RETHINKING PARENTHOOD AS AN EXCLUSIVE STATUS: THE NEED FOR LEGAL ALTERNATIVES WHEN THE PREMISE OF THE NUCLEAR FAMILY HAS FAILED

*Katharine T. Bartlett**

PARENTHOOD, with few exceptions, is an exclusive status. The law recognizes only one set of parents for a child at any one time, and these parents are autonomous, possessing comprehensive privileges and duties that they share with no one else.

A fundamental premise of the law of exclusive parenthood is that parents raise their own children in nuclear families. The nuclear family,¹ which is the preferred social unit in our society, is itself an exclusive unit, its membership reserved to a married couple and their dependent children. Exclusivity gives the family much of its moral power over the lives of its members, for it forges in them a sense of common destiny and mutual commitment.² Pa-

* Associate Clinical Professor of Law, Duke University. I am grateful to Sara Beale, Herma Hill Kay, David Lange, Millie Mishkin, Chris Schroeder, and Sally Sharp for their comments on earlier drafts of this article. I thank also Amy Flick, Pamela Gerr, Lori Larson, Mindy McNichols, Cindy Rerucha, Howard Vingan, and William Werner, law students at Duke University who provided useful research assistance.

¹ The term "nuclear family" in this paper refers to the conjugal household consisting of a husband, wife, and their dependent children. The term "family" has implied different living arrangements throughout history and among different social classes. See P. Aries, *Centuries of Childhood: A Social History of Family Life* (1962); J. Dempsey, *The Family and Public Policy* 9-10 (1981); M. Glendon, *The New Family and the New Property* 11-17 (1981); M. Poster, *A Critical Theory of the Family* 168-205 (1978); E. Shorter, *The Making of the Modern Family* (1975); Gordon, Introduction, in *The Nuclear Family in Crisis: The Search for an Alternative* 2-10 (M. Gordon ed. 1972); Laslett, *The Family as a Public and Private Institution*, in *Intimacy, Family, and Society* 94-114 (A. Skolnick & J. Skolnick eds. 1974). Nonetheless, the private, largely self-contained, marriage-centered nuclear family has been the norm throughout most of American history.

² A. Smith, *The Theory of Moral Sentiments* 219-20 (D. Raphael & A. Macfie eds. 1976) (1st ed. London 1759). R. Laing describes this mutual identification in terms of expectations as well as sentiment:

The family is a common *we*, in contrast to *them* outside the family When I identify myself as one of *us*, I expect you to do likewise. Then there are three, you and he or she and me, each becomes one of *us*. In such a family *we*, each of *us*, recognize(s) not only his or her own family synthesis, but expects a comparable family synthesis to exist in you, him, or her also.

R. Laing, *The Family and the 'Family,' in The Politics of the Family and Other Essays* 3, 4-

rental or family autonomy³ builds upon this commitment, encouraging parents to raise their children in the best way that they can by making them secure in the knowledge that neither the state nor outside individuals may ordinarily intervene.⁴

Although the premise of the nuclear family underlies the legal norm of parental autonomy, an increasing number of children do not live in traditional nuclear families. In 1982, twenty-five percent of children under the age of eighteen in the United States—over fifteen and a half million children—did not live with both natural

5 (1971).

³ Parental autonomy is, in most respects, a narrower concept than family autonomy. Parental autonomy refers solely to authority over children and not to other matters that the Supreme Court has considered to be part of family autonomy, such as marriage, procreation, contraception, and family organization. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (right to choose family living arrangements); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraception). See also *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1313-14 (1980) (discussing parental autonomy as a "more limited interest" than the interest of each member of the family in family autonomy) [hereinafter cited as *Developments in the Law*]; cf. Schoeman, *Childhood Competence and Autonomy*, 12 J. Legal Stud. 267, 271-72 (1983) (drawing a distinction between "strong discretion" (family autonomy), in which adults are given discretion both to set standards of conduct and to apply them, and "weak discretion" (parental autonomy), in which parents' discretion is limited to acting within a prescribed standard of conduct intended to serve the best interests of the child).

The respects in which parental autonomy extends beyond the traditional family unit are very limited. See *infra* notes 196-228 and accompanying text.

⁴ The assignment of such power to parents reflects some important social and political judgments. Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 Law & Contemp. Probs., Summer 1975, at 38, 40-41; see also *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 204, 324 N.Y.S.2d 937, 944, 274 N.E.2d 431, 436 (1971) (child custody principles "reflect considered social judgments in this society respecting the family and parenthood").

For example, parental autonomy denotes society's reluctance to select caretakers for children on the basis of qualitative parenting standards. Qualitative standards would require society to define a parenting norm, a task it claims to be unwilling to do. See Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs., Summer 1975, at 226, 260-61; Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 992-93 (1975).

In giving decisional rights to parents, the state acknowledges as well that it cannot effectively raise children. See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion) ("this affirmative process of teaching, guiding, and inspiring by precept and example . . . is beyond the competence of impersonal political institutions"); see also J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* 12 (1979); Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interest*, 81 Mich. L. Rev. 463, 473-74 (1983); *Developments in the Law*, *supra* note 3, at 1214.

parents.⁵ One authority estimates that by 1990 this figure will grow to forty percent.⁶ The reasons for this phenomenon are familiar. More and more parents obtain divorces, resulting in single parent families⁷ or, as divorced parents remarry,⁸ step-families. An increasing number of parents never marry.⁹ Some parents abandon their children; others give their children to temporary caretakers; and still others are judged unfit to raise their children, who are then placed in foster homes.

Children affected by these circumstances often form attachments to adults outside the conjugal nuclear family—to stepparents, foster parents, and other caretakers.¹⁰ Current law provides virtually no satisfactory means of accommodating such extra-parental attachments, however, because the presumption of exclusive parenthood requires that these relationships compete with others for legal recognition. According to traditional parental rights doctrine, applied still in many states, the state will not recognize relationships formed by adults other than the child's legal parents unless the legal parents are unfit or have abandoned the child.¹¹

⁵ Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Special Studies Series P-20, No. 380, Marital Status and Living Arrangements: March 1982, at 5, Table F (1983). The statistics are even more remarkable for black children, 58% of whom did not live with both parents in 1980. *Id.*

⁶ Glick, Children of Divorced Parents in Demographic Perspective, 35 J. Soc. Issues No. 4, at 170, 171, Table 1 (1979).

⁷ The divorce rate in this country more than tripled from 1960 to 1982. See Bureau of the Census, *supra* note 5, at 4, Table D. In 1975 it was projected that 44% of all marriages would end in divorce. Preston, Estimating the Proportion of American Marriages that End in Divorce, 3 Soc. Methods & Research 435, 436, 457-59 (1975).

⁸ Approximately 80% of divorced persons remarry. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Special Studies Series P-20, No. 312, Marriage, Divorce, Widowhood and Remarriage by Family Characteristics: June 1975, at 8-10 (1977). See also Glick, Remarriage: Some Recent Changes and Variations, 1 J. Fam. Issues 455 (1980) (83% of divorced men and 76% of divorced women remarry).

⁹ The number of children living in never-married single parent households grew by 450% between 1970 and 1982. Bureau of the Census, *supra* note 5, at 5, Table E (0.8% of children under the age of 18 lived in never-married single parent households in 1970, as compared to 4.4% in 1982). In 1982, 3.7% of family households were headed by never-married single parents. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-20, No. 381, Household & Family Characteristics: March 1982, at 7, Table E (1983).

¹⁰ As one court has noted, "Those involved with domestic relations problems frequently see situations where one who is not a natural parent is thrust into a parent-figure role, and through superior and faithful performance produces a warm and deeply emotional attachment." *Looper v. McManus*, 581 P.2d 487, 488-89 (Okla. Ct. App. 1978).

¹¹ See *infra* notes 78-82 and accompanying text.

Thus, psychological relationships are often subordinated to those based on biological ties. Under tests applied in other states, which focus on the welfare (or "best interests") of the child instead of parental unfitness,¹² biological relationships may be sacrificed to those that are psychological. *Both* approaches, however, share the premise that parenthood is exclusive. Competing relationships are important not as potential objects of the law's protection but as evidence in determining an individual's legal right to exclusive parenthood. Thus, for example, a stepfather and a natural father cannot simultaneously have a legal parenting relationship with a child; one must have all parental rights and duties and the other may have none.¹³

This paper challenges the law's adherence to the exclusive view of parenthood when the premise of the nuclear family has failed. In such a situation, the child's need for continuity¹⁴ in intimate relationships demands that the state provide the opportunity to maintain important familial relationships with more than one parent or set of parents. Modern experts defend exclusive parenthood on the grounds that children need one parent (or set of parents) who have unequivocal and undivided parental authority over them.¹⁵ Although persuasive enough to warrant the concentration of parental authority in natural parents at a child's birth, this argument fails to consider the situation of children who form child-parent relationships with adults outside of nuclear families. Current research demonstrates that even if nuclear families are best for children, when children form parental relationships outside of the nuclear family they often lose more from the law's enforcement of exclusive parental relationships than they gain.¹⁶

This article is concerned not with *how* children form parenting relationships outside the nuclear family, but with how the law

¹² See *infra* notes 83-88, 167-86, 239-40 and accompanying text.

¹³ The decline in the nuclear family has also raised questions about whether the law should ensure that every child have *at least* one mother *and* one father. Some women claim the right to an exclusive single-parent status, and their claims are being eased by new reproductive technologies. See Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 Harv. Women's L.J. 1 (1981). This paper does not take up these issues.

¹⁴ See *infra* Part II.

¹⁵ See, e.g., J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 35-39 (1979).

¹⁶ See *infra* Part II.

should regard those relationships that do form. In doing so, it urges that states develop options that do not presume the exclusivity of parenthood. This approach does not compel a uniform solution of all conflicts over children. Indeed, nonexclusive parenting alternatives—for example, those developed in the context of divorce—may reflect a variety of positions states have taken on such matters as the weight of the custodial preference given to the child's primary caretaker, or the conditions, if any, under which a court should order joint custody. However these issues are resolved, the wider availability of nonexclusive parenthood alternatives will better enable the law to recognize familial relationships that children have developed. Such recognition will allow children to experience the continuity of familial relationships that they need in the growing range of circumstances in which these relationships are formed outside the nuclear family.

I. PARENTHOOD AS AN EXCLUSIVE STATUS

A. *The Rights and Duties of Parents*

Parents' rights and duties are ordinarily both exclusive and indivisible. They are exclusive in that only a child's legal parents will have rights and duties ordinarily considered parental; nonparents cannot acquire them. They are indivisible in that each parent, with respect to his or her own child, will have every right and duty generally available to parents.¹⁷ If there are two parents, the law assumes that each will exercise his respective rights and duties in concert with the other.¹⁸ If one parent for some reason ceases to be a parent, the other automatically assumes all parental rights and duties.¹⁹

¹⁷ A parent with *any* parental rights and duties will have each and every right and duty available to parents.

¹⁸ The assumption that parents act in concert is reflected by the law's failure to provide for the arbitration of childrearing disputes by parents living together in an intact family. See *Kilgrow v. Kilgrow*, 268 Ala. 475, 107 So.2d 885 (1958); *People ex rel. Sisson v. Sisson*, 271 N.Y. 285, 2 N.E.2d 660 (1936); *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). The assumption is also apparent in the law's attribution of responsibility to one parent for the actions of the other. See, e.g., *In re Halamuda*, 85 Cal. App. 2d 219, 192 P.2d 781 (1948) (mother responsible for failing to protect child from father's extreme cruelty).

¹⁹ See, e.g., *Campbell v. Chapman*, 238 Ga. 427, 233 S.E.2d 155 (1977); *In re Guardianship of Doney*, 174 Mont. 282, 570 P.2d 575 (1977); *James v. Pretlow*, 242 N.C. 102, 86 S.E.2d 759 (1955); *Ingles v. Hodges*, 562 P.2d 845 (Okla. 1977); *In re Kosmicki*, 468 P.2d 818 (Wyo. 1970).

Parental rights are comprehensive, and they operate against the state,²⁰ against third parties,²¹ and against the child.²² Parents have the right to custody of their child;²³ to discipline the child;²⁴ and to make decisions about education,²⁵ medical treatment,²⁶ and religious upbringing.²⁷ Parents assign the child a name.²⁸ They have a right to the child's earnings and services.²⁹ They decide where the child shall live.³⁰ Parents have a right to information gathered by others about the child and may exclude others from that information.³¹ They may speak for the child and may assert or waive the child's rights.³² Parents have the right to determine who

²⁰ See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²¹ See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *People ex rel. Portnoy v. Strasser*, 303 N.Y. 539, 104 N.E.2d 895 (1952) (superseded by statute as stated in *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976)).

²² See, e.g., *Moe v. Dinkins*, 533 F. Supp. 623 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir.), *cert. denied sub nom. Axelrod v. Coe*, 459 U.S. 827 (1982).

²³ See *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (quoting *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981), quoting in turn *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

²⁴ See, e.g., *State v. Fischer*, 245 Iowa 170, 60 N.W.2d 105 (1953); *Bowers v. State*, 283 Md. 115, 389 A.2d 341 (1978).

²⁵ See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *LeRoy v. Odgers*, 18 Ariz. App. 499, 503 P.2d 975 (1972).

²⁶ See *In re Hofbauer*, 65 A.D.2d 108, 411 N.Y.S.2d 416 (1978), *aff'd*, 47 N.Y.2d 648, 393 N.E.2d 1009, 419 N.Y.S.2d 936 (1979). But see *In re Sampson*, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (Fam. Ct. 1970) (parent's religious objections to blood transfusions must give way to state's duty to ensure child's right to grow up without disfigurement), *aff'd*, 37 A.D.2d 668, 323 N.Y.S.2d 253 (1971), *aff'd*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972).

²⁷ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Jackson v. Jackson*, 181 Kan. 1, 309 P.2d 705 (1957); *Waites v. Waites*, 567 S.W.2d 326 (Mo. 1978).

²⁸ See *Daily v. Minnick*, 117 Iowa 563, 91 N.W. 913 (1902); *D'Ambrosio v. Rizzo*, 1981 Mass. App. Ct. Adv. Sh. 1539, 425 N.E.2d 369 (1981); see generally Note, *Like Father Like Child: The Rights of Parents in Their Children's Surnames*, 70 Va. L. Rev. ____ (forthcoming 1984) (discussing rights of custodial and noncustodial parents in the surnames of children).

²⁹ See, e.g., Cal. Civ. Code § 197 (West 1982); Ky. Rev. Stat. § 405.010 (1972); N.J. Stat. Ann. § 9:1-1 (West 1976).

³⁰ See *Shea v. Shea*, 100 Cal. App. 2d 60, 63-64, 223 P.2d 32, 33-34 (1950).

³¹ See, e.g., Family Educational Rights and Privacy Act § 438, 20 U.S.C. § 1232g (1982); N.C. Gen. Stat. § 7A-675 (1981).

³² See, e.g., *State v. Kinderman*, 271 Minn. 405, 136 N.W.2d 577 (1965), *cert. denied*, 384 U.S. 909 (1966). But see *People v. Flowers*, 23 Mich. App. 523, 179 N.W.2d 56 (1970) (father could not effectively consent to search of son's room where father had no personal or punishable involvement in alleged crime).

may visit the child³³ and to place their child in another's care.³⁴

Parents' duties correspond to their rights. Parents must care for their child,³⁵ support him financially,³⁶ see to his education,³⁷ and provide him proper medical care.³⁸ They have the duty to control the child, and if they fail in this duty, they may be required to answer for the child's wrongdoings.³⁹

The state, in addition to imposing duties on parents, also constrains certain of their rights. For example, in disciplining children, parents may not injure them severely.⁴⁰ Parents may not, even for religious reasons, make unconventional decisions about their children's medical treatment if such treatment is likely to result in the child's death.⁴¹ A parental decision to commit a child to a mental institution is subject to review by professionals of the institution.⁴² Parents may not put their children to work in violation of child labor laws,⁴³ and they do not have unlimited options in educating their children.⁴⁴

³³ See, e.g., *Chodzko v. Chodzko*, 66 Ill. 2d 28, 360 N.E.2d 60 (1976); see also *infra* notes 215-223 and accompanying text.

³⁴ See *Parham v. J.R.*, 442 U.S. 584 (1979); see also *Freeman v. Chaplick*, 388 Mass. 398, 446 N.E.2d 1369 (1983) (natural parents may determine child's guardians against child's preference); *In re Petition of the Dep't of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 421 N.E.2d 28 (1981) (under Massachusetts statute, child may not be removed from custody of an incarcerated mother absent a court order).

³⁵ See, e.g., N.J. Stat. Ann. § 9:2-4 (West 1976).

³⁶ See, e.g., Cal. Civ. Code §§ 196, 242 (West 1982 & Supp. 1984); Ill. Ann. Stat. ch. 40, § 1101 (Smith-Hurd 1980).

³⁷ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); see also Fla. Stat. § 232.01(1)(a) (Supp. 1981); N.Y. Educ. Law §§ 3205, 3212(2) (McKinney 1981).

³⁸ See *Faunteroy v. United States*, 413 A.2d 1294, 1299-1300 (D.C. 1980); *Greenspan v. Slate*, 12 N.J. 426, 443, 97 A.2d 390, 399 (1953); *State v. Williams*, 4 Wash. App. 908, 915, 484 P.2d 1167, 1172 (1971).

³⁹ See, e.g., *Parsons v. Smithey*, 15 Ariz. App. 412, 489 P.2d 75 (1971), vacated, 109 Ariz. 49, 504 P.2d 1272 (1973); *Biecker v. Owens*, 234 Ark. 97, 350 S.W.2d 522 (1961); *Dortman v. Lester*, 380 Mich. 80, 155 N.W.2d 846 (1968).

⁴⁰ See, e.g., *Bowers v. State*, 283 Md. 115, 389 A.2d 341 (1978); *State v. Black*, 360 Mo. 261, 227 S.W.2d 1006 (1950).

⁴¹ Ordinarily, medical treatment is not ordered in these situations unless a conventional treatment is likely to save the child's life. See, e.g., *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, cert. denied sub nom. *Labrenz v. Illinois*, 344 U.S. 824 (1952); *In re Custody of a Minor*, 378 Mass. 732, 393 N.E.2d 836 (1979); *In re Cicero*, 101 Misc. 2d 699, 421 N.Y.S.2d 965 (Sup. Ct. 1979).

⁴² *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

⁴³ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

⁴⁴ See, e.g., *State v. Chavis*, 45 N.C. App. 438, 263 S.E.2d 356, cert. denied, 300 N.C. 377, 267 S.E.2d 679, cert. denied sub nom. *Chavis v. North Carolina*, 449 U.S. 1035 (1980); *State*

The state, however, does not condition parental status upon compliance with all of these duties, and thus minimizes any incursion on the exclusivity of that status. A parent who violates the child labor laws, for example, is subject to a fine, but will not ordinarily lose custody of the child.⁴⁵ If he makes an erroneous medical decision, he may be enjoined to provide proper treatment, but does not forfeit his parental status altogether.⁴⁶ In fact, only if the parent abandons the child or seriously violates his parental duties will the state terminate his parental status.⁴⁷ Exclusive parenthood is then pursued through the legal substitution of *other* parents who obtain exclusive rights to the child.⁴⁸

B. The Legal and Theoretical Background of Exclusive Parenthood

The concept of parenthood as an exclusive status has developed from long and complex legal traditions. Two traditions have been most prominent: natural or divine law, which assumes the existence of a fundamental social order, and instrumentalism, which attempts to devise rules that best serve the welfare of society and its children. Although property law, denoting parental ownership of children,⁴⁹ and trust law, emphasizing parental steward-

v. Shaver, 294 N.W.2d 883 (N.D. 1980); *State v. Riddle*, 285 S.E.2d 359 (W. Va. 1981).

⁴⁵ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (custodial aunt appeals from convictions under the Massachusetts child labor law, which punished violators with fines and short imprisonment).

⁴⁶ See, e.g., *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978) (legal custody of child vested in welfare agency for the limited purpose of assuring that treatment for leukemia was administered); *In re Cicero*, 101 Misc. 2d 699, 702-03, 421 N.Y.S.2d 965, 968 (Sup. Ct. 1979) (guardian appointed for "sole purpose of consenting to operation to close defective spinal column").

⁴⁷ See *infra* notes 78-82 and accompanying text.

⁴⁸ See *infra* notes 74-77 and accompanying text.

⁴⁹ Under ancient law, children, being economic assets, were viewed as private property, owned and controlled by the father. See J. Dempsey, *supra* note 1, at 3; 2 J. Kent, *Commentaries on American Law* *202-03; S. Tiffin, *In Whose Best Interest?* 16 (1982); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 897 (1975); Sayre, *Awarding Custody of Children*, 9 U. Chi. L. Rev. 672, 675-76 (1942); tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 2), 16 Stan. L. Rev. 900, 925 (1964). Social historians have documented that early forms of adoption were actually financial transactions, reflecting the cash value of children. J. Dempsey, *supra* note 1, at 4; cf. McGough & Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 Emory L.J. 209, 210 n.5 (1978) (until late 19th century, parent could contract

ship,⁵⁰ have also influenced development of the concept of parenthood, these doctrines no longer operate as meaningful constraints on any redefinition of the status of parenthood. Hence, this article restricts its discussion primarily to natural law and instrumentalism.⁵¹

1. *Natural Law*

The traditional parental rights doctrine has drawn much support from principles said to be inherent in, or "natural" to, any civilized state. As part of natural law, parental rights are presumably independent of any act or agreement. They are pre-political; the law

away custody of child to indentured service, a trade, or a craft). With industrialization, children lost their economic value. J. Dempsey, *supra* note 1, at 3; Stern, Smith & Doolittle, *How Children Used to Work*, 39 *Law & Contemp. Probs.*, Summer 1975, at 93. Social commentators became concerned with children's welfare, perhaps because the dominant classes believed that improperly raised children threatened social order. See S. Tiffin, *supra*, at 8-11, 27, 39, 41, 55, 88.

An occasional judicial decision analogizes the parent's right to custody to a property right. See, e.g., *In re Guardianship of Campbell*, 130 Cal. 380, 62 P. 613 (1900); See also *Shea v. Shea*, 100 Cal. App. 2d 60, 65, 223 P.2d 32, 34 (1950) ("California has, in effect, adopted the harsh rule that the right of a fit and proper parent to have the custody of his child is somewhat in the nature of a property right . . ."). Under modern law, however, the property element of parental rights has been discredited—kept alive, as one commentator states, only in the courts' denials of the notion. *tenBroek*, *supra*, at 923-24. Although it is said that the use of the terms "rights" and "abandonment" demonstrates the persistence of property law notions in family law, see, e.g., *Roche v. Roche*, 25 Cal. 2d 141, 145, 152 P.2d 999, 1000-01 (1944) (Schauer, J., dissenting), property law cannot today be viewed as any serious theoretical limitation on future developments in the law relating to parenthood.

⁵⁰ Courts in the distant past used trust concepts to support the propositions that parents have no inherent or absolute right to their children and that their parental rights are derived from the state for the benefit of the children. See, e.g., *Nugent v. Powell*, 4 Wyo. 173, 33 P. 23 (1893). On these grounds courts justified state intervention in the interests of children, and thus treated trust law as a qualification on both property law theory and the "natural rights" of parents. See, e.g., *Purinton v. Jamrock*, 195 Mass. 187, 201, 80 N.E. 802, 805 (1907) ("The right of the parents is not an absolute right of property, but is in the nature of a trust reposed in them, and is subject to their correlative duty to care for and protect the child; and the law secures their right only so long as they shall discharge their obligation."); *In re Adoption by Jacques*, 48 N.J. Super. 523, 138 A.2d 581 (1958). These implied limitations are now taken for granted in the context of child abuse and neglect proceedings, but they are too imprecise to provide useful guidance in the current debates on child custody law.

⁵¹ It would be misleading to characterize these two approaches as mutually exclusive alternatives. Case law typically joins natural law and instrumental analysis. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979); *Chapsky v. Wood*, 26 Kan. 650 (1881); cf. Paine, *Instrumentalism v. Formalism: Dissolving the Dichotomy*, 1978 *Wis. L. Rev.* 997. These approaches are more properly viewed as two major doctrinal threads than as competing modes of analysis.

presupposes rather than creates them; and they arise from a relationship that is entirely apart from the power of the State.⁵² Indeed, according to natural law, one of the state's most basic functions is to protect these rights.⁵³

Within the natural law framework, parental rights are deemed the very foundation of social order. Unless parents are left free to raise their own children, the entire social fabric will be destroyed: "man" will be "denaturalized," the "instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed."⁵⁴ The basic building block of this social order is the family, which is commanded by nature "the God-given plan of taking care of children."⁵⁵ The family, indeed

⁵² *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977) (natural family has "its origins entirely apart from the power of the State . . . [and] the liberty interest in family privacy has its source . . . not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition'") (footnote omitted) (quoting *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) ("We cannot and should not lose sight of the basic proposition that a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring. This is a rule older than the common law itself."); *In re J.P.*, 648 P.2d 1364, 1373 (Utah 1982) (the "parental right transcends all property and economic rights. It is rooted . . . in nature and human instinct"); see also *S. Tiffin*, *supra* note 49, at 142; *Areen*, *supra* note 49, at 896-97.

⁵³ See, e.g., *Lacher v. Venus*, 177 Wis. 558, 569-70, 188 N.W. 613, 617 (1922) ("A natural affection between the parents and offspring, though it be naught but a refined animal instinct and stronger from the parent down than from the child up . . . has always been recognized as an inherent, natural right, for the protection of which . . . our government is formed."), overruled, *In re Adoption of R.*, 98 Wis. 2d 613, 297 N.W.2d 833 (1980); see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

⁵⁴ *Risting v. Sparboe*, 179 Iowa 1133, 1137, 162 N.W. 592, 594 (1917); see also *Walker v. Brooks*, 203 Va. 417, 421, 124 S.E.2d 195, 198 (1962) (parental rights are "founded upon natural justice and wisdom, and [are] essential to the peace, order, virtue and happiness of society"). Pufendorf writes that without parental care and concern for children "it is impossible to conceive of a social life." 2 S. Pufendorf, *On the Law of Nature and Nations*, ch. 2, § 4, at 915 (C. Oldfather & W. Oldfather trans. 1934) (1st ed. Lund 1672). See also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (describing the privilege of bringing up children as having been "long recognized at common law as essential to the orderly pursuit of happiness by free men").

⁵⁵ *Gregg*, *Placing Out Children*, *Proceedings of the 19th NCCC*, at 415 (1892), quoted in *S. Tiffin*, *supra* note 49, at 93. In early American history, the natural rights of parenthood were indistinguishable from the divine order. God had ordained that parents have unlimited power over their children, except insofar as they answered ultimately to God. Because parents "in regard to their children doe beare a singular image to God, as Hee is the Creator, Sustainer and Governour," their authority was to be unchallenged." *S. Tiffin*, *supra* note 49,

marriage itself, is nature's guaranty that adults will bear and provide for children:⁵⁶ "[I]f there is one certainty, it is this, that the family is the direct outcome of nature's own plan to secure the safety and growth of the child."⁵⁷

Within the family, nature creates the link between the social order and parental rights. Nature works on parents to "stir up their Diligence, wisely implant[ing] in them a most tender Affection towards these little Pictures of themselves."⁵⁸ These natural emotions, in turn, motivate parents to act in the interests of their children. According to John Locke, "[t]he affection and tenderness God hath planted in the breasts of parents toward their children make it evident that this is not intended to be a severe, arbitrary government, but only for the help, and preservation, of their offspring."⁵⁹

Natural law has been interpreted very strictly to protect parental rights. Although it assumes that parents will exercise their rights in the best interests of their children, the rights themselves do not depend on their doing so. Even "utter selfishness . . . cannot be allowed to cut off the natural claim of parents of the custody of their own offspring."⁶⁰ Parental rights thus prevail even against caretakers whose guardianship of children would be in the children's best interests, except in cases of total abandonment or unfitness.⁶¹ Likewise, although it is assumed that parents will raise

at 16 (quoting E. Morgan, *The Puritan Family: Essays on Religion and Domestic Relations in Seventeenth Century New England* 106 (E. Morgan ed. 1944), which is quoting in turn W. Ames, *Conscience with the Power and Cases Thereof*, Book V, at 159 (London 1643)).

This theme has emerged in some recent cases as well. See, e.g., *In re D.A. McW.*, 429 So. 2d 699 (Fla. Dist. Ct. App. 1983); *Behn v. Timmons*, 345 So. 2d 388 (Fla. Dist. Ct. App. 1977); *In re Interest of Dimmitt*, 560 S.W.2d 368 (Mo. Ct. App. 1977).

⁵⁶ See 1 W. Blackstone, *Commentaries* *447 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children . . .").

⁵⁷ E. Hirsch, *Proceedings of the Conference on the Care of Dependent Children*, Washington, D.C., Jan. 25-26, 1909, quoted in S. Tiffin, *supra* note 49, at 93. Mr. Hirsch also noted that "[t]his dependence of the child . . . forced, in the course of the ages, man to adopt the family and the family to adapt itself to [the child] . . ." *Id.*

⁵⁸ 2 S. Pufendorf, *supra* note 54, ch. 2, § 4, at 915.

⁵⁹ J. Locke, *The Second Treatise of Civil Government* 85 (J.W. Gough ed. 1947) (1st ed. London 1690).

⁶⁰ *Risting v. Sparboe*, 179 Iowa 1133, 1136, 162 N.W. 592, 593-94 (1917).

⁶¹ See, e.g., *Roche v. Roche*, 25 Cal. 2d 141, 152 P.2d 999 (1944); see also *Santosky v. Kramer*, 455 U.S. 745, 758-60 (1982) ("A parent's interest in the accuracy and justice of the decision is . . . a commanding one."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (the due process clause would forbid states to force the breakup of a family over the objections of the

their children themselves, their failure to do so, short of total abandonment, does not deprive them of their exclusive status as parents.⁶²

These natural law underpinnings have made the law of parenthood decidedly unresponsive to changes in social behavior and norms.⁶³ Changes in family patterns under the natural law framework may bring into question the adequacy of the sanctions designed to reinforce the nuclear family, but they do not challenge the legitimacy of the rights themselves.⁶⁴ Within the natural law framework, such changes in social patterns are irrelevant. This unresponsiveness works to the detriment of children who develop bonds outside the nuclear unit; these children are powerless to change the social patterns of which they are a part, and they cannot respond meaningfully to legal or social sanctions intended to promote the nuclear family.

2. Instrumentalism

Parental exclusivity is also defended on instrumental grounds. Under this approach, rules for visitation, custody, and adoption are evaluated according to how well they accomplish certain pre-determined goals. It is usually taken for granted that the primary goal is to protect the interests of the children rather than to benefit adults directly or to preserve a particular social or natural order.

parents absent some showing of unfitness if the sole basis for state action was the children's best interests) (citing *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

⁶² See, e.g., *In re Ward*, 39 Wash. 2d 894, 239 P.2d 560 (1952); see also cases cited *infra* note 90.

⁶³ A natural law framework is not necessarily unresponsive to changing social conditions, particularly if proponents seek to achieve the natural order through universal norms rather than absolute rights. Ronald Dworkin's basic premise that all individuals be afforded equal dignity and respect, for example, may well be extended to include children. In the context of child custody, one might conclude that the opportunity for equal dignity and respect will be enhanced by certain exclusive parental rights, always assuming that these rights will be exercised in an appropriately intimate social unit within which dignity and respect are likely to be promoted. Consistent with this conclusion, however, one might also surmise that if the child is raised by those outside his natural family, entirely or in considerable part by nonparents, the premise does not hold and these rights ought to be revised. See R. Dworkin, *Taking Rights Seriously* 180 (1977).

⁶⁴ Cf. *Wilkinson & White*, *Constitutional Protection for Personal Lifestyles*, 62 *Cornell L. Rev.* 563 (1977) (discussing state regulation of personal modes of living that appear to threaten the nuclear family).

Although explicit justifications offered to defend child welfare as the goal of custody law tend to be sentimental or exaggerated,⁶⁵ the protection of children has been pervasive in our law, strengthened both by the moral claims of the helpless and by the belief that society as a whole benefits when its individual members have been properly raised.⁶⁶

Parental exclusivity is defended from an instrumentalist perspective on the grounds that the care of children will be handled most efficiently—to the greatest benefit of children and society as a whole—when the task is turned over to the child's parents.⁶⁷ This approach to parental rights thus builds upon the same nurturing instincts between parents and their children that are presumed under natural law. Natural parents, as a general assumption, are more likely to do what is best for their own children than are any other individuals, groups, or institutions.⁶⁸ Rights are given to parents to reinforce their natural instincts and innate sense of responsibility. Investing such rights in parents not only *encourages*

⁶⁵ See, e.g., Sayre, *supra* note 49, at 682-83:

[w]e quite justly put the emphasis on the children, because with them lies the future, and it is only through them that any (whether or not they are parents themselves) can hope to have a continued world for their efforts. This is a demonstrable fact. If there are no children, the world must come to an end with the death of those now living. Such a situation would not only remove incentive for daily effort of every kind among all people everywhere, but it would also bring a general despair which would cause disintegration and destruction of the people now living at a much earlier date than their life-span under normal conditions would make probable.

⁶⁶ See Hafen, *supra* note 4, at 476-78.

⁶⁷ A somewhat different approach to parental rights, which may be viewed also as instrumentalist, is that there is no other workable alternative to the parent. This approach is apparent most clearly in the work of those who argue that the best interests of children cannot be fairly and accurately ascertained. See, e.g., J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 49-52; Mnookin, *Foster Care—In Whose Best Interests?*, 43 *Harv. Educ. Rev.* 599, 613-22 (1973).

⁶⁸ See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Pendergrass v. Watkins*, 383 So. 2d 851, 854 (Ala. Civ. App. 1980); *In re Guardianship of Smith*, 42 Cal. 2d 91, 97, 265 P.2d 888, 892 (1954) (Traynor, J., concurring); *Wilson v. Mitchell*, 48 Colo. 454, 111 P. 21 (1910); *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971).

The story of King Solomon resolving a child custody dispute is often offered as an example of an application of the best interests test. See, e.g., Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 *Yale L.J.* 151, 156 n.27 (1963). The tale is in fact a clearer example of the instrumental basis of the parental rights doctrine. The dispute focused on who was the child's real mother, not in whose custody the child's best interests would be served. Solomon realized that the claimant who acted in the child's best interests was more likely to be the natural mother.

them to care for their children, but also *enables* them to do so, for without broad discretion and autonomy, parents cannot provide the care and guidance presumed to be in their children's best interests.⁶⁹

The instrumental approach to parenthood, like the natural law approach, assumes a direct relationship between parents and the family. It is within the family that parents provide for the child's security and intimacy, conditions necessary for each child's physical, emotional, and moral development.⁷⁰ The family provides the setting within which children are raised to become stable, responsible citizens.⁷¹ This conclusion—that the family is the best means

⁶⁹ The link between the parents' motivation and their authority is drawn also by natural law adherents. "[T]he Care cannot duly be exercised, unless the Parents have Power to direct and govern the Actions of the child, in order to the procuring his Benefit and Safety." 2 S. Pufendorf, *supra* note 54, ch. 2, § 4, at 915.

⁷⁰ Modern commentators stress that children are best raised in an intimate setting where they may be nurtured and socialized. See, e.g., J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 9, 13-14; T. Parsons & R. Bales, *Family, Socialization and Interaction Process* 16 (1955).

The family is also said to be a refuge from a cold and impersonal world. See 2 J. Kent, *supra* note 49, at *190 ("Under the thousand pains and perils of human life, the home of the parents is to the children a sure refuge from evil, and a consolation in distress."); Hafen, *supra* note 4, at 479-80 (drawing heavily on P. Berger & R. Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (1977)); see also C. Lasch, *Haven in a Heartless World* (1977) (analyzing stresses on the family, a refuge from the outside world).

⁷¹ Several commentators describe the family as teaching altruism, honor, self-sacrifice, and obedience, all elements necessary for good citizenship. See, e.g., Hafen, *supra* note 4, at 476-78; Schoeman, *supra* note 3, at 281-82; see also *Bellotti v. Baird*, 443 U.S. 622, 637-38 (1979) (plurality opinion) (guidance of parents "is essential to the growth of young people into mature, socially responsible citizens"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.").

Professor Hafen contrasts the sense of voluntary duty learned in the family with Adam Smith's assumption that self-interest is man's dominant value. Hafen, *supra* note 4, at 476; see also Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1505 (1983) (contrasting market ideology, in which universal selfish behavior is supposed to result in the betterment of society, with the ideology of family, in which sharing and sacrifice works for the good of society). In fact, Adam Smith also recognized the power of kinship in stimulating man's benevolence, sympathy, and virtue. A. Smith, *supra* note 2, at 219-24; see also Coase, *Adam Smith's View of Man*, 19 J. L. & Econ. 529, 533 (1976); cf. G. Becker, *A Treatise on the Family* 194-98 (1981) (altruism promotes efficiency in families in the same way in which self-interest promotes efficiency in the market economy).

It is also emphasized that only through the family are the diverse cultural traditions that make our society richly pluralistic passed on to future generations. See *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979) (plurality opinion) (the "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society

to reach these goals—is based upon empirical claims: “The experience of man has demonstrated that the best development of a young life is within the sacred precincts of a home, the members of which are bound together by ties entwined through ‘bone of their bone and flesh of their flesh.’”⁷²

In light of its avowed reliance on experience, the instrumental approach should permit reevaluation of traditional child custody rules to take into account the way children respond to changes in family patterns. Indeed, traditional parental rights have been modified substantially in many states, in part out of recognition that *de facto* parents in some situations may be more suitable than natural parents to care for children.⁷³ Most of these changes, however, have not affected the exclusive view of parental rights, but have merely adjusted the rules for determining which set of adults has these exclusive rights.

This exclusive view of parenthood is explored further below through an analysis of adoption law, which illustrates its application, and divorce custody law, which represents in part an exception to it.

C. Adoption and Exclusive Parenthood

When a child is adopted, the adoptive parents assume all rights and obligations of parenthood.⁷⁴ Adoption severs the relationship

constitutionally committed to the ideal of individual liberty and freedom of choice”); *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) (plurality opinion) (“the Constitution prevents [the state] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns”); Hafen, *supra* note 4, at 480; Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 *Stan. L. Rev.* 985, 992 (1975) (presumption in favor of parental autonomy reflects political commitment to diversity of views and lifestyles).

⁷² *Wilson v. Mitchell*, 48 Colo. 454, 466, 111 P. 21, 26 (1910).

Some commentators have criticized the nuclear family for promoting relationships that are too restrictive, intense, and isolating. See *Beyond the Nuclear Family—Model Cross Cultural Perspectives* (L. Lenero-Otero ed. 1977); D. Cooper, *The Death of the Family* (1970); M. Poster, *supra* note 1; R. Sennett, *The Uses of Disorder* (1970); R. Thamm, *Beyond Marriage and the Nuclear Family* (1975); see also Gordon, *supra* note 1, at 7-22 (summarizing some modern criticisms of the nuclear family).

⁷³ See *infra* notes 83-88, 168-86, 239-40 and accompanying text.

⁷⁴ See, e.g., *Neb. Rev. Stat. § 43-110* (1978). Like natural parents, adoptive parents may not easily abrogate their duties. See, e.g., *In re Adoption of a Minor*, 350 Mass. 302, 214 N.E.2d 281 (1966); *In re Adoption of L.*, 56 N.J. Super. 46, 151 A.2d 435 (Essex County Ct. 1959); *Parsons v. Parsons*, 101 Wis. 76, 77 N.W. 147 (1898).

In choosing adoptive parents, the state usually prefers two-parent families to further the

between the child and the natural parents, who become legal "strangers."⁷⁵ Where possible, the law insulates the adoptive parents from the natural parents, keeping the names of the adoptive parents secret so that the natural parents are unable to interfere in the adoptive home.⁷⁶ A trial court, in fact, may reject an adoption if contact between the natural parents and the adoptive parents appears likely.⁷⁷

Because it vitiates the natural parents' absolute rights to their

likeness to the traditional nuclear family. See, e.g., *In re Adoption of H.*, 69 Misc. 2d 304, 330 N.Y.S.2d 235 (Fam. Ct. 1972); Child Welfare League of America, *Guidelines for Adoption Service* 12 (1969), cited in H. Clark, *Domestic Relations Cases and Problems* 553 (1980).

A number of states implement this policy in part by requiring the consent of both spouses if the child is to be adopted into a two-parent home. See, e.g., Ill. Ann. Stat. ch. 40, § 1502A(a) (Smith-Hurd Supp. 1984-1985); Ky. Rev. Stat. § 199.500 (1982); Mich. Comp. Laws Ann. § 710.24 (West Supp. 1984-1985); see also *Browder v. Harmeyer*, 453 N.E.2d 301 (Ind. Ct. App. 1983) (upholding constitutionality of Ind. Code Ann. § 31-3-1-6(a)(6) (Burns 1980) (requiring both spouses to join in an adoption petition)).

⁷⁵ See, e.g., *Mitchell v. Brown*, 18 Cal. App. 117, 120-21, 122 P. 426, 427 (1912) (no obligation of support after termination proceedings; State Welfare Div. of the Dep't of Human Resources v. Vine, 662 P.2d 295, 297-98 (Nev. 1983) (termination is "binding and irrevocable"; "[c]omplete severance of the relationship removes all connections which may otherwise engender feelings of continuing attachment or right."), cert. denied, 104 S. Ct. 413 (1983).

Many states' adoption statutes explicitly require the complete severance of the rights of natural parents. E.g., Ohio Rev. Code Ann. § 3107.15(A) (Page 1980):

A final decree of adoption . . . shall . . . relieve the biological or other legal parents of the adopted person of all parental rights and responsibilities, and . . . terminate all legal relationships between the adopted person and his relatives, including his biological or other legal parents, so that the adopted person thereafter is a stranger to his former relatives for all purposes including inheritance and the interpretation or construction of documents, statutes, and instruments

Furthermore, the child does not have the right to contact his biological parents, to learn information about them, or to inherit from them. See, e.g., *In re Roger B.*, 84 Ill. 2d 323, 418 N.E.2d 751, appeal dismissed sub nom. *Barth v. Finely*, 454 U.S. 806 (1981) (no right to information); *In re Estate of Shehady*, 83 N.M. 311, 491 P.2d 528 (1971) (no right to inherit); *Linda F.M. v. Dep't of Health*, 52 N.Y.2d 236, 418 N.E.2d 1302, 437 N.Y.S.2d 283 (1981) (no right to information), appeal dismissed sub nom. *Mason v. Abrams*, 454 U.S. 806 (1981); *In re Estate of Toppel*, 32 Wis. 2d 223, 228, 145 N.W.2d 162, 165 (1966) (no right to inherit). Ordinarily, only upon a showing of "good cause," such as medical need, may an adopted child have any access to his parents, and even then access is limited to the extent necessary to satisfy that need. See, e.g., N.Y. Dom. Rel. Law § 114 (McKinney 1977) (upheld in *Alma v. Mellon*, 601 F.2d 1225 (2d Cir.), cert. denied, 444 U.S. 895 (1979)); see also Unif. Adoption Act § 16(2), 9 U.L.A. 49 (1971).

⁷⁶ See, e.g., *Winter v. Director, Dep't of Welfare*, 217 Md. 391, 143 A.2d 81 (1958); *Jacob v. State*, 7 Utah 2d 304, 323 P.2d 720 (1958); see also Borgman, *Antecedents and Consequences of Parental Rights Termination for Abused and Neglected Children*, 60 Child Welfare 391, 396-97 (1981).

⁷⁷ See, e.g., *In re M.N.*, 649 P.2d 749 (Mont. 1982).

children, adoption requires these parents' consent or a court-ordered termination of their rights.⁷⁸ To strengthen and protect the autonomy of the natural parents, the standards for involuntary termination of these rights are usually quite rigorous. Traditionally, one seeking to adopt without parental consent must prove unfitness or abandonment.⁷⁹ Courts usually interpret "abandonment" strictly, requiring physical abandonment as well as subjective intent to relinquish all parental ties.⁸⁰ Likewise, "unfitness" ordina-

⁷⁸ Adoption was not permitted at common law. See, e.g., *Poe v. Case*, 263 Ark. 488, 565 S.W.2d 612 (1978); *In re McKenzie*, 197 Minn. 234, 266 N.W. 746 (1936); *Taylor v. Taylor*, 58 Wash. 2d 510, 364 P.2d 444 (1961).

For histories of adoption, see H. Witmer, E. Herzog, E. Weinstein & M. Sullivan, *Independent Adoptions: A Follow-up Study* 24-43 (1963); Brosnan, *The Law of Adoption*, 22 Colum. L. Rev. 332 (1922); Kawashima, *Adoption in Early America*, 20 J. Fam. L. 677 (1981-82).

⁷⁹ See, e.g., *In re Petition of the Dep't of Soc. Servs. to Dispense with Consent to Adoption*, 15 Mass. App. Ct. 161, 444 N.E.2d 399, appeal denied, 383 Mass. 1104, 447 N.E.2d 670 (1983); *Ford v. Litton*, 211 So. 2d 871 (Miss. 1968); *In re Sanjivini K.*, 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979); *Berrien v. Greene County Dep't of Pub. Welfare*, 216 Va. 241, 217 S.E.2d 854 (1975).

About one-third of the states still require such showings. See Ala. Code § 26-10-3 (Supp. 1983); Colo. Rev. Stat. § 19-4-107(1) (1978 & Supp. 1983) (except stepparent adoptions); Del. Code Ann. tit. 13, § 1103 (1981); Fla. Stat. § 63.072 (1976); Ky. Rev. Stat. §§ 199.500, 208C.090 (1982); La. Rev. Stat. Ann. §§ 9:422.1, 13:1601 (West 1983 & Supp. 1984) (except grandparent and stepparent adoptions); Me. Rev. Stat. Ann. tit. 22, § 4055 (Supp. 1983-1984); Md. Fam. Law Code Ann. § 76 (Supp. 1982); Mich. Comp. Laws Ann. §§ 710.43, 710.51 (West Supp. 1984-1985) (except stepparent adoptions); Minn. Stat. Ann. § 260.221(b)(1)-(7) (West Supp. 1984); Mo. Rev. Stat. § 453.040 (Supp. 1983); Neb. Rev. Stat. § 43-104 (1978); S.D. Codified Laws Ann. § 25-6-4 (Supp. 1984); Tenn. Code Ann. § 36-1-110 (1984); Vt. Stat. Ann. tit. 15, § 435(5) (Supp. 1983); Wash. Rev. Code Ann. §§ 13.34.030(2), 13.34.180(1), 26.32.032(3), 26.32.056 (Supp. 1984-1985) (except stepparent adoptions); W. Va. Code § 48-4-1 (1980).

Some of these states set a time period after which abandonment will be found. See, e.g., Mo. Rev. Stat. § 453.040(4) (Supp. 1983) (willful abandonment for six months of a child over one year old; abandonment for sixty days of a younger child); Neb. Rev. Stat. § 43-104 (1978) (abandonment for six months); S.D. Codified Laws Ann. § 25-6-4(2) (Supp. 1984) (abandonment for one year).

⁸⁰ See, e.g., *In re T.C.M.*, 651 S.W.2d 525 (Mo. Ct. App. 1983); *In re Adoption of Ernst*, 318 N.W.2d 353 (S.D. 1983); *In re Adoption of Tryon*, 27 Wash. App. 842, 621 P.2d 775 (1980); see also *Susan W. v. Talbot G.*, 34 N.Y.2d 76, 80, 312 N.E.2d 171, 174, 356 N.Y.S.2d 34, 38 (1974) ("Even where the flame of parental interest is reduced to a flicker the courts may not properly intervene to dissolve the parentage.") (superseded by statute as stated in *B. v. B.*, 53 A.D.2d 160, 385 N.Y.S.2d 821 (1976)); *In re Adoption of Walton*, 123 Utah 380, 384, 259 P.2d 881, 884 (1953) ("abandonment" means "that the parent has placed the child on some doorstep or left it in some convenient place in the hope that some one will find it and take charge of it, or has abandoned it entirely to chance or fate" (footnote omitted) (quoting *Jensen v. Earley*, 63 Utah 604, 228 P.2d 217 (1924)).

rily requires a showing that the parents' conduct has severely harmed the child.⁸¹ Moreover, the Supreme Court has held that the evidence on any statutory ground for termination must be "clear and convincing."⁸²

Several states have liberalized the standards for termination of parental rights.⁸³ A number of states following the Uniform Adoption Act⁸⁴ have statutorily expanded the definition of "abandonment" by requiring only a showing that the noncustodial parent failed to provide support for or communicate with the child for a specific period of time—usually one year—regardless of the parent's intent.⁸⁵ Some of these statutes also specify that in determining abandonment, the court may disregard token visits, communications, or contributions of support.⁸⁶ Other states, instead of expanding the definition of abandonment, have shifted the focus of the inquiry from the parent's conduct to the child's best interests. Most of these statutes, however, still require some showing of un-

⁸¹ See, e.g., *Ford v. Litton*, 211 So. 2d 871, 873 (Miss. 1968) ("immoral conduct or vicious habits" must be demonstrated); *D.S. v. Department of Pub. Assistance & Social Servs.*, 607 P.2d 911, 919 (Wyo. 1980) (parent is unfit if his conduct "poses a serious danger to the child's physical or mental well-being").

⁸² *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁸³ For a review of some of these changed standards and of proposed model codes, particularly in the context of termination of parental rights, see Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 Seton Hall L. Rev. 1 (1978).

⁸⁴ *Unif. Adoption Act* § 6(a)(2), 9 U.L.A. 26 (1971).

⁸⁵ See, e.g., *Cal. Civ. Code* § 224 (West 1982) (one year); *Ga. Code* § 19-8-6(b) (1982) (one year); *Mont. Code Ann.* §§ 40-8-111(1)(a)(iii-v), 41-3-102(3)(d) (1983) (one year or six months, depending on circumstances); *N.C. Gen. Stat.* § 48-2(1)(b) (Supp. 1983) (six months); *Ohio Rev. Code Ann.* § 3107.07(A) (Page Supp. 1983) (one year).

⁸⁶ See, e.g., *Ind. Code Ann.* § 31-3-1-6(g)(1) (Burns 1980); *N.H. Rev. Stat. Ann.* § 170-C:5(I) (1977); *N.Y. Dom. Rel. Law* § 111(6)(b) (McKinney 1977); *R.I. Gen. Laws* § 15-7-7(a) (Supp. 1983); *Utah Code Ann.* § 78-30-5 (1977); *Wis. Stat. Ann.* § 48.415(1)(b) (West Supp. 1983-1984); see also *Ga. Code* § 19-8-6(b) (1982) ("failed significantly" to communicate or support); *Wyo. Stat.* §§ 1-22-110(v) (1977) (failed to contribute "substantially" to support); *infra* note 95 for other statutes incorporating liberalized criteria for termination of parental rights.

Some courts, even absent statutory provisions, require parents to demonstrate more than token effort. See *In re Adoption of Greer*, 463 P.2d 677 (Okla. 1969); *In re Adoption of CCT & CDT*, 640 P.2d 73 (Wyo. 1982).

Other states have vague provisions that may be interpreted as liberal termination standards. See, e.g., *Miss. Code Ann.* §§ 93-15-103(3)(e), 93-17-7 (Supp. 1983) (termination justified if child shows a deep-seated antipathy toward parent, caused by parent's unreasonable failure to visit or communicate); *N.J. Rev. Stat.* § 9:3-46(a) (Supp. 1983-1984) (termination justified by failure to maintain an emotional relationship with the child).

fitness or abandonment.⁸⁷ Only a few statutes provide that the best interests of the child may be the *sole* consideration.⁸⁸

State courts have not been uniformly receptive to legislative efforts to liberalize termination standards. At least one state supreme court has held that such a statute is an unconstitutional violation of parents' rights in their children,⁸⁹ and the United States Supreme Court has implied that a best interests standard may be unconstitutional.⁹⁰ Other courts have interpreted their statutes so

⁸⁷ See, e.g., N.M. Stat. Ann. § 40-7-4 (Supp. 1984); N.C. Gen. Stat. §§ 7A-289.22 (1981), 48-1 (1976 & Supp. 1983); 23 Pa. Cons. Stat. Ann. § 2511 (Purdon Supp. 1984-1985). For an example of judicial application, see *State ex rel. Dep't of Human Servs. v. Natural Mother*, 96 N.M. 677, 634 P.2d 699 (1981).

⁸⁸ The most common of these, modeled after the Uniform Adoption Act, § 19(c)(3), 9 U.L.A. 52 (1971), provide that adoption may be granted over the parent's objection whenever consent is withheld contrary to the best interests of the child. See Alaska Stat. § 25.23.180(c)(2) (1983). Ark. Stat. Ann. § 56-220(c)(3) (Supp. 1983). D.C. Code Ann. § 16-304(e) (1981); Md. Ann. Code art. 16, § 74 (1981) (repealed 1982); N.D. Cent. Code § 14-15-19(3)(c) (1981); Va. Code § 63.1-225(C) (1980); see also N.D. Cent. Code § 14-15-06(j) (1981) (consent not required if adoption is in best interest of child by reason of parent's failure to establish substantial relationship with minor or manifest significant parental interest).

Other statutes use different wording to achieve the same result. See Ariz. Rev. Stat. Ann. § 8-106(C) (Supp. 1983-1984) (consent not required if interests of child will be promoted thereby); Idaho Code § 16-2005(e) (1979) (consent not required where termination found in best interest of parent and child); Iowa Code § 600.7(4) (1979) (consent not required where court determines that, in best interests of child and of petitioner for adoption, consent is unnecessary).

⁸⁹ With a constitutional challenge to the best interest standard pending before the Utah Supreme Court, the Utah legislature in 1981 amended its termination of parental rights statute to include eight specific factors that a court must consider in determining the child's best interest. See *In re J.P.*, 648 P.2d 1364 (Utah 1982); Utah Code Ann. § 78-3a-48(a) (Supp. 1983). Nevertheless, the court found the statute unconstitutional, even as improved by the 1981 amendment. The statute "markedly diluted the protection enjoyed by natural parents" and provided "an open invitation to trample on individual rights through trendy redefinitions and administrative or judicial abuse." *In re J.P.*, 648 P.2d at 1370, 1376. See also *Washington County Dep't of Social Servs. v. Clark*, 296 Md. 190, 461 A.2d 1077 (1983) (holding unconstitutional a statute that permitted termination of parental rights when child had been in foster care for one or more years).

⁹⁰ The Supreme Court in dicta in *Quilloin v. Walcott* suggested that breaking up a nuclear family without a showing of parental unfitness could be unconstitutional. 434 U.S. 246, 255 (1978) (citing *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)). Further, the Court's requirement of clear and convincing evidence before parental rights are terminated may signal that liberal substantive termination standards are also unconstitutional. *Santosky v. Kramer*, 455 U.S. 745 (1982).

A District of Columbia court since *Quilloin* has upheld the best interests test for the termination of parental rights. *In re J.O.L.*, 409 A.2d 1073 (D.C. 1979), vacated sub nom. *Johnson v. J.O.L.*, 449 U.S. 989 (1980).

as to remove any constitutional defect; one court, for example, construed the "best interests" of the child as "necessarily includ[ing] consideration of the rights of the parent."⁹¹ Some courts have engrafted additional evidentiary requirements onto liberal statutory standards,⁹² while others have sidestepped statutory reforms altogether.⁹³

⁹¹ See, e.g., *In re Appeal in Pima County*, 118 Ariz. 111, 115, 575 P.2d 310, 314 (en banc) ("It is understood that the best interests of the child necessarily include consideration of the rights of the parents. Parental rights cannot terminate without consent until the unfitness of the parent is proven."), cert. denied sub nom. *Clark v. Curran*, 439 U.S. 848 (1978); accord, *Petition of New England Home for Little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 636-37, 328 N.E.2d 854, 858 (1975) ("elements of parental 'unfitness' figure strongly in the 'best interests' test"); see also *In re Adoption of K.M.M.*, 611 P.2d 84, 87 (Alaska 1980) ("parents should not be deprived of the fundamental rights and duties inherent in the parent-child relationship except for 'grave and weighty' reasons"); *Harper v. Caskin*, 265 Ark. 558, 561, 580 S.W.2d 176, 178 (1979) ("natural rights of parents should not be passed over lightly" in deciding whether to decree adoption against consent of parent); *In re Adoption of Voss*, 550 P.2d 481, 486 (Wyo. 1976) (parental unfitness not sufficient unless it is "in the whole sense").

⁹² See, e.g., *Woodruff v. Keale*, 64 Hawaii 85, 98, 637 P.2d 760, 768 (1981) (court must find both the conduct described in the liberal abandonment statute and an intent to abdicate all parental rights); *In re Adoption of Anonymous*, 158 Ind. App. 238, 302 N.E.2d 507 (1973) (court must find not only lack of communication with the child but also the parent's ability to communicate); *In re Adoption of McAhren*, 460 Pa. 63, 71-72, 331 A.2d 419, 423 (1975) (parental duties comprise many tasks; failure to perform only one of these, even a duty as important as support, does not warrant termination of parental rights).

The Supreme Court of Virginia has interpreted the best interests test to require an inquiry not into whether adoption would *promote* the child's best interests, but into whether a continuation of the existing parent-child relationship would *harm* the child. *Malpass v. Morgan*, 213 Va. 393, 192 S.E.2d 794 (1972) (statute dispensing with parental consent when withheld contrary to the best interest of the child); *Cunningham v. Gray*, 221 Va. 792, 273 S.E.2d 562 (1981) (following *Malpass* and reversing adoption decree where, even though trial court had found adoption to be in the child's best interests, there was no evidence that continuation of the limited relationship between father and daughter would harm the child).

⁹³ See, e.g., *D'Augustine v. Bush*, 269 S.C. 342, 237 S.E.2d 384 (1977) (termination of parental rights, *where the action is one for adoption*, is a question of intent and governed by the adoption statutes, not by the liberal but separate statutory provisions for termination of parental rights).

In *Corey L. v. Martin L.*, 45 N.Y.2d 383, 380 N.E.2d 266, 408 N.Y.S.2d 439 (1978), the New York Court of Appeals recognized that in enacting N.Y. Dom. Rel. Law § 111(6) (McKinney 1977) the legislature had amended the definition of abandonment so that "insubstantial or infrequent visits or communication" would not preclude a finding of abandonment. *Id.* at 388, 380 N.E.2d at 268, 408 N.Y.S.2d at 440. Nevertheless, the court declared that there "remains a heavy burden of constitutional magnitude on one who would terminate the rights of natural parents through adoption." *Id.* at 386-87, 380 N.E.2d at 267, 408 N.Y.S.2d at 440. In this case, the natural father, who lived near the child, had visited him only two or three times and had not paid any support for two years. The court found that a determination of abandonment was unwarranted.

Statutes that liberalize termination requirements in the context of adoption, however they are applied by the courts, reflect dissatisfaction with the application of strict parental rights doctrine to children who have formed attachments to adults outside the traditional nuclear family. Yet even these statutes, which provide different rules for determining who will be the child's parents, preserve parental exclusivity: one parent or set of parents has all of the rights of parenthood; the other has none. In either case, the child gains or retains an autonomous parent or set of parents but must sacrifice his relationships with another set of parents.⁹⁴

D. Child Custody at Divorce and Nonexclusive Parenthood

There is one distinct area of current family law in which exclusive parenthood is *not* the norm: custody of a child upon divorce of his natural parents. The division of parental rights incident to the dissolution of the family offers in some respects a paradigm of nonexclusive parental status. The law assumes that both parents will continue to have relationships with the child and that they will divide parental duties and responsibilities.⁹⁵ Neither parent's continuing status as parent requires the exclusion of the other parent.

This is not to say that divorce custody law is inconsistent with the concept of exclusive parenthood. One aspect of exclusive parenthood is the notion that once parenthood is established within the nuclear family it will be preserved forever. Divorce custody arrangements that divide parental rights and responsibilities may be viewed as a manifestation of this permanence. Moreover,

⁹⁴ Moreover, a child whose parents' rights have been terminated may not always be adopted by persons with whom the child has formed a parental relationship, even where such persons exist and desire to adopt the child. See, e.g., *Kyeys v. County Dep't of Pub. Welfare*, 600 F.2d 693 (7th Cir. 1979); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977) (en banc), cert. denied, 437 U.S. 910 (1978).

⁹⁵ The family after divorce may be seen as an interdependent unit, albeit reorganized. See Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. Rev. 523, 552 (1979). These authors argue that family autonomy ought not be diminished simply because one of the decisions that the family makes is to dissolve. *Id.*; see also Comment, *Joint Custody: An Alternative for Divorced Parents*, 26 UCLA L. Rev. 1084, 1104 (1979). Along the same lines, the post-divorce family may be analogized to a family that loses a parent by death. See *Developments in the Law*, supra note 3, at 1323. Although this analogy overlooks the possibility of conflicting authority for the child when parents divorce and establish separate households, it is probably true that some divorced parents are able to act in concert more successfully than other parents who live together.

the dispersion of parental rights at divorce or separation is often very limited, reinforcing the basic proposition that parenthood is an exclusive status. The most common custodial arrangement following divorce is for one parent to hold, nearly intact, the full set of legal parental rights and privileges. The other parent retains only a duty of support and a visitation privilege.⁹⁶

The authority of the custodial parent, however, may be subject to real limits. Visitation privileges conflict directly with the otherwise exclusive rights of the custodial parent, and they may restrict, for example, the custodial parent's ability to move,⁹⁷ control, and influence the child.⁹⁸ The division of support responsibilities may represent another limit on the custodial parent's authority, for the support duty of the noncustodial parent is generally defined specifically rather than merged with the duty of the other parent, as it is in the intact family.⁹⁹ This arrangement may limit markedly the resources available to the custodial parent and child.¹⁰⁰

Other increasingly common custodial arrangements following di-

⁹⁶ But see Note, *supra* note 28, at — (noncustodial fathers often given veto over proposed name changes).

It has been estimated that in 1968 mothers were awarded sole custody in 90% of divorce cases. Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. Rev. 473, 484 (1979). Weitzman and Dixon noted that this pattern has changed little in Los Angeles and San Francisco despite the many changes in divorce laws since 1968, such as no-fault divorce and elimination of the maternal preference. *Id.* at 489, 501-05. The division of support responsibilities may severely limit the resources available to the child. See Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181, 1249-63 (1981).

⁹⁷ See, e.g., *Scheiner v. Scheiner*, 336 So. 2d 406 (Fla. Dist. Ct. App. 1976), cert. denied, 342 So. 2d 1103 (Fla. 1977); *Ryan v. Ryan*, 300 Minn. 244, 219 N.W.2d 912 (1974); *Weiss v. Weiss*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 208 N.W.2d 336 (1973).

Cases illustrating a more permissive attitude toward custodial parents who wish to move include *In re Marriage of Guterthuth*, 246 N.W.2d 272 (Iowa 1976); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27 (App. Div.) aff'd, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976), *Bennett v. Bennett*, 228 Wis. 401, 280 N.W. 363 (1938).

⁹⁸ See, e.g., *In re Marriage of Mentry*, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983) (reversing restraining order against father prohibiting him from engaging in any religious activity or discussion during visitations); see also *infra* notes 324-25 (discussing limitations on custodial parent's ability to control visitation).

⁹⁹ Compare Md. Fam. Law Code Ann. § 5-203 (1984) (parents jointly and severally liable for child's support) with *Rand v. Rand*, 280 Md. 508, 374 A.2d 900 (1977) (applying statute at divorce of parents to require fixed monthly support from noncustodial parent, in accordance with parents' respective abilities to pay).

¹⁰⁰ See generally Weitzman, *supra* note 96, at 1249-63 (1981).

force entail even more substantial divisions of parental authority, responsibility, and privilege. Under a variety of joint or split custody arrangements, parents may share legal responsibility for and authority over children, sometimes in conjunction with equal or roughly equal physical custody.¹⁰¹ In some cases, a form of custody composed of exclusive parental rights and privileges rotates between parents on a periodic basis.¹⁰² Although courts long disfavored such arrangements,¹⁰³ statutes in more than half the states now permit joint custody,¹⁰⁴ a few of these explicitly favoring it.¹⁰⁵ All of these custody arrangements contemplate that the child of divorced parents will retain a permanent, ongoing relationship with each parent. To this extent, these arrangements create nonexclusive parental relationships.

Divorce custody law thus offers alternative models for resolving custody disputes over children who have developed child-parent relationships with adults outside their nuclear family. Whether these models may appropriately be applied in other contexts depends on what can be determined about the needs of children in

¹⁰¹ Where legal custody of the child is held jointly, the arrangement is generally referred to as joint custody. See Folberg & Graham, *supra* note 95, at 528-30; see, e.g., *Dodd v. Dodd*, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (Sup. Ct. 1978). Florida uses the term "shared parental responsibility." Fla. Stat. § 61.13(2)(b) (Supp. 1983).

¹⁰² This arrangement is sometimes referred to as divided or alternating custody. See Folberg & Graham, *supra* note 95, at 526-27; see, e.g., *Childers v. O'Neal*, 251 Ark. 1097, 476 S.W.2d 799 (1972).

¹⁰³ See, e.g., *Smith v. Smith*, 257 Iowa 584, 588, 133 N.W.2d 677, 679-80 (1965); *Rickard v. Rickard*, 7 Wash. App. 907, 911, 503 P.2d 763, 766 (1972).

¹⁰⁴ See Freed, *Joint Custody Laws: An Analysis and Comparative Study*, 9 Fam. L. Rep. (BNA) 4025 (July 19, 1983).

¹⁰⁵ See Cal. Civ. Code § 4600.5 (West Supp. 1984) (only if both parents agree; otherwise, discretionary with the court); Fla. Stat. § 61.13(2)(b) (Supp. 1983); La. Civ. Code Ann. art. 146(A)(1) (West Supp. 1984); Freed, *supra* note 104.

A few courts, in the absence of specific legislation, have ordered joint custody to divorcing parents who did not request it. See, e.g., *Kerns v. Kerns*, ___ Md. App. ___, 474 A.2d 925 (1984); *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981).

A good deal of literature has been generated discussing the benefits and disadvantages of joint custody. See, e.g., Ahrons, *Joint Custody Arrangements in the Postdivorce Family*, 3 J. Divorce 189 (1980); Cox & Cease, *Joint Custody*, Fam. Advocate, Summer 1978, at 10; Folberg & Graham, *supra* note 95; Levy & Chambers, *The Folly of Joint Custody*, Fam. Advoc., Spring 1981, at 6; Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 Golden Gate L. Rev. 539 (1982); Scott & Derdeyn, *Rethinking Joint Custody*, 45 Ohio St. L.J. 455 (1984); Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications* (Bodenheimer Address), 16 U.C.D. L. Rev. 739 (1983).

their child-parent relationships. The next section of this article explores these needs.

II. THE CHILD'S NEED FOR CONTINUITY IN FAMILY RELATIONSHIPS

Vigorous debate rages over how a child develops, what is in a child's best interests, and how to achieve certain objectives on behalf of a child. Near consensus does exist, however, for the principle that a child's healthy growth depends in large part upon the continuity of his personal relationships.¹⁰⁶ When divorce, death of a parent, foster care, or adoption intrude on a child's family life, such continuity is inevitably interrupted. Although some children may not experience lasting emotional or social harm from these crises, and some children may even benefit from them eventually,¹⁰⁷ it seems reasonable to adopt as an operating principle the notion that a break in family continuity is detrimental to a child.

The appropriate response to this type of disruption seems clear: the law, when invoked to resolve custody questions, should attempt to foster continuity in the child's life. The concept of continuity, however, is elusive. If when we refer to continuity we mean the prospect for stability and certainty in the child's future, then

¹⁰⁶ J. Goldstein, A. Freud & A. Solnit, *supra* note 4, at 8-9, 31-33; see M. Ainsworth, *The Effects of Maternal Deprivation: A Review of Findings and Controversy in the Context of Research Strategy in Deprivation of Maternal Care: A Reassessment of Its Effects*, 97, 143 (1962); Colon, *Family Ties and Child Placement*, 17 *Fam. Process* 289 (1978); E. Erikson, *Identity and the Life Cycle* 122-31 (1980); Finkelstein, *Children in Limbo*, 25 *Soc. Work* 100 (1980); Laird, *An Ecological Approach to Child Welfare: Issues of Family Identity and Continuity*, in *Social Work Practice: People and Environments* 174 (1979); M. Pringle, *The Needs of Children* 34-39 (1974); Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 *Am. J. Orthopsychiatry* 20 (1976).

¹⁰⁷ In their study of the children of 58 families from Marin County, California, during various intervals after their parents' divorce, Wallerstein and Kelly found numerous examples of increased developmental, moral and social growth *after* divorce. J. Wallerstein & J. Kelly, *Surviving the Breakup* 254-57, 270 (1980). They also found that some adolescents increased in maturity and independence following their parents' divorce. *Id.* at 89-95. For a judicial recognition of the benefits a child may experience as a result of a change in a satisfactory custody relationship, see *In re Guardianship of Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954):

It may not be to the best interest of the child to have every advantage. He may derive benefits by subordinating his immediate interests to the development of a new family relationship with his own parent, by giving as well as receiving. Thus although a change in custody from an outsider to a parent may involve the disruption of a satisfactory status quo, it may lead to a more desirable relationship in the long run.

Id. at 96, 265 P.2d at 891-92 (Traynor, J., concurring).

continuity may best be served by severing ties with everyone but the child's current custodian. On the other hand, if the concept comprehends the whole of a child's past existence as well as his present and future, it may require preserving ties with the past, even at the risk of some uncertainty or instability.¹⁰⁸

This elusiveness is complicated by the fact that a child's needs for continuity change as he passes through the various developmental stages. The infant's need for continuity is most often described as the need for attachment, which can be fulfilled only in a close and selective relationship between a child and a caregiver.¹⁰⁹ Children who do not form primary attachments in infancy are likely to suffer damage in many aspects of their development and will be hampered in their ability to form intimate relationships later in life. Although experts disagree as to the minimum requirements for successful attachment during infancy,¹¹⁰ there seems to be a consensus that the greater the number of separations from a caregiver, the more likely that the child's ability to form lasting attachments will be impaired.¹¹¹ This consensus suggests that when the infant's relationships with parents are disrupted, the law should seek to minimize the risks of further disruption, at least during the attachment stage.

¹⁰⁸ See Kelly, Further Observations on Joint Custody, 16 U.C.D. L. Rev. 762, 767-68, 770 (1983) (fulfilling short-term needs for continuity must be balanced by attention to long-term needs for continuity); see also Garrison, Why Terminate Parental Rights?, 35 Stan. L. Rev. 423, 458-74 (1983) (citing literature suggesting that continuity has been overemphasized at the cost of contact with natural parents).

¹⁰⁹ 1 J. Bowlby, Attachment and Loss 177 (1969); Kinnie & Kelley-Kinnie, Psychological Evaluation as an Aid in Permanency Planning, in *Protecting Children Through the Legal System* 543, 545 (Nat'l Legal Resource Center for Child Advocacy and Protection ed. 1981).

¹¹⁰ Bowlby and Winnicott, for example, stress the crucial importance of having a single mother. J. Bowlby, *Child Care and the Growth of Love* 13 (1965); D. Winnicott, *The Child, the Family, and the Outside World* 85-92 (1964). Michael Rutter, on the other hand, suggests that if the mothering is of high quality and is provided by persons who remain constant during the child's early life, the child's exposure to four or five mother figures need cause no adverse effects. M. Rutter, *Maternal Deprivation Reassessed* 27 (1981); see also Ainsworth, *The Development of Infant-Mother Attachment*, in 3 *Rev. of Child Dev. Research* 1, 81 (1973).

¹¹¹ M. Ainsworth, *supra* note 106, at 141, 143; A. Freud, *Psychoanalytic Knowledge and Its Application to Children's Services*, in 5 *The Writings of Anna Freud* 460, 468 (1969); M. Rutter, *supra* note 110, at 87-88, 102-03; Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *Stan. L. Rev.* 623, 671, 695-96 (1976).

The child's continuity requirement in the pre-school and latency periods takes the form of a need for permanence. Permanence can be achieved when children feel that they belong to a group, most often a family, whose members share a commitment to one another.¹¹² As the child experiences new impulses and new associations with peers and with adults outside the family, a stable family serves as a dependable reference point.¹¹³ An absence of permanence in a child's pre-school and latency years¹¹⁴ may cause him to have difficulty learning self-control and absorbing a value system.¹¹⁵

The adolescent child's need for continuity is usually expressed through his need to develop a sense of his role in society.¹¹⁶ As he tries to establish an independent adult identity, he may revolt against parental authority.¹¹⁷ Psychologists consider it important that the adolescent, as part of his effort to master his environment, control the assertion of his own independence.¹¹⁸ When the process of breaking the parental attachment is involuntary, compelled by court intervention or by the parents' divorce, the child's identity formation may be thrown off course.¹¹⁹ Adolescents also need a

¹¹² Finkelstein, *supra* note 106, at 102.

¹¹³ M. Pringle, *supra* note 106, at 37; see also Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 *Am. J. Orthopsychiatry* 256, 257 (1976).

¹¹⁴ For example, children in the three-to-five year old range often blame themselves for the disruption and rely on fantasies of their family's reunification to cushion the shock. See Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 *J. Am. Acad. Child Psychiatry* 600, 605 (1975). Children in the early latency period may respond with deep sadness and immobilization, see Kelly & Wallerstein, *supra* note 106, at 23, and later latency children whose parents divorce tend to align with one parent. Wallerstein & Kelly, *supra* note 113, at 266.

¹¹⁵ On the importance of one's family in developing a value system, see R. Blunden, 4 *Social Development, Studies in Developmental Pediatrics* 95, 97 (1982); M. Pringle, *supra* note 106, at 36; Finkelstein, *supra* note 106, at 102; Kelly & Wallerstein, *supra* note 106, at 25; Wallerstein & Kelly, *supra* note 113, at 263. On the child's general need for a secure family base as his experiences move beyond his immediate family, see E. Erikson, *supra* note 106, at 118-23; J. Wallerstein & J. Kelly, *supra* note 107, at 65; Sarnoff, *Ego Structure in Latency*, 40 *Psychoanalytic Q.* 387 (1971).

¹¹⁶ E. Erikson, *supra* note 106, at 22.

¹¹⁷ R. Blunden, *supra* note 115, at 105.

¹¹⁸ E. Erikson, *supra* note 106, at 94.

¹¹⁹ J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 34. See also E. Erikson, *supra* note 106, at 146-48; J. Wallerstein & J. Kelly, *supra* note 107, at 80-83. Furthermore, for an adolescent whose parents are divorcing, the struggle to define human relations may be complicated by fears that divorce may occur in his future or that he may develop sexual

sense of their own heritage. Those unaware of their biological and cultural pasts may find it difficult to develop satisfying self-concepts.¹²⁰ Thus, adopted children who are uncertain of their pasts may suffer from poor self-esteem and an inability to form satisfying relationships.¹²¹

It would seem, then, that while the law may serve infants best by emphasizing stability in their present and future attachments, at the expense of past relationships if necessary, older children are likely to benefit from maintaining ties with their former caretakers.¹²² This conclusion is reinforced by a more concrete examination of the problems commonly faced by children whose relation-

problems similar to those involved in his parents' divorce. Wallerstein & Kelly, *The Effects of Parental Divorce: The Adolescent Experience*, in 3 *The Child in His Family*, 479, 487-89 (1974).

¹²⁰ See E. Erikson, *Childhood and Society*, 238-41 (1963); R. Evans, *Dialogue with Erik Erikson* 35-37 (1967); Lifton, Foreword to M. Benet, *The Politics of Adoption* 3-4 (1976). Other authorities discuss the child's general need to understand his past, but do not view this need as confined to adolescents or to adoptees. See Laird, *supra* note 106, at 177; Lifton, *supra*, at 1-7; Littner, *The Importance of the Natural Parents to the Child in Placement*, 54 *Child Welfare* 175, 177 (1975).

¹²¹ The way in which a child is told about his adoption, when he is told, and the attitude of the adopting parents toward the birth parents are important factors in the child's development of self-esteem and his ability to develop satisfying relationships. L. Raynor, *The Adopted Child Comes of Age* 76-78, 90-102 (1980). Raynor's study is based on interviews with adult adopted persons. The interviewees were often well-adjusted if they had not only known but really grasped the meaning of their adopted status. See Colon, *supra* note 106, at 297-98, 301. Even children adopted early in their lives may face problems in later stages of their development. See Brinich, *Some Potential Effects of Adoption on Self and Object Representations*, 35 *The Psychoanalytic Study of the Child* 107, 111-13 (1980); Sorosky, Baran & Pannor, *Identity Conflicts in Adoptees*, 45 *Am. J. Orthopsychiatry* 18 (1975).

The need to understand one's heritage is particularly crucial for adopted children, but their special problems will not be explored in this paper. F. Fisher, *The Search for Anna Fisher* (1973); J. Triseliotis, *In Search of Origins: The Experiences of Adopted People* (1973) (advocating system in which all available data on adoptees given to adopting parents at time of adoption, subject to their independent discretion in deciding if and when to reveal the information to the child); Klibanoff, *Genealogical Information in Adoption: The Adoptee's Quest and the Law*, 11 *Fam. L.Q.* 185 (1977) (suggesting that the interests of the individual adoptee, the biological and adoptive parents, and the public should be weighed in deciding whether access to information about adoptee's history should be granted); Comment, *Adoptees' Right to Identity—A Ninth Amendment Approach to the Sealed Birth Certificate Statute*, 27 *S.D.L. Rev.* 122 (1982) (discussing possibility of ninth amendment right to identity).

¹²² Borgman, *supra* note 76; Derdeyn, *A Case for Permanent Foster Placement of Dependent, Neglected, and Abused Children*, 47 *Am. J. Orthopsychiatry* 604, 609 (1977); see also Wald, *supra* note 111, at 672-73 (citing Weinstein's study as support for notion that, at least for older children, maintaining parental contact after placement may be superior to termination followed by long-term foster care).

ships with their parents have been disrupted. One such problem is that children, confused about their new living situations, may manufacture reasons for their parents' absence.¹²³ The child of divorce may feel that he has caused the divorce.¹²⁴ The child in foster care may feel that he is bad and that the placement is punishment, that his natural parents have rejected him and will never see him again, or that his natural parents are dead.¹²⁵ Children who remain bewildered are likely to be held back developmentally.¹²⁶

Researchers also report that children are likely to develop unrealistic ideas about parents from whom they are separated. They may either idealize their absent parents or exaggerate parental faults.¹²⁷ If a child has little further contact with his parents after placement outside the home, or with the noncustodial parent after divorce, his irrational images will strengthen and multiply. Although these fantasies may temporarily help children deal with a lack of confidence or with anxiety, guilt, or shame,¹²⁸ they do not provide a foundation for long-term resolution of loss.¹²⁹ The child who is offered a more realistic sense of his parents and his past may achieve a continuity that allows him to establish his own identity.¹³⁰ Professor Andrew Watson puts it this way: "No matter

¹²³ J. Wallerstein & J. Kelly, *supra* note 107, at 232; see also Littner, *supra* note 120, at 177-78.

¹²⁴ J. Wallerstein & J. Kelly, *supra* note 107, at 50-51, 171; Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 *J. Am. Acad. Child Psychiatry* 600, 605 (1975).

¹²⁵ Littner, *supra* note 120, at 177.

¹²⁶ J. Wallerstein & J. Kelly, *supra* note 107, at 232; see also Fanshel, *Decision-Making Under Uncertainty: Foster Care for Abused or Neglected Children?*, 71 *Am. J. Pub. Health* 685, 686 (1981) (discussing the child's need to understand what his parents are like and why he is not with them).

¹²⁷ See, e.g., Littner, *supra* note 120, at 177; Stein & Derdeyn, *The Child in Group Foster Care*, 19 *J. Am. Acad. Child Psychiatry* 90, 92-93 (1980).

¹²⁸ Littner, *supra* note 120, at 177.

¹²⁹ See Derdeyn, *Children in Divorce: Intervention in the Place of Separation*, 60 *Pediatrics* 20, 21 (1977); see also J. Wallerstein & J. Kelly, *supra* note 107, at 248-50; Littner, *supra* note 120, at 178.

¹³⁰ See Colon, *supra* note 106, at 298; Littner, *supra* note 120, at 177. It is widely believed that unless the child is allowed to come in contact with his parents, so that he can come to terms with his unrealistic positive or negative images of his parents, his sense of identity and his ability to function are impaired. Regular contact can also abate the child's fears that he has inherited some bad trait from his parents. See M. Benet, *supra* note 120, at 191.

Furthermore, if the child can deal with his parents directly, he is not as likely to suppress fear and anger concerning the separation—feelings that may be displaced onto the adoptive parents if the child does not express them directly. See Jolowicz, *A Foster Child Needs His*

what type of parents the child has, sooner or later he must see them in accurate perspective and eliminate whatever fantasies he may have had about them. This may not be accomplished *in vacuo* and can only come about through continued and intensive contact."¹³¹

Contacts with noncustodial parents may also help children to deal with the grief they experience over the loss of their parent. Children of divorce at every developmental level experience sadness and even severe depression if they do not have frequent visits with the noncustodial parent.¹³² Similarly, foster children feel substantial ties even to parents who abused and neglected them.¹³³ The child's healthy mourning over an absent parent can be impeded by the ambiguity of the parent's status in the child's mind: "I do not see him, but he is alive somewhere."¹³⁴ The child may rely on fantasies of reunion to cushion his shock.¹³⁵ Total separation, therefore, rather than causing the child to forget his absent

Own Parents, *in* Parents of Children in Placement: Perspectives and Programs 55 (P. Sinanoglu & A. Maluccio eds. 1981); see also Katz, Adoption Counseling as a Preventive Mental Health Specialty, 59 Child Welfare 161, 163 (1980).

¹³¹ Watson, The Children of Armageddon: Problems of Custody Following Divorce, 21 Syracuse L. Rev. 55, 85 (1969); see also Benedek & Benedek, Postdivorce Visitation: A Child's Right, 16 J. Am. Acad. Child Psychiatry 256, 261-62 (1977); Derdeyn, Rogoff & Williams, Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care, 31 Vand. L. Rev. 1165, 1174-75 (1978).

¹³² J. Wallerstein & J. Kelly, *supra* note 107, at 248. Of the children in the Wallerstein and Kelly study, the boys especially suffered markedly from loss of contact with their non-custodial fathers. *Id.* at 170-72. Girls who identified with their custodial mothers seemed less affected than boys by their fathers' disappointing visitation patterns. *Id.*; see also Kelly & Wallerstein, *supra* note 106, at 23 (children in early latency become deeply depressed).

¹³³ Fanshel, *supra* note 126, at 685-86; see also D. Fanshel & E. Shinn, Children in Foster Care: A Longitudinal Investigation 486-90 (1978); Borgman, The Consequences of Open and Closed Adoption for Older Children, 61 Child Welfare 217, 219-20 (1982); Jolowicz, *supra* note 130, at 56-57; Laird, *supra* note 106, at 187; Littner, *supra* note 120, at 178-79. In one study of 111 foster children aged 9-18 who could not return home, 59 appreciated the stable care provided by foster parents, but did not wish to be adopted or exclusively attached to their foster parents. Bush & Goldman, The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique, 52 Am. J. Orthopsychiatry 223, 229-33 (1982).

¹³⁴ E. Furman, A Child's Parent Dies 47 (1974), quoted in Garrison, *supra* note 108, at 466 n.199.

¹³⁵ Stein & Derdeyn, *supra* note 127, at 92-93; see also *In re Patricia W.*, 89 Misc. 2d 368, 371-72, 392 N.Y.S.2d 180, 183 (Fam. Ct. 1977) ("As the latest thinking bears out, the reality of his natural family is uppermost in the mind of the adoptive child and his functioning as a person at peace with himself cannot go forward until his questions are answered and his psychological universe in order.").

parent, may actually increase the parent's importance to the child.¹³⁶

A common assumption about children who live apart from their families is that continued contact with absent parents confuses their loyalties, thereby jeopardizing their adjustment to new family situations.¹³⁷ On the basis of this assumption, Joseph Goldstein, Anna Freud, and Albert Solnit urge that when families are disrupted, all but one locus of the child's loyalty should be eradicated from his life.¹³⁸ With respect to children removed from their parents because of abuse or neglect, Goldstein, Freud, and Solnit maintain that if reunion is not achieved within certain time periods, determined by the child's age at separation, then the legal ties between the child and the absent parent or parents should be permanently terminated.¹³⁹ As to children of divorced parents, they suggest that only one parent should have a legally recognized interest in the child. Visitation by the noncustodial parent should be

¹³⁶ Wallerstein and Kelly noted:

The strength of the child's attachment could easily be underestimated and inadvertently reinforced by the rigid proscription of visiting. Unfortunately, the absolute prohibition of visiting with the . . . parent is as likely to strengthen the relationship as to weaken it, and the well-intentioned strategy may boomerang because children all too readily idealize the parent they are prohibited from seeing.

J. Wallerstein & J. Kelly, *supra* note 107, at 256. See also Benedek & Benedek, *supra* note 131, at 261 (children often become obsessed with absent noncustodial parent).

¹³⁷ Mnookin, *supra* note 67, at 624-25; see also *Phillips v. Phillips*, 153 Fla. 133, 135, 13 So. 2d 922, 923 (1943) ("[N]o man can serve two masters and it is certainly true that no child can pursue a normal life when subjected to the precepts, example and control of first one person and then another . . .").

¹³⁸ J. Goldstein, A. Freud & A. Solnit, *supra* note 4, at 135-37; J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 6-7, 35-39. For critical commentary on this aspect of their recommendations, see Katkin, Bullington & Levine, *Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action*, 8 L. & Soc'y Rev. 669, 674-81 (1974); Laird, *supra* note 106, at 184-88; Wald, *supra* note 111, at 686 n.252.

¹³⁹ These authorities make the length of time dependent upon the age of the child at the time of the separation. J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 47-49, stress that in general, the younger the child, the shorter the time period they should be allowed to remain in temporary care. They recommend, however, that the time factor be flexible and vary with each child on the basis of the child's maturity at the time of separation and the extent to which ties with the absent adults have been kept alive.

Professor Wald, on the other hand, while acknowledging that some flexibility is necessary, proposes specific maximum time limits depending on the child's age at the time of removal. Wald suggests six months as the outside limit for temporary care of children under three years of age, and one year for children over three years of age. See Wald, *supra* note 111, at 695-96.

entirely in the custodial parent's control.¹⁴⁰

Children of divorce¹⁴¹ and children in foster care¹⁴² do feel conflicting loyalties. A child feels a commitment to his absent parents based in part on his identification with them.¹⁴³ When the child must live with someone else, he may become uncertain as to whom he is to view as his parent. If this ambiguity develops during infancy, it may hinder his ability to develop a selective primary attachment.¹⁴⁴ During middle childhood, uncertainty may prevent the child from developing a value system capable of assimilating challenges to his nascent sense of morality.¹⁴⁵ Visitation may appear to aggravate loyalty conflicts by making the conflicting sources of loyalty more visible in the child's life.

Nonetheless, recent research does not bear out the conclusion that severing relations with parents or caretakers will resolve a child's loyalty conflicts. In fact, loss of contact with absent parents is more likely to aggravate these problems. Children of divorce who do not maintain contacts with their noncustodial parents suffer harm at every developmental stage;¹⁴⁶ those who maintain ties with noncustodial parents adjust more easily to their new situations.¹⁴⁷ Similarly, children in foster care who remain in contact with their

¹⁴⁰ J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 38.

¹⁴¹ Wallerstein & Kelly, *supra* note 113, at 266.

¹⁴² See Borgman, *supra* note 133, at 219.

¹⁴³ Littner, *supra* note 120, at 177. The child may interpret his being prevented from seeing that parent as criticism of that parent and hence as criticism of the child himself.

¹⁴⁴ See J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 32-33.

¹⁴⁵ J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 33-34; M. Pringle, *supra* note 106, at 37; Wallerstein & Kelly, *supra* note 113, at 257.

¹⁴⁶ J. Wallerstein & J. Kelly, *supra* note 107, at 248. Even children who have visiting relationships with parents who are erratic, who openly reject the child, who hurt the child's feelings, or who exploit the child for selfish purposes, seem to suffer less detriment as a result of divorce than children who lose contact with the noncustodial parent. M. Roman & W. Haddad, *The Disposable Parent* 57-59, 94, 119-20 (1978); J. Wallerstein & J. Kelly, *supra* note 107, at 218-19.

¹⁴⁷ Wallerstein and Kelly found both a clear negative effect of the noncustodial parent's relative abandonment and a positive contribution by the noncustodial parent who maintained a reliable relationship with the child. J. Wallerstein & J. Kelly, *supra* note 107, at 218-19; see also Hess & Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, 35 *J. Soc. Issues*, Fall 1979, at 92-95 (child's relationship with noncustodial father is separate from relationship with custodial mother but equally important to child's well-being); Messinger & Walker, *From Marriage Breakdown to Remarriage: Parental Tasks and Therapeutic Guidelines*, 51 *Am. J. Orthopsychiatry* 429, 430 (1981) (both parent's play vital roles in the development and well-being of the child).

parents experience fewer cognitive and psychological problems than do children whose bonds with their parents are completely severed.¹⁴⁸ This is because a child's commitments to his past are a source of security despite the instability of the family relationship.¹⁴⁹ If his current placement is stable, contacts with former parents or caretakers are unlikely to confuse him as to the permanence of his new family unit¹⁵⁰ and may be necessary to help resolve conflicting loyalties.¹⁵¹ With help from his foster parents,¹⁵²

¹⁴⁸ Jolowicz, *supra* note 130, at 61-63; Simmons, Gumpert & Rothman, *Natural Parents as Partners in Child Care Placement*, in *Parents of Children in Placement: Perspectives and Programs*, *supra* note 130, at 375.

For a perceptive if unscientific perspective on this point, see *In re Guardianship of Smith*, 42 Cal. 2d 91, 265 P.2d 888, (1954):

Even in a case where the foster parent treats the child as his own, the child may still suffer from the lack of a natural parent in the eyes of his playmates, or natural children or other relatives of his foster parent may discriminate against him. If he gets into trouble, members of his foster family may be tempted to point out that he is not really one of them.

Id. at 96, 265 P.2d at 891 (Traynor, J. concurring).

One study has demonstrated that foster children who are separated from their parents early in life because of parental neglect and who have only occasional contact with their parents nevertheless enjoy greater well-being than children who do not see their parents at all. E. Weinstein, *The Self-Image of the Foster Child* 17, 68-70 (1960). This conclusion applied to foster children who identified predominantly with either their foster parents or their natural parents. Children with mixed identifications generally do not develop well, regardless of the fact that their natural parents visit them regularly. On average, however, the correlation between visiting and well-being is strong. *Id.*; see also Garrison, *supra* note 108, at 461-64; Holman, *Exclusive and Inclusive Concepts of Fostering*, in *New Developments in Foster Care and Adoption* 69, 78-82 (J. Triseliotis ed. 1980); Thorpe, *The Experiences of Children and Parents Living Apart*, in *New Developments in Foster Care and Adoption*, *supra*, at 85, 94-95.

¹⁴⁹ Littner, *supra* note 120, at 177-79.

¹⁵⁰ E. Weinstein, *supra* note 148, at 35-36. In a study of 111 foster children aged 9 to 10 who could not return home, 59 children appreciated the stable care provided by their foster parents but did not wish to be adopted or exclusively attached to their foster parents. Bush & Goldman, *supra* note 133, at 229-33.

¹⁵¹ Borgman, *supra* note 76, at 402-03; Colon, *supra* note 106, at 297; Littner, *supra* note 120, at 178-79.

Regular contact by natural parents can also abate fantasies and fears of foster parents (or even adoptive parents) of what "bad traits" the children may have inherited from their parents. Jolowicz, *supra* note 130, at 58; Littner, *supra* note 120, at 180. Non-custodial parents, too, can benefit if they can relate to the child in a positive manner during the visits, or to realistically and legitimately accept their limitations in the parental role. Laird, *supra* note 106, at 193.

¹⁵² A child's negative reaction to contacts with his natural parents is actually a reflection of the attitude of his current custodian. Both foster parents and adoptive parents may resent the intrusion of the natural parents, provoking in a child a negative reaction to contacts to contacts with his natural parents. Littner has identified several reasons for this resent-

he can learn to draw strength from the multiple relationships.¹⁵³ Children whose parents' rights are terminated, on the other hand, are unable to benefit from the additional relationships, and they may experience heightened feelings of disloyalty.¹⁵⁴

The current legal framework of exclusive parenthood ignores children's needs to maintain continuous contact with parent figures, including their natural parents, and underestimates their ability to manage multiple parenting relationships. The next section describes this framework and its application to child custody disputes in a variety of family situations.

III. RESOLVING DISPUTES OVER CHILDREN WITHIN THE FRAMEWORK OF EXCLUSIVE PARENTHOOD

The implications of an exclusive view of parenthood can best be evaluated by examining how courts apply visitation, custody, and adoption law in disputes over children who have not been raised continuously in nuclear families. Although these disputes ordinarily arise in disrupted families, courts resolve them according to rules reflecting the norm of the intact nuclear family and the ex-

ment. Parents may be difficult to get along with, and their presence may make the foster parent's work more difficult. Natural parents may be uncooperative, unpredictable, and inconsistent, and they may make unrealistic promises to the child and perhaps attempt to undermine the foster parents' role by treating them as hired help. Littner, *The Art of Being a Foster Parent*, 57 *Child Welfare* 3, 7 (1978). The natural parents frequently have a lifestyle different from that of the foster family, and this difference can be a source of irritation for both families. Although some foster parents may be able to help the child to realize that a person's lifestyle does not affect his worth as a person, McAdams, *The Parent in the Shadows*, 51 *Child Welfare* 51, 54-55 (1972), it may be difficult for foster parents to be uncritical when the natural parents' lifestyle has caused emotional or physical damage to the child. See Littner, *supra*, at 7. Visitation can also be uncomfortable to visiting parents, who may be reminded that they are failures as parents. When the foster parents give the natural parents orders about caring for the child, often in the child's presence, it is difficult for the natural parents to create or maintain an image of responsibility. McAdams, *supra*, at 53-54. These attitudes in adults may be the most important key to enabling children to maintain multiple parenting relationships. Cf. J. Wallerstein & J. Kelly, *supra* note 107, at 145 (children of divorced parents may reflect hostility of noncustodial parent toward custodial parent).

¹⁵³ Colon, *supra* note 106, at 297; Laird, *supra* note 106, at 106-08, 119; see also R. Thamm, *supra* note 72, at 20. (arguing that just as parents should have more than one child, to decentralize their possessiveness and dependency on any one of them, children should have more than one parent of each sex, to provide them with a larger number of role models).

¹⁵⁴ Borgman, *supra* note 76, at 402-03.

clusive view of parenthood implied by that norm. This section examines the application of these rules to the claims of stepparents, unwed fathers, foster parents, and nonparent caretakers.

A. Stepparents

Almost one-quarter of America's children live or will live in stepfamilies.¹⁵⁵ Insofar as the stepfamily contains one of the child's natural parents, it is but one degree removed from the traditional family, and for this reason the law prefers it both to single-parent and to non-parent families. Yet because it does not contain both of the child's natural parents and indeed may threaten the status of the noncustodial parent, the stepfamily challenges traditional family-based doctrines of parental rights.

The relationship between children and their stepparents is both psychologically and legally amorphous. Although the stepparent is psychologically a stranger to the child, he is also "the person closest to the closest relative a child can have. He or she is right in the centre of the inner family circle with all that implies in physical and emotional proximity to a child."¹⁵⁶ This tension makes the stepparent's role uncertain. Questions about discipline, access to school records, financial support, educational and medical decisions, names, vacation planning, and religious upbringing are common in stepfamilies. Such uncertainties may create a strain in the new marriage as well as in stepparent-child relations that may already be burdened by feelings of envy, hostility, or guilt.¹⁵⁷ These questions are complicated further if each adult brings children to the marriage, because each set of children may be governed by a different set of rules and expectations.¹⁵⁸

The stepparent's legal role is similarly uncertain. Under the

¹⁵⁵ Comment, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U.C.D. L. Rev. 604, 604-05 (1979) (quoting D. Mayleas, *Rewedded Bliss* 7 (1977)).

¹⁵⁶ Comment, *supra* note 155, at 608 n.26 (quoting B. Maddox, *The Halfparent* 20 (1975)).

¹⁵⁷ See E. Einstein, *The Stepfamily* 7-13, 51, 60, 150 (1982); R. Rapoport, R.M. Rapoport, Z. Strelitz & S. Kew, *Fathers, Mothers and Others* 110-17 (1977). These factors may help to explain the findings of one study that children with surrogate fathers in the home (stepfathers as well as male relatives and unrelated males) revealed significantly more behavioral difficulties than those reported for children living with both natural parents, or for children living with no father in the home. McCarthy, Gersten & Langner, *The Behavioral Effects of Father Absence on Children and Their Mothers*, 10 Soc. Behav. & Personality 11 (1982).

¹⁵⁸ R. Rapoport, R.M. Rapoport, Z. Strelitz & S. Kew, *supra* note 157, at 112.

common law, the stepparent-stepchild relationship does not itself give rise to any legal rights or obligations. For example, the stepparent need not support his stepchild or accept the child into his home.¹⁵⁹ A stepfather may not give his name to his stepchild if the natural father objects,¹⁶⁰ and usually a stepchild cannot inherit from his stepparent.¹⁶¹

If the stepparent receives the child into his home and treats him as a member of his family, the stepparent may incur legal obligations under the common law doctrine of *in loco parentis*. According to this doctrine, any person who voluntarily assumes the status of parent without the formality of adoption may incur support and education obligations.¹⁶² A few states now impose a statutory duty of support on stepparents while the child lives in the family.¹⁶³ The *in loco parentis* doctrine, however, is not the equivalent of legal parenthood. The stepparent's duties toward a stepchild continue only as long as the child chooses or is permitted to remain in the stepparent's home. Under the common law, the stepparent may le-

¹⁵⁹ *Faber v. Commissioner*, 264 F.2d 127, 129 n.3 (3d Cir. 1959); *Skribner v. Skribner*, 153 N.J. Super. 374, 379 A.2d 1044 (Ch. Div. 1977).

¹⁶⁰ *In re Trower*, 260 Cal. App. 2d 75, 66 Cal. Rptr. 873 (1968); *Robinson v. Hansel*, 302 Minn. 34, 223 N.W.2d 138 (1974); *Kay v. Kay*, 112 N.E.2d 562, 51 Ohio Op. 434 (1953); see also Note, *supra* note 28.

¹⁶¹ *Bryant v. Thrower*, 239 Ark. 783, 394 S.W.2d 488 (1965); *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978); *In re Estate of Smith*, 49 Wash. 2d 229, 299 P.2d 550 (1956). But see *Young v. Hipple*, 273 Pa. 439, 117 A. 185 (1922) (stepdaughter has an insurable interest in life of stepfather).

For an analysis of the legal recognition given to the steprelationship in the areas of wrongful death, insurance, welfare, worker's compensation, and inheritance, see Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 Fam. L.Q. 209, 215-26 (1970).

¹⁶² *Kelley v. Iowa Dep't of Social Servs.*, 197 N.W.2d 192 (Iowa), appeal dismissed, 409 U.S. 813 (1972); *Taylor v. Taylor*, 58 Wash. 2d 510, 364 P.2d 444 (1961); *Monk v. Hurlburt*, 151 Wis. 41, 138 N.W. 59 (1912).

The stepparent who stands *in loco parentis* to a child also may be entitled to some of the advantages of parenthood, such as the right to the child's services, *Wood v. Wood*, 166 Ga. 519, 143 S.E. 770 (1928), or the privilege of intrafamily tort immunity, *Trudell v. Leatherby*, 212 Cal. 678, 300 P. 7 (1931) (overruled in *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971)).

¹⁶³ See, e.g., *Logan v. Logan*, 120 N.H. 839, 424 A.2d 403 (1980) (interpreting N.H. Rev. Stat. Ann. §§ 546-A:1 to -A:2 (1974)); *Kaiser v. Kaiser*, 93 Misc. 2d 36, 402 N.Y.S.2d 171 (Fam. Ct. 1978) (interpreting N.Y. Fam. Ct. Act § 415 (McKinney 1983)); *Washington Statewide Org. of Stepparents v. Smith*, 85 Wash. 2d 564, 536 P.2d 1202 (1975) (upholding constitutionality of Wash. Rev. Code Ann. §§ 26.16.205 and 26.20.030(1)(b) (Supp. 1984-1985), which charge stepparent with support for duration of marriage); Or. Rev. Stat. § 109.053 (1983).

gally abandon the *in loco parentis* relationship at any time.¹⁶⁴ Moreover, because the step-relationship derives from the marriage of the natural parent and the stepparent, it is generally held by statute as well as under the common law that the relationship automatically ends upon termination of the marriage or on the death of the natural parent. Thus, a stepfather may immediately upon his divorce from the custodial mother discontinue support.¹⁶⁵ If the custodial parent dies, the noncustodial parent may immediately retrieve the child from a stepparent, and the stepparent, whom the child may have come to look upon as his real parent, may be unable either to object to the removal or to obtain visitation.¹⁶⁶

The few courts that have awarded stepparent visitation¹⁶⁷ or stepparent custody¹⁶⁸ have had to strain both common and statutory law to reach such results. In visitation cases, courts sometimes have disregarded the absence of a statute granting visitation rights to nonparents and have assumed jurisdiction to allow such visitation simply because the stepparent had physical custody of the child at the date of the petition for custody or visitation.¹⁶⁹ Other courts have invoked the *in loco parentis* doctrine,¹⁷⁰ ignoring the

¹⁶⁴ State ex rel. Gilman v. Bacon, 249 Iowa 1233, 91 N.W.2d 395 (1958); see also Schneider v. Schneider, 25 N.J. Misc. 180, 183-84, 52 A.2d 564, 566-67 (Ch. 1947) (person must intentionally act *in loco parentis* toward spouse's child by a former marriage before he can be held to have assumed such burdens).

¹⁶⁵ See, e.g., Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961); McDowell v. McDowell, 378 S.W.2d 814 (Ky. Ct. App. 1964); Kaiser v. Kaiser, 93 Misc. 2d 36, 402 N.Y.S.2d 171 (Fam. Ct. 1978); Chestnut v. Chestnut, 247 S.C. 332, 147 S.E.2d 269 (1966); Taylor v. Taylor, 58 Wash. 2d 510, 364 P.2d 444 (1961). But see Miller v. Miller, 97 N.J. 154, 478 A.2d 351 (1984) (stepparent may be estopped from terminating obligation to support stepchildren at divorce from custodial parent if his conduct has actively interfered with support of children by noncustodial parent).

¹⁶⁶ See, e.g., Pierce v. Pierce, 645 P.2d 1353 (Mont. 1982). But see In re Adoption of Cheney, 244 Iowa 1180, 59 N.W.2d 685 (1953) (stepparent who stood *in loco parentis* has standing to contest adoption of child upon death of natural mother).

¹⁶⁷ E.g., Carter v. Brodrick, 644 P.2d 850 (Alaska 1982); Collins v. Gilbreath, 403 N.E.2d 921 (Ind. Ct. App. 1980); Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979); Looper v. McManus, 581 P.2d 487 (Okla. Ct. App. 1978); Spells v. Spells, 250 Pa. Super. 168, 378 A.2d 879 (1977); Gribble v. Gribble, 583 P.2d 64 (Utah 1978).

¹⁶⁸ See, e.g., Lloyd v. Lloyd, 92 Ill. App. 3d 124, 415 N.E.2d 1105 (1980); Cebrzynski v. Cebrzynski, 63 Ill. App. 3d 66, 379 N.E.2d 713 (1978); Palermo v. Palermo, 164 N.J. Super. 492, 397 A.2d 349 (App. Div. 1978); In re Allen, 28 Wash. App. 637, 626 P.2d 16 (1981).

¹⁶⁹ Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979). The applicable statute did not allow visitation rights in nonparents.

¹⁷⁰ Carter v. Brodrick, 644 P.2d 850 (Ala. 1982) (stepfather who had acted *in loco parentis* may be entitled to visitation privileges); Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979)

common law rule that such status ends with the dissolution of the stepparent's marriage. In *Gribble v. Gribble*,¹⁷¹ for example, an applicable statute allowed the court to grant visitation to "parents, grandparents, and other relatives."¹⁷² Although stepparents fit none of these categories, the court construed the statute to include stepparents who had assumed *in loco parentis* status.¹⁷³ The court ruled further that the *in loco parentis* status is terminable only at the will of the adult or the child, not at dissolution of the marriage.¹⁷⁴ Another court assumed jurisdiction on the basis of a statute allowing the court to award to a stepparent visitation rights to any "child of the marriage."¹⁷⁵ The court found the stepchild to be a child of the marriage because the stepfather had assumed *in loco parentis* status. Still another court relied not upon statutory law but reasoned that because it was "against public policy to limit or destroy the relationship of parent to child,"¹⁷⁶ it must also be against public policy to constrain the relationship of a child to a stepfather who had acted *in loco parentis*.¹⁷⁷

Some cases reach emotionally appealing results without legal analysis. Ordinarily in these cases the stepparent has loyally cared for the child while the natural custodial parent has lived elsewhere.¹⁷⁸ In one unusual case, the mother of three children had recently committed suicide.¹⁷⁹ After a review of case law denying visitation to third parties if the custodial parent objected,¹⁸⁰ the court awarded visitation to the stepfather against the father's will. The court held that to end the girls' two-year custodial relation-

(stepparent entitled to hearing regarding whether he is *in loco parentis* to the child and, if so, whether visitation is in child's best interests); *Spells v. Spells*, 250 Pa. Super. 168, 378 A.2d 879 (1977) (same).

¹⁷¹ 583 P.2d 64 (Utah 1978).

¹⁷² Utah Code Ann. § 30-3-5(1) (Supp. 1983).

¹⁷³ *Gribble v. Gribble*, 583 P.2d 64, 68 (Utah 1978).

¹⁷⁴ *Id.* at 67.

¹⁷⁵ *Carter v. Brodrick*, 644 P.2d 850, 855 (Alaska 1982). But see *Perry v. Superior Court*, 108 Cal. App. 3d 480, 481, 166 Cal. Rptr. 583, 584 (1980) (visitation by stepfather not allowed under divorce statute providing only for visitation of minors who are "children of the marriage") (superseded by statute as stated in *Marckwardt v. Superior Court*, 150 Cal. App. 3d 471, 198 Cal. Rptr. 41 (1984)).

¹⁷⁶ *Spells v. Spells*, 250 Pa. Super. 168, 175, 378 A.2d 879, 883 (1979).

¹⁷⁷ *Id.*

¹⁷⁸ *Looper v. McManus*, 581 P.2d 487 (Okla. Ct. App. 1978).

¹⁷⁹ *Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. Ct. App. 1980).

¹⁸⁰ *Id.* at 923.

ship with their stepfather would be "unfair and traumatic,"¹⁸¹ because the girls would thereby lose two parents in ten days.

Courts awarding custody to stepparents where natural parents are fit face similar analytic difficulties in jurisdictions where statutes allow custody to be awarded only to natural parents. A few courts, while making passing reference to a natural parent presumption, have approved what was essentially a best interests analysis to justify an award of custody to a stepparent.¹⁸² One court arranged the law to fit the facts. In *In re Allen*¹⁸³ the stepmother had devoted herself for four years to help her deaf stepchild, attaining statewide recognition for her work on behalf of education for the deaf. She and her three children also learned sign language; the custodial natural father had not done so. Both stepmother and father sought custody upon their divorce. The court, reasoning that a best interests test would not adequately protect the natural parent's primary right to custody and that a parental unfitness test would not sufficiently protect the child's welfare, adopted an intermediate "actual detriment to the child" test.¹⁸⁴ The court concluded that the child's intellectual development would be hindered if custody were awarded to the father, who could not communicate with the child, and that the child would

¹⁸¹ *Id.*

¹⁸² See, e.g., *Palermo v. Palermo*, 164 N.J. Super. 492, 397 A.2d 349 (App. Div. 1978). In *Palermo*, the child had lived with the father and stepmother during their 15-month marriage, and then for the following two years lived with the stepmother while the father moved around. The court awarded custody to the stepmother by applying a best interests analysis. See also *Lloyd v. Lloyd*, 92 Ill. App. 3d 124, 415 N.E.2d 1105 (1980). In *Lloyd* the court awarded custody of the child to the stepfather, who had lived with the child longer than the mother. The presumption in favor of the mother was overcome by a showing that custody by the stepfather would be in the child's best interests. See also *Root v. Allen*, 151 Colo. 311, 377 P.2d 117 (1962) (stepfather with whom children had lived for three previous years awarded custody at death of mother despite fitness of natural father); *In re Ewing*, 96 Idaho 424, 529 P.2d 1296 (1974) (same).

¹⁸³ 28 Wash. App. 637, 626 P.2d 16 (1981).

¹⁸⁴ *Id.* at 649, 626 P.2d at 23. This standard, explicitly adopted by statute in California, see Cal. Civ. Code § 4600(c) (1983), had been applied in a California case used by the *Allen* court to support its decision. It was not, however, available under the terms of the applicable Washington statutes.

Under the statute applicable in *Allen*, a nonparent could petition for custody only if the natural parent were unfit or if the natural parent did not have custody at the date of the divorce. Neither criterion was fulfilled in this case. The court concluded nevertheless that it had jurisdiction to award custody to the stepmother because the children were "dependent" to the marriage. 28 Wash. App. at 643-44, 626 P.2d at 20.

have the advantages of being in a nuclear family if custody were awarded to the stepmother, who had remarried.¹⁸⁵

Stepparent custody cases have also arisen when the stepparent and noncustodial natural parent both have sought custody on the death of the custodial natural parent. One court, borrowing the best interests standard from the context of custody disputes arising at the divorce of two natural parents, awarded joint custody to a stepmother and a noncustodial natural mother upon the death of the children's natural father.¹⁸⁶ The court believed that because the children were already suffering from grief and confusion at their father's death, their current living arrangements ought not be disrupted. The decree, awarding weekday custody to the stepmother and weekend custody to the natural mother, preserved the living arrangements that existed prior to the father's death.

All of these cases granting visitation or custodial rights to stepparents do so by manipulating the common law, by stretching statutory law, or by borrowing a test from one type of custody proceeding and applying it in another. Such judicial creativity provides an unstable and unpredictable basis for dispute resolution. Currently, the only generally accepted legal alternative to this ad hoc rulemaking is stepparent adoption, a resolution that is far from satisfactory.¹⁸⁷ Although adoption in these situations regularizes the child's family relationships, it also virtually ensures that the child will lose the benefits of a relationship with the absent parent—who no longer has the right even to see the child. Thus, liberal stepparent adoption statutes¹⁸⁸ merely confirm the exclusivity of parenthood by vesting rights to the child exclusively in the stepparent and his spouse. The law does not accommodate both

¹⁸⁵ *Allen*, 28 Wash. App. at 649, 626 P.2d at 23.

¹⁸⁶ *Cebzynski v. Cebzynski*, 63 Ill. App. 3d 66, 379 N.E.2d 713 (1978).

¹⁸⁷ Adoption requires either the natural parent's consent or the involuntary termination of his rights in the child. See, e.g., Cal. Civ. Code §§ 224 (West 1982), 7017 (West 1983); see also *supra* text accompanying notes 78-82. In some states, liberalized adoption statutes make it easier to terminate the noncustodial parent's rights over his objection. See *supra* notes 74-77 and accompanying text. A few states have liberal adoption statutes that apply specifically to stepparent adoptions. See Colo. Rev. Stat. § 19-4-107(1)(e)(II) (1978); La. Rev. Stat. Ann. § 9:422.1 (West, Supp. 1984); Mich. Comp. Laws Ann. § 710.51(6) (West Supp. 1984-1985). But see Del. Code Ann. tit. 13, § 1103(5)(b) (1981) (requiring adopting parents to prove that the child has resided with the stepparent for one year and that the noncustodial parent has been and will remain incapable of fulfilling parental duties).

¹⁸⁸ See *supra* note 187.

natural parents and stepparents; either the stepparent will remain without legal duties and privileges concerning a child in his household,¹⁸⁹ or all of the natural parent's duties and privileges will be permanently severed.¹⁹⁰

The conflict between the claims of the natural parent and those of the stepparent reveals the inherent conflict between parental exclusivity and the nuclear family. Traditional parental rights doctrine, whether grounded in instrumentalism or natural law, assumes that children are best raised by their biological parents. Strict stepparent adoption statutes reflect this view in their assumption that biological parents serve the child better than strangers and that even minimal contact with a biological parent psychologically benefits the child.¹⁹¹ But the parental rights doctrine also assumes that children are best raised in families, and that each child may have only one family. This seemingly inconsistent tenet finds reflection in more liberal stepparent adoption statutes, which assume that a nuclear family best serves the child and that ties with the noncustodial parent must be severed.¹⁹² Stepparent adoption cases force a choice between these two norms, because existing law cannot effect a compromise that would create a substitute nuclear family for the child without sacrificing his relationship with his noncustodial natural parent.¹⁹³

This legal failure may be particularly tragic if the stepfamily later dissolves. A stepparent who has served as a father for several years may suddenly be nothing more, legally, than a stranger to the child. Alternatively, if the natural father's rights have been ter-

¹⁸⁹ See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *In re Carson*, 6 Mass. App. Ct. 665, 382 N.E.2d 1116 (1982); *In re Adoption of Children by D*, 61 N.J. 89, 293 A.2d 171 (1972); *In re Adoption of McAhren*, 460 Pa. 63, 331 A.2d 419 (1979);

¹⁹⁰ See, e.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978).

¹⁹¹ See, e.g., *Visher & Visher*, *Legal Action is No Substitute for Genuine Relationships*, *Fam. Advoc.*, Fall 1981, at 35; see also *Wadlington*, *The Divorced Parent and Consent for Adoption*, 36 U. Cinn. L. Rev. 196, 208-09 (1967) (advocating adoption by stepparent only when natural parent consents or is shown to be unfit).

¹⁹² See *H. Clark*, *The Law of Domestic Relations in the United States* 632 (1968); *Berkowitz*, *supra* note 161, at 228-29; see also *Comment*, *A Survey of State Law Authorizing Stepparent Adoptions Without the Noncustodial Parent's Consent*, 15 *Akron L. Rev.* 567, 593-94 (1982) (where legislature has enacted "best interests" statute, courts should examine psychological bonds a child has developed with stepparent).

¹⁹³ See, e.g., *Bodenheimer*, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 *S. Cal. L. Rev.* 10, 44-46 (1975); *Comment*, *supra* note 155, at 614-16.

minated in order to give parenting status to the stepparent, and if the dissolution of the stepfamily causes the stepfather to lose all interest in the child, the child may have a legal father who does not care for him and a natural father whom he cannot reach. Both results, invited by the framework of exclusive parenthood, respond poorly to the needs of the child who no longer lives in a traditional nuclear family.

B. Unwed Fathers

Like stepparents, parents who do not marry pose a dilemma for the parental rights doctrine. But where the stepparent's claim is based upon an existing family and a de facto parent-child relationship, the unwed father's claim is based, sometimes exclusively, upon the one element missing from the stepparent relationship—biological parenthood. According to the parental rights doctrine, this biological link between parent and child stimulates responsible parenting and thus is a key ingredient in establishing an adult's parental rights.¹⁹⁴ Nonetheless, when unwed parents do not offer their children a family whose adult members are legally committed to one another, the family that the doctrine of parental rights seeks to promote simply does not exist. Because of his formal assumption of legal responsibilities, the law expects the man married to the child's mother to take his parental duties seriously.¹⁹⁵ Absent marriage, the basis for this expectation becomes questionable. For this reason, the common law gave the unwed father no rights or duties with respect to his child.¹⁹⁶

¹⁹⁴ See *supra* text accompanying notes 58-59.

¹⁹⁵ Hafen, *supra* note 4, at 498; see also *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (state not foreclosed from recognizing a difference "in the extent of the commitment to the welfare of child" between the wed and unwed father).

¹⁹⁶ At common law, the unwed father had no legal rights or duties with respect to his illegitimate child. The common law was modified in England by the Elizabethan Poor Law of 1576, which created an obligation of support by both parents. See Poor Law Act of 1576, 18 Eliz. 1, c. 3, cited in Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 Va. L. Rev. 431, 432 (1977). The primary goal of the statute was to reduce the burden on the parish of supporting illegitimate children. *Id.*

The common law also occasionally required unwed mothers to support their illegitimate children, even absent a statute. See W. Tiffany, *Persons and Domestic Relations* § 114, at 304-06 (1921). There is evidence, moreover, that some ecclesiastical courts, before the passage of the Poor Law of 1576, enforced a duty of support of illegitimate children against their fathers. Helmholz, *supra*, at 436-46.

The modern response to the unwed father has been to erect a series of barriers that he must overcome before he will be granted any status as a parent. His rights to the child depend upon what barriers he is able to overcome.¹⁹⁷

The first barrier is proof of paternity. Although some state courts have held that an unwed father has a constitutional right to establish his paternity,¹⁹⁸ many states create procedural impediments to his doing so. Evidentiary rules may preclude his submission of blood test evidence,¹⁹⁹ while other substantive presumptions may preclude a finding of paternity altogether.²⁰⁰ Some states

American courts recognized early on the blood relationship between the illegitimate child and the mother, and they awarded her the right of custody against all strangers. *W. Tiffany*, supra, § 114, at 305; see also *People ex rel. Meredith v. Meredith*, 272 A.D. 79, 69 N.Y.S.2d 462, aff'd, 297 N.Y. 692, 77 N.E.2d 8 (1947) (mother of illegitimate child prima facie entitled to its custody as against the father or anyone else); *Pierce v. Jeffries*, 103 W. Va. 410, 137 S.E. 651 (1927) (mother of illegitimate child entitled to its custody unless she is unfit). This was not the case with fathers. But, as was the case at common law before the Poor Law of 1576, illegitimate fathers had no legal duty of support. See, e.g., *Best v. House*, 113 S.W. 849 (Ky. 1908); *Bissell v. Myton*, 160 A. D. 268, 145 N.Y.S. 591 (1914), aff'd, 214 N.Y. 672, 108 N.E. 1089 (1915). Nor did they have a right of visitation or custody. See, e.g., *DePhillips v. DePhillips*, 335 Ill. 2d 154, 219 N.E.2d 465 (1966) (visitation) (superseded by statute as stated in *In re Custody of Myer*, 100 Ill. App. 3d 27, 426 N.E.2d 333 (1981)); *Friesner v. Symonds*, 46 N.J. Eq. 621, 20 A. 257 (1890) (custody); *Commonwealth ex rel. Golembewski v. Stanley*, 205 Pa. Super. 101, 208 A.2d 49 (1965) (visitation) (overruled in *Commonwealth v. Rozanski*, 206 Pa. Super. 397, 213 A.2d 155 (1965)); see generally *Tabler, Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. Fam. L. 231 (1971).

¹⁹⁷ In California, for example, a father who has done no more than prove his paternity may be entitled to visitation and even custodial privileges; but unless he has openly recognized and received the child into his home, he will not have standing to object to the child's adoption. See *In re Richard M.*, 14 Cal. 3d 283, 122 Cal. Rptr. 531, 537 P.2d 363 (1975); Cal. Civ. Code § 224 (West 1982); id. § 7004 (West 1983). Compare *Gomez v. Perez*, 409 U.S. 535 (1973) (duty of support is based on biological parenthood) with *Lehr v. Robertson*, 103 S. Ct. 2985 (1983) (no constitutional right to block adoption on the basis of biological parenthood alone).

¹⁹⁸ See, e.g., *Pritz v. Chesnul*, 106 Ill. App. 3d 969, 436 N.E.2d 631 (1982); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

¹⁹⁹ See *Goodrich v. Norman*, 100 Misc. 2d 33, 421 N.Y.S.2d 285 (Fam. Ct. 1979) (results of human leukocyte antigen tests not admissible in paternity action under New York statute, unless they disprove paternity).

²⁰⁰ See, e.g., Cal. Evid. Code § 621(a) (West Supp. 1984) (conclusive presumption that issue of a wife cohabiting with husband who is not impotent or sterile is a child of the marriage, except when conclusions of all the experts, based upon blood tests, are otherwise); see also *A. v. X., Y., & Z.*, 641 P.2d 1222 (Wyo. 1982) (unwed father has no standing to bring action to establish his paternity of a child born to mother after her marriage to another man), cert. denied, 459 U.S. 1021 (1982) (superseded by statute in *In re. T.R.G.*, 665 P.2d 491 (Wyo. 1983)).

allow only the mother or the state to bring a paternity action;²⁰¹ others require the mother's consent.²⁰² Even if he proves paternity or the mother concedes it, the law may also require the unwed father to legitimate the child before he is entitled to any parental rights,²⁰³ a step that may require the mother's cooperation or consent²⁰⁴ or a court finding that legitimation is in the child's best interests.²⁰⁵

If the unwed father seeks visitation, then he must also show that visitation is in the best interests of the child.²⁰⁶ If he seeks custody,

²⁰¹ See, e.g., *Ford v. Loeffler*, 363 So. 2d 23 (Fla. Dist. Ct. App. 1978); *Paltani v. Creel*, 169 Neb. 591, 100 N.W.2d 736 (1960).

The recent trend, however, is to permit putative fathers to bring a paternity action. See, e.g., *R. McG. v. J.W.*, 200 Colo. 345, 615 P.2d 666 (1980); *Johannesen v. Pfeiffer*, 387 A.2d 1113 (Me. 1978); *Barry County Dep't of Social Servs. v. Potter*, 72 Mich. App. 233, 249 N.W.2d 370 (1976); *In re Mengel*, 287 Pa. Super. 186, 429 A.2d 1162 (1983).

²⁰² See, e.g., Ohio Rev. Code Ann. § 2105.18 (Page Supp. 1983).

²⁰³ See, e.g., *In re Adoption of Mullenix*, 359 So. 2d 65 (Fla. Dist. Ct. App. 1978); *In re V., M., & B.*, 559 S.W.2d 901 (Tex. Civ. App. 1977).

²⁰⁴ See, e.g., *In re Reyna*, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976).

²⁰⁵ See, e.g., *Marby v. Tadlock*, 157 Ga. App. 257, 277 S.E.2d 688 (1981); *In re Baby Girl S.*, 628 S.W.2d 261 (Tex. Civ. App. 1982), cert. granted sub nom. *Kirkpatrick v. Christian Homes of Abilene*, 103 S. Ct. 784, vacated and remanded, 103 S. Ct. 1760 (1983); Ohio Rev. Code Ann. § 2105.18 (Page Supp. 1983).

In many states, the father may legitimate the child (or acquire a parental status as if he had formally legitimated the child) by demonstrating the formation of a parental relationship. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *In re Mark T.*, 8 Mich. App. 122, 154 N.W.2d 27 (1967); *In re Gerald G.*, 61 A.D.2d 521, 403 N.Y.S.2d 57 (1978), appeal dismissed, 46 N.Y.2d 1036, 389 N.E.2d 1106, 416 N.Y.S.2d 586 (1979). In some states the father may achieve the same status by proving that he has supported the child. See, e.g., N.Y. Dom. Rel. Law § 111(1)(d)(i) (*McKinney* 1977 & Supp. 1983-1984).

²⁰⁶ See, e.g., *Sullivan v. Bonafonte*, 172 Conn. 612, 376 A.2d 69 (1977); *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981); cf. *Phillips v. Horlander*, 535 S.W.2d 72 (Ky. 1976) (unwed father has right to visitation so long as no showing that visitation would be contrary to the child's best interests); *Maxwell v. LeBlanc*, No. 82-C-1801 (La. April 14, 1983) (all parents have visitation rights regardless of illegitimacy of parenthood). Visitation is usually granted where the unwed father is meeting his child support obligations. See, e.g., *Mixon v. Mize*, 198 So. 2d 373 (Fla. Dist. Ct. App. 1967); *Gardner v. Rothman*, 370 Mass. 79, 345 N.E.2d 370 (1976); *Baker v. Baker*, 81 N.J. Eq. 135, 85 A. 816 (1913) (reasoning that man has a right to see how his money is spent); *Anonymous v. Anonymous*, 56 Misc. 2d 711, 289 N.Y.S.2d 792 (Fam. Ct. 1968); *Commonwealth v. Rozanski*, 206 Pa. Super. 397, 213 A.2d 155 (1965).

Some courts have awarded visitation where the father was not paying child support. See, e.g., *Commonwealth ex rel. Peterson v. Hayes*, 252 Pa. Super. 487, 381 A.2d 1311 (1977). An award of visitation is especially likely if the mother refused to accept it. *Phillips v. Horlander*, 535 S.W.2d 72 (Ky. 1975); *People ex rel. Francois v. Ivanova*, 14 A.D.2d 317, 221 N.Y.S.2d 75 (1961), or did not ask for it, *Bagwell v. Powell*, 267 Ala. 19, 99 So. 2d 195 (1957); *Normand v. Barkei*, 385 Mass. 851, 434 N.E.2d 631 (1982). But see *Slawek v. Stroh*,

he must offer further proof of his suitability for custody. If he competes with the mother for custody, this burden is particularly heavy, for the unwed father's custody right is almost always secondary to that of the mother.²⁰⁷ Only a few courts have awarded an unwed father custody of an illegitimate child in preference to the mother.²⁰⁸ Indeed, the mother's custodial right is so strong in some states that she may decline to relinquish her parental rights and at the same time place the child in foster care—thereby giving up

62 Wis. 2d 295, 215 N.W.2d 9 (1974) (that mother is capable of supporting herself and child may be a valid defense to a paternity suit brought by the father for the purpose of obtaining visitation rights).

Proof of a familial relationship with the child also will ordinarily satisfy the father's burden. See, e.g., *Gay v. Cairns*, 298 N.W.2d 313 (Iowa 1980); *Maxwell v. LeBlanc*, No. 82-C-1801 (La. April 14, 1983); *Raleigh v. Watkins*, 97 Mich. App. 258, 293 N.W.2d 789 (1980); *Pearson v. Clark*, 382 So. 2d 482 (Miss. 1980); *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981); *Pierce v. Yerkovich*, 80 Misc. 2d 613, 363 N.Y.S.2d 403 (Fam. Ct. 1974); *Slade v. Dennis*, 594 P.2d 898 (Utah 1979). But see *DePhillips v. DePhillips*, 35 Ill. 2d 154, 219 N.E.2d 465 (1966) (father denied visitation although he had lived with mother and child for nine years).

If the failure to establish a familial relationship was due to the mother's resistance, the courts may excuse the failure when the father seeks visitation. See, e.g., *In re One Minor Child*, 295 A.2d 727 (Del. Super. Ct. 1972); see also *Adoption of Lathrop*, 2 Kan. 2d 90, 575 P.2d 894 (1978) (father may be excused where outside agency prevented him from bestowing parental care); *In re P.*, 36 Mich. App. 497, 194 N.W.2d 18 (1971) (mother's release of child to adoption agency does not terminate father's right to child). Courts have regarded such excuses as irrelevant when the unwed father has sought custody or to block the child's adoption. See, e.g., *Lehr v. Robertson*, 103 S. Ct. 2985 (1983); *In re Reyna*, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976). In New York such excuses are irrelevant in actions to defeat adoption if the child is less than six months old when placed for adoption. N.Y. Dom. Rel. Law § 111(1)(d), (e) (McKinney 1977 & Supp. 1983-1984).

²⁰⁷ See, e.g., *Blakemore v. Blakemore*, 217 Ga. 174, 121 S.E.2d 642 (1961); *Norcia v. Richard*, 32 A.D. 656, 300 N.Y.S.2d 608 (1969), *aff'd sub nom. Anonymous v. Anonymous*, 26 N.Y.2d 740, 257 N.E.2d 288, 309 N.Y.S.2d 40 (1970); *In re Guardianship of Harp*, 6 Wash. App. 701, 495 P.2d 1059 (1972); *cf. Cal. Civ. Code* § 197 (West 1982) (father and mother equally entitled if father meets "presumed father" requirements); *id.* § 7004 (West 1983) (outlining "presumed father" requirements, which are marriage to mother, attempt to marry mother, or receiving child into home and holding him out as natural child).

²⁰⁸ See, e.g., *Orezza v. Ramirez*, 19 Ariz. App. 405, 507 P.2d 1017 (1973); *Heyer v. Peterson*, 307 N.W.2d 1 (Iowa 1981); *Whitaker v. Glerup*, 35 Or. App. 201, 580 P.2d 1073 (1978). In one unusual case, the mother was incompetent. The court awarded her visitation, after the adoption by the unwed father, on the basis of a New Jersey statute allowing visitation after stepparent adoptions with consent of the natural parent. The court interpreted "step-father" as including natural fathers and apparently also deemed the natural mother to have consented to the adoption, even though she was legally incompetent. *In re Adoption by A.R.*, 152 N.J. Super. 541, 378 A.2d 87 (P. Div. 1977).

custody of the child while preventing the father from obtaining it.²⁰⁹

If the mother has died, surrendered the child for adoption, or had her parental rights terminated, the unwed father still must establish his fitness for custody.²¹⁰ Even in these circumstances, many courts will not permit an unwed father to block the adoption of his illegitimate child²¹¹ or to regain custody from another guardian.²¹² The father's right to custody in such a situation may depend on whether he has established a family relationship with the child.²¹³ In some states, the unwed father who has established no

²⁰⁹ See, e.g., *Cheryl Lynn H. v. Superior Court*, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974) (disapproved in *In re M.*, 14 Cal. 3d 783, 573 P.2d 363, 122 Cal. Rptr. 531 (1975)).

²¹⁰ In *Stanley v. Illinois*, the Court found that the unwed father who had lived with his children had a substantive interest in his child that warranted protection in the absence of a powerful countervailing interest. 405 U.S. 645 (1972). Many state court cases since *Stanley* have assumed that *Stanley* requires only that the unwed father be afforded a hearing on the subject of custody. See, e.g., *Cheryl Lynn H. v. Superior Court*, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974) (disapproved in *In re M.*, 14 Cal. 3d 783, 573 P.2d 363, 122 Cal. Rptr. 531 (1975)); *In re Guardianship of D.A. McW.*, 429 So. 2d 699 (Fla. Dist. Ct. App. 1983); *In re New Bedford Child & Family Servs.*, 385 Mass. 482, 432 N.E.2d 97 (1982); *In re K.*, 535 S.W.2d 168 (Tex.), cert. denied, 429 U.S. 907 (1976); see also *Caban v. Mohammed*, 441 U.S. 380, 385 n.3 (1979) (appellant had had notice of and had attended adoption hearing; and thus did not argue that he had been denied the procedural due process required by *Stanley*).

Other state courts, however, both before and after *Stanley*, have held that the unwed father, unless he is unfit or has abandoned the child, has an automatic right to custody upon the death of the mother or her relinquishment of the child. See, e.g., *In re Guardianship of Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954); *In re Guardianship of D.A. McW.*, 429 So. 2d 699 (Fla. Dist. Ct. App. 1983); *In re Custody of Townsend*, 86 Ill. 2d 502, 427 N.E.2d 1231 (1981); *Aycock v. Hampton*, 84 Miss. 204, 36 So. 245 (1904); *In re Guardianship of C.*, 98 N.J. Super. 474, 237 A.2d 652 (Juv. & Dom. Rel. Ct. 1967); *In re Mitchell*, 70 A.D.2d 367, 421 N.Y.S.2d 443 (1979), rev'd sub nom. *In re M.*, 56 N.Y.2d 77, 436 N.E.2d 491, 451 N.Y.S.2d 41 (1982); *Hayes v. Strauss*, 151 Va. 136, 144 S.E. 432 (1928); *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975); see also Cal. Civ. Code § 224 (West 1982); id. § 7004(a)(4) (West 1983) (unwed father who has received child into his home may prevent adoption).

Custody by married fathers upon the death of the mother is, of course, automatic. See, e.g., *Derby v. Kim*, 238 Ga. 429, 233 S.E.2d 156 (1977).

²¹¹ See, e.g., *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126 (1965); *South Carolina Dep't of Social Servs. v. Parker*, 275 S.C. 176, 268 S.E.2d 282 (1980); *In re K.*, 535 S.W.2d 168 (Tex.), cert. denied, 429 U.S. 907 (1976); *Commonwealth v. Hayes*, 215 Va. 49, 205 S.E.2d 644 (1974).

²¹² See, e.g., *In re Guardianship of Morgan*, 70 Misc. 2d 1063, 335 N.Y.S.2d 226 (Surrogate's Ct. 1972).

²¹³ Compare *In re Guardianship of D.A. McW.*, 429 So. 2d 699 (Fla. Dist. Ct. App. 1983) (unwed father who had publicly acknowledged paternity and who had babysat child several times a week since child was three months old had priority over maternal grandmother with whom child had lived since birth), and *Neal v. White*, 362 So. 2d 1148 (La. App. 1978)

such relationship may even be denied notice and the opportunity to participate in the adoption hearing.²¹⁴

The courts' emphasis on the prior development of a family relationship as a substitute for the usual guaranty of responsible parenthood—marriage—demonstrates both the desire to protect the child's actual relationships and the belief that parenthood is not based solely on a biological connection.²¹⁵ Yet although the un-

(unwed father who had cared for four-year-old daughter since she was six weeks old given custody over natural mother who had left child in his care) with *In re Reyna*, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976) (willingness of unwed father to receive child into his home will not suffice; father must publicly acknowledge paternity and receive child into his family in order to have full parental rights in an adoption proceeding), *In re Female D.*, 83 A.D.2d 933, 442 N.Y.S.2d 575 (1981) (statute making unwed father's preadoption consent unnecessary where he has failed to be a functioning parent held constitutional), and *In re T.E.T.*, 603 S.W.2d 793 (Tex. 1980) (rights of unwed father who had not established substantial family relation with child not violated when his petition in adoption proceeding to legitimate the child was denied), cert. denied sub nom. *Oldag v. Catholic Charities*, 450 U.S. 1025 (1981).

A relationship based upon visitation rather than custody may suffice in these circumstances. See, e.g., *In re Richard M.*, 14 Cal. 3d 783, 792-96, 122 Cal. Rptr. 531, 536-39, 537 P.2d 363, 368-71 (1975) (requirement that father must have "received child into his home" was met despite lack of custody, where child had had periodic visits in father's home).

²¹⁴ Such a denial has been upheld by the United States Supreme Court. *Lehr v. Robertson*, 103 S. Ct. 2985, 2993 (1983). The Supreme Court's decision in *Lehr* dispelled the implication in *Stanley v. Illinois*, 405 U.S. 645, 657 n.9 (1972), that all "unwed fathers who desire and claim competence to care for their children" were entitled to a hearing on the question of fitness. Married fathers, by contrast, are always entitled to a hearing on the question of custody. *Armstrong v. Manzo*, 380 U.S. 545 (1965).

In California, the right to custody of an unwed father who has not legitimized the child is statutorily subject to the superior right of the mother. Cal. Civ. Code § 197 (West 1982) (mother has superior right unless father meets the "presumed father" requirements); id. § 7004(a) (West 1983) (setting forth "presumed father" requirements as marriage of mother, attempted marriage of mother, or receipt of child into home). In one case, however, a putative father was held to be entitled to notice and an opportunity to participate in adoption proceedings despite his failure to legitimate the child. *In re Adoption of Rebecca B.*, 68 Cal. App. 3d 193, 137 Cal. Rptr. 100 (1977).

Courts in other states, before the Supreme Court's decision in *Lehr*, insisted upon the right of the unwed father to have notice of and the opportunity to protest in adoption proceedings, even where legitimation requirements were not satisfied. See, e.g., *In re Zink*, 264 Minn. 500, 119 N.W.2d 731 (1963); *In re Adoption of Walker*, 468 Pa. 165, 360 A.2d 603 (1976).

²¹⁵ The Court in *Lehr* protected "developed" relationships, not biological connections. *Lehr v. Robertson*, 103 S. Ct. 2985, 2993 (1983); cf. *Hafen*, supra note 4, at 497-99 (man's biological rights not coextensive with his right to become legal father of a child). For an argument that an unwed father has a constitutionally protected "opportunity interest" in developing a relationship with his child, see *Buchanan*, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 Ohio St. L.J. 313, 351-82 (1984).

wed father's rights are often partial rather than full,²¹⁶ his status as father continues in an important sense to be exclusive, for no substitute father can acquire any rights until those of the unwed father are extinguished. For the same reason, when a stepfather offers the child through adoption two legal parents within a single nuclear family, the unwed father may lose even his partial status as parent. Unless his relationship with the child is sufficiently strong, the unwed father, who previously may have been entitled to parenting privileges such as visitation, may face the loss of these privileges and perhaps all of his other parental rights.²¹⁷ No matter how limited the unwed father's rights, the law considers such rights inconsistent with those of the legally recognized father.

*Quilloin v. Walcott*²¹⁸ illustrates how an unwed father may be required to surrender his limited rights to a substitute father. The unwed father, Quilloin, had never married the child's mother nor lived with the child, but he had supported the child irregularly, visited him, and occasionally given him gifts. When the child was eleven years old, the mother's husband, who had been living with her and the child for almost seven years, sought to adopt the child. The natural father opposed the adoption but did not seek custody.

²¹⁶ For a development of the distinction between full and partial parenting, see Poulin, *Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits*, 70 *Nw. U.L. Rev.* 910, 918 (1976).

²¹⁷ *Quilloin v. Walcott*, 434 U.S. 246 (1978). The availability of a substitute family has influenced many other stepparent adoption cases. See, e.g., *Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972); see also *Cheryl Lynn H. v. Superior Court of Los Angeles*, 41 Cal. App. 3d 277, 115 Cal. Rptr. 849 (1974) (unwed father's right to notice and hearing did not preclude unwed mother from initiating adoption proceedings); *Willmott v. Decker*, 56 Hawaii 462, 541 P.2d 13 (1975) (stepparent adoption may be granted over objection of putative father who would otherwise have visitation rights, if in best interests of the child); *Adoption of Zimmerman*, 229 N.W.2d 245 (Iowa 1975) (noncustodial parent does not have power to veto adoption merely because he possesses visitation rights).

The law in California illustrates the role a substitute family may have in ascertaining the rights of the unwed father. The biological father may have support obligations and visitation or even custody privileges, but only the father who has recognized the child or received the child into his home may object to an adoption approved by the natural mother. Courts have been more willing to find that the father recognized the child if the child would otherwise remain illegitimate. See, e.g., *In re Richard M.*, 14 Cal. 3d 783, 122 Cal. Rptr. 531, 537 P.2d 363 (1975). Conversely, where a child is already living with a stepfather or other caretaker who wishes to adopt him, the criteria for the father's recognition of the child will be more strictly applied to prevent the unwed father from blocking the adoption. See, e.g., *In re Adoption of Marie R.*, 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978); *Adoption of Rebecca*, 68 Cal. App. 3d 193, 137 Cal. Rptr. 100 (1977).

²¹⁸ 434 U.S. 246 (1978).

He did wish to visit the child, but the mother felt that these visits were disruptive.²¹⁹

The Georgia courts, like those of other states, would not accommodate the exercise of parental rights by more than one father. At trial, the adopting stepfather did not show that Quilloin had abandoned his child, that he was unfit, or that he met any of Georgia's other requirements for the termination of parental rights.²²⁰ The United States Supreme Court, in upholding the Georgia Supreme Court's affirmance of the trial court decision, confirmed settled law that the state may not break up a natural family over the objections of the parents and their children without some showing of unfitness. It concluded, however, that Quilloin was not one of those parents to whom this doctrine was intended to apply. Quilloin had never married the mother, had never lived with the child, had never "sought . . . actual or legal custody of his child,"²²¹ and had not asserted himself in the "daily supervision, education, protection, or care of the child."²²² On this basis, although no grounds existed for the termination of his rights, the Court determined that Quilloin had no parental rights to terminate. In competition with another father figure, he lacked all status as parent. The Court denied Quilloin's rights without exploring the roles both fathers might play in the child's life—including a continuing non-custodial role for the natural father—and without discussing the possible harm to the child of having his natural father cut out of his life entirely.²²³ The Court also failed to recognize the incentives this decision may create for unwed fathers to seek custody that they do not want and cannot handle.

A year later, in another case where an unwed father objected to a stepparent adoption, the Court reiterated the *Quilloin* rule but reached the opposite result on the merits. In *Caban v. Moham-*

²¹⁹ Id. at 251.

²²⁰ See *Chancey v. Department of Human Resources*, 156 Ga. 338, 274 S.E.2d 728 (1980) (showing of parental unfitness, caused either by intentional or unintentional misconduct resulting in abuse or neglect of the child, or by what is tantamount to physical or mental incapacity to care for the child, required for termination of parental rights in Georgia).

²²¹ 434 U.S. at 255.

²²² Id. at 256. The father also could have established parenting status by legitimizing the child, but he apparently was ignorant of this possibility. Id. at 253-54. A similar ignorance disadvantaged the unwed father in *Lehr v. Robertson*, 103 S. Ct. 2985 (1983).

²²³ In fact, the child had expressed a wish to continue visitation with his natural father. 434 U.S. at 251 n.11.

med²²⁴ the unwed father had lived with the mother and their two children for over five years and had maintained contact with his children after separation. Both the stepfather and the natural father offered two-parent families, and both sought exclusive paternal rights. The Court's decision, based entirely on equal protection grounds, invalidated a New York law that permitted an unwed mother, but not an unwed father, to block an adoption. Because this unwed father had assumed a paternal relationship to the children, the Court held inappropriate the statute's assumption that unwed fathers are irresponsible and declared that the penalty for the father's failure to legitimate the children was unfair.²²⁵ As a result, the unwed father in *Caban v. Mohammed* occupied all legal ground available as "father"—even though he was not necessarily entitled to legal custody.²²⁶ The stepfather, with whom the children had lived for several years, had no legal rights in them.²²⁷

From the standpoint of the children, the result in *Caban* may be less pernicious than the result in *Quilloin*. In *Caban* the children could maintain relationships with both their custodial stepfather and their natural father. The result in each case is nevertheless inadequate, for the Court extends legal recognition to only one father, while the children understood themselves to have two.²²⁸

C. Nonparent Caretakers

In 1978 over two and one-half million children in the United States lived with *neither* parent.²²⁹ Some experts project that by 1990 five percent of American children will be living with adults who are not their parents.²³⁰ These nonparents include the child's relatives,²³¹ adults the parents have permitted to care for the

²²⁴ 441 U.S. 380 (1979).

²²⁵ *Id.* at 394.

²²⁶ See *id.* at 412, 416 (Stevens, J., dissenting).

²²⁷ The Court did not explain how the state should resolve the custody issue.

²²⁸ As Justice Stevens pointed out, the children remained illegitimate. *Id.* at 412 (Stevens, J., dissenting). See Hafen, *supra* note 4, at 499-500.

²²⁹ Glick, *supra* note 6, at 171, table 1.

²³⁰ *Id.*

²³¹ It is not uncommon for parents to leave their children in the care of a grandparent, aunt, or uncle, for all or part of a day on a regular basis, or even for extended periods of time. See, e.g., *In re Adoption of Berman*, 44 Cal. App. 3d 687, 118 Cal. Rptr. 804 (1975).

Of the 3.1% percent of children living with neither parent in 1982, over 80% percent of these (2.5% of all children) live with relatives. Bureau of the Census, *supra* note 5, at 5,

child,²³² and foster parents selected by the state.²³³ Because the rules for handling disputes among natural and substitute parents differ depending upon whether the child is placed with another by the parent or by the state, this section discusses each situation separately.

1. *Caretakers Selected by the Parent*

a. *Third-Party Custody.*

Under traditional parental rights doctrine, the parent has the right to regain custody of the child whom he has left with alternate nonparent caretakers, even where the caretaker is the only parent the child has ever known. Parents prevail in these cases because they lack the specific intent to abandon, because they have maintained sufficient contact with their children to negate abandon-

table E. Care of children within extended family networks is particularly common in black families. See C. Stack, *All Our Kin* (1974); Peters, "Making It" Black Family Style: Building on the Strengths of Black families, in 3 *Family Strengths* 73 (1981). Of the 8.4% of black children who lived with neither parent in 1982, 90% percent lived with relatives. Bureau of the Census, *supra* note 5, at 5, table E.

The Supreme Court has recognized the importance of the extended family.

Decisions concerning child rearing . . . long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

See *Moore v. City of E. Cleveland*, 431 U.S. 494, 505 (1977) (plurality opinion) (footnote omitted).

²³² Parents leave their children in the care of others for a number of reasons, including the need to find work or to take work requiring travel, to get help in caring for children after one parent's death, to resolve marital difficulties, and to deal with physical or emotional problems. See, e.g., *In re Melissa M.*, 101 Misc. 2d 407, 421 N.Y.S.2d 300 (Fam. Ct. 1979) (job difficulties); *In re Confessor B.*, 75 Misc. 2d 576, 348 N.Y.S.2d 21 (Fam. Ct. 1973) (emotional stress and economic difficulties), *aff'd sub nom. Benitez v. Llano*, 39 N.Y.2d 758, 384 N.Y.S.2d 775, 349 N.E.2d 876 (1976); *Smith v. Green*, 4 Or. App. 533, 480 P.2d 437 (1971) (marital problems); *De La Hoya v. Saldivar*, 513 S.W.2d 259 (Tex. Civ. App. 1974) (death of a parent).

Normally, a parent unable to provide continuous care for his child will satisfy his legal obligations by arranging for another adult to provide such care. See, e.g., *In re Burney*, 259 N.W.2d 322 (Iowa 1977); *Freeman v. Chaplick*, 388 Mass. 398, 446 N.E.2d 1369 (1983); *In re Ayres*, 513 S.W.2d 731 (Mo. App. 1974); *Hendricks v. Curry*, 401 S.W.2d 796 (Tex. 1966); *In re Valdez*, 29 Utah 2d 63, 504 P.2d 1372 (1973). But see *Gowland v. Martin*, 21 Ariz. App. 495, 520 P.2d 1172 (1974) (father found unfit for custody even though he lived with his parents who were fit; custody given to maternal grandparents).

²³³ See *infra* notes 280-302 and accompanying text.

ment, or because they have failed to commit acts serious enough to constitute unfitness. Thus, the natural parent can retrieve full and exclusive parental rights in the child while the nonparent's relationship with the child goes unrecognized.²³⁴

Courts have not, however, consistently adhered to this traditional rationale. Some courts—often without statutory support—have adopted alternative custody tests that focus not on parental unfitness, but rather on the child's best interests. These two tests are not always easy to distinguish. For example, courts often justify an award to a natural parent under the parental rights doctrine on the grounds that the child's best interests are served if his legal parents care for him.²³⁵ Other courts use the same grounds to justify awards to parents under the best interests doctrine.²³⁶ Indeed, the distinctions between these two tests are so blurred that courts sometimes state one test and apply another.²³⁷

²³⁴ See, e.g., *In re Guardianship of Mathews*, 174 Cal. 679, 164 P. 8 (1917); *Busbee v. Weeks*, 80 Fla. 323, 85 So. 653 (1920); *Hulbert v. Hines*, 178 N.W.2d 354 (Iowa 1970); *Wood v. Beard*, 290 So. 2d 675 (La. 1974); *Barstad v. Frazier*, 118 Wis. 2d 549, 348 N.W.2d 479 (1984).

²³⁵ See, e.g., *Wood v. Beard*, 290 So. 2d 675 (La. 1974).

²³⁶ See, e.g., *Wilson v. Mitchell*, 48 Colo. 454, 111 P. 21 (1910); *Eravi v. Bohnert*, 201 Neb. 99, 266 N.W.2d 228 (1978).

²³⁷ Some courts, for example, announce a preference for natural parents but appear to engage in a fairly unencumbered best interests analysis. See, e.g., *In re Custody of Piccirilli*, 88 Ill. App. 3d 621, 410 N.E.2d 1086 (1980); *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966); *Comer v. Comer*, 61 N.C. App. 324, 300 S.E.2d 457 (1983); *Hall v. Honeycutt*, 489 S.W.2d 37 (Tenn. Ct. App. 1972); *Ex parte Day*, 189 Wash. 368, 65 P.2d 1049 (1937).

Other courts treat best interests and parental preference as one and the same. See, e.g., *In re New England Home for Little Wanderers*, 367 Mass. 631, 641, 328 N.E.2d 854, 860 (1975) (doctrines are "not separate and distinct but cognate and connected"); *Wallin v. Wallin*, 290 Minn. 261, 264, 187 N.W.2d 627, 630 (1971) ("From a very early date this court has recognized both doctrines."); *In re Perales*, 52 Ohio St. 2d 89, 96 n. 9, 369 N.E.2d 1047, 1051 n.9 (1977) (doctrines are not subject to meaningful distinctions).

It is almost impossible to determine the standards used by some courts. The court's language in *Brown v. DeWitt*, 320 Mich. 156, 165, 30 N.W.2d 818, 821 (1948), is typical of such cases: "The superior right of the parents to the child should only be enforced when it accords with the best interest of the child."

Such confusion has led commentators to disagree about whether the majority rule is the parental rights test or the best interests of the child test in custody disputes between parents and third parties. Compare McGough & Shindell, *supra* note 49, at 213-14 ("few jurisdictions [as of 1978] clearly apply the [best interests of the child] standard to parent-third party disputes") with Curtis, *The Psychological Parent Doctrine in Custody Disputes Between Foster Parents and Biological Parents*, 16 Colum. J.L. & Soc. Probs. 149, 153 (1980) (the best interests of the child standard is "the prevailing standard today"), and Note, *Psy-*

Courts have used a number of substantive and procedural rules to resolve these cases. For example, some courts commonly use presumptions or burdens of proof that strongly favor the legal parent.²³⁸ Other courts use the same technique to favor the current custodian,²³⁹ or grant custody to a nonparent over a fit parent on the basis of a "special or extraordinary reason."²⁴⁰

chological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution, 17 J. Fam. L. 545, 548-52 (1978-79) (concluding that 21 states use parental rights test while 20 states use best interests or an intermediate test). Disagreement among commentators about whether a particular case was decided under one test or the other is also not unusual. Compare, e.g., McGough & Shindell, *supra* note 49, at 214 n.24 (classifying *In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974) as a case in which the parental rights doctrine was applied) with Bodenheimer, *supra* note 193, at 27 (concluding that *In re B.G.* "abrogates California's traditional parental rights doctrine").

²³⁸ See, e.g., *Pendergrass v. Watkins*, 383 So. 2d 851 (Ala. Civ. App. 1980) (nonparent has burden of proof); *In re Two Minor Children*, 283 A.2d 859 (Del. Ch. 1971) (rebuttable presumption favoring natural parent); *Hendrickson v. Binkley*, 161 Ind. App. 388, 316 N.E.2d 376 (1974) (rebuttable presumption favoring natural parent), cert. denied, 423 U.S. 868 (1975); *Bahr v. Bahr*, 60 Mich. App. 354, 230 N.W.2d 430 (1975) (rebuttable presumption favoring natural parent); *In re Confessoria B.*, 75 Misc. 2d 576, 348 N.Y.S.2d 21 (Fam. Ct. 1973) (rebuttable presumption favoring natural parent), aff'd sub nom. *Benitez v. Llano*, 39 N.Y.2d 758, 349 N.E.2d 876, 384 N.Y.S.2d 775 (1976); *Ellerbe v. Hooks*, 490 Pa. 363, 416 A.2d 512 (1980) (nonparent bears heavy burden of production and persuasion).

For a critical discussion of some of these procedural rules, see *In re Custody of Hernandez*, 249 Pa. Super. 274, 283-86, 376 A.2d 648, 653-54 (1977).

²³⁹ See, e.g., *Look v. Look*, 21 Ill. App. 3d 454, 315 N.E.2d 623 (1974); *Halstead v. Halstead*, 259 Iowa 526, 144 N.W.2d 861 (1966).

Still other courts have held that once a court has awarded custody to a nonparent, the parent bears the burden of proof in a subsequent proceeding brought to demonstrate that the child's best interests require his return to the parent. See, e.g., *Martin v. Sand*, 444 A.2d 309 (Del. Fam. Ct. 1982); *Reflow v. Reflow*, 24 Or. App. 365, 545 P.2d 894 (1976); *McEntire v. Redfearn*, 217 Va. 313, 227 S.E.2d 741 (1976); *In re Guardianship of Palmer*, 81 Wash. 2d 604, 503 P.2d 464 (1972). But see *Britt v. Britt*, 567 P.2d 308 (Alaska 1977) (no presumption favoring prior court order based on consent of parents).

²⁴⁰ *In re K.K.M.*, 647 S.W.2d 886, 890 (Mo. Ct. App. 1983).

Often the extraordinary circumstance is merely the fact that the child has lived with the nonparent caretaker for an extended period. See, e.g., *Look v. Look*, 21 Ill. App. 3d 454, 458, 315 N.E.2d 623, 626 (1974) (normally the child's best interests are served by parental custody, but the parents may be chargeable with laches or forfeiture for having left the child with the other party for a long period of time, and of course the best interests of the child always prevail); *In re K.K.M.*, 647 S.W.2d 886, 892 (Mo. Ct. App. 1983); *Mansukhani v. Pailing*, 318 N.W. 2d 748, 753 (N.D. 1982) (test is whether there are "exceptional circumstances" requiring nonparent custody; here, the child had a strong psychological bond with grandparents and not with mother); see also *In re Ewing*, 96 Idaho 424, 529 P.2d 1296 (1974) (natural father who had rarely visited children and did not support them for four years lost custody to stepfather with whom children had been living); *Chapsky v. Wood*, 26 Kan. 650 (1881) (natural father's right is not absolute; court will not grant custody when he seeks reclamation after a lapse of time, if child has formed ties with foster parent); *In re Confes-*

The multiplicity of types of proceedings in which child custody cases arise invites further confusion of the parental rights and the best interests tests, because the outcome of a case may depend upon its procedural posture. For example, a custody order unavailable in a divorce or adoption action may be available in a habeas corpus action, which invokes the broad equity jurisdiction of the courts.²⁴¹ Alternatively, courts may overlook the procedural context of the case to reach a desired result.²⁴²

Both the unfitness and the best interests tests exclude a parent figure from the child's life to secure exclusive rights for another. Occasionally, however, courts appear to depart from the norm of exclusive parenthood by awarding *custody* of a child to a nonparent under a best interests test, while denying *adoption* by the nonparent under a stricter doctrine.²⁴³ In such cases, courts may distinguish custody from full parental status by emphasizing that the custody is temporary²⁴⁴ or that the natural parent's rela-

sora B., 75 Misc. 2d 576, 348 N.Y.S.2d 21, 25 (Fam. Ct. 1973) (length of time child had lived with foster parent, age of child, and expressed desire to live with foster parent were reasons compelling enough to overcome presumption in favor of natural parent), *aff'd sub nom.* Benitez v. Llano, 39 N.Y.2d 758, 349 N.E.2d 876, 384 N.Y.S.2d 775 (1976).

The relevance of this circumstance may depend upon the reason for the arrangement. See, e.g., *In re Sanjivini K.*, 47 N.Y.2d 374, 381-82, 391 N.E.2d 1317, 1320, 418 N.Y.S.2d 339, 344 (1979) (failure by welfare agency to reunite child with mother); *In re Adoption of Landaverde v. Howie*, 95 A.D.2d 29, 465 N.Y.S.2d 6 (1983) (delay in reunion of child and mother caused by frustration of mother's legal efforts to obtain child, who had been living with prospective adoptive parents); *In re Custody of Hernandez*, 249 Pa. Super. 274, 376 A.2d 648 (1977) (refusal of nonparents to return child).

²⁴¹ See, e.g., *In re Ewing*, 96 Idaho 424, 529 P.2d 1296 (1974); *De La Hoya v. Saldivar*, 513 S.W. 2d 259 (Tex. Civ. App. 1974).

²⁴² See, e.g., *In re Adoption of J.B.*, 63 N.J. Super. 98, 164 A.2d 65, 65 (1960) (adoption by aunt and uncle who had lived with child for most of her life granted on the basis of the best interests of the child, despite adoption statute requiring parental consent or a finding that the parent had forsaken parental obligation); see also *In re Adoption of Vincent*, 219 So. 2d 454 (Fla. Dist. Ct. App. 1969); *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964); *In re Adoption by Jacques*, 48 N.J. Super. 523, 138 A.2d 581 (1958).

²⁴³ See, e.g., *Fielding v. Highsmith*, 152 Fla. 837, 13 So. 2d 208 (1943); *Jackson v. Russell*, 342 Ill. App. 637, 97 N.E.2d 584 (1951); *Polzin v. Polzin*, 237 Minn. 164, 54 N.W.2d 143 (1952); *In re Adoption of B.*, 152 N.J. Super. 546, 378 A.2d 90 (Pr. Ct. 1977); *In re Sulewski*, 113 Pa. Super. 301, 173 A. 747 (1934); *Ex parte Day*, 189 Wash. 368, 65 P.2d 1049 (1937).

²⁴⁴ See, e.g., *Gowland v. Martin*, 21 Ariz. App. 495, 520 P.2d 1172 (1974); *In re Two Minor Children*, 283 A.2d 859 (Del. Ch. 1971); *Cawthorne v. Williams*, 313 So. 2d 915 (La. Ct. App. 1975).

The term "permanent custody" is used often in custody cases. E.g., *Borsdorf v. Mills*, 49 Ala. App. 658, 662, 275 So. 2d 338, 341 (1973); *In re Custody of Piccirilli*, 88 Ill. App. 3d 621, 628, 410 N.E.2d 1086, 1092 (1980). Even a "permanent" custody award, however, usually

tionship to the child remains unsevered.²⁴⁵ The result is that the court grants the nonparent a status falling short of full exclusive parenthood.

The distinctions between custody and full parental rights or between temporary and permanent custody, however, are largely illusory.²⁴⁶ Although some residual elements of parenthood, such as the duty of support²⁴⁷ or the possibility of future custody, may remain in the natural parent whose rights are not fully terminated,²⁴⁸ courts generally do not provide opportunities for the parent to develop or continue his relationship with the child. Only a handful of cases that award custody to a nonparent in preference to a parent

can be modified on grounds short of the customary standards for terminating parental rights. *Bandel v. Bandel*, 211 Kan. 672, 508 P.2d 487 (1973). But see *Coulter v. Coulter*, 141 Colo. 237, 347 P.2d 492 (1959) (where court award of custody of child to paternal grandmother following the divorce of the parents was specifically made "permanent," mother was not entitled to show changed circumstances in order to regain custody).

²⁴⁵ See, e.g., *In re Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973); *In re K.K.M.*, 647 S.W.2d 886 (Mo. Ct. App. 1983); *Reflow v. Reflow*, 24 Or. App. 365, 545 P.2d 894 (1976); *In re Custody of Hernandez*, 249 Pa. Super. 274, 376 A.2d 648 (1977); *Brokenleg v. Butts*, 559 S.W.2d 853 (Tex. Civ. App. 1977), cert. denied, 442 U.S. 946 (1979); see generally *Taylor, Guardianship or "Permanent Placement" of Children*, 54 Calif. L. Rev. 741 (1966) (advocating use of legal "guardians" for children whose parents do not consent to adoption or do not meet the statutory standard for severance of their parental rights).

²⁴⁶ See *Roche v. Roche*, 25 Cal. 2d 141, 152 P.2d 999, 1000 (1944) (trial court's award of legal custody to a father while awarding physical care and custody of children to grandparents termed an "artifice"). One court stated that "temporary custody orders have a tendency to become permanent custody orders." *Odegard v. Odegard*, 259 N.W.2d 484, 485 (N.D. 1977); see also *In re Guardianship of Doney*, 174 Mont. 282, 570 P.2d 575 (1977) (custody award couched in temporary guardianship terms held tantamount to a permanent custody order because based on prior deeds that the parent could not change).

²⁴⁷ One trial court in Maryland, in awarding custody of a child to a grandmother who had cared for the child for eight years, ordered that the mother pay child support. This support order was reversed, however, by the Maryland Court of Special Appeals: "There is irony, if not an aura of injustice, in an order denying a natural mother her child, then compelling payment to those who have taken her." *Ross v. Hoffman*, 33 Md. App. 333, 335 n.3, 364 A.2d 596, 598 n.3 (1976), modified, 280 Md. 172, 372 A.2d 582 (1977). Apparently the father's support obligation remained, because the mother was required to turn over to the grandmother all support tendered by the father for the child's support. *Ross v. Hoffman*, 280 Md. 172, 193, 372 A.2d 582, 595 (1977); see also *Hall v. Honeycutt*, 489 S.W.2d 37 (Tenn. Ct. App. 1972) (upholding principle of parental support for a child in another person's custody, but striking down a particular order as too indefinite to be enforced).

²⁴⁸ This opportunity is more likely to depend upon improvements in the parent's behavior or circumstances than on the parent's developing a relationship to the child. See, e.g., *In re Two Minor Children*, 283 A.2d 859 (Del. Ch. 1971); *Cawthorne v. Williams*, 313 So. 2d 915 (La. Ct. App. 1975).

specifically allow for visitation by the noncustodial parents.²⁴⁹ Except in these few cases, courts deciding custody questions between nonparents and parents apply standards akin to those applied in divorce custody cases—but without the expectation that the parent who loses the custody action will have a continuing role in the child's life, and without the protection of parental rights contained in most adoption statutes. From the point of view of the child who has multiple parent figures, temporary custody offers the same disadvantages that inhere in any exclusive approach to parenthood: relationships are secured to the exclusion of, rather than in addition to, other relationships.

b. Third-Party Visitation

A recent trend in favor of grandparent visitation has modified the concept of exclusive parenthood. Under the common law, third parties, including relatives, were denied visitation as well as custody. The law has long permitted parents to deny grandparents and other third parties contact with the child, even if visitation is

²⁴⁹ See, e.g., *Coulter v. Coulter*, 141 Colo. 237, 347 P.2d 492 (1959); *Martin v. Sand*, 444 A.2d 309 (Del. Fam. Ct. 1982); *In re Marriage of Smith*, 269 N.W.2d 406 (Iowa 1978); *S.M. v. S.J.*, 143 N.J. Super. 379, 363 A.2d 353 (Ch. Div. 1976); *Mansukhani v. Pailing*, 318 N.W.2d 748 (N.D. 1982); *Langenberg v. Steen*, 213 Or. 150, 322 P.2d 1087 (1958).

A few courts have tied visitation to a specific goal, such as developing a parental relationship that may later serve as a basis for custody. See, e.g., *MacGregor v. Phillips*, 96 Idaho 779, 537 P.2d 59 (1975) (child's long separation from its mother required that transfer of custody to mother take place over period of several months); *In re B.B. & R.B.*, 537 S.W.2d 682 (Mo. Ct. App. 1976) (father to visit children in custody of grandparents until relationship developed and his family life settled; at such time he may obtain custody). More often, the expectations are vague. See, e.g., *Ex parte Day*, 189 Wash. 368, 386, 65 P.2d 1049, 1056 (1937) (father an entire stranger to his children, aged 13, 10, and 8; rights not permanently terminated because "[w]hat the future holds, no one can tell. It may be that, at some future time, appellant's children, or one or two of them, should go to him"); *In re D.G.*, 246 N.W.2d 892 (N.D. 1976) (visitation award based on promise by father, who hardly knew the child, that he could make a home for him in future). In some cases, in fact, visitation is expressed merely as a hope. See, e.g., *Haynes v. Haynes*, 205 Neb. 35, 39-40, 286 N.W.2d 108, 110 (1979) (court recommending that grandmother "should do everything in her power to encourage children to develop a relationship with their father"); cf. *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511 (Iowa 1976) (court expressing hope that child will have future contact with adoptive parents, after setting aside adoption and returning child to natural parents).

For a rejection of a phased plan for visitations by the mother, leading up to eventual return, see *In re Kowalzek*, 37 N.C. App. 364, 246 S.E.2d 45, appeal dismissed, 295 N.C. 734, 248 S.E.2d 863 (1978).

in the child's best interests.²⁵⁰ Judicial enforcement of visitation rights against the parent's wishes has been thought to infringe on the parent's custodial rights and hinder proper discipline by dividing authority over the child.²⁵¹ If one parent died, courts applying the traditional common law would refuse visitation to the deceased parent's family: the deceased parent's authority "cannot, by any means, and certainly not by a court be transferred to the grandparents."²⁵² If both parents died or if their rights were terminated, the courts would again deny visitation to relatives on the assumption that visitation would frustrate the child's adoption.²⁵³

Over forty states, however, have created statutory exceptions to the common law for grandparents.²⁵⁴ Most commonly, these stat-

²⁵⁰ The case most often cited for this proposition is *Succession of Reiss*, 46 La. Ann. 347, 352, 15 So. 151, 152 (1894) ("Without doubt it is desirable that the ties of affection that nature creates between the ascendants and their grandchildren be strengthened and unceasing, but, if there is a conflict, the father alone or the mother should be the judge."); see also *Odell v. Lutz*, 78 Cal. App. 2d 104, 107, 177 P.2d 628, 629 (1947) (visitation by grandparent not permitted despite obvious benefit to grandchild); *In re Goldfarb*, 6 N.J. Super. 543, 548, 70 A.2d 94, 96 (Ch. Div. 1949) (although court may allow grandparent visitation when in the best interests of the child, such visitation is not a right); *Noll v. Noll*, 277 A.D. 286, 289, 98 N.Y.S.2d 938, 941 (1950) (grandparent visitation denied when not essential to welfare, contentment, peace of mind, and happiness of child).

²⁵¹ See *Odell v. Lutz*, 78 Cal. App. 2d 104, 107, 177 P.2d 628, 629 (1947); *Jackson v. Fitzgerald*, 185 A.2d 724, 725-26 (D.C. 1962); *Succession of Reiss*, 46 La. Ann. 347, 352, 15 So. 151, 152 (1894).

²⁵² *Noll v. Noll*, 277 A.D. 286, 288, 98 N.Y.S.2d 938, 940 (1950); see also *Jackson v. Fitzgerald*, 185 A.2d 724 (D.C. 1962) (visitation denied to grandparent after child's mother had died, although grandparent had lived with, cared for, and supported the child); *Succession of Reiss*, 46 La. Ann. 347, 15 So. 151 (1894) (law accords ascendants no authority over the children during existence of father and mother). But see *In re Goldfarb*, 6 N.J. Super. 543, 70 A.2d 94 (Ch. Div. 1949), discussed *infra* note 277.

²⁵³ See, e.g., *In re Johnson*, 210 Kan. 828, 504 P.2d 217 (1972). In *Johnson*, the mother had died in an automobile accident and the father's parental rights had been terminated for abandonment. The court acknowledged that the grandmother was the one person who could give the children the love and care most like that of their deceased mother. Upon adoption of the child by a non-relative, however, the court rejected the maternal grandmother's petition for custody or visitation, claiming that such action was in the best interests of the child. See also *Johnson v. Richardson*, 434 So. 2d 972 (Fla. Dist. Ct. App. 1983) (at the death of the mother, unwed father entitled to absolute custody against custodial grandparents); *J. v. M.*, 157 N.J. Super. 478, 494, 385 A.2d 240, 248 (App. Div. 1978) ("A grandparent's right to custody, or even to visitation, can rise no higher than those of the natural parents.").

²⁵⁴ 1983 Survey of American Family Law, 10 Fam. L. Rep. (BNA) 3026-27 (Jan. 17, 1984). In addition to the statutory provisions, courts in some states have awarded grandparent visitation on the basis of a showing that it is in the child's best interests. See, e.g., *Boyles v. Boyles*, 14 Ill. App. 3d 602, 302 N.E.2d 199 (1973); *Krieg v. Glassburn*, 419 N.E.2d 1015 (Ind. Ct. App. 1981); *Commonwealth ex rel. Williams v. Millner*, 254 Pa. Super. 227, 385

utes allow the courts to order grandparent visitation upon the divorce or separation of the parents²⁵⁵ or upon the death of the grandparent's own child.²⁵⁶ Some states also permit grandparents visitation where a child has been removed from the home,²⁵⁷ where the parents' rights have been terminated,²⁵⁸ or where there are other custody disputes.²⁵⁹ A few states extend visitation privileges to siblings,²⁶⁰ to other relatives,²⁶¹ to stepparents,²⁶² or to other

A.2d 992 (1978); see also *Daly v. Morse*, 665 P.2d 797 (Nev. 1983) (stepgrandmother visitation may be granted under court's *parens patriae* power). The visitation orders in these circumstances have usually followed a prior caretaker relationship. See, e.g., *Parks v. Crowley*, 221 Ark. 340, 253 S.W.2d 561 (1952); *In re Guardianship of D.A. McW.*, 429 So. 2d 699 (Fla. Dist. Ct. App. 1983); *Warman v. Warman*, 496 S.W.2d 286 (Mo. Ct. App. 1973); *Looper v. McManus*, 581 P.2d 487 (Okla. Ct. App. 1978); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A.2d 70 (1960); *Ponsford v. Crute*, 56 Wis. 2d 407, 202 N.W.2d 5 (1972), overruled sub nom. *Mawhinney v. Mawhinney*, 66 Wis. 2d 679, 225 N.W.2d 501 (1975), as stated in *Barstad v. Frazier*, 112 Wis. 2d 343, 332 N.W.2d 835 (Ct. App. 1983). Most of the states from which these cases have come now have specific visitation statutes, some of which might be applicable today to similar fact situations. See, e.g., Ark. Stat. Ann. § 34-1211.1 (Supp. 1983); Fla. Stat. Ann. § 68.08 (Harrison Supp. 1983); Ill. Ann. Stat. ch. 40, §607(b) (Smith-Hurd Supp. 1983-84); Ind. Code Ann. § 31-1-11.7-2 (Burns Supp. 1983); Mo. Ann. Stat. § 452.400(3) (Vernon Supp. 1984); Okla. Stat. Ann. tit. 10, § 5 (West Supp. 1982-1983).

²⁵⁵ As of July 1983, about 43 states had some provisions for grandparent visitation when the parents divorce or separate. 10 Fam. L. Rep. (BNA) 3026-27 (Jan. 17, 1984). E.g., Cal. Civ. Code § 4351.5 (West Supp. 1984); N.Y. Dom. Rel. Law § 240 (McKinney Supp. 1983-1984).

²⁵⁶ As of July 1983, about 33 states had some provision for grandparent visitation at the death of one or both parents. E.g., Ga. Code § 19-7-3(a) (1982) (death of one parent, not both); Utah Code Ann. §§ 30-5-1(2)(a), 30-5-2 (Supp. 1983).

²⁵⁷ E.g., Colo. Rev. Stat. § 19-1-116(1)(b) (Supp. 1983) (visitation rights may be awarded to grandparents where legal custody is given to someone other than a parent or the child is placed outside of the home of the parent); Iowa Code § 598.35(4) (1979) (visitation may be awarded to grandparents where child placed in a foster home).

²⁵⁸ Fla. Stat. § 68.08 (Supp. 1981) (visitation may be awarded to grandparents where one of parents has deserted); Ga. Code § 19-7-3(a) (1982) (grandparents may be awarded visitation rights where one parent's rights have been terminated); Tex. Fam. Code Ann. §§ 14.03(e), 15.07 (Vernon Supp. 1984) (same).

²⁵⁹ E.g., Cal. Civ. Code § 4601 (West 1983) (visitation may be awarded whenever custody of a minor is at issue); N.C. Gen. Stat. § 50-13.5(j) (Supp. 1983) (visitation may be awarded in any action in which the custody of a minor has been determined); Or. Rev. Stat. §§ 108.110, 109.121(1)(b) (1983) (visitation may be awarded in a support action, among other proceedings).

²⁶⁰ E.g., Ark. Stat. Ann. § 57-137 (Supp. 1983); La. Rev. Stat. Ann. § 9:572(D) (West Supp. 1984); Nev. Rev. Stat. § 123.123(1) (1979).

²⁶¹ E.g., Ohio Rev. Code Ann. § 3109.11 (Page 1980) (only to relatives of deceased parent); Va. Code § 20-107.2 (Supp. 1984).

²⁶² E.g., Cal. Civ. Code § 4351.5 (West Supp. 1984); Kan. Stat. Ann. § 60-1616(b) (1983); Tenn. Code Ann. § 36-6-302 (1984); Va. Code § 20-107.2 (Supp. 1984).

third parties.²⁶³

These statutes refute parental exclusivity, for they permit courts to order visitation against the will of the parents. Nonetheless, the statutes themselves reflect continuing faith in the nuclear family norm. First, most of these statutes operate only if the family is disrupted by death or divorce; with few exceptions,²⁶⁴ they do not permit visitation over the objections of parents in an intact family. Some states require the complete disruption of the family before the statutes become operative.²⁶⁵ Second, some of the statutes limit kin-visitation orders to situations in which the grandparent's own son or daughter is not in a position to allow visitation.²⁶⁶ In addition, courts may construe these statutes strictly to reinforce the nuclear family structure. In one recent Indiana case,²⁶⁷ for example, the court determined that the grandparent visitation statute

²⁶³ E.g., Conn. Gen. Stat. Ann. § 46b-56(a) (West Supp. 1984); Hawaii Rev. Stat. § 571-46(7) (1976); Ill. Ann. Stat. ch. 110½, § 11-7.1 (Smith-Hurd 1978); Mich. Comp. Laws Ann. § 722.27(b) (West Supp. 1984-85); Ohio Rev. Code Ann. § 3109.05(B) (Page Supp. 1983); Wash. Rev. Code Ann. § 26.09.240 (Supp. 1984-85).

²⁶⁴ E.g., Cal. Civ. Code § 4601 (West 1983) (visitation may be granted in divorce proceedings to "any other person having an interest in the welfare of the child"); Conn. Gen. Stat. Ann. § 46b-59 (West Supp. 1984) (visitation may be granted to any person "upon an application"); Del. Code Ann. tit. 10, § 950(7) (Supp. 1982) (grandparent visitation available "in any civil action within the jurisdiction" of the family court); Idaho Code § 32-1008 (1983) (when grandparent establishes substantial relationship with child, court may, upon proper showing, grant visitation); N.Y. Dom. Rel. Law § 72 (McKinney 1977) (grandparent visitation available "where circumstances show that conditions exist which equity would see fit to intervene"); see also *Herron v. Selzak*, 10 Fam. L. Rep. (BNA) 1133 (Pa. Super. Ct. Dec. 2, 1983) (grandparents may not obtain visitation rights to visit granddaughter living with her married parents).

The California and New York statutes have recently been held to apply against the will of both parents in an intact family. In *re Desjardins*, 10 Fam. L. Rep. (BNA) 1229 (Cal. App. (Jan. 25, 1984)); In *re La Russo*, 9 Fam. L. Rep. (BNA) 2646 (N.Y. Fam. Ct. August 10, 1983). See *infra* text accompanying note 356; see also Minn. Stat. Ann. § 257.022(2a) (West 1982) (granting grandparent visitation rights where minor has resided with grandparents for twelve months or more and is subsequently removed from the home by his parents).

²⁶⁵ Illinois, for example, requires that both parents be dead. Ill. Ann. Stat. ch. 110½, § 11-7.1 (Smith-Hurd 1978).

²⁶⁶ E.g., R.I. Gen. Laws § 15-5-24.2 (Supp. 1983) (visitation may be allowed to parents of noncustodial parent who is denied visitation rights or who fails to exercise them); Utah Code Ann. § 30-5-1(2)(b) (Supp. 1983) (parent is divorced or separated); W. Va. Code § 48-2B-1 (1980) (grandparent's child must be deceased).

²⁶⁷ In *re Visitation of J.O.*, 441 N.E.2d 991 (Ind. Ct. App. 1982). Perhaps anticipating restrictive constructions such as this one, the Delaware legislature inserted in its grandparent visitation statute the phrase "regardless of marital status of the parents." Del. Code Ann. tit. 10, § 950(7) (Supp. 1982).

applicable to divorce proceedings did not permit visitation for a maternal grandmother with whom the child had lived for three years, because the child's father was not the husband in the divorce proceeding. The court held that the divorce did not trigger the statute and thus no grandparent visitation rights could arise.

Finally, again illustrating the strength of the nuclear family in defining the legal status of parenthood, grandparent visitation statutes in most states cease to operate as soon as the child regains a nuclear family through adoption. This result is accomplished either by statute²⁶⁸ or by judicial interpretation that adoption statutes cutting off parental rights also cut off the derivative rights of grandparents or other kin.²⁶⁹

Only a few states have been willing to subordinate the adoptive parents' rights to the grandparents' visitation claims. These states, however, distinguish between adoption by strangers, in which natural parents and their families are substituted out of the child's life, and relative or stepparent adoptions, in which the child retains some connection to his natural family. In these jurisdictions, stepparent²⁷⁰ or grandparent²⁷¹ adoption will not automatically ter-

²⁶⁸ Ark. Stat. Ann. § 56-215(a)(1) (Supp. 1983) (adoption terminates all legal relationships, so that child is stranger to former relatives for all purposes); Ill. Ann. Stat. ch. 110½, § 11-7.1 (Smith-Hurd 1978) (visitation allowable where both parents are deceased, as long as minor has not been adopted); N.M. Stat. Ann. § 40-9-4 (1983) (grandparent visitation act does not apply in event of termination of parental rights upon adoption); Ohio Rev. Code Ann. § 3107.15(A)(1) (Page 1980) (adoption terminates all legal relationship between child and his relatives). But see La. Rev. Stat. Ann. § 9:572(B) (West Supp. 1984) (grandparent's limited visitation rights not terminated by adoption after death of child's parent).

²⁶⁹ See, e.g., *In re Bronstein*, 434 So. 2d 780 (Ala. 1983); *In re Adoption of Schumacher*, 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983); *Krieg v. Glassburn*, 419 N.E.2d 1015 (Ind. Ct. App. 1981); *In re Adoption of Gardiner*, 287 N.W.2d 555 (Iowa 1980); *Browning v. Tarwater*, 215 Kan. 501, 524 P.2d 1135 (1974); *Smith v. Trosclair*, 321 So. 2d 514 (La. 1975); *Bikos v. Nobliski*, 88 Mich. App. 157, 276 N.W.2d 541 (1979); *In re Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982); *Deweese v. Crawford*, 520 S.W.2d 522 (Tex. Civ. App. 1975); see also *In re K.S., T.W. & G.S.*, 654 P.2d 1050 (Okla. 1982) (grandparent visitation statute inapplicable where parent's rights have been terminated); *In re Nicholas*, 457 A.2d 1359 (R.I. 1983) (grandparent visitation statute inapplicable to parent of unwed father who consented to child's adoption).

²⁷⁰ See, e.g., Ga. Code § 19-7-3(a) (1982); Mass. Gen. Laws Ann. ch. 119, § 39D (West Supp. 1984-85); Tenn. Code Ann. § 36-6-301 (1984); Tex. Fam. Code Ann. §§ 14.03(e), 16.09(d) (Vernon Supp. 1984).

²⁷¹ See, e.g., Cal. Civ. Code § 197.5(c) (West 1982); Minn. Stat. Ann. § 257.022(3) (West 1982); Mont. Code Ann. § 40-9-102(5) (1983); N.D. Cent. Code § 14-09-05.1 (Supp. 1983); Okla. Stat. Ann. tit. 10, § 5.60.16(3) (West Supp. 1982); S.D. Codified Laws Ann. § 25-4-54 (Supp. 1983); see also *People ex rel. Simmons v. Sheridan*, 98 Misc. 2d 328, 414 N.Y.S.2d 83

minate visitation rights. When an adoption by strangers creates a substitute family, however, visitation by former family members seems more threatening and conformance to the original ideal of the nuclear family becomes more tempting. Only a few statutes permit grandparent visitation in certain circumstances regardless of who adopts.²⁷²

A few courts, without either statutory authority or legal analysis, have upheld grandparent visitation despite adoption.²⁷³ One court, noting the devastating impact of family breakdown in American society, expressed a preference for wider family circles.²⁷⁴ Another court, also relying on intuitive social judgments, lauded the special role that grandparents, "bound to their grandchildren by the unbreakable links of heredity,"²⁷⁵ can play in a child's life. The court reflected that although visitation by a noncustodial parent may undermine the adoptive parent's authority, grandparents are "generous sources of unconditional love and acceptance, which complements rather than conflicts with the roles of the parents."²⁷⁶

Such cases are rare. The majority of jurisdictions cut off visitation upon adoption. When the adopted child is brought within a nuclear family, the emotional ties deemed worthy of preservation

(Sup. Ct. 1979) (under New York law, visitation rights not cut off by grandparent adoption).

²⁷² See, e.g., La. Rev. Stat. Ann. § 9:572(B) (West Supp. 1984) (grandparents may be granted limited visitation rights, upon the child's adoption, if they are parents of a deceased parent of the child and the parents' marriage was dissolved by death of that parent); see also *Johnson v. Fallon*, 129 Cal. App. 3d 71, 181 Cal. Rptr. 414 (1982) (although grandparent visitation statute, Cal. Civ. Code § 197.5 (West 1982), is specifically inapplicable upon adoption by anyone other than grandparent or stepparent, this statute does not preclude granting visitation under Cal. Civ. Code § 4601 (West 1983), which permits visitation to any person showing an interest in the child).

²⁷³ A number of New York courts have concluded that adoption does not cut off visitation to which grandparents are otherwise entitled under grandparent visitation statutes. See, e.g., *People ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049, 455 N.Y.S.2d 420 (1981); *People ex rel. Simmons v. Sheridan*, 98 Misc. 2d 328, 414 N.Y.S.2d 83 (Sup. Ct. 1979), *aff'd*, 79 A.D.2d 896, 435 N.Y.S.2d 871 (1980); see also *Roquemore v. Roquemore*, 275 Cal. App. 2d 912, 80 Cal. Rptr. 432 (1969) (court should not have dismissed grandparents' petition for visitation rights without allowing them the opportunity to show that visitation was in the best interests of the child as provided by statute).

²⁷⁴ *Graziano v. Davis*, 50 Ohio App. 2d 83, 91, 361 N.E.2d 525, 530 (1976). Soon after this ruling, however, the Ohio legislature amended the adoption statute, stipulating that adoption terminates "all legal relationships between the adopted person and his relatives . . . so that the adopted person thereafter is a stranger to his former relatives for all purposes." Ohio Rev. Code Ann. § 3107.15(A)(1) (Page 1980).

²⁷⁵ *Mimkon v. Ford*, 66 N.J. 426, 437, 332 A.2d 199, 204 (1975).

²⁷⁶ *Id.* at 436, 332 A.2d at 204.

when the former family was disrupted suddenly become contrary to public policy.²⁷⁷ The adoptive parents, according to the traditional doctrine, must be free from the disruptive influence and unnatural complications of third-party visitations.²⁷⁸ As a result, for the adopted child, the need for continuity with the past becomes subordinated to the need for a "fresh start."²⁷⁹

2. Foster Parents

About 700,000 children in America enter or re-enter foster care each year.²⁸⁰ Foster care is a form of nonexclusive parenthood, for the rights and privileges of parenthood are divided among various parties. Although the exact division of authority varies,²⁸¹ foster

²⁷⁷ This reasoning has some precedent in the common law. In *In re Goldfarb*, 6 N.J. Super. 543, 70 A.2d 94 (Ch. Div. 1949), for example, a New Jersey court suggested that [i]n a contest between a surviving parent and the grandparents on the deceased parent's side, one can readily understand that circumstances could justify the conclusion that the best interests of the child require visitation with the grandparents. But where the surviving parent remarries and the new spouse adopts the infant, thereby establishing a new family relation for the child, a very different situation is presented.

Id. at 547-48, 70 A.2d at 96.

²⁷⁸ See *Bikos v. Nobliski*, 88 Mich. App. 157, 163-64, 276 N.W.2d 541, 544 (1979) ("To reach the opposite result . . . would lead to some unusual situations which we doubt the legislature intended. First of all, a grandchild could easily end up with three sets of grandparents. If both natural parents died this could result in four sets of grandparents."). See also *Browning v. Tarwater*, 215 Kan. 501, 524 P.2d 1135 (1974) (provisions of statute authorizing parent of deceased father visitation upon finding that it would be in best interests of child not intended to apply after adoption, because such interpretation would subject adoptive parent to influence of third person regarding child); *In re Fox*, 567 P.2d 985 (Okla. 1977) (same).

²⁷⁹ See *In re Adoption of Gardiner*, 287 N.W.2d 555, 557 (Iowa 1980); see also *In re Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982) (visitation would make child's adjustment to his new home more difficult).

²⁸⁰ Ertl, *The Nebraska Foster Parent Training Program: Strengthening Foster Families*, in 3 *Family Strengths* 365, 365 (1981).

Although the term "foster care" sometimes is used to refer to any third-party custodial arrangement, Katz, *Legal Aspects of Foster Care*, 5 *Fam. L.Q.* 283, 285 (1971), the term used here is in its more customary modern sense to refer to temporary care of children in substitute families that is overseen by a child welfare agency. For a history of modern foster care, see A. Gruber, *Children in Foster Care* 13-18 (1978) (growth of foster care in America); J. Pers, *Government as Parent: Administering Foster Care in California* 3-11 (1976) (Institute of Governmental Studies, Berkeley) (development of government responsibility for child care in California); Katz, *supra*, at 282.

²⁸¹ See *Smith v. Organization of Foster Parents for Equality & Reform*, 431 U.S. 816, 826-28 (1977); see also A. Kadushin, *Child Welfare Services* 355, 432-34 (1967) (foster care may harm children because it separates them from their parents and places them in an anomo-

parents typically have responsibility for day-to-day care of the child,²⁸² while the natural parent retains authority over certain important decisions, such as marriage or medical treatment.²⁸³ Because the state welfare agency has legal custody of the child,²⁸⁴ however, foster parents and legal parents may have difficulty in attaining or regaining legal custody.

Although foster parents often provide a long-term family for the child, they routinely fare worse in custody disputes with parents than do other third party caretakers. Nor do foster parents ordinarily succeed against the will of the state child welfare agency. When the state agency removes the child from the foster home, foster parents are often denied standing to object.²⁸⁵ Even if standing is granted, foster parents are unlikely to prevail, particularly if there is a chance that the child may be reunited with his nuclear family.²⁸⁶

lous position in a foster home); Mnookin, *supra* note 67, at 624; Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *Stan. L. Rev.* 623, 645 (1976).

²⁸² See *Smith*, 431 U.S. at 826-27; see also A. Kadushin, *supra* note 281, at 354-55; Mnookin, *supra* note 67, at 624.

²⁸³ See *Smith*, 431 U.S. at 827-28 & n.20; see also Cal. Welf. & Inst. Code § 739(a) (West Supp. 1984); A. Gruber, *supra* note 280, at 16 (1978); A. Kadushin, *supra* note 281, at 355.

²⁸⁴ E.g., D.C. Code Ann. § 32-1005(a) (1981) (the "care, custody, and control" of foster children remains in the placing agency); Idaho Code § 16-1623(h) (Supp. 1984) ("[t]he department having been granted legal custody of a child shall have the right to determine where and with whom the child shall live . . ."). Case law expresses the same concept. See, e.g., *Golz v. Children's Bureau*, 326 So. 2d 865 (La. 1976) (voluntary surrender of a child to the agency gives irrevocable custody to that agency), appeal dismissed, 426 U.S. 901 (1976).

²⁸⁵ In 39 states the foster parent has no statutory or case-law right to a pre-removal hearing. Note, *The Power of Foster Parents to Prevent Removal of Their Foster Children*, 21 *J. Fam. L.* 115 (1982-83). A few states, however, give foster parents who have had custody of a child for a certain length of time standing to object to a change of placement. See, e.g., N.Y. Soc. Serv. Law § 383(3) (McKinney 1983); Va. Code § 16.1-282(C)(4) (Supp. 1984). Although the Supreme Court has reserved judgment on the question of whether a foster family has a constitutional liberty interest in its own continuity, the Court has implied that because the state created the relationships and gave the family no expectation of permanence, the foster family has no liberty interest in continuity. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 846-47 (1977).

²⁸⁶ See, e.g., *Smith*, 431 U.S. 816 (1977); *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1977); *In re Jewish Child Care Ass'n*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959). But see *In re One Minor Child*, 254 A.2d 443 (Del. 1969) (permanent custody awarded to foster parents with whom child had lived for nine of his ten years, although welfare agency had decided to return the child to his natural parents); *Commonwealth ex rel. Children's Aid Soc'y v. Gard*, 362 Pa. 85, 66 A.2d 300 (1949).

The failure of foster families to achieve substitute parent status arises from the nature of foster care as an institution, rather than from the human realities of the individual child's situation. One institutional concern is that the state creates and controls foster care relationships. The child welfare agency selects and supervises the foster parents²⁸⁷ and establishes the conditions under which the child shall be removed from the foster parents²⁸⁸ and either placed elsewhere or returned to the natural parents.²⁸⁹ The primary reason advanced for applying stricter standards when foster parents seek custody is that such standards are a necessary limit on the state's ability to intervene in families through the foster care system.²⁹⁰

(custody awarded to foster parents who had raised a three-year-old child for two years, over objection of agency that sought to enforce contract giving agency the right to retrieve the child at agency request).

²⁸⁷ See *Smith*, 431 U.S. at 826-29.

²⁸⁸ *Id.* at 825-26; see also *In re Jewish Child Care Ass'n*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959) (persons accepting a foster child do so with the understanding that adoption is not contemplated, that the child will be returned to the natural parents as soon as feasible, and that one of the primary responsibilities of the foster parents is to prepare the child psychologically for such a return).

²⁸⁹ See *Smith*, 431 U.S. at 826; see also N.Y. Soc. Serv. Law § 384-a(1), -a(2)(a) (McKinney 1983). According to the New York law, voluntary agreements are open to negotiation. If the negotiated instrument fails to specify a date or identifiable event upon which the agency shall return the child, return shall occur within 20 days after the agency receives notice that the parent wishes the child returned, unless such action would be contrary to court order. Social services districts that disobey this provision are subject to the termination of funds with respect to the child they have unlawfully detained.

As a party involved in the creation and termination of parental relationships, the state can be a formidable adversary, tipping the balance in favor of one party or the other. See *Santosky v. Kramer*, 455 U.S. 745 (1982). The state's heavy hand can severely prejudice the continuation of established relationships. See, e.g., *In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974) (failure to notify mother of dependency proceedings); *In re Sanjivini K.*, 47 N.Y.2d 374, 391 N.E.2d 1316 418 N.Y.S.2d 339 (1979) (failure to make efforts to reunite mother and child); *In re Lafreniere*, — R.I. —, 420 A.2d 82 (1980) (failure to encourage and strengthen parental relationship by arranging visitation); *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973) (failure to afford parents a meaningful hearing for more than three years).

Negligence of welfare agencies may prejudice not only parents but foster parents as well. See, e.g., *In re Z.*, 81 Wis. 2d 194, 260 N.W.2d 246 (1977). Foster parents may also intentionally frustrate the plan of reuniting parent and child. See, e.g., *In re Ross*, 29 Ill. App. 3d 157, 329 N.E.2d 333 (1975); *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971).

²⁹⁰ See Mnookin, *supra* note 4, at 265-68; see also *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. 371, 385-87, 324 A.2d 562, 570-71 (1974) ("It is a serious matter for the long arm of the state to reach into a home and snatch a child from its mother. It is a

There are other institutional concerns as well. If the state permitted foster parents to gain permanent custody of the child, it could not guarantee the natural parents that agreements made with them would be enforced. This problem not only would damage the credibility of the state but would also jeopardize the viability of a system of critical importance to many families and children.²⁹¹ Parents needing help would not seek it, and agencies would be discouraged from providing positive services to help the family become reunited.²⁹² Furthermore, the fact that the state pays foster parents (although probably not enough²⁹³) is thought to be inconsistent with a true parent-child relationship, for it "contradicts the idea of family affection, closeness, and moral responsibility."²⁹⁴

Yet another reason why foster families are not regarded as substitute nuclear families is that foster care is in principle a temporary custodial arrangement,²⁹⁵ the goal of which is purportedly the child's reunion with his legal family. Indeed, close ties between the foster parent and his child are discouraged.²⁹⁶ Thus, in *Smith v.*

power which a government dedicated to freedom for the individual should exercise with extreme care, and only where the evidence clearly establishes its necessity.").

²⁹¹ See *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971).

²⁹² See *Montgomery County Department of Social Servs. v. Sanders*, 38 Md. App. 406, 381 A.2d 1154, (1977).

Another concern is that the state's standards for foster parents differ from its standards for adoptive parents. See *Kyees v. Dep't of Pub. Welfare*, 600 F.2d 693 (7th Cir. 1979); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977) (en banc), cert. denied, 437 U.S. 910 (1978); *Knight v. Deavers*, 259 Ark. 45, 531 S.W.2d 252 (1976).

²⁹³ See, e.g., *In re Diana P.*, 120 N.H. 791, 795, 424 A.2d 178, 180 (1980) (\$20 per week held not enough). The rates are generally about twice that paid for welfare assistance to indigent parents, a fact that may provide an incentive for some families to arrange foster care. See *In re Curtis H.*, 112 Misc. 2d 460, 446 N.Y.S.2d 986 (Fam. Ct. 1982) (relative held not entitled to foster-care rate).

²⁹⁴ *In re Curtis H.*, 112 Misc. 2d 460, 466, 446 N.Y.S.2d 986, 989 (Fam. Ct. 1982); see also *In re Diana P.*, 120 N.H. 791, 424 A.2d 178 (1980) (payment to foster parents handicaps formation of *in loco parentis* relationship, but does not absolutely prevent it).

Natural parents are theoretically liable for the costs of foster care, see, e.g., Cal. Welf. & Inst. Code § 903 (West Supp. 1984). Because most families with children in foster care are poor, however, generally little effort is made to enforce this obligation. See Mnookin, *supra* note 4, at 241-42, n.74; Rein, Nutt & Weiss, *Children and Decent People* 24 (A. Scherr ed. 1974).

²⁹⁵ See *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 836 (1977); Garrison, *supra* note 108, at 428 & n.23; Mnookin, *supra* note 4, at 275 n.217.

²⁹⁶ See *Drummond v. Fulton County Dep't of Family & Children's Serv.*, 563 F.2d 1200,

Organization of Foster Families for Equality & Reform,²⁹⁷ Justice Stewart noted that close ties between foster parents and their children represent "not a triumph of the system . . . but a failure."²⁹⁸ Such bonds "may hinder the child's ultimate adjustment in a permanent home, and provide a basis for the *termination* of the foster family relationship."²⁹⁹

The temporary, state-controlled nature of foster care prevents courts from recognizing foster families as substitute nuclear families even when children do form strong emotional attachments with their foster parents. The institution is thus criticized both for perpetuating the child's uncertainty and for failing to give *de facto* long-term relationships the legal status and concomitant security that children need.³⁰⁰

A few jurisdictions have addressed these criticisms by means of legal reforms that give preference in adoption proceedings to foster parents who have had custody of a child for a particular length of time.³⁰¹ Other states have adopted liberal termination statutes applicable on the same basis.³⁰² Like similar solutions to the problems of stepparents and nonparent caretakers, however, these

1207 (5th Cir. 1977) (en banc), cert. denied, 437 U.S. 910 (1978); *In re Jewish Child Care Ass'n*, 5 N.Y.2d 222, 228, 156 N.E.2d 700, 703, 183 N.Y.S.2d 65, 69 (1959).

²⁹⁷ *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977).

²⁹⁸ *Id.* at 861 (Stewart, J., concurring).

²⁹⁹ *Id.* at 862. Foster care is more often unstable. Children often are neither returned to their families nor given stable foster-care families. See *id.* at 836-37; Garrison, *supra* note 108, at 429-31; Mnookin, *supra* note 4, at 271 n.202; Wald, *supra* note 111, at 645-46.

³⁰⁰ J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 207; Wald, *supra* note 111, at 665-74. The proposed model acts that have been advocated since the Goldstein, Freud and Solnit proposals are summarized in Garrison, *supra* note 108, at 449-55.

³⁰¹ See, e.g., Mo. Ann. Stat. § 453.070(3) (Vernon 1977) (eighteen months); N.Y. Soc. Serv. Law § 383(3) (McKinney 1983) (same); see also *In re McBain*, 8 Fam. L. Rep. (BNA) 2492 (N.Y. Fam. Ct. May 28, 1982) (foster parents who could not afford to adopt given permanent custody after termination of parental rights).

³⁰² See, e.g., N.C. Gen. Stat. § 7A-289.32(3) (Supp. 1983) (permitting termination where parent has willfully left child in foster care for more than two consecutive years without showing substantial progress in correcting conditions that led to the removal of the child or without responding positively to the efforts of the social services department); Va. Code § 16.1-283(C)(2) (1982) (permitting termination where parents without good cause are unwilling or unable within a reasonable period to remedy condition that led to child's foster-care placement), upheld in *Knox v. Lynchburg Div. Soc. Serv.*, 223 Va. 213, 288 S.E.2d 399 (1982). But see *Washington County Dep't of Social Servs. v. Clark*, 296 Md. 190, 461 A.2d 1077 (1983) (holding unconstitutional a statute presuming that adoption without the consent of natural parents is in best interests of child, when child has been in continuous foster care for two or more years).

reforms sacrifice one set of emotional ties for another, rather than permitting the continuation of the parental ties of both foster parents and natural parents.

IV. ALTERNATIVES TO EXCLUSIVE PARENTHOOD

This proposal for nonexclusive parenthood alternatives incorporates the instrumental approach to parental rights: the child's need for continuity in his intimate relationships with his caretakers demands that the state permit visitation and custody by persons with whom the child has established a parent-child relationship. The proposal does not attempt to replace altogether traditional parenthood with nonexclusive parenthood alternatives. Because exclusivity in parental rights strengthens the nuclear family to the benefit of children, traditional doctrine should remain society's first choice. Unfortunately, however, the law's current reluctance to recognize child-parent relationships that arise outside the nuclear family does not benefit children. Given the law's inability to affect the formation of emotional bonds, it would seem that its most appropriate objective should be to resolve disputes in a way that minimizes the detriment that children suffer when these bonds do not conform to traditional family norms.

The concept of nonexclusive parenthood permits recognition of *de facto* parenting relationships without severing the child's relationships with natural or legal parents. The concept builds on others' recommendations that wider use be made of guardianships,³⁰³ permanent custodial arrangements, and adoptions that do not terminate the natural parents' rights,³⁰⁴ all of which normalize

³⁰³ Guardianship law promotes stable family relationships for children who cannot live with their biological parents without severing the ties with these parents. Yet guardianship law has at least three drawbacks: it generally sets standards for appointment that are inappropriate outside the context of a relatively narrow range of cases; the absence of clear standards for terminating the guardianship threatens its stability; and the law is ambiguous regarding financial support obligations and the authority to make significant decisions about the child. See Note, *Stability in Child-Parent Relations: Modifying Guardianship Law*, 33 Stan. L. Rev. 905, 909-16 (1981).

³⁰⁴ Proposals have been made to permit written agreements by the adoptive parents, the birth parents, and the child allowing contact between the child and the natural parent after the child has been adopted. See, e.g., Model State Adoption Act and Model State Adoption Procedures § 104(c) (Recommendations of Model Adoption Legislation and Procedures Advisory Panel 1980), reprinted in 45 Fed. Reg. 10,622, 10,654 (1980); Amadio & Deutsch, *Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives*, 22 J.

parenting relationships for children who cannot live with their biological parents but who will not benefit from an absolute break with them.

The key disadvantages of broadening access to parenthood are that it may increase the number of adults making claim to a child and enhance the indeterminacy that already exists in child custody law.³⁰⁵ The law's recognition of multiple parents, by diluting the individual autonomy of parents, may reduce the incentive for parents to take their parenting responsibilities seriously.³⁰⁶ Uncertainty may both increase the litigiousness of persons seeking rights in the child³⁰⁷ and create distortions in private bargaining among parties to child custody and visitation disputes.³⁰⁸

Ideally, nonexclusive parenthood status should be initiated only by a neutral representative or guardian acting on behalf of the child, and not by an adult acting in his own interest.³⁰⁹ Because of the variety of circumstances in which custody disputes arise, however, there will often be no guardian who can act for the child. The child's welfare must then depend, as it does in the intact family,

Fam. L. 59 (1983-84); see also Bodenheimer, *supra* note 193, at 41-51; Derdeyn, Rogoff & Williams, *supra* note 131, at 1188-92.

³⁰⁵ Professor Mnookin's analysis of the risks of indeterminacy in child custody law is well known. Mnookin, *supra* note 4. One risk he has identified is that of unequal, uncertain, and unfair results, *id.* at 262-63; that of enhanced opportunity for judges to impose their moral judgments in custody decisions and for intruding into families, *id.* at 269-70; and that of lack of finality in child custody decisions, *id.* at 282.

³⁰⁶ The basic assumption that broad discretion tends to increase the quality of performance has been demonstrated in other contexts. See R. Elmore, *Complexity and Control: What Legislators and Administrators Can Do About Implementation* (1979) (Public Policy Paper No. 11, Institute of Governmental Research), cited in M. Yudof, D. Kirp, T. Van Geel & B. Levin, *Educational Policy and the Law* 658-75 (2d ed. 1983) (school teachers perform better when given greater power and discretion); see also *In re Guardianship of Smith*, 42 Cal. 2d 91, 97, 265 P.2d 888, 892 (1954) (Traynor, J., concurring) ("[T]he care and support [the children] will receive from their father will be greater if they move into his home than if they remain essentially strangers to him.").

³⁰⁷ See *Simpson v. Simpson*, 586 S.W.2d 33, 36 (Ky. 1979) (Stephenson, J., dissenting) (decrying a decision granting visitation to a stepmother, on the grounds that it "opens the door to the butcher, the baker and the candlestick maker to a right to a hearing on 'visitation' rights.").

³⁰⁸ Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 969-77 (1979) (arguing that the uncertainty of custody litigation produces distortions in the settlement process that favor parties who are the least risk-averse).

³⁰⁹ See, e.g., *Adoption of Children by F.*, 170 N.J. Super. 419, 426, 406 A.2d 986, 989 (Ch. Div. 1979) (guardian *ad litem* appointed to enforce visitation rights of natural father after stepfather adoption).

upon the initiative of adults already involved in the child's life.

To address the problems outlined above, several limits on multiple parenthood are desirable. First, the law should not allow nonparents to exercise parental status unless the child's relationship with his legal or natural parent has been interrupted. Absent the failure of the premise of the nuclear family underlying traditional exclusive parenthood, the state should not intervene in families to create new parental rights.

The law should also require a demonstration that an adult is the legal, natural, or psychological parent of the child before a court grants him party status in a custody case. Psychological parents³¹⁰ are adults who provide for the physical, emotional, and social needs of the child, needs normally satisfied by the child's nuclear family. Because the concept of psychological parenthood is most amenable to expansion under a regime of nonexclusive parenthood, it is appropriate to set forth criteria that a court should use to identify such a relationship.

The first criterion is that the adult have had physical custody of the child for at least six months. This requirement cannot guarantee that a psychological parent relationship exists, but may help ensure that courts do not inappropriately confer parental status.³¹¹

³¹⁰ The term "psychological parent" is adapted from the influential work of Goldstein, Freud, and Solnit. J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 98. Despite the use of part of the Goldstein-Freud-Solnit definition of a psychological parent, the proposal for non-exclusive parenthood flatly contradicts their child placement recommendations, which are firmly based upon a concept of exclusive and autonomous parenthood. See J. Goldstein, A. Freud & A. Solnit, *supra* note 4, at 4-14.

³¹¹ The Juvenile Justice Standards Project of the American Bar Association recommends that in most circumstances if the child was under the age of three at the time of placement outside the home, the parents' rights to the child should be terminated once the child has been outside the home for six months and cannot be returned home. The comparable period of time for children over the age of three at the time of placement is one year. Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect* § 8.3 (Tentative Draft 1977), reprinted in W. Wadlington & M. Paulsen, *Cases and Other Materials on Domestic Relations* 1033 (3d ed. 1978). This termination, although it may depend upon the child's prospects of adoption by another, is not affected by whether the child has formed a psychological parenting relationship with another adult. *Id.* at §§ 8.3, 8.4. Goldstein, Freud and Solnit conclude that any residual ties with the child's absent parents are less significant than the ties the child has developed with a long-term caretaker, defined as an adult who has directly and continuously cared for the child for 12 months or more if the child was less than three years old at the time the relationship began, or for 24 months if the child was over the age of three. J. Goldstein, A. Freud & A. Solnit, *supra* note 4, at 46. On the basis of the assumption that the child's ties to the caretaker are now stronger, these authorities propose that long-term caretakers be presumed to be the child's legal parents and that they

The requirement is a reasonably objective screen that eliminates many potential claimants, such as babysitters and neighbors, whose relationships with the child are unlikely to warrant state protection. It also assists courts in identifying as psychological parents only those adults whose relationships with the child conform to the underlying premise of parenthood: that "parents" raise their own children.

"Mutuality"³¹² is a second criterion for psychological parenthood. To meet this criterion, the adult must demonstrate that his motive in seeking parental status is his genuine care and concern for the child. Although self-interest is not altogether incompatible with parenthood, society expects parents to act out of concern for the welfare of their children. Nonparents should demonstrate the existence of this concern, which is presumed to exist in natural parents, before attaining any parental status. Mutuality also denotes that the child perceives the adult's role to be that of parent. If the child sees the adult as a temporary babysitter or companion subject to the direction of the real parent, a true psychological parenting relationship does not exist. The child's concept of the relationship can be ascertained if the child is old enough to articulate his feelings to a social worker, family therapist, a guardian *ad litem*, or to a judge in chambers.³¹³

As a final criterion for psychological parenthood, the court should require the petitioning adult to prove that the relationship with the child began with the consent of the child's legal parent or under court order. This requirement is designed to avoid enhancing incentives for child-snatching.³¹⁴ Rules that focus on the strength of adult-child relationships rather than on previously recognized legal rights can exacerbate the problem of child-snatch-

be given full parental autonomy. *Id.* at 188-89. The presumption can be overcome only under certain circumstances and only as to children more than five years old. *Id.* at 47-48, 195. In light of these recommendations, the proposal to use a six-month minimum period for identification of a psychological parenting relationship seems a conservative one.

³¹² J. Goldstein, A. Freud & A. Solnit, *supra* note 15, at 19, 98.

³¹³ Unif. Marriage and Divorce Act § 404(a), 9A U.L.A. 203 (1973) allows judges to interview children in chambers as to their preferences for a custodial parent.

³¹⁴ See generally S. Katz, *Child Snatching: The Legal Response to the Abduction of Children* (1981); Comment, *A Search for Solutions to Child Snatching*, 11 *Hofstra L. Rev.* 1073 (1983) (proposing stronger criminal sanctions for child snatching and recognition of child custody determinations as a matter of full faith and credit).

ing.³¹⁵ Because of the seriousness of this problem for children in general, the law should recognize only those de facto relationships that have arisen at the forbearance of one or both parents, or under court order.³¹⁶

Once the adult shows himself to be the legal, natural, or psychological parent of the child, the court must decide whether and in what way to protect the child-parent relationship. Ordinarily, parental status implies the opportunity to develop or to continue a relationship with a child. Providing such an opportunity is the purpose of nonexclusive parenthood as well. In each case, the court should examine the child's needs to determine in what way his interests will best be served. In accordance with those interests, the court should consider each parent eligible for primary custody, joint custody with another parent, or visitation.

In making its inquiry, the court should focus on the child's welfare rather than the parents' rights.³¹⁷ It should not be assumed, however, as it is in cases bound by the concept of exclusive parenthood, that children cannot adjust to complex associations,³¹⁸ or that a child should have only one mother or father.³¹⁹ Nor

³¹⁵ See, e.g., *Lloyd v. Lloyd*, 92 Ill. App. 3d 124, 415 N.E.2d 1105 (1980) (relying on strong relationship between child and stepfather to uphold stepfather custody, even though stepfather had abducted child from his mother).

One appellate court has criticized the concept of affording legal parenting status to psychological parents on precisely this ground. In *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1977), the court rejected "[u]nrestrained application of the psychological parenthood theory," because to

allow a person to abscond with a child and then judicially condone the action after a pre-established time period has lapsed is to place a premium on disobedience of court orders and simultaneously to reduce the child to "personal property" to which any person can acquire some sort of "squatter's rights."

Id. at 422-23, 381 A.2d at 1164.

³¹⁶ This limitation, like the others set forth in this article, applies only to the circumstances underlying the formation of a de facto parenting relationship. Natural and legal parents acquire parenting status according to existing law.

³¹⁷ Divorce custody law also purports to serve the best interests of the child. For example, the parent is not entitled to visitation if the child's welfare would suffer from it. *Block v. Block*, 15 Wis. 2d 291, 298, 112 N.W.2d 923, 927, cert. denied, 368 U.S. 906 (1961). Divorce law also, however, assumes a strong (and contradictory) parental right to custody. See, e.g., *Paine v. Paine*, 201 A.2d 20, 22 (D.C. 1964); *Barron v. Barron*, 184 N.J. Super. 297, 445 A.2d 1182 (Ch. Div. 1982); *Petraglia v. Petraglia*, 56 A.D.2d 923, 392 N.Y.S.2d 697 (1977).

³¹⁸ See *In re Carson*, 6 Mass. App. Ct. 665, 669, 382 N.E.2d 1116, 1119 (1978).

³¹⁹ See *In re Adoption by D.*, 61 N.J. 89, 98, 293 A.2d 171, 175 (1972) (disapproving trial court's finding that criminal record alone was sufficient to cut off parental rights); *Malpass v. Morgan*, 213 Va. 393, 394-400, 192 S.E.2d 794, 796-99 (1972) (disapproving trial court's

should custody depend on an amicable relationship among the various adults.³²⁰ Although hostility among the adults may diminish the visitation's value for the child,³²¹ visitation ordinarily should not be prohibited altogether.³²² The court should consider both the child's long-term need to remain in contact with his psychological or natural parents and the anxiety that he may feel as a result of his parents' inability to get along.³²³ Indeed, in the context of divorce, courts increasingly are assuming responsibility for ensuring that hostile parents put their children's welfare ahead of their own disputes.³²⁴ And there is some evidence that many shared-custody arrangements ordered by courts in highly acrimonious divorces are eventually worked out reasonably well to the benefit of the children.³²⁵ This result may demonstrate that decisions that assume

finding that too many fathers can create trouble for child).

³²⁰ This is the general rule governing visitation by a noncustodial divorced parent. See, e.g., *Marciano v. Marciano*, 56 A.D.2d 735, 392 N.Y.S.2d 747 (1977). As one court has noted in the context of divorce, if visitation depended on the friendliness of the parties, "the custodial parent would always effectively deny visitation simply by testifying to suspicion or animosity." *Commonwealth ex rel. Williams v. Miller*, 254 Pa. Super. 227, 232, 385 A.2d 992, 995 (1978).

³²¹ *J. Wallerstein & J. Kelly*, supra note 107, at 121-31; see, e.g., fact situation in *In re Marriage of Gutermuth*, 246 N.W.2d 272 (Iowa 1976).

³²² See, e.g., *Gay v. Cairns*, 298 N.W.2d 313, 315 (Iowa 1980) (strained relations between natural parents should not necessarily preclude visitation in light of the possibility that each parent can contribute to child's welfare); *Goode v. Goode*, 415 So. 2d 321 (La. Ct. App. 1982) (visitation ordered despite animosity between parents); *Mansukhani v. Pailing*, 318 N.W.2d 748 (N.D. 1982) (visitation ordered despite hostility between custodial grandparents and natural mother); see also cases cited supra note 249.

³²³ See supra note 108 and accompanying text.

³²⁴ See, e.g., *Spingola v. Spingola*, 91 N.M. 737, 580 P.2d 958 (1978); *Joye v. Shechter*, 118 Misc. 2d 403, 460 N.Y.S.2d 992 (Fam. Ct. 1983); *Wood v. Wood*, 510 S.W.2d 399 (Tex. Civ. App. 1974). Child custody orders may increasingly require that the parents cooperate with one another in matters concerning the child. A parent may even lose primary custody if that parent impedes visitation by the noncustodial parent. See, e.g., *In re Gloria S.*, 80 A.D.2d 72, 347 N.Y.S.2d 441 (1982); see also *Dodd v. Dodd*, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (Sup. Ct. 1978) (joint custody award changed to primary custody in the mother due to conflict between the parents in joint custody arrangement; mother deemed more likely to promote positive images of both parents). But cf. *Engelhardt v. Bergeron*, 113 R.I. 50, 317 A.2d 877 (1974) (upholding trial court's ruling that attitude of potential custodians toward the natural father was irrelevant to custody issue).

³²⁵ *M. Roman & W. Haddad*, supra note 146, at 116-19, 148; *J. Wallerstein & J. Kelly*, supra note 107, at 130-31, 219; *Folberg & Graham*, supra note 95, at 541 n.116, 550; *Grief, Fathers, Children, and Joint Custody*, 49 *Am. J. Orthopsychiatry* 311, 318 (1979); see also *Bruch, Making Visitation Work: Dual Parenting Orders*, *Fam. Advoc.*, Summer 1978, at 22, 24 (describing custodial parents who permit visitation reluctantly, only because the law requires them to); *Kelly*, supra note 108, at 766 (describing changes in attitudes of mothers

cooperation between parents help to create such cooperation.³²⁶ Visitation should therefore be denied only if the custodial parent satisfies a heavy burden of proof that the visits are actually detrimental to the child³²⁷ and that restrictions on visitation would be insufficient to alleviate the harm.³²⁸

It is important as well that continued access to the child not depend on the noncustodial parent's satisfaction of child support obligations.³²⁹ Although child support continues to be a serious problem for custodial parents and their children,³³⁰ the court should recognize that visitation's importance to the child is independent of the parent's financial contributions. Moreover, uncon-

toward joint custody following mediated discussions).

³²⁶ See Folberg & Graham, *supra* note 95, at 536 (citing Folberg, *Counseling in the Courts—A Better Way to Resolve Family Disputes*, Judge's J., Fall 1975, at 74); see also J. Wallerstein & J. Kelly, *supra* note 107, at 310 (some evidence that legal accountability may shore up psychological and financial responsibility); Benedek & Benedek, *supra* note 131, at 263 (court order of visitation often provides an "independent force" to resolve conflicting pressures and ambivalent feelings of custodial parent regarding visitation).

³²⁷ In divorce custody cases, for example, visitation will be curtailed or suspended if the child would be at risk of physical or emotional harm. See, e.g., *In re Joseph*, 416 N.E.2d 857 (Ind. Ct. App. 1981) (visitation rights suspended because of extreme emotional stress to the child); *Block v. Block*, 15 Wis. 2d 291, 112 N.W.2d 923 (visitation rights suspended because father's irresponsible conduct jeopardized children), cert. denied, 368 U.S. 906 (1961).

Under current law, the suspension of rights, like the termination of parental rights, would probably require a high standard of proof. See *In re Rhine*, 456 A.2d 608, 614 (Pa. Super. Ct. 1983); see also *Santosky v. Kramer*, 455 U.S. 745 (1982) (parental rights may not be terminated without clear and convincing evidence of unfitness).

³²⁸ See, e.g., *Petraglia v. Petraglia*, 56 A.D.2d 923, 392 N.Y.S.2d 697 (1977) (imposition of conditions as to hours, notice, and entering the custodian's home); *Mansukhani v. Pailing*, 318 N.W.2d 748 (N.D. 1982) (restrictions as to time, notice, place, and third-party transportation on parental visitation of children in custody of grandparents). Such restrictions, as well as suspension of visitation, may be altered upon a showing of changed circumstances. See, e.g., *Donovan v. Donovan*, 212 N.W.2d 451 (Iowa 1973).

³²⁹ See, e.g., *Acker v. Acker*, 365 So. 2d 180 (Fla. Dist. Ct. App. 1978); *People ex rel. Norris v. Norris*, 209 N.Y.S.2d 232 (Sup. Ct. 1960). The trend is to regard support and visitation as independent. See, e.g., *Van Zee v. Van Zee*, 302 Minn. 371, 375, 226 N.W.2d 865, 868 (Minn. 1974); *Ledsome v. Ledsome*, 301 S.E.2d 475 (W. Va. 1983); *Block v. Block*, 15 Wis. 2d 291, 112 N.W.2d 923, cert. denied, 368 U.S. 906 (1961); see also *Masters v. Craddock*, 4 Mass. App. Ct. 426, 351 N.E.2d 217 (1976) (children's visitation with father should not be penalized by father's unlawful conduct in failing to return them to their mother after a visit); *Barron v. Barron*, 184 N.J. Super. 297, 445 A.2d 1182 (1982) (father granted visitation rights despite his five-year failure to support or contact the children). But cf. *Creed v. Schultz*, 148 Cal. App. 3d 733, 196 Cal. Rptr. 252 (1983) (support to be paid into trust until mother complies with visitation order).

³³⁰ See Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 Harv. Women's L.J. 1 (1983); Weitzman, *supra* note 96, at 1233-41, 1249-53, 1260-63.

ditional visitation may help to remedy the support problems that occur when noncustodial parents who rarely see their children become resentful about their support payments.³³¹ Frequency and regularity of contact may help the noncustodial parent maintain his interest in and responsibility toward the child.³³²

The significance of the law's accommodation of nonexclusive parenthood alternatives will be more fully understood when these alternatives are applied to the family situations previously described in Part III.

A. Stepchildren

Many remarried custodial parents share their parental rights and responsibilities with their new partners, thus encouraging the creation of a new nuclear family for their children. A stepparent who lives with the child, supports him, provides physical and emotional care, and shares in decisions concerning him is well positioned to become the child's psychological parent. Yet current law, as we have seen, is unable to recognize a permanent stepparent relationship without terminating the child's relationship with his natural noncustodial parent.

Three legal structures would recognize the stepparents' bonds with the child without terminating the rights of fit natural parents: stepparent adoption without termination of parental rights; stepparent custody; and statutory recognition of psychological parents upon the dissolution of the stepfamily.

1. Stepparent Adoption

In most states, stepparent adoption automatically terminates the rights of the natural noncustodial parent; adoption decrees that allow visitation by the natural parents are ordinarily unenforce-

³³¹ Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 Mich. L. Rev. 1614, 1624 (1982).

³³² In one study of 50 child-custody arrangements, many noncustodial parents had broken off contact with their children and had stopped paying child support, whereas none of the eighteen sets of parents with joint custody had done so. D. Luepnitz, *Child Custody* 53 (1982); see also J. Wallerstein & J. Kelly, *supra* note 107, at 310 (legal accountability in a joint custody situation may shore up psychological and financial responsibility); Kelly, *supra* note 108, at 764 (describing "emerging evidence of a link between a continuing relationship with the child and the visiting parent's compliance with child support obligations").

able.³³³ A few courts, however, on dubious authority, have ratified agreements giving visitation rights to noncustodial natural parents. One New York court,³³⁴ for example, analogized to the New York grandparents' visitation statute and awarded visitation to a natural father in a stepparent adoption action. A Maryland court held that its adoption statute, which cut off natural parents' rights, was intended to prevent harassment by natural parents, and not to prevent enforcement of agreements between natural parents and adoptive parents for post-adoption visitation.³³⁵ And a New Jersey court,³³⁶ interpreting a stepparent adoption statute³³⁷ almost certainly intended to protect the rights of the custodial parent spouse in a stepparent adoption situation, applied the statute to a noncustodial natural parent as well.

A workable stepparent adoption alternative that does not call for the termination of the rights of natural parents must have a clearer statutory foundation. Such a statute should focus on stabilizing relationships with both stepparents and noncustodial natural parents, and it should apply even when the natural parent has not consented to the adoption. Although often the natural parent may initiate the post-adoption visitation arrangement, the statute should clarify that the "right" of visitation belongs not to the adult, but to the child. The appointment of a guardian *ad litem*, who can protect the child's interests in a stepparent adoption case and, if the court orders visitation, help enforce the order, would reinforce this focus on the child's interests.³³⁸

³³³ See, e.g., *Rodgers v. Williamson*, 489 S.W.2d 558, 561 (Tex. 1973) (superseded by statute as stated in *McGee v. McGee*, 651 S.W.2d 891 (Tex. Civ. App. 1983)).

³³⁴ *In re Adoption of N.*, 78 Misc. 2d 105, 355 N.Y.S.2d 956 (Sup. Ct. 1974). In this case the natural father had ceased visiting the child when the mother remarried, in part because of the mother's concern that visits were upsetting to the child.

³³⁵ *Weinschel v. Strople*, 56 Md. App. 252, 466 A.2d 1301 (1983).

³³⁶ *Adoption of Children by F.*, 170 N.J. Super. 419, 406 A.2d 986 (Ch. Div. 1979).

³³⁷ N.J. Stat. Ann. § 9:3-50(a) (West Supp. 1984-1985). This statute provides, in part, that when the plaintiff is a stepfather or stepmother of the adopted child and the adoption is consummated with the consent and approval of the mother or father, respectively, such adoption shall not affect or terminate any relationship between the child and such mother or father or any rights, duties or obligations based thereupon.

³³⁸ The court in *Adoption of Children by F.*, 170 N.J. Super. 419, 406 A.2d 986 (Ch. Div. 1979), followed this approach in appointing, at the father's request, a guardian *ad litem* whom the children could contact if their mother and adoptive father prevented them from journeying to visit their father.

2. *Stepparent Custody*

A second means of recognizing a stepparent's psychological parenthood is stepparent custody. A stepparent who has become a psychological parent may obtain joint custody with his spouse, the natural custodial parent.³³⁹ Although stepparent adoption may be preferable where the child feels fully assimilated into the new family, stepparent custody nevertheless has several advantages where the child's ties to the noncustodial parent remain strong. One such advantage is that the noncustodial parent may retain rights in addition to visitation. For example, the noncustodial parent could retain the right to custody if the child's circumstances changed, and his decisional rights concerning the child could remain as in the original divorce decree. By crystallizing the stepparent's responsibility to the child, the state would encourage him to fulfill his parental duties.³⁴⁰ The child would benefit indirectly from the stepparent's certainty concerning their relationship,³⁴¹ and would benefit directly from having three parents legally obligated to support him.³⁴²

The key advantage to the child of stepparent custody would become evident at the dissolution of the stepfamily by death of the natural parent or by divorce. If the natural custodial parent were to die, custody would automatically remain with the stepparent until the noncustodial parent petitioned for custody. Remaining in the home that existed before the parent's death would give the child some stability in the initial difficult days. In a custody dis-

³³⁹ Professor Bodenheimer first suggested a similar legal status, which she called "step-parenthood with custodial rights." Bodenheimer, *supra* note 193, at 46; see also Comment, *supra* note 155, at 614-30. Professor Bodenheimer also recommended that courts be permitted to change the child's surname to that of the stepfather. Bodenheimer, *supra* note 193, at 45. This article's proposal does not encompass this recommendation, which is likely to be inflammatory and symbolizes a replacement of fathers that contradicts a goal of non-exclusive parenthood.

³⁴⁰ The English Children's Act of 1975 and the Adoption Act of 1976 offer custodianship as an alternative to adoption. One purpose of custodianship is to strengthen *de facto* family ties. See Eekelaar, *Children in Care and the Children Act of 1975*, 40 *Mod. L. Rev.* 121, 136 (1977).

³⁴¹ See Sayre, *supra* note 49, at 684.

³⁴² See Comment, *supra* note 155, at 622 (describing noncustodial parent's support as an "insurance policy" for the child). The recognition that the financial resources of the natural parent may benefit the child sometimes leads courts to deny stepparent adoption. See, e.g., *In re Gerald G.*, 61 A.D.2d 521, 403 N.Y.S.2d 57 (1978), appeal dismissed, 46 N.Y.2d 1036, 389 N.E.2d 1106, 416 N.Y.S.2d 586 (1979).

pute between the stepparent and the noncustodial natural parent, the stepparent's custodial status would place the burden of proof on the noncustodial parent. The child would remain in the home situation to which he was accustomed unless the noncustodial natural parent could show that the child's welfare would be better served in his custody.

Dissolution of the stepfamily is more likely to occur by divorce than by death. A stepmarriage is one and one-half times as likely to fail as a first marriage.³⁴³ If, in a divorce case, both the stepparent and the custodial natural parent sought custody, the law would probably favor the natural parent, because of its traditional preference for the natural parent and the likelihood that the child's relationship with this parent had been of longer duration. A stepparent or the child could overcome the preference, however, by demonstrating that the stepparent had a stronger relationship with the child. In such a case, the stepparent could be awarded joint custody with the natural parent or even primary custody, with visitation rights in both natural parents. If the stronger relationship were not shown, the stepparent could nevertheless obtain visitation, incident to his already recognized right to custody.

3. *Psychological Parenthood Custody*

A third way to protect the child's relationships with both his stepparents and his natural parents would be to enact custody statutes that recognize *de facto* parenthood following death or divorce of the child's parents. A few divorce statutes do allow custodial or visitation rights in strangers, although their standards for adjudication remain vague.³⁴⁴ In Illinois, for example, the court may "for good reason" award custody to either parent or to "some other person."³⁴⁵ In custody disputes upon divorce, this alternative would resemble stepparent custody: the court would prefer the

³⁴³ Clingempeel, *Quasi-Kin Relationships and Marital Quality in Stepfather Families*, 41 J. Personality & Soc. Psychology, 890, 890 (1981) (one-third of first marriages end in divorce while one-half of remarriages do) (citing Bureau of the Census statistic).

³⁴⁴ See, e.g., Cal. Civ. Code § 4601 (West 1983) (visitation may be awarded to "any other person having an interest in the welfare of the child"); Mich. Comp. Laws Ann. § 722.25 (West Supp. 1984-1985) (third parties may sue for custody, although presumption is in favor of parent); see also *Fisher v. Fisher*, 10 Fam. L. Rep. (BNA) 1042 (Nev. Nov. 15, 1983) (any "concerned person" has standing to seek custody).

³⁴⁵ Ill. Ann. Stat. ch. 110½, § 11-7 (Smith-Hurd 1978).

natural parent, but the stepparent would be able to overcome this preference and win primary custody, joint custody, or visitation. Upon the death of the natural parent, or a finding that he is unfit, the stepparent would again have the burden of proof, not having been previously adjudicated a custodial parent. This alternative offers the advantage of reducing unnecessary hostility between the noncustodial parent and the stepparent during the stepfamily's existence. Under stepparent custody, even though the natural parent's access to the child is not decreased, the natural parent may feel that his status is diminished. Animosity among the adults may have an adverse effect on the child; it may also have the indirect effect of causing the noncustodial parent to resent his support obligation or to lose interest in the child.³⁴⁶ This is less likely under an alternative that does not create a legal status until circumstances require that status to secure a *de facto* parent-child relationship.

B. Unwed Fathers

Nonexclusive parenthood would not necessarily remove the burdens now imposed on unwed fathers who wish to establish parental status. It would not necessarily vitiate, for example, the traditional view that the absence of marital commitment justifies courts and legislatures in declining to recognize these fathers unless they formally acknowledge, visit, or support their child, or unless they initiate judicial proceedings or file legal notice or their parental claims.³⁴⁷ The primary effect of the expanded view of parenthood

³⁴⁶ See *Miller v. Miller*, 97 N.J. 154, 478 A.2d 351 (1984) (addressing situation in which stepfather's conduct in assuming parental role led to breach in the relationship between the children and their natural father and termination of the natural father's support payments).

³⁴⁷ Some commentators have noted the apparent inequities in parenting status between nonmarital mothers and nonmarital fathers. See, e.g., Tabler, *supra* note 196; Note, *Equal Protection for Unmarried Parents*, 65 Iowa L. Rev. 679, 699 (1980); Note, *Putative Fathers: Unwed But No Longer Unprotected*, 8 Hofstra L. Rev. 425, 444 (1980); Comment, *Equal Protection and the Putative Father: An Analysis of Parham v. Hughes and Caban v. Mohammed*, 34 Sw. L.J. 717 (1980). In fact, one may argue that the unwed mother faces the same burdens as the unwed father does, but that they are for practical reasons easily satisfied. The mother must show that she is the mother, for example, but she does so without the complicated proof problems inherent in establishing paternity. See, e.g., *Unif. Parentage Act* § 3(1), 9A U.L.A. 589 (1973) ("the natural mother may be established by proof of her having given birth to the child . . ."). This ease of proof may change with the increasing use of surrogate mothers and new conception technologies, raising for the first time the factual/legal issue of maternity. See Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 Va. L. Rev. 465, 474 (1983).

would be that the unwed father's full or partial parenthood would no longer depend upon his ability to defeat all other competing claims. Nonexclusive parenthood may also help prevent disputes that arise when disinterested unwed fathers, suddenly threatened with termination of their rights in an adoption proceeding, decide to counterclaim for custody or visitation.³⁴⁸ Unwed fathers tempted to object to adoption out of pride rather than concern for the child could, under the proposed framework, consent to the adoption without losing all rights in the child.

The burden of legitimating the child or otherwise establishing a tie with the child sufficient to entitle the father to custody, visitation, or to prevent the adoption of the child by another, may also be said to exist with respect to the mother. But the law construes her decision to carry and bear the child as a sufficient demonstration of her commitment to the child. By recognizing the relationship between a mother and the child she has conceived, carried, and delivered, the law assures the child a parent. By not extending the same recognition to the unwed father, the law refuses to base legal parenthood on the biological connection alone, reserving autonomous parental status for adults who have concretely demonstrated their parental intentions. The unwed mother's commitment to the child at birth, however indifferent or involuntary, is presumed superior to that of any other individual. She is therefore entitled to immediate physical custody of the child. See *Caban v. Mohammed*, 441 U.S. 380, 404-09 (1979) (Stevens, J., dissenting) (describing differences between mothers and fathers that justify giving the mother of a newborn the exclusive right to consent to its adoption); *Bradley v. Bennett*, 168 Ala. 240, 243, 53 So. 262, 263 (1910) ("The mere fact of the paternity as a rule entails but small trouble or inconvenience . . ."). That entitlement may be defined broadly or narrowly, corresponding to the two directions the law has taken with respect to the legal rights of the unmarried mother to release her child for adoption over the objection of the father. Defined broadly, the unwed mother's right is either to continue to exercise custody of the child or to give the child to another for adoption, despite the objections of the father. Defined more narrowly, the right limits the mother's options to deciding whether or not she will continue to parent the child herself; if she decides not to do so, the law may allow an unwed father who demonstrates a parental commitment to acquire parenting status.

³⁴⁸ Judge Justine Wise Polier describes one aspect of this problem:

Frequently parents have shown little or no active interest in a child for long periods of time, or indeed, until they receive notice of the action to terminate parental rights and free the child for adoptive placement. The parent may never have provided a home, may have maintained no real contact with the child, and may have no plans for making a home for the child. Still, the possible termination of parental rights comes as a jolt and is seen as punishment, forfeiture of what is theirs, and as a threat to self-esteem which must be fought.

In *re Barbara P.*, 71 Misc. 2d 965, 966, 337 N.Y.S.2d 203, 205 (1972). Cases abound in which parents show little interest in their children until their legal relationship with the child is about to be changed. See, e.g., *Root v. Allen*, 151 Colo. 311, 377 P.2d 117 (1962) (father petitioned for return of child only after stepfather sought custody); In *re Adoption of Zimmerman*, 229 N.W.2d 245 (Iowa 1975) (father opposed adoption because of wish to prevent his flesh and blood from assuming a different last name); *Whitlatch v. Whitlatch*, 206 Neb. 527, 293 N.W.2d 856 (1980) (father exhibited no interest in child until date of custody trial); In *re Roy*, 90 Misc. 2d 35, 393 N.Y.S.2d 515 (Fam. Ct. 1977) (mother opposing adoption because of desire to maintain title to the child).

The availability of adoption without termination of parental rights could have helped the children in both *Quilloin v. Walcott*³⁴⁹ and *Caban v. Mohammed*.³⁵⁰ In *Quilloin*, Walcott could have legitimated the children and been awarded legal custody without depriving the children of their relationship with their natural father, who had neither abandoned his children nor been shown to be unfit. Similarly, in *Caban v. Mohammed* the lower courts could have allowed joint custody or primary custody subject to visitation rights, depending on the nature of the relationships existing in each of the children's two families.³⁵¹

The unwed father's status may be limited by the court, especially in the case of fathers who have never established a parental relationship with the child. The court, concerned about the child's primary need for attachment and his ability to handle multiple parenting figures, might reasonably disallow joint custody or frequent visitation while the child is in infancy or early childhood.³⁵² The court could allow more frequent visitation as the child becomes older. Visitation, however, should not ordinarily be curtailed merely on the custodial parent's testimony that the visits are "disruptive."³⁵³ Rather, the child's long-term need to know his father should be balanced against the short-term difficulties. Instead of

³⁴⁹ 434 U.S. 246 (1978).

³⁵⁰ 441 U.S. 380 (1979).

³⁵¹ A few cases have allowed visitation after adoption of an illegitimate child. Dictum in one New York case, *In re Gerald G.*, 61 A.D.2d 581, 403 N.Y.S.2d 57 (Sup. Ct. 1978), appeal dismissed, 46 N.Y.2d 1036, 389 N.E.2d 1106, 416 N.Y.S.2d 586 (1979), noted the possibility of an adoption without terminating the unwed father's rights in the child, but the court refused the adoption, over vigorous dissent, on the ground that it would be against the child's best interests to lose his relationship with his natural father. One New Jersey case allowed the natural mother visitation upon the child's adoption by his unwed father, on the basis of a strained construction of a stepparent adoption statute that permitted visitation by the natural parent after an adoption with that parent's consent. The court interpreted "stepfather" to include unwed fathers, and evidently waived the consent requirement, because the mother was incompetent to give consent. *In re Adoption of A.R.*, 152 N.J. Super. 541, 378 A.2d 87 (1977).

³⁵² See *supra* notes 109-11 and accompanying text.

³⁵³ 434 U.S. 246, 251 n.10 (1978). In *Quilloin*, the mother complained that the visits of the natural father had become disruptive. *Id.* Where visits are shown to be detrimental to the child, limiting or suspending visits would not be inconsistent with the principles of nonexclusive parenthood. The disruptive effect would have to be evaluated, however, in light of long-term and short-term benefits to the child of a continued relationship with a noncustodial parent. See *supra* Part II.

denying visitation altogether, the court could order reasonable limits on visitation or, in the case of extremely hostile parents, a temporary suspension of visitation.

C. *Children Cared for by Nonrelatives*

The needs of children who have been cared for by nonparents are similar to the needs of stepchildren. Nonparent caretakers should be made eligible for custody or visitation upon the legal parents' divorce. Furthermore, caretakers who are given permanent custody or allowed to adopt the child must accommodate a continuing role for the noncustodial parent.³⁵⁴

Grandparent visitation statutes are a first step toward this goal, but not a well-conceived one. On the one hand, these statutes ordinarily do not apply to other kin or to unrelated caretakers, allow only visitation, and terminate upon the child's adoption.³⁵⁵ On the other hand, some kin visitation statutes go too far, allowing courts to order visitation over the objections of parents in intact families. The decline of the nuclear family may mean that the fabric of social relationships is torn, but the patch must fit the tear. Statutes allowing kin visitation over the objections of parents of intact families³⁵⁶ are too great an intrusion on parents who have managed to raise their children in traditional nuclear families. Other limits on

³⁵⁴ Despite the large number of cases in which custody was awarded to a grandparent or other relative over a parent, only a few such cases accommodate a continuing role for the noncustodial parent. See, e.g., *Coulter v. Coulter*, 141 Colo. 237, 347 P.2d 492 (1959); *In re Custody of Piccirilli*, 88 Ill. App. 3d 621, 410 N.E.2d 1086 (1980); *In re Marriage of Smith*, 269 N.W.2d 406 (Iowa 1978); *Mansukhani v. Pailing*, 318 N.W.2d 748 (N.D. 1982); *Cook v. Cobb*, 271 S.C. 136, 245 S.E.2d 612 (1978); *Smitheal v. Smitheal*, 518 S.W.2d 842 (Tex. Civ. App.), cert. denied, 423 U.S. 928 (1975); see also *In re K.K.M.*, 647 S.W.2d 886, 893 (Mo. Ct. App. 1983) (trial court on remand could award visitation to parent "as [it] deems appropriate"); *Haynes v. Haynes*, 205 Neb. 35, 286 N.W.2d 108 (1979) (court suggesting but not ordering grandmother to allow the father to visit the child); *Brokenleg v. Butts*, 559 S.W.2d 853 (Tex. Civ. App. 1977) (award of custody to grandparents did not warrant termination of mother's rights; visitation by mother implied but not expressed).

In one New Jersey case, the mother was granted visitation after an adoption by grandparents. The court held that a statute purporting to insulate adoptive parents from disturbances by natural parents did not apply where visits were formerly permitted, the adoption was by relatives, and the child wished to visit his mother. *Kattermann v. DiPiazza*, 151 N.J. Super. 209, 376 A.2d 955 (App. Div. 1977); N.J. Stat. Ann. 9:3-17(c) (West 1976), repealed by Act of Feb. 6, 1978, ch. 367, § 20, 1977 N.J. Laws 1333 (codified in N.J. Stat. Ann. § 9:3-17 (West Supp. 1984-1985)).

³⁵⁵ See *supra* notes 254-72 and accompanying text.

³⁵⁶ See *supra* text accompanying note 264.

kin visitation may also be advisable. The statutes could be restricted, for example, to first degree kin. The amount of visitation could be limited to correspond to the relationship already established,³⁵⁷ or alternatively, the person seeking greater visitation than previously allowed could be required to meet a more difficult standard of proof.³⁵⁸

D. Foster Children

Parental relationships that develop between foster parents and children must be respected as no less significant to children than those that develop without the state's involvement. Although the special features of foster care warrant careful standards respecting state intervention in families and the terms on which foster parents, children, and natural parents should interact, these features should not affect the extent of legal protection extended to de facto child-parent relationships. Thus, the child's interest in maintaining his relationship with foster parents ought not depend on whether a court concludes that the foster parent relationship amounts to a constitutionally protected liberty or property interest.³⁵⁹

Nonexclusive parenthood could assume several forms in the context of foster care, depending on the factual circumstances. A child who had developed a psychological parent-child relationship with foster parents, but whose primary loyalties remained with the natural parents, could be returned to the natural parents without severing entirely the foster parent relationship. A child whose foster parents were unable to continue physical custody could be adopted by third parties, with visitation rights accorded the foster parents. A child who had developed strong ties with foster parents could be placed in their permanent custody with visitation allowed the natural parents, even if the natural parents had demonstrated rehabil-

³⁵⁷ See, e.g., Cal. Civ. Code § 197.5(b) (West 1982) ("In granting visitation rights to persons other than the parents of the decedent, the court shall consider the amount of personal contact between such persons and the minor child prior to the application for the order granting them visitation rights.").

³⁵⁸ See *In re La Russo*, 9 Fam. L. Rep. (BNA) 2646 (N.Y. Fam. Ct. Aug. 10, 1983) (burden of proof is on grandparents who seek visitation; parents had allowed no visitation heretofore, but court concludes that visitation is probably appropriate).

³⁵⁹ See *supra* note 285 and accompanying text.

itation.³⁸⁰ The precise accommodations among the parties would depend on the length of time that the child had been in foster care, the strength of the child's ties with foster and natural parents, and the predicted ability of the foster or natural parents to provide continuous care for the child.

Once the state recognizes psychological parenthood in the context of foster care, the fact that the state has legal custody of the child could work to the child's advantage. For example, the state could continue child support payments to foster parents who desired permanent custody but were unable to afford adoption. The state could also carefully structure visitation agreements among the parties. A parent who is mentally ill, for example, and therefore unfit to have physical custody, need no longer have his rights terminated. Instead, he could visit the child in the company of a social worker or family therapist, who could help the parent deal with the child and help the child understand that he is not unloved, despite his parent's inability to care for him. Finally, as the law learns to accommodate multiple parenting relationships, the state could better plan for the reality that foster care will not be necessarily a temporary response to family crisis. The state could offer training for foster parents to enable them to understand and ease the child's relationship with his natural parents. Training would also enable foster or adoptive parents to deal with their own hostility toward the natural parents.³⁸¹

Will families formerly eager to adopt children or to serve as foster parents be willing to accept children as "their own" under the more limited nonexclusive parenthood status? Little evidence ex-

³⁸⁰ See, e.g., *Martin v. Sand*, 444 A.2d 309 (Del. Fam. Ct. 1982) (long-term custody of child retained by foster parents; parents allowed visitation).

Few cases have reached such a result. Even cases that do not explicitly terminate parental rights to give "permanent" custody to foster parents often do not provide for visitation by the natural parents. For example, in one case ordering continued custody by foster parents, the court failed to order visitation for the mother, despite evidence of the child's ties with his mother. *In re Confessora B.*, 75 Misc. 2d 368, 348 N.Y.S.2d 21 (1973); see also *Borsdorf v. Mills*, 49 Ala. App. 658, 275 So. 2d 338 (1973) (same); *In re Giurbino*, 258 Ark. 277, 524 S.W.2d 236 (1975) (foster parents retained custody despite mother's improved behavior toward the child; no indication of visitation rights).

For a well-developed proposal for foster care without terminating parental rights, and a discussion of its likely impact on the behavior of natural parents, foster parents, and welfare agencies, see Garrison, *supra* note 108, at 474-96.

³⁸¹ See *supra* note 151 for a discussion of problems of foster and natural parents that could be alleviated by foster-parent training.

ists on which to base speculation. Somewhat helpful, perhaps, is evidence that adoptive parents who were reluctant to allow contact with the child's natural parents found that their fears were unfounded or exaggerated.³⁶² Many foster parents who love their foster children and desire to keep them as their own see no need to adopt the child unless threatened with loss of custody.³⁶³ Further, children with stable placements usually do not distinguish between adoption and foster care.³⁶⁴ Finally, one commentator suggests that because so many couples desire to adopt children and so few children are available for adoption, these couples will be eager to turn to foster care and non-exclusive adoptions to fulfill the desire to raise a family.³⁶⁵

Non-exclusive parenthood ought not replace existing adoption laws entirely, however. Adoptions by consent may continue to serve the needs of children whose natural parents are unwilling or unable to care for them. Involuntary adoptions may also be necessary in cases of abandonment or extreme cruelty.³⁶⁶ But because traditional adoption would no longer be the only way in which a child could acquire a permanent family, courts could reserve termination for the truly egregious cases. Non-exclusive permanent custody and adoption would allow courts otherwise loath to order adoption, with its drastic consequences, to order permanent custody to non-parents who had developed strong relationships with the child.

V. CONCLUSION

The concept of nonexclusive parenthood is not a precise legal doctrine intended to provide easy answers to difficult questions of authority over and access to children. It is, rather, an alternative

³⁶² A. Sorosky, A. Baran & R. Pannor, *The Adoption Triangle* 186-87, 192.

³⁶³ Proch, *Differences Between Foster Care and Adoption: Perceptions of Adopted Foster Children and Adoptive Foster Parents*, 61 *Child Welfare* 259, 263 (1982).

³⁶⁴ *Id.* at 265-66, 268.

³⁶⁵ Garrison, *supra* note 108, at 482 n.264.

³⁶⁶ These cases are not easy to define. For an example of a case that may be deemed appropriate for the complete severance of parental rights, see *J. v. M.*, 157 N.J. Super. 478, 385 A.2d 240 (App. Div. 1978) (parents had severely battered first three children leading to death of one of them, and had also allowed children to become malnourished and neglected; treatment of these children held to justify terminating rights to a fourth child born to mother in reformatory).

for approaching certain child custody disputes in which, because the child has developed child-parent relationships with adults outside his nuclear family, one of the critical, underlying premises of child custody law—that parents raise their own children in nuclear families—is no longer a fair one. It is a view of parenthood that eliminates the necessity of exclusivity in every parent-child relationship and thus is a more appropriate way to handle certain disputes over children. Its flexibility allows for a wide variety of child custody arrangements, including those currently available in divorce cases, and accommodates changes in those arrangements over time, according to changes in the needs of the child. In some cases it suggests answers that courts, more mindful of the welfare of children than of legal precedent, have already reached, but the development of determinate, principled standards will provide a more stable foundation for these decisions. Without such a foundation, courts more often will be constrained to apply the law as they understand it to be, law that remains bound by an exclusive view of parenthood.

A final concern this article must address is whether alternatives to exclusive parenthood will contribute further to the decline of the nuclear family. The relationship between legal reform and social change can be neither easily discovered nor accurately predicted. Given the reasons children come into the care of nonparents, and the increasing likelihood that a psychological parent may prevail in a child custody fight, it seems unlikely that an approach that attempts to accommodate more than one parent or set of parents in a child custody arrangement will further weaken the already vulnerable institution of the family. Indeed, the decline of the nuclear family seems more directly related to economic and social factors than to legal ones.³⁶⁷ No matter; once it is demonstrated that children with certain child-parent histories experience more benefit (or less detriment) from carrying on multiple, nonexclusive parental relationships than from being restricted to exclusive ones, child custody law seems an inappropriate tool for suppressing the decline of the nuclear family. In this regard, the view that the failure to make legal changes to correspond to social change harshly punishes those who participate in the natural

³⁶⁷ K. Keniston, *All Our Children: The American Family Under Pressure* 3-23 (1977).

evolution of society,³⁶⁸ is especially compelling, because the participants are not willing ones.

³⁶⁸ Cf. Willemsen, *Justice Tobriner and the Tolerance of Evolving Lifestyles: Adapting the Law to Social Change*, 29 *Hastings L.J.* 73, 97 (1977).