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Family Boundaries: Third-Party Rights and Obligations with Respect to Children

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Much has been written in the last decade under the heading "redefining the family." The impetus to reconsider the basic structure of family has been brought about by significant social changes such as same-sex marriage, the high divorce rate, and the tremendous increase in both cohabitation and nonmarital parenting. These changes have naturally forced courts, legislatures, and family law practitioners and scholars to revisit the laws and policies that create, support, reflect, or hinder family structure.

The debate about whether the law should accommodate the changing family form or stick to its traditional guns is far from resolved. It plays out differently, depending on the particular social change at issue, the nature of the family structure presented, and the particular moment in the ebb and flow of moral debate. The chimerical tone of the debate on many of these issues—individual liberty versus the survival of civilization, to take the example of same-sex marriage—often eclipses the real, day-to-day challenges American families face as traditional family structures evolve and their boundaries become increasingly ambiguous.

One important set of those challenges involves defining the role of third parties with respect to children. Third parties, loosely defined as the set of adults, other than legal parents, with some tie to children, sometimes reinforce, but often strain, family boundaries. The law alternately gives these parties rights they can sue to protect and imposes obligations they can sue to avoid. Litigation over these rights has in turn generated a patchwork of rules and doctrines that regulate the relationship among parents, children, and third parties in a variety of contexts.

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The legally defined role for third parties with respect to children is an important measure of both a family's power and its limits. The law's definition of family, after all, does not come about as a judicial pronouncement about what does or does not constitute one. Instead, it is the amalgamation of the specific rules and doctrines that regulate the boundary between family and third parties.

This symposium, which John Gregory and I have co-edited, confronts the issues raised by the presence of third parties in children's lives. Our goal is to examine relevant doctrines side-by-side in order to fully portray the pressure imposed on and the support given by third parties to parents and their children. While some of the pieces tread on familiar ground, this symposium departs from other "defining the family" compilations by being both more abstract and more specific. It considers the influence of third parties generally, regardless of the precipitating reason for the claim. It thus divorces the definition of family from potentially controversial challenges posed by specific social issues, such as same-sex relationships and related claims for same-sex parenting. But, at the same time, the symposium focuses on several specific contexts in which third parties—stepparents, same-sex coparents, grandparents, nonbiological fathers, and, in a less obvious way, the state—tend to raise and litigate claims, and treats each independently.

This symposium illuminates several themes relating to the law's treatment of third parties. First, the articles consider whether the law should (or does) recognize a *continuum* of those adults with claims to children, in which a nonlegal parent might earn more or fewer rights based on his or her particular relationship to a child and/or a legal parent, or maintain its customary binary parent/nonparent approach. As several authors note, the law tends toward the binary approach, reflecting a longstanding suspicion of "multiple parenthood" and "quasi-parenthood," though underlying social changes push modern law toward both. Second, our authors consider how to characterize particular third-parties—as legal strangers, quasi-parents, "near-parents," or simply as parties with a cognizable interest in a child—and the legal consequences that naturally flow from any particular characterization. By and large, these articles demonstrate that third-party doctrines tend to reaffirm traditional parent–child relationships, but expand categories at the margins to include some third parties who act like parents or serve some parental function. The consent or objection of a child's legal parent is, in many instances, relevant to this categorization. Third, these articles consider the scope of third-party rights relative to those of legal parents and the relative burden of obtaining them.

In this issue, a wonderful and diverse group of commentators illuminate

these themes while exploring the current legal status of third parties in specific contexts. The first author, Brian Bix, brings together his well-known expertise in family law and philosophy together to explore whether there is any philosophical basis for according third parties *any* rights or obligations with respect to children. In *Philosophy, Morality, and Parental Priority*, Professor Bix confronts anew the question that is so central to family law jurisprudence: "Do parents have a fundamental right to raise their children?" He weaves familiar family law principles with less familiar philosophical ones to consider the answer. The question is an important one, since the answer, in turn, dictates the constitutional and moral permissibility of distinguishing between "family" and "others." Though Professor Bix finds moral philosophy generally "not up to the task" of answering the question he poses (since it is still grappling with much more basic propositions that the law simply assumes to be true), his analysis leads to the useful conclusion that the rights of nonparents turn less on high theory than on the more pragmatic question of whether the law (through its institutional actors) can rationally or reliably distinguish between "near parents," on the one hand, and "meddling strangers," on the other. Whether parental priority is absolute must turn, in part, on the ability to make that distinction.

Professor Deborah Forman, an expert on the constantly changing landscape for same-sex parents, contributes *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality* to this volume. In this piece, Professor Forman traces the evolution in legal recognition for same-sex partners of parents—from strangers to third parties with only limited rights to equal parents. In the national landscape, she finds all three of these phases in operation and thoughtfully weighs the advantages and disadvantages of each. The law's treatment of same-sex coparents is important to the broader themes of this symposium because, depending on the particular case, the claims might be presented with the consent of a child's legal parent *or* over her objection. They might involve claims where a parent seeks to have a third party also labeled a "parent" (occasioned, typically, by the desire for child support) over the third party's objection. In this context, we thus see head-on the importance of characterizing an adult as "third party" or "parent." And Professor Forman's treatment of same-sex coparents, which focuses primarily on the recent trilogy of lesbian coparent cases decided by the California Supreme Court, shows that the law in many jurisdictions has moved beyond the two-category system (parent/nonparent) to a broader continuum that accords rights and obligations commensurate with the level of the third party's involvement in creating and rearing a child.

Ronald Henry, a practitioner and frequent commentator on father's rights issues, contributes *The Innocent Third Party: Victims of Paternity Fraud* to this volume. In this provocative piece, Henry reviews the legal framework in which paternity is established and argues that the drive to hold someone accountable for child support has compromised the accuracy of father identification. Henry takes a critical view of the "business-as-usual" approach to the establishment of paternity, noting the high percentage of default judgments, the lack of legal representation for putative fathers, and the inadequacy of the procedures used for in-hospital paternity acknowledgments. He then considers the legal mechanisms that perpetuate what he terms "paternity fraud," including presumptions of paternity and procedural limitations on the ability of a man to disestablish paternity despite irrefutable evidence that he is not a child's biological father. Together these mechanisms combine to transmute third parties with no connection to children into *legal* fathers, a status many are reluctant to assume.

Professor Margaret Mahoney, author of *Stepfamilies and the Law* (1994), contributes *Stepparents as Third Parties in Relation to Their Stepchildren*, an exhaustive look at the legal recognition accorded stepparent–child relationships. Stepparents of course form a significant category of third parties with ties to children that are *legally* created and severed by marriage to a child's parent. But the practical and emotional ties between stepparents and stepchildren do not necessarily flow from legal or even residential status. Questions about the rights and obligations of stepparents arise not only when the marriage relationship ends, potentially triggering issues of custody, visitation, or inheritance, but also while it persists. By and large, Mahoney argues, the stepparent remains a third-party, even during marriage, and gains the status of legal parent, with rights equal to the child's parent, only through adoption. But adoption is only possible when the child's noncustodial parent has given up or lost parental rights or died.

While a stepparent's day-to-day authority within the household is often determined independent of legal rules, that informal power is useless when dealing with outside entities such as school and hospitals. Professor Mahoney examines the "continuing failure" of courts and legislatures to construct a "clear and consistent legal status for residential, nonadoptive stepparents." She explains this failure, in part, as a result of the wide variation in the operations of stepfamilies, which makes a one-size-fits-all legal status difficult to justify, and the law's "underlying aversion" to multiple parenting. Together, these factors dictate a default rule of nonrecognition, leaving stepfamilies to operate in a largely unsatisfactory legal regime that fails to afford appropriate protection to de facto parent–

child relationships. Professor Mahoney ends with a recommendation for a stepparent registration system, which would enable stepfamilies to opt-in to a more expansive legal status. Existing law, however, reflects the traditional binary approach to third-party rights: a stepparent is either a nonparent, with only sharply limited rights, or a full adoptive parent with equal rights (though most stepparents do not adopt their stepchildren). The legal system has, thus far, "reaffirmed the primacy of biological and adoptive parenthood."

Professor Naomi Cahn brings a blend of international and domestic expertise to bear on the question of who represents the interests of children in conflicts over parent–child relationships. In *State Representation of Children's Interests*, Professor Cahn considers the state's role as a third party charged with protecting children's interests and the ways in which the state shapes family boundaries. She first considers the doctrinal limits on state intervention into families and then develops a conceptual framework within which to evaluate the appropriateness of particular interventions based on the relative strengths of the parental and children's rights and the particular substantive goal being pursued. By way of example, she explores the role of the state with respect to children in three contexts: abortion rights of minors, where the state ostensibly acts to protect them; guardianship rights after a parent's death, where the state abstains from acting in most cases; and, internationally, where the role of the state's *parens patriae* power is often carried out by nongovernmental organizations.

Professor Cahn's treatment of the state's role with respect to children illuminates the boundary against which all families operate—the requirement of parental fitness and adequate provision for children. When this boundary is transgressed, the state's potential third-party role becomes actualized, which may or may not be in the interest of the children the state purports to represent. Her examples challenge us to think more carefully about the state's power over families.

Finally, Professor John Dewitt Gregory, coeditor of this volume and coauthor of the widely used treatise *Understanding Family Law*, revisits a central third-party issue—grandparent visitation—in *The Detritus of* Troxel. An expert in parent–child issues with a longstanding suspicion of "legal strangers," Professor Gregory considers the medium-term aftermath of the Supreme Court's 2000 decision in *Troxel v. Granville*. In *Troxel*, the Court held that Washington State's "breathtakingly broad" third-party visitation statute, as applied, unconstitutionally infringed on "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." The discretion of courts to award visitation to "any person" at "any time," was deemed too broad to recon-

cile with the near absolute rights historically accorded parents.

Though much ink has been spilled over the impact of *Troxel*, Professor Gregory concludes that it has, in fact, had very little effect on the law of third-party visitation in most states. Both before and after the Supreme Court's decision, lower courts have ruled on a case-by-case basis as to whether a visitation statute is so broad as to compromise the constitutionally protected sphere of parental decision-making. Valid statutes fall somewhere between a pure best-interests-of-the-child standard and a standard requiring a showing of parental unfitness or actual harm to a child. The issue of third-party visitation is central to any discussion of third-party rights vis-à-vis children since litigated cases are premised on the objection of the legal parent(s). The law's treatment of third-party visitation claims thus directly implicates fundamental principles of parental authority and family autonomy. Any successful claim by a third party for visitation necessarily involves at least a modest infringement on parental rights and transgression of a family's self-drawn boundaries.

Scholars and practitioners alike should find this symposium of interest. The articles provide practical guidance for navigating the ever-shifting terrain of family boundaries and third-party rights, while remaining mindful of the broader policy issues implicated by any particular claim. Such is the nature of modern family law—the bread-and-butter of local law practice and, at the same time, the stuff of public policy debates, presidential campaigns, and scholarly interchange. This symposium, and the many family law issues it considers, prove the oft-repeated claim of my colleague and coeditor, Professor Gregory, that "family law is and has always been the most dynamic area of the law school curriculum."