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Blood Ties: A Rationale for Child Visitation by Legal Strangers

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Blood Ties: A Rationale for Child Visitation by Legal Strangers

John DeWitt Gregory*

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I. Introduction

This Article addresses some of the issues that arise when nonparents seek visitation with other peoples' children. More often than not, natural parents successfully resist assertions of child visitation rights by legal strangers such as stepparents and so-called lesbian "coparents."¹ However, grandparents, aided by a raft of legislation and judicial decisions, fare infinitely better

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1. See *infra* Part II (discussing legal response to third party visitation claims).

when petitioning for visitation with their grandchildren. This Article discusses the current law and legal scholarship concerning visitation rights of legal strangers and concludes that courts and legislatures should support legal parents' rights to raise their children without unwanted interference from legal strangers.

Legislative enactments that deal explicitly with visitation by third parties do not provide uniform or clear standards reflecting the circumstances under which visitation claims will be honored. However, the statutes generally reflect the requirement, whether express or implicit, that visitation be in the best interests of the child. By and large, courts have adopted the same standard in third party visitation cases.

Against this background, some commentators have proposed changes in the law of third party visitation that would redefine parent and family to give legal recognition to relationships between children and third parties. These proposals would treat third parties and natural parents identically in visitation cases. This Article rejects these proposals on constitutional and policy grounds. Instead, the decisions of fit natural parents concerning who may visit their children should be controlling, absent a showing of significant harm or danger to the child. This position finds support in long standing and highly cherished traditional views about family autonomy and its concomitant, parental authority.

Part II examines the current law relating to third party visitation claims by "coparents", stepparents, grandparents, and foster parents. Part III discusses scholarship critical of the current bases for legal recognition of parental status. Finally, Part IV proposes adoption of a third party visitation standard grounded in family autonomy and parental authority that respects the child rearing decisions of fit natural parents in the absence of a showing of harm to the child.

II. The Law's Response to Third Party Visitation Claims

A. "Coparents"

The New York Court of Appeals's 1991 decision in *Alison D. v. Virginia M.*² inspired the writing of this Article.³ Two years after *Alison D.* and *Virginia M.* established a relationship and began living together, they decided to have a child and agreed that *Virginia M.* would be artificially inseminated.⁴

2. 572 N.E.2d 27 (N.Y. 1991).

3. *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991).

4. *Id.* at 28. A number of writers have urged that the term artificial insemination be abandoned and replaced by "alternative insemination." I decline to do so. Professor Nancy D. Polikoff uses the new term, calling it "a more appropriate description of the procedure com-

The parties also agreed to share the rights and responsibilities of child rearing.⁵ Virginia M. gave birth to a baby boy, who was given both Alison D.'s and Virginia M.'s surnames.⁶ Alison D. shared in the expenses relating to the child's birth, provided support, participated with Virginia M. in child care, and was active in making parental decisions.⁷

The parties separated when the child was 2 years and 4 months old, and his natural mother, Virginia M., eventually terminated Alison D.'s visitation.⁸ Alison D. then commenced a legal action seeking visitation rights.⁹ Affirming lower court decisions to dismiss the action, New York's highest court, the Court of Appeals, emphasized Alison D.'s concession that she was not the child's biological or adoptive parent.¹⁰ Instead, she claimed that she had acted as a *de facto* parent,¹¹ or that the court should view her as a parent by estoppel,¹²

monly referred to as 'artificial insemination.' Because there is nothing artificial about inseminating a woman, alternative insemination aptly describes a process that is merely an alternative to insemination through sexual intercourse." Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 467 n.24 (1990); see also Lisa M. Pooley, *Heterosexism and Children's Best Interests: Conflicting Concepts in Nancy S. v. Michele G.*, 27 U.S.F. L. REV. 477, 479-80 n.14 (1993) (using term alternative insemination); Carmel B. Sella, *When a Mother Is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135, 139 n.13 (1991) (same). Professor Ruthann Robson notes an additional reason for preferring the term alternative insemination; it is the term preferred by many women in the lesbian community who have used the procedure. Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1393 n.66 (1994). In contrast, Professor Marc E. Elovitz uses the traditional term artificial insemination despite his preference for the new term, appropriately noting that the traditional usage is consistent with statutes and case law. See Marc E. Elovitz, *Reforming the Law to Respect Families Created by Lesbian and Gay People*, 3 J.L. & POL'Y 431, 432 n.4 (1995). A thorough search of the case law uncovered only one reported case that actually employs the term alternative insemination. *In re Camellia*, 620 N.Y.S.2d 897, 899 (Fam. Ct. 1994).

5. *Alison D.*, 572 N.E.2d at 28.

6. See *id.* (noting that Alison D.'s last name became child's middle name and that Virginia M.'s last name became child's last name).

7. *Id.*

8. *Id.*

9. See *id.* at 29 (outlining Alison D.'s claim pursuant to New York's Domestic Relations Law).

10. *Id.*

11. See *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 216 (Ct. App. 1991) (describing *de facto* parent as one "who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care" (quoting *In re B.G.*, 523 P.2d 244, 253 n.18 (Cal. 1974))).

12. See *id.* at 217 (explaining that some courts will resort to equitable estoppel to deny existence of parent-child relationship previously encouraged and supported by legal parent).

with standing to seek visitation rights.¹³ Discussing the requirements and traditional judicial interpretation of the governing statute, the court observed:

Traditionally, in this state it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent. To allow the courts to award visitation – a limited form of custody – to a third person would necessarily impair the parents' right to custody and control.¹⁴

The court rejected Alison D.'s claims of parentage and of visitation rights on this basis.¹⁵

Judge Judith Kaye dissented sharply from the court's per curiam opinion.¹⁶ She explained that her dissent was compelled by "[t]he majority's retreat from the court's proper role – its tightening of rules that should in visitation petitions, above all, retain the capacity to take the children's interests into account."¹⁷ In particular, Judge Kaye objected to the court's finding that the word parent in the statute governing custody referred exclusively to a biological parent.¹⁸ She argued that this reading "foreclose[d] all inquiry into the child's best interest, even in visitation proceedings" and was inconsistent with the explicit legislative objective of promoting the best interest, welfare, and happiness of the child.¹⁹ Finally, after a brief review of the legislative history and prior judicial applications of the statute, Judge Kaye argued that the majority's literal definition of parent was inappropriate.²⁰

Judge Kaye's dissent also faulted the majority for "overlook[ing] the significant distinction between visitation and custody proceedings."²¹ She asserted that, although judicial infringement of the right to rear a child must be based on the custodial parent's unfitness, burdens on visitation rights "must be based on the child's overriding need to maintain a particular relation-

13. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991).

14. *Id.* at 29 (citations omitted). New York's Domestic Relations Law provides that "either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court . . . may award the natural guardianship, charge and custody of such child to either parent . . . as the case may require." N.Y. DOM. REL. LAW § 70 (a) (McKinney 1988 & Supp. 1997-98).

15. *Alison D.*, 572 N.E. 2d at 29-30.

16. *Id.* at 30 (Kaye, J., dissenting).

17. *Id.*

18. *Id.* at 31.

19. *Id.*

20. *See id.* at 31-32 (noting that it is within competence and authority of court to determine meaning of term parent and that court should have exercised that power in matter at hand).

21. *Id.* at 31.

ship."²² Judge Kaye concluded that "the fitness concern present in custody disputes is irrelevant in visitation petitions, where continuing contact with the child rather than severing of a parental tie is in issue."²³ Judge Kaye would have remanded the case for a determination of whether Alison D. stood in loco parentis to the child and whether visitation would be in the child's best interest.²⁴

The New York Court of Appeals was neither the first court nor the last to reject requests for visitation by lesbian former coparents. In two earlier cases, the California Court of Appeal similarly denied visitation to women who had been involved in homosexual relations with the natural mothers of children conceived through artificial insemination.²⁵ After the New York court's decision in *Alison D. v. Virginia M.*, Wisconsin's highest court rejected a claim for visitation rights by lesbian former partners of legal parents.²⁶ Recently, however, the Wisconsin Supreme Court has reconsidered its earlier position on visitation rights for lesbian coparents, and a New Mexico appeals court has expressed a willingness to entertain requests for visitation rights by coparents.²⁷

1. Judicial Rejection of "Coparent" Visitation Rights

In *Curiale v. Regan*,²⁸ a mother's lesbian former partner brought suit to enforce a purported custody agreement.²⁹ Upon termination of their relationship, the parties had executed a written agreement providing for shared custody.³⁰ The California Court of Appeal framed the issue as "whether plaintiff, who is neither the natural mother, step-mother, nor adoptive mother

22. *Id.*

23. *Id.* at 32.

24. *Id.* at 33.

25. See *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991) (concluding that nonbiological lesbian coparent could not establish existence of legally cognizable parent-child relationship); *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522-23 (Ct. App. 1990) (deciding plaintiff lacked standing to assert visitation or custody claim against former partner); see also *West v. Superior Ct.*, 69 Cal. Rptr. 2d 160, 162-64 (Ct. App. 1997) (refusing to recognize standing of lesbian former coparent) (citing *Curiale*, 272 Cal. Rptr. at 521-22).

26. See *In re Interest of Z.J.H.*, 471 N.W.2d 202, 212 (Wis. 1991) (concluding that law did not entitle plaintiff to establish existence of legally recognizable parent-child relationship), overruled by *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 434 (Wis. 1995).

27. See *H.S.H.-K.*, 533 N.W.2d at 421 (stating that trial courts have equitable power to find parent-like relationship); see also *A.C. v. C.B.*, 829 P.2d 660, 663-64 (N.M. Ct. App. 1992) (remanding case for determination of best interests of child).

28. 272 Cal. Rptr. 520 (Ct. App. 1990).

29. *Curiale v. Reagan*, 272 Cal. Rptr. 520, 521 (Ct. App. 1990).

30. *Id.*

of the child has standing to assert a claim for custody and/or visitation as against the child's natural mother with whom the child resides."³¹ The court found that no statutory or decisional authority existed to afford visitation over the objections of a natural parent, and the court refused to award the plaintiff visitation rights.³²

In *Nancy S. v. Michele G.*,³³ the California Court of Appeal heard an appeal in a case with facts similar to those that faced the New York Court of Appeals in *Alison D.*³⁴ Nancy S. was seeking partial custody of the biological children of her lesbian former partner.³⁵ The court noted that under California's Uniform Parentage Act, a court may not award custody to a nonparent without the parents' consent, unless the court finds that parental custody would be detrimental to the child and that an award to a nonparent would serve the child's best interests.³⁶ The court further explained that only the natural or adoptive parent of a child is a parent under the Uniform Parentage Act.³⁷

Because Nancy S. was neither the children's natural nor adoptive parent, nor was she married to the mother, she could not establish a parent-child relationship that would entitle her to visitation under California law.³⁸ The court also found that Nancy S. failed to establish standing through alternative theories, including de facto parenthood, the in loco parentis doctrine, and equitable estoppel.³⁹ First, the court rejected her assertion of de facto parenthood, explaining that only clear and convincing evidence that parental custody was detrimental to the child would justify an award to a de facto parent.⁴⁰ Second, the court noted that the in loco parentis doctrine had never been applied to give a nonparent the same status as a parent and declined to extend that theory.⁴¹ Finally, the court refused to apply the equitable estoppel doctrine to prevent the natural mother "from denying the existence of a parent-child relationship that she allegedly encouraged and supported for many years and which she now denies for the sole purpose of obtaining unfettered control over the custody of the children."⁴²

31. *Id.* at 521.

32. *Id.* at 522-23.

33. 279 Cal. Rptr. 212 (Ct. App. 1991).

34. *See Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 214 (Ct. App. 1991) (describing case's factual background).

35. *Id.*

36. *Id.* at 214-15; *see* CAL. FAM. CODE § 3041 (West 1994).

37. *Nancy S.*, 279 Cal. Rptr. at 215; *see* CAL. CIV. CODE § 7601 (West 1994).

38. *Nancy S.*, 279 Cal. Rptr. at 215.

39. *Id.* at 215-16.

40. *Id.* at 216.

41. *Id.* at 217.

42. *Id.*

Judicial refusal to recognize visitation rights for former partners of lesbian mothers continued after the New York court's decision in *Alison D. In re Interest of Z.J.H.*,⁴³ Wendy L. Sporleder sought visitation with the adopted child of her former partner.⁴⁴ The Supreme Court of Wisconsin refused to recognize a coparenting contract between Sporleder and her former partner and refused to grant Sporleder visitation rights.⁴⁵

Sporleder and her former partner, Janice Hermes, had lived together for eight years.⁴⁶ After an unsuccessful attempt at artificial insemination of Sporleder, they decided that Hermes would adopt a child.⁴⁷ Sporleder provided primary care for the child while Hermes held a job.⁴⁸ Pursuant to their coparenting contract, the parties agreed that if they separated they would determine physical custody of the child through mediation, with the non-custodian having liberal visitation rights.⁴⁹

The parties separated after the adoption, and Hermes prevented Sporleder from seeing the child.⁵⁰ Sporleder brought an action for physical placement or visitation and sought to enforce the coparenting agreement.⁵¹ The family court granted Sporleder visitation rights.⁵² However, the circuit court of appeals reversed, holding that Sporleder did not have the legal status of parent, that she lacked standing to exercise parental rights, and that the agreement was void as against public policy.⁵³ Moreover, the court decided that Hermes was not equitably estopped from denying Sporleder's parental status.⁵⁴

The Supreme Court of Wisconsin affirmed the court of appeals's judgment.⁵⁵ First, the court explained that a nonparent could not sue to obtain custody of a minor child absent unfitness of the natural or adoptive parent or the existence of compelling circumstances to award custody to a third party.⁵⁶

43. 471 N.W.2d 202 (Wis. 1991).

44. *In re Interest of Z.J.H.*, 471 N.W.2d 202, 206 (Wis. 1991), *overruled by In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 434 (Wis. 1995); *see infra* notes 67-81 and accompanying text (discussing *In re Custody of H.S.H.-K.*).

45. *Z.J.H.*, 471 N.W.2d at 212-13.

46. *Id.* at 204.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 213.

56. *See id.* at 204-09 (discussing standards for obtaining standing in visitation and custody cases).

The court then held that Sporleder was not entitled to visitation under the applicable statute, which permitted petitions for visitation "by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child,"⁵⁷ when a court finds that visitation is in the child's best interest.⁵⁸ Based on its prior case law, the court concluded that the statute is implicated only when an underlying legal action exists that affects the family unit.⁵⁹ With respect to the coparenting agreement between the parties, the court stated that, to the extent the agreement purported to give Sporleder custody or visitation rights, it "is inconsistent with legislative intent behind the custody and visitation statutes, which prefer parents over third parties. It is also inconsistent with our conclusion that, unless circumstances compel a contrary conclusion, it is in [the child's] best interest to live in his legal parent's home."⁶⁰ The court explained:

[B]ecause of the public interest in maintaining a stable relationship between a child and his or her legal parent, the co-parenting agreement, to the extent that it purports to award custody or grant visitation rights . . . , is unenforceable. While we recognize that Sporleder may have had a reasonable expectation that she would have continued contact with [the child] under the agreement, enforcing the agreement would be contrary to legislative intent and the public interest.⁶¹

Finally, the court observed that Hermes was not equitably estopped from denying that Sporleder was the child's parent, pointing out that "[t]he legal effects and consequences of statutory limitations cannot be avoided by estoppel."⁶² The Wisconsin court simply was not ready to recognize visitation rights for lesbian coparents.

2. Judicial Acknowledgment of "Coparent" Visitation Rights

Less than a year after the Wisconsin court's decision in *Z.J.H.*, a New Mexico appeals court refused to find that an oral coparenting agreement between the mother of an artificially conceived child and the mother's female companion was unenforceable as a matter of law.⁶³ In *A.C. v. C.B.*,⁶⁴ the New

57. WIS. STAT. ANN. § 767.245(1) (West 1993 & Supp. 1997).

58. See *In re Interest of Z.J.H.*, 471 N.W.2d 202, 210-11 (Wis. 1991) (explaining legislative intent and pertinent case law), *overruled by In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 434 (Wis. 1995).

59. *Id.* at 209.

60. *Id.* at 211.

61. *Id.* at 212.

62. *Id.*

63. *A.C. v. C.B.*, 829 P.2d 660, 663-65 (N.M. Ct. App. 1992).

64. 829 P.2d 660 (N.M. Ct. App. 1992).

Mexico trial court had granted C.B.'s motion to dismiss, concluding that visitation was not in the child's best interest.⁶⁵ The court of appeals, citing and implicitly rejecting *Z.J.H.*'s holding that a coparenting agreement was void as against public policy, remanded the case for an evidentiary hearing on whether visitation would be in the best interests of the child.⁶⁶

In 1995, the Wisconsin court reconsidered its position on visitation rights for lesbian partners of legal parents. In *In re Custody of H.S.H.-K.*,⁶⁷ the Wisconsin Supreme Court radically departed from its prior decision in *Z.J.H.*⁶⁸ Justice Shirley S. Abrahamson, who had dissented in *Z.J.H.*, delivered the court's opinion.⁶⁹ In *H.S.H.-K.*, Sandra Holtzman sought custody of, or visitation rights to, the biological child of her lesbian former partner, Elsbeth Knott.⁷⁰ Consistent with its earlier decision, the court held that the Wisconsin statute that governed visitation did not apply to Holtzman's petition for visitation with Knott's child because the legislature only intended the statute to apply to cases involving the dissolution of marriage.⁷¹ Nevertheless, the court reached the startling conclusion that the legislature did not intend that the visitation statute "be the exclusive provision on visitation," nor that it "supplant or preempt the courts' long recognized equitable power to protect the best interest of a child by ordering visitation *in circumstances not included in the statute*."⁷²

Asserting that it was "[m]indful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child," the court determined that, in order for a hearing court to decide whether visitation is in the child's best interest, a petitioner must prove that she has a "parent-like relationship" with the subject child and that "a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."⁷³ In order to show that a parent-like relationship exists, the court stated that the party asserting that such a relationship exists must satisfy four requirements. First, the party must prove consent and fostering of the relationship by the biological or adoptive parent.⁷⁴ Second,

65. A.C. v. C.B., 829 P.2d 660, 662 (N.M. Ct. App. 1992).

66. *Id.* at 664 (citing *In re Interest of Z.J.H.*, 471 N.W.2d 202, 211 (Wis. 1991)).

67. 533 N.W.2d 419 (Wis. 1995).

68. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 420 (Wis. 1995).

69. *Id.*

70. *Id.*

71. See *id.* at 424 (explaining that custody provisions of Wisconsin statute were not applicable to situations that involve nonmarital relationships) (citing WIS. STAT. ANN. § 767.245 (West 1993 & Supp. 1997)).

72. *Id.* at 424-25 (emphasis added).

73. *Id.* at 435.

74. *Id.*

the party and the child must have lived in the same household.⁷⁵ Third, the party must have assumed parental obligations by undertaking – without expectation of payment – significant responsibility for the child's care, education, and development, including contribution toward the child's support.⁷⁶ Finally, the claiming party must have maintained a parental role for a time sufficient to establish "a bonded, dependent relationship parental in nature."⁷⁷ Only when these four conditions are met will the court consider awarding visitation rights.⁷⁸

With respect to the "significant triggering event" that will justify coercive state intervention in the relationship between the child and the natural or adoptive parent, the court stated that the party seeking visitation must prove the parent's substantial interference with the parent-child like relationship and that the party sought court-ordered visitation within a reasonable time after the interference.⁷⁹ If the party seeking visitation can prove these elements of a parent-child like relationship and a significant triggering event followed by a prompt petition for visitation, the Wisconsin Supreme Court decided that the trial court must determine whether visitation is in the child's best interests.⁸⁰ The court remanded the case to the trial court to hold a hearing concerning H.S.H.-K.'s best interests.⁸¹

The New Mexico court's decision in *A.C. v. C.B.* and the Wisconsin court's decision in *H.S.H.-K.* signal an increasing willingness to recognize visitation claims by lesbian former coparents. However, such recognition is not universal. In *West v. Superior Court*,⁸² the California Court of Appeal recently denied visitation rights to a lesbian former coparent.⁸³

B. Stepparents

Proceedings implicating the visitation rights of stepparents arise in a context significantly different from those in which the parties describe them-

75. *Id.*

76. *Id.* at 435-36.

77. *Id.* at 436.

78. *Id.* at 435.

79. *Id.* at 436.

80. *Id.*

81. *Id.* at 437; see also *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321-22 (Pa. Super. Ct. 1996) (finding lesbian former partners lived together in nontraditional family with child and concluding relationship entitled plaintiff to seek parental custody rights).

82. 69 Cal. Rptr. 160 (Ct. App. 1997).

83. *West v. Superior Ct.*, 69 Cal. Rptr. 160, 164 (Ct. App. 1997) (refusing to recognize standing of lesbian former coparent) (citing *Curiale v. Regan*, 272 Cal. Rptr. 520, 521-22 (1990)).

selves as lesbian coparents. In some cases, stepparents seek visitation when marriage to a custodial parent ends in divorce. The issue also frequently arises upon the death of the custodial parent.⁸⁴

As divorce rates rose during the 1970s and 1980s and many families confronted issues involving child custody and visitation, legislatures began recognizing visitation rights for third parties. Legislatures in every state have recognized such rights for grandparents.⁸⁵ In addition, approximately one-third of states have statutes that provide, either expressly or in language authorizing nonparent visitation that is sufficiently broad to include some stepparents, for visitation by stepparents.⁸⁶

Even a cursory review of statutes that explicitly provide for stepparent visitation reveals little uniformity and a surprising lack of clarity. Currently, statutes in eight states explicitly address visitation by stepparents.⁸⁷ Most of these statutes, with varying degrees of complexity, provide for both stepparent and grandparent visitation rights.⁸⁸ For example, the Kansas statute simply states that "[g]randparents and stepparents may be granted visitation rights."⁸⁹ More broadly, Oregon's statute affords standing to petition or intervene in custody or visitation proceedings to anyone "who has established emotional ties creating a child-parent relationship with a child" and expressly includes, among others, stepparents and grandparents.⁹⁰ Uniquely, the Louisiana statute gives identical visitation rights to stepparents and stepgrandparents.⁹¹

In addition to the general requirement, whether express or implicit, that visitation be in the best interest of the child, a number of statutes contain additional conditions that must be satisfied before the court will entertain a petition for visitation by a third party.⁹² For example, Virginia's statute

84. See MARGARET M. MAHONEY, *STEPFAMILIES AND THE LAW* 129 (1994) (discussing stepparent visitation right disputes).

85. See *id.* at 130 (citing Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295 (1985)).

86. *Id.*

87. CAL. FAM. CODE § 3101 (West 1994); KAN. STAT. ANN. § 60-1616 (1994 & Supp. 1996); LA. CIV. CODE ANN. art. 136 (West Supp. 1997); N.H. REV. STAT. ANN. § 458.17 (1995); OR. REV. STAT. § 109.119 (1995); TENN. CODE ANN. § 36-6-303 (1996); VA. CODE ANN. § 16.1-241 (Michie 1996); WIS. STAT. ANN. § 767.245 (West 1993 & Supp. 1997).

88. KAN. STAT. ANN. § 60-1616(b) (1994 & Supp. 1996); N.H. REV. STAT. ANN. § 450.17(v) (1995); OR. REV. STAT. § 109.119(1) (1995); VA. CODE ANN. § 16.1-241 (Michie 1996); WIS. STAT. ANN. § 767.245(1) (West 1993 & Supp. 1997).

89. KAN. STAT. ANN. § 60-1616(b) (1994 & Supp. 1996).

90. OR. REV. STAT. § 109.119(1) (1995).

91. LA. CIV. CODE ANN. art. 136(B) (West Supp. 1997).

92. See CAL. FAM. CODE § 3101(a) (West 1994) (describing best interest of child as always critical). The California statute provides: "Notwithstanding any other provision of law,

requires that a petitioner for visitation have a "legitimate interest."⁹³ The statute further requires broad construction to include (within the category of persons with legitimate interests) stepparents, former stepparents, grandparents, and other family members and blood relatives.⁹⁴ In addition, the court must accommodate the child's best interests.⁹⁵ Tennessee requires that visitation be in the child's best interests and that the stepparent provide or contribute to the child's support before the stepparent may be granted visitation rights.⁹⁶

Under Louisiana's statute, a noncustodial parent will receive reasonable visitation rights unless the court finds that visitation is not in the child's best interest.⁹⁷ Other petitioners who seek visitation, including stepparents, must prove that "extraordinary circumstances" exist.⁹⁸ The statute does not define extraordinary circumstances, nor does the case law indicate when such circumstances might exist.⁹⁹ Finally, in Wisconsin, biological or adoptive parents must receive notice of the hearing before a court can award stepparents and other third parties visitation rights.¹⁰⁰

the court may grant reasonable visitation to a stepparent, if visitation by the stepparent is determined to be in the best interest of the minor child." *Id.* Louisiana's statute sets out a more elaborate definition of best interests. It provides:

Under extraordinary circumstances, a relative, by blood or affinity, or a former stepparent or stepgrandparent, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. In determining the best interest of the child, the court shall consider:

- (1) The length and quality of the prior relationship between the child and the relative.
- (2) Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.
- (3) The preference of the child if he is determined to be of sufficient maturity to express a preference.
- (4) The willingness of the relative to encourage a close relationship between the child and his parent or parents.
- (5) The mental and physical health of the child and the relative.

LA. CIV. CODE ANN. art. 136(B) (West Supp. 1997).

93. VA. CODE ANN. § 16.1-241(A)(6) (Michie 1996).

94. *Id.*

95. *Id.* § 16.1-278.15(B).

96. TENN. CODE ANN. § 36-6-303(a) (1996).

97. LA. CIV. CODE ANN. art. 136(A).

98. *Id.* art. 136(B).

99. See *Henry v. Henry*, 665 So. 2d 87, 88 (La. Ct. App. 1995) (stating that stepgrandmother must establish existence of extraordinary circumstances for a court to grant visitation rights).

100. WIS. STAT. ANN. §767.245(1) (West 1993 & Supp. 1997).

In addition to those states in which the legislature has explicitly addressed the issue of stepparent visitation, statutes in nine states are broad enough to permit recognition of a stepparent's standing to seek visitation.¹⁰¹ Alaska's statute permits the court in connection with certain designated proceedings to order visitation by a child's grandparent "or other person if that is in the best interests of the child."¹⁰² Courts hearing matrimonial actions in Connecticut may grant visitation "to a third party, including but not limited to grandparents."¹⁰³ In addition, the Arizona statute that governs maternity and paternity proceedings permits "any party" to request visitation.¹⁰⁴

A relative paucity of reported cases addresses the right of stepparents to visitation. Apparently, the earliest case was decided in 1977.¹⁰⁵ Although petitions for visitation rights by stepparents, like those of so-called lesbian coparents, have received a somewhat mixed reception, courts more often than not have found several bases on which to grant visitation. Courts have awarded these visitation rights even in the face of legislative silence with respect to the specific question and despite criticism that granting visitation "opens the door to the butcher, the baker and the candlestick maker to a right to a hearing on 'visitation' rights."¹⁰⁶

In *Spells v. Spells*,¹⁰⁷ apparently the first appellate court decision to address the question of stepparent visitation rights, the Superior Court of Pennsylvania found the paramount interest in visitation disputes to be the best interest of the child.¹⁰⁸ The court stated:

It is our belief that a stepfather may not be denied the right to visit his stepchildren merely because of his lack of a blood relationship to them. Clearly, a stepfather and his young stepchildren who live in a family envir-

101. ALASKA STAT. § 25.24.150 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-803(B) (West Supp. 1997); CONN. GEN. STAT. ANN. § 46B-56(a) (West 1995); HAW. REV. STAT. § 571-46(7) (Supp. 1996); MINN. STAT. ANN. § 257.022 (2b) (West 1992); MO. ANN. STAT. § 452.375 (West 1997); N.C. GEN. STAT. § 50-13.1 (1995); OHIO REV. CODE ANN. § 3109.051(B)(1) (Banks-Baldwin Supp. 1997); WASH. REV. CODE ANN. § 26.09.240 (West 1997).

102. ALASKA STAT. § 25.24.150 (Michie 1996).

103. CONN. GEN. STAT. ANN. § 46B-56 (West 1995).

104. ARIZ. REV. STAT. ANN. § 25-803(B) (West Supp. 1997). It should be noted, however, that the Arizona Court of Appeals has placed limitations on the statutory language by denying visitation to a party who failed to establish paternity. *Hughes v. Creighton*, 798 P.2d 403, 405-06 (Ariz. Ct. App. 1990). That court has also limited visitation rights to noncustodial parents, grandparents, great-grandparents, and stepparents, despite the plaintiff's in loco parentis relationship with the child. *Id.*

105. *Spells v. Spells*, 378 A.2d 879, 879 (Pa. Super. Ct. 1977).

106. *Simpson v. Simpson*, 586 S.W.2d 33, 36 (Ky. 1979) (Stephenson, J., dissenting).

107. 378 A.2d 879 (Pa. Super. Ct. 1977).

108. *Spells v. Spells*, 378 A. 2d 879, 881 (Pa. Super. Ct. 1977).

onment may develop deep and lasting mutual bonds of affection. Courts must acknowledge the fact that a stepfather (or stepmother) may be the only parent that the child has truly known and loved during its minority. A stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be. Rejection of visitation privileges cannot be grounded in the mere status as a stepparent.¹⁰⁹

The court used this reasoning to remand the case to the trial court for a determination of whether granting visitation rights to the children's stepfather would be in the children's best interest.¹¹⁰

Most commonly, courts granting stepparent visitation have relied on the *in loco parentis* doctrine, coupled with the requirement that visitation be in the best interests of the child.¹¹¹ Courts in some states, however, have decided the question of stepparent visitation solely on the basis of what serves the best interest of the child, without requiring a showing that the child and stepparent were *in loco parentis*.¹¹² In *Shoemaker v. Shoemaker*,¹¹³ the Alabama Court of Civil Appeals held that a former stepparent had no formal right, either at common law or by statute, to visitation with a former stepchild.¹¹⁴ However, the court stated that, because there was no legislative prohibition against

109. *Id.*

110. *Id.* at 883-84.

111. See *Carter v. Brodrick*, 644 P.2d 850, 855 (Alaska 1982) (remanding case for determination of whether stepfather stood *in loco parentis* to child and whether grant of visitation to stepfather would be in child's best interest); *In re Marriage of Dureno*, 854 P.2d 1352, 1357 (Colo. Ct. App. 1992) (listing factors to consider in determining stepparent visitation rights include best interests of child and whether stepparent has acted in custodial and parental relationship); *Hughes v. Banning*, 541 N.E.2d 283, 284 (Ind. Ct. App. 1989) (explaining that to establish visitation rights, third person must show custodial and parental relationship exists and that visitation would be in child's best interests); *Simmons v. Simmons*, 486 N.W.2d 788, 790-92 (Minn. Ct. App. 1992) (holding that *in loco parentis* relationship between stepparent and child may entitle stepparent to visitation while still recognizing precedence of child's best interests); *Klipstein v. Zalewski*, 553 A.2d 1384, 1386 (N.J. Super. Ct. Ch. Div. 1988) (stating that ultimate goal of court is to promote child's best interests and stating that many courts have held that when stepparent assumes *in loco parentis* relationship with child, there are circumstances when court will impose support obligations on parent); *Wilson v. Wilson*, 594 A.2d 717, 719 (Pa. Super. Ct. 1991) (considering whether two years spent with child is enough time to establish *in loco parentis* status and recognizing importance of child's best interests).

112. See *Wills v. Wills*, 399 So. 2d 1130, 1131 (Fla. Dist. Ct. App. 1981) (stating that if visitation with nonparent would promote welfare of child trial judge should have broad discretion to allow such visitation); *Honaker v. Burnside*, 388 S.E.2d 322, 324 (W. Va. 1989) (explaining determination of best interests of child is significant to decision involving child custody).

113. 563 So. 2d 1032 (Ala. Civ. App. 1990).

114. *Shoemaker v. Shoemaker*, 563 So. 2d 1032, 1034 (Ala. Civ. App. 1990).

granting a former stepparent visitation rights, a court could grant visitation when visitation would be in the best interests of the child.¹¹⁵ Significantly, the court placed limits on when visitation is in the best interests of the child, stating that

[i]t may be questioned whether the best interests of a child would be served if the exercise of visitation by a former stepparent was against the wishes of the natural parent. . . . To force a former stepparent's (legally a mere non-parent) visitation upon a natural parent or the former stepchild, over either's objection, would appear to be a detriment to the best interests of the child.¹¹⁶

The *Shoemaker* court concluded that the stepparent could not gain visitation rights because he could not show that such rights would advance the best interests of the child.¹¹⁷

Florida and Maryland court decisions echo the *Shoemaker* court's elevation of the best interests of the child standard. In *Wills v. Wills*,¹¹⁸ the District Court of Appeal of Florida found that when the record shows that visitation is in the child's best interest, the trial judge's discretion is sufficiently broad to allow an order of visitation with a nonparent.¹¹⁹ The court carefully limited its reasoning, stressing that "this type of visitation, contrary to the wishes of the custodial parent, should be awarded with great circumspection."¹²⁰ In *Evans v. Evans*,¹²¹ Maryland's highest court concluded that Maryland trial courts could award visitation rights to stepparents.¹²² However, the Maryland court did not include the limiting language that appears in *Wills*.¹²³ In *Evans*, the Maryland court stated: "While an *in loco parentis* status may affect the court's determination as to the best interests of the child, that relationship need not exist under Maryland law before visitation rights may be granted."¹²⁴

115. *Id.*

116. *Id.*

117. *Id.*

118. 399 So. 2d 1130 (Fla. Dist. Ct. App. 1981).

119. *Wills v. Wills*, 399 So. 2d 1130, 1131 (Fla. Dist. Ct. App. 1981).

120. *Id.*

121. 488 A.2d 157 (Md. 1985).

122. *Evans v. Evans*, 488 A.2d 157, 162 (Md. 1985).

123. *See Wills*, 399 So. 2d at 1131 (stating that courts should exercise caution when granting visitation rights against custodial parent's wishes).

124. *Evans*, 488 A.2d at 162; *see also Rhinehart v. Nowlin*, 805 P.2d 88, 92-93 (N.M. Ct. App. 1990) (concluding that trial courts have power and discretion to grant visitation rights to stepmother when such visitation is in best interests of children).

In *Cox v. Williams*,¹²⁵ the Supreme Court of Wisconsin took a less expansive approach to the question of whether there was a legal basis for visitation by a former stepparent over the objection of a child's mother.¹²⁶ The court stated that the stepparent, who sought court-ordered visitation with the child of her deceased husband and his first wife, lacked standing.¹²⁷ Relying on prior Wisconsin decisions,¹²⁸ the court explained that, in order for a party to have standing to seek nonparent visitation, there must exist an underlying action affecting the family unit and the child's family must not be intact.¹²⁹ Neither condition was satisfied in *Cox*.¹³⁰

The *Cox* court divided sharply. One dissenter described the result as "inappropriately grotesque and contrary to an unmistakable mandate of the legislature."¹³¹ Another dissenter called the result harsh, unnecessary, and absurd.¹³²

The cases discussed above demonstrate that Professor Katharine Bartlett's observations with respect to judicial treatment of stepparent visitation are as true today as when she made them in 1984.¹³³ Professor Bartlett stated:

The few courts that have awarded stepparent visitation or stepparent custody 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

125. 502 N.W.2d 128 (Wis. 1993).

126. *Cox v. Williams*, 502 N.W.2d 128, 128-29 (Wis. 1993).

127. *Id.*

128. See *In re Interest of Z.J.H.*, 471 N.W.2d 202, 210-11 (Wis. 1991) (stating no authority existed for nonparent to petition for visitation rights when no intact family unit existed or in absence of underlying action affecting family unit); *Van Cleve v. Hemminger*, 415 N.W.2d 571, 573-74 (Wis. Ct. App. 1987) (limiting statutory visitation right to cases in which underlying action affecting family unit previously has been filed).

129. *Cox*, 502 N.W.2d at 130 (citing WIS. STAT. ANN. § 767.245 (West 1993 & Supp. 1997)). The statute provides, in pertinent part:

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

WIS. STAT. ANN. § 767.245(1).

130. *Cox*, 502 N.W.2d at 130.

131. *Id.* at 131 (Heffernan, C.J., dissenting).

132. *Id.* (Bablitch, J., dissenting).

133. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 912-19 (1984).

physical custody of the child at the date of the petition for custody or visitation. Other courts have invoked the *in loco parentis* doctrine, ignoring the common law rule that such status ends with the dissolution of the stepparent's marriage.¹³⁴

Noting that "[s]ome cases reach emotionally appealing results without legal analysis,"¹³⁵ Professor Bartlett described the "similar analytic difficulties" faced by courts in those jurisdictions in which statutes limit custody awards to natural parents.¹³⁶ In some such instances, she noted, "[w]hile making passing reference to a natural parent presumption, [the courts] have approved what was essentially a best interests analysis to justify an award of custody to a stepparent."¹³⁷

C. Foster Parents

In light of the significant number of children in long term foster care, it is surprising to see how infrequently one encounters judicial decisions or commentary relating to visitation claims by former foster parents.¹³⁸ Requests for visitation by foster parents necessarily arise in a context that distinguishes them from petitions by lesbian coparents or by former stepparents. The latter two groups of claimants argue, in effect, that they and the child were members of a family that has been disrupted. Foster parents, whose relationships with children originate in a contract with the state to provide child care, cannot make this claim.

Only Oregon explicitly authorizes petitions for visitation by foster parents.¹³⁹ Oregon's statute affords standing to "[a]ny person including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage who has established emotional ties creating a child-parent relationship with a child."¹⁴⁰ The statute generally defines a parent-child relationship as one in existence within a six-month period prior to the filing of an action, but requires a period in excess of eighteen months if the relationship is between a child and a nonrelated foster parent.¹⁴¹

134. *Id.* at 914-15.

135. *Id.* at 915.

136. *Id.* at 916.

137. *Id.*

138. See ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE* 460 (1995).

139. See OR. REV. STAT. § 109.119(1) (1995) (providing authority to courts to award visitation to stepparents).

140. *Id.*

141. *Id.* § 109.119(4).

In the absence of explicit legislative authority to grant visitation to step-parents, the courts generally refuse to grant visitation rights. In an early case concerning visitation rights for foster parents, a highly respected New York Family Court judge, Nanette Dembitz, dealt squarely with a conflict between a child's foster parents and her natural father and stepmother.¹⁴² In *In re Melissa M.*,¹⁴³ Judge Dembitz succinctly stated the issue as "whether the court can and should grant the right of visitation to former foster-parents, who had given their foster-child excellent care for virtually all of her first 4 1/2 years of life, after her return to her natural father and step-mother."¹⁴⁴ Judge Dembitz said no.¹⁴⁵

When the court first returned the child to her father and stepmother, the foster parents petitioned the court for visitation rights.¹⁴⁶ The court granted the child's parents' request that the court delay consideration of the foster parents' motion for visitation to afford them time to promote the child's adjustment to them as her custodial parents.¹⁴⁷ Nine months later, the foster parents renewed their motion.¹⁴⁸ Although conceding the foster parents' love for the child, the parents opposed visitation, asserting that it would cause the child confusion and instability and would disrupt their family life.¹⁴⁹ The court found the parents' view to be reasonable and viewed the issue as "whether the court can substitute its judgment of Melissa's best interests for theirs."¹⁵⁰ Although recognizing the poignancy of the foster parents' heartbreak at their separation from the child and its "seeming unfairness," Judge Dembitz stated:

While the State can modify and even abrogate the parent's right to raise his child under exigent circumstances, nevertheless the parental decisionmaking prerogative with "freedom of personal choice in matters of . . . family life" should be maintained or restored unless there is strong reason for interference with it. Here state intervention would be unjustified because the parents have shown themselves entirely adequate to judge Melissa's needs as an individual and as a family member.¹⁵¹

Thus, Judge Dembitz denied the foster parents' request for visitation rights.¹⁵²

142. *In re Melissa M.*, 421 N.Y.S.2d 300, 301 (Fam. Ct. 1979).

143. 421 N.Y.S.2d 300, 301 (Fam. Ct. 1979).

144. *In re Melissa M.*, 421 N.Y.S.2d 300, 301 (Fam. Ct. 1979).

145. *Id.* at 304.

146. *Id.* at 301.

147. *Id.*

148. *Id.*

149. *Id.* at 304.

150. *Id.*

151. *Id.* (citations omitted).

152. *Id.*

The New York courts continue to reject foster parent requests for visitation rights. In *Bessette v. Saratoga County Commissioner of Social Services*,¹⁵³ an intermediate appellate court held that, absent a statute granting standing, former foster parents have no right to seek visitation limiting the rights of a fit parent.¹⁵⁴ Citing *Alison D. v. Virginia M.*, the *Bessette* court explained that because the former foster parents did not have standing under the applicable statute, they enjoyed "no right to seek visitation which would limit or diminish the right of the biological parent, who has not been found to be unfit, to choose with whom her children associate."¹⁵⁵

Falling between the extremes of granting and denying visitation rights to foster parents, some courts have permitted visitation by foster parents for a limited period of time in order to ease the transition from foster parents to natural parents. In *In re Simolke*,¹⁵⁶ for example, the Louisiana Court of Appeal affirmed the trial court's order transferring care of a child to his natural parents.¹⁵⁷ The trial court had permitted monthly visitation by the foster parents in order to "prevent an abrupt transition with the intent to reduce possible traumatic effect on the child."¹⁵⁸ Noting that the best interests of the child is "the sole criterion" in child custody cases, the court of appeal found no abuse of discretion in awarding custody to the natural parents and in simultaneously awarding visitation rights to the foster parents.¹⁵⁹

D. Grandparents

Although the common law treated grandparents as legal strangers, today grandparents generally enjoy a statutory right to visitation.¹⁶⁰ One authoritative commentator has observed that, "[s]ince these statutes are the product of a combination of the lobbying efforts of grandparent groups and the sentimentality of the state legislatures, they take so many different forms and limit visitation to so many different kinds of circumstances that it is extremely

153. 619 N.Y.S.2d 359 (App. Div. 1994).

154. *Bessette v. Saratoga County Comm'r of Soc. Servs.*, 619 N.Y.S.2d 359, 360 (App. Div. 1994).

155. *Id.* at 360 (citing *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29-30 (N.Y. 1991)).

156. 422 So. 2d 196 (La. Ct. App. 1982).

157. *In re Simolke*, 422 So. 2d 196, 198 (La. Ct. App. 1982).

158. *Id.* at 197-98.

159. *Id.* at 198; *cf. In re Kristina L.*, 520 A.2d 574, 582 (R.I. 1987) (stating that foster family should continue to be part of child's life and that provisions must be made to ease transition for everyone concerned).

160. See Catherine A. McCrimmon & Robert J. Howell, *Grandparents' Legal Rights to Visitation in the Fifty States and the District of Columbia*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 355, 355-56 (1989) (noting that "access to grandparents, regardless of other legal situations, is now considered the child's legal right").

difficult to classify them."¹⁶¹ However, most of the statutes encompass an approach based on the best interests of the child standard.¹⁶²

The statutes vary with respect to the circumstances under which a grandparent may petition for, or be entitled to, the right of visitation. Some are couched in language that is broad enough to allow a court to grant visitation by a grandparent whenever it is in the best interests of the child.¹⁶³ Others require the grandparent and the child to have established a substantial relationship before visitation rights may be granted.¹⁶⁴ New York allows grandparents to petition for visitation "where circumstances show that conditions exist which equity would see fit to intervene."¹⁶⁵ However, some states bar courts from granting visitation rights when doing so would interfere with the parent-child relationship.¹⁶⁶

Although all states have general provisions that provide for some form of grandparent visitation, many statutes also list a wide variety of specific circumstances that permit a grandparent to petition for visitation rights. Frequently, one finds statutory provisions that permit grandparents to petition for visitation when the child's parents are either divorced or are in the process of dissolving their marriage,¹⁶⁷ or when either one or both of the child's parents has died.¹⁶⁸ In a few states, specific statutory provisions permit a grandparent to petition for visitation rights when courts have terminated the parental rights of one or both parents.¹⁶⁹

161. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 19.7, at 828 (2d ed. 1988).

162. See *infra* notes 281-319 and accompanying text (discussing application and criticism of best interest of child standard in grandparent visitation cases).

163. CONN. GEN. STAT. ANN. § 46-59 (West 1995); HAW. REV. STAT. § 571-46(7) (Supp. 1996); N.D. CENT. CODE § 14-09-05.1 (1997); S.C. CODE ANN. § 20-7-420(33) (Law Co-op. Supp. 1997); WASH. REV. CODE ANN. § 26.09.240(5) (West 1997).

164. IOWA CODE ANN. § 598.35 (West 1996 & Supp. 1997); KAN. STAT. ANN. § 38-129(a) (1993); MISS. CODE ANN. § 93-16-3(2)(a) (1994).

165. N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1997-98).

166. MINN. STAT. ANN. § 257.022 (West 1992); NEB. REV. STAT. § 43-1802(2) (1993); 23 PA. CONS. STAT. ANN. § 5311 (West 1991).

167. ALASKA STAT. § 25.24.150(a) (Michie 1996); GA. CODE ANN. § 19-7-3(b) (Supp. 1997); HAW. REV. STAT. § 571-46(7) (Supp. 1996); IOWA CODE ANN. § 598.35 (West 1996 & Supp. 1997); MASS. GEN. LAWS ANN. ch. 119, § 39D (West 1993); MO. ANN. STAT. § 452.4021(1) (West 1997); NEB. REV. STAT. § 43-1802(1)(b) (1993).

168. ALASKA STAT. § 25.24.150(a) (Michie 1996); COLO. REV. STAT. ANN. § 19-1-117(1)(c) (West 1997); FLA. STAT. ANN. § 752.01(1)(a) (West 1997); 750 ILL. COMP. STAT. ANN. 5/607 (b)(1)(C) (West Supp. 1997); 755 ILL. COMP. STAT. ANN. 5/11-7.1 (West 1992); MICH. COMP. LAWS ANN. § 722.27b (West Supp. 1997); MINN. STAT. ANN. § 257.022 (West 1992); OHIO REV. CODE ANN. § 3109.11 (Banks-Baldwin Supp. 1997); 23 PA. CONS. STAT. ANN. § 5311 (West 1991); TEX. FAM. CODE ANN. § 153.433(2)(A) (West 1996 & Supp. 1998).

169. GA. CODE ANN. § 19-7-3(b) (Supp. 1997); MISS. CODE ANN. § 93-16-3(1) (1994);

Other statutory provisions provide for a cause of action for grandparents when visitation has been denied unreasonably for a specified period of time¹⁷⁰ or when the grandparent and the child have resided together for a statutorily defined time period.¹⁷¹ A few legislatures have placed an arguably insubstantial limitation on the visitation rights of grandparents by enacting provisions requiring the termination of those rights upon the adoption of the child by anyone other than a stepparent or a grandparent.¹⁷²

Simply stated, legislatures in every state have afforded statutory rights to grandparents seeking visitation. The enactments and the scope of the rights granted are of an enormous variety and virtually defy rational classification.¹⁷³ No other group of legal strangers to children has been as favorably treated with respect to visitation. For the most part, courts have applied the existing statutory mandates and guidelines without question.¹⁷⁴ Recently, however, an increasing number of courts and commentators have questioned both the wisdom and the constitutionality of what has been wrought pursuant to grandparent visitation statutes.¹⁷⁵

NEV. REV. STAT. §§ 125A.330, 125A.340 (1995); OKLA. STAT. ANN. tit. 10, § 5(A)(4) (West Supp. 1998); TEX. FAM. CODE ANN. § 153.433(2)(E) (West 1996 & Supp. 1998).

170. MISS. CODE ANN. § 93-16-3(2) (1994); MO. ANN. STAT. § 452.4021(3) (West 1997).

171. MINN. STAT. ANN. § 257.022(2a) (West 1992); N.M. STAT. ANN. § 40-9-2 (Michie 1994); 23 PA. CONS. STAT. ANN. § 5313(a) (West Supp. 1997); TEX. FAM. CODE ANN. § 153.433(2)(F) (West 1996 & Supp. 1998).

172. CAL. FAM. CODE § 3102(c) (West Supp. 1997); FLA. STAT. ANN. § 752.01(3) (West 1997); MONT. CODE ANN. § 40-9-102(5) (1997); N.C. GEN. STAT. § 50-13.5(j) (1995); S.D. CODIFIED LAWS § 25-4-54 (Michie 1992); TENN. CODE ANN. § 36-6-302(d) (Supp. 1997); VT. STAT. ANN. tit. 15, § 1016 (1989).

173. *But see* *Frame v. Nehls*, 550 N.W.2d 739, 747-48 (Mich. 1996) (upholding statute that only allowed grandparent visitation in specifically described situations). In *Frame v. Nehls*, the Supreme Court of Michigan rejected an equal protection-based attack on a statute that limits standing of grandparents seeking visitation to cases in which either a child custody dispute is pending or the parent of their grandchild is deceased, thus barring visitation petitions by grandparents whose child is alive or not involved in a custody dispute. *Id.* Noting the absence of a fundamental right or suspect class, the court found a rational basis for the classifications, and provided the following reasons, among others:

The Legislature might have determined that unlimited resort to judicially enforced grandparent visitation might infringe on a parent's fundamental right to raise a child without interference from the government, that unlimited jurisdiction over grandparent visitation might invite legal disputes over issues that are more appropriately resolved outside the legal forum, or that because visitation disputes by definition involve interfamily conflict, expansive jurisdiction would not serve the minor's best interests.

Id. at 747.

174. *See* *Sightes v. Barker*, 684 N.E.2d 224, 232 (Ind. Ct. App. 1997) (upholding grandparent visitation statute because "it is rationally related to furthering the legitimate state interest in fostering relationships between grandparents and their grandchildren").

175. *See infra* notes 320-64 and accompanying text (discussing criticisms of grandparent

III. Scholarly Commentary on Third Party Visitation

Despite the mixed reception that their claims have received in the courts, legal strangers who assert a right to visitation with other people's children have not lacked for champions and defenders in the law reviews. In numerous articles, any number of which come uncomfortably close to what Professor Mary Ann Glendon characterizes as advocacy scholarship,¹⁷⁶ legal writers have proposed changing the common understanding and definitions of parent and family. For example, one commentator has proposed the following radical and far reaching definition:

A family is a living system, an entity, whose members are its interacting parts A family . . . includes individuals who share or seek to share intimate relationships with each other. This definition includes biological parents, even if the parents have had little or no contact with their child, so long as they seek to form an intimate relationship with the child. It also encompasses foster parents and stepparents, as well as certain neighbors or friends, so long as they truly have a relationship of intimacy with a child.¹⁷⁷

Such proposals, if accepted by legislatures and courts, would significantly enhance the rights of those who seek third party visitation with other people's children.

Professor Nancy D. Polikoff was among the first advocates of enhanced legal status for persons whose intimate relationships with children are often denied legal recognition.¹⁷⁸ She "proposes expanding the definition of

visitation statutes). *But see* Karen Czapanskiy, *Grandparents, Parents, and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1374-75 (1995) (supporting adoption of new legal standard granting legal rights over children based on degree of care exercised by adult).

176. *See* MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 208 (1994). Professor Glendon observes:

[A]dvocacy scholarship, as that term is understood among law professors, openly or covertly abandons the traditional obligation to deal with significant contrary evidence or arguments Ironically, it was a paragon of romantic judging who was one of the first people to call attention to the sudden increase of partisan legal literature in the 1960s. Many writers of law review articles, Justice William O. Douglas complained, were failing to disclose that they were "people with axes to grind."

Id. (quoting William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 229 (1965)).

177. Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1, 4 (1996).

178. *See* Polikoff, *supra* note 4, at 463 (arguing that then-current legal literature ill-prepared courts to address problems caused by dissolution of lesbian coparent relationships).

parenthood to include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature."¹⁷⁹ Although Polikoff's concern appears to be primarily with lesbian-mother families, she notes that issues regarding the legal definition of parenthood have also arisen in contexts such as surrogacy, stepfamilies, and out-of-wedlock births.¹⁸⁰ She asserts:

A new definition of parenthood is necessary to adapt to the complexities of modern families. Although biology coupled with a relationship and legal adoption currently confer parenthood and should continue to do so, *such status should also derive from proof of a parent-child relationship that has developed through the cooperation and consent of someone already possessing the status of a legal parent.*¹⁸¹

In addition, Polikoff questions the sufficiency of biology and legal adoption as bases for establishing the status of parent "in a complex world affected by cultural norms, technology, and patterns of sexual behavior."¹⁸² Pointing out the commonness of variation from the one father and one mother model for parenthood, she argues that "[c]ommunal child rearing, surrogacy, open adoption, stepfamilies, and extramarital births all destroy the myth of family homogeneity."¹⁸³

In her discussion of new theories for establishing parenthood, Polikoff describes equitable parenthood, child-parent relationships, and nonexclusive parenthood doctrines.¹⁸⁴ In *Atkinson v. Atkinson*,¹⁸⁵ the Michigan Court of

Professor Polikoff is generally recognized as a leading authority on and an articulate advocate for the legal recognition of those she describes as lesbian-mother families. Her other works in this and related areas include: *The Deliberate Construction of Families Without Fathers: Is It an Option For Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375 (1996); *The Social Construction of Parenthood in One Planned Lesbian Family*, 22 N.Y.U. REV. L. & SOC. CHANGE 203 (1996); Thomas S. v. Robin Y.: *Brief Amicus Curiae of the National Center for Lesbian Rights; Lambda Legal Defense and Education Fund; Gay and Lesbian Advocates and Defenders; Center Kids; and Gay and Lesbian Parents Coalition International in Support of Respondent-Appellee*, 22 N.Y.U. REV. L. & SOC. CHANGE 213 (1996); and *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 14 WOMEN'S RTS. L. REP. 175 (1992).

179. Polikoff, *supra* note 4, at 464; see Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 410-11 (1994) (arguing courts should grant visitation rights to individuals who maintain parent-like relationships with other people's children).

180. Polikoff, *supra* note 4, at 471.

181. *Id.* (footnotes omitted) (emphasis added).

182. *Id.* at 474.

183. *Id.*

184. *Id.* at 483-91.

185. 408 N.W.2d 516 (Mich. Ct. App. 1987).

Appeals created the equitable parent doctrine.¹⁸⁶ In *Atkinson*, the mother of a four-year-old child claimed that her divorced husband was not entitled to custody or visitation because he was not the child's father.¹⁸⁷ Although a court-ordered blood test excluded the former husband as the biological father, the Michigan appellate court heeded the husband's novel request that it adopt the equitable parent doctrine.¹⁸⁸ The court stated:

[W]e adopt the doctrine of "equitable parent" and find that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.¹⁸⁹

Polikoff presumes that the latter two parts of this test, the nonbiological mother's desire for parenthood rights and willingness to pay child support, would apply in a lesbian-mother family.¹⁹⁰ She also asserts that the first requirement, that the husband and child mutually acknowledge the parent-child relationship or that the biological mother cooperate in developing the relationship, is easily adapted from a marital to a nonmarital situation.¹⁹¹ Accordingly, she concludes that "[i]f the nonbiological mother in a lesbian-mother family satisfies the relationship prong of the *Atkinson* test, she is no less a parent than was the husband in *Atkinson*."¹⁹²

Polikoff's second theory for establishing parenthood for legal strangers is the child-parent relationship doctrine. In her discussion of this theory, Polikoff cites the Oregon statute that gives standing in custody and visitation

186. *Atkinson v. Atkinson*, 408 N.W.2d 516, 519-20 (Mich. Ct. App. 1987).

187. *Id.* at 517.

188. *Id.* at 519.

189. *Id.* The majority of courts that have considered equitable parenthood claims have rejected them. See *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 217-19 (Ct. App. 1991) (refusing to apply doctrine of equitable estoppel and noting that one California court declined to adopt concept of equitable parenthood); *In re Marriage of Goetz & Lewis*, 250 Cal. Rptr. 30, 33 (Ct. App. 1988) (stating that legislature is better equipped to determine whether to adopt equitable parent doctrine); *In re Ash*, 507 N.W.2d 400, 402-05 (Iowa 1993) (rejecting lower court's reliance on equitable parent doctrine); *In re O'Brien*, 772 P.2d 278, 283-84 (Kan. Ct. App. 1989) (rejecting claim of adoption by estoppel or equitable parenthood); *Zuziak v. Zuziak*, 426 N.W.2d 761, 766 (Mich. Ct. App. 1988) (refusing to extend equitable parent doctrine). But see *In re Gallagher*, 539 N.W.2d 479, 480-82 (Iowa 1995) (stating that "equitable parenthood may be established in a proper case by father who establishes" several factors).

190. Polikoff, *supra* note 4, at 485.

191. *Id.*

192. *Id.*

proceedings to anyone "who 'has established emotional ties creating a child-parent relationship with a child.'"¹⁹³ The Oregon statute expressly includes stepparents and grandparents, among others.¹⁹⁴ After a review of the legislative history and a judicial interpretation of the statute, Polikoff concludes that, if one reads the statute to require a best interests standard in disputes between legally recognized parents and nonparents who have established a child-parent relationship, "the interpretation could facilitate awards of custody to nonbiological lesbian mothers."¹⁹⁵

Polikoff describes a third new theory, nonexclusive parenthood, as a "hybrid of the equitable parenthood and child-parent relationship doctrines."¹⁹⁶ She credits Professor Katharine Bartlett for this approach, which proposes that in custody disputes courts should afford status as parties to legal, biological, and psychological parents.¹⁹⁷ She notes Bartlett's three requirements for psychological parenthood: (1) that there be at least six months of physical custody, (2) that the adult custodian is motivated by care and concern for a child who conceives of the adult's parental role, and (3) that the relationship with the child began with the consent of the child's legal parent or by court order.¹⁹⁸

Polikoff observes that "[it] is cause for optimism that courts, legislatures, and scholars are struggling to devise new doctrines to address the needs of children in families that do not fit the one-mother/one-father model."¹⁹⁹ She states:

Courts or legislatures looking for guidance in developing a new definition of parenthood would best serve the interests of children by focusing on two criteria: the legally unrelated adult's performance of parenting functions and the child's view of that adult as a parent. Courts would also protect the interests of legal parents in parental autonomy by focusing on the actions and intent of those parents in creating additional parental relationships.²⁰⁰

In addition to the development of new theories for the establishment of parenthood, Polikoff describes the possible application of two existing doctrines in lesbian coparent disputes: equitable estoppel and the *in loco parentis* doctrine.²⁰¹ She examines state court cases that have applied these doctrines

193. *Id.* at 486 (quoting OR. REV. STAT. § 109.119(1) (1995)).

194. OR. REV. STAT. § 109.119(1).

195. Polikoff, *supra* note 4, at 488.

196. *Id.* at 489.

197. *Id.* (citing Bartlett, *supra* note 133, at 944-51).

198. *Id.* at 489-90 (citing Bartlett, *supra* note 133, at 946-47).

199. *Id.* at 490.

200. *Id.* at 490-91.

201. *See id.* at 502 (noting that *in loco parentis* doctrine "creates parental rights and responsibilities in one who voluntarily provides support or takes over custodial duties"); *see*

in the context of child support awards and in decisions preserving parent-child relationships between children and their nonbiological fathers, primarily step-fathers.²⁰² She argues that the results from these cases demonstrate that both doctrines protect the interests of nontraditional families, including the children.²⁰³

Polikoff next discusses the nonparent or third party legal status that lesbian mothers currently occupy in disputes concerning custody and visitation.²⁰⁴ She reviews the "overwhelmingly confused" jurisdictional law relating to standing and the substantive standards that the courts have applied in third party custody and visitation disputes.²⁰⁵ With respect to third party visitation, Polikoff concludes:

"Third parties" who have functioned as parents to a child, as opposed to third parties who have not, should be able to obtain visitation under the standard applicable to parents. Thus, even jurisdictions in which non-parents can be awarded visitation have not gone far enough. In these jurisdictions the grant of visitation is discretionary with the court or requires the nonparent to prove that visitation is in the best interests of the child. The purpose of distinguishing among categories of third-party visitation claimants is to recognize the explicitly parental status that some "third parties" occupy in the lives of children. Once "third parties" achieve such status, courts should seek to continue the parent-child relationship regardless of what happens to the adult relationship. Denying visitation should be predicated on the same grounds as it is between legally recognized parents – only upon proof of detriment to the child.²⁰⁶

However, recognition that third parties have occupied "parental status" in the lives of some children in some cases does not compel acceptance of Polikoff's advice to courts deciding visitation cases – that they should treat a legal stranger to the child identically to the child's natural parent.

While Polikoff focuses on the legal status of lesbian-mother families, her concerns seem broader because she proposes an expanded definition of parenthood "to include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship

also supra note 12 (describing equitable parent doctrine).

202. Polikoff, *supra* note 4, at 491-508.

203. See *id.* at 502 (noting equitable parent doctrine "serves the best interest of the child, who will have developed the additional parental relationship in reliance upon the actions of the legally recognized parent"); *id.* at 507 (stating that under *in loco parentis* doctrine "the rights and responsibilities of parenthood . . . are based on the reality of who intentionally fulfills the parenting function").

204. *Id.* at 508-22.

205. *Id.* at 508, 511-22.

206. *Id.* at 521 (footnotes omitted).

with the intent that the relationship be parental in nature."²⁰⁷ In contrast, Paula Ettelbrick is concerned exclusively with lesbian families. She focuses on situations involving "lesbian couples who choose to have children together, separate at some later point, and struggle over what parenting rights the non-legal mother will or will not have."²⁰⁸

Ettelbrick concedes at the outset that she writes as an advocate who was involved in the cases central to her discussion and as "a long-time advocate for the legal recognition of lesbian and gay families in general."²⁰⁹ In what appears to be a radical departure from Polikoff's views, Ettelbrick explains her basic theory:

The experiences of lesbians having children cannot be addressed by trying to fit them into a family law system that is so resolutely heterosexual in its structure and presumptions. The law must be developed according to the perspectives and experiences of lesbians, in much the same way that some advocate that it be developed to fit the experiences of women and people of color. As part of the evolving "outsider jurisprudence," a lesbian family law jurisprudence must continue to emerge. The experiences of lesbians having children, and the method by which the law responds, must stand apart from heterosexual experience.²¹⁰

In support of her theory, Ettelbrick asserts that the basic experiences of lesbians as parents differ from the experiences of heterosexual parents.²¹¹ Further, in Ettelbrick's view, because lesbian couples cannot marry, legal rules that presume that marriage is the determinative factor for legal recognition as a parent inherently discriminate against lesbian families.²¹² She contends legal rules that presumptively give greater weight to the parent and child biological connection over all other parental claims "eliminate the possibility that the relationship between a non-biological lesbian mother and the child she raises with her partner will ever be recognized."²¹³ Ettelbrick concludes that "the unique experiences of lesbians must be taken into account in developing the law. Just as laws based on male experience do not work for women, laws which draw only from heterosexual experience do not work for lesbians."²¹⁴

207. *Id.* at 464. The rash of proposals in the law review literature during the 1990s were significantly influenced by the arguments set out by Professor Bartlett. See Bartlett, *supra* note 133, at 882 (challenging exclusive notions of legal parenthood when nuclear families fail).

208. Paula L. Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 514 (1993).

209. *Id.*

210. *Id.* at 514-15 (footnotes omitted).

211. *Id.* at 515.

212. *Id.* at 515-16.

213. *Id.* at 516.

214. *Id.*

With respect to the treatment of lesbian coparents seeking visitation with the children of their former partners, Ettelbrick concludes that many courts have ignored their own precedents solely because of "an underlying, though unstated, antipathy towards lesbians and the 'immorality' of lesbian parenting, which follows neither the tradition of marriage nor biology."²¹⁵ She cites *Alison D. v. Virginia M.* and *In re Interest of Z.J.H.* in support of her assertion.²¹⁶

Ettelbrick notes that she was the lawyer for Alison D. and that many of the facts in her discussion of the case are based on her personal knowledge.²¹⁷ She explains that the New York Court of Appeals was faced with the question whether Alison D. was a "parent" and, therefore, had standing under the statute to sue for visitation with Virginia M.'s biological child.²¹⁸ Although New York's statute allows either parent of a minor child residing within the state to apply for a writ of habeas corpus, it leaves the term "parent" undefined.²¹⁹ Ettelbrick asserts that, while Alison D. brought the first case asking

215. *Id.* at 521.

216. *Id.* at 521-22 (citing *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *In re Interest of Z.J.H.*, 471 N.W.2d 202 (Wis. 1991), *overruled by In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995)); *see also supra* notes 2-24 and accompanying text (discussing *Alison D.*); *supra* notes 43-62 and accompanying text (discussing *Z.J.H.*). *But see H.S.H.-K.*, 533 N.W.2d at 421 (departing significantly from decision in *Z.J.H.*); *supra* notes 67-81 and accompanying text (discussing *H.S.H.-K.*).

217. Ettelbrick, *supra* note 208, at 522 n.38. The decision in *Alison D.* and the arguments that Ettelbrick presented in that case have given rise to a variety of articles, notes and comments in law reviews, which generally urge new legal definitions of family. *See* Martha L. Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270-84 (1991) (discussing functional notion of family and noting author worked on *Alison D.* case); *see also* Barbara J. Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J.L. & POL. 5, 60-67 (1991) (discussing barriers that make it difficult to achieve legislative change and arguing that courts should "use the means available to them to protect nonlegal parents in alternative families"); William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POL. 89, 90-105 (1991) (reflecting on "challenges in the search for legal recognition of lesbian and gay relationships"); Kimberly P. Carr, Comment, *Alison D. v. Virginia M.: Neglecting the Best Interests of the Child in a Nontraditional Family*, 58 BROOK. L. REV. 1021, 1059-61 (1992) (recommending that courts determine best interests of child and standing for visitation by analyzing relationship between petitioner and child); Denise Glaser Malloy, Note, *Another Mother?: The Courts' Denial of Legal Status to the Non-Biological Parent Upon Dissolution of Lesbian Families*, 31 J. FAM. L. 981, 996-1002 (1993) (calling for legislation to reflect needs of nonbiological parent in lesbian families and for courts to recognize need for expanded interpretation of case law).

218. Ettelbrick, *supra* note 208, at 523.

219. N.Y. DOM. REL. LAW § 70(a) (McKinney Supp. 1997-98). The statute provides, in pertinent part:

Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award

any state's highest court to recognize "the relationship created by two lesbians with their child, prior holdings in New York courts supported Alison's argument that functional parental relationships should be recognized."²²⁰

Ettelbrick reaches her conclusion on two bases. First, under the common law in loco parentis doctrine, courts in New York and many other states "had recognized that one who assumes the obligations of a parent acquires the relative rights and responsibilities of a parent."²²¹ Second, she finds it "curious, and somewhat inexplicable," that the court did not refer to its own earlier decision in *Braschi v. Stahl Associates Co.*,²²² in which the court decided that two homosexual men who lived together and who shared a financial and emotional commitment to one another constituted a family unit for the purposes of New York's rent control regulations.²²³

Despite Ettelbrick's criticisms, good reasons support the *Alison D.* court's failure to cite the cases discussed by Ettelbrick. With respect to the court's failure to mention the in loco parentis doctrine, the trial court and intermediate appellate court cases Ettelbrick cites provide little, if any, support for Ettelbrick's position.²²⁴ In *People v. Lilly*,²²⁵ for example, the court reversed the child abuse conviction of a criminal defendant, who caused the death of a three-month-old child, because the trial court gave an erroneous jury instruction that the defendant was obliged to provide medical assistance to the child if he, the child, and the child's mother were living together as a family unit.²²⁶ The appellate court found that the instruction oversimplified the in loco parentis doctrine.²²⁷

the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

Id. Related sections of the Domestic Relations Law that provide standing to siblings and grandparents also refer to parent or parents without defining the terms. See N.Y. DOM. REL. LAW §§ 71, 72 (McKinney 1988 & Supp. 1997-98).

220. Ettelbrick, *supra* note 208, at 523.

221. *Id.* at 523-24.

222. 543 N.E.2d 49 (N.Y. 1989).

223. Ettelbrick, *supra* note 208, at 526; see *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (discussing relationship at issue); see also *infra* notes 232-40 and accompanying text (discussing *Braschi*).

224. See Ettelbrick, *supra* note 208, at 524 n.45.

225. 422 N.Y.S.2d 976 (App. Div. 1979).

226. *People v. Lilly*, 422 N.Y.S.2d 976, 977-78 (App. Div. 1979).

227. *Id.* at 978.

In *Trapp v. Trapp*,²²⁸ the trial court denied a natural mother's motion to dismiss a stepfather's visitation petition for lack of standing.²²⁹ Although the *Trapp* court made no reference to the in loco parentis doctrine, the court explained that "[w]hether the nature of the relationship between petitioner and the children . . . was such that its disruption would create an extraordinary circumstance which would drastically affect the welfare of the children must be judicially determined."²³⁰ Neither *Trap* nor *Lilly*, nor any of the other cases cited by Ettelbrick, justify her complaint against the court for failure to mention the in loco parentis doctrine in support of Alison D's claim.²³¹

It is also neither curious nor inexplicable that the court in *Alison D.* did not refer, even in passing, to *Braschi v. Stahl Associates Co.*²³² The appellant in that case, Miguel Braschi, lived in a rent controlled apartment in New York City with another male who was the tenant of record.²³³ The owner of the premises sought to evict Braschi after the death of the named tenant.²³⁴ Braschi requested injunctive relief, claiming that he was entitled to be protected from eviction under New York City Rent and Eviction Regulations, which prohibited the eviction of the surviving spouse of a deceased tenant of a rent controlled apartment or of a member of the deceased tenant's family who had been living with the tenant.²³⁵

A divided Court of Appeals narrowly defined the issue presented. The court explained that "[r]esolution of this question requires this court to determine the meaning of the term 'family' as it is used in this context."²³⁶ It is apparent from the court's opinion that it addressed this issue and this issue only. The court observed that, "since rent-control laws are remedial in nature and designed to promote the public good, their provisions should be interpreted broadly to effectuate their purposes."²³⁷ Next, the court examined the legislative purpose of such laws, stating:

Rent control was enacted to address a "serious public emergency" created by "an acute shortage in dwellings," which resulted in "speculative, unwarranted and abnormal increases in rents." These measures were designed to regulate and control the housing market so as to "prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to

228. 480 N.Y.S.2d 979 (Fam. Ct. 1984).

229. *Trapp v. Trapp*, 480 N.Y.S.2d 979, 979-80 (Fam. Ct. 1984).

230. *Id.* at 980.

231. Ettelbrick, *supra* note 208, at 524 n.45 (citing New York in loco parentis cases).

232. *See id.* at 526 (describing court's failure to cite *Braschi* as curious and inexplicable).

233. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 50-51 (N.Y. 1989).

234. *Id.*

235. *Id.* at 50 (citing N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (1995)).

236. *Id.* (emphasis added).

237. *Id.* at 52.

produce threats to the public health; . . . [and] to prevent uncertainty, hardship and dislocation.²³⁸

Thus, the court pointed out that the legislature undertook to control both rents and evictions in order to accomplish the goals of rent control. In this limited context, the *Braschi* court found that the term "family," as used in the regulations governing rent and eviction in the City of New York, should not be rigidly restricted to relationships formalized by marriage or adoption and that

[t]he intended protection against sudden eviction . . . should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence.²³⁹

The court concluded that this definition of family was consistent with the purposes of New York's rent control laws.²⁴⁰

In later decisions, New York courts have resisted invitations to give *Braschi* a more expansive reading. In *In re Cooper*,²⁴¹ for example, an intermediate appellate court found that the survivor of a homosexual relationship was not entitled to a statutory election against the decedent's will as a surviving spouse.²⁴² In *Cooper*, the court cited its own opinion in *Alison D.*, in which it found "that a lesbian partner was not a 'parent' under [the relevant statute] and rejected, as 'totally misplaced' the argument that the holding in *Braschi* compelled a different result."²⁴³

Ettelbrick's suggestion that the Court of Appeals in *Alison D.* obviously avoided a discussion of *Braschi* is at least questionable. She concludes that "[m]ore than likely, the court simply did not want to give its stamp of approval to lesbian families, particularly lesbian couples who are raising children together."²⁴⁴ However, such speculation finds no support in the *Alison D.* opinion.²⁴⁵

238. *Id.* (citations omitted) (quoting N.Y. UNCONSOL. LAW § 8581 (McKinney 1987 & Supp. 1997-98)).

239. *Id.* at 54.

240. *Id.*

241. 592 N.Y.S.2d 797 (App. Div. 1993).

242. *In re Cooper*, 592 N.Y.S.2d 797, 798-99 (App. Div. 1993).

243. *Id.* at 799 (citations omitted) (quoting *Alison D. v. Virginia M.*, 552 N.Y.S.2d 321, 324 (App. Div. 1990), *aff'd*, 572 N.E.2d 27 (N.Y. 1991); *see also* *Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel, Inc.*, 606 N.Y.S.2d 965 (Sup. Ct. 1993) (noting reluctance of courts to expand *Braschi* from its original context). It should be noted that New York's intermediate appellate court subsequently extended the ruling in *Braschi* from the context of rent control to the context of rent stabilization, thereby expanding its coverage from about one hundred thousand apartments to some one million apartments, and that amended regulations have codified the decision. *See* Rubenstein, *supra* note 217, at 97.

244. Ettelbrick, *supra* note 208, at 531.

245. Ettelbrick is not the only commentator who engages in speculation about the reasons

It would be naive to suggest that courts deciding custody and visitation cases have generally been free of antihomosexual bias. Indeed, as I have observed elsewhere:

The conduct of a parent that will most often affect custody is sexual conduct, sometimes disguised by references to "lifestyle." Courts generally will consider a parent's heterosexual conduct outside of marriage or homosexual conduct as one factor to be considered in a custody determination, rather than as constituting unfitness *per se*. Nevertheless, cases involving lesbian or gay male custodians who maintain live-in or other relationships with persons of the same sex often enough provoke judicial high dudgeon.²⁴⁶

Despite the presence of bias in some cases, however, nothing in the *Alison D.* opinion suggests antihomosexual bias on the part of the majority of the New York Court of Appeals.

IV. A Proposed Standard

There is a strong and enduring tradition of family autonomy in American law, of which the natural concomitant is parental authority.²⁴⁷ As one commentator has observed:

The traditional view of our society is that the care, control, and custody of children resides first in their parents; in fact "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of

for the court's decision in *Alison D.* See Rubenstein, *supra* note 217, at 100-05 (discussing *Alison D.* and *Braschi*). Rubenstein, a respected scholar and gay rights advocate, was co-counsel for Miguel Braschi and argued the *Braschi* case before the New York Court of Appeals. *Id.* at 90. He was also co-counsel for amicus curiae in *Alison D.* in both the Appellate Division and in the Court of Appeals. *Id.* With respect to this latter case, he observes:

It is . . . difficult to discount the role that sexism played in the court's decision-making. On the simplest level, *Braschi* involved men, while *Alison D.* involved women. More centrally, *Alison D.* involved the relationship between two women and a child: the implication of the case—that two women could raise a child in the absence of a man—had to be threatening, on some level to the male jurists considering the case. I don't say that lightly—consider the facts. The *Alison D.* case was heard by eleven jurists on its way through the New York state court system: nine of them were men, two women. All of the nine men—the Supreme Court justices, two of the three Appellate Division justices, and six of the seven judges of the Court of Appeals—voted against Alison, while both of the female jurists—Justice Sybil Hart Kooper on the Appellate Division and Judge Judith Kaye of the Court of Appeals—voted for her.

Id. at 102.

246. JOHN DEWITT GREGORY, UNDERSTANDING FAMILY LAW 377 (2d ed. 1993).

247. See CALEB FOOTE ET AL., CASES AND MATERIALS ON FAMILY LAW 1-26 (2d ed. 1976); Bruce Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 BYUL REV. 605, 615-26 (discussing constitutional and common law backgrounds of parental rights).

our society" This parental interest in family relationships has been defined as a liberty interest entitled to due process protection.²⁴⁸

Beginning with *Meyer v. Nebraska*,²⁴⁹ in which the United States Supreme Court explicitly recognized the right "to marry, establish a home and bring up children" as a "liberty" guaranteed by the Fourteenth Amendment, the Supreme Court has given strong support to the prerogative of parents vis-a-vis the state.²⁵⁰ In *Pierce v. Society of Sisters*,²⁵¹ the Court unequivocally reaffirmed this principle.²⁵² Enjoining the enforcement of the Oregon Compulsory Education Law against two private educational institutions, the Court observed:

Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.²⁵³

Thus, the Court concluded that the statute compelling public school attendance could not be enforced.²⁵⁴

Almost a half-century after *Meyer* and *Pierce*, the Supreme Court gave a ringing reaffirmation to the principles of family autonomy and parental authority. In *Wisconsin v. Yoder*,²⁵⁵ the Court affirmed a judgment of the Supreme Court of Wisconsin that invalidated the criminal convictions of parents, who were members of the Old Order Amish religion, under the state compulsory education law.²⁵⁶ The Court quoted with approval its language

248. Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 95, 109 (1995). Another commentator accurately observes that the Supreme Court "has consistently held that matters touching on natural parent-child relationships and involving the custody and control of one's children are fundamental liberty and privacy interests protected by the Fourteenth Amendment. As such, they are entitled to the greatest constitutional protection." Marian L. Faupel, *The "Baby Jessica Case" and the Claimed Conflict Between Children's and Parents' Rights*, 40 WAYNE L. REV. 285, 289 (1994).

249. 262 U.S. 390 (1923).

250. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

251. 268 U.S. 510 (1925).

252. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

253. *Id.* (citation omitted).

254. *Id.*

255. 406 U.S. 205 (1972).

256. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

from *Pierce*, characterizing *Pierce* as "perhaps the most significant statement of the Court in this area."²⁵⁷ The Court further observed:

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.²⁵⁸

In addition to this strong endorsement of parental authority, the Court has repeatedly reaffirmed the principle of family autonomy.²⁵⁹

In light of the Supreme Court's undisturbed precedent supporting family autonomy and parental authority, the persistence of several academic commentators and some state courts in seeking to invent new rights for legal strangers raises serious questions. Such efforts minimize or ignore, and, in effect, reject the long line of Supreme Court pronouncements that acknowledge and protect the constitutional liberty interests of parents in their relationships with and custody and control over their own children.

Courts have generally recognized visitation as a subspecies or limited form of custody.²⁶⁰ As New York's highest court observed in *Alison D. v. Virginia M.*, "[t]o allow the courts to award visitation – a limited form of custody – to a third person would necessarily impair the parents' right to custody and control."²⁶¹ Like custody, visitation implicates the physical

257. *Id.* at 232.

258. *Id.*

259. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (stating that natural parent is entitled to due process at state-initiated parental rights termination proceeding); *Smith v. Organization of Foster Families*, 431 U.S. 816, 843-44 (1977) (outlining procedures required to remove foster children from foster homes); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (holding that mandatory termination provisions for pregnant public school teachers violate due process); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that state statute that allows removal of children from custody of unwed father upon death of mother violates due process rights of father); *May v. Anderson*, 345 U.S. 528, 534 (1952) (ruling that Wisconsin decree does not bind Ohio court in habeas corpus proceeding attacking right of mother to retain possession of minor children); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that certain areas of family life exist which state cannot enter); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that state statute providing for sterilization of criminals violates prisoner rights).

260. See *Ronald FF. v. Cindy GG.*, 511 N.E.2d 75, 77 (N.Y. 1987) (describing visitation as subspecies of custody); see also *Jackson v. Fitzgerald*, 185 A.2d 724, 726 (D.C. 1962) (stating that "right of visitation derives from the right to custody"); *Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (Pa. Super. Ct. 1978) (noting that "visitation is correlative to custody").

261. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991). Curiously, the lone dissenter in *Alison D.* observed that "[t]his is not a custody case, but solely a visitation petition."

control of children, and "the principles, rules, and considerations that guide custody cases greatly influence the outcome in cases involving the visitation rights of parents."²⁶² Nevertheless, many judges and an increasing number of academic commentators either fail to take into account or give little deference to the interests of natural parents, as well as the fundamentally important and long recognized values that underlie these interests. Instead, they urge resolution of visitation disputes between natural parents and legal strangers in accordance with the best interests of the child.²⁶³

Child custody and visitation disputes arise most often in connection with divorce. Upon dissolution of marriage in cases where there are children, courts ordinarily will award custody to one parent and visitation rights to the noncustodial parent.²⁶⁴ In these adjudications, in which the custody determination involves two fit parents, the generally prevailing standard mandates resolution in accord with the best interest of the child.²⁶⁵ Modern statutes frequently reflect this standard in explicit language.²⁶⁶ Perhaps this standard is serviceable when a custody or visitation dispute is between two natural fit parents. Nevertheless, in light of the principles of family autonomy and parental authority recognized by the Supreme Court, application of this standard to resolve a visitation dispute between a fit natural parent and a legal stranger is highly questionable and inappropriate.

A number of judges and commentators have subjected the best interests of the child standard to the unrelenting barrage of thoughtful criticism that it deserves.²⁶⁷ In an early and frequently cited article, Professor Robert Mnookin set out "to expose the inherent indeterminacy of the best-interests standard."²⁶⁸ In addition, one group of behavioral scientists has said of the standard: "To judges, too often, [the best interests rule] is the cloak of judicial

Id. at 30 (Kaye, J., dissenting).

262. Melanie Myers Bronfin, Note, *Louisiana Family Law – The Visitation Rights of a Noncustodial Parent*, 59 TUL. L. REV. 487, 488 (1984).

263. *Carter v. Brodrick*, 644 P.2d 850, 855 (Alaska 1982); *Spradling v. Harris*, 778 P.2d 365, 370 (Kan. Ct. App. 1989); *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992); Carr, *supra* note 217, at 1022-23.

264. GREGORY, *supra* note 246, at 353.

265. See CLARK, *supra* note 161, § 20.4, at 876 (discussing factors that influence resolution of custody disputes between natural parents).

266. GREGORY, *supra* note 246, at 371.

267. For an excellent and detailed summary of criticisms of the best interests standard see Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2219-25 (1991).

268. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 256 (Summer 1975); see also Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11-12 (1987) (arguing that best interest standard is indeterminate and fails to yield just decisions).

security, in which they can hide fuzzy thinking, uninformed opinions, laziness, frustration, and even out-and-out prejudice."²⁶⁹ In a similar vein, Professor Robert J. Levy decries "the invitation the 'best interests' standard's indeterminate qualities offers to judges to award custody to those litigants whose attributes and values most resemble their own."²⁷⁰ Finally, in the course of discussing new reproductive technologies, Professor Janet L. Dolgin observes:

Application of the standard does not, and probably cannot, serve the best interests of children in custody cases, because particular custody decisions under the best-interest standard depend on the insight and wisdom, and thus the world-view, of individual judges. As a result, widespread disagreements about how to imagine and apply the standard are inevitable.²⁷¹

Professor David L. Chambers points out that despite the seeming flexibility, simplicity, and egalitarianism of the best interests standard, decisions under such flexible and open standards frequently reach either overreaching or arbitrary results.²⁷² He notes that "[m]any people criticize judges who decide custody cases for giving inappropriate expression to personal or sexist biases. In our peculiarly American tradition, the decisions are regarded not merely as arbitrary but as discriminatory as well."²⁷³ Professor Chambers goes on to identify two deeper and more fundamental problems reflected in the best interests standard. The first critical problem, he observes, is "that to the extent that judges are applying the wrong values, it is in large part because legislatures have failed to convey a collective social judgment about the right values."²⁷⁴ A second difficulty with the standard, which Professor Chambers describes as "more mundane but no less serious," is that "[r]egardless of what values judges apply, they do not obtain, and perhaps can never routinely obtain, reliable information about the child and the parents, and thus they cannot make sensible predictions or choices."²⁷⁵

In the context of a wide-ranging discussion of fixed rules and discretion in American family law and succession law, Professor Mary Ann Glendon observes:

The "best interests" standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a

269. BENJAMIN M. SCHULTZ ET AL., SOLOMON'S SWORD 1 (1989).

270. Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 197 (1993).

271. Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473, 495 (1996).

272. See David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984).

273. *Id.*

274. *Id.* at 481-82.

275. *Id.* at 482.

judge or other third party. Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself. Arguing that the idea that a judge can determine the best interests of a child under such circumstances is a fantasy, and that efforts for legal reform should concentrate on the effect of custody law on private ordering, Robert Burt has suggested that almost any automatic rule would be an improvement over the present situation.²⁷⁶

In sum, the best interests of the child standard is both vague and indeterminate and gives precious little guidance to judicial decision makers. It provides to judges the invitation, which they frequently accept with alacrity, to engage in virtually untrammelled exercises of discretion in deciding issues of child custody and visitation. It serves poorly the interests of children in custody or visitation cases, speaking rather to the interests of contending adults.

The standard lacks any settled meaning and is more a rubric than an analytical tool for deciding child custody and visitation cases. It has meant different things at different points in time. The tender years doctrine, for example, was an effort to articulate what is in the best interests of children based on the age of the children involved.²⁷⁷ Under another tradition, long since rejected, trial courts commonly awarded custody on the basis of sex.²⁷⁸ The notion of psychological parent is yet another effort to describe what is in the best interests of the child, this time from a psychological perspective.²⁷⁹

276. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986); see JAMES C. BLACK & DONALD J. CANTOR, CHILD CUSTODY 42 (1990). Black and Cantor explain:

Leaving judges with an ultimate standard but with no real guidance on how to satisfy it puts them in a position of having only two ways to do their job: either they follow their own instincts or they rely on the expertise of others. Following their own instincts is simply another way of saying that they act in a vacuum, a philosophical vacuum, in which their particular experience, upbringing, biases, and, perhaps, irrationalities lead them to a conc[li]usion. This form of decision-making is not only personal, bearing no necessary relation to what another judge might decide on the facts, but also utterly without any necessary relation to what is best for the child in question.

Id.

277. See IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 502-03 (2d ed. 1991); Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 344-45 (1982).

278. See ELLMAN ET AL., *supra* note 277, at 503, 508.

279. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (2d ed. 1979); see also Nancy Goldhill, *Ties That Bind: The Impact of Psychological and Legal Debates on the Child Welfare System*, 22 N.Y.U. REV. L. & SOC. CHANGE 295, 297 (1996).

It is obvious that these various ways of understanding what is in the best interests of children frequently are in conflict with each other. Because it is impossible even to define the best interests standard, it is quixotic to expect that judges will apply it on a principled basis. Rather, it presents the arguably irresistible temptation to exercise unfettered discretion in deciding what is in the best interests of the child.

Despite the criticisms just discussed and the skepticism with which so many commentators have viewed the best interests of the child standard, it retains its vitality as the prevailing rule in child custody determinations. Not only does the standard apply in custody or visitation disputes between two fit parents on the occasion of divorce, but it also frequently persists in visitation contests between fit parents and legal strangers. It is the dominant standard in statutes that permit third party visitation by grandparents, stepparents, and other petitioners under a variety of circumstances. Even when the legislature has been silent with respect to visitation by legal strangers, courts nevertheless have invoked the best interests of the child standard to permit it.²⁸⁰

The Supreme Court of Kentucky decision in *King v. King*²⁸¹ provides a paradigmatic illustration of the unfettered and unprincipled application of the best interests of the child standard to permit visitation by third parties in derogation of the principles of family autonomy and parental authority.²⁸² The case arose in the context of grandparent visitation, the area in which third parties seeking visitation, aided significantly by statutory enactments, have been most successful.²⁸³

In *King*, the trial court ordered visitation by a paternal grandfather with his female granddaughter, after the child's married parents denied the grandfather's request to see the child following a family dispute.²⁸⁴ On appeal, the Supreme Court of Kentucky identified two issues: the constitutionality of the applicable statute, which authorized the trial court to grant reasonable visitation to a grandparent upon a finding that visitation was in the best interests of the child,²⁸⁵ and whether the trial court erred in finding that grandparent visitation served the child's best interests.²⁸⁶

280. See *Alison D. v. Virginia M.*, 572 N.E.2d 27, 31 (N.Y. 1991) (Kaye, J., dissenting); *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1320-21 (Pa. Super. Ct. 1996); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 434 (Wis. 1995).

281. 828 S.W.2d 630 (Ky. 1992).

282. *King v. King*, 828 S.W.2d 630, 632-33 (Ky. 1992).

283. See David L. Walther, *Survey of Grandparents' Visitation Rights*, 11 AM. J. FAM. L. 95, 96 (1997) (noting that all fifty states recognize grandparent visitation rights to some extent).

284. *King*, 828 S.W.2d at 630-31 (explaining that parents denied visitation rights to grandfather after he ordered family to move out of house located on grandfather's farm).

285. *Id.* at 631; KY. REV. STAT. ANN. § 405.021 (Michie 1984).

286. *King*, 828 S.W.2d at 632.

In its brief opinion, the court answered both questions affirmatively, rejecting the parents' argument that "the statute . . . constitute[d] an unwarranted intrusion into the liberty interest of parents to rear their children as they see fit."²⁸⁷ With respect to the constitutional issue, the court relied upon *Meyer v. Nebraska* and acknowledged "the right to rear children without undue governmental interference."²⁸⁸ In support of its assertion that the "right is not inviolate," the court noted the law's requirements that parents must provide for their children's education and that children must be inoculated against disease, restrained when riding in motor vehicles, and restricted in employment.²⁸⁹

Having reluctantly tipped its judicial hat to the principle of family autonomy, the court turned to the statute before it and concluded:

This statute seeks to balance the fundamental rights of the parents, grandparents and the child. At common law, grandparents had no legal right to visitation. However, the General Assembly determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved. If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. *The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents.*²⁹⁰

On this basis, the court held that the statute in question was constitutional and, not surprisingly, that visitation was in the best interests of the child.²⁹¹

A dissenting opinion in *King* cogently and accurately characterized the opinion of the majority:

The opinion of the majority makes little pretense of constitutional analysis but depends entirely on the sentimental notion of an inherent value in visitation between grandparent and grandchild, regardless of the wishes of the parents. The fatal flaw in the majority opinion is its conclusion that a grandparent has a "fundamental right" to visitation with a grandchild. No authority is cited for this proposition as there is no such right.²⁹²

287. *Id.* at 631.

288. *Id.*

289. *Id.*

290. *Id.* at 632 (citation omitted) (emphasis added).

291. *Id.* at 632-33.

292. *Id.* at 633 (Lambert, J., dissenting).

Unfortunately, the court's opinion in *King* is not merely an isolated example of the "best interests of the child" doctrine run rampant. In *Herndon v. Tuhey*,²⁹³ the Supreme Court of Missouri addressed the constitutionality of a statute that authorized the court to grant reasonable visitation rights to grandparents if visitation was unreasonably denied for more than ninety days.²⁹⁴ The statute required the court to determine whether visitation would be in the child's best interest or would endanger the physical health or impair the emotional development of the child.²⁹⁵ It permitted an order of visitation only "when the court finds such visitation to be in the best interests of the child."²⁹⁶

In *Herndon*, after several arguments with the parents that included physical altercations and legal actions involving money and property, the grandparents of a ten-year-old boy sought court-ordered visitation with their grandson.²⁹⁷ As in *King*, the court found the visitation statute to be constitutional and rejected the parents' assertion of their "basic constitutional right to raise their children as they see fit, free from state intrusion absent a showing of harm to the child."²⁹⁸

While purporting to acknowledge the constitutional right of parents "to make decisions affecting the family," the *Herndon* court asserted that "the magnitude of the infringement by the state is a significant consideration in determining whether a statute will be struck down as unconstitutional."²⁹⁹ The Missouri court cited a lengthy portion of the Kentucky Supreme Court's opinion in *King* and concluded:

Missouri's statute is reasonable both because it contemplates only a minimal intrusion on the family relationship and because it is narrowly tailored to adequately protect the interests of parents and children. . . . A court may grant visitation only if it will be in the best interest of the child. If visitation would endanger the child physically, mentally, or emotionally then visitation must be denied.³⁰⁰

The Missouri court's conclusion reflects enthusiastic agreement with the Kentucky court's erroneous ruling in *King*. Undeniably, as one dissenting

293. 857 S.W.2d 203 (Mo. 1993).

294. *Herndon v. Tuhey*, 857 S.W.2d 203, 206-07 (Mo. 1993).

295. *Id.* (citing MO. ANN. STAT. § 452.402 (West 1997)).

296. *Id.*

297. *Id.* at 204-06.

298. *Id.* at 207.

299. *Id.* at 208.

300. *Id.* at 210; see also *Campbell v. Campbell*, 896 P.2d 635, 641-42 (Utah Ct. App. 1995) (upholding statute that permitted reasonable visitation rights to grandparents and other immediate family members if visitation served children's best interests). The Utah court explained: "While parents have a constitutional right to make decisions affecting the family, the degree of infringement by the state is a significant consideration in determining whether courts will strike a statute down as unconstitutional." *Id.*

opinion pointed out, the decision of the majority of the court "rests in actuality upon the court's discretion, rather than upon traditional principles of constitutional analysis."³⁰¹ Furthermore, "[a] best interest test standing alone does not justify intrusion into the parents' constitutionally protected right of autonomy in child rearing."³⁰²

The holdings in *King* and *Herndon* are among the most blatant examples of the exercise of virtually unlimited judicial discretion in derogation of the constitutionally recognized principle of family autonomy. The recent decision of the Supreme Court of Wyoming in *Michael v. Hertzler*,³⁰³ upholding that state's grandparent visitation statute is no less troubling.³⁰⁴ The statute under review provided, in pertinent part, for an original action by a grandparent against the custodian of a minor grandchild.³⁰⁵ Alternative conditions for such an action included the death or divorce of the grandparent's child who is the minor grandchild's parent and the custodian's refusal of reasonable visitation to the grandparent, or the grandchild's residence with the grandparent for more than six consecutive months and the refusal of visitation after return to the custodial parents.³⁰⁶ If one of the alternative conditions existed, the court could award visitation to the grandparents upon a finding that visitation would be in the child's best interests without substantial impairment of the rights of the parents.³⁰⁷

The court stated that parental rights are fundamental and that the court must test the statute's constitutionality under a standard of strict scrutiny.³⁰⁸ The court concluded that a compelling state interest justified the statute and that the statute was constitutional.³⁰⁹ The court also acknowledged that the defendant father's fundamental right to raise his child is a constitutionally protected liberty interest.³¹⁰ Nevertheless, reviewing authority from other

301. *Herndon v. Tuhey*, 857 S.W.2d 203, 206-07 (Mo. 1993) (Covington, J., dissenting).

302. *Id.*

303. 900 P.2d 1144 (Wyo. 1995).

304. *Michael v. Hertzler*, 900 P.2d 1144, 1145 (Wyo. 1995).

305. *Michael*, 900 P.2d at 1146 (citing WYO. STAT. ANN. § 20-7-101 (Michie 1994)).

306. WYO. STAT. ANN. § 20-7-101 (Michie 1994).

307. *Id.* Wyoming has since amended its statute. See WYO. STAT. ANN. § 20-7-101 (Michie 1997). The current version retains the best interest of the child standard, but has eliminated the language describing specific situations in which grandparents may bring an action for visitation rights. *Id.*

308. *Michael*, 900 P.2d at 1145.

309. *Id.*

310. *Id.* at 1147. As examples of limitations on the liberty interests of parents, the court cited several United States Supreme Court cases. *Id.* at 1147-48; see *Bellotti v. Baird*, 443 U.S. 622, 650-51 (1979) (holding that state could restrict minor's right to obtain abortion by requiring parental consent only if state provided for alternative judicial proceeding for bypassing parental consent); *Parham v. J.R.*, 442 U.S. 584, 606-07 (1979) (concluding that child was

jurisdictions upholding visitation statutes, the court found a compelling state interest also exists in protecting the best interests of the child.³¹¹ Accordingly, the court concluded:

Following the lead of the courts of our sister jurisdictions, we perceive a compelling state interest in the State of Wyoming which justifies the grandparent visitation statute, perhaps more so. The statute specifically adopts the best interest of the child as a standard which we perceive as representing a compelling state interest in the state's role as *parens patriae*.³¹²

The court then purported to weigh the "compelling interest of the State in protecting the best interest of the child" against the fundamental liberty right of the child's natural parent.³¹³ First, pursuant to various statutory provisions, the state may intrude upon parental rights in order to protect children from abuse or neglect, with the power to terminate parental rights under appropriate circumstances.³¹⁴ The court cited other "examples of the manifestation of the state interest in protecting children."³¹⁵ For example, in the exercise of the state's *parens patriae* role, there are statutes requiring parents to use child seats in automobiles and to send their children to school.³¹⁶ The court also noted that intervening in the best interests of the child, courts have awarded temporary custody to grandparents upon a showing of neglect or physical abuse of a child by the child's natural parent.³¹⁷ Finally, citing the Supreme Court's recognition of children as "persons" within the meaning of the Bill of Rights, the court asserted that the right to associate with one's family, a fundamental liberty under the Wyoming Constitution, was "an equivalent fundamental right to that asserted by [the child's parent]. It is available to children and grandparents, as well as parents, and the state has an equal duty to protect the fundamental rights of the grandparents and the children."³¹⁸ Accordingly, the court held that the grandparent visitation statute was constitutional and concluded that, "in addition to the compelling state interest attaching to the best interest of the children, the compelling state

entitled to hearing prior to commitment to mental institution by parents); *Prince v. Massachusetts*, 321 U.S. 158, 168, 170-71 (1944) (noting that "the state's authority over children's activities is broader than over like actions of adults" and deciding that state statute proscribing child labor was constitutional).

311. *Michael v. Hertzler*, 900 P.2d 1144, 1148-49 (Wyo. 1995).

312. *Id.* at 1149.

313. *Id.*

314. *Id.* at 1149-50.

315. *Id.* at 1150.

316. *Id.*

317. *Id.*

318. *Id.* (citing *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

interest exists in maintaining the right of association of grandparents and grandchildren."³¹⁹

After the Kentucky Supreme Court's decision in *King v. King*, Professor Laurence Nolan identified "a trend to extend grandparent visitation statutes to the traditional intact family."³²⁰ If this was true when Professor Nolan made the observation, later events suggest that the direction the law will take with respect to visitation by grandparents and by other third parties is far from clear. If such a trend exists, in several recent cases courts have been loath to follow it.³²¹

Before examining these recent cases, one should recall that in both *King* and in *Herndon* the tortured reasoning of the courts provoked strong dissents.³²² In *King*, for example, the author of the dissenting opinion sharply criticized the majority for "mak[ing] little pretense of constitutional analysis but depend[ing] entirely on the sentimental notion of an inherent value in visitation between grandparent and grandchild."³²³ The dissenter identified as the "fatal flaw" in the court's opinion its conclusion, without citation of

319. *Id.* at 1151; see *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 28-30 (N.Y. 1991) (discussing right of grandparents to seek visitation rights). In *Emanuel S.*, New York's highest court addressed the issue of whether the state's grandparent visitation statute "may be applied to grant standing to grandparents seeking visitation with a grandchild when the nuclear family is intact and the parents object to visitation." *Id.* at 28. Section 72 of New York's Domestic Relations Law gives grandparents standing to sue when a parent has died and also "where circumstances show that conditions exist which (sic) equity would see fit to intervene." N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1997-98). The court granted the grandfather's petition, finding "nothing in the statutory language or legislative history foreclosing petitioner solely on the grounds that the grandchild resides with fit parents in an intact nuclear family." *Emmanuel S.*, 571 N.E.2d at 29. The parents asserted that a grant of visitation over their objections when they were neither separated nor unfit would violate their constitutional rights. *Id.* at 30. Stating that the question was not before it, the court adroitly avoided the constitutional issue: "We are not addressing an award of visitation, but only whether petitioner has standing to seek it." *Id.*

320. Laurence C. Nolan, *Honor Thy Father and Thy Mother: But Court-Ordered Grandparent Visitation in the Intact Family?*, 8 BYU J. PUB. L. 51, 52 (1993).

321. See *Castagno v. Wholean*, 684 A.2d 1181, 1189 (Conn. 1996) (holding that trial court has jurisdiction to entertain third party's visitation petition only when minor child's family life has been sufficiently disrupted to justify other intervention); *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996) (holding that statute allowing visitation over parents' objection in intact family violates parents' fundamental rights); *Brooks v. Parkerson*, 454 S.E.2d 769, 773 (Ga. 1995) (holding that grandparent visitation statute violates constitutionally protected interest of parents to raise their children without undue state interference); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993) (holding that application of grandparent's visitation act to married couple whose fitness as parents was unchallenged violated state constitutional right to privacy in parenting decisions).

322. See *supra* notes 292, 301-02 and accompanying text (discussing *King* and *Herndon* dissents).

323. *King v. King*, 828 S.W.2d 630, 633 (Ky. 1992) (Lambert, J., dissenting).

authority, "that a grandparent has a 'fundamental right' to visitation with a grandchild."³²⁴ The opinion concluded: "Absent a showing of harm to the child, there is no compelling state interest in intervention into the affairs of an autonomous family and any statute which authorizes such intervention violates the parents' liberty interest under the Fourteenth Amendment."³²⁵

Similarly, the dissenter in *Herndon* observed that "[t]he majority opinion's holding rests in actuality upon a trial court's discretion, rather than upon traditional principles of constitutional analysis."³²⁶ The opinion appropriately concluded that "[a] best interest test standing alone does not justify intrusion into the parents' constitutionally protected right of autonomy in child rearing."³²⁷

The principles reflected in the dissents in *King* and *Herndon* have found their way into decisions in grandparent visitation cases in a number of jurisdictions. The first such significant decision was that of the Supreme Court of Tennessee in *Hawk v. Hawk*,³²⁸ which held that the state's grandparent visitation statute was unconstitutional.³²⁹ Two years later, the Supreme Court of Georgia reached a similar result in *Brooks v. Parkerson*.³³⁰ Finally, in *Beagle v. Beagle*,³³¹ Florida's highest court held that a statute permitting grandparent visitation in an intact family was constitutionally infirm.³³²

In *Hawk*, the parents of two minor children determined that association with the paternal grandparents was no longer appropriate because of a long history of family disputes.³³³ The grandparents sought court-ordered visitation under a Tennessee statute that permitted a court to order reasonable visitation by grandparents with a minor child when visitation was in the child's best interests.³³⁴ The trial court, although it did not find the parents unfit, nevertheless ordered liberal visitation by finding that family conflicts should not interfere with the relationship between the children and their grandparents.³³⁵

The Supreme Court of Tennessee reversed the trial court's decision. It found the statute violated the right to privacy under the Tennessee Constitution "as applied to [a] married couple, whose fitness as parents is unchal-

324. *Id.*

325. *Id.* at 635.

326. *Herndon v. Tuhey*, 857 S.W.2d 203, 211 (Mo. 1993) (Covington, J., dissenting).

327. *Id.*

328. 855 S.W.2d 573 (Tenn. 1993).

329. *Hawk v. Hawk*, 855 S.W.2d 573, 575 (Tenn. 1993).

330. *Brooks v. Parkerson*, 454 S.E.2d 769, 770 (Ga. 1995).

331. 678 So. 2d 1271 (Fla. 1996).

332. *Beagle v. Beagle*, 678 So. 2d 1271, 1272 (Fla. 1996).

333. *Hawk*, 855 S.W.2d at 575.

334. *Id.*

335. *Id.* at 577.

lenged.³³⁶ Although its decision was based on the state constitutional provision, the court observed that "the right to rear one's children is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution."³³⁷

In the course of a careful review of Supreme Court decisions, the court observed that although it is "often expressed as a 'liberty' interest, the protection of 'childrearing autonomy' reflects the Court's larger concern with privacy rights for the family."³³⁸ Further, the court rejected the grandparents' assertion that a finding of visitation to be in the childrens' best interests creates a compelling state interest that overrides objections to visitation by fit parents.³³⁹ Instead, the court noted that both federal and Tennessee cases and statutory law require that state interference with a parent's right to raise a child be based on a showing of harm to a child's welfare.³⁴⁰ The court explained:

[W]ithout a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the "best interests of the child" when an intact, nuclear family with fit, married parents is involved. By holding that an initial showing of harm to a child is necessary before the state may intervene to determine the "best interests of the child," we approve the reasoning of both Tennessee and federal cases that have balanced various state interests against parental privacy rights.³⁴¹

In a later case before the Tennessee Supreme Court, *Simmons v. Simmons*,³⁴² the paternal grandparents of a five-year-old child asserted a right to visitation over the objections of the child's natural mother and adopting father.³⁴³ The petitioning grandparents argued that the court's earlier decision in *Hawk*, in which the family was intact and the children not in substantial danger of harm, was not applicable.³⁴⁴

In *Simmons*, the grandparents asserted that constitutional protection was "limited to married, natural parents who have maintained continuous custody of their children and whose fitness as parents has not been challenged."³⁴⁵

336. *Id.* (citing TENN. CONST. art. I, § 8)

337. *Id.* at 578.

338. *Id.* (citation omitted).

339. *Id.* at 579.

340. *Id.* at 580-81.

341. *Id.* at 579-80.

342. 900 S.W.2d 682 (Tenn. 1995).

343. *Simmons v. Simmons*, 900 S.W.2d 682, 682 (Tenn. 1995).

344. *Id.* at 684.

345. *Id.*

They argued that, in light of the parents' divorce and the child's adoption by a stepparent, state intervention was not constitutionally precluded.³⁴⁶ The court denied visitation to the grandparents and held that in the absence of a substantial danger of harm to the child the parenting decisions of both adoptive parents and natural parents are constitutionally protected from state intrusion.³⁴⁷

The decision of the Supreme Court of Georgia in *Brooks v. Parkerson* represents a further erosion of the best interest of the child standard in third party visitation cases that involve grandparents.³⁴⁸ The Georgia statute permitted the court to "grant any grandparent . . . reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child."³⁴⁹ The court held that the statute was unconstitutional under both the federal and state constitutions "because it does not clearly promote the health and welfare of the child and does not require a showing of harm before state interference is authorized."³⁵⁰

In *Beagle v. Beagle*, the Supreme Court of Florida struck down as unconstitutional a statutory amendment that provided for grandparent visitation in cases involving intact families.³⁵¹ The provision in question required the court to award reasonable grandparent visitation rights despite a married natural parent's prohibition, if the visitation would be in the minor child's best interest, regardless of whether there was a broken relationship between the child's parents and grandparents.³⁵²

After a brief summary of the "divergent views in other jurisdictions as to whether the government can constitutionally infringe upon the rights of parents to raise their children"³⁵³ and a discussion of the legislative history of the Florida grandparent visitation right,³⁵⁴ the court turned to the "very narrow" issue before it: "Does the State have a compelling state interest in

346. *Id.*

347. *Id.* at 684-85.

348. *Brooks v. Parkerson*, 454 S.E.2d 769, 774 (Ga. 1995).

349. *Id.* at 770-71 (citing GA. CODE ANN. § 19-7-3(c) (1988)). Georgia has since amended the visitation statute. The statute now allows visitation rights for grandparents when a "court finds the health or welfare of a child would be harmed unless such visitation is granted, and if the best interests of the child would be served by such visitation." GA. CODE ANN. § 19-7-3(c) (Supp. 1997).

350. *Brooks*, 454 S.E.2d at 774.

351. *Beagle v. Beagle*, 678 So. 2d 1271, 1272 (Fla. 1996).

352. *Id.* at 1273 (citing FLA. STAT. ANN. § 752.01 (1)(e) (West 1997)).

353. *Beagle*, 678 So. 2d at 1274-76 (citing *Brooks*, 454 S.E.2d at 773; *Herndon v. Tuhey*, 857 S.W.2d 203, 211 (Mo. 1993); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993); *Michael v. Hertzler*, 900 P.2d 1144, 1151 (Wyo. 1995)).

354. *Beagle*, 678 So. 2d at 1275.

imposing grandparental visitation rights, in an intact family, over the objection of at least one parent?"³⁵⁵ The court, observing that "[o]ur cases have made it abundantly clear that the State can satisfy the compelling state interest standard when it acts to prevent demonstrable harm to a child," held that the amended statute did not show such a compelling state interest.³⁵⁶

Although the constitutional brake that these recent cases have placed on grandparent visitation may not be directly in response to the observations of a number of academic critics, they clearly reflect the criticism. More than a decade ago, by which time most states had enacted statutes providing for court-ordered visitation by grandparents and other third parties, Professor Kathleen Bean sounded alarms about the rarity of "[d]octrinal, constitutional, or policy-oriented analyses" in court decisions granting visitation under the best interest of the child standard, with little guidance from the Supreme Court.³⁵⁷ Professor Bean describes three major deficiencies in the decisions.³⁵⁸ She notes the failure of courts granting visitation to consider the authority for state intervention in the family, the failure to provide "an intervening constitutional construction for an analysis that begins and ends with the best interest of the child standard, and the determination of best interest "with scant reference to the needs of the particular child involved, . . . overshadowed by the court's desire to contribute to the maintenance of a grandparent-grandchild relationship."³⁵⁹

Professor Bean notes at the outset of her examination of the state's authority to intervene in families by awarding grandparent visitation rights that it is necessary to identify "the boundary between the family's authority to make decisions concerning visitation for the child and the state's authority to exercise its *parens patriae* power in the best interest of the child."³⁶⁰ Then, the best interest standard "must be applied within constitutional confines and, as a matter of public policy, should be so applied," which would proscribe court-ordered grandparent visitation absent a showing of harm to the child that results from family decision making or a lack of decision making.³⁶¹ Further, Professor Bean observes:

The harm to the child should be discernible without consideration of the sentimental weight courts assign to maintaining a relationship with grandparents. Once harm is shown, the benefit of grandparent visitation for the

355. *Id.* at 1276.

356. *Id.*

357. Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. FAM. L. 393, 393-94 (1985-86).

358. *Id.* at 394.

359. *Id.*

360. *Id.*

361. *Id.*

child may be considered, but only in the context of the court's consideration of what action will remedy that child's harm. If grandparent visitation will remedy or address that harm, and the intrusion of court-ordered visitation is justified by the benefits to the child, court-ordered visitation is appropriate and constitutionally permissible.³⁶²

These prescient early observations may well be a harbinger of the constitutionally ordained judicial rejection of the Tennessee grandparent visitation statute in *Hawk* and subsequent decisions invalidating statutes in Georgia and Florida.³⁶³ Simply stated, the tide may be turning.³⁶⁴

In a comprehensive discussion of the Tennessee Supreme Court's decision in *Hawk*, Professor Joan Bohl begins with the observation that "[t]he linchpin of the court's decision was that appellants, as the fit, married parents of the children in question, possessed a right to autonomy in child rearing decisions and that the parents and children together possessed a privacy right as a family."³⁶⁵ Bohl argues for the application of the principles in *Hawk* "to every grandparent visitation suit brought to override the united wishes of married parents."³⁶⁶ In a later work addressing grandparent visitation, Bohl again apparently limited her condemnation to instances of state intrusion into intact families "where fit married parents decide grandparent visitation is not in their offspring's best interest."³⁶⁷

The analysis of another commentator, Cynthia Greene, similarly typifies the views of those who would fault on constitutional grounds *only* "court-ordered grandparent visitation over the objection of the child's parents in an intact marriage."³⁶⁸ Greene describes two types of grandparent visitation statutes. The earliest enactments, while adopting the best interests of the child

362. *Id.* at 394-95; see also J.C. Bohl, *Brave New Statutes: Grandparent Visitation Statutes as Unconstitutional Invasions of Family Life and Invalid Exercises of State Power*, 3 GEO. MASON U. CIV. RTS. L.J. 271, 297-98 (1993) (arguing that open-ended grandparent visitation statutes are unconstitutional).

363. See *Brooks v. Parkerson*, 454 S.E.2d 769, 773-74 (Ga. 1995) (finding Georgia statute unconstitutional because it failed to promote clearly the health or welfare of child and did not require showing of harm before authorizing intervention); *Beagle v. Beagle*, 678 So. 2d 1271, 1277 (Fla. 1996) (finding Florida visitation statute facially unconstitutional).

364. See Cynthia L. Greene, *Grandparents' Visitation Rights: Is the Tide Turning?*, 12 J. AM. ACAD. MATRIM. LAW 1, 71-72 (1994) (discussing recent case law addressing constitutional issues involved in state-compelled grandparent visitation statutes and concluding that "open ended" grandparent visitation statutes soon will be declared unconstitutional).

365. Joan C. Bohl, *Hawk v. Hawk: An Important Step in the Reform of Grandparent Visitation Law*, 33 J. FAM. L. 55, 55 (1995).

366. *Id.* at 55.

367. Joan C. Bohl, *The "Unprecedented Intrusion:" A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29, 36 (1996).

368. Greene, *supra* note 364, at 52.

standard, require such special circumstances as the death of a parent or divorce before grandparents may assert a recognizable right to visitation.³⁶⁹ Later statutes, also reflecting a best interest standard, permit court-ordered visitation regardless of the situation of a particular family.³⁷⁰ Greene asserts that a constitutional distinction exists between cases that involve intact families and those in which the parents' marriage is no longer intact.³⁷¹ In the latter cases, she argues that "the state has a legitimate purpose in seeking to mitigate the potential harm to the child caused by the traumatic break-up of the family unit."³⁷² Greene concludes:

Thus, the constitutional distinction between the two types of grandparent statutes is that children in intact families do not have such a "demonstrated need for extraordinary state protection" and, therefore, "in light of the parents' constitutionally recognized right to the care, custody, and management of their child, the legislature may not provide for a grandparent, over the objection of parents living with their child in an intact family, to petition for visitation with his or her grandchild."³⁷³

Greene's distinction is not persuasive. It does not accurately reflect the teaching of the United States Supreme Court in a long line of cases that have established and have reinforced time and again the principle of parental authority.³⁷⁴ Greene properly acknowledges that "[t]he key to all of these decisions is the threshold showing of harm required before state action will be deemed a justified intrusion into family life."³⁷⁵ The suggestion that some undefined "potential harm" or "threatened harm" will suffice when a fit parent is no longer a partner in an intact family surely does not satisfy the required compelling state interest that will warrant overriding the constitutionally protected privacy right of a fit parent.³⁷⁶

369. *Id.* at 54-55.

370. *Id.* at 55.

371. *Id.* at 59.

372. *Id.*

373. *Id.* (citing Edward M. Burns, *Grandparent Visitation Rights: Is it Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59, 80 (1991)).

374. See *supra* notes 247-59 and accompanying text (discussing Supreme Court's protection of parental authority).

375. Greene, *supra* note 364, at 57. State court decisions also recognize, as they must, this implicit requirement of the Supreme Court's decisions. See *Brooks v. Parkerson*, 454 S.E.2d 769, 772 (Ga. 1995) (observing that "Supreme Court has made clear that state interference with a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child"); *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993) (noting that "[f]ederal cases . . . clearly require that some harm threaten a child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child").

376. Cf. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (holding that Equal Protection Clause

No constitutional doctrine justifies limiting recognition and protection of parental authority to married parents in intact families and denying the same protection and recognition to natural parents who are entirely fit but are unmarried. The decisions of the Supreme Court that first established a right to family privacy are illustrative.³⁷⁷ In *Griswold v. Connecticut*,³⁷⁸ the Court struck down a state statute proscribing the use of contraception by married couples.³⁷⁹ As Professor Janet L. Dolgin notes, the Court "found the origins of the constitutional right to privacy" in two of its earlier decisions, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.³⁸⁰

Seven years after the *Griswold* decision, in *Eisenstadt v. Baird*,³⁸¹ the Court extended its privacy protection to unmarried persons by striking down a Massachusetts statute that prohibited the distribution of contraceptives only to married persons except upon a doctor's prescription.³⁸² Holding that the statute violated the equal protection rights of unmarried persons, the Court stated: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."³⁸³ This history provides additional support for the conclusion that no valid basis supports a constitutional distinction that would protect intact families while permitting the intrusion into the child rearing prerogatives of a fit, unmarried parent.

Professor Laurence Nolan provides an additional reason for skepticism about limiting the proscription of grandparent visitation to intact families.³⁸⁴ Professor Nolan speculates that prohibiting visitation in intact families but permitting it in families that are not intact may constitute unconstitutional discrimination under the Equal Protection Clause of the Fourteenth Amendment.³⁸⁵ She states:

forbade removal of child residing in racially mixed household from custody of fit mother). "The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not." *Id.* at 433.

377. See generally Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1540-46 (1994).

378. 381 U.S. 479 (1965).

379. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

380. Dolgin, *supra* note 377, at 1536 n. 83; see *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); see *supra* notes 249-59 (discussing *Meyer* and *Pierce*).

381. 405 U.S. 438 (1972).

382. *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972).

383. *Id.* at 453.

384. See Nolan, *supra* note 320, at 72.

385. *Id.*

All grandparent visitation cases impinge upon the fundamental right of child rearing. When a classification intrudes upon the fundamental right of childrearing, state regulation limiting the right is unconstitutional if it is not justified by a compelling state interest and the regulation is not narrowly drawn to express only the legitimate state interests at stake.³⁸⁶

Application of a single standard in grandparent visitation cases, which Professor Nolan suggests would avoid the equal protection issue, also promises to go far toward clarifying and settling the uncertain, and unprincipled, state of the law with respect to visitation by other legal strangers.³⁸⁷ Much support exists for a recommendation to adopt a standard that recognizes the once sacrosanct authority of parents to make decisions with respect to the control and care of their children. The standard flows, of course, from the long standing and thus far unrefuted assumption that parents generally act in their children's best interests. Absent a showing of significant harm to a particular child, the child rearing decisions of a fit natural parent deserve respect.

Acknowledgment of the primacy of a fit parent's authority to raise her child and choose the child's associates will significantly harness the opportunity for virtually unlimited judicial discretion that the best interest standard provides. It promises to dampen any inclination of judges to prefer "those litigants whose attributes and values most resemble their own,"³⁸⁸ or to give "inappropriate expression to personal or sexist biases"³⁸⁹ in visitation and custody decisions.

A standard that recognizes parental authority will stall judicial incursions into legislative prerogatives by the at least questionable invocation of equitable powers.³⁹⁰ Further, this standard will render irrelevant the urging of those academic commentators who would so redefine parent and family as to infringe upon the traditional and appropriately recognized child rearing prerogatives of fit natural parents.³⁹¹ Such redefinitions could, as the California Court of Appeal presciently observed in *Nancy S. v. Michele G.*,

386. *Id.*

387. *Id.*; see Walther, *supra* note 283, at 97 (explaining that "[i]f grandparents had standing to petition for visitation only under special circumstances, but not when the family is intact, then the grandparents of intact families are being treated differently under the law from grandparents of broken families. This disparate treatment may be a violation of the equal protection clause") (footnotes omitted)).

388. See Levy, *supra* note 270, at 197.

389. See Chambers, *supra* note 272, at 481.

390. See *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435 (Wis. 1995) (invoking court's equitable power to hear visitation petition). But see *Titchenal v. Dexter*, 693 A.2d 682, 689-90 (Vt. 1997) (finding that court cannot hear visitation or custody claims absent common law or legislative authorization).

391. See *supra* notes 176-245 and accompanying text (discussing views of commentators who urge redefinition of family).

expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family. No matter how narrowly we might attempt to draft the definition, the fact remains that the status of individuals claiming to be parents would have to be litigated and resolution of these claims would turn on elusive factual determinations of the intent of the natural mother, the perceptions of the children, and the course of conduct of the party claiming parental status.³⁹²

Certainly, the prospect of interminable litigation by third parties over child visitation cannot be in the best interests of children under any view of that standard.

Simply stated, the standard proposed in this Article gives a child's natural parent the authority to decide when and whether to grant or deny the right of visitation to a grandparent, a stepparent, a so-called coparent, or any other legal stranger. Protection of family autonomy and parental authority reflects a presumption that when fit natural parents make fundamental decisions affecting their children, they are acting in the best interests of those children. Accordingly, parental decisions relating to visitation, like other decisions involving their children, deserve respect of a high order. Only in the rare case of demonstrable harm or danger to a child should the law permit judicial contravention of a parent's decision about third party visitation. This approach protects children and families and is constitutionally sound.

392. *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991).