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THE QUASI-PARENT CONUNDRUM

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Although family law is very much concerned with legal parentage and its attendant rights, children are much more concerned with maintaining relationships with those who care for them, regardless of whether that person is a legal parent or someone functioning as one. What happens though if the child's legal parent attempts to banish the quasi-parent from the child's life? Doing so can be extremely damaging to the child. Nonetheless, parents do possess a constitutional right to make decisions about how to rear their children, including who may have access to the child.

Trying to strike a balance between protecting the child and safeguarding the parent's right is a daunting task. The Supreme Court has provided little guidance on this issue, having written only one opinion on the subject, Troxel v. Granville*, that only obliquely deals with the subject of quasi-parenthood. Still, the states have relied on* Troxel *to craft a number of different approaches to the challenging question of quasi-parenthood.*

As Troxel *nears its twentieth anniversary, however, a problem has emerged. In implementing* Troxel*, the states have by and large treated the traditional nuclear family model as normative, using it to create a "law of quasi-parenthood." This approach is problematic for two reasons. First, since*

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Troxel *was decided, the composition of the "nuclear family" has drastically changed. From the legalization of same-sex marriage to the increase in divorce, cohabitation, and re-marriage, fewer and fewer children are raised by their two legal parents. Second, for a significant portion of the American population, including racial and ethnic minorities, the nuclear family model has never represented the typical family structure, with children often being reared by members of the extended family.*

By premising the law of quasi-parenthood on the outdated and unrealistic nuclear family model, more and more children do not receive the protections that the law of quasi-parenthood was intended to provide. This Article traces the history of quasi-parenthood, analyzing how the law has evolved into a current practice that is, much to the harm of American children, both shortsighted and underinclusive. The Article concludes with concrete suggestions for change—changes that will hopefully spur a legal standard for quasi-parenthood that is less discriminatory and more reflective of the contemporary American family.

INTRODUCTION

> The Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living.
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> – Justice Brennan, *Moore v. City of East Cleveland*

To understand the concept of quasi-parentage, consider the story of Ephraim, who was born in 1990 to unmarried parents, Jon and Susan.[1] Susan subsequently married another man, Phillip, and together they raised Ephraim until Susan's untimely death in 2003. Prior to his mother's death, Ephraim did not know his biological father. Although Phillip never legally adopted his stepson, Ephraim nonetheless considered Phillip his father given that Phillip was "the only father figure [Ephraim] had ever known."[2] When it became clear that his mother's death entitled Ephraim, now an adolescent, to Social Security benefits, Jon reemerged and sought custody of the child he had essentially abandoned for the first twelve years of his life. Phillip counterclaimed, seeking custody of Ephraim. The state court, despite finding that "Jon was mostly absent from Ephraim's life until Susan died,"[3] awarded custody to Jon.[4] It did so in light of the state's "presumption in favor of child custody with a biological parent as against an unrelated third party."[5] At no point did the court consider the harm to Ephraim that would result—on the heels of losing his mother—from having the man he had always considered his father removed from his life.

Cases like Ephraim's are by no means unusual, and neither are the kinds of family arrangements that give rise to such fact patterns.[6] Indeed, the people who actually function as a child's parents can change over the child's life[7]—a phenomenon

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1. *See* State *ex rel.* Ephraim H. v. Jon P., No. A-04-1488, 2005 WL 2347727 (Neb. Ct. App. Sept. 27, 2005).
2. *Id.* at *1.
3. *Id.* at *3.
4. *Id.* at *4.
5. *Id.* at *3.
6. *See infra* Part III; Section I.A.
7. *See infra* Part I.

one scholar refers to as "mid-life parental switches."[8] Of course, quasi-parenthood as a legal phenomenon has a long history in the United States. Long before the Supreme Court would even begin to weigh in on the constitutional dimensions of parenthood,[9] a number of state courts had dealt with claims by quasi-parents.[10]

A quasi-parent is generally defined as "a person not a legal parent who nonetheless has greater rights in a contest with the legal parent than does any other third party."[11] Although this Article uses the term quasi-parent, courts have described these individuals using a variety of terms, including psychological parent, *in loco parentis*, de facto parent, and parent by estoppel. And, just as courts have employed different terminology, they have also used different standards for determining when and to what extent nonlegal "parents" can gain parental rights to children they have helped raise.

Much of this lack of uniformity stems from the uncertainty courts face when balancing the rights of the quasi-parent with those of the legal parents. Although the Supreme Court has labeled the right of parents to direct their child's upbringing as "fundamental,"[12] in practice it has not applied typical fundamental-rights analysis to state action interfering with the parent's right to direct their child's uprbringing.[13] But, if strict scrutiny does not apply to *all* state interference with the parent-child relationship, what is the appropriate standard? And, more to the point, *when* can the state confer rights typically associated with parenthood upon individuals who are not the child's legal parents? Or, if the standard is in fact strict scrutiny, might the state nonetheless have a compelling justifica-

8. Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 676 (2002) ("In these cases, a child classically lives with one or both biological parents for some period of her life, but at some point, others assume much or all of the parents' child rearing responsibilities.").

9. *See infra* notes 233–242 and accompanying text.

10. *See infra* notes 218–229 and accompanying text.

11. Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 458 (2007).

12. Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415, 1431 (1995) ("For the past sixty-five years, the Supreme Court has maintained that parental rights are 'fundamental' and that they should receive heightened protection from state regulation through the Fourteenth Amendment's Due Process Clause.").

13. *See infra* notes 259–266 and accompanying text.

tion to limit parental rights in the face of competing claims by a quasi-parent? Unfortunately, the Supreme Court has not answered these questions.[14] To the contrary, what little guidance the Court has provided on this subject has only further complicated the issue.

In 2000, the Court issued its first and only case touching on the rights of third parties vis-á-vis legal parents.[15] In *Troxel v. Granville*, the Court took up a challenge to Washington State's grandparent-visitation statute.[16] There, a mother sought to limit the time her children spent with their paternal grandparents following the death of her husband.[17] The grandparents commenced an action under the state statute, which provided that "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings."[18] The grandparents were successful at the state level, and the children's mother appealed.[19] The Supreme Court reversed, holding that the Washington statute infringed on the Fourteenth Amendment parental rights of the mother because it was not narrowly tailored to further a compelling state interest.[20] In its opinion, the Court explicitly avoided the question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."[21] Nonetheless, the Court implied that perhaps states could, in certain situations, award visitation to nonparents. Unfortunately, the Court offered no clues as to what sorts of situations might qualify, merely noting that a court "must accord at least some special weight" to the wishes of the child's parent.[22]

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14. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 529 (2000) ("In articulating the scope of its review, the Court has seemed consciously to avoid the familiar language of strict scrutiny, opting instead to muddy the waters with ambiguous hedge phrases and arguable synonyms.").

15. *See* Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279, 280 (2000) ("While *Troxel* itself is a narrow ruling on a particularly problematic statute, it is the Supreme Court's first word, and perhaps only word, on a subject of considerable interest to courts and legislatures throughout the country.").

16. Troxel v. Granville, 530 U.S. 57, 60 (2000).

17. *Id.* at 60–61.

18. *Id.* at 61 (quoting WASH. REV. CODE § 26.10.160(3) (2018)).

19. *Id.*

20. *Id.* at 72–73.

21. *Id.* at 73 ("We do not, and need not, define today the precise scope of the parental due process right in the visitation context.").

22. *Id.* at 70.

In the years immediately following the Supreme Court's decision, state courts[23] and scholars[24] alike attempted to discern exactly how to handle quasi-parent claims brought by third parties. Today, because of the lack of any meaningful direction by the Court, state courts have developed a variety of standards. Accordingly, where a person happens to live will determine whether they qualify as a quasi-parent and, if so, to what rights they are entitled. As one commentator, writing shortly after *Troxel* was decided, noted: "[T]he standard for governmental interference with parental rights remains extremely vague. The plurality did not make clear what factors are important to consider when determining whether a visitation statute adequately protects parents' rights, and it did not examine the important constitutional issues implicated in the case."[25]

In all fairness to the Supreme Court and the states, quasi-parenthood presents an extremely complicated issue.[26] To develop a workable rule, states must first answer a number of difficult questions. First, whether a person has spent sufficient time in the life of a child to transition from mere caregiver to quasi-parent. Second, whether the quasi-parent's claim should prevail against the right of the legal parent to decide who has

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23. *See infra* Part III.

24. *See, e.g.*, Christina M. Alderfer, Troxel v. Granville*: A Missed Opportunity to Elucidate Children's Rights*, 32 LOY. U. CHI. L.J. 963 (2001); Buss, *supra* note 15, at 280; Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865 (2003); Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-*Troxel*?*, 43 ARIZ. L. REV. 751, 755–56 (2001); David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1129–30 (2001); Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After* Troxel, 2003 WIS. L. REV. 115, 118 (2003); Alessia Bell, Note, *Public and Private Child:* Troxel v. Granville *and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225 (2001).

25. Alderfer, *supra* note 24, at 1005.

26. *See In re* Marriage of Lewis & Goetz, 250 Cal. Rptr. 30, 33 (Ct. App. 1988) ("Given the complex practical, social and constitutional ramifications of the 'equitable parent' doctrine, we believe that the Legislature is better equipped to consider expansion of current California law should it choose to do so."); *In re* Scarlett Z.-D., 28 N.E.3d 776, 790 (Ill. 2015) ("[S]tanding to petition for custody or visitation is a complex issue that demands a comprehensive legislative solution."); Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997) ("Given the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem.").

access to the child.[27] Third, whether the child has an independent right to maintain contact with a quasi-parent and how to balance that right with the decision-making authority of the legal parent. Finally, states must consider particularly thorny questions like how to handle quasi-parenthood claims by those, like foster parents,[28] who are legally sanctioned to act as temporary parents and what to do when quasi-parent claims would subject the child to multiple adults with parental rights.[29]

Since *Troxel* was decided, these questions have required state courts to consider parental rights in a whole new light. But as *Troxel* approaches its twentieth anniversary, the time has come to reexamine the Court's decision. The need to revisit the issue of quasi-parenthood comes from the "seismic shift" that is taking place within the American family.[30] In the twenty years post-*Troxel,* legal claims based on quasi-parenthood are increasingly common because of increased patterns of "divorce, cohabitation, and remarriage."[31] Douglas NeJaime has described this evolution of the nuclear family as follows: "With

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27. *See Troxel*, 530 U.S. at 70 ("In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance."); *see also* Lulay v. Lulay, 739 N.E.2d 521, 531 (Ill. 2000) ("Encompassed within the well-established fundamental right of parents to raise their children is the right to determine with whom their children should associate."); Eaton v. Paradis, 91 A.3d 590, 593 (Me. 2014) ("Parents have a fundamental right to direct the upbringing of their children, including the right to determine who may associate with their children."); Hoff v. Berg, 595 N.W.2d 285, 291 (N.D. 1999) ("Deciding when, under what conditions, and with whom their children may associate is among the most important rights and responsibilities of parents.").

28. *See* Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 844–45 (1977) (holding that "we cannot dismiss the foster family as a mere collection of unrelated individuals" and thus suggesting that there may exist some liberty interest in the relationship between foster parents and their children).

29. As one scholar aptly points out, "[t]he best interests of the child are not served by granting rights to more and more parental claimants." JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD 205 (2014).

30. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 184 (2015).

31. Linda C. McClain, *A Diversity Approach to Parenthood in Family Life and Family Law*, *in* WHAT IS PARENTHOOD: CONTEMPORARY DEBATES ABOUT THE FAMILY 41, 55 (Linda C. McClain & Daniel Cere eds., 2013); *see also* ENCYCLOPEDIA OF GENDER AND SOCIETY 271 (Jodi O'Brien ed., 2012) ("The marriage rate has declined in recent decades, especially among the poor, and the remarriage rate has dropped. The increase in cohabitation largely accounts for these decreases.").

more divorces came more second marriages. As divorced parents formed blended families—and other unmarried women with children married—stepparents assumed parental roles."[32] An increasing number of children are being raised in households headed by adults who are neither their biological nor adoptive parents, resulting in a society where "[m]ultiple parents . . . are a social reality, but not a legal category."[33]

The legalization of same-sex marriage has likewise pressed the issue of quasi-parentage. In *Obergefell v. Hodges*, the Court recognized that "hundreds of thousands of children" are currently being raised by same-sex couples.[34] However, because same-sex couples cannot—at least at present[35]—conceive using only their genetic material, any child being raised by a same-sex couple will have a biological connection with at most only one adult member of the family.[36] The question then becomes what is the legal status of the adult who does not have a biological connection to the child? Must that person adopt his or her spouse's child in order to have parental rights? And if not, does that person nonetheless have some rights vis-á-vis the child?

Indeed, the confluence of these various social changes has helped give rise to a number of novel questions relating to parenthood—questions that have increasingly forced courts to decide whether someone who is neither the child's biological nor adoptive parent can nonetheless gain rights to the child simply by virtue of having functioned as a parent.[37]

At the same time, issues of quasi-parenthood arise not only from the changing nuclear family but also as a result of the continued presence of the extended family model within the United States. By and large, the law has ignored this model of family, which is particularly prevalent among ethnic and racial

32. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1196 (2016).

33. Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231, 231 (2007).

34. 135 S. Ct. 2584, 2600 (2015).

35. As advances in assisted reproduction continue, even this may change. *See* Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1093 (2016) (discussing how in vitro gameteogenesis (IVG) might allow for sperm cells to be converted to egg cells and vice versa, thereby permitting same-sex couples to reproduce).

36. John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 324–25 (2004).

37. *See infra* Section I.A.2.

minorities.[38] In her *Troxel* plurality, Justice O'Connor explicitly referenced the extended family, noting that "in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing."[39] However, in the almost twenty years that have elapsed since *Troxel*, the states have lost sight of the extended family, adopting tests relating to quasi-parenthood that are premised on a nuclear family model.[40] Justice Kennedy, who dissented in *Troxel,* warned against just such an approach, stating that his "principal concern" was that the plurality opinion "seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers, . . . [which] in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case."[41]

Thus, while acknowledging the complex questions associated with quasi-parenthood, the focus of this Article concerns a more foundational issue. As courts continue to struggle with the appropriate test for quasi-parenthood, this Article takes the position that the law has lost sight of one very important consideration—the complexity of the contemporary American family. Indeed, whereas American familial structures are more heterogeneous than ever before, courts increasingly cling to the "traditional" nuclear family model to develop standards for quasi-parenthood rights.[42] As a result, despite the states' increased willingness to protect a child's relationship with a quasi-parent, only children whose quasi-parents fit into the traditional nuclear family model are benefiting from those protections. The children from nontraditional families, which disproportionately include ethnic and racial minorities, are particularly at risk of the harms associated with having a quasi-parent ripped from their life.[43]

The goal of this Article is to correct that misunderstanding of the American family structure and offer guidance on specific

38. *See infra* Section I.B.
39. Troxel v. Granville, 530 U.S. 57, 64 (2000).
40. *See infra* Part III.
41. *Troxel*, 530 U.S. at 98.
42. *See infra* Part III.
43. *See infra* notes 391–393 and accompanying text (discussing the harms that befall children in general when removed from the care of a quasi-parent).

ways to make the law of quasi-parenthood more reflective of the contemporary family and less discriminatory toward family structures that stray from the traditional nuclear family model—a model that scholars have described as "vanishing"[44] and "increasingly rare in modern society."[45]

With that goal in mind, Part I begins with an exploration of how quasi-parenthood issues arise in contemporary family settings. Given the multiplicity of family structures within the United States, Part I first explores the changing composition of the nuclear family, where immediate family units more often contain individuals—including stepparents and same-sex partners—who have no biological or legal connection to the children in their families. Part I also offers a detailed look at the extended family model—a model that has been largely ignored by American law. Specifically, Part I explores the extended family model and the related concept of informal adoption as it exists in both the African American and Hispanic communities, where childcare is much more communal and parentage more fluid. Part II looks at the constitutional rights of parents as those rights have developed over time, culminating in a discussion of *Troxel*—the one and only time the Court has provided any guidance on the rights of parents vis-á-vis third parties. Part III examines the case law that has emerged post-*Troxel*, focusing on three discrete areas—standing to bring a quasi-parent claim, the role parental fitness plays in adjudicating such claims, and the extent to which a court should consider the harm to the child if the quasi-parent's claim is denied—in which state courts have adopted standards that although seemingly consistent with the outer boundaries of *Troxel,* nonetheless discriminate against a number of modern American families. Those standards pose great harms to a wide array of

44. Marie A. Failinger, *A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to Its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195, 203 (2004) ("[S]o-called 'traditional' nuclear families consisting of a married couple and their children have indeed recently shrunk as a proportion of the American population.").

45. Katherine H. Dampf, *Happily Ever After: Eliminating the 890 Usufruct to Protect the Blended Family*, 74 LA. L. REV. 899, 902 (2014); *see also* Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 66 (1993) ("The major demographic changes of the past thirty years—declining fertility, rising divorce rates, increasing rates of out-of-wedlock births, aging population—have caused the decline of the traditional nuclear family.").

children. Part III concludes with concrete suggestions for how, in those three areas, state courts can craft standards that not only comply with the constitutional rights of parents but are also more inclusive of children being reared in the contemporary American family.

I. THE EMERGENCE OF QUASI-PARENTHOOD

To best understand where quasi-parenthood fits in the law of domestic relations, it is necessary to understand how the phenomenon of quasi-parenthood arises. There are, no doubt, instances of adults who informally adopt children who were complete strangers;[46] however, adults who act as quasi-parents are generally individuals who have a preexisting familial relationship with the child.[47] This Part focuses on who quasi-parents with preexisting familial relationships tend to be and how they typically transition from mere acquaintances to quasi-parents. In doing so, this Part looks at the two most common family models: the nuclear family and the extended family. Because quasi-parenthood arises somewhat differently in each, they are discussed separately. The nuclear family model, despite the fact that it is "less prevalent,"[48] is discussed first because it has historically been the "most widely valued model of family"[49] by American courts.

46. Consider, for instance, the character of Heathcliff from Emily Brontë's *Wuthering Heights* who, after being discovered on the streets of Liverpool, was brought to Yorkshire and raised (but seemingly not adopted) by the Earnshaw family. EMILY BRONTË, WUTHERING HEIGHTS (Barnes & Noble Classics, 2005).

47. *See, e.g.*, Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 436 (1998) ("Informal adoptions take place when relatives or family friends assume the responsibility of caring for a child for an indefinite period.").

48. Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 302 (2015); *see also* sources cited *supra* note 45 and accompanying text.

49. Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 383 (2002).

A. Quasi-Parenthood in the Nuclear Family Model

Although regarded as "the archetype in American law and politics,"[50] the nuclear family model is very much on the decline—a decline that is most pronounced when it comes to the *traditional* nuclear family, typically defined as "heterosexual married couples living with their own children."[51] After all, marriages are no longer exclusively heterosexual, and cohabitating couples are less likely than ever before to be legally married.[52] Both of these changes to the traditional nuclear family have fostered situations in which quasi-parenthood is much more common.[53] Accordingly, unlike the relatively invisibile role that the extended family has played in American law,[54] one can find a number of judicial opinions that wrestle with the rights of quasi-parents in nuclear families made up of stepparents, cohabiting partners, and/or same-sex spouses.

A brief look at some representative cases is instructive in order to better understand how claims by quasi-parents typically arise and how the courts deal with them. Notwithstanding Professor David Meyer's observation that "[a] growing number of courts and legislatures now permit adults who assumed the functional role of parent to preserve their relation-

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50. *Developments in the Law—The Law of Marriage and Family*, *Introduction: Nuclear Nonproliferation*, 116 HARV. L. REV. 1999, 2001 (2003); *see also* Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431, 437 (2014) (critiquing Amy Wax's conclusion that the heterosexual nuclear family model is the "gold standard").

51. June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in A New Era of Class Division*, 39 HOFSTRA L. REV. 859, 880 (2011); *see also* Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 1000 n.48 (2008) (describing the traditional nuclear family model as "two married parents living with their shared biological children").

52. *See, e.g.*, Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J.L. & FAM. STUD. 289, 315 (2011) (noting that "most cohabitating couples do so consciously as an alternative to marriage"); Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77, 78 (1990) ("As an alternative to marriage, more couples are choosing to cohabit.").

53. *See, e.g.*, Wendy D. Manning et al., *Cohabitation and Parenthood: Lessons from Focus Groups and In-Depth Interviews, in* MARRIAGE AND FAMILY: PERSPECTIVES AND COMPLEXITIES 115, 117 (H. Elizabeth Peters & Claire Kamp Dush eds., 2009) ("Approximately half of children living with cohabitating parents are living with one biological parent and his or her cohabiting partner.").

54. *See infra* Section III.A.

ship with a child,"[55] historically, as illustrated below, courts have been resistant to recognizing such relationships.[56]

1. Stepparents and Cohabitating Partners

A group of researchers recently noted that "[o]ne of the most important changes in family life over the past 50 years has been the increase in family complexity, arising from higher rates of divorce, nonmarital childbearing, cohabitation, and remarriage."[57] Specifically:

> In 2009, only 69 percent of children lived with two parents, down from 85 percent in 1960. More specifically, 59 percent of children lived with two biological married parents, 3 percent lived with two biological cohabiting parents, and 7 percent lived with a biological parent who was married to a stepparent. . . . Close to 3 percent lived with a single mother and her cohabiting partner. Overall, it is far less common for children to live with two married biological parents today than it was 50 years ago and far more common to live with a single mother, with stepparents, or in a multigenerational household.[58]

As adult relationships become less formal and less enduring, children are more likely to have "legal strangers"[59] come into their lives and occupy a parental role—one that produces

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55. David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 47, 50 (Robin Fretwell Wilson ed., 2006).

56. *See, e.g.*, Julia Frost Davies, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1066 (1995) ("Courts, however, have been reluctant to recognize more than one mother and one father per child.").

57. Ariel Kalil et. al., *Time Investments in Children Across Family Structures*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 150, 150 (2014).

58. *Id.* at 151.

59. The term "legal stranger" is often used as a synonym for "nonparent." *See, e.g.*, John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998) (using "nonparent" and "legal stranger" interchangeably); David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075, 1087 (2001) ("Lacking traditional recognition as parents, long-time caregivers lacking biological or adoptive ties are classified as nonparents, or legal 'strangers,' for constitutional purposes.").

strong emotional ties with the child.[60] Given the lack of a biological or legal connection to the child, the question arises as to whether such an individual could ever become a "parent." Further, how would such recognition impact the parental rights of the child's biological parents?

When it comes to cohabiting partners, many courts have refused claims for parental rights brought by the nonlegal parent. Consider, for instance, the case of Donald, who lived with his girlfriend, Tamera, and her son for seven years.[61] Donald, despite being neither the child's legal nor biological father, had nonetheless assumed responsibility for helping raise the boy.[62] When the relationship between Donald and Tamera ended, Donald filed for visitation, claiming that he was a de facto parent.[63] The lower court dismissed his petition on the basis that "at common law a nonparent had no right to visitation with a minor child,"[64] and the Supreme Court of South Dakota affirmed.[65] In its ruling, the court stated that "[b]efore a parent's right to custody over his or her own children will be disturbed in favor of a nonparent[,] a clear showing against the parent of 'gross misconduct or unfitness, or of other extraordinary circumstances affecting the welfare of the child' is required."[66] According to the court, Donald failed to make any such showing.[67] In holding as it did, the court made clear that "an award cannot be made to [quasi-parents] simply because they may be bet-

60. *See* Mabry, *supra* note 47, at 443 ("The psychological parent theory stands for the proposition that people who are not necessarily biological parents may form strong emotional bonds with children."); Maldonado, *supra* note 24, at 910–11 ("[C]hildren develop significant emotional bonds with third parties who function as parents.").

61. Cooper v. Merkel, 470 N.W.2d 253, 254 (S.D. 1991).

62. *Id.* at 254.

63. *Id.*

64. *Id.*

65. *Id.* at 256.

66. *Id.* at 255 (quoting Langerman v. Langerman, 336 N.W.2d 669, 670 (S.D. 1983)).

67. *Id.* at 256 ("Donald's motion for visitation contained no charge that Tamera was unfit or guilty of misconduct nor was there any allegation of unusual circumstances. The motion merely alleged that Donald helped raise Tamera's son and that having assumed part of that responsibility he should be granted the opportunity to visit the boy.").

ter custodians."[68] South Dakota is not alone when it comes to following such a rigid approach.[69]

Even in cases involving married couples, stepparents have met resistance when trying to gain parental rights over the children they helped raise. For example, in a 2014 case out of Illinois, Miki finalized the adoption of her son William three months prior to her marriage to Nicholas.[70] William was not quite one year old, and Miki had adopted him as a single parent.[71] Nicholas had also intended to adopt William but never completed the process.[72] Nicholas did, however, hold himself out as William's father and maintained that he served as the child's primary caregiver.[73] When Miki filed for divorce, Nicholas petitioned for sole custody of William.[74] In response, Miki successfully moved to dismiss his petition on the basis that Nicholas was not the child's legal parent.[75] Nicholas appealed, claiming that "he acted as William's father in every way and has developed a bond with William such that he should be recognized as William's 'equitable parent.'"[76] The court rejected his argument, noting that the state had not recognized equitable parentage and that Nicholas, despite knowing "at all times that he would have to formally adopt William in order to be his legal parent," failed to do so.[77] In ruling as it did, the court seemed to suggest that Nicholas could have protected his right but chose not to. Entirely missing from the court's analysis is (1) the fact that William had no ability to compel the adoption

68. *Id.* at 255 (quoting *Langerman*, 336 N.W.2d at 670).

69. *See, e.g.*, Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993) (declaring unconstitutional under the state constitution a statute that permitted grandparent visitation on the basis that it infringed the parents' right to make "child-rearing decisions" where there was no evidence of harm to a child); *see also* Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of de Facto Parents, in* RECONCEIVING THE FAMILY, *supra* note 55, at 98 ("Very few [jurisdictions] permit unmarried cohabitants to initiate action for custody or visitation.").

70. *In re* Marriage of Mancine and Gansner, 9 N.E.3d 550, 555 (Ill. App. Ct. 2014).

71. *Id.* ("Because Miki had already started the adoption process of William as a single parent before she met Nicholas, Miki and Nicholas were advised by the adoption agent to finish the process of Miki's adoption of William, and then for Nicholas to adopt William as a stepparent after the parties' marriage.").

72. *Id.* at 555–56.

73. *Id.* at 556.

74. *Id.*

75. *Id.*

76. *Id.* at 565.

77. *Id.* at 568.

and (2) any consideration of the harm likely to befall William in losing the quasi-parent who was his primary caregiver.[78]

Some courts have been more sympathetic to the claims of stepparents. For instance, in a pre-*Troxel* opinion from 1992, the Minnesota Court of Appeals granted visitation to a stepfather, David, over the objections of the child's mother, JoEllen.[79] The couple had married in 1989.[80] At the time, JoEllen had a five-year-old son from a previous relationship.[81] When the couple separated twenty months later, David petitioned the court for visitation.[82] While acknowledging that "the question of whether a former stepparent may assert a common-law right to visitation is one of first impression," the court ruled in David's favor.[83] The court held that "a former stepparent who was in loco parentis with the former stepchild may be entitled to visitation under the common law."[84] Finding nothing in the record to contradict the trial court's determination that visitation with David would be in the child's best interest, the court affirmed.[85]

Thus, despite the fact that more and more children are being reared (sometimes exclusively) by stepparents, the protections afforded stepparents and cohabiting partners vary by state. Although state variation is not an inherently bad thing, discrimination on the basis of family structure and the harm such discrimination plays in the lives of children is something the law should not tolerate. In that regard, Justice Kennedy's opinion in *Obergefell* is instructive. There, he spoke of the impact that familial equality has on children, noting that discrimination in the context of marriage forces "children [to] suffer the stigma of knowing their families are somehow lesser."[86]

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78. *See infra* Section III.C (outlining the harms that can befall children who are removed from the care of a quasi-parent).

79. Simmons v. Simmons, 486 N.W.2d 788, 789 (Minn. Ct. App. 1992).

80. *Id.* at 789.

81. *Id.* ("[The] biological father has had no contact with him and has surrendered his parental rights.").

82. *Id.* at 789–90.

83. *Id.* at 790–91.

84. *Id.* According to the court, "[b]ecause section 257.022 does not contain any clause specifically repealing, restricting, or abridging a non-parent's common-law visitation rights, we construe the statute to extend and supplement the common-law rule."

85. *Id.* at 792 (noting that "[t]he trial court has broad discretion to determine the child's best interests in the area of visitation").

86. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

2. Same-Sex Couples

As Justice Kennedy noted in his majority opinion in *Obergefell v. Hodges*, "hundreds of thousands of children are presently being raised" by same-sex couples—couples who "provide loving and nurturing homes to their children, whether biological or adopted."[87] For same-sex couples who jointly adopt, parenthood determinations present little difficulty. However, for biological children being raised in same-sex households, the questions become more difficult. After all, two people of the same sex cannot currently conceive a child using only their genetic material.[88] Thus, any child whose biological parent is in a same-sex relationship will, at most, be the biological child of only one of the adults in that family. For that person's spouse or partner—that is, the person who lacks a biological relationship with the child—states have had to grapple with the question of that individual's parental rights. As a result, a number of state cases have emerged that show how courts have dealt with claims by adults in same-sex households who lack biological connections with their children.[89]

One option has been to apply the marital presumption, the name given to the "common-law rule that a child born to a married woman, assuming her husband was neither impotent nor out of the country at the time of conception, is conclusively . . . presumed to be" the husband's child.[90] Although the

87. *Id.*

88. *See* Boucai, *supra* note 35, at 1093; Robertson, *supra* note 36, at 324–25.

89. Currently, the available cases on this subject concern lesbian couples. That is likely attributable to the fact that, given the different roles men and women play in the reproduction cycle, it is much easier for a lesbian couple to have children using assisted reproduction technologies than for a same-sex male couple. *See* NeJaime, *supra* note 32, at 1200 ("With the rise of alternative insemination in the late 1970s and 1980s, the number of lesbian couples starting families skyrocketed."). Same-sex male couples, on the other hand, who desire children with a biological connection to one of the fathers would have to use some version of surrogacy, which is exponentially more expensive, more complicated, and thus more unusual. *See* Robertson, *supra* note 36, at 350 ("[A] surrogate mother is essential for gay male reproduction to occur."); *see also* RICHARD A. POSNER, SEX AND REASON 306 (1992) ("The overall picture is definitely brighter for lesbians, for in addition to the factors already mentioned, it is simple for a lesbian to become pregnant through artificial insemination, an option not open to the male homosexual.").

90. David M. Wagner, *Balancing "Parents Are" and "Parents Do" in the Supreme Court's Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 BYU L. REV. 1175, 1181 n.32.

rule was historically cast in terms of "husband" and "wife," at least one court has adapted the marital presumption to same-sex couples by using the term "spouse." In 2013, in the case of *Gartner v. Iowa Dept. of Public Health*, the Iowa Supreme Court did just that.[91] Melissa and Heather Gartner married in June 2009, just a few months after Iowa legalized same-sex marriage.[92] After Heather became pregnant using artificial insemination, the state Department of Health refused to list Melissa's name on the birth certificate.[93]

Iowa's marital presumption provides that "[i]f the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate."[94] The Department believed this statute to be inapplicable to same-sex couples: "The system for registration of births in Iowa currently recognizes the biological and 'gendered' roles of 'mother' and 'father,' grounded in the biological fact that a child has one biological mother and one biological father."[95]

The Supreme Court of Iowa disagreed with the Department of Health and held that interpreting the marital presumption to apply to opposite-sex but not same-sex couples would violate the equal protection guarantee of the Iowa Constitution.[96] Specifically, the court held that treating same-sex couples differently would amount to discrimination on the basis of either sex or sexual orientation, either of which under the Iowa Constitution would trigger intermediate scrutiny.[97] Accordingly, the court directed the Department of Health to issue a corrected birth certificate that listed both mothers' names.[98]

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91. 830 N.W.2d 335, 341 (Iowa 2013).

92. *Id.* at 341.

93. *Id.* at 341–42 ("The certificate only listed Heather as Mackenzie's parent. The space for the second parent's name was blank.").94.*Id.* at 344 (quoting IOWA CODE § 144.13(2)).

94. *Id.* at 344 (quoting IOWA CODE § 144.13(2)).

95. *Id.* at 342.

96. *Id.* at 354. The court noted that, under the Iowa Constitution, "the equal protection guarantee requires that laws treat all those who are similarly situated *with respect to the purposes of the law* alike." *Id.* at 351 (quoting Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009)).

97. *Id.* at 351–52. Per the court, both same-sex and opposite-sex couples were similarly situated in this regard: "The Gartners are in a legally recognized marriage, just like opposite-sex couples. The official recognition of their child as part of their family provides a basis for identifying and verifying the birth of their child, just as it does for opposite-sex couples." *Id.* at 351.

98. *Id.* at 354.

In so ruling, the court held that the state failed to prove that its interpretation of the marital presumption was substantially related to any important governmental objective: "It is important for our laws to recognize that married lesbian couples who have children enjoy the same benefits and burdens as married opposite-sex couples who have children."[99] The court went so far as to suggest that "the only explanation for not listing the nonbirthing lesbian spouse on the birth certificate is stereotype or prejudice."[100]

However, on the same issue, the Supreme Court of Arkansas reached the opposite conclusion, upholding the Arkansas Department of Health's refusal "to issue birth certificates for minor children of *married* female couples showing the name of the spouse of the mother."[101] The Arkansas statute in question provided as follows: "[I]f the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child."[102] In interpreting the statute, the court first found that its purpose was "to truthfully record the nexus of the biological mother and the biological father to the child."[103] Accordingly, the court ruled that the statute must be strictly construed using the "ordinary and usually accepted meaning" of the statutory terms.[104] Turning to the word "husband," the court noted that *Webster's* dictionary defines the term as "a married man."[105] In contrast to the Supreme Court of Iowa, the Arkansas court did not see any equal protection violation in this gendered reading of the statute. Indeed, the court rejected the very suggestion, stating that same-sex spouses were not similarly situated to those of the opposite sex: "[T]he female spouse of a biological mother . . . does not have the same biological nexus to the child that the biological moth-

99. *Id.* at 353. Specifically, in terms of birth certificates, "married lesbian couples require accurate records of their child's birth, as do their opposite-sex counterparts. The distinction for this purpose between married opposite-sex couples and married lesbian couples does not exist and cannot defeat an equal protection analysis." *Id.* at 351.

100. *Id.* at 353.

101. Smith v. Pavan, 505 S.W.3d 169, 172 (2016) (emphasis added).

102. *Id.* at 175 (quoting ARK. CODE ANN. § 20-18-401(f)(1)).

103. *Id.* at 180.

104. *Id.* at 177.

105. *Id.* at 177–78 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1104 (2002)).

er or the biological father has."[106] Although the U.S. Supreme Court subsequently issued a summary reversal, it did so without even mentioning the constitutional rights of parents or those who have functioned as parents.[107] Instead, the Court seemed to rely on an equal protection argument, limiting its holding to the narrow ground that by making the marital presumption available to married *opposite-sex* couples, Arkansas could not withhold that same benefit from married *same-sex* couples.[108]

For same-sex couples who are unmarried, states have likewise reached divergent opinions regarding the parental status of nonmarried individuals vis-à-vis the biological children of their same-sex partners. In *Elisa B. v. Superior Court*, for instance, the Supreme Court of California extended parental obligations to Elisa, the former partner of a woman who had conceived twins via artificial insemination.[109] Although Elisa had no biological relationship to the children and the two women were never married, the court nonetheless ruled that she was a legal parent under the terms of the state's paternity statute.[110] Specifically, California law provided that "a man is presumed to be the natural father of a child," if "[h]e receives the child into his home and openly holds out the child as his natural child."[111] Despite the fact that the statute was phrased in terms of fathers, another statute provided that, when attempting to establish a mother-child relationship, "the provisions of this part applicable to the father and child relationship apply."[112] In light of that statutory directive, and given the active

106. *Id.* at 181. In support, the court quoted from the Supreme Court's decision in *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001): "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Pavan*, 505 S.W.3d at 181. Thus, the *Pavan* court concluded that "[i]t does not violate equal protection to acknowledge basic biological truths." *Id.*

107. Pavan v. Smith, 137 S. Ct. 2075 (2017).

108. *Id.* at 2078–79 ("The State uses [the marital presumption] to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.").

109. 117 P.3d 660 (Cal. 2005).

110. *Id.* at 662.

111. *Id.* at 667 (quoting CAL. FAM. CODE § 7611(d) (2005)). California subsequently amended the statute to make it gender neutral. *See* 2013 Cal. Legis. Serv. ch. 510 (A.B. 1403) (West).

112. *Id.* at 665 (quoting CAL. FAM. CODE § 7650 (2005)).

role Elisa had played in the twins' early life, the court held that Elisa was a legal parent.[113]

In other states, courts have refused to afford same-sex partners such recognition even when it was the intent of all involved that the individual would serve as the child's parent and even when the person affirmatively performed that role. For instance, the Supreme Court of Wisconsin remanded a case with facts similar to that of *Elisa B.,* noting that for a same-sex partner of a biological parent to receive any parental rights whatsoever, she would have to prove that "she has a *parent-like* relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."[114] In other words, the court seemed to assume that a same-sex partner in that position had no claim to legal parenthood but perhaps could qualify as a quasi-parent.

But therein lies the rub. If quasi-parenthood is premised on an outdated model of family that effectively excludes same-sex partners, there is no recourse for those individuals to protect their relationships with the children they helped parent. This is no small problem. After all, with the Court's ruling in *Obergefell*, more and more children are being raised by married couples who also happen to be of the same gender. However, when it comes to determining the parental rights of the biological parent's same-sex spouse, the states are in such conflict that many children being raised by same-sex married couples will lack the safeguards typically enjoyed by the children of opposite-sex marriages—a result that goes directly against one of the Court's rationales for its decision in *Obergefell*.[115] The best

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113. According to the court:

> Elisa is a presumed mother of the twins . . . because she received the children into her home and openly held them out as her natural children, and that this is not an appropriate action in which to rebut the presumption that Elisa is the twins' parent with proof that she is not the children's biological mother because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children's second parent.

Id. at 670.

114. *See In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

115. Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015) ("Without the recognition, stability, and predictability marriage offers, their children suffer the stigma

solution would be to recognize the two married adults—whatever their sex—as the legal parents of the child. If, however, the states are unwilling to provide statutory recognition or if a couple is unmarried, there needs to be some meaningful protection—beyond "the time-consuming, costly, and invasive process of adopt[ion]"[116]—for the adult who plays the role of quasi-parent.

B. Quasi-Parenthood in the Extended Family Model

In *Moore v. City of East Cleveland,* Justice Brennan recognized that the extended family "provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities."[117] Additionally, Justice Brennan noted that the extended family "remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society."[118] Justice Brennan's observations, although written in 1977, remain true today.

Indeed, although most Americans tend to define family using the nuclear family model, a large percentage of American families do not conform to that standard.[119] Instead, under the

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of knowing their families are somehow lesser."); *see also* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017) ("[A]s courts and legislatures approach the parental claims of women and same-sex couples within existing frameworks organized around marital and biological relationships, they reproduce some of the very gender- and sexuality-based asymmetries embedded in those frameworks.").

116. NeJaime*, supra* note 115, at 2264. Not to mention the fact that requiring adoption by same-sex spouses but not opposite-sex spouses is discriminatory and likely constitutionally infirm. *See* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 267 (2009) ("[R]ecognition of a child's family should not depend upon the family's access to court proceedings that require a lawyer and take two precious and limited commodities—time and money.").

117. 431 U.S. 494, 508 (1977).

118. *Id.*

119. Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 NEV. L.J. 629, 640 (2011) ("[W]ith the decreasing prevalence of the traditional nuclear family structure, extended family households have experienced a recent resurgence in the United States."); Jerry Simon Chasen & Elizabeth F. Schwartz, *Estate and Gift Tax Planning for Nontraditional Families*,

extended family model, "family" encompasses "kinships" that include grandparents, aunts, uncles, cousins, and other relatives who, although related by blood or marriage, typically do not reside in the home with the nuclear family.[120] Additionally, the extended family model also includes "fictive kinships," defined as "kinshiplike relationship[s] between persons not related by blood or marriage, who also have some reciprocal social or economic relationship."[121] As one commentator points out: "While many cultures place higher priority on genetically based kinships in terms of members' roles and obligations to such kin groups, other cultures, especially in collectivistic societies, regard fictive kinships as equally important in the daily lives of their members."[122]

Kinship relationships can be quite beneficial because they "provide a structure of interconnectedness and obligation sufficiently powerful, resilient, and flexible to insure support and shelter for all members of the community in times of need and to serve as a buffer between individuals and the impersonal state."[123] One of the more specific benefits of the extended family model is the greater ability of family units to care for chil-

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PROB. & PROP., Jan./Feb. 2001, at 6, 8 ("Extended families are the most prevalent type of nontraditional household among midlife and older persons.").

120. C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431, 433–34 (2004) ("Kinship is defined as a system of rights and responsibilities between particular categories of people, and refers not only to biological or legal connections between people but also to particular positions in a network of relationships." (internal quotes and citations omitted)).

121. Signithia Fordham & John U. Ogbu, *Black Students' School Success: Coping with the "Burden of 'Acting White,'" in* MINORITY STATUS, OPPOSITIONAL CULTURE, & SCHOOL 593, 601 (John U. Ogbu ed., 2008); *see also* Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 591–92 ("'Fictive kinship' is the term anthropologists use to describe a binding relationship between individuals similar to that of close blood kin but not based on birth, marriage, or descent.").

122. Kwok Leung & Soon Ang, *Culture, Organizations, and Institutions: An Integrative Review, in* CAMBRIDGE HANDBOOK OF CULTURE, ORGANIZATIONS, AND WORK 23, 32 (Rabi S. Bhagat & Richard M. Steers eds., 2011).

123. Woodhouse, *supra* note 121, at 594; *see also* Melba J.T. Vasquez, Troxel v. Granville*: Impact on Ethnic Minority Families*, 41 FAM. CT. REV. 54, 56–57 (2003) ("[T]he inclusiveness of the extended family network provides support in many ways and on various levels, including child rearing, lending money in times of need, and assistance in negotiating through the labyrinth of larger systems that newly arrived family members will encounter, whether they are from another state or another country.").

dren, often through the practice of informal adoption.[124] When it comes to marginalized communities, where rates of poverty are higher and education lower, the practice of informal adoption is quite common.[125] Thus, given the degree to which American society frequently marginalizes racial and ethnic minorities, it is not surprising to learn that many children in those communities are being raised by adults who are not their legal parents. The practice of "kinship care" in American society is most pervasive within African American and Hispanic communities.[126] Thus, to better understand the prevalence of quasi-parenthood within the United States as well as the societal pressures underlying quasi-parenthood in the extended family model, a brief discussion of informal adoption within both communities is warranted.[127]

1. Extended Family in African American Communities

Noted historian and professor Tera Hunter recently observed that "[w]hite families are judged as the standard

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124. Susan L. Waysdorf, *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers,* 3 TEX. J. WOMEN & L. 145, 213 n.248 (1994) (quoting *Authorization for Medical Consent for Children in the Care of Adults Other than Parents, 1993: Hearings on Bill 10-15 Before the Comm. on Human Servs.* 2-4 (D.C. 1993) (statement of Annie J. Goodson, Exec. Assistant to the Comm'r on Soc. Sers., Dep't of Human Servs.)) ("From the earliest recorded history, parents have relied on extended families to care for their children during times of need or stress."); *see also infra* notes 144–164, 196–212 and accompanying text.

125. Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy,* 70 CAL. L. REV. 204, 246 n.126 (1982) ("[E]xtended families of varying types are more prevalent among racial or ethnic minority groups and among the poor."); Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century,* 66 S. CAL. L. REV. 1993, 2023 (1993) ("[M]ost ethnic groups place greater reliance on extended family."); Issac J.K. Adams, *Growing Pains: The Scope of Substantive Due Process Rights of Parents of Adult Children,* 57 VAND. L. REV. 1883, 1927 (2004) (noting "the prevalence of extended family households among racial and ethnic minorities").

126. *See, e.g.*, A. Mechele Dickerson, *Race Matters in Bankruptcy,* 61 WASH. & LEE L. REV. 1725, 1746 (2004) ("The rearing or informal adoption of children by members of their extended family for both short and long periods of time is more likely among blacks and Hispanics than among other racial groups.").

127. Although significantly supplemented and updated, portions of the research compiled in the following two Sections first appeared in a much earlier article of mine dealing with the subject of intestate succession. *See* Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 230 (2008).

against which black families are assessed as dysfunctional in comparisons that refuse to account for the conditions that white supremacy created and commanded in order to sustain itself and prosper for centuries."[128] Despite the negative stereotypes that exist, African American families are not at all dysfunctional but have instead been described as "healthy productive households"[129]—they simply "do not conform to prevailing notions of the nuclear family."[130] As noted by Professor Shirley A. Hill, "the social construction of the ideal family as a two-parent nuclear unit with a breadwinner father and a homemaker mother . . . was never a tradition among Black families."[131] Instead, for the African American community, "family and household are not the same thing,"[132] with "family" encompassing not only the members of a particular household but also "patterns of sharing and exchange of favors across networks of siblings, aunts, uncles, and other family members."[133] Although statistics on this point are somewhat difficult to come by, studies have shown that anywhere from 25 to 44 percent of African Americans live in an extended family,[134] compared with only 11 percent of white Americans who live in an extended family.[135]

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128. TERA W. HUNTER, BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY 300 (2017).

129. Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2055 (1992) (quoting BELL HOOKS, YEARNING: RACE, GENDER, AND CULTURAL POLITICS 77 (1990)).

130. *Id.*

131. Shirley A. Hill, *Class, Race, and Gender Dimensions of Child Rearing in African American Families*, 31 J. BLACK STUD. 494, 495–96 (2001).

132. Niara Sudarkasa, *African American Families and Family Values*, *in* BLACK FAMILIES 9, 20 (Harriette Pipes McAdoo ed., 3d ed. 1997).

133. FAYE Z. BELGRAVE, AFRICAN AMERICAN GIRLS: REFRAMING PERCEPTIONS AND CHANGING EXPERIENCES 34 (2009) ("Extended family members may live within or outside the home and include grandparents, cousins, aunts, and uncles."); Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing,* 95 W. VA. L. REV. 275, 324 (1992–93).

134. *See, e.g.*, Darlene B. Hannah, *The Black Extended Family: An Appraisal of its Past, Present, and Future Statuses*, *in* THE BLACK FAMILY: PAST, PRESENT, AND FUTURE 33, 35 (Lee N. June ed., 1991) (estimating "the percentage of Black extended families" to be between 25 and 33 percent).

135. Cynthia G. Hawkins-León, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis,* 36 BRANDEIS J. FAM. L. 201, 210–11 (1998) ("[F]orty-four percent of African Americans live in an extended family situation, whereas only eleven percent of whites reflect a similar family structure."). Not surprisingly, one finds similar familial structures in West Africa, the location from which most enslaved Americans were taken. Sudarkasa, *supra* note

Furthermore, "[b]lood ties have not held the preeminent position in Black families that they have held in white families."[136] African Americans are also less likely to see marriage as the necessary step to family formation. One study found that only 32 percent of blacks over the age of eighteen were married, contrasted with 56 percent of whites.[137] Thus, within the African American community, the concept of family frequently transcends both marriage and bloodline. And these extended-family structures can take a number of forms:

> One is the three-generation household, a structure that allows for pooling financial and human resources for the care of children and the elderly, as well as for the emotional support of parents. Another is that of family members choosing to live in separate households but close proximity to each other, so that daily interaction is not only possible but likely. And a third structure quite common in African American communities is that of fictive kin. Here, families establish familial relationships with people who are not related by blood and who may or may not live with the nuclear family. Friends or neighbors are likely candidates for fictive kin relationships and may be given kinship titles, such as aunt or uncle.[138]

132, at 10–11. Indeed, "[t]he African immediate family, consisting of a father, his wives, and their children, is but a part of a larger unit. This immediate family is generally recognized by Africanists as belonging to a local relationship group termed the 'extended family.'" ROBERT B. HILL ET AL., RESEARCH ON THE AFRICAN AMERICAN FAMILY: A HOLISTIC PERSPECTIVE 105 (1993) (quoting MELVILLE J. HERSKOVITS, THE MYTH OF THE NEGRO PAST 182 (1958)). Additionally, the costs of child rearing in the extended family model of West Africa are "rarely borne exclusively by biological parents; rather, they are shared by many people through the extended family and other social networks." Rebecca L. Hegar & Maria Scannapieco, *Grandma's Babies: The Problem of Welfare Eligibility for Children Raised by Relatives*, 27 J. SOC. & SOC. WELFARE 153, 155–56 (2000) (quoting Caroline H. Bledsoe et al., *The Effect of Child Fostering on Feeding Practices and Access to Health Services in Rural Sierra Leone*, 27 SOC. SCI. & MED. 627, 627 (1988)).

136. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 269 (1995).

137. HUNTER, *supra* note 128, at 309; *see also* Trina Jones, *Single and Childfree! Reassessing Parental and Marital Status Discrimination*, 46 ARIZ. ST. L.J. 1253, 1295 (2014) ("African Americans are less likely to marry than any other race.").

138. Connie M. Kane, *African American Family Dynamics as Perceived by Family Members*, 30 J. BLACK STUD. 691, 692–93 (2000) (citations omitted).

Regardless of what precise form it might take, the extended family model within the African American community has served a consistent purpose: survival or, more specifically, "the survival of the child for the survival of the community."[139] One commentator has gone so far as to recognize the extended family model as "the institution most responsible for the survival of African people in the United States."[140] The extended family fits into and is the result of a community where "interdependence—rather than individualism—is highly valued."[141] In other words, the extended family model operates under a "collectivistic philosophy"[142] in which the individual members focus not on individual needs, but on the needs of the "family and significant other members of the 'family tribe.'"[143] Two specific obstacles have made the extended family model almost indispensable to African Americans: slavery and this country's history of discriminatory child-welfare practices.

The extended family model was crucial to surviving the devastation that slavery inflicted upon the African American community. As Professor Barbara Bennett Woodhouse described, "strong extended family and kin relationships were a major source of strength that helped early African-American families survive the dislocation and brutality of slavery."[144] Slavery was particularly destructive for children because they were constantly at risk of being separated from their parents.[145]

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139. Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy,* 68 TEMP. L. REV. 1649, 1660 (1995).

140. Sudarkasa, *supra* note 132, at 12; *see also* ROBERT B. HILL, NAT'L URBAN LEAGUE RESEARCH DEP'T, INFORMAL ADOPTION AMONG BLACK FAMILIES 29 (1977) ("The institution primarily responsible for the survival and advancement of black people from slavery to present times has been the extended family."); Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following* Brown v. Board of Education, 47 DUKE L.J. 399, 407 (1997) (noting how "the development of black families as extended kinship networks . . . proved useful survival mechanisms for blacks facing the poverty and discrimination inherent in post-slavery America").

141. Zachary W. Best, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L.J. 1671, 1695 (2011).

142. NANCY BOYD-FRANKLIN, BLACK FAMILIES IN THERAPY: UNDERSTANDING THE AFRICAN AMERICAN EXPERIENCE 6 (2d ed. 2003).

143. FAYE Z. BELGRAVE & KEVIN W. ALLISON, AFRICAN AMERICAN PSYCHOLOGY: FROM AFRICA TO AMERICA 36 (2005).

144. Woodhouse, *supra* note 121, at 592–93.

145. Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment,* 4 YALE J.L. & FEMINISM 207, 220 (1992) (noting how slavery "included the constant threat and actual separation of

Because of family separations, the extended family model, with its "flexible boundaries where outside members can be subsumed into the formally defined family,"[146] became particularly crucial. As one commentator describes:

> When young children were sold away from their mothers or fathers, the family acquiring them usually softened the trauma of separation, much as we today adopt orphans or take in foster children. A child in need of parenting attracts foster parents. Slave families were generally available to take in a child. On a plantation, there were several nuclear families into which the child might be adopted.[147]

This practice, known as informal adoption, "permitted thousands of black children to withstand the ordeals of slavery—after their parents had often been sold as chattel."[148]

Of course, even after slavery was abolished, African American families continued to face challenges that would further underscore the need for extended-family networks and informal adoptions. Specifically, African American families were generally denied access to early child-welfare programs.[149] As Dorothy Roberts has pointed out, "for a century black families had

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mothers from children and other family members from one another"); David M. Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to* Stenberg v. Carhart, 24 HARV. J.L. & PUB. POL'Y 815, 831 (2001) (noting the "heart-rending stories of spouses separated and children sold away from their parents").

146. G. Susan Mosley-Howard & Cheryl Burgan Evans, *Relationships and Contemporary Experiences of the African American Family: An Ethnographic Case Study*, 30 J. BLACK STUD. 428, 431 (2000).

147. JOHN DEWAR GLEISSNER, PRISON AND SLAVERY: A SURPRISING COMPARISON 181 (2010).

148. HILL, *supra* note 140, at 22.

149. In fact, at the 1930 White House Conference on Child Health and Protection of Dependent and Neglected Children, Dr. Ira De A. Reid presented data outlining the discriminatory treatment that African American families were receiving in foster and child care. The data showed that 1) African American families were at best underrepresented and, at worst, completely excluded from the Mother's Aid program (a precursor to AFDC and TANF); 2) despite the higher rates of illegitimacy that existed among African Americans, facilities that were designed to care for illegitimate children and their unwed mothers were almost exclusively for whites; and 3) most health-care services existed mainly to serve whites, despite the high level of infant mortality that existed among African Americans at the time. ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 81–85 (1972).

no recourse to the formal child welfare system. Blacks were virtually excluded from openly segregated child welfare services until the end of World War II."[150] Furthermore, during segregation, African American children were excluded from most adoption agencies because "Jim Crow laws prevented black children from being cared for by the institutions of white society that tried to place orphans in adoptive homes."[151] Of course, "[e]ven after such discriminatory laws were dismantled, black children were still denied access to most formal child welfare institutions because they were undesirable to white adoptive parents."[152] In response, the extended family and the practice of informal adoption "came to the rescue of thousands of related and non-related African American children who had no means of support."[153]

Even today, despite the greater availability of nondiscriminatory child welfare services, the extended family model continues to help the African American community withstand the "poverty, racism, and socioeconomic and psychological stressors"[154] that continue to prey on African American families. And just as it did in the past, the practice of informal adoption persists. Statistics show that in 1996, 23 percent of African American children lived in extended families, compared with only 10 percent of white children.[155] Similarly, recent data from the 2010 census reveals that "[w]hile 7 percent of White, non-Hispanic children lived with a grandparent, 12 percent of Hispanic children and 14 percent of Black and Asian children lived with a grandparent."[156] Such statistics are hardly surprising given that, as Professor Solangel Maldonado has pointed out, while "the majority of White grandparents make a distinction between grandparental and parental roles, [t]his distinction exists less clearly in African-American and Latino

150. Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1622 (2001).

151. Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL'Y 303, 305 (2006).

152. *Id.*

153. Ruth G. McRoy, *African American Adoptions, in* CHILD WELFARE REVISITED: AN AFRICENTRIC PERSPECTIVE 256, 260 (Joyce E. Everett et al. eds., 2004).

154. *Id.*

155. Jacqueline Marie Smith, *The Demography of African American Families and Children at the End of the Twentieth Century*, *in* CHILD WELFARE REVISITED, *supra* note 153, at 15, 23.

156. RENEE R. ELLIS & TAVIA SIMMONS, U.S. CENSUS BUREAU, CORESIDENT GRANDPARENTS AND THEIR GRANDCHILDREN 8 (2014).

families."[157] Additionally, when compared with white and Hispanic children, an African American child is more likely to live with neither parent. A 2011 report from the U.S. Census Bureau reveals that 8.7 percent of African American children live with neither parent, compared with 3.1 percent and 4 percent for white and Hispanic children, respectively.[158]

Such statistics are illuminating because children who do not live with either parent have a much greater chance of being informally adopted. In fact, Robert B. Hill has noted that 80 percent of African American children not living with either parent are informally adopted.[159] For those children born to unmarried parents, one study found that 90 percent of African American children were raised by the extended family, in contrast with only 7 percent of white children, who were more likely to be put up for formal adoption.[160] The number of African American children who lived with and were informally adopted by relatives rose from 1.3 to 1.4 million between 1970 and 1979.[161] By 1990, the number had reached 1.6 million.[162] In total, it has been estimated that nearly 15 percent of African American children are informally adopted.[163] Although more recent statistics on the practice are difficult to locate, even the U.S. Census Bureau acknowledged, as late as 2014, that "informal adoptions may also be more common among Hispanics and Blacks than other race and ethnic groups."[164]

157. Maldonado, *supra* note 24, at 901.

158. ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN: 2009 HOUSEHOLD ECONOMIC STUDIES 4–5 (2011).

159. Robert B. Hill, *Institutional Racism in Child Welfare*, *in* CHILD WELFARE REVISITED, *supra* note 153, at 57, 69.

160. HILL, *supra* note 140, at 23.

161. HILL, *supra* note 135, at 32.

162. ROBERT B. HILL, THE STRENGTHS OF AFRICAN AMERICAN FAMILIES: TWENTY-FIVE YEARS LATER 126 (1999); *see also* JANET DEWART, THE STATE OF BLACK AMERICA 55 (1989) ("[B]etween 1970 and 1987, the proportion of black children in informally adoptive families soared from 13 percent to 17 percent.").

163. ANDREW BILLINGSLEY, CLIMBING JACOB'S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES 30 (1992).

164. ROSE M. KREIDER & DAPHNE A. LOFQUIST, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2010 POPULATION CHARACTERISTICS 2 (2014).

2. Extended Family in Hispanic Communities

Within the United States, the Hispanic population is not only the largest minority group,[165] it is also the nation's second fastest growing minority community.[166] In fact, between the 2000 and 2010 censuses, the Hispanic population in the United States increased by 43 percent, compared with a 3 percent increase in the African American population and a 5.7 percent increase in the white population.[167] Overall, it is estimated that there are 50.5 million Hispanics living in the United States today.[168] The term "Hispanic" is a blanket term that encompasses individuals from various regions and cultures,[169] though there are some shared qualities among these distinct communities.[170] Chief among them is the "elevation of family over individual needs."[171]

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165. *See* KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 CENSUS BRIEFS 4 (2011) (reporting that 16.3 percent of the population identified as "Hispanic and Latino," compared to 12.6 percent for "Black or African American").

166. *See* Gustavo López et al., *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RESEARCH CTR. (Sept. 8, 2017), http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/ [https://perma.cc/GMH9-SJY3] ("The U.S. Asian population grew 72% between 2000 and 2015 (from 11.9 million to 20.4 million), the fastest growth rate of any major racial or ethnic group. By comparison, the population of the second-fastest growing group, Hispanics, increased 60% during the same period.").

167. *See* HUMES, *supra* note 165, at 3–4.

168. *Id.*

169. *See* Bron B. Ingoldsby, *Poverty and Patriarchy in Latin American, in* FAMILIES IN MULTICULTURAL PERSPECTIVE 335, 335 (Bron B. Ingoldsby & Suzanna Smith eds., 1995) ("It is not possible to make accurate generalizations about an area as large and diverse as Latin America."); *see also* SHARON R. ENNIS ET AL., U.S. CENSUS BUREAU, THE HISPANIC POPULATION: 2010 CENSUS BRIEFS 5 fig.2 (2011) (reporting that, in the 2010 Census, 63 percent of the nation's Hispanic population identified as Mexican, 9.2 percent identified as Puerto Rican, 3.5 percent as Cuban, and the balance as "Other Hispanic," which includes Spanish, Dominican, and Central and South American).

170. The term "Hispanic" is generally used to refer to people of Spanish descent, while the term "Latino/a/x" is generally used to refer to people of Latin American descent. *See generally* Paul Taylor et al., *When Labels Don't Fit: Hispanics and Their Views of Identity*, PEW RESEARCH CENTER: HISPANIC TRENDS (Apr. 4, 2012), https://www.pewhispanic.org/2012/04/04/when-labels-don't-fit-hispanics-and-their-views-of-identity/ [https://perma.cc/B7XK-P9RD]. This Article uses the term Hispanic inclusively to refer to people of Spanish and Latin American descent.

171. As sociologist Alfredo Mirandé notes, "[j]ust as there is no one uniform Anglo-American family, so there is no one [Hispanic] family but a number of family types that vary according to region, recentness of migration to the United States, education, social class, age, and urban-rural locale." ALFREDO MIRANDÉ,

Not surprisingly, "the multigenerational, informal extended family"[172] plays an important role within the Hispanic community. Such family structures are frequently comprised of not only the traditional nuclear family but also "highly integrated extended kinship systems."[173] These include both primary kin, such as parents and siblings, and secondary kin, such as aunts, uncles, cousins, grandparents, and even godparents (*compadrazgos*).[174] In fact, within the Hispanic community, "the presence of several generations within the same household is an accepted norm."[175] Specifically, studies have revealed that whereas only 13 percent of whites live in intergenerational homes, for Hispanics the rate is 22 percent.[176] Regardless, within the Hispanic community, "[m]embers of the different layers of this extended family do not have to reside in the same household, or neighborhood for that matter, to exercise the reciprocal and mutual help functions which characterize it."[177] To understand the degree to which the Hispanic community treats family and household as two distinct things, one need only look to the Spanish language:

THE CHICANO EXPERIENCE: AN ALTERNATIVE PERSPECTIVE 153 (1985). Nonetheless, there does exist a "strong, persistent familistic orientation," or "familism," within the Hispanic community. *Id.* ("Probably the most significant characteristic of the Chicano family is its strong emphasis on familism."); *see also* Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811, 815 (1999) (noting that many of the "cultural commonalities" within the Hispanic community "converge around the importance of family").

172. HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION: CONTEMPORARY ISSUES 327 (1995).

173. Oscar Ramírez & Carlos H. Árce, *The Contemporary Chicano Family: An Empirically Based Review, in* EXPLORATIONS IN CHICANO PSYCHOLOGY 3, 15 (Augustine Barón, Jr. ed., 1981).

174. *Id.* at 16; *see also* Woodhouse, *supra* note 121, at 591–92 (noting that, when it comes to fictive kinship, "the religious and social institution of compadrazgo, or godparenthood, plays a crucial role"). In addition, it is not uncommon in the Hispanic community for friends and neighbors to be "symbolically incorporated" into the family. MIRANDÉ, *supra* note 171, at 155.

175. José Szapocznik et al., *Shenandoah: A School-Based Intervention, in* A HISPANIC-LATINO APPROACH TO SUBSTANCE ABUSE PREVENTION 171, 179 (José Szapocznik ed., 1998).

176. *See* KATHERINE VAN WORMER, HUMAN BEHAVIOR AND THE SOCIAL ENVIRONMENT: MICRO LEVEL INDIVIDUALS AND FAMILIES 273 (2010).

177. Marta Sotomayor, *The Hispanic Elderly and the Intergenerational Family*, *in* INTERGENERATIONAL PROGRAMS: IMPERATIVES, STRATEGIES, IMPACTS, TRENDS 55, 59 (Sally Newman & Steven W. Brummel eds., 1989).

> In Spanish, the denotation of the term *familia* is generic. *Familia* can embrace all extended family kin and single or various combinations of individual households. Thus, when speaking Spanish, one is usually careful to make a distinction between a reference to extended family members or households at large (*familia* always) and a reference to members of the immediate household (*la casa*—"house" or "home"), which is ordinarily a nuclear-family centered dwelling.[178]

As a result, children in Hispanic families typically develop "close bonds not only with members of the immediate family but with grandparents, aunts and uncles, cousins, and family friends."[179]

Just as the extended family has contributed to the survival of the African American community,[180] the familial bonds within the Hispanic community have helped promote "economic assistance, encouragement, and support" among its members.[181] It has done so by "emphasiz[ing] obligations of material and emotional support to family members. In return, the individual receives family help and support to solve problems."[182] In that respect, the extended family within the Hispanic community has been described as "a problem-solving unit," a quality that helps distinguish it from the traditional nuclear family model.[183] As one commentator put it: "In many ways, the Hispanic family helps and supports its members to a degree far beyond that found in individualistically oriented Anglo families."[184]

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178. Jaime Sena-Rivera, *Extended Kinship in the United States: Competing Models and the Case of La Familia Chicana,* 41 J. MARRIAGE & FAM. 121, 123 (1979); *see also* MIRANDÉ, *supra* note 171, at 157 ("[F]or Chicanos, the distinction between casa (household) and familia (relatives) is significant.").

179. MIRANDÉ, *supra* note 171, at 155.

180. *See supra* notes 139–143 and accompanying text.

181. Hilary N. Weaver, *Social Work Practice with Latinos, in* CULTURAL DIVERSITY AND SOCIAL WORK PRACTICE 74, 90 (Bruce A. Thyer et al. eds., 2010).

182. James Allen et al., *Well-Being and Health, in* COUNSELING ACROSS CULTURES 435, 448 (Paul B. Pedersen et al. eds., 7th ed. 2015).

183. Shirley L. Patterson & Flavio Francisco Marsiglia, *"Mi Casa Es Su Casa": Beginning Exploration of Mexican Americans' Natural Helping*, 81 FAM. SOC'Y 22, 24 (2000); *see also* Rosina M. Becerra, *The Mexican-American Family, in* ETHNIC FAMILIES IN AMERICA: PATTERNS AND VARIATIONS 153, 161 (Charles H. Mindel et al. eds., 4th ed. 1998) ("The family is a major support system, a unit to which the individual may turn for help when in stress or in other types of need.").

184. Ingoldsby, *supra* note 169, at 337.

More specifically, just as the extended family model made it easier for African Americans to weather the challenges of slavery and discriminatory child-welfare policies, so too has it enabled the Hispanic community to combat the unique difficulties it has faced in this country. First, the extended family has helped Hispanic deal with the challenges of poverty. Although poverty exists throughout the United States, "[t]he Latino family experiences more severe financial burdens than the white American family."[185] For instance, as of 2014, the poverty rate for white Americans was 10.1 percent but was 23.6 percent for Hispanic.[186] Furthermore, families headed by single mothers constitute the majority of the poor in the United States.[187] And in 2009, for instance, 19 percent of white children lived in homes headed by a single mother, whereas the percentages for Hispanic and African American children jumped to 26 percent and 50 percent, respectively.[188] For all these reasons, some commentators have pointed to familism within the Hispanic community as a response to "historical conditions of economic deprivation."[189] After all, the extended family allows for "the potential for an exchange of services among poor people whose income did not provide the basis for family subsistence."[190]

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185. Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 HARV. L. REV. 1319, 1323 (1992).

186. *See* CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED SATES: CURRENT POPULATION REPORTS 12–14 (2015). Recently, this trend may have even worsened. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 125 (2016) ("Between 2007 and 2010, the average white family experienced an 11 percent reduction in wealth [whereas the] average Hispanic family lost 44 percent.").

187. *See* Akari Atoyama-Little, *Taxing Single Mothers: A Critical Look at the Tax Code,* 88 N.Y.U. L. REV. 2146, 2152 (2013) ("Poverty is pervasive among single-mother households. In 2011, 40% of such households lived below the national poverty line." (citations omitted)); Sally F. Goldfarb, *Who Pays for the "Boomerang Generation"?: A Legal Perspective on Financial Support for Young Adults,* 37 HARV. J. L. & GENDER 45, 84 (2014) ("[S]ingle-mother families have a higher poverty rate than any other major demographic group.").

188. KREIDER & ELLIS, *supra* note 158, at 4–5, tbls.1 & 2.

189. Maxine Baca Zinn, *Familism Among Chicanos: A Theoretical Review*, 10 HUMBOLDT J. SOC. REL. 224, 231 (1982); *see also* Esme Fuller-Thomson & Meredith Minkler, *Central American Grandparents Raising Grandchildren,* 29 HISP. J. BEHAV. SCI. 5, 6 (2007) (defining familism as a value system in which "all members strongly identify with their respective family units and feel a deep sense of family loyalty").

190. Bonnie Thornton Dill, *Fictive Kin, Paper Sons, and Compadrazgo: Women of Color and the Struggle for Family Survival*, *in* WOMEN OF COLOR IN U.S. SOCIETY 149, 164 (Maxine Baca Zinn & Bonnie Thornton Dill eds., 1994).

Second, Hispanic families are less likely than other ethnicities to avail themselves of governmental resources. This finding seemingly stems from the fact that, "[i]n times of stress or when problems arise, [Hispanics] typically [turn] to the family for help rather than to outside agencies."[191] To explain this underutilization of formal resources, scholars have offered three rationales: lack of awareness that these benefits even exist,[192] the inevitable difficulties that arise when communicating with governmental employees,[193] and the general distrust many Hispanics have for governmental agencies.[194] Regardless of the reason, Hispanics within the United States simply rely less on formal resources like governmental benefits and more on informal resources like the extended family. Specifically, studies show that members of the extended family can typically be counted on to provide services like "labor, . . . sickbed care, personal advice with problems, and transportation."[195]

Even in the area of childcare, the extended family tends to provide the majority of support. In fact, a tenet in Hispanic culture is that children are primarily cared for by the family.[196] As one commentator describes: "Because of family values, mothers are expected to stay home and raise children, so young Latino children are less likely to be in early care and education set-

191. MIRANDÉ, *supra* note 171, at 151–52.

192. Joan W. Moore, *Mexican Americans and Cities: A Study in Migration and the Use of Formal Resources*, 5 INT'L MIGRATION REV. 292, 295 (1971).

193. *Id.* at 294–95 (referring to this as "culture conflict"); *see also* Luz M. López et al., *Group Work with Immigrants and Refugees*, *in* GROUP WORK WITH POPULATIONS AT RISK 201, 209 (Geoffrey Greif & Carolyn Knight eds., 4th ed. 2016) (noting the demand among the Hispanic community for "culturally sensitive and bilingual social workers in all 50 states who are proficient in culturally specific group interventions").

194. Erin Lovejoy, *Taking Advantage of Laws, Not People: Curbing Language Discrimination Against Texas Consumers*, 69 BAYLOR L. REV. 437, 460 (2017) (noting "Hispanics' distrust of government-sponsored activities"); Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context that Matters*, 82 WASH. L. REV. 897, 965 n.91 (2007) (noting "Latino distrust of government").

195. M. Jean Gilbert, *Extended Family Integration Among Second-Generation Mexican Americans*, *in* FAMILY AND MENTAL HEALTH IN THE MEXICAN AMERICAN COMMUNITY 25, 40 (J. Manuel Casas & Susan E. Keefe eds., 1978).

196. *See* Maldonado, *supra* note 24, at 907 ("[A]lthough most parents needing full-time childcare prefer a grandparent over any other in-home caretaker, this is especially true in African-American and Latino families where grandmothers who are homemakers tend to care for their grandchildren from infancy until school age.").

tings. When this is not possible, extended family frequently takes over the care of young children."[197] In some instances, this reliance on the extended family goes beyond daily childcare to temporary child placement and informal adoption. In terms of temporary child placement, Michael Benjamin notes that "in times of crisis, family boundaries are sufficiently flexible and the norms of mutual support (*confianza en confianza*) sufficiently strong to sanction child lending."[198] This process of child lending is far from unusual, having instead been referred to by experts as both "common within families of color"[199] and "the *easy and frequent* transferring of excess children from one nuclear family to another, within a structure of blood and ritual kin."[200]

When a child is in need of a permanent placement in a new home within the Hispanic community, there exists a strong cultural aversion to formal adoption.[201] Interestingly, one study found that when compared to African Americans and whites, Hispanic women are much less likely to formally adopt a child.[202] This preference has been attributed to a number of obstacles faced by Hispanics, including "lack of information, financial resources, and bilingual workers,"[203] longer wait times for a child,[204] and even the degree to which adoption might

197. PENNY DEINER, INCLUSIVE EARLY CHILDHOOD EDUCATION: DEVELOPMENT, RESOURCES, AND PRACTICE 32 (Mark Kerr et al. eds., 6th ed. 2012).

198. MICHAEL BENJAMIN, CULTURAL DIVERSITY, EDUCATIONAL EQUITY AND THE TRANSFORMATION OF HIGHER EDUCATION 56–57 (1996).

199. MICHAEL REISCH & CHARLES D. GARVIN, SOCIAL WORK AND SOCIAL JUSTICE: CONCEPTS, CHALLENGES, AND STRATEGIES 159 (2016).

200. J. Mayone Stycos, *Family and Fertility in Puerto Rico*, 17 AM. SOC. REV. 572, 577 (1952) (emphasis added). Of particular importance in this area is the godparent, or *compadrazgo*, an example of a fictive kinship in which there exists "a core relational commitment between the child and sponsor as well as between the sponsor and the child's parents." Woodhouse, *supra* note 121, at 592. The *compadrazgo* is charged with taking care "of the physical and spiritual needs of the child in the event that the parents could not perform these essential duties." NORMA WILLIAMS, THE MEXICAN AMERICAN FAMILY: TRADITION AND CHANGE 26–27 (1990).

201. *See* Maria Suarez Hamm, NAT'L COUNCIL FOR ADOPTION, *Latino Adoption Issues*, *in* ADOPTION FACTBOOK III, at 257–58 (Connaught Marshner ed., 1999) (noting the cultural bias against formal adoption).

202. Kathy S. Stolley, *Statistics on Adoption in the United States*, 3 FUTURE CHILD. 26, 37–38 (1993).

203. Robert S. Bausch & Richard T. Serpe, *Recruiting Mexican American Adoptive Parents*, 78 CHILD WELFARE 693, 706 (1999).

204. *Id.* at 698 (noting that some agency criteria have the effect of screening out minority families).

threaten "the masculinity of Latino males."[205] Most notably, there is again the strong sense of familism that exists in the Hispanic communities, part of which includes the practice of "stepping in when close relatives are not able to raise their child."[206] In fact, in a survey of Hispanic couples who chose not to adopt, over 50 percent indicated that the belief that the family should care for a child in need was either "very" or "somewhat important" to their ultimate decision to forgo adoption.[207]

In light of these attitudes and predispositions away from formal adoption, rates of informal adoption among the Hispanic community are relatively high.[208] Even the U.S. Census Bureau has noted that informal adoptions are higher in African American and Hispanic communities.[209] To better understand how informal adoption operates in practice, consider this description by J. Mayone Stycos, who studied the practice in Puerto Rico:

> At the death of the father or mother of a family, it is quite usual in rural areas for the members to be dispersed to kin or ritual kin, but such a family crisis is hardly needed for the adoption of children. For example, a very young child may be sent to live with a relative or friend who is better off economically, or to live with grandparents who may be lonely. The latter will informally adopt the child, feed and clothe it, and in return may expect it to assist in the housework.[210]

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205. *Id.* at 706. In essence, the fear is that adoption could be taken to mean either that the natural father is incapable of providing for the child or that the adopting father is infertile, two impressions that could undermine a male's machismo. BENJAMIN, *supra* note 198, at 58; *see also* Judith L. Gibbons et al., *Gender Attitudes Mediate Gender Differences in Attitudes Toward Adoption in Guatemala,* 54 SEX ROLES 139, 142 (2006) ("[T]hose who hold machismo beliefs have more negative beliefs about adoption.").

206. J.D. Cooley, *Baby Girl's Fate:* Adoptive Couple v. Baby Girl—*Placing a Child's Chosen Parental Path in the Hands of the United States Supreme Court*, 8 S.J. POL'Y & JUST. L.J. 99, 131 (2014).

207. Bausch & Serpe, *supra* note 203, at 707 tbl.3.

208. *Id.* at 701 (noting the "cultural preference for informal rather than formal adoption").

209. ROSE M. KREIDER, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: CENSUS 2000 SPECIAL REPORT 3 (2003) ("Informal adoptions are also more common among Blacks and Hispanics.").

210. Stycos, *supra* note 200, at 578.

Stycos further noted that these informal adoptions can last "from months to life."[211] When it comes to Hispanic children who have been informally adopted, Professor Melba Sánchez-Ayéndez notes that they "are generally treated by their adoptive parents as though they were their own and that their status within the household is like that of the other children of the parents," and that, even when no legal adoption was involved, these children nonetheless "know that the family and home of the adoptive parents is their own."[212]

In sum, although the Hispanic and African American communities are by no means the only communities to use the extended family model or informal adoption, these practices in both communities show that many families in the United States simply do not conform to the traditional nuclear family model. Further, the extended family model is not the result of some arbitrary choice but is instead, in many ways, a response to the oppressive forces African American and Hispanic communities have encountered in the United States.[213]

Decision makers in state governments must keep the extended family model in mind—along with the evolving nuclear family discussed earlier[214]—if their goal is to enact laws that are not only fully representative of the American family but also truly protective of children, who of course the state, as *parens patriae*, has a responsibility to protect.[215]

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211. *Id.*; *see also* Jill E. Korbin, *Child Maltreatment in Cross-Cultural Perspective: Vulnerable Children and Circumstances, in* CHILD ABUSE AND NEGLECT: BIOSOCIAL DIMENSIONS 31, 44 (Richard J. Gelles & Jane B. Lancaster eds., 1987) ("Mechanisms such as child lending, fostering, and informal adoption all redistribution of children on a temporary or permanent basis.").

212. Melba Sánchez-Ayéndez, *The Puerto Rican Family*, *in* ETHNIC FAMILIES IN AMERICA: PATTERNS AND VARIATIONS 199, 204 (Charles H. Mindel et al. eds., 4th ed. 1998).

213. *See supra* notes 139–154, 180–195 and accompanying text.

214. *See supra* Section I.A.

215. Claire Houston, *What Ever Happened to the "Child Maltreatment Revolution"?*, 19 GEO. J. GENDER & L. 1, 5 (2017) ("[T]he state has the responsibility and the right to protect those who cannot protect themselves, including children."); Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's* The Autonomy Myth, 93 CALIF. L. REV. 1285, 1313–14 (2005) ("Few would disagree that the state has some responsibility to protect and defend its most vulnerable citizens—children, the elderly, and other dependents—when they cannot protect themselves.").

II. PARENTS, CHILDREN, AND THE CONSTITUTION

As discussed earlier, state courts are confronting the fact that the role of "parent" is increasingly occupied by individuals other than legal parents.[216] Becuase the purpose of this Article is to explore the legal lacuna that exists regarding the protections afforded quasi-parents, it is important to understand the nature and strength of the constitutional rights that attach to parentage. Although the Supreme Court has never explicitly addressed the rights of quasi-parents under the Constitution, it has issued a number of decisions dealing with the rights of legal parents—rights that, as this Part explores, seemingly provide a basis for quasi-parents to claim at least some parental rights.

Initially, it is important to note that the Court did not issue any opinion on the topic of parental rights until the 1920s.[217] Prior to that, a number of state courts had granted parental rights over the objections of a child's *legal* parents to someone who had *acted* as the child's parent. For instance, in 1881, the Supreme Court of Kansas, in an opinion described as "a prototype of cases in which nonparents claim to have established parentlike relationships,"[218] awarded custody to a child's aunt over the objections of the child's father.[219] The child was born to a mother who was ill and a father who was "penniless."[220] Five-and-a-half years after entrusting the child to his wife's sister, the father, who at no point was deemed unfit, sought to reclaim the child.[221] In a unanimous opinion written by future U.S. Supreme Court justice David Brewer, the Kansas Supreme Court ordered that the child remain with the aunt:

> [T]he child has had, and has to-day, all that a mother's love and care can give. The affection which a mother may have and does have, springing from the fact that a child is her offspring, is an affection which perhaps no other one can re-

216. *See supra* Part I.

217. *See infra* notes 233–242 and accompanying text.

218. Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 560 n.259 (1987).

219. Chapsky v. Wood, 26 Kan. 650, 658 (1881).

220. *Id.* at 654–55.

221. *Id.* at 655.

> ally possess; but so far as it is possible, springing from years of patient care of a little, helpless babe, from association, and as an outgrowth from those little cares and motherly attentions bestowed upon it, an affection for the child is seen in Mrs. Wood that can be found nowhere else. And it is apparent, that so far as a mother's love can be equaled, its foster-mother has that love, and will continue to have it.[222]

The court reached this conclusion despite its recognition that "[t]he father is the natural guardian and is *prima facie* entitled to the custody of his minor child [and] cannot, by merely giving away his child, release himself from the obligation to support it, nor be deprived of the right to its custody."[223] Nonetheless, the court also pointed out that "[i]t is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time."[224]

Similarly, a Virginia court in 1886 awarded custody to a nonparent over the parent's objection, announcing that "in all cases the interest and welfare of the child is the great leading object to be obtained."[225] The case was *Merritt v. Swimley*, in which a father placed his youngest child with the child's maternal aunt following the death of the child's mother.[226] Thirteen years later, the father sought to regain custody.[227] Although noting that, generally, a father is entitled to the custody of his children, the court pointed out that:

> [T]here may be cases where the reputation of the father is stainless; he may not be afflicted with the slightest mental, moral or physical disqualification from superintending the general welfare of the infant . . . and yet the interests of the

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222. *Id.* at 657. Comparing the aunt to the women who would help care for the child if the father were awarded custody, the court observed: "On the other hand, if she goes to the house of her father's family, the female inmates are an aunt, just ripening into womanhood, and a grandmother; they have never seen the child; they have no affection for it springing from years of companionship." *Id.*

223. *Id.* at 652.

224. *Id.* at 653.

225. Merritt v. Swimley, 82 Va. 433, 437 (1886).

226. *Id.* at 434.

227. *Id.* During those thirteen years, "he ha[d] only seen her two or three times, and ha[d] never seen her at all except when called to Virginia on business connected with her mother's property." *Id.*

> child may imperatively demand the denial of the father's right.[228]

According to the court, the question then was "not what are the rights of the father or the other relative to the custody of the child, or whether the right of the one be superior to that of the other, but *what are the rights of the child?*"[229] Given the child's attachment to her aunt, the court denied the father's petition.[230]

These cases, and others like them,[231] reveal two things. First, quasi-parenthood is a social phenomenon that courts have had to contend with for some time. Second, these decisions suggest that, historically, state courts did not regard legal parentage, including biological and adoptive parents, as having a monopoly on parental rights.[232] Of course, there is a question as to how these cases comport with modern U.S. Supreme Court jurisprudence given that they were decided before parental rights were constitutionalized by the Supreme Court.

The Supreme Court first considered parental rights in *Meyer v. Nebraska*, a 1925 case involving a Nebraska statute that prohibited teaching "any subject to any person in any language [other] than the English language."[233] The Court treated

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228. *Id.* at 437.

229. *Id.* at 439–40.

230. *Id.* at 440.

231. *See, e.g.,* United States v. Green, 26 F. Cas. 30, 31 (C.C.D.R.I. 1824); Wilcox v. Wilcox, 14 N.Y. 575, 576 (1856); Clark v. Bayer, 32 Ohio St. 299 (1877); Coffee v. Black, 82 Va. 567 (1886); Green v. Campbell, 14 S.E. 212 (W. Va. 1891).

232. As one commentator has characterized the law from this era on this topic: "Treating parenthood as a trusteeship rather than a proprietary right, judges developed innovative policies and set new standards for parental behavior that took into consideration the needs of the child and society. Although biological rights remained important, parental supremacy was no longer unchallengeable." PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH 165 (Thomas A. Green & Hendrik Hartog eds., 1995). Jeffrey Shulman writes that "though his observations are regionally based, Bardaglio provides a fair assessment of judicial developments throughout the country." SHULMAN, *supra* note 29, at 55.

233. 262 U.S. 390, 396 (1923). The rationale behind the law, as laid out by the lower court and adopted by the Supreme Court, was largely the anti-German xenophobia so prevalent during the post-World War I era. *Id.* As the Court noted, "[t]he obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state." *Id.* at 398. The Court also acknowledged that "the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in

the case as primarily one concerning language rights and, on that basis, struck down the law in question.[234] In its ruling, the Court acknowledged that the Due Process Clause "[w]ithout doubt . . . denotes not merely freedom from bodily restraint, but also the right of the individual to[, among other things,] establish a home and bring up children."[235] Despite the fleeting nature of its reference to parental rights, *Meyer* is regarded as one of the foundational cases establishing the fundamental right of parents.[236]

Meyer began earning that legacy just two years later, when the Court relied on it to support its holding in *Pierce v. Society of Sisters*.[237] There, the Court was confronted with an Oregon statute requiring all children to attend public school.[238] A private educational organization brought suit on the grounds that the law "conflicted with the right of parents to choose schools where their children will receive appropriate mental and religious training."[239] Just as it had done in *Meyer*, the Court struck down the challenged legislation. This time the Court was more explicit in basing its ruling on parental rights, holding that the law in question "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[240] According to the Court, the Due Process Clause "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[241] Instead, in an oft-quoted passage, the Court made clear that parents retained the

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a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled." *Id.* at 401.

234. *Id.* at 401. "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." The Court noted that "it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution." *Id.*

235. *Id.*

236. *See* Meyer, *supra* note 14, at 533 (describing *Meyer* as one of "the foundational family privacy cases"); *see also* Samuel A. Gunsburg, *Frozen Life's Dominion: Extending Reproductive Autonomy Rights to in Vitro Fertilization*, 65 FORDHAM L. REV. 2205, 2235 (1997) ("The Supreme Court decision which established the foundation for the contemporary right to privacy was *Meyer v. Nebraska* . . . .").

237. 268 U.S. 510, 534 (1925).

238. *Id.* at 530.

239. *Id.* at 532.

240. *Id.* at 534.

241. *Id.*

right to make such decisions: "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."[242]

Over the years, the Court increasingly invoked *Meyer* and *Pierce* as evidence of its historical recognition of the fundamental rights of parents. In 1944, for instance, the Court cited both cases, stating that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[243] Likewise, in 1997, the Court relied on *Meyer* and *Pierce*, stating:

> In a long line of cases, we have held that . . . the 'liberty' specially protected by the Due Process Clause includes the rights to marry; to have children; *to direct the education and upbringing of one's children*; to marital privacy: to use contraception; to bodily integrity and to abortion.[244]

By the time of *Troxel*, Justice O'Connor even cited the two cases to support her sweeping declaration that this right of parents "is perhaps the oldest of the fundamental liberty interests recognized by this Court."[245]

Importantly, *Troxel* marked the first and only time the Court would address the rights of a child's parents vis-á-vis third-party caregivers in the child's life.[246] There, the Court was asked to determine the constitutionality of Washington's third-party visitation statute, which permitted "[a]ny person [to] petition the court for visitation rights at any time."[247] In *Troxel*, the paternal grandparents had used this law to gain

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242. *Id.*

243. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). *Prince* involved a woman who was convicted of violating child labor laws by permitting her niece (for whom she served as the legal guardian) to proselytize on the streets. *Id.* at 161–62. In upholding the conviction, the Court rejected her claim that the law infringed upon her rights as a parent, noting that such rights are not "beyond limitation." *Id.* at 166.

244. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (emphasis added) (internal citations omitted).

245. Troxel v. Granville, 530 U.S. 57, 65 (2000).

246. Blixt v. Blixt, 774 N.E.2d 1052, 1056 (Mass. 2002) (describing *Troxel* as "the only case thus far decided by that Court on Federal due process (but not equal protection) implications of grandparent visitation statutes").

247. *Troxel*, 530 U.S. at 61 (quoting WASH. REV. CODE § 26.10.160(3)).

visitation of their grandchildren, which their daughter-in-law had attempted to limit following the death of their son.[248] In a plurality decision, the Court struck down the statute on the basis of its "sweeping breadth."[249] After all, the statute did not require that the child's parent be unfit and "it gave no special weight at all to [the mother's] determination of her daughters' best interests."[250] Thus, the Court held that as applied to the mother, the Washington statute "violated her due process right to make decisions concerning the care, custody, and control of her daughters."[251] The Court left for another day the question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."[252] In other words, the Court did not address "the precise scope of the parental due process right in the visitation context."[253] What *Troxel* did do, however, is make clear that a parent's right, vis-á-vis the child, is not absolute.

The Court has frequently stated that parents have a fundamental right to direct the upbringing of their children.[254] Constitutional scholars have long questioned whether the Court's opinions in *Meyer* and *Pierce* truly support such statements. As Jeffrey Shulman has argued, *Meyer* and *Pierce* "sustained only the limited proposition that neither parent nor state enjoyed absolute authority over the child."[255] Instead, "they stand for a much more modest proposition: . . . the state cannot prohibit parents from teaching their children subject matter outside the scope of a state-mandated curriculum or from teaching them outside the public school system."[256] Professor Emily Buss agrees, noting that both cases were a prod-

248. *Id.* at 60–61.

249. *Id.* at 73 (describing the statute as conferring "broad, unlimited power").

250. *Id.* at 69; *see also id.* at 58 ("In effect, it placed on Granville the burden of *disproving* that visitation would be in her daughters' best interest and thus failed to provide any protection for her fundamental right.").

251. *Id.* at 75.

252. *Id.* at 73.

253. *Id.* The Court did note that "[i]n this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best elaborated with care." *Id.* (internal quotes omitted).

254. *See supra* notes 243–245 and accompanying text.

255. SHULMAN, *supra* note 29, at 108.

256. *Id.* at 101.

uct of the *Lochner* era and, as such, are cases where "the Court's recognition of parental rights was incidental to its consideration of the economic liberty claims of educators."[257] Nonetheless, Buss concedes that "the Court routinely cites to these cases to demonstrate its long and consistent support for parental rights."[258]

Scholars also question whether the Court's use of the word "fundamental" is an accurate description of the right at issue. After all, fundamental rights typically trigger strict scrutiny.[259] Yet, in neither *Meyer* nor *Pierce* did the Court employ such scrutiny; the Court merely employed a reasonableness test.[260] Although "*Meyer* and *Pierce* were decided before the Supreme Court had delineated degrees of constitutional scrutiny,"[261] the Court's rationales in both cases nonetheless reveal "little of the rigor of heightened review."[262] Instead, what Professor David

257. Buss, *supra* note 8, at 655. Nonetheless, Buss concedes that "parental rights survived the collapse of the *Lochner* era doctrine that produced them." *Id.*

258. *Id.* at 655–56. Accordingly, Buss argues that "[t]he doctrine's survival on this arguably shaky foundation is itself an odd testament to the doctrine's strength." *Id.* at 656.

259. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 394 n.407 (1998) ("Strict scrutiny applies to laws infringing or unequally burdening fundamental rights and those employing suspect classifications such as race."); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 28 (1988) (identifying the appropriate levels of constitutional review as "minimal scrutiny for ordinary rights, strict scrutiny for fundamental rights and suspect classifications").

260. *See, e.g.*, Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1003 (1996) (noting how "the early substantive due process decisions in *Pierce* and *Meyer* . . . support . . . a 'reasonableness' test").

261. SHULMAN, *supra* note 29, at 108; *see also* Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 533 (1st Cir. 1995) ("[T]he *Meyer* and *Pierce* cases were decided well before the current 'right to privacy' jurisprudence was developed . . . ."); Carmen Green, *Educational Empowerment: A Child's Right to Attend Public School*, 103 GEO. L.J. 1089, 1127 (2015) ("*Meyer* and *Pierce* were both decided before the strict scrutiny test was articulated in the 1930s.").

262. SHULMAN, *supra* note 29, at 108; *see also* Kyle Still, Smith*'s Hybrid Rights Doctrine and the* Pierce *Right: An Unintelligent Design*, 85 N.C. L. REV. 385, 396 (2006) ("Furthermore, as in *Meyer*, the Court in *Pierce* used the language of rational basis, [and as such,] . . . *Meyer* and *Pierce* are distinct from cases dealing with other fundamental rights, which generally are treated with strict scrutiny."); Haley J. Conard, *The Constitutionality of Teacher Certification Requirements for Home-Schooling Parents: Why the Original* Rachel L. *Decision Was Valid*, 2 DREXEL L. REV. 206, 223 (2009) ("Although *Meyer* and *Pierce* did become 'the cornerstone' of the Supreme Court's personal liberties decisions of the 1960s and 1970s, the Court proceeded with caution rather than granting parents broad authority when applying *Meyer* and *Pierce* in their original educational context.").

Meyer describes as "[t]he improvisational nature of the Court's family privacy jurisprudence"[263] has resulted in decisions that are "difficult to square neatly with the traditional strict-scrutiny formula."[264]

In many ways, then, *Troxel* confirmed what legal scholars have long suspected about the Court's standard of review in parental-rights cases. If the mother in *Troxel* had a fundamental right to direct the upbringing of her children—a right entitled to strict scrutiny—the Washington statute would almost clearly have been unconstitutional. Rather than strike down the Washington statute on the basis that it was not narrowly tailored to further a compelling state interest, however, the Court relied on *the degree* to which the statute interfered with the parent's rights, implying that some interference might be constitutionally permissible. As one lower court, attempting to apply *Troxel,* pointed out: "Justice O'Connor mentions 'heightened protection' for 'certain fundamental rights and liberty interests' but does not explicitly indicate strict scrutiny as the appropriate standard of review for evaluating non-parental visitation statutes."[265] At least one commentator has characterized *Troxel* as offering "only constrained support for parental rights."[266] Nonetheless, a burning question remains—just how strong are those parental rights? And are they strong enough to thwart any attempt by the state to grant parental rights to a quasi-parent?

III. POST-*TROXEL* CONFUSION

Viewed narrowly, *Troxel* involved grandparent visitation, but more broadly, the case dealt with third-party claims that contravene the wishes of a child's legal parent(s).[267] It is no surprise then that state courts have relied on *Troxel* to help

263. Meyer, *supra* note 14, at 533.
264. *Id.* at 589.
265. *In re* G.P.C., 28 S.W.3d 357, 365 (Mo. Ct. App. 2000).
266. Buss, *supra* note 8, at 639. Justice Thomas, who concurred in *Troxel,* pointed out this very issue: "The opinions of the plurality, Justice Kennedy, and Justice Souter recognize [the fundamental right of parents], but curiously none of them articulates the appropriate standard of review." 530 U.S. at 80 (Thomas, J., concurring).
267. Bell, *supra* note 24, at 226 ("Only on the surface, however, is *Troxel* a grandparents' rights case. Its lasting importance lies in the Supreme Court's examination of the child-parent-state relationship.").

them decide cases involving claims by quasi-parents. As illustrated below, there is much confusion as to what exactly the Court held. Consider, for instance, the words of the Supreme Court of Utah when it attempted to apply *Troxel*:

> [*Troxel*] yielded little guidance for lower courts going forward. From *Troxel* we know that parents have a fundamental right to make decisions about visitation, that their decisions are entitled to "special weight," and that the presumption in favor of their decisions may not be overridden by a "mere disagreement" over a child's best interests. But we know little more than that. We do not have a clear statement of the operative standard of scrutiny—and thus no way to know exactly how much "special weight" the parent's decision gets or what kind of proof is required to overcome it.[268]

But apply it the state courts must, and given *Troxel's* unanswered questions, state courts have reached very different conclusions on the question of quasi-parenthood.

Most states have concluded that *Troxel* mandates strict scrutiny of any state action that interferes with parental rights. For instance, in the 2006 case *SooHoo v. Johnson*, the Supreme Court of Minnesota was confronted with a case where a woman sought visitation with the two children of her former same-sex partner.[269] Nancy SooHoo and Marilyn Johnson were together for twenty-two years, lived together, and even owned a home together.[270] During their relationship, Johnson adopted two children.[271] Although SooHoo did not formally adopt either child, "the record indicate[d] that Johnson and SooHoo coparented the children, recognized themselves as a family unit

268. Jones v. Jones, 359 P.3d 603, 608 (Utah 2015) (ultimately concluding "that the high court's recognition of a 'fundamental' right of a parent to regulate the visitation of a child implies a standard of strict scrutiny," which in turn "requires a party seeking to override a parent's decision on visitation to present concrete proof that a visitation order is narrowly tailored to advance a compelling government interest").

269. 731 N.W.2d 815, 818 (Minn. 2015).

270. *Id.*

271. *Id.* ("During the course of that relationship, Johnson adopted two children from China. When Johnson adopted the first child, both she and SooHoo traveled to China. When Johnson adopted the second child, SooHoo remained in Minneapolis and cared for the first child while Johnson went to China.").

with two mothers, and represented themselves to others as such."[272] Subsequently, the relationship between Johnson and SooHoo ended, and SooHoo—over Johnson's objections—sought visitation with the two children.[273] The relevant statute provided that a third party "who resided in a household with a child for two or more years but no longer resides with the child, may petition the court for an order granting reasonable visitation with the child."[274]

The Supreme Court of Minnesota first noted that "the Supreme Court in *Troxel* did not articulate the standard of review to be applied when reviewing third party visitation statutes."[275] Nonetheless, the court applied strict scrutiny: "Strict scrutiny is the appropriate standard of review when fundamental rights are at issue and . . . the Court has declared that a parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right."[276] Applying that standard, the court acknowledged that the Minnesota law was much more tailored than the Washington law at issue in *Troxel*.[277] Nonetheless, the court struck down the third-party visitation statute as unconstitutional because the Minnesota law put "the burden on the custodial parent to prove that visitation would interfere with

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272. *Id.* As the court explained:

> For example, SooHoo took maternity leave to care for both children upon their arrival in the United States. SooHoo also participated in the selection of child-care providers and schools for the children and shared in the daily parenting responsibilities, including dropping off and picking up the children from day care, helping with school projects and homework, preparing meals for the family, taking the children to doctors appointments (including authorizing the children's immunizations), coordinating extracurricular activities and play dates, providing the sole care while Johnson was away on business, and taking the children to California to visit SooHoo's extended family, all without apparent objection by Johnson. The record further reflects that the children referred to SooHoo as "mommy," and referred to SooHoo's parents as their grandparents.

Id. at 818–19.

273. *Id.* at 819.

274. *Id.* at 819–20 (citing MINN. STAT. § 257C.08(4)).

275. *Id.* at 821.

276. *Id.*

277. *Id.* at 822 ("The Washington statute [in *Troxel*] allowed courts to award visitation to any person at any time so long as it was in the child's best interests. In contrast, [the Minnesota law] limits the class of individuals who may petition for visitation to those persons who have resided with the child for two years or more.").

the parent-child relationship."[278] According to the court, "[t]he parent's fundamental right . . . carries with it the presumption that the parent is acting in the best interest of the child and requires deference to the parent's wishes. Accordingly, placing the burden on the parent to prove no interference violates that fundamental right."[279]

A number of courts, even while purportedly applying strict scrutiny, have used *Troxel* to reach very different answers to the question of "exactly what compelling state interests subordinate the substantive due process rights and attendant presumptions accorded a fit, legal parent in a dispute with a nonparent over parental responsibilities."[280] For instance, in contrast to the Minnesota decision, a Colorado court used *Troxel* to reach the opposite conclusion in a case involving very similar facts—a case the court described as one that "illustrates the evolving nature of parenthood."[281] The case in question was from 2004 and involved Cheryl Ann Clark and Elsey Maxwell McLeod, who were in a committed relationship for eleven years.[282] Although the two never married, they did discuss having children together, eventually settling on adoption, with Clark adopting a child from China.[283] Because China would not permit adoption by same-sex couples, the adoption was by Clark only.[284] Nonetheless, the two traveled together to China to bring the child home and subsequently represented themselves publicly as the child's two parents.[285] Six years after the adoption, the relationship between Clark and McLeod

278. *Id.* at 824.
279. *Id.* (internal citations omitted).
280. *In re* E.L.M.C., 100 P.3d 546, 557 (Colo. App. 2004).
281. *Id.* at 548.
282. *Id.* at 549. Additionally, the two "owned a home in joint tenancy [and] had a commitment ceremony." *Id.*
283. *Id.*
284. *Id.* ("The social worker who performed the background check for the adoption indicated China would not permit an adoption by a same-sex couple. For this reason, the adoption papers were made out in the name of Clark alone.").
285. *Id.* For example, the adoption announcement stated: "[E.L.M.C.] was born in the Hunan providence [sic] of the People's Republic of China. She lived the first six months of her life in the Yue Yang Children's Welfare Home in Yue Yang, China. She now lives with two adoring moms." *Id.*

ended.[286] When Clark attempted to limit McLeod's visitation with the child, McLeod petitioned for equal parenting time.[287]

In ruling, the Colorado Court of Appeals initially held that laws of this sort were subject to strict scrutiny.[288] Nonetheless, the court held that McLeod, despite being neither a natural nor adoptive parent, was a psychological parent, which the state defined as "someone other than a biological parent who develops a parent-child relationship with a child through day-to-day interaction, companionship, and caring for the child."[289] In light of that recognition, and concerned with the harm that would befall the child should McLeod's visitation be terminated, the court granted McLeod's petition, awarding her joint parental responsibilities over the child.[290] The court relied on *Troxel* to support its decision, holding that parental unfitness is not required and "even the existence of a developed biological parent-child relationship will not prevent nonparents from acquiring parental rights vis-á-vis the child."[291]

As these cases (and many others)[292] demonstrate, without clear guidance from the Supreme Court, the states have extrapolated from *Troxel* a variety of divergent principles regarding the rights of quasi-parents. That result is, in and of itself, problematic given that "it is the nature of a constitution to

286. *Id.* at 550.

287. *Id.* Specifically, "Clark sought to restrict McLeod to ten overnights per month in 2003 and six overnights per month in 2004, and to terminate all court-ordered parenting time in 2005." *Id.*

288. *Id.* at 552 ("[C]onsistent with *Troxel*'s acknowledgment that this right 'is perhaps the oldest of the fundamental liberty interests recognized by [the] Court,' we join those courts that have concluded the strict scrutiny test applies to statutes which infringe on the parent-child relationship." (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)) (internal citations omitted)).

289. *Id.* at 559 (quoting *In re* Marriage of Martin, 42 P.3d 75, 77–78 (Colo. App. 2002)).

290. *Id.* at 562 ("Accordingly, we conclude that, in light of the overwhelming evidence showing McLeod had become a psychological parent, whom E.L.M.C. recognized almost from birth, the curtailment and later termination of McLeod's parental responsibilities in Clark's proposed parenting plan threatened emotional harm to E.L.M.C.").

291. *Id.* at 556.

292. *See, e.g.*, McGovern v. McGovern, 33 P.3d 506, 509 (Ariz. Ct. App. 2001) (noting how "the lack of any majority opinion in *Troxel* complicates the resolution of these issues"); *In re* Marriage of Winczewski, 72 P.3d 1012, 1056 (Or. Ct. App. 2003) (noting how "the various opinions in *Troxel* prevented the Court from speaking with a clear and unified voice"); In Interest of H.S., 550 S.W.3d 151, 175 (Tex. 2018) (pointing to *Troxel* as an example of how "the Supreme Court has not described the contours of the [fundamental rights of parents] with clarity").

set outer limits to legislative competence."[293] It is not, however, the purpose of this Article to dictate what that standard should be. After all, as noted earlier, the issue is an extremely complex one with many ancillary questions, each of which presents challenging issues of its own.[294] Instead, the goal of this Article is more modest—one that arises from the unfortunate reality that, in the nearly twenty years since *Troxel* was decided, neither the courts nor the state legislatures have recognized the full scope of the problem.

When it comes to quasi-parenthood, the states have spent so much time attempting to give life to what little the Court said in *Troxel* about quasi-parenthood that they have lost sight of an important fact—namely, that whatever standard the law ultimately settles on regarding the rights of parents vis-á-vis third parties, it cannot be premised on the traditional nuclear family model. That model is unrealistic, outdated, and quite simply fails to represent the reality of contemporary American life. In other words, the law in this area has followed a path that Justice Kennedy warned against in his *Troxel* dissent when he noted that his "principal concern" was the use of "the conventional nuclear family . . . to establish the visitation standard for every domestic relations case."[295] Most importantly, by failing to heed that warning, the law is increasingly harming children who happen to be born into families that do not conform to the traditional model.

Accordingly, this Part focuses on three facets of *Troxel* that courts have wrestled with, noting the degree to which myopia regarding the American family pervades each and proposing alternative approaches—ones that better balance the rights of all involved and create a system that is less discriminatory to "alternative" family structures. The three facets at issue and the way in which they have improperly been implemented are: (1) employing overly narrow definitions of "family" when determining who has *standing* to petition for rights as a quasi-parent, (2) allowing legal parents to wield their own *parental fitness* as means to unilaterally terminate the rights of a quasi-

293. Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 798 (1964).

294. *See supra* notes 26–29 and accompanying text.

295. Troxel v. Granville, 530 U.S. 57, 98 (2000) (Kennedy, J., dissenting). According to Kennedy, "[a]s we all know, this is simply not the structure or prevailing condition in many households." *Id.*

parent, and (3) ignoring the legal rights of the child by requiring a high degree of *harm* in order to safeguard the child's interest in maintaining a relationship with a quasi-parent.

A. Legal Standing

In *Troxel,* the Court identified, as one of the more troubling aspects of the Washington statute, the fact that it permitted "*any person* to petition the court for visitation rights."[296] That reference by the Court, coupled with its ultimate conclusion that the statute was unconstitutional as a result of its "sweeping breadth,"[297] has lead a number of states to limit the class of individuals who may claim quasi-parent status for purposes of petitioning for visitation rights. In other words, legislatures have adopted statutes where "only persons with a certain relationship to the child may seek visitation."[298] New York, for instance, is perhaps the most restrictive in that its statute is expressly limited to "grandparents."[299]

Other states are a bit more permissive, but many nonetheless restrict standing to a fairly limited group of blood relatives. Georgia, for instance, provides that, in certain actions, "[a]ny *family member* shall have the right to intervene in and seek to obtain visitation rights."[300] However, the statutory definition of "family member" is limited to "a grandparent, great-grandparent, or sibling."[301] Washington is more permissive still but nonetheless excludes a number of individuals. There, the statute permits a "relative" who has "an ongoing and substantial relationship with the child" to seek visitation.[302] The statute, in turn, defines "relative" to include blood relatives and stepparents, among others.[303] Interestingly, the Washington definition does make provision for "extended fam-

296. 530 U.S. at 61 (quoting WASH. REV. CODE § 26.10.160(3)).

297. *Id.* at 73.

298. Leslie Joan Harris, Troxel v. Granville*: Not the End of Grandparent Visitation*, EXPERIENCE 6, 9 (Spring 2001).

299. *See* N.Y. DOM. REL. LAW § 72 (2018). In 2017, the New York Assembly proposed that the law be amended to allow others standing, but even then the statute would only encompass, in addition to a grandparent, a "relative who is related to a parent of such child within the second degree of consanguinity or affinity, residing in this state." S.B. 7574, 2017 Leg., 240th Sess. (N.Y. 2017).

300. GA. CODE ANN. § 19-7-3 (b)(1)(B) (2018) (emphasis added).

301. *Id.* at (a)(1).

302. WASH. REV. CODE § 26.001.002 (2018).

303. *See* WASH. REV. CODE § 26.001.001(2)(a)(i)-(vi).

ily members" but only for Indian children and, even then, only to the extent required by the Indian Child Welfare Act.[304]

Of course, the justification for limiting the class of third parties who can petition for visitation is understandable. As Justice Kennedy noted in his dissent in *Troxel*, the very act of having to defend such petitions filed by third parties "can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated."[305] Thus, to expand the pool of potential claimants to include too many people could greatly undermine the rights of legal parents. On the other hand, states have seemingly overlooked the fact that overly restrictive definitions create a myopic preference for the nuclear family model. As the New York, Georgia, and Washington statutes illustrate, such statutes fail to contemplate the degree to which "family" might extend beyond that limited class of individuals.

As discussed earlier, the nuclear family model is not only on the decline within the United States, it is much less common than the extended family model.[306] Thus, to the extent states limit their definitions of who can seek visitation, they are turning a blind eye to the reality of familial structures in the United States. What is more alarming is the fact that the extended family model is particularly prevalent in minority communities within the United States.[307] Accordingly, the states are adopting standards that will disproportionately harm people of color. This is true not only of those states that

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304. *Id.* at (2)(a)(vi). Specifically, the statute includes the following within the definition of "relative":

> Extended family members, as defined by the law or custom of an Indian child's tribe or, in the absence of such law or custom, a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent who provides care in the family abode on a twenty-four hour basis to an Indian child as defined in 25 U.S.C. Sec. 1903(4).

Id.

305. Troxel v. Granville, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting) ("Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship.").

306. *See supra* Section I.A.

307. *See supra* Section I.B.

have adopted restrictive statutes but also of those that are unwilling to take seriously claims brought by those outside the immediate family. After all, within both the African American and the Hispanic communities in the United States, informal adoption is quite common and is not limited to only the child's closest relatives.[308]

To illustrate the harms that can come from treating the nuclear family as normative, consider the case of *O'Neal v. Wilkes*.[309] There, Hattie O'Neal was an African American child born in 1949 to an unwed mother, who died when O'Neal was only eight years old.[310] For the next four years, O'Neal would live in several different households, sometimes headed by relatives and other times not.[311] O'Neal was eventually sent to Georgia to live with an aunt, who subsequently placed O'Neal with a married couple, Mr. and Mrs. Roswell Cook, who were looking to adopt a little girl.[312] Although she was never formally adopted, from the time she went home with the Cooks until she married in 1975, O'Neal was in all meaningful ways their "daughter."[313] After O'Neal left their home and got married, she continued her relationship with the Cooks, who referred to O'Neal's children as their "grandchildren."[314] When Mr. Cook died without a will, O'Neal brought suit, claiming that she had been "equitably adopted" and, as such, was entitled to inherit from Mr. Cook.[315] The Supreme Court of Georgia

308. *See supra* Section I.B.

309. 439 S.E.2d 490 (Ga. 1994).

310. *Id.* at 491. O'Neal was born out of wedlock and "[a]t no time did O'Neal's biological father recognize O'Neal as his daughter, take any action to legitimize her, or provide support to her or her mother." *Id.*

311. *Id.* After living with a maternal aunt in New York City, O'Neal then went to Savannah, Georgia, where "a woman identified only as Louise who was known to want a daughter" took her in. *Id.*

312. *Id.*

313. *Id.* ("Although O'Neal was never statutorily adopted by Cook, he raised her and provided for her education and she resided with him until her marriage in 1975. While she never took the last name of Cook, he referred to her as his daughter.").

314. *Id.*

315. *Id.* ("The appellee, Firmon Wilkes, was appointed as administrator of Cook's estate and refused to recognize O'Neal's asserted interest in the estate."). Equitable adoption permits an individual, who "[a]lthough not adopted with statutory formalities[,] . . . to maintain a claim in equity to at least some of the benefits that come with the status of a biological or legally adopted child." Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (the Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 766 (1984).

refused O'Neal's claim on the basis that there was no valid adoption, and thus she failed to qualify as Mr. Cook's "child."[316] Nowhere in the opinion was it revealed that O'Neal was African American, that the rural Georgia town where she lived with the Cooks had a mere population of 767, or that there were no lawyers in that town during the time period in which O'Neal came to live with the Cooks[317]—facts that would have made the informal nature of Hattie O'Neal's adoption all the more understandable. Instead, all the court ever said is that it "sympathize[s] with O'Neal's plight."[318]

For many, cases like *O'Neal* represent a miscarriage of justice resulting from the court's apparent ignorance about families that do not fall into the nuclear family model.[319] Instead, if true justice is to be achieved and discrimination on the basis of familial arrangements avoided, the law must make allowances for other forms of family structures. The same is true regarding the legal standards applicable to quasi-parents. After all, in any case involving the rights of a quasi-parent, one of the key questions courts must answer is: What kind of person can even qualify as a quasi-parent? The definition cannot be so limited that it excludes everyone other than a child's immediate family. Such a definition would privilege those who more closely conform to the nuclear family model—a group that tends to exclude a large number of children, especially the children of ethnic minorities living in the United States.[320]

Instead, this Article proposes that states adopt a functional approach to identifying quasi-parents. Thus, to the ex-

316. *O'Neal*, 439 S.E.2d at 492. Specifically, the court ruled against O'Neal because the aunt who had placed her lacked "the legal authority to enter into a contract for her adoption," a condition precedent to succeeding on a claim of equitable adoption. *Id.*

317. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 99 (7th ed. 2005) (providing additional facts about the case).

318. *O'Neal*, 439 S.E.2d at 492.

319. *See, e.g.*, Rebecca C. Bell, *Virtual Adoption: The Difficulty of Creating an Exception to the Statutory Scheme*, 29 STETSON L. REV. 415, 422 (1999) (using *O'Neal* as an example of "the injustice that may occur when applying the contractual theory" of equtiable adoption); Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J.L. & PUB. POL'Y 1, 16 (2015) ("As the dissent in *O'Neal v. Wilkes* cogently explains, however, there are many situations where the elements of a contract are unlikely to exist, as when the biological and adoptive parents have never met, and where the custody of the child is transferred through the hands of numerous intermediaries before finally reaching the custodial parent.").

320. *See supra* Part I.

tent states elect to limit the class of individuals who can qualify as a quasi-parent, the states should do so by looking at how that person has behaved vis-á-vis the child and not simply the degree of consanguinity between the individual and the child. And, indeed, some states have done just that. In a 2006 opinion, for instance, the South Carolina Court of Appeals reversed a decision of the lower court denying the visitation request of a cohabiting boyfriend despite the fact he had taken an active role in the child's life for ten years.[321] Because South Carolina did not have a statute that addressed the standing of third parties to seek custody, the court looked to other states, eventually settling on a four-part test. First, the court looked to whether "the biological or adoptive parent[s] consented to, and fostered," the third party's relationship with the child.[322] Second, it would require "that the petitioner and the child lived together in the same household" and, third, "that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation."[323] Finally, the court considered the length of this relationship, focusing on whether the third party occupied "a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[324] The court identified the last two prongs as the most important in light of the fact that "they ensure both that the psychological parent assumed the responsibilities of

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321. Middleton v. Johnson, 633 S.E.2d 162, 173 (S.C. Ct. App. 2006). As the court observed:

> As Josh entered elementary school, it was Middleton rather than Mother who accompanied him to his first day of kindergarten, and it was Middleton who brought Josh to school almost every morning. . . . Middleton took Josh to doctor and dentist appointments, and Josh attended family reunions and functions with Middleton. . . . Josh lived with Middleton at least half of the week for most of his life [with] Josh [having] his own room, clothes, and school books in Middleton's house. . . . On weekends they would go to movies and visit Frankie's Fun Park. On Sundays, Middleton and Josh attended church. [Accordingly,] Josh spent ten years of his life thinking of Middleton as a father and is suffering greatly in his absence.

Id. at 170.

322. *Id.* at 168.

323. *Id.*

324. *Id.* at 168 (quoting *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435–36 (Wisc. 1995)).

parenthood and that there exists a parent-child bond between the psychological parent and child."[325]

Similarly, in a 2004 case out of the New Jersey Court of Appeals, a neighbor who had, with the consent of the child's legal custodian, been "involved in every aspect of [the child's] life from four months old to four and one-half years old" qualified as a quasi-parent.[326] The court held that the neighbor had standing to petition for custody.[327] Like other state courts that have awarded rights to quasi-parents, the court was primarily motivated by the harm that would befall the child should the relationship be terminated: "At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them."[328]

What states must recognize is that a functional standard is more inclusive and more reflective of the variety of familial structures in the United States. States should adopt functional definitions, being ever mindful to ensure that those definitions do not discriminate against the variety of individuals who can and frequently do act as quasi-parents.

B. Parental Fitness

In striking down the Washington statute in *Troxel*, the Court noted that the law "failed to accord the determination of [the children's mother], a fit custodial parent, any material weight."[329] As the Court pointed out earlier in the opinion, "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to . . . question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[330] The Court did not offer any guidance on just how much weight must be given to the wishes of legal parent, merely noting that the Court "need not[ ] define today the precise scope of the parental due

325. *Id.* at 169.
326. P.B. v. T.H., 851 A.2d 780, 790 (N.J. Super. Ct. App. Div. 2004).
327. *Id.*
328. *Id.* at 785 (quoting V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000)); *see also* Scott v. Scott, 147 S.W.3d 887, 890 (Mo. Ct. App. 2004) (awarding third-party custody to the former partner of a biological mother given that "to remove him from her custody would be detrimental to his welfare").
329. 530 U.S. 57, 72 (2000).
330. *Id.* at 68.

process right in the visitation context."[331] Thus, state courts have been left to their own devices when deciding how much weight to accord the wishes of the child's legal parent. Not surprisingly, the states have reached vastly different conclusions on that point.

Most troubling is that some states have effectively allowed the presence of a fit parent to preclude any claim whatsoever by a quasi-parent. The Supreme Court of Utah, for instance, has held that "the common law doctrine of *in loco parentis* does not independently grant standing to seek visitation against the wishes of a fit legal parent."[332] Further, a fit parent could terminate another's status as a quasi-parent at any time: "[A] legal parent may freely terminate the *in loco parentis* status by removing her child from the relationship, thereby extinguishing all parent-like rights and responsibilities vested in the former surrogate parent."[333] Utah is not alone in expressing such sentiments. In 2005, Maryland's highest court held that:

> Where the dispute is between a fit parent and a private third party, [the two] do not begin on equal footing in respect to rights to "care, custody, and control" of the children. The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of others. Generally, absent a constitutional statute, the non-governmental third party has no rights, constitutional or otherwise, to raise someone else's child.[334]

Such a rigid approach fails to recognize the new reality of the American family. Gone are the days when the nuclear family consisted of a mother, a father, and their legal children. The increase in divorce, remarriage, and cohabitation as well as the legalization of same-sex marriage means that an increasing number of children are being raised in homes headed by adults who are not the child's legal parents.[335] Many households—

331. *Id.* at 73.

332. Jones v. Barlow, 154 P.3d 808, 810 (Utah 2007) (emphasis added).

333. *Id.* at 813. According to the court: "The in loco parentis status is 'temporary by definition and ceases on withdrawal of consent by the legal parent.'" (quoting *Carvin v. Britain*, 122 P.3d 161, 168 n.7 (Wash. 2005)).

334. McDermott v. Dougherty, 869 A.2d 751, 770 (Md. 2005).

335. *See supra* Section I.A.

particularly those in ethnic-minority communities—are comprised of a number of individuals who may or may not be related to the child they are helping to parent.[336] Thus, to hold that a fit legal parent can unilaterally terminate the relationship between the child and the other adult living in the child's home—regardless of how close of a relationship those two share or how long that relationship has subsisted—not only exposes those children to the harms associated with the loss of a quasi-parent,[337] it also discriminates against children being reared in nontraditional family structures.

To see how harsh this legal regime can be, consider for instance a 2008 Maryland opinion involving two women, Janice M. and Margaret K., who were in an eighteen-year committed relationship.[338] While living together, Janice adopted a child, Maya.[339] Although Margaret did not independently adopt the child, "the parties shared most duties regarding Maya's care."[340] Janice and Margaret divided the responsibilities for preparing Maya's food, changing her diapers, bathing her, handling her schooling, addressing her healthcare needs, and performing most other caretaking duties."[341] The family lived together for five years until Janice and Margaret separated.[342] Even then, Margaret continued to visit the child several times a week until Janice eventually cut off visitation altogether.[343] Margaret responded by bringing suit for custody of Maya or, in the alternative, visitation.[344] The Maryland court denied Margaret's claim.

At the outset, the court identified the issue as "whether, in a custody or visitation dispute, a third party, non-biological, non-adoptive parent, who satisfies the test necessary to show de facto parenthood should be treated differently from other

336. *See supra* Section I.B.

337. *See infra* notes 391–393 and accompanying text.

338. Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) (overruled by *Conover v. Conover*, 146 A.3d 433 (Md. 2016)).

339. *Id.* at 75. The child was adopted from India after Janice M. was unable to get pregnant using in vitro fertilization.

340. *Id.* at 76.

341. *Id.*

342. *Id.*

343. *Id.* ("Margaret K. initially saw Maya between three and four times a week [until] Janice M. placed certain restrictions on Margaret K.'s visitation . . . . [Ultimately, Janice would deny] Margaret K. all visitation and prohibit[] her all access to Maya.").

344. *Id.*

third parties."[345] The court answered that question in the negative by adopting a rule that, absent *exceptional circumstances,* a quasi-parent "must demonstrate . . . that a legal parent is unfit . . . to justify granting that third party visitation rights over the legal parent's objections."[346] Margaret argued that her qualification as a quasi-parent was sufficient to meet the exceptional circumstances standard, but the court disagreed.[347] Instead, the court held that "while the psychological bond between a child and a third party is a factor in finding exceptional circumstances, it is not determinative."[348] Accordingly, the court remanded to the lower court to determine if Margaret could otherwise satisfy that standard.[349] Importantly, the court acknowledged that these issues "are not limited to same-sex couples and could arise in a myriad of other circumstances, including disputes involving step-parents, grandparents, and parties in a relationship with 'a significant other.'"[350]

Eight years later, the Maryland high court overruled *Janice M. v. Margaret K.*, recognizing that "gays and lesbians are particularly 'ill-served by rigid definitions of parenthood.'"[351] In light of that recognition and the court's evolution on the topic of quasi-parenthood, the court's original decision in *Janice M.* provides valuable instruction to other state courts wrestling with how to weigh parental fitness.

The evolving nuclear family more frequently contains individuals who, despite being neither the child's biological or adoptive parent, have functioned as a parent to the child.[352] Because those individuals currently have no constitutional pro-

345. *Id.* at 87.

346. *Id.* at 85. "In other words, where visitation or custody is sought over the objection of the parent, before the best interest of the child test comes into play, the de facto parent must establish that the legal parent is either unfit or that exceptional circumstances exist." *Id.* at 87.

347. *Id.* at 85, 92.

348. *Id.* at 93.

349. *Id.*

350. *Id.* at 88. Nonethless, the court did note that it was "mindful of the extensive literature in the law reviews on the issue of visitation rights for same-sex partners when their relationships have terminated and especially the difficulties, in some states, that same-sex partners experience when custody or visitation is at issue." *Id.* at 87–88.

351. Conover v. Conover, 146 A.3d 433, 449 (Md. 2016) (quoting 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, 464 (1990)).

352. *See supra* Section I.A.

tections related to parenthood,[353] they are at the mercy of state law when it comes to preserving any rights to the children they have parented. If, however, a state continues to preference legal parenthood over all other forms of parentage, those individuals' rights are now not only at the mercy of the state but also at the mercy of the legal parent. Two harms ensue from such a scheme. First, the law fails to reflect the reality of the changing American family, and second, children who are reared in such households have less protection for their relationships with those who functioned as their parents.

To avoid such harms and to develop less discriminatory standards, courts should afford less weight to the fitness of the legal parent whenever that parent consented to the third party playing the role of quasi-parent. Some courts have already adopted such an approach. For example, the North Carolina Court of Appeals, applying the best interest of the child standard, awarded joint legal and physical custody of a child to the child's mother, Irene Dwinnell, and the mother's former partner, Joellen Mason.[354] Although the mother argued that the ruling would infringe her constitutional rights to direct the upbringing of her child, the court announced that "when a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced."[355] Applying that standard, the court ruled that Dwinnell, by encouraging the relationship between her child and Mason, had forfeited her rights to object to Mason's claim:

> While this case does not involve the biological mother's leaving the child in the care of a third person, we still have the circumstances of Dwinnell's intentionally creating a family unit composed of herself, her child and, to use the Supreme Court's words, a "*de facto* parent." . . . [T]hey all

353. *See* Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 354 (2016) (noting the assumption by state courts "that constitutional protections only attach to the legal parent's relationship with the child and not to the relationship between a child and an individual entitled to recognition under one of the equitable parenthood doctrines").

354. Mason v. Dwinnell, 660 S.E.2d 58, 60 (N.C. Ct. App. 2008).

355. *Id.* at 69 (emphasis omitted) (quoting *Middleton v. Johnson*, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006)).

> lived together as a family and Dwinnell led her child to believe that Mason was one of his parents. Even though Dwinnell did not completely relinquish custody, she fully shared it with Mason, including sharing decision-making, caretaking, and financial responsibilities for the child. And . . . Dwinnell intended—during the creation of this family unit—that this parent-like relationship would be permanent, such that she "induced [Mason and the child] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." Ultimately . . . Mason and the child forged a strong parent-child bond.[356]

The court described Dwinnell's attempt to sever the relationship between the child and Mason as having the potential to "tear the heart of the child, and mar his happiness."[357]

North Carolina is not the only state to rule that even a fit parent may have limited ability to object to the claims of a quasi-parent if the parent consented to that relationship.[358] Even Justice Kennedy in his *Troxel* dissent suggested such an approach when he noted that "a fit parent's right vis-á-vis a complete stranger is one thing; her right vis-á-vis another parent or a de facto parent may be another."[359] Some courts have refused to follow this approach because the "fundamental" rights of parents implies the application of strict scrutiny,[360] but, as discussed earlier, the Supreme Court has never stated that strict scrutiny is the appropriate standard nor has it applied anything approaching strict scrutiny in cases dealing with parental rights.[361]

Interestingly, the American Law Institute has offered a different solution to this problem—it simply redefined "parent" to encompass a broader array of parent-child relationships. In

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356. *Id.* at 68–69.

357. *Id.* at 71 (quoting In re *Gibbons*, 101 S.E.2d 16, 22 (N.C. 1957)).

358. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000) ("That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child."); *Middleton*, 633 S.E.2d at 169.

359. Troxel v. Granville, 530 U.S. 57, 102 (2000) (Kennedy, J., dissenting).

360. *See* Beardsley v. Garcia, 731 N.W.2d 843, 851 (Minn. Ct. App. 2007).

361. *See supra* notes 254–264 and accompanying text.

its 2002 Principles of the Law of Family Dissolution,[362] the ALI attempted to determine "how the law should respond to changes in family forms over the last half century."[363] In response, the Principles recognize three categories of parentage.[364] In addition to the traditional category of legal parenthood,[365] the Principles propose two additional categories—parenthood by estoppel and de facto parenthood.[366] A parent by estoppel is one who lived with the child for at least two years with the permission of the child's legal parent and assumed "full and permanent responsibilities as a parent."[367] In contrast, a de facto parent is one who lived with the child and voluntarily performed caretaking functions equal to the "parent with whom the child primarily lived" for at least two years, either as a result of an agreement with the legal parent or because of that parent's "complete failure or inability . . . to perform caretaking functions."[368] A parent by estoppel is afforded all the same rights and responsibilities as a legal parent,[369] while a de facto parent holds a secondary status—one that, despite "being entitled to preserve established parenting roles alongside the child's other parents,"[370] is not afforded the same rights as a legal parent or a parent by estoppel.[371] For instance, the Principles prohibit courts from awarding de facto

362. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter PRINCIPLES].

363. Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 573 (2008).

364. PRINCIPLES*, supra* note 362, § 2.03(1)(a)–(c).

365. *Id.* § 2.03(1)(a) (referring to those currently classified—typically via a biological relationship or through formal adoption—as a parent under state law).

366. *Id.* § 2.03(1)(b)–(c).

367. *Id.* § 2.03(1)(b). For children less than two years of age, the person need only have lived with the child and assumed those responsibilities since the child's birth. *Id.*

368. *Id.* § 2.03(1)(c).

369. *See* Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 335 (2007) ("Under the ALI Principles, parents by estoppel have rights equivalent to those of legal parents."); Meyer*, supra* note 55, at 51 ("Thus, in a custody dispute between an adoptive parent and a parent by estoppel, neither would enjoy any legal preference over the other.").

370. Meyer, *supra* note 55, at 51.

371. Feinberg, *supra* note 353, at 353 n.118 ("The ALI Principles recognize parents by estoppel, but not de facto parents, as standing on equal footing to legal parents in the custody context.").

parents "the majority of custodial responsibility" if a legal parent or a parent by estoppel objects.[372]

Although the ALI's expansive definition of parenthood has proven controversial,[373] "several states have begun to move tentatively in that direction."[374] Maryland, for example, relied on the Principles in the opinion that overruled *Janice M.* They were just one example of the growing "decisional and statutory law of other jurisdictions" that prompted the court to "recognize de facto parenthood."[375] Similarly, the Supreme Court of Rhode Island ruled that a de facto parent could seek visitation, noting "that our position here is in harmony with the principles recently adopted by the American Law Institute."[376]

While no jurisdiction has explicitly adopted the ALI's approach, more and more courts will likely face situations requiring them to decide when legal strangers can claim parental rights. Regardless of whether states adopt an approach like the one suggested by the ALI or merely limit a legal parent's ability to use parental fitness to automatically evict a quasi-parent from a child's life, the states must recognize that any approach that values a legal parent's wishes above all else will pose a

372. *See* PRINCIPLES, *supra* note 362, § 2.18(1)(a); *see also id.* § 2.09 (entitling legal parents and parents by estoppel, but not de facto parents, to a presumption of decision-making authority).

373. *See, e.g.*, Buss, *supra* note 8, at 643 ("The ALI's custody scheme . . . is problematic in several interrelated respects."); Wilson, *supra* note 69, at 93 (criticizing the ALI's "ballooning definition of parent"); *see also*, Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769, 774 (1999) (noting that "a review of the critical provisions relating to nonlegal parents suggests that the ALI's improvements are largely illusory"); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2176 (2007) (noting how "the ALI Principles have drawn criticism for proposing to recognize certain categories of nonbiological parenthood").

374. *See* Meyer, *supra* note 55, at 51.

375. Conover v. Conover, 146 A.3d 433, 451 (Md. 2016) (overruling *Janice M. v. Margaret K.*, 948 A.2d 73 (2008)).

376. Rubano v. DiCenzo, 759 A.2d 959, 975 (R.I. 2000) ("There, the ALI has recognized that individuals who have been significantly involved in caring for and supporting children and for whom they have acted as parents may obtain legal recognition of their parental rights to visitation and custody."); *see also* E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (citing the Principles in support of the court's decision to treat a biological mother's former partner as a de facto parent and thus award visitation). *But see* LP v. LF, 338 P.3d 908, 921 (Wyo. 2014) (discussing the ALI Principles but ultimately "declin[ing] to adopt de facto parentage or parentage by estoppel, instead leaving that important policy decision to the Wyoming Legislature").

great risk to families that do not conform to the outdated nuclear family model.

C. Harm to the Child

Despite the fact that *Troxel* did not address "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation,"[377] many courts have required quasi-parents to make that very showing.[378] Indeed, when courts award parental rights to quasi-parents, they do so primarily on the basis that "children have a strong interest in maintaining the ties that connect them to adults who love and provide for them."[379] For instance, in *Scott v. Scott*, a Missouri court gave custody of a child to the mother's former partner.[380] There, Renae Scott filed for a divorce from her husband, Donald.[381] The two had one child, Danton. Renae and Donald had actually separated six years earlier and, during that time, Renae had had a short-lived relationship with a woman, Janice.[382] When the relationship between the Renae and Janice ended, Renae moved to another city to begin a new relationship with another woman.[383] However, wanting to "test out" the relationship before relocating her son, Renae left Danton in the care of Janice.[384] In looking at Janice's relationship with the child, the court found:

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377. Troxel v. Granville, 530 U.S. 57, 73 (2000).

378. *See, e.g.*, Patten v. Ardis, 816 S.E.2d 633, 637 (Ga. 2018) (striking down Georgia's statute, entitled "Grant of visitation rights to family members" because "it authorizes an award of visitation . . . over the objection of a fit parent and without any showing whatsoever (much less a showing by clear and convincing evidence) that the visitation is required to keep the child from actual or threatened harm").

379. V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000); *see also* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 28 (2008) (describing "the concept of 'psychological parent,' as . . . [based on] the harm that the child would experience if an ongoing relationship with an adult whom he or she regarded as a parent were disrupted, regardless of that adult's official status with respect to the child").

380. 147 S.W.3d 887 (Mo. App. 2004).

381. *Id.* at 890.

382. *Id.*

383. *Id.*

384. *Id.* During that time, Renae "failed to maintain any sort of consistent contact with Danton, often failing to show up for scheduled visits." *Id.* at 890–91.

> [S]he had, at the time of trial, been caring exclusively for Danton from August of 1999, when the appellant moved to Sedalia to live with her new girlfriend. During this time Danton had developed both mentally and physically as expected and appeared to be a normal, well-adjusted young man. In addition, Danton testified that he did not want to live with the appellant and that he thought of [Janice] as his mother.[385]

When Renae subsequently brought suit to regain permanent custody of Danton, the court refused and instead awarded custody to Janice. It did so by focusing on the harm that would befall Danton were the court to rule otherwise: "Danton had bonded with [Janice] such that to remove him from her custody would be detrimental to his welfare."[386]

Thus, courts that award parental rights to quasi-parents frequently do so based on the child's interest in maintaining that relationship, and not on the basis of the quasi-parent's rights.[387] As Professor Solangel Maldonado explains: "State legislatures did not enact third party visitation statutes for the benefit of third parties, but rather because legislators believed that, under certain circumstances, it is in the child's best interest to maintain relationships with third parties even over their parents' objections."[388] In some states the harm must be quite severe before the state will grant rights to a quasi-parent. The Supreme Court of Connecticut, for instance, held that a quasi-parent can only justify state interference with the rights of the child's legal parent(s) if the quasi-parent can prove that the child will otherwise "suffer real and substantial emotional harm."[389] The court described the requisite level of harm as

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385. *Id.* at 897.

386. *Id.* at 896.

387. *See* Meyer, *supra* note 55, at 50 ("[C]ourts have carved out a role for these care givers based on the rationale that the state's interest in protecting children from emotional harm is sufficiently strong to overcome parental rights.").

388. Maldonado, *supra* note 24, at 891.

389. Roth v. Weston, 789 A.2d 431, 445 (Conn. 2002); *see also* Dara v. Gish, 404 P.3d 154, 161 (Alaska 2017) ("Once standing is established, a third party seeking custody must show by *clear and convincing evidence* that the parent is unfit or that the welfare of the child requires the child to be in the custody of the non-parent." (emphasis added) (internal quotations omitted)).

"akin to the level of harm that would allow the state to assume custody under [state laws dealing with neglected children]."[390]

Although certainly understandable (and perhaps even laudatory) that states would require some justification before disregarding the wishes of a child's legal parent, the courts' focus has been overly narrow. For one thing, courts must be mindful that setting too high of a burden for showing harm ignores the reality of just how damaging it can be to children to have a quasi-parent removed from their life. As one court noted, "emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term."[391] And the harm can be quite severe. As Professor Jessica Feinberg recently summarized:

> The disruption of attachment relationships can cause significant both short- and long-term psychological and emotional harm to children. For example, when the relationship between an infant or toddler and psychological parent is disrupted, the child suffers anxiety and separation distress, and may have difficulty trusting the individuals with whom they form relationships in the future. . . . Disruption of attachment relationships during childhood also can lead to "aggression, fearful relationships, academic problems in school and . . . elevated psychopathology," and disruption experienced during childhood may continue to affect an individual even during adulthood.[392]

Not only is it harmful to terminate those relationships, but "[s]tudies have repeatedly shown that children derive significant benefits from continued contact with third parties who have functioned as parents."[393] Given the states' *parens patriae* responsibility "to safeguard the present and future welfare of

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390. *Roth*, 789 A.2d at 445.

391. *In re* E.L.M.C., 100 P.3d 546, 561 (Colo. App. 2004).

392. Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 65–66 (2017); Rebecca L. Scharf, *Psychological Parentage,* Troxel*, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615, 617 (2012) (exploring the "many ways children are harmed by the law's failure to ensure that the bonds they have developed with their psychological parents are not broken").

393. Maldonado, *supra* note 24, at 892.

children,"[394] state legislators and courts must take into account the true extent of the harms associated with removing a quasi-parent from the daily life of a child. Finally, states need to be mindful that losing a quasi-parent might pose even greater harm to children who reside in extended family structures because of the greater closeness they share with individuals who are not their legal parents. Consider for instance what one scholar observed when studying the extended family model in the Mexican American community: "[I]t is important to see relatives regularly face-to-face, to embrace, to touch, and to simply be with one another, sharing the minor joys and sorrows of daily life."[395] In contrast, when it came to white families, "these things are integral to nuclear family life but less important with regard to extended family ties."[396]

Of perhaps greater consequence is that by focusing exclusively on demonstrated harm, the courts are ignoring the question of whether children have a constitutional right to maintain a relationship with a quasi-parent. After all, there is no question that children enjoy constitutional rights. More than fifty years ago the Supreme Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[397] The Court has made clear that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[398]

The precise scope of those rights, however, is far from certain. Indeed, a plurality of the Court in *Michael H. v. Gerald D.* noted that "[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."[399] Eleven years lat-

394. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1218 (1970); *see also* SHULMAN, *supra* note 29, at 56 ("As *parens-patriae,* the state has plenary power to legislate on behalf of the child. The interest of the state in its children is so broad 'as to almost defy limitations.'" (quoting In re *Lippincott*, 124 A. 532, 533 (N.J. Ch. 1924))).

395. Susan Emley Keefe, *Real and Ideal Extended Familism Among Mexican Americans and Anglo Americans: On the Meaning of "Close" Family Ties*, 43 HUM. ORG. 65, 68 (1984).

396. *Id.*

397. *In re* Gault, 387 U.S. 1, 13 (1967).

398. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

399. Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

er, Justice Stevens penned a dissent in *Troxel* in which he posited that "it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation."[400] It is the position of this Article that Justice Stevens is correct.

A persuasive analogy can be found in the Court's treatment of illegitimacy. Historically, nonmarital children were viewed as having no legal parents. Considered "filius nullius," or "the child of no one," illegitimate children had no legal relationship to either parent.[401] Starting in the late 1960s, however, the Supreme Court began striking down laws that discriminated against nonmarital children. The first case to do so was *Levy v. Louisiana*, in which the Court struck down a Louisiana statute that prevented nonmarital children from bringing an action for the wrongful death of their mother.[402] Using the Equal Protection Clause, the Court concluded that "it is invidious to discriminate against [nonmarital children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done their mother."[403] Importantly, in a companion case, *Glona v. American Guarantee & Liability Insurance Co.*, the Court held that it was likewise unconstitutional to prevent a biological parent from suing for the wrongful death of a nonmarital child.[404] Thus, the right was reciprocal, with parent and child both qualifying as right-holders.

Of course, in those cases—and indeed in all cases concerning parental rights decided by the Supreme Court—the parent in question was not a quasi-parent but the legal parent. Although adults may have recourse to attain the status of legal parenthood over a child in their care, the child has no such power to compel an adoption and is instead at the mercy of

400. Troxel v. Granville, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting).

401. *See* Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 253 (1995). As John Dewey explains, "it was not understood to deny the fact of physiological begetting; it was asserting that such a one did not possess the specific rights which belong to one who was *filius*, implying wedlock as a legal institution." John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926).

402. 391 U.S. 68 (1968).

403. *Id.* at 72. Notably, the Court reached this result despite the fact that the law at issue "had history and tradition on its side." *Id.* at 71.

404. *Id.* at 73.

those adults who have stepped up to raise the child.[405] Further, it is not as though the child can simply strike out in search of parents who will adopt. As one commentator said when discussing the inheritance rights of informally adopted children: "It seems safe to assume that most children, even if they knew of their lack of status, would remain in the foster home and continue to act as dutiful children simply because they would have no other viable option."[406]

Whatever protections flow to legal parents by virtue of the Constitution should likewise flow to children, safeguarding their relationships with both legal and quasi-parents. As one commentator has pointed out, "[w]hile courts have afforded children's constitutional rights only limited protection in comparison to adults, they usually restricted children's rights to preserve the corresponding rights of the adults who take care of them or to promote the children's best interests."[407] Thus, when someone other than the parent is caring for the child, the usual limitations on the child's rights vis-á-vis the legal parent should go away, and the child's best interest should become the paramount consideration. At any rate, more guidance is needed from the Supreme Court regarding the nature of a child's right to maintain relationships with parental figures. It could be that state courts' current focus on psychological harm is too narrow and should also take into account the harm these situations pose to the constitutional rights of the child.

Regardless, states are failing to fully protect the child when they focus primarily on the rights of legal parents or only consider the child's interest when the threat of harm is quite high. The focus should instead be the *child's* rights in maintaining the relationship in question. Or, as one court put it many years ago: The question is "not what are the rights of the father or the other relative to the custody of the child, or whether the right of the one be superior to that to the other, but what are the rights of the child?"[408] States that fail to take

405. *See, e.g.*, O'Neal v. Wilkes, 439 S.E.2d 490, 494 (Ga. 1994) (Sears-Collins, J., dissenting) ("[A] child is usually too young to know of or understand the contract [to adopt], and it is thus difficult to find a meeting of the minds between the child and the adopting parents and the child's acceptance of the contract.").

406. Rein, *supra* note 315, at 776.

407. Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 386 (1994).

408. Merritt v. Swimley, 82 Va. 433, 440 (Va. 1886).

into account the child's best interest are likely creating laws that are, to put it mildly, short sighted. If courts fail to strike the proper balance, then we risk creating a system that exposes children to the very harms that state courts, acting as *parens patriae*, are intended to shield children from.

The legal question of how to adjudicate claims by quasi-parents is an incredibly complicated one—it will no doubt take years to reach a solid consensus on how to best balance all the competing interests. As a threshold matter, it seems quite clear that children cannot be discriminated against based on the family structures in which they were reared. As the Supreme Court has recognized, such discrimination "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[409] Unfortunately, as states have struggled to give effect to the Court's holding in *Troxel*, they have lost sight of the fact that children are increasingly less likely to come from the sort of family contemplated by the standards relating to quasi-parenthood that have evolved post-*Troxel.* The suggestions above are intended to help right that ship so that future developments in quasi-parenthood law can be built on a less discriminatory foundation.

CONCLUSION

Justice O'Connor, writing for the plurality in *Troxel v. Granville,* observed that "[t]he demographic changes of the past century make it difficult to speak of an average American family."[410] It is somewhat ironic then, that in the twenty years after *Troxel,* state courts have relied on that very opinion—the only opinion in which the Supreme Court has ever addressed the rights of parents vis-á-vis third parties—to adopt standards that treat the traditional nuclear family model as normative. That model, quite simply, is at odds with the reality of the American family. Indeed, throughout much of this country's history, many families have organized themselves into larger, more diverse family units. That is particularly true of the eth-

409. United States v. Windsor, 570 U.S. 744, 772 (2013).

410. Troxel v. Granville, 530 U.S. 57, 63 (2000). Later, she also observed that "persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing." *Id.* at 64.

nic minorities living in this country. It is bad enough that the law of domestic relations has largely ignored those family structures, but now this myopia has extended beyond those communities. With the legalization of same-sex marriage and the greater incidences of divorce, remarriage, and cohabitation, even the contemporary nuclear family looks much different today than it did when *Troxel* was decided—so much so that many more families will find themselves unprotected by laws that presume a traditional nuclear family model.

Discrimination of this variety exists in a number of laws dealing with domestic relations. Nonetheless, familial discrimination is particularly pernicious in legal regimes involving quasi-parenthood because the respective rights of the adults in a child's life are the law's exclusive focus, so the risk of harm to the child is a secondary concern or irrelevant altogether. And, as noted earlier, the harms that follow a forced separation from one who has behaved as the child's parent are well documented and serious—concerns about these harms are the driving force behind legal regimes that recognize the claims of quasi-parents.[411] Understandably, given the lack of guidance from the Supreme Court, the law on this issue will evolve as state courts continue to decide how best to structure the legal framework for quasi-parenthood. As a first step, the states must recognize the multiplicity of family forms that exist in the United States. As one court, writing back in 1993, correctly recognized:

> It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families. . . .[412]

Thus far the states have by and large failed to do that, and if the states do not correct their error, countless children—in particular the children of ethnic and sexual minorities—will continue to pay the price.

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411. Roth v. Weston, 789 A.2d 431, 445 (Conn. 2002).
412. *In re* Adoption of B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993).