child maintains a sense of her parent's house as her "home." Judge West took this approach in Foster v. Devino, No. 0110479, 1994 Conn. Super. LEXIS 1161 (Conn. Super. Ct. May 5, 1994). Because he believed that the grandparents' custody should continue only as long as absolutely necessary, his opinion laid out a blueprint for the mother's reunification with her children. *Id.* at *20-21.

361. 565 N.E.2d 1109 (Ind. Ct. App. 1991).

362. *Id.* at 1110.

363. *Id.* at 1111.

medical advice for treating the child, and had no source of income,[364] all of which are, arguably, indicators of the parent's inability to meet the child's basic needs.[365]

In *Foster v. Devino*,[366] a Connecticut trial court granted custody of two children to their paternal grandparents, who had intervened in a custody dispute between the parents.[367] The judge found that the grandparents had rebutted the presumption in favor of the parents by proving that remaining in the custody of their mother would prove detrimental.[368] The children had several unexplained injuries, and the mother had an unstable living arrangement, had refused to cooperate with a parenting assistance program, and had continuously interfered with the children's visitation with their father and paternal grandparents.[369] Finally, the judge found that the mother had no insight into the negative effect that her behavior had on the children.[370]

c. Burden and Quantum of Proof

Final considerations that give the preference its strength are the assignment of the burden of persuasion and the setting of the level of proof. In removal cases, the nonparent must have the burden of proving the parent's incapability by clear and convincing evidence. This is consistent with the policy concerns that called for the preference in the first place. It is also uniform

364. *Id.* at 1112.

365. In most jurisdictions, facts such as these would most likely also support a finding of parental unfitness. *See, e.g., In re* J.L.B., 594 P.2d 1127, 1129-31 (Mont. 1979). However, in an older case, a court purported to apply a presumption test but found it rebutted by essentially lifestyle choices, not parental incapacity. Painter v. Bannister, 140 N.W.2d 152 (Iowa), *cert. denied*, 385 U.S. 949 (1966). In *Painter*, the Supreme Court of Iowa reversed the trial court's award of custody to the parent. *Id.* at 158. Although conceding that the father was not "morally unfit," the court described him as "Bohemian"—able to offer his son a "romantic" and "intellectually stimulating" life, but one that was "impractical" and "unstable." *Id.* at 154-56. The ruling was a value-laden choice in favor of the grandparents' "stable, dependable, conventional, middle-class, middlewest" lifestyle, *id.*, and unrelated to the father's ability to care adequately for his child. The court compared the two home environments to determine which was "better," *id.* at 153, yet it defined "better" in extraordinarily judgmental terms.

366. No. 0110479, 1994 Conn. Super. LEXIS 1161 (Conn. Super. Ct. May 5, 1994).

367. *Id.* at *20.

368. *Id.* at *11.

369. *Id.* at *14-18.

370. *Id.* at *13.

with most abuse and neglect statutes.[371]

The clear and convincing standard requires a court to exercise caution when contemplating removal of a child. The risk of error is serious, for the child will suffer emotional trauma upon separation. Even if the child is one day reunited with her parent, the removal forever alters their relationship. Further, the possibility always looms that, once a child goes to live with a nonparent, she may never be able to go home again.

2. Reunification Cases

a. An Evaluation of the Psychological Impact on the Child

i. Selecting the Test

The preference in favor of a parent establishes that, in all types of reunification cases, the court must start with the assumption that the child should return to live with her parent. The question then becomes one of deciding which factors the court should look at to decide whether a change in custody is appropriate.

Resolving a reunification case often will require the court to engage in a two-step process.[372] The threshold consideration concerns whether the parent is capable of having custody. The parent who lost custody by court order in a prior third-party custody removal case first must demonstrate his new parental capability[373] by a preponderance of the evidence.

For the initial determination of custody between the parent and the nonparent,[374] a threshold determination of capability is not automatically necessary. If, however, the nonparent challenges the parent's fitness, he or she should have to prove the parent's inca-

371. For example, the Uniform Juvenile Court Act requires clear and convincing evidence before finding a child "deprived." UNIF. JUV. CT. ACT § 29(c), 9A U.L.A. 39 (1968).

372. In many cases, the court first must determine whether the parent is capable of meeting the child's minimum needs. When the court previously has removed the child from the parent's custody, it will have to find that the cause for the removal no longer exists. However, even in cases in which the court never found the parent incapable of caring for his child, the nonparent may raise the issue, as either a matter of good faith or as a tactical maneuver.

373. Removal cases follow this analysis. *See supra* note 332 and accompanying text.

374. A reunification scenario without a prior court-ordered removal cannot arise in an abuse and neglect case. A reunification situation occurs only if a parent voluntarily leaves his child with a family member or friend or a parent seeks custody from a third-party with whom the other parent has left the child.

pability by clear and convincing evidence, as in a removal case.[375]

Assuming that the court finds that the parent meets the minimum standard of parental capability, the court must then face the second essential question in a reunification case—whether the child should stay with the nonparent, even though the parent is fully capable of caring for his child. To answer this question, the court's inquiry should turn exclusively to the child.[376] The only ground sufficient to overcome the preference in favor of a capable parent is proof that the change in custody will cause the child significant and long-term psychological harm.

This decision to focus on the impact on the child is not an adoption of the traditional best interests test. The degree of emotional harm to the child is certainly one element of a best interests test and may very well be the most crucial. Nonetheless, the impact test restricts the court's inquiry to this single issue. Because the impact test is the only basis for declining to grant the parent custody, the nonparent cannot prevail simply because he or she has taken good care of the child.

The impact approach accomplishes the goal of bringing families back together and permits courts to identify those cases in which reunification of the family exacts too high an emotional cost on the child. In every case, a move would cause disruption in the child's life; in some, it would cause her permanent emo-

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375. *See supra* part IV.C.1.c. The nonparent should bear this burden even in cases in which the parent voluntarily placed his child with the nonparent. "Preferring" this parent by not requiring him to prove his capability rewards him for recognizing his own limitations and choosing to safeguard his child's needs. The first prong of a reunification case appropriately requires the nonparent to prove the parent's incapacity by the same quantum of evidence demanded in a removal case. Requiring the nonparent to prove the parent's incapacity guarantees consistent standards for all *initial* judicial decisions that relate to a parent's fitness to care for his child. When a parent voluntarily places his child with a nonparent, he may draw his own line for acceptable parenting at a higher level than a court would have set in a contested proceeding. The court should not penalize the parent for wanting to make sure his child would receive more than he was able to provide.

376. This emphasis on the impact on the child is not a novel concept. Justice Joseph Story recognized that the question in a reunification custody case is "whether [returning the child to the parent] will be for the real, permanent interests of the infant." United States v. Green, 26 F. Cas. 30, 31 (C.C.D. R.I. 1824) (No. 15,256). This focus on the child's needs has enjoyed a recent resurgence. *See, e.g.*, Woodhouse, *supra* note 165; Woodhouse, *supra* note 44.

tional harm. Exposing a child to some discomfort is acceptable, so long as the court has a reasonable basis for believing that the child will readjust with no permanent emotional scars. Causing permanent psychological damage to a child in order to reunite a family is not acceptable, however, no matter *how* the parent and child became separated.[377] The impact test thus is appropriate for both "parental condition" and "second family" reunification cases.

Choosing the impact test as the sole criterion for overcoming a preference is an explicit rejection of a test that differentiates among cases on the basis of parental conduct. The impact approach does not assess or judge the parent's condition for several reasons. First and foremost, decisions based on the degree of "blame" that the parent carries would often result in more serious harm to the child.[378] The "second family" cases may involve a parent who bears no "fault" for the separation, and yet his child may be completely integrated into a nonparent's home. Having just suffered the loss of the custodial parent, can the child now endure losing everything and everyone else familiar? In contrast, the child who is in the care of the nonparent while her parent goes through drug rehabilitation may be expecting to go home "as soon as Daddy is well again." The parent's behavior is hardly exemplary, but should a court frustrate the child's fondest desires in order to punish the parent for his poor past conduct? Courts should not decide the custody of the child with the purpose of rewarding blameless conduct or punishing blameworthy behavior.

A second good reason justifies rejecting a test that focuses on the nature of the parent's incapability. Ranking all of the permutations and achieving consensus on the levels of culpability would be very difficult. Reasonable people disagree, for example,

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377. One of the most sympathetic figures imaginable is a single parent involved in a car accident. The parent bears no blame for the accident, but he is in a coma for ten years. During that time, a family member raises his child, who was an infant at the time of the accident. When the parent awakens, the question becomes whether he should get the child back automatically.

378. The results of a "blame" test also may be opposite to the outcome required by the Constitution. *See generally* Hill, *supra* note 6, at 365 (explaining that the Constitution's Due Process Clause protects parental authority).

whether an alcoholic can control his drinking or whether he has a disease. Is substance abuse "worse" than teenage pregnancy? Perhaps a parent has a psychiatric disorder and fails to take his medication for years because of his delusions. Later, when he is once again fit to resume custody, is he really to blame for the long separation? Should the law fault the father whose child was born and placed for adoption without his knowledge, but who exhausts every avenue when he learns of the child's existence? These questions are hard to answer, would spark heated debate, and yet serve no purpose in the search for a standard that will overcome the preference without destroying the child.

ii. Identifying the Relevant Considerations

A further question concerns the type of evidence the court should consider to decide the ultimate issue of whether a change in custody will cause serious psychological harm to the child. The court faces the admittedly challenging task of looking into the future and drawing the line between an ordinary readjustment process and psychological harm of a long-term nature. Several factors bear on the difficulty of the move for the child. These variables may be present in either type of reunification case.

Perhaps the most important consideration is the closeness of the bond between the parent and the child. If the parent and the child enjoy frequent and lengthy visits, share their feelings and affection freely, and participate in the important events of each others' lives, the court is less likely to find that a move will cause the child substantial harm. The corollary is also true. The closer the bond between the nonparent and the child, the more likely the court will be to find that a move will cause emotional trauma to the child.[379]

Several other variables may be present in either type of reuni-

379. This test is similar to a suggestion that courts should decide these cases on the basis of "affection-relationships." Based on the psychological theories of Anna Freud and Erik Erikson and the case of Root v. Allen, 377 P.2d 117 (Colo. 1962) (en banc), the relevant consideration under this theory is the degree of the child's dependence on her affection-relationship. *See* Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

fication case to assist the court in assessing the degree of psychological impact a change in custody would have on the child.[380] A court should examine the following factors:[381]

> (1) the level of integration of the child into the nonparent's family, including the length of time the child has been there,[382] her age at arrival, and her attachment to any half- or step-siblings;[383]
> (2) the strength of the existing bond between the child and the parent, including whether she ever lived with the parent and the nature and frequency of visitation;
> (3) the likelihood that the bond with the parent could become stronger within a reasonable length of time;
> (4) the parent's awareness of the child's potential readjustment problems and his willingness to address them appropriately;
> (5) the child's preference;[384]

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380. Of course, a court may admit the testimony of a psychologist or psychiatrist as an expert on the issue.

381. Setting forth guidelines presents the risk that courts will apply them in an overly mechanical fashion. "[G]uidelines may become prescriptions if decision-makers fail to understand the logic and goals behind them." Waters & Noyes, *supra* note 252, at 512.

382. Normally, the court should not consider the length of time due solely to the litigation process. However, if the child was very young when she began living with the nonparent, the court should take that delay into account. Otherwise, the impact test would become an illusory safeguard for the youngest, and thus the most vulnerable, children.

383. Professors Goldstein, Freud, and Solnit advocate measuring time in a manner relevant to the child's perception of time, which changes depending on the child's developmental stage. GOLDSTEIN ET AL., *supra* note 197, at 40-45. The younger the child, the shorter the time period that she can tolerate "waiting" in temporary placements. *Id.* The logical extension of this theory is that, for a child removed at a young age, it would not take very long in "adult time" before it became "too late" to move the child back to a parent. In contrast, a child removed at an older age may be able to weather years of living apart from her parent and still be able to move back without serious psychological upset. However, this view runs counter to the popular notion that young children are the most resilient.

384. The child's preference is not any more dispositive in this kind of case than in any other custody case. The weight the judge should give it will depend on the age of the child and the reasons she gives for her preference. "[L]istening to children's authentic voices, and employing child-centered practical reasoning are not the same as allowing children to decide. They are strategies to insure that children's authentic voices are heard and acknowledged by adults who make decisions." Woodhouse, *supra* note 165, at 1840. In a reunification case, the child's opinion takes on a special relevance because it cannot help but provide a very significant indication of the child's likely ability to adjust to a custody change.

> (6) whether the child has an expectation that the placement is temporary and that she will return to live with the parent; and
> (7) any other reason affecting the child's ability to adjust to a move (such as preexisting emotional or developmental problems).

Another theory also makes the child's psychological needs paramount but suggests a different approach. Under this theory, the court would decide reunification cases under a "bright-line" test based solely on the duration of time that the child has spent with the nonparent and the child's age when she arrived.[385] A period of as little as two years with the nonparent would cause a court to find it was "too late" to return the child.[386] Like the impact test, this approach ignores the reason for the separation of the parent from the child. In contrast to the impact test, however, it also ignores other considerations that can soften the effects of the passage of time, such as the frequency and quality of the child's contact with the parent.[387] For this reason, the bright-line approach is too rigid.[388]

Moreover, it is too simplistic a notion to view time as a straight line that goes off in the distance forever, making it increasingly difficult for a child to return to her parent. In custody matters, time can have more of a "boomerang" effect. As time passes, the child gets older. A teenager may wish a stron-

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385. GOLDSTEIN ET AL., *supra* note 223, at 39-57, 188-89, 194-95.

386. Under the bright-line approach, a child automatically would remain with her longtime caretaker if she had resided with that caretaker continuously for 12 months, for a child up to three years old at the time of placement, or 24 months, for a child more than three years old at the time of placement. *Id.* at 46.

A parent would be entitled to a hearing only if the child was at least five years old at the time of placement, had lived with the parent for at least three years prior to the placement, and was not separated from the parent because he had inflicted serious bodily injury or sexually abused her. *Id.* at 47. If entitled to a hearing, the parent would prevail if he could demonstrate that he was still the child's psychological parent and that returning the child would be the least detrimental alternative for her. *Id.* at 48.

387. Garrison, *supra* note 51, at 455. Professor Garrison also suggests that Goldstein, Freud, and Solnit downplay the impact of the quality of care. *Id.* at 458-59.

388. *See* Douglas J. Besharov, Book Review, 34 VAND. L. REV. 481, 483 (1981) (referring to the "inflexibility of [Goldstein, Freud, and Solnit's] decision making rules").

ger tie with her parent and would be more intellectually capable of understanding the separation and adjusting to the move.[389] Given a long enough period of time to allow for her to mature, the impact of the move on the child might eventually lessen in some cases.

Judges deciding reunification cases also should consider whether ordering a structured period of transition would be an appropriate step. If the sole consideration is the impact of the move on the child, then the judge may hold the key to the child's successful readjustment. Rather than denying custody to a parent because a rupture has occurred in the parent-child relationship, the court should take an active role in attempting to repair that bond. Especially when distance or visitation disputes with the nonparent have weakened the relationship, a period of gradual transition may be entirely appropriate and just might change the result.[390]

b. Support from Existing Case Law

Significant case law in many jurisdictions supports the psychological-impact-on-the-child test in reunification cases.[391] Once again, although judges speak in terms of rebutting presumptions, they identify those factors that justify defeating a

389. She probably also would be less vulnerable to the stresses and manipulations of the adults vying for her loyalties.

390. For example, in Lewis v. Taylor, 554 So. 2d 158 (La. Ct. App. 1989), the court ordered a short transition period, apparently to assure a smoother change for the children and to undo the damage done by the nonparents' resistance to visitation. *See id.* at 160, 164. If the structured transition period would exceed one year, however, it no longer would make practical sense to put off the final decision. At that point, the court must find for the nonparent. It would then require a showing of a substantial change in circumstances to reopen and modify the custody arrangement.

391. Commentators reviewing decisions in many states have noted a rather unsurprising fact: a court is more likely to grant custody to a nonparent when the child is already living with him or her. Hill, *supra* note 6, at 364 n.39; Stephanie H. Smith, Note, *Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution*, 17 J. FAM. L. 545, 550-52 (1978-1979). Courts have tended to engage in case-by-case analysis without announcing any policy considerations or definitions to explain this statistical tendency. The implicit theory behind the results begins to emerge only through the examination of many cases.

parent's claim for custody.[392] For this reason, their opinions are applicable to any sort of preference standard.

The Supreme Court of Colorado upheld a trial court finding that the nonparent had rebutted the presumption in favor of the parent when removing the child from a nonparent and awarding custody to the parent "would be extremely detrimental to the child and would likely result in permanent damage to her personality and development."[393] Similarly, Virginia courts measure whether returning custody to a parent would have a "significant harmful long term impact" on the child.[394] In Florida, a court may award custody to a nonparent if awarding custody to a parent would cause detriment to the child.[395] The Florida courts have defined detriment as:

> circumstances that produce or are likely to produce lasting mental, physical or emotional harm. . . . [It is] "more than the normal trauma caused to a child by uprooting him from familiar surroundings such as often occurs by reason of divorce, death of a parent or adoption. It contemplates a longer term adverse effect that transcends the normal adjustment period in such cases."[396]

Usually, reunification cases arise when the child has been living with the nonparent for many years.[397] The length of time alone is not dispositive of the harm the child will suffer if moved. The level of contact that the parent has maintained with the child is a very significant factor. A Florida appellate court overturned the trial court's award of custody to the maternal

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392. *See, e.g.*, Look v. Look, 315 N.E.2d 623, 626 (Ill. App. Ct. 1974).

393. Root v. Allen, 377 P.2d 117, 121 (Colo. 1962) (en banc).

394. Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986).

395. *In re* D.A.McW., 460 So. 2d 368, 370 (Fla. 1984). The court also may deprive the parent of custody if he is unfit. *Id.*

396. *In re* Matzen, 600 So. 2d 487, 490 (Fla. Dist. Ct. App. 1992) (quoting Filter v. Bennett, 554 So. 2d 1184, 1185 (Fla. Dist. Ct. App. 1989)). Although recognizing that any move or loss causes psychological harm to a child, the court viewed detriment as a black-or-white issue, not a continuum. The court specifically stated that "[d]etriment . . . cannot be measured in degrees. It either is present or it is not." *Id.*

397. For example, in *Bailes*, 340 S.E.2d 824, the child had been living with his stepmother for eight years when his father died, *id.* at 825. The court made its custody decision more than a decade after the child had first begun to live with his stepmother. *Id.* at 824-25.

grandparents despite the fact that the children had been living with their grandparents for six years.[398] The children had a strong relationship with their father and stepmother, and the court had no evidence that there were any special reasons why the children would not adjust to the move.[399] The Wisconsin Supreme Court also reversed a trial court's award of custody of an eight-year-old child to his maternal grandmother.[400] The child had lived with his grandmother since infancy, but his mother, who was sixteen years old at the time of his birth, had also lived with them for substantial periods of time.[401] The Wisconsin Supreme Court acknowledged that the boy and his grandmother were close, but also found a very strong and continuous relationship between the mother and her son.[402] In Connecticut, the Supreme Court upheld a trial court's award of custody of a child to his mother, even though the child had lived with his paternal grandparents for almost all of his five years.[403] The court upheld a trial court's finding that the normal adjustment difficulties inherent in the move were not sufficient to constitute detriment.[404] In all of these cases, the courts concluded that the child would suffer no significant long-term effects from returning to live with a parent.[405]

Courts are more likely to find that breaking the bond with the nonparent will cause long-term harm to the child when the child's bond with the parent is weak. The Supreme Court of Alaska endorsed this view when it overturned a trial court's grant of summary judgment awarding custody of a twelve-year-

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398. *Matzen*, 600 So. 2d at 490. At the time that the court ruled, the children were eight and ten years old. *See id.* at 488. The court previously had found the father unfit but determined that he was rehabilitated because he had remarried and was leading a stable life. *Id.* at 489.

399. *Id.* The court found that the father and the stepmother were aware of and quite sensitive to the problems that the children would face. *Id.*

400. Barstad v. Frazier, 348 N.W.2d 479 (Wis. 1984).

401. *Id.* at 481.

402. *Id.* at 489. The court concluded that this case did not present a situation in which an "extended disruption of parental custody, or other similar extraordinary circumstances . . . would drastically affect the welfare of the child." *Id.*

403. Perez v. Perez, 561 A.2d 907 (Conn. 1989).

404. *Id.* at 910, 916-17.

405. *Id.* at 916; *In re* Matzen, 600 So. 2d 487, 490 (Fla. Dist. Ct. App. 1992); *see Barstad*, 348 N.W.2d at 489.

old boy to his mother.[406] The boy had lived with the nonparent and his half-sister for ten years and had only sporadic contact with his mother during the previous several years.[407]

If the child has endured a major trauma or loss that makes her particularly vulnerable to the emotional stress of changing caregivers, courts are very likely to find that the parent's claim for custody does not prevail. In one of the classic third-party custody cases, the Supreme Court of Colorado granted custody of a ten-year-old girl to her stepfather after the death of her mother.[408] The child had an extremely close relationship with her stepfather and no relationship at all with her father.[409] In light of the trauma that this child had endured when her mother died and because her stepfather was her "one great stabilizing factor,"[410] the court found that continuity was absolutely necessary for this child.[411] The Supreme Court of Virginia has ruled similarly in favor of a third party by affirming a trial court's award of custody of a teenage boy to his stepmother after his father's death.[412] The court found that the child's grief over his father's death was intense, as evidenced by his threats to run away or even "to join his father" by committing suicide if the

406. Buness v. Gillen, 781 P.2d 985 (Alaska 1989). The court remanded the case for reconsideration. *Id.* at 989.

407. *Id.* at 986. The mother and her son had moved in with Mr. Buness when the boy was two years old. *Id.* Mr. Buness and Ms. Gillen did not marry, but they did have a daughter together. *Id.* The boy's natural father was not a party to the action nor did the boy have any relationship with him. *Id.*

408. Root v. Allen, 377 P.2d 117 (Colo. 1962) (en banc).

409. *Id.* at 118. The child had not lived with her father since she was less than a year old. *Id.* Although the father contributed to her support, his only contact with his daughter prior to the mother's death had consisted of a short visit when he identified himself only as a "friend of the family." *Id.*

410. *Id.* at 119.

411. *Id.* at 121.

412. Bailes v. Sours, 340 S.E.2d 824 (Va. 1986). The boy had lived with his father since he was a year old. *Id.* at 825. His father had been remarried to his stepmother for over ten years, and the child had visited with his mother only sporadically before his father's death. *Id.* at 825-26. The court stated that the visits between the mother and the son had become more regular and increasingly trouble-free since the father's death, *id.*, and hinted that the father had been less than cooperative in facilitating visitation, *see id.* The court focused on the existing relationship between the boy and his mother, regardless of the fault of others in eroding that relationship. *Id.* at 826.

court forced him to leave his stepmother.[413]

In some cases, a special reason causes the court to believe that a particular child would be incapable of adjusting to a change in custody. For example, a trial court in Minnesota held that a nonparent had rebutted the presumption by proving that an emotionally delayed child would suffer "severe emotional and behavioral regression" if she moved again, and the Supreme Court of Minnesota affirmed.[414] The Washington Court of Appeals remanded a case involving an abused boy with emotional problems because the trial court had not considered evidence of the special needs of a particularly fragile child.[415] Although

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413. *Id.* In other cases, an extreme reaction to the death of a custodial parent formed the basis for overcoming the presumption in favor of the surviving parent. In Turpen v. Turpen, 537 N.E.2d 537 (Ind. Ct. App. 1989), the child had lived with his father and his paternal grandparents for years, *id.* at 538. After the father's death, the child was distraught. *Id.* at 540. When asked by a therapist to draw his family, he drew a picture of his dead father and grandparents, but did not include his mother. *Id.* The court concluded that moving the boy would provoke a "crisis." *Id.*

414. Durkin v. Hinich, 442 N.W.2d 148, 153 (Minn. 1989). The child had spent time living in foster care and with her maternal grandmother by the time she was three and one-half years old. *Id.* at 150. Her father then placed her with a family friend. *Id.* After six months, the friend sought to formalize her custody of the child. *Id.* By the time the Minnesota Supreme Court heard the case, the child had lived with the nonparent for three years—almost half of her life. *Id.*

415. Stell v. Stell, 783 P.2d 615 (Wash. Ct. App. 1989). The child was a seven-year-old boy. *Id.* at 617. He had suffered abuse as an infant when in the care of his mother. *Id.* at 618. When the child was four and a half, his father voluntarily had placed him with the father's sister to assure that the boy had access to appropriate therapy. *Id.* After the boy had lived with his aunt for more than a year, she requested joint custody of the child. *Id.* The appellate court held that, to prevail, the aunt had to establish that "circumstances are such that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent." *Id.* at 620 (quoting *In re* Allen, 626 P.2d 16, 23 (Wash. Ct. App. 1981)). Because the nonparent had the burden of proof, the court concluded that the trial court had committed error by excluding evidence from the boy's therapist about the effect of a change in custody. *Id.* at 620-21.

In Hughes v. McKenzie, 539 So. 2d 965 (La. Ct. App.), *cert. denied*, 542 So. 2d 1388 (La. 1989), a Louisiana appellate court also stated that a child's fragile emotional condition could result in permanent harm if it removed the child from a stable home, *id.* at 971. The court specified that trial courts should consider any developmental difficulties, abnormal overdependency, or emotional instability, and whether the child had been in multiple placements. *Id.* at 970-71. However, the case before the court did not include any evidence of such conditions. The case involved a four-year-old child who had been living with the mother's cousin since birth, with the parents' initial consent. *Id.* at 966. The length of time that the child had been with

most of these cases focus on the emotional needs of the child, one court found the unique physical needs of the child sufficient to overcome the parental presumption and granted custody to a stepparent because she was the only caretaker able to cope with the child's hearing impairment.[416]

c. Burden and Quantum of Proof

The nonparent must have the burden of proving that the move will cause long-term serious psychological harm to the child.[417] The nonparent bears the burden of persuasion for all of the reasons that make the preference standard the appropriate test in the first place. It also would be very difficult for the parent to prove a negative—that the move would *not* cause the child serious harm in the future.

Nonetheless, the nonparent cannot easily prove the likelihood of a future occurrence. Further, that future occurrence is a very important consideration—whether the child will suffer significant emotional harm. The risk of an error is serious. Requiring too high a level of proof would undermine the goal of putting the child's long-term needs at the fore. The preference should function to reunite most parents with their children, but it must not make it impossible for the nonparent to prevail when such an outcome is warranted. For these reasons, the nonparent should have the burden of proving the impact on the child only by a preponderance of the evidence.[418]

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the nonparent and the lack of a strong relationship with her parents more properly explained the court's decision to affirm the trial court's award of custody to the nonparent. However, because the court described in detail the instability of the parents' marriage, including the father's adultery with another young family member, *id.* at 970, the decision is more a criticism of parental conduct than a detailed analysis of the impact of a move on the child.

416. In *Allen*, 626 P.2d 16, a stepmother prevailed in a custody dispute with the child's natural father after their divorce. The child was hearing-impaired, and the court was persuaded by the fact that, when the family was intact, it was the stepmother who had learned sign language and had attended to the child's special needs. *Id.* at 23. Under one approach, this case would not constitute a third-party custody case, but instead a parent-versus-parent case best decided under a best interests test. *See supra* part II.A.1.b.

417. The nonparent should bear the burden of persuasion, regardless of which party initiated the action.

418. The Court in Santosky v. Kramer, 455 U.S. 745 (1982), did not require the

D. Proposed Legislation

A third-party custody statute, even one that incorporates all of the recommendations in this Article, cannot stand on its own in every jurisdiction. Lawmakers must tailor it to fit into the spaces left by the subject matter jurisdiction and standing rules of each state.

Policymakers must recognize the similarities among all child removal systems and should set certain goals for themselves when making any necessary adjustments to the proposed third-party custody statute. First, the various statutes and court systems that address custody, guardianship, or any other child removal provisions should have a unitary test, or at least consistently defined standards. Such uniformity removes the forum-shopping potential because the result would not differ depending on an accident or manipulation of jurisdiction. Second, the burden and levels of proof should not differ because of procedural or jurisdictional considerations, such as which party is the movant, or in which court the movant files the claim for custody.[419]

The statute proposed in this Article assumes that nonparents have standing to initiate a removal case, at least through a permissive intervention rule. Substantively, however, a jurisdiction can achieve a result similar to the one recommended in the proposed legislation by denying the nonparent standing. The nonparent would then have to pursue the matter in a juvenile or probate court, where the court would apply a test with a strong preference for the parent. However, efficiency concerns suggest that allowing removal cases to proceed, at least through intervention into an existing case between the parents, is the better approach. If a custody action between the parents is pending

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use of a clear and convincing standard because the case was not a termination action, *id.* at 756-57. In some states, however, the adoption of a clear and convincing standard may be preferable. The reunification case burden and level of proof standards should be consistent with the standards by which a parent can resume custody or guardianship in an abuse and neglect case.

419. There is also no logical basis for a difference in the parties' and the child's access to affordable or free counsel and to support services. Although states would experience a significant budgetary impact if they had to offer the same services to third-party custody parties that they offer to individuals involved in child abuse and neglect proceedings, that issue is beyond the scope of this Article.

and there is a genuine fitness question as to both parents, it wastes everyone's time, as well as their financial and emotional resources, to require the nonparents to commence a separate action in another court.

AN ACT CONCERNING CUSTODY DISPUTES BETWEEN PARENTS AND NONPARENTS

A. DEFINITIONS

1. Parent: A parent is any person who is the biological parent of a child or who has adopted a child, if the adoption is final.

2. Nonparent: A nonparent is any person who is not a parent, including a grandparent, a stepparent, another relative related by blood or marriage, a foster parent, or a prospective adoptive parent, whether or not the individual is currently providing custodial care for the child.

3. Third-party custody proceeding: A third-party custody proceeding is a child custody proceeding between a parent and a nonparent, whether of the same or of the opposite gender. This category includes disputes between a parent and a prospective adoptive parent or parents who have been caring for the child. This category does not include:

a. proceedings between two women who both have a biological connection to the child, one by contributing the ovum and one by gestating the fetus; or

b. proceedings that arise out of a failed surrogacy or sperm donation agreement; or

c. proceedings that arise because the child is living with a nonparent as a result of a kidnapping or custodial interference.

4. Removal case: A removal case is a third-party custody proceeding in which:

a. the child is living with the parent; or

b. the child has been living with the nonparent for less than six months; and there is no court order granting custody to the nonparent; and the parent originally consented to the child living with the nonparent but has since withdrawn consent; or

c. the court previously removed the child from the parent by issuing a temporary emergency order without full hearing or based only on a finding of probable cause that the parent was incapable of meeting the child's basic needs.

5. Reunification case: A reunification case is a third-party custody proceeding in which:

a. the child has been in the custodial care of the nonparent for more than six months; and

b. the child has resided with the nonparent as a result of a court order in a removal case; or

c. the child's parent who is a party to the proceeding voluntarily placed the child with the nonparent, or consented to such placement, regardless of the reason; or

d. the child came to live with the nonparent because the other parent who is not a party to the proceeding arranged for the child to live with the nonparent.

It is not necessary for the parent who is a party to the proceeding and the child to have lived together previously.

B. STANDARD

1. Preference: In every third-party custody proceeding, there shall be a preference that the parent shall have custody of his or her child; except that in any dispute between a parent and a nonparent, whether of the same or of the opposite gender, who

have married or cohabitated together with the child for more than one year with the intention of creating a nuclear family, the court shall decide custody on the basis of the best interests of the child.

2. Overcoming the Preference:

a. In all third-party custody proceedings, the nonparent shall have the burden of overcoming the preference, regardless of the procedural posture of the case or which party initiated the complaint, or with whom the child currently is living.

b. Removal cases:

i. The preference shall be overcome only by clear and convincing evidence that the parent is presently unfit due to ongoing abuse or neglect of the child or that the parent is presently incapable of meeting the child's minimum needs for:

(A) love and affection;
(B) food, clothing, and medical care;
(C) adequate residential arrangements;
(D) social and educational guidance; and
(E) freedom from physical harm.

ii. The court shall make every effort to ensure that the parent and the child have access to supportive services to provide assistance to obviate the need for removal.

iii. If the court removes the child, the court shall:

(A) state in writing the reasons for removal and the steps that the court would require of the parent for eventual reunification;
(B) order that rehabilitative or supportive services be made available to the parent;
(C) order counseling for the parent and child, separately or together; and
(D) order the maximum feasible visitation between the parent and the child, including overnight visits when

appropriate and safe for the child. The court shall continue jurisdiction over the case for at least one year, regardless of whether the parties file any postjudgment motions. The court shall, sua sponte, hold a monitoring hearing no later than one year after entering judgment and at any time thereafter as the court deems necessary.

c. Reunification cases:

i. If the court has previously removed the child under the removal standard outlined in this Act or its equivalent, the parent has the burden of proving by a preponderance of the evidence that the original cause for the removal no longer exists and that he or she is capable of meeting the child's minimum needs, as defined in section (B)(2)(b)(1).

ii. If the child is residing with the nonparent without prior court order or finding of parental unfitness or incapacity, the nonparent may allege that the parent is unfit or incapable. The nonparent has the burden of proving by clear and convincing evidence that the parent is unfit or incapable, as defined in section (B)(2)(b)(1).

iii. If the court finds that the parent is not unfit or incapable, then the preference is overcome only by proof by a preponderance of the evidence that the change in custody would cause long-term and substantial psychological or emotional harm to the child.

iv. In determining whether the change in custody will cause long-term and substantial psychological or emotional harm, the court shall consider:

(A) the level of integration of the child in the nonparent's home, including the length of time the child has been there, his or her age at arrival, and his or her attachment to any half- or step-siblings;

(B) the strength of the existing bond between the child and the parent, including whether he or she has ever lived with the parent, and the nature and frequency of

any visitation;
(C) the likelihood that the bond with the parent could become stronger within a reasonable length of time;
(D) the parent's awareness of the child's potential readjustment problems and willingness to address them appropriately;
(E) the child's preference;
(F) whether the child has an expectation that the placement is temporary and that he or she will return to live with the parent; and
(G) any other reasons affecting the child's ability to adjust to a change in custody, including preexisting emotional or developmental problems.

v. The child's opinion shall not be dispositive but is relevant and probative evidence of his or her ability to adjust to the change in custody.

vi. If the court finds that an immediate change in custody will cause the child long-term psychological or emotional harm, the court shall then consider whether a gradual transition period, not to exceed one year, would lessen sufficiently the negative impact of the custody change. If so, the court shall enter transitional orders, including a gradual increase in visitation, designed to result in a change in custody within one year. If the court finds that a transition period of one year or less will not sufficiently reduce the harm to the child, the court shall order that the nonparent shall retain custody of the child.

vii. Once the court has found in favor of a nonparent in a reunification case, the court may modify custody only upon a finding of a substantial change in circumstances. Such change must be of a nature that indicates either:
(A) the nonparent is no longer capable of caring for the child; or
(B) the relationship between the parent and the child has strengthened such that the child prefers to live with the parent.

C. PROCESS

The court shall expedite the handling of third-party custody proceedings by court staff by engaging family service agencies to evaluate reunification cases and by giving any contested hearings priority on the trial list. In each case, the court shall consider the appropriateness of disregarding the length of time of any separation of parent and child caused by the litigation process. If the child was three years old or younger at the time he or she began living with the nonparent, however, the court shall not disregard the length of separation caused by the litigation process. The court also shall not disregard any delay that is solely the responsibility of, or the result of noncooperation by, the parent.

V. CONCLUSION

This Article provides a blueprint for deciding third-party custody cases. It recommends a system of categories and standards tailored to respond to the differing equitable concerns that each type of case presents. Each standard is designed to put the child's most salient needs at the forefront of the court's inquiry.

But will the blueprint work?[420] Using this statute, how would a court evaluate and decide each of the five illustrative stories identified at the beginning of this Article?

Case 1: If the mother can provide her child with his basic needs, through public assistance or through employment, she will retain custody, regardless of the material and even emotional advantages that the grandmother can offer or of the amount of love between the boy and his grandmother. Nothing

420. This very question implies that the current system does not work and requires some definition of the standards for judging whether any system "works." This Article suggests that trial judges should receive more and clearer direction and, regrettably, less discretion. However, the creation of more rigid categories increases the risk that those established will not be able to account for all the permutations presented by future cases. Questions remain both regarding whether the model statute suggested in this Article allows for just results in every imaginable variation, and, more importantly, regarding which results are "just." It is through the eyes and heart of the child that we should judge the result.

suggests that the mother is not meeting her child's minimum physical and emotional needs, so she should prevail.

Case 2: The court will decide custody by judging the husband and the wife under the traditional best-interests-of-the-child test. The wife's lack of a biological link to the child that she has raised for over ten years is irrelevant. If the mother has been the primary caretaker of the child, she probably will prevail.

Case 3: Although he deserves commendation for his faithful visits and support, the father will not prevail on those grounds alone. The court will weigh the strength of the bond between the child and her father and the bond between the child and her stepfather and half-siblings. The loss of her mother will play a significant role in this analysis. If the child cannot withstand more change, she may remain with her stepfather, at least for the time being. If the father is the child's main source of emotional support and comfort, however, he certainly will prevail.

Case 4: Even if the nonparents have a larger home and are highly educated, these factors should not affect the decision. The boys may be doing well in their current school, but they do wonder about their mother. The mother agrees to continue in counseling for herself and to include her children in the sessions when appropriate. Because the mother has visited the children only twice in the last year and has a new apartment that the boys have never seen, the court will order three months of gradually increasing visitation at the mother's home. Thereafter, the court will award her full custody.

Case 5: The father's diligence in pursuing contact with his child is commendable and certainly understandable, but the court will not award custody solely on that basis. The court will grant custody to the nonparents, with gradually increasing visitation for the father. Due to the child's young age and the complete absence of a prior relationship between the father and the daughter, it would be too traumatic for the child to change custody at any time within the next year. If the father and the

daughter continue to visit regularly, and, much later, she asks to live with him, he might then prevail on a motion to modify custody.

Many families appear to be in chaos and disarray, often suffering the effects of parental illness, substance abuse, and financial crises. More and more, family courts will have to decide when and for what reasons to remove a child from one or both parents. When the extended family and friends have stepped in, rather than the state foster care system, courts will end up addressing complex and painfully emotional reunification cases that surely will stretch and test the importance of the biological connection.

Some third-party custody cases are heartbreaking; all of them force tough custody choices. In each, courts must use standards designed to give the child the best chance of emerging from the process emotionally intact. The law must require the judges and, in their wake, the lawyers and litigants, to view the world through the eyes of the child at the center of the storm and to listen to the voice of the child.[421]

421. Professor Woodhouse has coined the term "generism" to define a critical perspective "that would evaluate parents' authority over children and their obligations to children, and to each other, through the lens of children's needs and experiences." Woodhouse, *supra* note 165, at 1749.