RETHINKING VISITATION: FROM A PARENTAL TO A RELATIONAL RIGHT

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I. INTRODUCTION

Visitation with children has been in the public and legal limelight for several decades. Despite the enormous interest evoked by this issue and the extensive concern with this right, confusion and dissatisfaction with existing legal rules surrounding visitation has only intensified. This article argues that the perplexity surrounding this issue reflects the absence of an underlying theory of visitation that would specify the interests and values that a right to visitation should aim to protect. It is further argued that the current perception of visitation rights as parental rights and the attempts to resolve the dilemmas prompted by visitation within a parental rights context thwart the development of a theory of visitation. The article proposes an alternative perspective on these dilemmas that challenges the fundamental premise of visitation as a *parental* right and as an integral component of the rights cluster associated with parental status. Instead, it is suggested to understand the right to visitation as independent of the cluster of rights associated with parental status and based on relational values.

In rejecting the understanding of visitation rights as parental rights, this article does not follow the child advocates' view of visitation rights merely as children's rights. Rather, visitation rights are considered as adults' rights.[1] Nevertheless, it is argued that the law's distinction between different adult claimants based on their parental status (or lack thereof) is flawed. This article seeks to redirect the law concerning adults' claims to enjoy relationships with children toward a legal model based on relational interests and on the needs of both children and adults.

The first part of the article deals with the current view of visitation as a parental right and with the implications of this perception. It describes the legal rules based on this approach, which distinguish between claimants of visitation rights on grounds of parental status or lack thereof. Then it addresses the growing critique of traditional visitation rules in the wake of extensive changes in family structure and their effect on the meaningful relationships that children

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1. This framework of analysis does not attempt to challenge the rights of children to maintain significant relationships in their lives, but rather recognizes that adults too may have interests in maintaining relationships with children. These interests should also be legally recognized and protected.

form with adults, whether or not they are legally recognized as their parents. Following, there is an examination of the legislative and judicial reactions to this critique and the deep confusion that plagues this area of law, which culminated in the *Troxel v. Granville*[2] decision of the Supreme Court.

The article argues that the current confusion concerning visitation can be attributed to the existence of two separate and conflicting notions of visitation appearing in case law, legislation, and jurisprudence. The first and more overt notion emphasizes the underlying relational values, which recognize the interests of adults who have nurtured and cared for children and enable children to maintain significant relationships in their lives. The second and more implicit notion embodies remnants of the perception of children as their parents' property, extolling the institution of marriage and the nuclear family as the preferred model. The co-existence of these two conflicting subtexts within visitation jurisprudence thwarts the development of a visitation theory and perpetuates turmoil in this legal domain.

The article demonstrates that the understanding of visitation as a parental right, which marginalizes the nurture and care of children and disregards their relational interests, is incompatible with a relational understating of visitation. Only by detaching visitation from the cluster of rights, privileges, and responsibilities comprised in parental status can we begin to construe it as a relational right and develop a coherent visitation theory.

Detaching visitation from the bundle of rights associated with parenthood will transform not only the right to visitation but legal parenthood itself, strengthening the tie between child rearing and rights considered parental. Note that, although this article seeks to detach one element from the cluster of rights associated with parenthood, it does not pave the way for the unbundling of legal parenthood. Parental status is significant, and, at least partly, this significance stems from the exclusiveness of the parental status. An additional advantage of the proposal made in this article, then, is that it enables the preservation of parental exclusivity while recognizing the visitation rights of both parents and non-parents.

II. VISITATION AS A PARENTAL RIGHT

The right to visitation is generally perceived as a parental right, part of the cluster of rights associated with parental status. This understanding is evident mainly in two basic principles of visitation rules. First, visitation rights are considered to arise from the very fact of parenthood, so that parents are entitled to this right simply by being legally recognized as parents. Second, visitation rights are subject to the general rule of parental exclusivity: only a child's legal parents have rights considered parental, and "non-parents cannot acquire them."[3] Thus, whereas parents are usually entitled to visitation, non-parents are not. Note that *a right* to visitation, as opposed to merely a privilege to visit a

2. 530 U.S. 57 *2000).

3. 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, 883 (1984). For current exceptions to this general rule, *see* infra notes 35–42 and accompanying text.

child, also entails a duty.[4] Custodial parents in particular are under a minimal duty of non-interference toward a person granted visitation rights.

A. Parental Visitation Rights

Parents' rights to visitation are considered natural, inherent, and arising from the very fact of parenthood.[5] The parental right of visitation is considered, absent custody, to protect the parents' interest in the companionship of their children.[6] Parental visitation rights are strong and granted as a matter of entitlement, so that courts are usually reluctant to deny them or even restrict them.[7]

Ostensibly, parents' visitation rights are subject to the "best interest of the child" standard, but this is not an accurate description of the law as presently applied.[8] Visitation rights are granted to parents even when the parent making the request has never lived with the child or never demonstrated any willingness or even any desire to have custody of the child.[9] Most courts are averse to deny visitation to legally recognized parents, even in cases of abusive parents, where supervised visitation seems sufficient to guard the child against serious danger.[10] Even where a child expresses unwillingness to spend time with the parent, courts will generally refuse to deny or suspend parents' visitations, which are routinely ordered over children's objections.[11] Indeed, a parent will be

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4. *Cf.* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1374–76 (1994) (discussing the difference between parental child-rearing rights and parental child-rearing privileges).

5. *See, e.g.*, In re Marriage of L.R., 559 N.E.2d 779, 789 (Ill. App. Ct. 1990); Chandler v. Bishop, 702 A.2d 813, 817–18 (N.H. 1997).

6. The right of parents to control the upbringing of their children was acknowledged by the Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). For the weight and importance that is attributed to this right, see Santosky v. Kramer, 455 U.S. 745, 753 (1982) (holding that a state must use due process to deny parents the right to their children).

7. *See, e.g.*, In re Marriage of Diehl, 221 Ill. App. 3d 410, 429 (Ill. App. Ct. 1991).

8. James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 932–33 (2003). The "best interest of the child" standard does play some role in determining the amount and particular form of visitation. But here as well, the presumption in most jurisdictions is that non-custodial parents should receive "standard visitation"—understood as weekend-long stays every other week, one overnight every week, and a couple of weeks in the summer—absent a showing that this is likely to significantly harm the child. *Id*. at 938.

9. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1369 (1994); Dwyer, *supra* note 8, at 934.

10. Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 271 (1999); Dwyer, *supra* note 8, at 936. This interpretation stretches the best interest of the child standard to its outer limits.

11. Cynthia E. Cordle, Note, *Note: Open Adoption: The Need for Legislative Action*, 2 VA. J. SOC. POL'Y & L. 275, 295–96 (1995). *See also* Michael J. Lewinski, Note, *Visitation Beyond the Traditional Limitations*, 60 IND. L. J. 191, 198 (1984); Dwyer, *supra* note 8, at 936–37. Cases of children expressly opposing visitation involve mostly older children, and the issues they raise are thus different from the ones I discuss in this article. Nevertheless, I found it worthy to mention these cases to exemplify the strength of parental visitation rights. Practically, older children can usually avoid spending time with a non-custodial parent by not complying with court orders. Usually, courts would not cut off child support or use extreme measures such as ordering police enforcement of visitation orders,

denied visitation rights only under exceptional and rare circumstances, usually when there is a clear showing of physical or emotional danger to the child.[12]

Some scholars have even suggested that parental visitation rights are constitutionally protected.[13] So far, no Supreme Court case has overtly recognized visitation as a fundamental interest of non-custodial parents, entitling them to substantial due process. Nevertheless, several decisions have recognized the interests of non-custodial parents in having a relationship with their children as a liberty interest sufficient to warrant application of the procedural due process doctrine.[14] Federal and state courts have occasionally interpreted these Supreme Court rulings as suggesting that parental visitation rights are constitutionally protected.[15] Other courts, however, have declined to recognize constitutional protection of parental visitation rights.[16]

While the constitutionality of parents' visitation rights is still undecided, the strength of parental visitation rights is unquestionable.[17] For purposes of this

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although children have occasionally been jailed to coerce them to visit the non-custodial parent. Dwyer, *supra* note 8, at 937.

12. 24A Am. Jur. 2d *Divorce and Separation* § 973 (2008); Uniform Marriage and Divorce Act § 407.

13. *See, e.g.*, Steven L. Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121, 124–39.

14. *See, e.g.*, *Santosky*, 455 U.S. at 745. In *Santosky*, the Supreme Court struck down a New York law that terminated parental rights if the state proved by a "fair preponderance of the evidence" that the child was permanently neglected. The Court held that a parent's right to raise his or her child could be terminated only upon "clear and convincing" proof that the child was neglected. *Id*. at 769. "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Id.* at 753. Thus, the interests of parents in visiting and communication with their children after temporarily losing custody were acknowledged by the Court as important enough to entitle the parent to procedural protections mandated by the Due Process Clause. In Armstrong v. Manzo, 380 U.S. 545, 550 (1965), the Court held that failure to give a non-custodial parent notice of an adoption proceeding "violated the most rudimentary demands of due process of law." The Court thus recognized the interest of a divorced non-custodial father in the preservation of his visitation rights as a "liberty interest" sufficient to warrant application of procedural due process doctrine.

15. *See, e.g.*, Franz v. United States, 707 F.2d 582, 594–95 (D.C. Cir. 1983). *See also* In re C.J., 729 A. 2d 89, 94 (Pa. Super. 1999); Hoversten v. Superior Court, 74 Cal. App. 4th 636, 641 (Cal. Ct. App. 1999); In re Julie M., 81 Cal. Rptr. 2d 354, 358 (Cal. Ct. App. 1999); McAlister v. Shaver, 633 So. 2d 494, 496 (Fla. Dist. Ct. App. 1994).

16. *See, e.g.* Young v. County of Fulton, 999 F. Supp. 282, 286–87 (N.D.N.Y. 1998) ("The plaintiff has failed to set forth even one case which establishes that visitation, as opposed to custody, is a constitutionally protected liberty interest of a parent who does not have custody"); In re Marriage of Brewer, 760 P.2d 1225, 1227 (Kan. Ct. App. 1988). *See also* Mendez v. Greening, 814 P.2d 42 (Kan. Ct. App., 1991) (conditioning visitation on payment of support did not violate the father's constitutional rights).

17. Some scholars have criticized the one-sided nature of parents' visitation rights; namely, that the visitation rights of parents that courts and legislators seem so eager to protect are not reciprocal. *See, e.g.*, Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 U.C.L.A. L. REV. 1415, 1468 (1991). Currently, a child does not have a legal right of visitation with her parents. Courts have refused to recognize such a right and rejected claims to compel visitation. *See, e.g.*, Louden v. Olpin, 118 Cal. App. 3d 565, 567; Dana v. Dana, 789 P.2d 726, 730 (Utah App. 1990); In re Joshua M., 274 Cal. Rptr. 222, 225 (1990) (holding that a father may terminate his parental rights over the objection of the child's mother). Courts have also denied children's claims for compensation for emotional damage allegedly resulting from the lack of parental companionship. *See, e.g.*, Burnette v. Wahl, 588 P.2d 1105, 1112 (Or. 1978).

article, doubts over the constitutionality of parental visitation rights attest that these rights represent an exception in the cluster of rights associated with parenthood. Visitation provides the only means to enable a non-custodial parent to maintain a relationship with the child. In essence, denying visitation is tantamount to terminating the parental rights of the non-custodial parent. Nevertheless, the constitutionality of parents' visitation rights remains debatable, unlike other parental rights associated with custody whose constitutionality has long been recognized.[18]

B. The Traditional View: Denying Visitation Rights to Non-Parents

Since visitation is considered part of the cluster of rights associated with parenthood, non-parents have usually been barred from claiming visitation rights. Contrary to the almost absolute right of parents to visitation, the interests of non-parents in developing or maintaining relationships with children have not traditionally been respected, absent special circumstances, legal recognition, or protection.[19] The law has created a stark dichotomy between "parents" and "non-parents," and parenthood has generally been considered an exclusive status where only a child's legal parents could claim rights with respect to the child.[20] More recently, as is discussed in more detail in another section, some exceptions have emerged to the complete exclusivity of parenthood.[21] Nevertheless, barring special statutory provisions, non-parents are not held to have any rights to visitation, constitutional or otherwise.

When non-parents seek to protect their interests in a relationship with a child by making a claim for visitation, they often encounter the countervailing (constitutional) rights of parents. The United States Constitution has long been construed to protect parents' exclusive authority to make childrearing decisions,[22] including the right to decide with whom their children shall associate.[23] Legally, non-parents are often considered "outsiders" who threaten the parent-child relationship. Non-parents may be characterized as "third parties" and even "strangers" to a child, especially when the legal system assesses their request for visitation.[24] This understanding involves implications for their visitation claims as well because, under the Constitution, a right to

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18. *See infra* note 22.

19. See *infra* notes 22–23 and accompanying text.

20. Bartlett, *supra* note 3, at 883.

21. *See infra* section 3.A.

22. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 401 (1923). *See also* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

23. The paradigmatic example is, of course, Troxel v. Granville, 530 U.S. 57 (2000). For a detailed discussion of *Troxel*, *see infra* notes 48–57 and accompanying text.

24. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1786 n. 150 (1993). The terms "third party" or "stranger" denote disconnection, detachment, and even a threat. In reality, however, many of those referred to as "third parties" and "strangers" are hardly detached from the child's life. Thus, for instance, the term "strangers" was used to describe grandparents. *Id.* It has also been used to describe a surrogate mother. Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 UCLA L. REV. 637, 684–85 (1993). On these grounds, I have chosen to use the term "non parents."

privacy is recognized in families and in the parent-child relationship, giving them a private realm that cannot be entered.[25] The Constitution, then, has also been interpreted as providing shelter to the parent-child relationship by creating a boundary that protects parents and their children from outside interference.[26]

III. CHALLENGING TRADITIONAL VISITATION RULES

The last decades of the twentieth century witnessed growing unease with traditional legal conceptions of family and parenthood, including traditional visitation laws. The main reason for the ongoing discontent with existing laws has been the changing reality of the American family, partly due to changes in social norms: the high rate of divorce, the growing numbers of blended (or "step") families and of single-parent families, the increase in the proportion of children born outside of marriage, and the emergence of new gay and lesbian families.[27] In addition, advancements in medical technology have radically expanded the range of procreative possibilities, undermining traditional conceptions of procreation and parenthood.[28]

This confluence of changing social norms and advancement in reproductive technologies has had a tremendous effect on the family relationships between children and adults. An ever increasing number of children have begun to form strong and meaningful attachments with adults who are not legally recognized as their parents, and these relationships have challenged the legal system in a multitude of ways.[29] With visitation defined as a parental right and parenthood as exclusive, these relationships between children and non-parental adults have been denied recognition and protection under the law. Stepparents, partners of

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25. *See, e.g.*, *Prince*, 321 U.S. at 166; Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

26. Prior to *Troxel*, several state courts found that third party visitations violated family privacy. *See, e.g.* Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993). The plurality's decision in *Troxel*, however, was not founded on the parents' or the family's right to privacy but on the parental autonomy to make childrearing decisions. See *infra* notes 51–53 and accompanying text. Jennifer Nedelsky is critical of the notion of legal rights as boundaries and of this understanding of the right to privacy in particular. According to Nedelsky, this view depicts the self as bounded and fosters independence and selfishness rather than interdependence and connectedness. Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162, 183–84 (1990). Nedelsky's critique, however, does not fully take into account the role of rights as boundaries around groups and, particularly, intimate groups such as the family. Ferdinand Schoeman, for example, argues that boundaries protecting relationships from intrusion are essential for the very possibility of intimate relationships. Boundaries, according to Schoeman, enable and foster the creation of a safe environment enabling individuals to expose and share their selves with each other. In his view, the notion of intimacy provides the basis for according the family a right to privacy. Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 6, 14–15 (1980). Elsewhere, I criticize the notion of rights as establishing boundaries, even around the family.

27. *Troxel*, 530 U.S. at 64. These variant family patterns are grouped under the category of "nontraditional" families. This term, however, is misleading, for it is used to describe all family patterns that depart from the model of the nuclear family, although they have in fact existed throughout human history. Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional Family,"* 1996 UTAH L. REV. 569, 570.

28. In particular, artificial insemination and in vitro fertilization. *See, e.g.*, Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 837–42 (2000).

29. Bartlett, *supra* note 3, at 883.

legal parents, grandparents, surrogate mothers, foster-parents—all have sought and generally failed to protect their interest in continuing their relationships with children by claiming visitation rights.[30] Their stories exemplify the ever-increasing disjunction between the new reality of people's lives and the dominant legal norms, and have captured public as well as academic attention.[31]

When legal rules cease to relate to people's actual lives, their justification is significantly undermined, hence the extensive criticism of family law in general and of existing visitation laws in particular.[32] The law's failure to protect the meaningful relationships shared by children and adults and its seeming disregard for their respective relational interests have yielded various proposals for its modification. In all fifty states, legislative and judicial initiatives have attempted to adapt the law to "the changing realities of the American family."[33]

The main change adopted in the various reforms has been the erosion of parental exclusivity concerning visitation and the recognition of visitation rights for various non-parents. This move has generated an intense debate, which is still ongoing: How can parental authority on child-rearing decisions be reconciled with the associational interests of both children and adults and with the best interest of the child standard? What place is there for parental exclusivity in the changing reality of family life? Whose interest in access to the child should be legally recognized and protected? What should be the basis for recognizing individuals' visitation rights?

These and various other dilemmas remain unresolved. In the following sections, this article reviews the legal reforms and the legal chaos surrounding visitation issues, which culminated in *Troxel v. Granville* and suggest that the

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30. *See, e.g.* Cox v. Williams, 502 N.W.2d 128, 131 (Wisc. 1993) (holding that a former stepparent did not have standing to petition for visitation); Pierce v. Pierce, 645 P.2d 1353, 1355 (Mont. 1982) (holding that a step-father could not adopt his step-child by "equitable adoption" and his parental rights terminated at the dissolution of the marriage); Worrell v. Elkhart County Office of Families & Children, 704 N.E.2d 1027, 1028 (Ind. 1998) (holding that former foster parents lacked standing to seek visitation with former foster child); In re Melissa M., 421 N.Y.S.2d 300, 304 (N.Y. Fam. Ct. 1979) (holding that former foster parents denied visitation rights after child was returned to biological father and stepmother); In re Corey Richardson, 53 Va. Cir. 128, 133 (Va. Cir. 2000) (denying former foster parents visitation rights after biological father regained custody); Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (denying lesbian co-mother visitation after the relationship with the biological mother had ended); Johnson v. Calvert, 851 P.2d 776, 782–83 (Cal. 1993) (denying legal rights for relationship with a child from a surrogate mother after deciding that legally, she was not the child's mother).

31. The literature on these questions is particularly extensive. *See, e.g.*, Bartlett, *supra* note 3; Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & LAW 505, 505 (1998); Dwyer, *supra* note 8; Kimberly P. Carr, *Alison D. v. Virginia M.: Neglecting the Best Interest of the Child in a Nontraditional Family*, 58 BROOKLYN L. REV. 1021, 1021 (1992); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1299 (1997); Gilbert G. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 358 (1994); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 329 (1995); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 83 (2004).

32. *See generally, supra* note 31.

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

turmoil and the impasse on the visitation issue can be attributed to the lack of an underlying theory of visitation.

IV. THE VISITATION DEBATE

A. The Disarray in Third-Party Visitation Statutes

Recognizing the changes affecting the American family, the legal system began to deviate from parental exclusivity on the issue of visitation and to acknowledge relationships between children and non-parents, *inter alia*, by enacting various third-party visitation statutes. Like most matters of family law, visitation issues are subject to state discretion, and all states have indeed recognized some form of third party visitation.[34] The common denominator of all the different statutes is the perception of visitation as a parental right. When recognized, visitation by non-parents is regarded as the exception. Except for this feature, however, the statutes and the case law concerning non-parents' visitation are "dazzlingly varied," and even a cursory review of them is sufficient to reveal vast inconsistencies and confusion.[35]

States diverge significantly as to who may be entitled to visitation rights. Although every state has enacted legislation according some visitation rights to grandparents, the circumstances under which visitation will be granted differ significantly from state to state.[36] Only about one-third of states provide for visitation by stepparents in their legislation, either expressly or in language that is broad enough to include them,[37] and state courts addressing visitation rights of stepparents have arrived at different conclusions.[38] The uncertainty and lack of consistency intensify with regard to other interested parties, such as foster parents, siblings, uncles, and cousins. Such interested parties have rarely been accorded visitation rights in states' legislation, and the courts have varied widely on whether they should be.[39]

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34. *See, e.g.*, *Troxel*, 530 U.S. at 73 n.1.

35. John DeWitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 FAM. L.Q. 163, 168 (2002); *Developments in the Law: IV. Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2054 (2003) [hereinafter *Changing Realities of Parenthood*].

36. Michael E. Ratner, *Note: In the Aftermath of Troxel v. Granville: Is Mediation the Answer?*, 39 FAM. CT. REV. 454, 455 (2001); Anne Marie Jackson, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 569 (1994); Christopher M. Bikus, Note, *One Step Forward, Two Steps Back*, 75 NEB. L. REV. 288, 293 (1996); John Dewitt Gregory, *Blood Ties: a Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 369–71 (1998); Michael Quintal, *Note, Court-ordered Families: an Overview of Grandparent-visitation Statutes*, 29 SUFFOLK U.L. REV. 835, 835 (1995).

37. Gregory, *supra* note 35, at 361.

38. *Compare* Finck v. O'Toole, 880 P.2d 624, 628 (Ariz. 1994) (en banc) (holding that stepparents lack standing to seek visitation) *with* Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 17 (Neb. 1991) (allowing the award of visitation to a stepparent), *and* Rhinehart v. Nowlin, 805 P.2d 88, 98–99 (N.M. Ct. App. 1990) (denying visitation to a stepparent due to hostile circumstances). *See also* Gregory, *supra* note 35, at 360–67; Diane L. Abraham, *California's Stepparent Visitation Statute*, 7 S. CAL. REV. L. & WOMEN'S STUD. 125 (1997).

39. Lewinski, *supra* note 11, at 195. For state differences concerning foster parents, *see, e.g.*, Gregory, *supra* note 35, at 367–69. Regarding siblings visitation, *compare* State ex rel. Noonan v. Noonan, 547 N.Y.S.2d 525, 527 (N.Y. Sup. Ct. 1989) (holding that half-siblings have standing to seek visitation) *with* Ken R. v Arthur Z., 682 A.2d 1267, 1269 (Pa. 1996) (holding that a sibling lacks

State laws, however, differ not only on who may seek visitation, but also regarding the circumstances in which visitation rights should be granted to non-parents and on the substantive standards that should govern the decision.[40] To give but a few examples: states differ on whether or not a disruption in family relations in the form of death or divorce is a precondition for awarding visitation to non-parents, or whether other requirements, such as mediation, should also be met prior to such a decision.[41] Visitation laws are indeed as varied as the different states, and the prevalent confusion is also evident in the frequent changes various states make in third-party visitation laws.[42]

Differences in third-party visitations laws between states are not intrinsically problematic and do not constitute a violation of "integrity," in Dworkin's terms.[43] Family matters always involve conflicting interests and policy considerations. Whenever children are concerned, emotions also tend to run high. Varied political and social forces have also influenced state legislation on visitation.[44] With so many interests, policy considerations, and emotions at play, and with intuitions pointing in conflicting directions, it is not surprising that people disagree on what the law should be and only plausible, and even inevitable, that different states should have developed different non-parents' visitation regimes.

This article's critique, then, does not target the variance in visitation rules for non-parents, although this fact alone can cause great uncertainty to family

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standing to seek visitation). Regarding aunts, uncles, and cousins, *compare* Youmans v. Ramos, 711 N.E.2D 165, 174 (Mass. 1999) (holding that an aunt who acted as a de facto parent has standing to obtain visitation) *and* MacDonald v. Quaglia, 658 A.2d 1343, 1346 (Pa. Super Ct. 1995) (granting a cousin visitation) *with* In re Katrina E., 636 N.Y.S.2d 53, 53 (N.Y. App. Div. 1996) (holding that an aunt and uncle have no standing to sue for visitation).

40. Russell M. Coombs, *Child Custody and Visitation by Non-Parents Under the New Uniform Child Custody Jurisdiction and Enforcement Act: A Rerun of Seize-and-Run*, 16 J. AM. ACAD. MATRIMONIAL LAW 1, 13–14 (1999).

41. Most states do condition non-parents visitation on a prior disruption of family life and are reluctant to award visitation over objection of parents in intact nuclear families. *See, e.g.* Gregory, *supra* note 35, at 168. For states awarding grandparents visitation in cases of dissolution of the relationship between the child's parents, or in cases of death of a parent or parents of the child, *see, e.g.*, MASS. GEN. LAWS Ch. 119, § 39D (2000); MINN. STAT. § 257C.08 (2002); NEB. REV. STAT. § 43-1802(1)(a) (1998); NEV. REV. STAT. § 125C.050(1)(2001); OHIO REV. CODE ANN. § 3109.11 (West Supp. 2003); 23 PA. CONS. STAT. ANN. § 5311 (West 2001).

42. Coombs, *supra* note 40, at 14. *See also* Patricia S. Fernandez, *The Status of Grandparents' Visitation Rights in Massachusetts*, 40 BOSTON B.J. 6, 6 (1996) (stating that the grandparent visitation statute in Massachusetts was amended a number of times between 1972 and 1996); Weathers v. Compton, 723 So. 2d 1284, 1285 (Ala. Ct. Civ, App. 1998) (summarizing frequent amendments of Alabama's grandparent visitation law).

43. "Integrity holds within political communities, not among them. . . . The American Constitution provides a federal system: it recognizes states as distinct political communities and assigns them sovereignty over many issues of principle. So there is no violation of political integrity in the fact that the tort laws of some states differ from those of others even over matters of principle." RONALD DWORKIN, LAW'S EMPIRE 185–86 (1986).

44. Third party visitation statutes, and particularly statutes awarding visitation rights to grandparents , were pushed by powerful lobbies, including the AARP (formerly known as the American Association of Retired Persons). Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM L. REV. 337, 372 (2002).

members.[45] The objection is to the lack of any principle or theory underlying the current variations of visitation laws among states. Statutes and case law on this issue were triggered by the rapidly changing social reality and by the pressures exerted by various political groups. Instead of developing these changes on solid theoretical grounds, stating the nature of visitation rights, the values that should underlie them, and how to reconcile these rights with parental authority, these changes seem like erratic, ad hoc responses to perceived injustices.[46] Hence, they fail to offer a calculated and coherent scheme that could serve as a basis for alternative jurisprudence. This disarray is evident in *Troxel v. Granville*,[47] the 2000 Supreme Court ruling that addressed the constitutionality of third party visitation statutes.

B. *Troxel v. Granville* and Its Aftermath

The extent to which third party visitation statutes infringe the constitutional rights of parents to make child rearing decisions has long been a contested issue.[48] Although various state supreme courts reached mixed rulings on this question during the 1990s,[49] the Supreme Court had denied review of cases involving third-party visitation prior to granting certiorari in *Troxel*.[50] The Court's decision to hear *Troxel*, therefore, generated expectations that the ruling would clarify some of the concerns pertaining to this issue. These expectations, however, were to be disappointed.

The statute under consideration at *Troxel* was a law permitting "any person" to petition for visitation rights "at any time," whenever such visitation was seen to be in the child's best interest.[51] Acting under this statute, a family court judge ordered the broadening of visitation rights granted to the children's paternal grandparents, contrary to the wishes of the children's mother.

The Court issued no majority opinion in this case. The Court was deeply split and issued six separate opinions. The Justices disagreed about whether the case should have been granted certiorari and, if so, whether it should have been

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45. *See, e.g.*, Coombs, *supra* note 40, at 13–17.

46. The confusion and absence of a coherent and principled jurisprudence are evident not only on visitation issues but on family matters in general. *See* Dolgin, *supra* note 44.

47. 530 U.S. 57 (2000).

48. *Changing Realities of Parenthood*, *supra* note 35, at 2056.

49. *Compare* Beagle v. Beagle, 678 So.2d 1271, 1276 (Fla. 1996) (holding that when a child was living with both natural parents, and at least one parent objected to the visitation, the grandparent visitation statute violated an otherwise fit parent's " fundamental right to raise their children"); Herbst v. Sayre, 971 P.2d 395, 395 (Okla. 1998) (holding that a grandparent visitation statute allowing disruption of an intact nuclear family against the wishes of both parents , was unconstitutional as applied because it violated the parents' rights to the custody and management of their minor child); Hawk v. Hawk, 855 S.W.2d 573, 573 (Tenn. 1993) (holding that a showing of harm is necessary before visitation rights may be granted to non-parents) *and* Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga. 1995) (holding that grandparents' visitation must be limited to instances where "failing to do so would be harmful to the child") *with* King v. King, 828 S.W.2d 630, 630 (Ky. 1992) (holding that grandparent visitation did not violate parental rights) *and* Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993) (holding that granting grandparents visitation rights for the best interests of the child was constitutional).

50. *See, e.g. King*, 828 S.W.2d at 630; H.F. v. T.F., 483 N.W.2d 803 (Wis. 1992).

51. WASH. REV. CODE § 26.10.160(3) (2000) (citing *Troxel*, 530 U.S. at 60).

considered as a facial or an as-applied challenge; about the scope, if any, of the proper constitutional protection accorded to parental rights; about whose interests should have been considered; and about various additional matters.[52] Justice O'Connor's plurality opinion, joined by three other Justices, digressed to fact-specific grounds and concluded that, on the facts of the case, the Washington family court had failed to show adequate deference for the mother's decision.[53]

The lack of a majority, the multiplicity of opinions, and the confusion characterizing each opinion have provided fertile ground for diverse and even contradictory interpretations of *Troxel*. Indeed, non-parental visitation cases attempting to follow the *Troxel* precedent are mixed and confused. Courts in different states have interpreted *Troxel* differently and even within states, variant understandings of *Troxel* have led to contradictory rulings as to the constitutionality of state statutes.[54] *Troxel* has also proven a rich vein for extensive academic attempts to discern the case's meaning and implications.[55] Not surprisingly, these scholarly analyses also offer contradictory readings of the case and its various opinions.[56] In many respects, *Troxel* seems to have only triggered further doubts regarding non-parents' visitation rights.[57] The confusion exposed in *Troxel* is exacerbated by the perplexity surrounding the meaning of legal parenthood.

C. The Malleability of Parental Status

The swift and extensive changes in family patterns and norms over the last decades have significantly challenged traditional conceptions of parenthood. Thus far, current law has failed to keep up with changing social norms and bio-technological changes; it has not produced clear and stable new principles by which legal parenthood can be determined. Questions about motherhood and fatherhood in cases of surrogacy, sperm donation, same-sex families, children

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52. Martin Guggenheim, however, contends that "the Court was in considerably more substantive agreement on the basic constitutional issues concerning third-party visitation statutes than is apparent from the number of opinions filed and the inability of any one opinion to capture a majority of views." Martin Guggenheim, *The Making of the Model Third-Party (Non-Parental) Contact Statute: The Reporter's Perspective*, 18 J. AM. ACAD. MATRIMONIAL L. 15, 20 (2002).

53. Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer joined Justice O'Connor's plurality opinion. Troxel v. Granville, 530 U.S. 57, 60 (2000).

54. *See, e.g.*, Dolgin, *supra* note 44, at 396–401 (reviewing conflicting cases from New York and California); Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14 (2003) (reviewing post-*Troxel* case law from different states, including Maine, West Virginia, Mississippi, Kansas, Iowa, and Oklahoma); Dwyer, *supra* note 8, at 977–84.

55. A recent Lexis search found 870 references to *Troxel* in the "US & Canadian Law Reviews, Combined" database, of which at least 202 seem to undertake an in-depth analysis of the case (addressing it at least ten times in their text).

56. *Compare, e.g.*, Dwyer, *supra* note 8, at 978 (interpreting the case as clearly having "put the breaks on the trend toward expansion of third-party visitation") *with Changing Realities of Parenthood*, *supra* note 35, at 2057–58 (interpreting *Troxel* as implicitly endorsing non-parents' visitation rights: "By leaving in place only a hazy presumption that parents act in the best interests of their children, the plurality has allowed plenty of room for states to grant [visitation] rights to non-parents[.]").

57. For an in-depth analysis of *Troxel*, *see* Dolgin, *supra* note 44.

born out of wedlock, and other family situations still occupy legislators and judges.[58] The problem of deciding who is a parent carries significant implications for visitation issues. Since visitation is considered a parental right, deciding whether a claimant for visitation is a parent and thus prima facie entitled to visitation, or a non-parent and thus generally not entitled to this right, is key to determining visitation rights. Given that legal parenthood is fluid, open, and indeterminate, distinguishing claimants who are parents from claimants who are non-parents can be complicated.

The difficulty of determining who exactly is a "parent" has negative implications for legal predictability. Also, the indeterminacy of legal parenthood broadens and distorts the scope of visitation issues. Claimants for visitation, particularly in non-traditional family situations, are encouraged to state their claim as one of visitation by parents, thus requiring consideration of their legal status as "parents." Two telling, highly publicized examples are the Supreme Court case of *Quilloin v. Walcott*[59] and the New York case of *Thomas S. v. Robin Y.*[60]

The common features of these different cases concern a biological male progenitor who maintained an ongoing relationship with the child, but neither initiated nor showed interest in initiating legal proceedings to be recognized as the child's legal father. After the relationship had continued for several years, access to the child was denied by the mother, who was the legal parent.[61] Only when access to the child was denied (in both cases when the child was approximately twelve years old) and the men were compelled to seek access through rights of visitation, did they initiate proceedings to be legally recognized as the children's respective fathers.[62] In *Thomas S.* in particular, it was evident that Thomas' sole concern was to continue his relationship with the child, Ry. Since the claimants' prospects of being awarded visitation rights as non-parents were almost non-existent, they had to take their chances on a paternity claim, which is far broader and substantially different.[63]

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58. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 110 (1989); Elisa B. v. Super. Ct., 117 P.3d 660, 660 (Cal. 2005); V.C. v. M.J.B., 748 A.2d 539, 539 (N.J. 2000); Rubano v. DiCenzo, 759 A.2d 959, 959 (R.I. 2000); Johnson v. Calvert, 851 P.2d 776, 776 (Cal. 1993); Thomas S. v. Robin Y., 599 N.Y.S. 2d 377, 377 (Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (App. Div. 1994).

59. 434 U.S. 246 (1978).

60. 599 N.Y.S. 2d 377 (Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (App. Div. 1994).

61. *Id.* In *Thomas S.*, the child lived with two lesbian mothers, and both were opposed to the child's continued contact with Thomas. Under the law, however, only the biological mother was considered a legal parent authorized to make decisions as to who should be allowed to associate with the child.

62. In *Quilloin*, the mother's husband wanted to adopt the child and the couple found that contact with Quilloin was disruptive. *See infra* notes 104–108 and accompanying text. In *Thomas S.*, access to the child was denied following a deterioration of the relationship between Thomas and the child's two lesbian mothers. 618 N.Y.S.2d at 358.

63. Indeed, once his status as father was not recognized by the Supreme Court, Quilloin's claim for visitation was succinctly denied. *Quillion*, 434 U.S. at 255. So was the claim of Thomas S., according to the New York family court's decision that was reversed on appeal. *Thomas S.*, 618 N.Y.S.2d at 358. Another example often cited, which broadens and distorts the dispute, is Michael H. v. Gerald D., 491 U.S. 110 (1989). See *infra* notes 114–118 and accompanying text.

Disputes over visitation thus become distorted into battles about who the child's parents really are and slide into demands for parental rights in toto, including custody, thereby muddling significant questions. Instead of considering whether the nature of the relationship between the claimant and the child justifies awarding visitation rights, and the potential implications of awarding visitation rights for the child's relationship with her custodians, the courts enter a debate about a different and larger issue: what makes one a parent.[64]

Another consequence of the confused meanings of legal parenthood is that it is subject to manipulation. Legal parenthood can easily be interpreted in ways that fit a desired outcome, including but not limited to visitation issues. A claimant adjudged to be worthy of visitation can be legally recognized as a parent and vice-versa; parental status can be denied to block visitation. Visitation, then, is not only derivative from prior recognition of legal parenthood but is also a factor in determining it.[65] The New York family court decision in *Thomas S.* again provides an example. Judge Kaufmann denied Thomas's paternity claim because he found that compulsory visitation between him and the child, Ry, would be harmful to the child by destabilizing her family unit and undermining her relationship with her two mothers and her sister.[66] Although these concerns may have been real and may have justified denying Thomas rights of visitation, they are (or should be) unrelated to the question of paternal status. This was indeed the point asserted by the appellate court, which reversed the decision and held that the benefit or harm to Ry as a result of Thomas's visitation was irrelevant to his paternity claim. These considerations, the appellate court held, could and should be addressed under the best interest of the child standard when considering Thomas's request for visitation (as a father).[67]

The appellate court's argument that the potential impact of Thomas's visitation was irrelevant to his paternity claim is in principle correct. Courts are

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64. Whereas in *Quilloin* the child explicitly stated a wish to continue visitations with Quilloin, in *Thomas S.*, the child expressed anxiety about continued visitations. As noted, both children were approximately twelve years old and thus of an age where their wishes should be considered. Once Quilloin was denied paternal status, however, the almost automatic result was the denial of visitation. The visitation question was not considered per se. Thomas S., on the other hand, was eventually recognized as the legal father, and although the appellate court stated that visitation was to be considered separately, it was obvious that a paternity determination also determined that visitation would take place. Thomas S., however, stopped the contest at this point and did not pursue his visitation rights. Susan Dominus, *Growing Up with Mom & Mom*, N.Y. TIMES, October 24, 2004, 6 (magazine) at 69 (an interview with the child, Ry, at the age of 22).

65. The idea of rights considered parental is that legal parenthood is a given and that all rights, duties, and obligations considered parental follow and are simply attached to the legal parent. For a critique of this idea, *see infra* notes 102, 152, and accompanying text.

66. Legally, Ry had no sister and only one (biological) mother. Judge Kaufmann's decision was at first indeed celebrated in lesbian circles for recognizing non-biological ties in lesbian families, adopting a functional approach to legal parenthood and family. But misgivings have been raised as to whether the functional approach really achieves what it attempts to do. *See, e.g.*, Brad Sears, *Winning Arguments/Losing Themselves: The (Dys)Functional Approach in* Thomas S. v. Robin Y., 29 HARV. C.R.-C.L. L. REV. 559, 566–74 (1994); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1324 (1997).

67. Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 362 (App. Div. 1994).

indeed required to determine visitation with parents guided by the best interest of the child. But parents' rights of visitation, as noted, are firm and denied only under extreme circumstances.[68] Under current law, then, denying visitation rights to protect a child from potential harm to her and her family requires us to negate the claimant's paternity.[69]

The malleability of legal parenthood, then, together with the prevalent understanding of visitation as a parental right, opens the way for the improper conflation of questions concerning visitation and legal parenthood.[70] The move toward recognition of third party visitation was supposed to alleviate the improper conflation of issues, as it enables claimants to make a claim for visitation without being recognized as parents.[71] Nonetheless, and especially following *Troxel*, visitation by non-parents is still an exception whereas visitation by parents is the well established rule. As long as visitation is understood as a parental right, then, questions of visitation and questions concerning parenthood will remain entangled.

This is also evident in the use of such notions as de facto parentage, psychological parenting, or functional parenthood. These notions were developed in response to the changing reality of parenthood and child-adult familial relationship, and they enable the conferral of rights considered parental upon individuals who are not legally recognized as parents. As these notions suggest, although these individual claimants are not legally recognized as parents, they should be. Janet Dolgin offers recent examples of state courts using concepts such as de facto parentage or psychological parentage to award visitation rights to claimants by distinguishing these cases from *Troxel*, which had purportedly addressed the visitation rights of non-parents who did not *function* as parents.[72] These notions do blur the once clear line dividing parents from non-parents, but they re-establish the understanding of visitation as a parental right and its connection to all other rights considered parental. Individuals recognized as de facto, functional, or psychological parents can make a claim for all rights considered parental, not only to visitation. A visitation claim submitted by a de facto, functional, or psychological parent can, just like a paternity claim, reopen the way to a claim for parental rights in toto.[73]

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68. *See supra* notes 8–12 and accompanying text.

69. Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 1008 (1999).

70. As in *Quilloin* and in *Michael H.*, denying paternity in these cases was also meant to enable another man to assume the role of legal parent through adoption or the presumption of paternity, not only to block visitation. The malleability of legal parenthood, however, again enabled the Court to reach the desired outcome. The focus tends to be on the family rather than on the individual child, especially if the case concerns a traditional nuclear model. *See infra* notes 102–122 and accompanying text.

71. Sears, *supra* note 66, at 575.

72. Dolgin, *supra* note 44, at 401–04, referring mainly to Rideout v. Riendeau, 761 A.2d 291, 303 (Me. 2000) and Rubano v. DiCenzo, 759 A.2d 959, 969 (R.I. 2000).

73. *See infra* notes 165 and 166 and accompanying text.

D. Reformulating the Question as a Way Out of the Maze

The disarray of third party visitation status and the Supreme Court's confusion in *Troxel* reveal the absence of an underlying theory of visitation that would specify the interests and values that a right to visitation should aim to protect. Furthermore, as long as parental status is the main distinguishing factor between visitation claimants, the malleability of legal parenthood and concepts such as de facto parenthood compound the current confusion about visitation rights, especially by non-parents. It also clouds the real questions that should be debated concerning these rights, and thus thwarts the development of a theory of visitation.

In developing a comprehensive theory of visitation, it should not be assumed that visitation is a parental right. Rather than asking why *only* the parents' interests in their relationship with their children should be protected, this article challenges the basic assumptions of the existing laws and asks instead how rights of visitation should be understood and what should be the basis for recognizing such rights.

V. VISITATION AS A PARENTAL RIGHT: AN ADEQUATE CONSTRUCT?

The primary consideration in awarding visitation, from the children's perspective, is to maintain the continuity of meaningful relationships in their lives. Further, when adults are concerned, awarding visitation should primarily reward nurture and care for children rather than the biological relationship of the adult to the child. Visitation conceived as a parental right marginalizes both the children's relational interests and the nurture and care of children. It instead emphasizes considerations such as biology that, while not entirely irrelevant, should be secondary in constructing a right to visitation. The emphasis on biology and parental status leaves room for remnants of the perception of children as their parents' property and policy considerations that elevate marriage and the nuclear family as superior institutions.

Questioning the prevalent understanding of visitation as a parental right does not suggest that parents are not normally entitled to visitation or do not have a special relationship with their children that is qualitatively different from the relationships children have with grandparents, stepparents, and other relatives. By the theory presented in this article most parents would still be entitled to visitation rights. The basis for this entitlement, however, would be their active role as parents in nurturing and caring for their children rather than their parental status.

A. Children's Relational Interests

In light of the central role that children's interests should play in constructing the legal rules that affect them, this section begins the case against the conception of visitation as a parental right by discussing children's interests in the issue of visitation. Talking about children's interests in order to challenge (and even more so in order to justify) adults' rights requires a short pause. Children's interests can and often should be protected through children's own

rights.[74] Recognizing children's rights, however, does not preclude recognizing adults' rights in relation to children. If we cherish children's interests, however, we should guarantee that when there are available two alternative legal models for recognizing adults' interests and protecting them through rights, the preferable one is the one more compatible with children's interests.[75]

The current consensus on children's relational interests is that children can form multiple relationships, which are essential for their social developmental needs. Time with legal parents is insufficient to meet those needs, and grandparents, other adult relatives, stepparents, and other adults play roles in children's lives. When all the relationships a child enjoys are consensual, a child will only benefit from this broad web of multiple relationships.[76] Dilemmas arise when one of the child's existing or potential relationships is not welcomed by the child's custodial parent, creating a situation that will lead to a demand for visitation rights.

Two less than ideal alternatives exist in these cases.[77] The first is to maintain the multiple relationships in the child's life while exposing her to conflict and burdening her relationship with her custodian.[78] The second is to preserve a

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74. *See*, *e.g.*, JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006). While recognizing children's relationship rights, Dwyer does not utterly reject various adults' right to spend time with a child. Nonetheless he argues that such rights should be no different from rights adults have vis-à-vis other adults, which are contingent on reciprocal choice to be supplied by a surrogate when children are concerned.

75. Some even contend that adults are occasionally granted rights not in order to protect their own interests, but rather to serve children's interests. Meir Dan-Cohen calls these derivative rights because they are recognized in A out of concern for B. Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1233 (1991). Furthermore, some argue that recognizing adults' rights is sometimes a better way of protecting children's interests, given that children depend on adults for the exercise of their rights and thus become subject to abuse and manipulation. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005). Visitation is particularly conducive to the use of a children's rights vocabulary to conceal adults' interests. Emily Buss, *Children's Associational Rights?: Why Less is More*, 11 WM & MARY BILL OF RTS J. 1101, 1102 (2003). I do not attempt to claim that adults' visitation rights are merely derivative rights meant to secure children's interests. Rather my claim as stated in the text is much more modest and merely offers to choose a model for adults' rights that is more compatible with children's interests.

76. Even Joseph Goldstein, Anna Freud and Albert Solnit, who are associated the most with the position of securing one significant attachment for a child. *See infra* notes 79–83 and accompanying text) acknowledged the desirability of multiple and varied bonds for children. Joseph Goldstein indeed stated in an interview that "it is a misperception that we are talking about a single person. *Interview with Joseph Goldstein*, 12 N.Y.U. REV. L. & SOC. CHANGE 575, 579 (1983–1984). Nonetheless, the trio argued that the benefits a child acquires from multiple attachments are conditioned upon positive relation—or at least the lack of hostility and negative relations—among the adults involved. They thus emphasized that the existence of such a network of attachments, although it might and even should be encouraged, must remain voluntary or consensual. *See infra* notes 81–83 and accompanying text.

77. I follow Goldstein, Freud, and Solnit's proposal to use the "least detrimental alternative" for a child rather than the "best interests of the child" as a reminder of the limits of what can be attained within the limits of the law. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 6 (2d ed. 1979).

78. Who, as recalled, is under a duty at least of not interfering in the relationship between the child and the holder of visitation rights, and sometimes is even under a duty of cooperation. *See* text accompanying *supra* note 4 and accompanying text.

stable relationship with the custodian parent and allow additional relationships only as approved by the child's custodian.

Preference for stability in a child's life based on protecting her relationship with her custodian is the position that Joseph Goldstein, Anna Freud, and Albert Solnit adopt.[79] Their stance is also the most extreme, since they suggest that, following divorce, even visitation rights of non-custodial parents should be eliminated.[80] They do not disregard the significance of the relationship between children and their non-custodial parents. Indeed, their advice in situations of divorce is to encourage custodial parents to facilitate visitation between the non-custodial parent and the child. They even suggest that, other things being equal, courts should award custody to the parent most willing to provide the child opportunities for contact with the other parent. They argue, however, that children benefit from multiple ties on the condition that the relationships between the adults involved are positive, or at least not hostile and negative.

In their view, any visitation the custodial parent considers undesirable may expose the child to conflicting loyalties, compromise the intimacy between the child and the custodial parent, and shatter the child's required trust in the parent's autonomy when exercising control over the child's life.[81] Goldstein, Freud, and Solnit further contend that the threat that compulsory visitation poses to the child's relationship with her custodian is in no way offset by any of visitation's potential benefits, due to the limited relationship a child can form with an individual who is merely visiting.[82] They also argue that facilitating children's positive relationships with two people in conflict with one another is beyond the courts' capacity.[83]

Goldstein, Freud, and Solnit's position is rather extreme, as noted, and highly controversial in academic circles. Their numerous critics focus on the benefits of maintaining multiple relationships in children's lives, despite potential conflicts. Studies conducted in various contexts point out the

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79. GOLDSTEIN ET AL., *supra* note 77.

80. The anti-visitation proposal of Goldstein, Freud, and Solnit relies mainly on the authors' psychoanalytic theory of child development. Nonetheless, the authors' depiction of their work as scientific has been heavily criticized. *See, e.g.*, Daniel Katkin, Bruce Bullington & Murray Levine, *Above and Beyond the Best Interest of the Child: An Inquiry into the Relationship Between Social Science and Social Action*, 8 LAW & SOCIETY REV. 669, 672–73 (1974). The thrust of the argument against the authors was that they had failed to provide empirical basis for their contentions. *Id. See also* Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policy Making: Custody Determinations and Divorce*, 1987 WIS. L. REV. 107, 145–46; Robert D. Felner & Stephanie S. Farber, *Social Policy for Child Custody: A Multidisciplinary Framework*, 50 AMER. J. ORTHOPSYCHIATRY 341, 341 (1980); Michael S. Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 MICH. L. REV. 645, 664 (1980); Peter L. Strauss & Joanna B. Strauss, Book Review, 74 COLUM. L. REV. 996, 1002 (1974) (reviewing GOLDSTEIN ET AL., *supra* note 77).

81. GOLDSTEIN ET AL., *supra* note 77, at 37–38. The authors qualify their argument to children below the age of five or six at the time of parents' separation: "Once a child is past the age of five or six, he may be unwilling to give up the relationship to a parent who has played a large part in his early development. By that time he has outgrown his earlier unquestioning trust in parents, he has learned to criticize, to take sides in quarrels, to begin to understand that parents in some way share responsibility for the separation. In short, the progress in his cognitive capacity may help him with his emotional difficulties inherent in the situation." *Id.* at 119.

82. GOLDSTEIN ET AL., *supra* note 77, at 38.

83. *Id.* at 117.

significance of continued relationships in children's lives, and the harmful effects to the child of losing a significant relationship. Studies of families after divorce show that maintaining ties with non-custodial parents through visitation is highly significant for children.[84] Data on foster placement and on the adoption of older children also indicate that continued contact with the original parents generally promotes the child's sense of well-being and emotional security.[85] Cross-cultural research has expanded the framework of discussion, pointing out that children form multiple attachments not only to parents but also to psychological parents and to others who are members of their kin groups.[86] In various cultures, raising and caring for children is not the sole responsibility of parents; grandparents and other relatives assume care giving roles and thus play a significant role in a child's life.[87] In these various contexts of analysis—divorce, foster care, adoption, and cultural scenarios—advocates of expanding the web of relationships in children's lives point to the potential harm entailed by the loss of a meaningful relationship. They argue that it exceeds the harm of a conflicting relationship and the potential harm to the relationship between the child and her custodian.

For the purpose of this article, we do not need to take sides in this dilemma. The relevant data are confused and unreliable, and probably no single answer can contend with all cases.[88] Advocates of maintaining multiple relationships in children's lives, *inter alia* by awarding rights of visitation, focus on the continuity of meaningful relationships in children's lives rather than on

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84. The research most often cited in countering Goldstein, Freud, and Solnit's argument against post-divorce visitation is probably the long-term study conducted by clinical psychologist Judith Wallerstein and her associates, tracking the effects of divorce on children. JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) [hereinafter SURVIVING THE BREAKUP]; JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) [hereinafter SECOND CHANCES]; JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS (1995) (Judith Wallerstein and Joan Kelly analyzed and reported the effects of divorce on the lives of sixty divorced couples and their children, both at the time of marital breakup and at subsequent intervals of eighteen months and five years. For our purposes, one of their main findings concerned the importance for the child of a continued relationship with both parents following divorce and the significance of visitation in this regard.). Subsequent studies, however, emphasized the centrality to children's adjustment following divorce of the custodial parent-child relationship. Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 310–11 (1996).

85. Marsha Garrison, *Why Terminate Parental Rights?* 35 STAN. L. REV. 423, 461–63 (1983); David Fanshel, *Urging Restraint in Terminating the Rights of Parents of Children in Foster Care*, 12 N.Y.U. REV. L. & SOC. CHANGE 501, 502 (1984); Fernando Colon, *Family Ties and Child Placement*, 17 FAM. PROCESS 289, 290 (1978).

86. *See*, *e.g.*, Carol B. Stack, *Who Owns the Child? Divorce and Child Custody Decisions in Middle-Class Families*, 23 SOC. PROB. 505, 506 (1976); Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 358–60 (1996); Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 539 (1984).

87. *See*, *e.g.*, Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 907–08 (2003).

88. Even in a divorce context, where our strongest intuition suggests that the child's "best" and not merely "least detrimental" alternative is to maintain contact with the non-custodial parent, researchers admit that the question of whether a relationship with two antagonistic parents is better than with one overburdened but stable one remains open. Felner & Farber, *supra* note 80, at 344.

establishing new ones. From the perspective of children's interests, then, visitation laws should rely primarily on the existence or absence of a relationship with the child.[89]

B. The Inconsistency of the Legal Approach

In the prevalent perception of visitation as a parental right, non-parents are generally denied visitation rights, even when visitation is meant to preserve an ongoing relationship with a child. By contrast, "parents," once legally defined as such, are entitled to visitations even without any previous relationship with the child. This legal distinction seems incompatible with the interest in maintaining the continuity of meaningful relationships in children's lives.

Furthermore, when visitation laws rely on parental status results are inconsistent and incoherent. In some contexts the law supports multiple relationships, even if they are conflicting. In other contexts the law supports safeguarding one unconditional attachment for the child, even at the expense of severing other relationships. When the claimant for visitation is a non-parent, the law prefers to maintain one unconditional relationship with the child, and views legally enforced visitation as an intrusion on the custodian-child relationship.[90] The law rejects this perception of visitation rights, however, when the claimant is a legally recognized parent. Sustaining multiple, even conflicting, attachments in children's lives is viewed as the best, not just the least detrimental, alternative when the child's parents are involved.[91]

The inconsistency, however, could be merely apparent. A distinction between parents and non-parents seems entirely justified, since parents play the most significant role in children's lives. But parents are so significant because most parents raise and nurture their children, not because of their parental status. And yet, as discussed below, parental status cannot serve as a sufficiently adequate proxy for significant relationships in children's lives that should be preserved through rights of visitation.[92]

The seeming inconsistency evinced in the legal approach, however, goes beyond the parent/non-parent distinction. Over two decades ago, Marsha

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89. As I discuss in further detail below, I do not suggest that biology is utterly irrelevant to a decision concerning visitation. A relationship with biological parents does seem to be significant to children, though this significance might be socially constructed. Nonetheless, it is clear that maintaining meaningful relationships based on daily caretaking of a child is more significant than maintaining a relationship that is merely based on biological connection. This can be discerned, for example, from the (indeed limited) experience with open adoption. The benefits of maintaining contact with the biological parents were mainly shown in adoption of older children, who already had some form of relationship with their biological parents. As to the adoption of infants, the harm of conflict was more apparent. *See*, *e.g.*, Annette Ruth Appell, *Blending Families through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U.L. REV. 997, 1019 (1995). We should also bear in mind that, in any event, open adoption where children may have some kind of contact with their biological parents is primarily consensual; therefore, the issue of conflicting loyalties in this context is rather limited.

90. This perception of non-parents' visitation is also evident in *Troxel v. Granville*. 530 U.S. 57, 57 (2000).

91. On the problematic distinction between "parents" and "non-parents," *see supra* Section 3.C.

92. *See infra* Section 5.B.

Garrison recognized a further discrepancy.[93] Garrison compared the widespread legal acceptance of Goldstein, Freud, and Solnit's ideas in the contexts of foster care and adoption with the extremely negative reaction to their ideas in the context of divorce.[94] In the context of long-term foster care and adoption, the legal system embraced children's need for an unconditional permanent relationship and, upon children's adoption, terminated the original parents' parental rights, including visitation. In the post-divorce context, however, the idea of one unconditional permanent relationship was fiercely rejected, and the legal system endorsed children's need for the continuity of familial relationships.[95] Children's presumed legal need for a continuity of relationships following divorce led not only to strong visitation rights of non-custodial parents but also to the popularity of joint custody legislation in the late 1970s and 1980s.[96]

What makes Garrison's comparison particularly interesting is that the situations of post-divorce and of adoption after long-term foster care address the visitation rights of *parents* who had lost custody of their children. Garrison argued that children's needs in both these contexts are similar, and she questioned the law's differential treatment of these situations.[97] In the post-divorce situation, children and the parents who lose custody of them retain contact through visitation rights whereas, following adoption, children lose contact with their original parents, who are normally denied visitation rights.

In technical-legal terms, the post-divorce situation concerns parents' visitation while the post-adoption situation concerns non-parents' visitation, since the adoption terminated the parental status and rights of the original parents. But the title of Garrison's article—"Why Terminate Parental Rights?"—vividly pinpoints that legal parenthood is a human creation, and terminating parental status is a decision rather than a given. Legal decisions cannot be made by internal deduction from the legal concept of "parent." Garrison's research highlights that classifying a claimant for visitation as parent or non-parent is open and undetermined, all the more so given the upheaval in the traditional legal definitions of motherhood, fatherhood, and parenthood in recent decades.[98]

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93. Garrison, *supra* note 85, at 461–63.

94. *Id*. at 450–53. *See also* Peggy C. Davis, *"There's a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1587 (1987) (documenting the judiciary's blanket acceptance of the arguments in GOLDSTEIN ET AL. in regard to child's placement disputes).

95. Garrison's purpose in demonstrating the law's inconsistency was to bolster her argument against the termination of parental rights to allow post adoption visitation. Garrison, *supra* note 85, at 455. Whereas Garrison sides with Goldstein, Freud and Solnit's critics and claims they were wrong, I merely argue that it is inconsistent to adopt the critics' view on visitation with regards to parents while endorsing Goldstein, Freud, and Solnit's approach in the context of non-parents' visitation. Hence, to the extent that the legal system recognizes visitation rights, it cannot do so on the basis of the claimant's parental status.

96. *See* Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 466 (1984). Later experience, however, showed that, contrary to consensual arrangements, court ordered joint custody is harmful to children's interests by exposing them to perpetual conflict. *Id*. at 487–95. *See also* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 284–85 (1992).

97. Garrison, *supra* note 85, at 461–63.

98. *Infra* Section 3.C.

Indeed, the termination of parental rights usually follows a finding of parental unfitness or unwillingness to parent, factors undoubtedly relevant when considering whether to compel continued contact between the former parent and the child. But even though the parental misconduct that served as a basis for termination cannot be disregarded, the continuity of significant relationships in children's lives, if accepted as a primary consideration in visitation decisions, cannot be dismissed either.[99]

C. Protecting Marriage and Nuclear Families

Denying visitation to original parents in cases of adoption is justified on the grounds of not disrupting or undermining the new family created by the adoption.[100] This rationale is endorsed regardless of the adopted children's previous attachment to their original parents. This approach affords a glimpse into a key motive underlying the legal system's visitation policy. Visitation rules, including the general rule of denying the original parents' visitation rights upon a child's adoption, probably center less on protecting the children's primary relationship with the custodial parents and more on preserving the traditional model of the nuclear family and the institution of marriage. The justification for denying visitation to original parents in cases of adoption is to avoid interference with the new (nuclear) family, viewed as the ideal family pattern, rather than merely to protect the children's interests and their relationships with their custodians.

This rationale can be discerned in other family situations as well. Thus, for instance, preserving the traditional nuclear family was at the heart of the Supreme Court decision in *Quilloin*, as well as in other cases known as the "unwed fathers' cases,"[101] which culminated in the 1989 case of *Michael H. v. Gerald D.*[102] The circumstances of three of these cases concerned a child born out

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99. An important reason for the law's resistance to order visitation with a parent whose parental rights have been terminated is that that may be a deterrent to adoption for many potential adopters. *See* text accompanying *infra* note 100.

100. *See, e.g.*, 2 AM. JUR. 2D *Adoption* § 166; Matter of Adoption of RDS, 787 P.2d 968, 970 (Wyo. 1990); Matter of W.E.G., 710 P.2d 410, 415 (Alaska 1985); Marckwardt v. Superior Court, 150 Cal. App. 3d 471, 480 (Cal. Ct. App. 1984); *See also, e.g.*, Matter of C.O.W., 519 A.2d 711, 714 (D.C. 1987); Sanders v. Sanders, 498 So. 2d 1063, 1064 (Fla. Ct. App. 1986); Matter of C.P., 717 P.2d 1093 (Mont. 1986); In re Adoption of Dearing, 572 S.W.2d 929, 932 (Tenn. Ct. App. 1978); Matter of Fox, 567 P.2d 985 (Okla. 1977); In re Adoption of Herbst, 217 Kan. 164 (Kan. 1975); Jouett v. Rhorer, 339 S.W.2d 865, 866 (Ky. 1960).

101. Quilloin v. Walcott, 434 U.S. 246 (1978). *See also* Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

102. 491 U.S. at 110. Though *Michael H.* is perhaps the extreme example of how far the Court will go to protect the nuclear family, the motivation of protecting nuclear families underlies *all* the cases of unwed fathers. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 85 (1995). Prior to *Michael H.*, the rule that seemed to emerge from the Court as to the paternal status of unwed biological fathers allegedly focused on the relationship of the child and the biological father. The Court stated that a biological father who has established a substantial relationship with his children is legally a father, but it has been argued that the real focus was on the relationship between the biological father and the mother and their resemblance to the marital relationship. Fineman argues that, in fact, only when the biological father had maintained a social relationship with the mother that resembled a traditional conjugal

of wedlock, whose mother subsequently married a man who was not the biological father and wanted to adopt the child.[103] The adoption was dependent upon a priori determination that the biological male progenitor was not the child's legal father, thus focusing on the paternal status of biological fathers of children born out of wedlock. Another central issue, however, concerned the very continuation of a relationship between the biological father and the child through legal rights of visitations that, in turn, also depended on his parental status.[104]

Recognizing the biological father's parental status, therefore, could impede the adoption and hinder the creation of a traditional nuclear family for the child by enabling the biological father to interfere with its functioning. These considerations, as noted, affect the determination of parental status as well as the more limited question of visitation. A critical view of the confluence of issues in these cases, as well as of the influence of the wish to deny visitation on the determination of denying paternity, was noted above.[105] In three of these cases—*Michael H.*, *Lehr*, and *Quilloin*—the biological father was denied paternal status. A supposedly unavoidable consequence was a denial of his claim for visitation rights.

Resembling post-adoption situations, denying visitation to the biological fathers in these cases might be theoretically justified for the purpose of securing children a stable and unconditional relationship, as Goldstein, Freud, and Solnit advocated. On closer scrutiny, however, it is obvious that underlying the legal rules is not a child's need for one unconditional relationship but rather the wish to protect the family generally but more a specific ideal—that of the nuclear family. *Quilloin* is a telling example.

In *Quilloin*, the mother's husband, Walcott, wanted to adopt her son, who was then approximately twelve years old and had an established relationship with his biological father.[106] Although the child expressed a desire to be adopted by Walcott, he also clearly indicated that he wished to continue visitations with Quilloin. The mother, however, argued that "these contacts were having a disruptive effect on the child and on [the] . . . entire family."[107] In denying Quilloin paternal status and affirming the adoption, the Supreme Court of Georgia also succinctly denied the continuation of Quilloin's visitations based on the mother's claim, and this decision was upheld in the Supreme Court.[108]

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relationship in a nuclear family was he recognized as a legal father. For a similar argument, *see* Dolgin, *supra* note 24, at 654.

103. *Stanley*, 405 U.S. at 645–46. (Although this is the first case that began this chain of cases, it is an exception. *Stanley* was not a case of one man against another but a biological father against the state.).

104. Three of the biological fathers, Quilloin, Caban, and Michael H., did not initiate paternity proceedings until the pending adoption jeopardized their access to the child, suggesting they were more interested in the rights to visitation than in the symbolic parental status.

105. *See supra* notes 55–68 and accompanying text.

106. *Quilloin*, 434 U.S. at 251.

107. *Id.*

108. *Id.* Allegedly, that was an inevitable result of allowing the adoption. *Id.* at 251 n. 11. However, it was already noted that terminating original parents' rights following a child's adoption is a decision and not a given. *See supra* notes 100–101 and accompanying text.

Although the denial of Quilloin's rights of visitation was seemingly meant to protect the child from the visits' disruptive effect, the son still expressly indicated he wished them to continue. Obviously, had the mother and Quilloin been married and divorced before the child's birth, Quilloin would have been the legal father and the mother's claim to deny visitation could not have been heard. In the typical case of a divorce followed by the mother's remarriage, the potential harm to the children from incompatible male authority figures, persistent conflictual relationships, or disrupting the relationship with the custodian could not be considered grounds for denying visitation.[109] Moreover, had the mother not married, the Court would probably have been unreceptive to such a claim.

A more explicit instance of denying visitation through denial of paternal status in order to protect the ideal of the nuclear family is *Michael H.*[110] *Michael H.* reached the United States Supreme Court after four prior cases in which the Court seemed to have established clear conditions for recognizing an unwed biological progenitor as a father.[111] As in *Quilloin*, Michael's immediate concern was to ensure visitation rights with his daughter and thus protect his relationship with her.[112] The right to visitation thus stood at the heart of the legal proceedings for paternity. Unlike *Quilloin*, Michael's claim seemed quite strong, since he seemed to satisfy all the conditions set in the precedents for legal recognition as a father. He had lived with the child, recognized her as his daughter, enjoyed a close and loving relationship with her, and clearly demonstrated full commitment to the responsibilities of parenthood—all shown to be key factors in establishing legal fatherhood in prior cases.[113] The Court nevertheless denied Michael's claim for paternal status, knowing that this would end his attempts to establish visitation.[114] The underlying reason was the mother's marriage to another man and the Court's motivation to protect the family unit, which might be jeopardized were Michael's claim admitted. In dismissing Michael's claim, Justice Scalia explicitly stated that the motivation behind this decision was to protect the unit "typified by the marital family,"

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109. *See, e.g.* Pierce v. Yerkovich, 80 Misc. 2d 613, 622–24 (N.Y. Misc., 1974); Ireland v. Ireland, 246 Conn. 413, 442–43 (Conn. 1998).

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

111. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).

112. At least according to the Court. *Michael H.*, 491 U.S. at 118.

113. *See, e.g.*, *Lehr*, 463 U.S. at 256–63.

114. Theoretically, Michael could have sought visitation as a "non-parent." Section 4601 of the California Civil Code Annotated (West Supp. 1989) provided that "[i]n the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child." *Michael H.*, 491 U.S. at 144 (Stevens, J., concurring). This provision was indeed the basis for Justice Stevens's concurring opinion, finding that the California statute had provided sufficient protection to Michael's relationship with Victoria. *Id.* at 132–35. As Justice Brennan noted in his dissent, however, this provision did not provide a *real* option for Michael to obtain visitation with Victoria since, as interpreted by the California courts, a putative parent who cannot establish paternity would not be able to obtain discretionary visitations as a non-parent. *Id.* at 148–50 (Brennan, J., dissenting).

which in this case consisted of the child, her mother, the mother's husband and two other children born to the couple.[115]

Both *Quilloin* and *Michael H.* epitomize the centrality of protecting nuclear families in visitation laws. Not only did the biological father and the child have an established relationship (of twelve years in *Quilloin*), but it was also argued that continuing the relationship was meaningful for the children as well (in *Michael H*. by the guardian *ad litem* and in *Quilloin* by the child himself), but the courts did not view this as sufficiently important.

This article does *not* argue that Quilloin and/or Michael should have been awarded visitation rights.[116] Maintaining relationships with the biological father might indeed have been harmful to the child in either or both these cases, through exposure to conflict or disruption of the primary relationship with the custodial parent, as noted. These are genuine and valid concerns that the courts could address. What remains unexplained is the complete absence of these considerations, insofar as the legal system perceives them as valid, in post-divorce situations. Divorced fathers who had been legally married would not find their visitation rights denied following the mother's remarriage were the mother to claim that visitation has a disruptive effect on the child and on her new family. In fact, mothers who make such a claim in the name of the child may be accused of alienating the child from the father and risk losing custody.[117] The reason is that marriage, just like the nuclear family, is a sacred institution whose protection is an important goal of the law.

The motivation to preserve the ideal of the nuclear family can account for other common aspects of visitation rules, which may appear baffling when examined from the perspective of children's relational interests. Thus, for instance, a non-parent stands a better chance of having standing and being awarded visitation rights if the child with whom visitation is sought was born out of wedlock, the child's parents are divorced, or one of the child's parents has died.[118] When a child is part of an intact nuclear family, the likelihood that a non-parent will be awarded visitation rights declines significantly.[119] This distinction

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115. *Michael H.*, 491 U.S. at 123 n.3.

116. Nor do I challenge or endorse the decision that, legally, they are not fathers. My interest in this article is not in legal parenthood and in how it should be determined.

117. *See, e.g.*, Ritch v. Ritch, 195 S.W.2d 205, 205–06 (Tex. Civ. App. 1946). *See also, e.g.*, Ellis v. Ellis, 952 So.2d 982 (Miss. App. 2006); Clark v. Smith, 720 N.E.2d 973 (Ohio App.3d 1998). Martha Fineman has challenged the stereotype of mothers as vindictive and has called to recognize their misogynous basis: "Most mothers love their children and would not willfully deprive them of contact with a caring and responsible father. . . . By making these observations, I do not mean to suggest that abuses never occur, but rather to point out that they are not typical, or even common." Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making*, 101 HARV. L. REV. 727, 766–67 (1988).

118. *See*, *e.g.*, Stephen Elmo Averett, *Grandparent Visitation Right Statutes*, 13 BYU J. PUB. L. 355, 357–67 (1999); Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 873 (2003); Gregory, *supra* note 35, at 168; 69 A.L.R.5th 1 (1999).

119. Even in states where legislation is broad enough to award visitation when a nuclear family is intact and state courts recognize their authority to award visitation over objection of parents in intact traditional nuclear families, the actual chances of a non-parent to be awarded visitation are

was endorsed and promoted by Katharine T. Bartlett, one of the first scholars to advocate recognition of visitation rights to non-parents.[120] This distinction between intact nuclear families and other family patterns cannot be explained by reference to children's needs—be it the need for a stable unconditional relationship with the custodial parent, the need for continued attachment in the children's lives, or any other relational values.

As for children's need for uninterrupted relationships with their parents, the rules resulting from the legal distinction between intact nuclear families and families that have undergone a crisis are the opposite of the rules we might expect. Goldstein, Freud, and Solnit claimed that children's need for stability is greater following situations of family crisis.[121] A child raised in an intact nuclear family is part of a stable set of relationships, and thus seems subject to smaller risk from exposure to a conflicting relationship outside the nuclear family. By contrast, when the child's relationship with the custodial parent is already suffering due to a death or a disruption in amiable family relations, maintaining a relationship with an individual who is in conflict with the custodian seems to pose greater risk to the child.[122]

Stability in children's lives is indeed affected by larger social experiences, beyond their relationships with their legal parents. Grandparents and other members of the extended family play an important role in providing stability, particularly at times of family crises such as divorce or death.[123] But accounts of these stabilizing effects refer to cases where these relationships had not been rejected by the child's custodian. The relationship between the child and her custodian, as noted, is crucial to the child's success in coping with these crises,[124] and these situations require particular sensitivity to refrain from burdening the custodian-child relationship.

The legal distinction between different family patterns also remains confusing when considered according to children's need for continuity of relationships. If this is the underlying rationale for awarding visitation rights, children's meaningful relationships should be protected whether or not they live in a nuclear family. Here again, however, it seems that the legal policy is not motivated by children's relational interests but rather by a wish to uphold nuclear families as the preferred family pattern. Intact nuclear families are entitled to legal protection from visitation rights, which are perceived as interferences.[125]

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significantly lower. *See, e.g.*, Doe v. Smith, 595 N.Y.S.2d 624, 625 (Fam. Ct. 1993); Coulter v. Barber, 632 N.Y.S.2d 270, 271 (App. Div. 1995).

120. Bartlett, *supra* note 3.

121. GOLDSTEIN ET AL., *supra* note 77, at 117–18. Their critics did not challenge them on this point or on the destabilizing effect of court ordered visitation, only on the weight they attributed to this matter.

122. GOLDSTEIN ET AL., *supra* note 77, at 118.

123. *See e.g.*, Peter A. Zablotsky, *To Grandmother's House We Go: Grandparent Visitation After Stepparent Adoption*, 32 WAYNE L. REV. 1, 43 (1985).

124. *See, e.g.*, Wallerstein & Tanke, *supra* note 84.

125. *Troxel* may seem to rebut the legal distinction between the nuclear family pattern and others. Indeed, the Supreme Court presented the case as one involving an attempt to supersede a (single) mother's decision. Nevertheless, during the proceedings, the mother, Tommie Granville,

D. The Shadow of the Conception of "Children as Property"

Parents are entitled to visitations even without any previous relationship with the child, as noted, and the parental status-based legal distinction. This implies that visitation rules do not seek to protect children's meaningful attachments and that those rules rest instead on other considerations.[126] The focus of this article has been on social considerations, mainly the preservation of the traditional model of the nuclear family and the institution of marriage, but another element also seems to play; a role in constructing visitation laws: the *private* interests of the parents.[127] Incorporating and protecting adults' interests in relation to children generally and parents' interests specifically is *not* inherently objectionable. In the visitation context, however, the recognition and protection of parents' private interests embodies the remnants of the notorious conception

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married Mr. Kelly Wynn, who legally adopted the two children, Natalie and Isabelle. The girls, then, had two legally recognized parents raising them in an ostensibly traditional nuclear family. Despite the Court's attempt to play down the significance of this fact, it cannot be ignored. In fact, Ms. Granville herself believed that her husband's adoption of the two girls would undermine the grandparents' claim (though for different reasons). In re Visitation of Troxel, 940 P.2d 698, 701 (Wash. Ct. App. 1997).

126. The famous case, In re Baby M., 537 A.2d 1227 (N.J. 1988), provides a telling example. In *Baby M.*, Mary Beth Whitehead entered into a contract with William Stern whereby she agreed to be artificially inseminated with Stern's sperm, relinquish her parental rights, and deliver the child to Mr. and Mrs. Stern. After the baby was born, however, Mrs. Whitehead refused to relinquish her parental rights. The New Jersey Supreme Court determined that Mrs. Whitehead's parental rights could not be terminated based on the surrogacy contract alone. Thus, her entitlement as a mother to the companionship of Melissa was taken as evident. *Id.* at 1236. Though the court awarded custody to the father, Mr. Stern, Mrs. Whitehead was entitled to visitation because she was the mother of the child, securing her interest in a continued relationship with Melissa. The New Jersey Supreme Court remanded the case to the lower court to determine Mrs. Whitehead's rights of visitation. On remand, the Superior Court determined that Melissa's best interests were served by "unsupervised, uninterrupted, liberal visitation with her mother." In re Baby M, 542 A.2d 52, 53 (N.J. Super. Ct. Ch. Div. 1988). Note that no argument of harm to Melissa from breaking up an existing attachment she already had could be adduced to justify this award of visitation. Also absent from the court's decision is a concern of possible harm to the relationship Melissa shared with her custodial father. The courts' utter disregard for this concern is particularly strange in the circumstances of surrogacy in general, and in particular those that surrounded the *Baby M.* case. Unlike the circumstances that typically surround divorce, Stern and Whitehead had never chosen to have an intimate relationship, and yet the court imposed a shared (familial) relationship on them. Not surprisingly, this relationship was characterized by animosity and high conflict. A 1994 story in *Redbook*, which featured Baby M. and Mrs. Whithead's family, vividly illustrated some of the complications that followed from this determination. Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473, 526–27 (1996). Mrs. Whitehead emphasized the contrast between her home and that of the Sterns. She compared her own health with Mrs. Stern's worsening physical condition as a result of multiple sclerosis. She also found the eating, conversation, and recreation patterns in the Stern's home seriously wanting in comparison to her family's. She complained about the child following the "frumpy, old" model set by Mrs. Stern. The child clearly knew, and apparently frequently heard, that her birth had brought and continues to bring great sadness to her mother (Note: Legally, there was only one mother, Mrs. Whitehead. Mrs. Stern was never considered the legal mother.) *Id.* at 526–27 (1996).

127. Thus, for example, fathers' rights groups highly influence custody and visitation laws. *See, e.g.*, Scott & Derdeyn, *supra* note 96, at 462. But parents are not the only adults whose interests influence family politics and laws. Thus, third party visitation statutes, and particularly statutes awarding grandparents' visitation, were pushed by powerful grandparents lobbies. *See supra* note 44.

of children as their parents' property, which should be eliminated from current jurisprudence.

The disturbing history of children construed as chattels and as their parents' property is well known.[128] This perception has been abandoned at the declaratory level and all—courts, legislators, and legal scholars—today vehemently reject any such characterization.[129] But although we would like to think that the conception of children as property belongs only in legal history textbooks, many child advocates have shown that it still casts a shadow.[130] Barbara Bennet Woodhouse, for example, demonstrated how doctrines of parental rights, developed at a time when children were still treated as quasi-property, embody and continue to perpetuate this conception.[131]

When treated as a parental right, visitation laws show traces of this view, which is manifest, above all, in the language of entitlement. That language accompanies parental visitation rights, regardless of whether the parents have an established relationship with the child.[132] The proprietary roots of this parental entitlement are further evident in the quid pro quo approach that accompanies parents' rights in general and parental visitation rights in particular.[133] The common reasoning whereby the payment of child support entitles the father to a certain amount of visitation is an expression of this approach.[134]

The strength of parents' visitation rights and the reluctance to deny them, even if the parents are abusive, as well as the traditional exclusivity of parental rights regarding visitation, further attest to the parents' proprietary interests in their children. Exclusive possession and right of use characterize traditional conceptions of private property. According to this exclusivity rule, then, children are depicted as property and access to them is a private good to which

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128. *See, e.g.*, WALTER O. WEYRAUCH ET AL., CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS 760 (1994); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 951 (2d ed. 2002); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 46 (1994); Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. 489, 497 (1996); Garrison, *supra* note 28, at 864.

129. *See, e.g.* Raymond v. Raymond, 345 A.2d 48, 52 (Conn. 1974); In re E.F.V., 461 A.2d 1263, 1268 (Pa. Super. Ct. 1983); Commonwealth ex rel. Children's Aid Soc. v. Gard, 362 Pa. 85, 92–93 (1949); Olinghouse v. Olinghouse, 908 P.2d 280, 286 (Okla. Ct. App. 1995); Commonwealth ex rel. Robinson v. Ziegler, 35 Pa. D. & C.2d 55, 65 (1964). In fact, the recurring claim in family law scholarship, family law casebooks, and family law jurisprudence is that children are no longer perceived as their parents' property but as individuals with their own interests, not only at the declaratory level but in practice as well. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 848–49 (2004). *See also* Garrison, *supra* note 28, at 864, 893–94.

130. *See, e.g.* Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1042–43 (1992); Dwyer, *supra* note 4.

131. Woodhouse, *supra* note 130, at 1042–43.

132. *See, e.g.*, Dwyer, *supra* note 8, at 938–39.

133. About the quid pro quo approach that characterizes parenthood and parental rights, *see* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L. J. 293, 297–98 (1988).

134. Nancy Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1327 (2005).

only the owner-parents should be entitled.[135] The proprietary roots of visitation rights as parental rights can also account, at least partly, for the fact that grandparents have been much more successful than other non-parents in ensuring recognition to their claims for visitation.[136] Special provisions included in many state statutes ensure the grandparents' visitation rights upon the death of their child, their grandchild's parent. Grandparents thus inherit from their child right of access to their grandchild.[137]

VI. REFORMULATING VISITATION—REFORMULATING PARENTHOOD

A. Choosing Between the Two Faces of Visitation

This survey of visitation jurisprudence reveals two different and conflicting subtexts on this right. The first emphasizes that underlying this right are relational values: the continuity of meaningful relationships in children's lives and the legal recognition of the nurture and care adults bestow on children. The second subtext of visitation is less overt and embodies remnants of the perception of children as their parents' property, which usually accompanies an ideology upholding the nuclear family as a legally superior family model and marriage as a sacred institution. The co-existence of these two subtexts within visitation thwarts the development of a coherent theory of visitation.

The right to visitation should be detached from the cluster of rights associated with legal parenthood in order to eliminate the proprietary connotation of the right to visitation and endorse the relational understanding of this right. Parents would be entitled to visitation not because of their parental status but because they care daily for their children. Nor will the distinction between various non-parents depend on their status as grandparents, stepparents, and the like, but on whether they had cared for the child. Such a move would convey that our society values and rewards nurture and care for

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135. Woodhouse, *supra* note 130, at 1113. As noted *infra*, in Section 6, exclusivity may also serve worthy goals.

136. One possible explanation for the oftentimes more successful visitation efforts of grandparents are the comparatively powerful lobbying groups of older Americans, such as the AARP, in contrast to the less well-organized interest groups such as single fathers or same-sex partners denied custody.

137. In cases of parental death, some courts have explicitly recognized the visitation rights of grandparents as "based upon a 'derivative rights' theory which permits the grandparents to stand in the shoes of a deceased parent so that the child is not completely cut-off from one side of the family." Preston v. Mercieri, 573 A.2d 128, 132–33 (N.H. 1990). This rationale was more common before the statutory era of grandparents' visitation. Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 311 (1985). Most courts currently reject this line of reasoning. *See, e.g.*, Sally F. Goldfarb, *Visitation for Nonparents After* Troxel v. Granville*: Where Should States Draw the Line?*, 32 RUTGERS L. J. 783, 817 n.196 (2001). Generally, it is used to support the more limited extent of visitation rights awarded to grandparents as compared to parents, or to protect the grandparents' visitation rights following the grandchild's adoption by a stepparent. When courts adhere to a derivative rights theory of grandparents' visitation rights, an adoption that terminates the rights of the biological parent is generally also held to end the status of the grandparents upon which the right to visitation rests, thereby divesting the grandparent of visitation privileges. Denying this theory enables courts to continue grandparents' visitation despite the adoption. *See, e.g.*, *Preston*, 573 A.2d at 133.

children and would make the interest of children in the continuity of relationships a central consideration of visitation laws.

B. Parenthood as a Proxy

This critique of the perception of visitation as a parental right in the previous section focused on the marginalization of relational values that this construct implies. Because parenthood might ultimately be a proxy for such relational values as nurture, care, and the preservation of continuous relationships in children's lives, this critique might have been misplaced. Thus, insofar as visitation laws aim to recognize interests immanent in the care of children and in securing children's attachments, parenthood could indeed be a useful and valuable proxy, especially given the justified reluctance to grant judges discretion to inquire into the quality of child care and the strength of particular attachments.

Since the use of proxies is based on generalizations, it can be expected to be both over and under-inclusive. This is an inevitable cost of the reliance on proxies, which may seem acceptable in light of their benefits. Recognizing non-parents' visitation rights in statutes and in case law may rectify the under-inclusiveness of parenthood as a proxy for nurture and care for children and the meaningful relationships in children's lives.[138]

Parenthood, however, is an inadequate proxy for the values that should underlie visitation rights, and extending visitation to non-parents based on a conception of visitation as a parental right is flawed as a solution. Historically, parenthood may have been considered a good enough proxy for the nurture and care of children, as well as for the creation of significant attachments in a child's life. This article did not address that question, though there are reasons to doubt whether this was indeed so, because in today's reality there are legal parents who do not care for their children, while an ever-growing number non-parents do care for children. Moreover, given the current malleability of legal parenthood, it cannot function as a good enough proxy for strong and meaningful relationships in children's lives.

C. Reconceptualizing Parental Rights

Detaching visitation from the cluster of rights associated with parenthood will transform not only the right to visitation but legal parenthood as such, and will contribute to the ongoing endeavor of liberating legal parenthood from its proprietary remnants. Reshaping legal parenthood so as to eliminate the disgraceful notion of children as property is a long-term project that has been proceeding for over a century.[139] Parenthood is an activity as well as a certain stance vis-à-vis a child. As an activity, parenthood means caring for a child,

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138. Visitation statutes for many non-parents distinguish between various claimants based on their status. Yet, the post-*Troxel* understanding of non-parents' visitation rights emphasizes their entitlement based on the role they assumed in a child's life. *See* text accompanying *supra* note 72.

139. *See, e.g.*, MASON, *supra* note 128. In this respect, this paper joins a series of articles published over the last two decades, each proposing a specific reform of legal parenthood. *See, e.g.*, Bartlett, *supra* note 133; Woodhouse, *supra* note 24.

which includes educating, assuming responsibility for, and playing a supervisory role in a child's life. As a stance, parenthood emphasizes mainly biological, genetic, or formal legal ties. The caretaking activity should take priority in shaping legal doctrines of parental rights, thus contributing to the eradication of parenthood's proprietary legacy.[140]

An examination of the rights accorded to parents reveals that all the rights and entitlements that accompany parental status are associated with the raising of children, except for visitation, which is the only parental right that is not dependent on any prior care for the child.[141] Detaching the right to visitation from the cluster of rights associated with legal parenthood, therefore, strengthens the connection between parental rights and parents assuming responsibility for their children.[142] The stronger the connection between parental rights and child rearing, the greater the justification of these rights and the greater the chances of formulating a better definition of legal parenthood.[143]

The proposition that parental rights are connected to the activity of child rearing has received some support in Supreme Court cases, most notably the

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140. *Cf.* Woodhouse, *supra* note 24.

141. Though parents inherit the assets of their offspring who pre-deceased them intestate leaving no spouse or offspring of their own, inheritance focuses more on the rights of the deceased, attempting to divide their property based on their assumed wishes.

142. Woodhouse, however, argues that even parental rights associated with child rearing reflect this notion of children because they were developed at a time when children were still treated as quasi- property. Woodhouse, *supra* note 130.

143. Although my argument calls for strengthening the connection between parental rights and the activity of parenthood, it does not advocate changing the definition of legal parenthood to one determined on a functional basis. Legal parenthood could indeed be reformed by changing its very definition rather than merely by detaching visitation rights from the bundle of rights associated with parental status. Thus, for instance, legal parenthood can be defined functionally, focusing on parenting activity rather than on biology and genetics, or it can be defined from the children's perspective. *See, e.g.*, Woodhouse, *supra* note 24. In this new definition, detaching visitation from parental rights would become redundant. With legal parenthood centered around parenthood as the activity of caring for and assuming responsibility for children, relational values would be injected into the rights of visitation as a parental right, as they would into all other rights that flow from parental status. Visitation could thus remain a parental right and still express relational values, since parenthood itself would embody such values. Despite my recognition that legal parenthood should undergo extensive changes, mainly to fit the changing reality of American families, I argue that adopting a purely functional or child-centered approach to define legal parenthood gives judges too much discretion in allocating parental rights, outweighing the supposed benefit of ensuring better expression to legal parenthood. Resistance to broad judicial discretion to inquire into the function of particular relationships and determine whether they establish parenthood and prevail over biology, genetics, and the like, seems amply justified. In particular, groups suffering from discrimination have good reasons to distrust the discretion of the judiciary, which is dominated by white, middle-upper class men. *See* Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966) (frequently cited in the context of parental rights as an instance of these dangers). In *Painter*, the "bohemian" lifestyle of the biological father constituted grounds for the court's decision to award permanent custody of a child to his grandparents, whose lifestyle was "conventional." *Id.* at 1396, 1400. *Painter* was a custody case, rather than a parenthood determination case. The court's disregard of the inherent legal presumption in the father's favor, however, was based on its view of the grandparents as psychological parents and of the grandfather as a "father figure," as adduced in a psychological testimony. *Id.* at 1399. The decision regarding custody was thus premised on a priori view about the grandparents' parental status.

unwed fathers cases noted above,[144] and also in other courts' case law.[145] Eliminating the remnants of the "child as property" conception in the definition of legal parenthood thus requires that, as far as possible, parental legal entitlements be made dependent on parents assuming daily responsibility for the children's upbringing.[146]

D. Without Unbundling Parenthood

This proposal, though at first glance it may appear to be doing so, is not a call for unbundling the cluster of parental rights. Unbundling legal categories into the respective claim-rights, privileges, powers, and immunities that comprise them was a project that occupied various legal theorists, particularly following Hohfeld's work.[147] Private property was probably the central target of such a project.[148] The "unbundling of property" theorists wished to emphasize—what today seems obvious—that property is a human artifact rather than a natural institution.[149] As such, property is not an inevitable bundle of entitlements and, therefore, legal disputes cannot be resolved simply by reference to the institution of property through application of internal deductive reasoning. According to this line of reasoning, each element in the bundle of entitlements called property must be justified separately in the specific context where it arises.[150]

The theory of visitation rights presented in this article has some similarities with the project of "unbundling property." It also emphasizes the artificiality of legal parenthood, which is an artificial rather than a natural (or even a "God given") status.[151] Hence, this article rejects the idea that legal decisions can be

144. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 261 (U.S. 1983).

145. *See, e.g.*, Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981).

146. Scholars such as James G. Dwyer would probably argue that parents should have no Hohfeldian rights whatsoever, whether or not related to their child rearing activity. *See, e.g.* Dwyer, *supra* note 4. Eliminating parental rights and entitlements altogether may appear at first glance as the best way of eradicating proprietary remnants from legal parenthood. But the practical effect of parents' rights, and particularly parents' rights to raise their children as they see fit, is to raise the threshold for state involvement in child rearing decisions and in children's daily lives. Denying these rights would actually increase state involvement in child rearing, to the children's detriment. *See, e.g.*, Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST COMMENT 149, 154 (1999).

147. WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (Walter Wheeler Cook ed., 1923).

148. For a description of this analysis of property, *see* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 27–30 (1988).

149. Locke, for example, attempted to show that property rights could arise in the "state of nature" apart from government and positive law. For an explication of Locke's theory of property, *see, e.g.*, Waldron, *supra* note 148, at 137–251; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540–72 (1993).

150. THEORIES OF RIGHTS 1, 10–11 (Jeremy Waldron, ed. 1984); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1533 (2003).

151. Whereas property is now obviously regarded as a created institution, the perception of parenthood and parental rights as a human creation is not as solid. *See, e.g.* Bartlett, *supra* note 3, at 887–90; Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 845–48 (1985); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977); Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); Behn v. Timmons, 345 So.2d 388, 389 (Fla. Dist. Ct. App. 1977); In re J.P., 648 P.2d 1364, 1373 (Utah 1982).

made through internal deduction from the concept of parent.[152] It also calls for a critical examination of the specific claim-rights, immunities, powers, and duties that comprise parental status, and specifically challenge the right of visitation that parental status entails. Nonetheless, although the right to visitation should be detached from the cluster of rights associated with parenthood, this is not a call for the unbundling of legal parenthood altogether.

Legal institutions, categories, or statuses such as parenthood, however artificial and fictitious they may be, perform an important role in conveying the notions and ideals intended by the law.[153] They express, support, and enhance social goods and ideals.[154] Whether we think of the expressive role of law in terms of its concrete social effect or merely in its symbolic meaning, the law needs to convey its messages and ideals in ways visible to individuals in society. Since it is unlikely that individuals will know the particular details of specific legal obligations or entitlements, what is visible to them are fundamental and familiar legal concepts.[155]

Parenthood as a popular symbol, then, may achieve desired social effects by leading to the internalization of ideals of intimacy, care, and responsibility toward children in ways impossible to attain through the legal details and elements that construct this status. Dissolving parenthood, therefore, hinders its crucial expressive function. When parenthood is perceived as just a bundle of

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152. I do not suggest that this approach presents a naturalistic fallacy, moving from "is" (the fact of being a parent) to "ought" (the judgment that a parent has a special right to visitation). Since parenthood is a moral term, this "fact" itself is not devoid of moral import, and moving from "is" to "ought" thus poses no problem. *Cf.* A. I. MELDEN, RIGHTS AND RIGHT CONDUCT (1959) (discussing the right of a parent to "special consideration" from his children and suggesting this right is related to the moral fact of parenthood). But recognizing a moral relation such as parenthood and making a judgment about what is due to a person by other individuals are two separate issues. Philippa Foot, *Book Review*, 70 THE PHILOSOPHICAL REVIEW 260, 261 (1961) (Reviewing MELDEN, *supra* note 152).

153. As widely recognized, the law can convey ideas and ideals through its categories, statuses, and rules. On the expressive role of law, *see, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). This view usually encompasses two related accounts. The first concerns the symbolic aspect of law, and the second concerns the law's ability to direct and affect human behavior. *See, e.g.* Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1636 (1998); Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse,* 1994 UTAH L. REV. 503, 567–68. The second and more consequentialist account is debatable, since much still remains puzzling in the interaction between law and human behavior. *See, e.g.*, Neil MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239, 251–55 (1983); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 144–45 (1991). This is particularly true in the realm of family life and intimate relations, where ideology, emotions, and other powerful extra-legal forces affect human behavior. *See, e.g.,* Fineman, *supra* note 102, at 14–34. Nonetheless, the expressive function of law is not limited to its social effects, which are somewhat speculative. On the grounds for endorsing the expressive function of law other than its potential social effects, *see* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 69–70 (1995). For my current purposes, I adopt a modest version whereby, whatever the admittedly unknown influence of legal rights, they should point in the direction that is normatively desirable. Dagan, *supra* note 150, at 1561 n.218.

154. For this argument regarding property, *see* Dagan, *supra* note 150. For the specific expressive role of marital property, *see also* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 97–98 (2004).

155. Hanoch Dagan, Correspondence: Just Compensation, Incentives, and Social Meanings, 99 MICH. L. REV. 134, 149–50 (2000).

duties, obligations, privileges, claim-rights, powers, and immunities, it loses its powerful connotations. Parenthood has historically implied a dominating and patriarchal status expressing proprietary interests in children, traces of which are still evident today.[156] And yet, maintaining parental status as a legal category is still worthwhile because, as a fragmented bundle of obligations and entitlements, it is unlikely to convey any message at all—neither one of proprietary interest in children, nor one of commitment, responsibility, and care. If parenthood is to perform any expressive role, desirable or not, it cannot become a mere "laundry list" of independent duties, obligations, claim-rights, immunities, and powers, with an infinite number of potential combinations for bundling them together.[157] A certain measure of stability is also required for the law to have any effective influence,[158] which is unattainable when the status of parenthood is unbundled and its various constituent elements are capable of regroupment in countless ways. This article's argument that the right to visitation should not be thought of as a parental right, then, is not meant to unbundle legal parenthood altogether but to claim that the right of visitation is unfit for inclusion in the cluster of elements comprising parental legal status.[159]

E. Maintaining Parental Exclusivity

Recognition of the significant role of parental status is also at the heart of the argument concerning the significance of this status' exclusivity. As long as visitation is understood as a parental right, recognizing non-parents' visitation rights challenges the idea of parenthood as an exclusive status, a principle that should not be easily abandoned. By contrast, if visitation is understood as an independent relational right detached from parental status, the visitation rights of non-parents can be recognized while preserving the principle of parental exclusivity.

The exclusivity of parental status, which states that only a child's legal parents have rights and duties considered parental and non-parents cannot acquire them, has been a well-established principle in American legal tradition.[160] Parental exclusivity is mainly evident in the idea that the child's parents rather than the state or other individuals make decisions concerning the children's upbringing. Various scholars have criticized the idea of parental

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156. *Supra* note 125 and accompanying text.

157. For the theorists' claim on the "unbundling of property," *see* Dagan, *supra* note 150, at 1534.

158. Dagan, *supra* note 150, at 1562–63. But deconstructing legal concepts and addressing each element separately also sends a false message concerning the expressive role of law The specific bundle of obligations and entitlements is not a random event lacking any integrity; rather, a normative ideal unifies the various obligations and entitlements, and this ideal is what the law attempts to express. *Id*. The legal concepts, statuses, and categories, then, represent the ideals that unify the different obligations and entitlements.

159. Detaching visitation from parental status should not signal the onset of a process of disintegrating parenthood due to the difference between visitation and other parental rights noted above. All the rights and entitlements that accompany parental status, except for visitation, are associated with the activity of raising and taking care of children. Visitation is the only right that neither accompanies child rearing nor depends upon prior care for the child. *See* text accompanying *supra* note 9.

160. Bartlett, *supra* note 3, at 883–89.

exclusivity and the notion that only parents can have rights, duties, and obligations with respect to children.[161] Their critique was largely triggered by the changes in family structure and the law's failure to respond to them. Since legal definitions of parenthood appeared inadequate and unable to reflect the current reality of parenthood, arguments were raised in support of enabling individuals who are not legally recognized as parents to acquire parental rights as non-parents. The issue of contact between children and the non-parenting adults involved in their lives was one of the prime examples highlighting the inadequacy of parenthood as an exclusive status.[162]

Though contact between children and non-parents may at times be appropriately accorded legal recognition and protection, challenging parental exclusivity is the wrong course for addressing this issue. Critics of parental exclusivity fail to recognize the value and the role of this idea. Exclusivity is part of what defines legal parenthood; parents have a unique relationship with their children. Undermining parental exclusivity thus erodes the very meaning of legal parenthood. Diluting the parents' unique status may lower the threshold for non-parents to supersede the judgment and decisions of fit parents through state intervention giving standing and rights to other individuals to make claims concerning a child. It may even ease the removal of children from their parents by non-parents, without necessarily meeting a high standard such as parental unfitness.

It is reasonable to believe that few would support easy removal of children or the substitution of fit parents' judgment. On the issue of visitation, the call for recognizing not only the parents' rights but also those of others has gained some support, but an argument that non-parents (be it grandparents, parents' partners, or other relatives) should have rights to make daily decisions regarding children's lives is, barring rare circumstances, much more objectionable. Most adhere to the parents' exclusive role as decision-makers and caregivers for their children.[163]

But relinquishing the rule of parental exclusivity to allow for visitations undermines the very idea of exclusivity, hampering explanations of why visitation should be recognized as the sole exception to this rule. If non-parents can gain some rights considered parental, why not allow them *all* parental rights? Indeed, Katharine Bartlett, the scholar most closely associated with the idea that parenthood should not be an exclusive status, applied her argument not only to visitation rights but to all parental rights, duties, and obligations, including custody.[164] Notions such as de facto parentage blur the line between parents and non-parents since they are used to confer rights considered parental upon those who are not legally recognized as parents. But these notions are not

161. *See, e.g.*, Bartlett, *supra* note 3, at 883–89; Young, *supra* note 31; Kavanagh, *supra* note 31.

162. *See, e.g.*, Bartlett, *supra* note 3, at 883–89; Garrison, *supra* note 85.

163. Young, for example, recognizes the need to preserve core authority, though she does not recognize it as *parental* authority. Young, *supra* note 31.

164. Bartlett, *supra* note 3.

limited to conferring rights of visitation and they also enable recognition of non-parents' custody rights.[165]

On these grounds, Bartlett and the other scholars who advocate non-exclusive parenthood have been criticized for diluting the legal significance of parenthood. Parents from marginalized groups such as the poor, or gays and lesbians, have particular cause for concern from this possible detraction and even severance of their parental status.[166]

This article's proposal provides a strategy for addressing the problem of contact between children and non-parental adults who are part of their lives while also preserving the uniqueness of parental status. Visitation should be an independent right resting on relational values above all, so that both parents and non-parents can make a claim for visitation based on an existing meaningful relationship with a child. In this view, parental rights encompass only those rights that are an adjunct to the rearing and caring for children. Decision making and caretaking rights are thus exclusive to parents. This article's proposal would enable recognition of non-parents' visitation rights while maintaining parenthood as an exclusive status and preserving the parents' unique authority.[167]

VII. CONCLUDING REMARKS

Once visitation is understood as an independent right rather than part of the parental status cluster, the remaining challenge is to transcend the flow of rights from relationships and instead translate it into concrete rules. A detailed proposal for new rules of visitation as they seem to emerge from this analysis of visitation rights exceeds the scope of the paper. However some broad guidelines toward such an undertaking will be offered in conclusion.

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165. *See, e.g.*, Clark v. Wade, 544 S.E.2d 99, 106 (Ga. 2001); Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966).

166. *Painter* again serves as a good example. *See supra* note 143. In the context of gay and lesbian parents this fear was expressed by 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, 473 (1990); Sears, *supra* note 62, at 573–74.

167. My proposal is thus also a partial solution to the dilemma faced by lesbian and gay parents, as it was presented by Nancy Polikoff. On the one hand, lesbian and gay parents seek to strengthen the uniqueness and exclusivity of parental status to combat threats from homophobic relatives claiming to raise their children (who should not, according to them, be raised by gay parents), or otherwise try to interfere in the children's upbringing. Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 RUTGERS L. J. 825, 825–27 (2001). On the other hand, in a growing number of cases involving homosexual couples, a legally recognized mother has used her exclusive legal status to severe the child's relationship with her ex-partner, who was not legally recognized as a parent. Parental exclusivity may therefore foreclose the claims of legally unrecognized lesbian and gay parents. *Id*. Above all, a solution is obviously called for to enable recognition of parenthood in same-sex families. This, however, is not the subject of this article. Until legal definitions of parenthood adapt to parenthood in same-sex families, my understanding of the right to visitation and of parental right enables advocates of lesbian and gay parents to maintain parental exclusivity and safeguard their parental status against homophobic relatives. At the same time, it also enables legally unrecognized parents to claim at least visitation rights with children. Though this solution is not ideal, it enables the preservation of two ostensibly contradictory claims.

The first reform concerns the primary question that should be asked in visitation litigation, namely, whether or not the claimant has an existing relationship with the child. A distinction should be drawn, then, between claims to maintain an already existing relationship and claims to create a relationship that does not yet exist. The longer and more intense the relationship between the child and the claimant, the stronger the legal presumption should be that terminating the relationship would be harmful to the child. Indeed, to avoid subjective judicial assessment of the quality of the relationship between the child and the claimant (an inquiry potentially suspected as prejudiced and probably necessitating experts), legal rules should rely on objective criteria such as the duration and intensity of the relationship as proxy for quality. Biology, genetics, marital status, or a relationship with the child's parents should not be utterly ignored, but they should have only a secondary or supplementary role in legal rules and decision-making.

This understanding of visitation rights will probably not entail vital practical changes in the legal outcomes of visitation disputes. Although most legal parents would still be entitled to visitation rights and many non-parents would not, this analysis would entail changes in some cases that may be minor, but are still relevant. The reasons and justifications for awarding or denying such rights, are the more significant concern. Since these would be crucially different, they would constitute a change in the results because two radically different frameworks of analysis cannot reach the "same result."[168] The way of expressing visitation rights and the reasons adduced for denying them or recognizing them, therefore, are no less important than the end result.

Understanding the right to visitation as an independent right based on relational interests of nurture and care does not answer many difficult questions that occupy both lawmakers and legal scholars. Crucially, since talking about relational values does not mean that all relationships should be the basis for a claim of visitation rights, this approach does not explain what relationships should give rise to such a claim. Furthermore, it does not explain how to reconcile the authority of the custodial parent making child- rearing decisions with the recognition of others' visitation rights, whether parents or non-parents. These and other issues remain open for future discussion.

This proposal is not intended to foreclose the debate on visitation rights but to break new ground. The reading of visitation rights outlined here enables to redirect visitation laws toward a legal model based on the relational interests of both children and adults, making visitation rules coherent at the level of principle, and pursuing questions pertaining to adults' relationship with children within an adequate conceptual framework. In this respect, approaching these difficult dilemmas outside the parental status scheme and focusing on relational values is invariably better than the current status-based rules that seem to ignore the interests and needs of all the parties involved.

168. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1878–87 (1987).