

The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define “Parent”?

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ABSTRACT: This Note analyzes the psychological-parent and de facto-parent doctrines. These court-created doctrines allow third parties to gain standing to petition a court for the visitation of children. Such third parties are not biologically related to these children, yet they claim to have parent-like relationships with the children and seek to continue the relationships against the wishes of the biological or adoptive parents. These doctrines are becoming more common as family life in America becomes more fractured. Some states have adopted the doctrines, while others have rejected them; jurisdictions are in great conflict over the issue. This Note advocates for the rejection of the doctrines and suggests that the Uniform Parentage Act define “parent” to mean biological and adoptive parent, thus giving fit biological and adoptive parents the right to make decisions regarding third-party visitation. The Note argues that these doctrines infringe on the constitutional right of biological and adoptive parents to direct the upbringing of their children, create a slippery slope, and generally are not in the best interests of children.

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* J.D. Candidate, The University of Iowa College of Law, 2009; B.A., Iowa State University, 2002. Thanks to the editors and student writers of Volumes 93 and 94 of the *Iowa Law Review* for their hard work on this Note. Thanks also to my parents, John and Sheryl Rohlf, for their support of all of my endeavors.

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I. INTRODUCTION

*The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered. Public authorities cannot improve on nature.*¹

In the past few decades, the concept of "family" in the United States has changed radically. No longer is the "traditional family" of one father, one mother, and their biological children seen as the norm.² More children than ever before live in arrangements that include only one or neither of their biological parents.³ Since family law is primarily a state issue, there have been a wide variety of responses to these changes in the family structure.⁴ The fact that many people disagree about fundamental ideas of how the law should respond to these changes also contributes to the diversity.⁵ One area in particular that lacks uniformity is child visitation. This Note addresses one aspect of this area—third-party rights to petition for child visitation.

Many adults who are not biologically related to the children in their lives are increasingly claiming visitation rights to those children after the adult relationships that brought the children into their lives end. For example, a man who breaks up with his live-in girlfriend and wants to continue seeing his ex-girlfriend's daughter on a regular basis would be a third party seeking child visitation. The common law and state statutes generally have not given these third parties the right to bring suit for

1. *In re K.D. (A Minor) (Ward: Termination of Access)*, [1988] A.C. 806, 812 (H.L.) (appeal taken from Eng.) (U.K.) (opinion of Lord Templeman).

2. See FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 2007, at 87 tbl.FAM1.B (2007), available at http://www.childstats.gov/pdf/ac2007/ac_07.pdf (showing that in 2004 only sixty percent of America's children lived with two married biological or adoptive parents).

3. See *id.* at 87–89 tbl.FAM1.B (reporting that as of 2004, about seven percent of children lived with one biological or adoptive parent and a stepparent, twenty-six percent with only one parent, and four percent with no parent). The report also states that unmarried women were responsible for thirty-seven percent of all births in 2005. *Id.* at 92 tbl.FAM2.B.

4. See LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 24 (2d ed. 2006) ("[M]ost family law is local (state) law . . ."). Wardle and Nolan also note that "every state and separate federal territory each has its own unique set of family laws, policies, and doctrines and they vary significantly." *Id.* at 27–28 (1st ed. 2002).

5. See HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 8 (5th ed. 2003) ("Family law issues arouse controversy for a variety of reasons. Family relationships are intimate, generating strong, often conflicting, emotions. . . . Many issues of family law are also issues of morality, religious doctrine and cultural values . . .").

visitation against the wishes of a fit biological or adoptive parent.⁶ As a result, third parties have had to search for creative ways to find such a right.⁷ One such method involves the use of the psychological-parent and de facto-parent doctrines. These doctrines effectively redefine the term “parent” to go beyond biological and adoptive parents, thus permitting third parties to petition for visitation. Many proponents of these doctrines are pushing for their codification in the Uniform Parentage Act (“UPA”). This Note argues against the addition of these doctrines and instead suggests limiting the definition of “parent” to biological and adoptive parents, primarily because the doctrines violate the constitutional rights of fit biological and adoptive parents.

Part II of this Note surveys the varied state approaches to requests for third-party visitation. First, Part II considers the different types of statutes that states have enacted to address the issue. It then looks at the psychological-parent and de facto-parent doctrines as judicial responses to third-party-visitation issues. Part III of the Note explores the development in U.S. Supreme Court jurisprudence of the fundamental rights of parents in this country to direct the upbringing of their children—the rights that the psychological-parent and de facto-parent doctrines threaten. As a potential guide for states in protecting parental rights while crafting third-party-visitation statutes, Part IV examines the history and purposes of the UPA. Finally, Part V analyzes the potential ramifications of current efforts to include the psychological-parent and de facto-parent doctrines in the UPA. The Note concludes that such a change would violate the constitutional rights of parents, create a slippery slope for courts, and not be in the best interests of children. In conclusion, the Note advocates for a definition of “parent” that is explicitly limited to biological and adoptive parents.

II. THIRD-PARTY-VISITATION ISSUES

In an ideal world, a child would grow up in the home of his or her biological mother and biological father from birth to the age of majority. The world that we live in, however, is not ideal, and as such, children are raised in a variety of environments that involve third parties (i.e., non-natural parents). This Note defines “natural parent” as a biological or adoptive parent. The law recognizes an adoptive parent as the equivalent of a biological parent.⁸

6. See Holly M. Davis, Note, *Non-Parent Visitation Statutes: Was Troxel v. Granville Their Death-Knell?*, 23 WHITTIER L. REV. 721, 738 (2002) (observing that at common law, third parties had no relief in the courts).

7. See *id.* at 739–41 (discussing grandparents’ and other third parties’ efforts to expand visitation rights).

8. See WARDLE & NOLAN, *supra* note 4, at 336 (“The general effect of an adoption is to terminate completely the legal recognition of the parent-child relationship between the

In general, courts are not called on to intervene in circumstances that involve third parties because the adults involved with the children work it out among themselves. This Note does not address or criticize arrangements that natural parents might have with third parties.⁹ In fact, such relationships generally are highly beneficial to children and should be encouraged.¹⁰ Nor does the Note claim that only natural parents can be good, caring parents. This Note discusses only the limited issue of how the law should respond when third parties desire to obtain visitation rights¹¹ against the wishes of the fit natural parent.¹² Because these situations have become more common due to the breakdown of the traditional American family, states have responded with a variety of legislative and judicial actions. This Note next explores those responses.

A. THIRD-PARTY-VISITATION STATUTES

At common law, courts consistently upheld the right of parents to be free from state interference in the upbringing of their children.¹³ Thus, courts denied relief to third parties and held that “[a] parent is under no legal obligation to permit a child to visit [third parties] in the absence of a statute.”¹⁴ In response to the common law, grandparents—the traditional third party—lobbied state legislatures to change this policy in the last half of

biological parents and to establish in law the same relationship between the adoptive parents and children that exists between biological parents and children.”) In fact, the aim of adoption is to ensure that “the children enjoy so far as is legally possible the same relationship that biological children of the adoptive parents would enjoy—the same legal rights and duties.” *Id.*

9. Such arrangements might involve a parent sharing custody with a grandparent, a parent allowing his or her child to have regular visits with the child’s ex-stepparent, or a parent deciding to let his or her child live with a different family. If there is no disagreement and the natural parent supports the arrangement, then such decisions are totally within the realm of the parent’s rights to make choices about how his or her child is raised.

10. See *Roth v. Weston*, 789 A.2d 431, 447 (Conn. 2002) (“[T]here are often substantial benefits to a child in having close and sustained ties with extended family and those persons, while not related by blood, who take on caregiving roles.”).

11. Although custody and visitation are similar and often overlap in the law, this Note is limited to a discussion of visitation rights only. Many of the principles discussed in this Note may apply to custodial rights, but that is a discussion for another day.

12. If the parent is unfit, then the state is entitled to step in to protect the child. *WARDLE & NOLAN*, *supra* note 4, at 585. The definitions of “fit” and “unfit” vary from jurisdiction to jurisdiction. The Supreme Court has implied that fitness is equated with “adequately car[ing] for [the] child[.]” *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion). Another court has defined unfitness as “fail[ing] to provide[] emotional support[,] routine cleanliness[,] or nourishing food.” *Garska v. McCoy*, 278 S.E.2d 357, 362 n.9 (W. Va. 1981). In general, fitness is based on objective factors and not on subjective judgment calls about how to raise a child. See *id.* at 362 (describing the fit-parent standard as objective). Thus, a parent may be fit even if a court disagrees with his or her childrearing method.

13. *Davis*, *supra* note 6, at 738–39.

14. *Leake v. Grissom*, 614 P.2d 1107, 1110 (Okla. 1980).

the twentieth century.¹⁵ As a result, all fifty states now have some form of third-party-visitation statute.¹⁶ The Supreme Court recognized in *Troxel v. Granville* that these statutes aim to protect children by defending their relationships with third parties, but, as the Court stated, this protection comes with a cost that includes infringing on the parent-child relationship.¹⁷

States have enacted three basic types of third-party-visitation statutes.¹⁸ The first type allows third-party visitation only when a disruption in the nuclear family has occurred, such as divorce or death.¹⁹ This type of statute is the most common; about thirty states have enacted statutes that fall in this category.²⁰ For example, Nebraska's statute gives grandparents the right to petition for visitation only if one or both of the parents die, the parents get divorced, or the paternity of the child is established between two unmarried parents.²¹

The second type of statute, present in about fifteen states, awards visitation rights to grandparents when doing so is in the best interests of the child or when the court determines that it is appropriate, which can happen whether or not there is a disruption in the nuclear family.²² For example, South Dakota allows a court to award visitation to a grandparent if it is in the best interests of the child and either (1) such visitation would not interfere with the parent-child relationship or (2) the parent has not given the grandparent a reasonable opportunity to visit the child.²³

The third, and least common type of visitation statute, gives visitation rights to any third party who has a significant relationship with the child.²⁴ Only a handful of states have passed this type of law,²⁵ and out of those,

15. Davis, *supra* note 6, at 739.

16. *See id.* at 736 & n.152 (stating that over the past thirty years, every state has passed some kind of third-party-visitation statute, and listing those statutes).

17. *Troxel*, 530 U.S. at 64 (plurality opinion). The Court mentioned that one cost of recognizing the visitation interests of third parties is the "substantial burden on the traditional parent-child relationship." *Id.*

18. Davis, *supra* note 6, at 741.

19. *Id.*

20. *See id.* at 741 & n.184 (listing examples of such statutes).

21. NEB. REV. STAT. § 43-1802(1) (2004).

22. Davis, *supra* note 6, at 742 & n.188 (citing examples of this type of statute).

23. S.D. CODIFIED LAWS § 25-4-52 (2004).

24. Davis, *supra* note 6, at 743.

25. These states include Connecticut, Montana, Nevada, Oregon, Virginia, and Washington. *See* CONN. GEN. STAT. § 46b-59 (2007) (allowing courts to give visitation rights to any person who petitions the court if doing so is in the best interests of the child); MONT. CODE ANN. § 40-4-228 (2007) (giving courts the authority to award visitation rights to third parties upon clear and convincing evidence that (1) the natural parent "engaged in conduct that is contrary to the child-parent relationship," (2) the third party has a "child-parent relationship" with the child, and (3) "it is in the best interests of the child to continue that relationship" with

courts have recognized two of them as unconstitutional, one facially and one as applied.²⁶ For example, Oregon gives any person who has established significant "emotional ties" with a child the right to petition the court for visitation.²⁷ This last category of visitation statutes is the only one that effectively gives unrelated third parties the right to petition for visitation as "psychological parents."²⁸

The issue with all three types of third-party-visitiation statutes is not whether to show deference to natural parents, but "under what conditions, as determined by whom, that deference should be abandoned."²⁹ As the statutory schemes above demonstrate, states vary on the level of deference

the third party); NEV. REV. STAT. § 125C.050(2) (2007) (stating that courts may grant visitation rights to any person who has resided with and has a "meaningful relationship" with the child); OR. REV. STAT. § 109.119(1) (2007) (granting a right to petition for visitation to third parties who have "established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child"); VA. CODE ANN. § 16.1-278.15(B) (2003) (granting courts the authority to award visitation to a third party if the third party has a "legitimate interest" in visitation, which is to be "construed to accommodate the best interest of the child"); WASH. REV. CODE § 26.10.160(3) (2008) ("Any person may petition the court for visitation rights at any time . . .").

26. The Connecticut Supreme Court held its third-party-visitiation statute unconstitutional as applied, *see* Roth v. Weston, 789 A.2d 431, 451–52 (Conn. 2002) (holding that the lower-court ruling violated the natural parent's fundamental constitutional rights because the court did not honor the presumption in favor of the natural parent), and the Washington Supreme Court declared its third-party-visitiation statute to be facially unconstitutional, *see* Carvin v. Britain (*In re* Parentage of L.B.), 122 P.3d 161, 179 (Wash. 2005) ("Washington's current third party visitation statutes are unconstitutional and inoperative . . .").

27. OR. REV. STAT. § 109.119(1). Significant emotional ties are those that create "a child-parent relationship or an ongoing personal relationship" between the third party and the child. *Id.* The statute defines "child-parent relationship" as follows:

"Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

Id. § 109.119(10) (a). The statute defines "ongoing personal relationship" as "a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality." *Id.* § 109.119(10) (e).

28. *Cf.* Davis, *supra* note 6, at 744 ("It is in this category of statutes that lesbian and gay co-parents may have standing to petition for visitation rights if they are not granted 'psychological parent' status . . .").

29. Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v Granville*, 2000 SUP. CT. REV. 279, 284–85.

that they give to natural parents.³⁰ Since very few states have adequate statutory relief available to most third parties seeking visitation, many third parties have turned to the courts for help. In response to this, some courts have created doctrines to give these third parties the right to petition the courts for visitation.³¹ These doctrines redefine “parent” to include third parties who are not legal parents but who qualify as “psychological” or “de facto” parents.³² This gives these “psychological parents” standing to bring suit. This Note next discusses these doctrines.

B. *THE PSYCHOLOGICAL-PARENT AND DE FACTO-PARENT DOCTRINES*

1. Defining the Doctrines

The psychological-parent doctrine, an equitable theory, is a judge-made creation that allows courts to recognize a person who has a parent-like relationship with a child as a “psychological” parent and, thus, as someone who has standing to seek visitation.³³ In its most extreme reading, the doctrine gives any adult the right to claim parental rights to any child by showing that the adult has a “bonded, dependent . . . relationship” with the child and that the continuation of the relationship is in the best interests of the child.³⁴ A 1995 Wisconsin case set forth a four-element test that is now a common definition of the psychological-parent doctrine.³⁵ These four elements include the following:

- (1) that the biological or adoptive parent consented to, and fostered, the [third party’s] formation and establishment of a parent-like relationship with the child;
- (2) that the [third party] and the child lived together in the same household;
- (3) that the [third party] 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; and
- (4) that the

30. See *supra* notes 18–27 and accompanying text (discussing the general approaches that states take to third-party-visitation statutes).

31. See Recent Case, *E.N.O. v. L.L.M.*, 711 N.E.2d 886 (Mass.), cert. denied, 120 S. Ct. 500 (1999), 113 HARV. L. REV. 1551, 1551 (2000) (discussing how courts have used a variety of doctrines to give standing to lesbians who are not biologically related to their partners’ children).

32. See Nicole M. Onorato, Note, *The Right to Be Heard: Incorporating the Needs and Interests of Children of Nonmarital Families into the Visitation Rights Dialogue*, 4 WHITTIER J. CHILD & FAM. ADVOC. 491, 522 (2005) (discussing the change in the definition of “parent”).

33. See *id.* at 519–20 (explaining the psychological-parent doctrine).

34. Quaquia Soc’y, Inc., In Loco Parentis, <http://www.quaquia.org/inlocoparentis.htm> (last visited Jan. 21, 2009).

35. See Onorato, *supra* note 32, at 519–20 (discussing *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419 (Wis. 1995)).

[third party] has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.³⁶

Although this may have been the first articulation of the psychological-parent doctrine by a court, the theory has existed since the 1960s.³⁷ When the theory first appeared, proponents explained that "[i]t is this psychological parenthood, rather than the biological events which may precipitate such a relationship, which many psychologists identify as the *sine qua non* of successful personality development."³⁸ Well-known child psychoanalyst and Yale professor Anna Freud, the youngest daughter of Sigmund Freud,³⁹ also wrote on the theory.⁴⁰ Freud defined the term "psychological parent" as "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent."⁴¹

The de facto-parent doctrine is very similar to the psychological-parent doctrine, and the two doctrines emerged at around the same time.⁴² The de facto-parent doctrine focuses on the basic elements of the psychological-parent doctrine—the type of relationship between the third party and child, whether the third party was a part of the same household as the child, and whether the third party took on support obligations.⁴³ Courts have defined

36. *In re Custody of H.S.H.-K.*, 533 N.W.2d at 435–36 (footnote omitted).

37. Peggy C. Davis, "There Is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1543 (1987) (citing Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963)). This student Note was the first time that the concept of psychological parenting appeared in legal scholarship. *Id.*

38. Note, *supra* note 37, at 158.

39. See generally Anna Freud Ctr., About Anna Freud, http://www.annafreudcentre.org/anna_freud.htm (last visited Jan. 21, 2009) (highlighting the life and work of Anna Freud).

40. See generally JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17–20, 98 (1973) [hereinafter BEST INTERESTS I] (introducing and defining the concept of psychological parenthood); JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 39–57 (1979) [hereinafter BEST INTERESTS II] (discussing the psychological-parent doctrine in a chapter entitled "Familial Bonds Between Children and Longtime Caretakers Who Are Not Their Parents").

41. BEST INTERESTS I, *supra* note 40, at 98. The authors noted that "[t]he psychological parent may be a biological, adoptive, foster, or common-law parent, or any other person." *Id.* (citations omitted). Additionally, they advocated for the use of the psychological-parent doctrine in situations where children have been separated from their biological or adoptive parents for a long period of time. See BEST INTERESTS II, *supra* note 40, at 46–48 (proposing "maximum intervals beyond which it would be unreasonable to presume that a child's . . . ties with his absent [natural] parents are more significant than those that have developed between him and his longtime caretakers"). In most psychological-parent cases today, the biological parent has been involved in the child's life all along. See *infra* Part II.B.2 (discussing examples of such cases).

42. Onorato, *supra* note 32, at 521.

43. *Id.*

“de facto parent” as “one who has no biological relation to the child, but has participated in the child’s life as a member of the child’s family.”⁴⁴ The de facto parent must live with the child and, “with the consent and encouragement of the legal parent, perform[] a share of caretaking functions at least as great as the legal parent.”⁴⁵

If either psychological or de facto parenthood exists, a court that follows one or both of the doctrines will treat the third party as equal to the natural parent and will apply the “best interests of the child” standard to decide visitation, much the same as if two biological parents were vying for visitation or custody in a divorce proceeding.⁴⁶ In comparing the psychological-parent and de facto-parent doctrines, the differences are superficial and not important to the overall theme of this Note. The two doctrines are often used interchangeably, and the nuances between them vary by jurisdiction, but the same basic principles underlie their application. This Note discusses both doctrines as encompassed in the basic concept of “psychological parenting.”

2. The Application of the Doctrines in State Courts

The Supreme Court has never addressed the psychological-parent or de facto-parent doctrines. State courts are in great disagreement over the issue; some have embraced the doctrines while others have rejected them.⁴⁷ Two

44. E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999).

45. *Id.*

46. Onorato, *supra* note 32, at 521; *see also* V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000) (“Once a third party has been determined to be a psychological parent to a child, . . . he or she stands in parity with the legal parent. Custody and visitation issues between them are to be determined on a best interests standard . . .” (citation omitted)). *Black’s Law Dictionary* defines “best interests of the child” as the “standard by which a court determines what arrangements would be to a child’s greatest benefit, often used in deciding . . . visitation matters.” BLACK’S LAW DICTIONARY 170 (8th ed. 2004). The test varies between jurisdictions, but courts typically consider several factors in their determinations:

the emotional tie between the child and the parent or guardian, the ability of a parent or guardian to give the child love and guidance, the ability of a parent or guardian to provide necessities, the established living arrangement between a parent or guardian and the child, the child’s preference if the child is old enough [to decide], and a parent’s ability to foster a healthy relationship between the child and the other parent.

Id.

47. *See* Carvin v. Britain (*In re* Parentage of L.B.), 122 P.3d 161, 174–75 & 175 n.23 (Wash. 2005) (noting several jurisdictions that have recognized psychological or de facto parentage and several that have rejected the doctrines); Petition for a Writ of Certiorari at 11–24, Britain v. Carvin, 547 U.S. 1143 (2006) (No. 05-974), *available at* <http://www.telladf.org/UserDocs/BritainvCarvinPetition.pdf> (discussing the “pervasive conflict” among the states on the issue of de facto parentage and describing the holdings of the states on both sides of the issue); HOMER H. CLARK, JR. & ANN LAQUER ESTIN, CASES AND PROBLEMS ON DOMESTIC RELATIONS 1031 (7th

recent cases illustrate the disagreement and present many arguments on both sides of the issue.

The Utah Supreme Court declined to adopt the psychological-parent doctrine in the 2007 case of *Jones v. Barlow*.⁴⁸ In *Jones*, two women involved in a romantic relationship had a child through the artificial insemination of one of the women.⁴⁹ The relationship ended when the child was two years old, and eventually the biological mother, Barlow, cut off all contact between her former partner, Jones, and her daughter.⁵⁰ Jones then brought suit in Utah court seeking custody and visitation of the child.⁵¹

The case made it to the Utah Supreme Court, where the court held that Jones did not have standing to seek visitation or custody.⁵² The court refused to adopt the psychological-parent doctrine as a possible way for Jones to obtain relief.⁵³ It rejected the doctrine for several reasons. First, the court stated that the doctrine created an ambiguous jurisdictional test that would be difficult to administer uniformly.⁵⁴ Such a fact-based inquiry into intimate relationships "does not fulfill the traditional gate-keeping function of rules of standing" and would expose parents to claims by a "wide range" of individuals who assert "parent-like relationship[s] with their child[ren]."⁵⁵ Second, the court argued that endorsing this doctrine would overstep the authority of the judiciary.⁵⁶ Such an issue was within the realm of social policy, which the court believed should be a legislative function.⁵⁷

The possibility that the state could take away parental rights under the Constitution solely based on an "elusive factual determination[]" as to

ed. 2005) (listing several cases that extend standing to psychological parents as well as several cases that deny such standing).

48. *Jones v. Barlow*, 154 P.3d 808, 815–19 (Utah 2007).

49. *Id.* at 810.

50. *Id.*

51. *Id.*

52. *Id.* at 811.

53. *Jones*, 154 P.3d at 815–19. The court also rejected the *in loco parentis* doctrine as a basis for granting Jones visitation rights. *Id.* at 812–15. This doctrine applies when "someone who is not a legal parent nevertheless assumes the role of a parent in a child's life." *Id.* at 811. An individual acting in that role is basically standing in for a parent and has the "same rights, duties, and liabilities as [that] parent." *Id.* (quoting *Sparks v. Hinckley*, 5 P.2d 570, 571 (Utah 1931)). However, as the court recognized in *Jones*, the *in loco parentis* relationship is temporary, and the rights and duties of the *in loco* parent are terminated once the relationship ends and the legal parent withdraws consent to the relationship. *Id.* at 812. Since Barlow ended the *in loco parentis* relationship when she moved out, "Jones [did] not have standing to extend [that] relationship against Barlow's wishes." *Id.* at 815.

54. *Id.* at 816. Though the court referred to the de facto-parent doctrine, it was using that term interchangeably with the psychological-parent doctrine. *See id.* ("Most prominent among these other doctrines are those labeled 'psychological parent,' or 'de facto parent.'").

55. *Id.* (quoting *Titchenal v. Dexter*, 693 A.2d 682, 688 (Vt. 1997)).

56. *Id.*

57. *Id.* at 817.

whether [the parent] intended to relinquish those rights to a third party” also concerned the court.⁵⁸ The court found “no bedrock principles” on which to base such a power⁵⁹ and was therefore unwilling to enlarge the common law’s reach into parental rights.⁶⁰ The common law “evidences a strong presumption that parental rights shall not be disturbed absent a determination that the legal parents are unfit.”⁶¹ For all these reasons, the court refused to adopt the psychological-parent doctrine and denied Jones standing to seek visitation.⁶² This case serves as an example of a jurisdiction that rejected these court-created doctrines and instead upheld traditional views of family and parental rights.

Like Utah, other courts have refused to adopt the psychological-parent and de facto-parent doctrines for many of the same reasons. The Vermont Supreme Court rejected the doctrines because, among other reasons, they would expose parents to a “potentially wide range of third parties claiming . . . parent-like relationship[s] with their child[ren].”⁶³ The Michigan Supreme Court recognized that the legislature should make such determinations.⁶⁴ Additionally, the New York Court of Appeals held that “[t]o allow the courts to award visitation—a limited form of custody—to a third person would necessarily impair the parents’ right to custody and control.”⁶⁵

58. *Jones*, 154 P.3d at 816 (quoting *Van v. Zahorik*, 575 N.W.2d 566, 570 (Mich. Ct. App. 1997), *aff’d*, 597 N.W.2d 15 (Mich. 1999)).

59. *See id.* at 817–18 (“There are simply no bedrock principles upon which to construct a doctrine creating visitation rights for nonparents.”). The court cited precedent indicating that “[i]t is a fundamental tenet of our common law that ‘the only persons having any actually vested interest in the custody of a child cognizable by the law are the parents.’” *Id.* at 818 (quoting *Wilson v. Family Servs. Div.*, 554 P.2d 227, 229 (Utah 1976)).

60. *Id.* at 817.

61. *Id.* at 818. The court recognized that if a parent is fit, “courts may not make a ‘best interests’ inquiry into nonparent custody of a child.” *Id.*

62. *Id.* at 819. Besides the reasons given above, the court also recognized that the doctrine was inconsistent with the Utah legislature’s definition of a mother–child relationship, which is established by: “(a) the woman’s having given birth to the child . . . ; (b) an adjudication of the woman’s maternity; (c) adoption of the child by the woman; or (d) an adjudication confirming the woman as a parent of a child born to a gestational mother [pursuant to a valid] agreement.” *Id.* at 818–19 (quoting UTAH CODE ANN. § 78-45g-201 (Supp. 2006) (current version at UTAH CODE ANN. § 78B-15-201 (Supp. 2008))). The legislature had also specifically defined which third parties had standing to petition the courts for visitation. *Id.* at 819.

63. *Titchenal v. Dexter*, 693 A.2d 682, 688 (Vt. 1997).

64. *See Van v. Zahorik*, 597 N.W.2d 15, 18 (Mich. 1999) (“[T]his Court has indicated that the public policy issues related to child custody disputes are to be resolved by the Legislature, not the judiciary . . .”).

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

In contrast, in *In re Parentage of L.B.*, the Washington Supreme Court adopted the de facto-parent doctrine.⁶⁶ This 2005 case presented very similar facts to *Jones*. Two women, Carvin and Britain, had a same-sex relationship for about twelve years.⁶⁷ Almost six years into their relationship, Britain gave birth to a child through artificial insemination.⁶⁸ When the child was almost six, the women separated.⁶⁹ The two women shared custody and parental responsibilities at first, but Britain later cut off all visitation with Carvin.⁷⁰

The court adopted the de facto-parent doctrine to give Carvin standing to petition for visitation. To support its adoption of psychological parenting, the court recognized its authority to change the common law and to fill gaps in the existing statutes.⁷¹ The court also cited precedent in support of recognizing psychological parentage in Washington.⁷² Thus, although Washington had adopted the UPA, which "governs every determination of parentage," the court ruled that this did not prevent it from using the common law for situations that the UPA did not address, such as the circumstances of the case at bar.⁷³ The court also noted that Washington

66. Carvin v. Britain (*In re Parentage of L.B.*), 122 P.3d 161, 177 (Wash. 2005). The court defined "de facto parent" as an "individual who[] in all respects functions as a child's actual parent." *Id.* at 167 n.7. A "psychological parent" is one who has a "parent-like relationship which is 'based . . . on [the] day-to-day interaction, companionship, and shared experiences' of the child and adult." *Id.* (alterations in original) (quoting BEST INTERESTS I, *supra* note 40, at 19). Although the court defined psychological parent and de facto parent differently, the petitioner wanted to be recognized as either type of equitable parent. *Id.* The same basic principles underlie both doctrines, and it is difficult to distinguish between the two terms. In fact, the Washington Court of Appeals found that "a common law claim of *de facto* or psychological parentage exists in Washington," *id.* at 165, implying that the two doctrines are basically the same. Thus, the fact that the Washington Supreme Court adopted only the de facto-parent doctrine is insignificant.

67. *Id.* at 163–64.

68. *Id.* at 164.

69. *Id.*

70. *Id.*

71. *In re Parentage of L.B.*, 122 P.3d at 166.

72. *Id.* at 168–69 (citing *Stell v. Stell (In re Custody of Stell)*, 783 P.2d 615 (Wash. Ct. App. 1989); *In re Marriage of Allen*, 626 P.2d 16 (Wash. Ct. App. 1981)). In one case, the court awarded custody of a deaf child to his deaf stepmother instead of his biological father, primarily because she had raised the child from age three to age seven, during which time "the child showed 'remarkable development'" as a result of "the stepmother's 'dedication, devotion and determination.'" *Id.* at 168 (quoting *In re Marriage of Allen*, 626 P.2d at 19). In the other case, the court reversed the trial court's award of custody of a boy to the biological parent, finding that the child's aunt had become his psychological parent. *Id.* at 169 (citing *In re Custody of Stell*, 783 P.2d at 622).

73. *Id.* at 170 (quoting WASH. REV. CODE § 26.26.021(1) (2004)).

courts have a history of using equitable powers in such matters.⁷⁴ Finally, the court stressed that Washington has recognized the best-interests-of-the-child standard in evaluating visitation petitions.⁷⁵ All of these factors led to the court's conclusion that "the history of Washington's visitation law evinces its common law foundation, a lack of legislative intent to preempt the common law, and equally important, its emphasis on the interests of the children."⁷⁶

With this conclusion, the court found that the UPA was meant to "supplement and clarify parentage actions" and not to replace the common-law equity powers of the courts to decide issues such as rights to visitation and custody.⁷⁷ Since the court ruled that it had the authority to recognize the de facto-parent doctrine, it did just that.⁷⁸ In sum, the court held that although the Washington statutory scheme did not give such a right to third parties, the common law gave a third party such as Carvin standing to show that she is a de facto parent.⁷⁹ Furthermore, Washington courts recognize a de facto parent as equal to a natural parent.⁸⁰ Thus, the courts determine the visitation rights between de facto parents and natural parents based on the best interests of the children.⁸¹

The court further concluded that Britain's parental rights were not violated since Washington common law recognized that a de facto parent is the equivalent of a biological parent.⁸² In effect, according to the court, *both* the de facto parent and the biological parent have a "fundamental liberty interest[]" in the 'care, custody, and control' of [the child].⁸³ The court also distinguished *Troxel v. Granville*, in which the U.S. Supreme Court held Washington's third-party-visitation statute unconstitutional, stating that *Troxel* did not limit states' ability to define the terms "parent" or "family" through legislation or the common law.⁸⁴ The court narrowly construed

74. See *id.* at 171 n.18 ("It is well recognized, both in Washington and nationally, that child custody and visitation orders may be established by reliance on courts' equity powers and the common law.").

75. *Id.* at 172-73.

76. *In re Parentage of L.B.*, 122 P.3d at 173.

77. *Id.*

78. *Id.* at 176. The court adopted the well-known four-prong test set forth in *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 421 (Wis. 1995). *In re Parentage of L.B.*, 122 P.3d at 176; see also *supra* notes 35-36 and accompanying text (citing the relevant case and quoting the test that the court laid out).

79. *In re Parentage of L.B.*, 122 P.3d at 176.

80. *Id.* at 177.

81. *Id.*

82. *Id.* at 178.

83. *Id.* (first alteration in original) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion)).

84. *In re Parentage of L.B.*, 122 P.3d at 178.

Troxel to apply only to its particular facts and thus did not think it was applicable to its case.⁸⁵

Other courts have adopted the psychological-parent and de facto-parent doctrines under similar reasoning. For example, in Colorado, a court granted visitation to a psychological parent because the court presumed that the child would incur emotional harm if the psychological parent's visitation rights were taken away.⁸⁶ The Supreme Judicial Court of Maine held in one case that the emotional ties between the grandparents and child constituted "a compelling basis for the State's intervention into an intact family with fit parents."⁸⁷ Further, the Massachusetts Supreme Judicial Court applied the best-interests-of-the-child standard, recognizing that a parent's constitutional rights can be outweighed if a court determines that the third-party relationship is in the best interests of the child.⁸⁸

Cases adopting the de facto-parent doctrine stand in stark contrast to the decisions in jurisdictions that refuse to adopt it. These cases demonstrate the great divide that exists among jurisdictions in this area of law. There are dozens of cases on each side of the debate regarding third-party visitation and custody.⁸⁹ In response to this divide in the law, some scholars and courts have suggested changing the UPA to take into account these doctrines.⁹⁰ Such a change would give third parties the right to petition the courts for visitation because psychological parents would stand in parity with natural parents. In evaluating this option, the fundamental constitutional rights of natural parents, discussed in the next Part of this Note, must be considered.

III. THE DEVELOPMENT OF PARENTAL RIGHTS

A parent has a fundamental right to control his or her child's upbringing. This Part first traces the Supreme Court's recognition of natural parents' right to choose how to raise their children and examines the

85. See *id.* (citing *Troxel*, 530 U.S. at 69) ("*Troxel* . . . simply disapproved of the grant of visitation in that case . . .").

86. *In re E.L.M.C.*, 100 P.3d 546, 560–61 (Colo. App. 2004).

87. *Rideout v. Riendeau*, 761 A.2d 291, 302 (Me. 2000).

88. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 893 (Mass. 1999).

89. See sources cited *supra* note 47.

90. See, e.g., John Sheldon, *The Good News, and Some Bad News, About the Uniform Parentage Act of 2002*, 18 ME. B.J. 94, 94 (2003) (recommending that the Maine legislature adopt the UPA subject to an amendment dealing with same-sex parents); John G. New, Note, "*Aren't You Lucky You Have Two Mamas?*": *Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 CHI.-KENT L. REV. 773, 779 (2006) (advocating for the development of the UPA's definition of "parent" to include nonparents in same-sex relationships); Nicole L. Parness, Note, *Forcing a Square into a Circle: Why Are Courts Straining to Apply the Uniform Parentage Act to Gay Couples and Their Children?*, 27 WHITTIER L. REV. 893, 907 (2006) ("[W]hen courts attempt to apply the UPA to gay couples to determine parentage of their children, it is almost as if they are attempting to fit a square into a circle, and it just does not fit.").

rationales underlying the right. It then discusses that right as it applies to issues of third-party visitation and custody, which the Supreme Court recently considered in a 2000 case that struck down the State of Washington's third-party-visitation statute because it infringed on natural parents' constitutional rights.

A. PARENTS' FUNDAMENTAL CONSTITUTIONAL RIGHTS

Over the years, the U.S. Supreme Court has created a strong presumption in favor of natural parents' decisions regarding custody and visitation—a presumption that is in tension with the psychological-parent and de facto-parent doctrines. Although the U.S. Constitution does not contain the words “parent” or “child” anywhere within its text,⁹¹ the Supreme Court has “consistently and vigorously protected [natural parents'] rights through the application of constitutional principles.”⁹² American society has always given great weight to the parent-child relationship, and, in general, our culture has accepted the principle that important decisions about the custody and control of children should be left in the hands of natural parents.⁹³ Two types of interests drive this constitutional protection of parents' rights—the interest of the family in being free from outside intervention and the interest of parents in protecting the parent-child relationship and having authority over their children.⁹⁴

The recognition of parental rights dates back nearly a century to 1923, when the Supreme Court articulated for the first time the fundamental right of parents to raise their children.⁹⁵ The Court rooted this right in the “liberty” of the Fourteenth Amendment.⁹⁶ Recently, the Court

91. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 18 (2005).

92. *Id.*; see also *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion) (outlining the “extensive precedent” for parental rights); ALAN SUSSMAN & MARTIN GUGGENHEIM, THE RIGHTS OF PARENTS: THE BASIC ACLU GUIDE TO THE RIGHTS OF PARENTS 1 (1980) (“[T]he legal rights of parents to bear children, raise their offspring, and guide their family according to their own beliefs are firmly rooted in the first ten amendments to the Constitution . . .”).

93. SUSSMAN & GUGGENHEIM, *supra* note 92, at 1.

94. Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1071–72 (1996).

95. See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding unconstitutional a Nebraska law forbidding teachers from instructing in any language other than English in part because it abridged parents' fundamental right to “control the education of their own”). The Court in *Meyer* emphasized that the United States is not a society in which the state should have a primary role in childrearing. See *id.* at 402 (arguing that the ideas underlying the use of “official guardians” to educate children are “wholly different from [the principles] upon which our institutions rest”).

96. The *Meyer* Court defined “liberty” as “not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children.” *Id.* at 399. The

acknowledged that this fundamental right is "perhaps the oldest of the fundamental liberty interests recognized by [the] Court."⁹⁷ Few constitutional rights have had such long-term recognition as the parental right to direct a child's upbringing,⁹⁸ which is, according to the Court, "established beyond debate as an enduring American tradition."⁹⁹ Since 1923, the Supreme Court has reaffirmed numerous times the constitutional rights of parents.¹⁰⁰ Parental rights are now some of the most protected and valued constitutional rights in this country.¹⁰¹

The parental right finds its foundation in the citizen-state relationship and in the role that childrearing plays in developing future citizens.¹⁰² According to Professor Martin Guggenheim, two fundamental principles of American law shape this right.¹⁰³ The first principle is the tenet that the

Fourteenth Amendment's text states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

97. *Troxel*, 530 U.S. at 65 (plurality opinion).

98. GUGGENHEIM, *supra* note 91, at 31; *see also* SUSSMAN & GUGGENHEIM, *supra* note 92, at 2 ("[Parental rights] are held in very high esteem. It might even be said that they command the highest respect of all personal rights protected by the Constitution.")

99. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), *quoted in* GUGGENHEIM, *supra* note 91, at 18. The Supreme Court, however, has not "set out exact metes and bounds to the protected interest of a parent in the relationship with his child." *Troxel*, 530 U.S. at 78 (Souter, J., concurring in the judgment). The Court has indicated that a parent's right is not absolute, but instead, has limits. *Id.* at 87 (Stevens, J., dissenting). The Court has also never addressed the "nature of a child's liberty interests in preserving established familial or family-like bonds." *Id.* at 88. While it is clear that the parental right is not unlimited, the Court has honored it in very broad circumstances.

100. *See, e.g., Yoder*, 406 U.S. at 232 ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("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.")

101. GUGGENHEIM, *supra* note 91, at 23; *see* John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 384 (1998) (noting that the Supreme Court has "undisturbed precedent supporting family autonomy and parental authority"); *see supra* note 97 and accompanying text.

102. GUGGENHEIM, *supra* note 91, at 23.

103. *Id.* at 23-24. Professor Guggenheim has taught at the NYU School of Law for over thirty years and is considered "[o]ne of the nation's foremost experts on children's rights and family law." NYU Law, Faculty Profiles, <http://its.law.nyu.edu/faculty/profiles/index.cfm?fuseaction=bio.main&personID=19969> (last visited Jan. 21, 2009). He has "represented hundreds of kids in juvenile-delinquency, child-protection and [termination-of-parental-rights] cases as a legal-services attorney." Daniel Bergner, *The Case of Marie and Her Sons*, N.Y. TIMES, July 23, 2006, § 6 (Magazine), at 28.

“government exists to serve the will of the people.”¹⁰⁴ Because of this fundamental belief, the Constitution limits the government’s ability to regulate speech; in general, citizens may speak, think, and express themselves however they desire in order to make their will known.¹⁰⁵ Since speech is unrestricted for the most part, a wide range of ideas has emerged about how people should “live their lives and . . . shape their society.”¹⁰⁶ According to free-speech principles, the government may not restrict speech based on a preference for one idea over another—it may not engage in “viewpoint discrimination.”¹⁰⁷ Thus, the government must not prefer one opinion of childrearing over another, because a parent’s method of childrearing reflects his or her viewpoint.

The second principle of American law that underlies parental rights is based on the fact that the Constitution gives the government a very limited role in the arena of religion.¹⁰⁸ The First Amendment guarantees the free exercise of religion and prohibits the establishment of a governmental religion.¹⁰⁹ Accordingly, the government must allow religion to thrive and must not prefer one religion over another.¹¹⁰ Therefore, the state also may not prefer one religious upbringing of a child to another.

Applying these two principles to third-party visitation, the government should not be able to override natural parents’ decisions about such visitation without showing that the parents are unfit. Such decisions are

104. GUGGENHEIM, *supra* note 91, at 23; *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed . . .”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (stating that the government must be “responsive to the will of the people”).

105. GUGGENHEIM, *supra* note 91, at 23; *see also* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”); *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.” (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

106. GUGGENHEIM, *supra* note 91, at 23–24.

107. *Id.* at 24 (internal quotation marks omitted); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

108. *See* GUGGENHEIM, *supra* note 91, at 24 (discussing the “extremely limited role assigned to [the] government in connection to religion”). Indeed, the Court has consistently affirmed that a “wall of separation” should exist between the government and religion. *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (internal quotation marks omitted).

109. GUGGENHEIM, *supra* note 91, at 24; *see* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

110. GUGGENHEIM, *supra* note 91, at 24; *see also* *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 875–76 (2005) (“[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause.”).

often related to the parents' beliefs and values.¹¹¹ Justice Souter, in fact, has noted that "adults not only influence but may indoctrinate children."¹¹² As Professor Guggenheim states, "Precisely because childrearing means forming the values, interests, ideas, and religious beliefs of the next generation, we should expect American law to insist, as the Supreme Court has, that the state cannot enter the domain of family life."¹¹³ Parental decisions to instill values in children and to expose them to religious training are judgments that "the state can neither supply nor hinder."¹¹⁴ Indeed, the home is the very foundation of democracy, for it is there that children begin to formulate ideas about who they are, how to relate to others, and how to solve problems.¹¹⁵

Furthermore, the Supreme Court has recognized fundamental rights in the freedom to procreate and the corresponding freedom not to procreate.¹¹⁶ One scholar notes that "[t]he right to bear and raise children is at the core of an individual's autonomy because it permits him or her the opportunity to choose the kind of life that makes the most sense."¹¹⁷ Another commentator explains that childrearing is one way in which a large number of people define and live out their most important values about life.¹¹⁸ Intimate relationships tend to be a means through which many

111. See GUGGENHEIM, *supra* note 91, at 25 ("The best way to guard against government becoming too involved in shaping the ideas or religion of its citizens is to deregulate and privatize childrearing.")

112. *Troxel v. Granville*, 530 U.S. 57, 78 (2000) (Souter, J., concurring in the judgment).

113. GUGGENHEIM, *supra* note 91, at 25; see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926–27 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (observing that the Supreme Court has held that "the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as . . . childrearing").

114. GUGGENHEIM, *supra* note 91, at 25 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

115. Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1, 4 (2000) ("Truly, '[t]he family is the very seedbed of democracy. Home is the place where we get our first ideas about [ourselves], our attitudes toward other people, and our habits of approaching and solving problems.'" (alterations in original) (quoting CHRISTINE BEASLEY, *DEMOCRACY IN THE HOME* 25 (1954))).

116. See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973) ("We . . . conclude that the [constitutional] right of personal privacy includes the [choice to terminate a pregnancy]."); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding unconstitutional a Connecticut law that made contraceptives illegal, even for married individuals, because the marriage relationship lies within a "zone of privacy" upon which the state should not encroach); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding unconstitutional an Oklahoma law allowing the state to sterilize repeat criminal offenders, and, in doing so, noting that procreation is a "basic civil right[] of man" that is "fundamental to the very existence and survival of the race").

117. GUGGENHEIM, *supra* note 91, at 32.

118. David A.J. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 28 (1980), quoted in GUGGENHEIM, *supra* note 91, at 32. Professor

people come to understand themselves.¹¹⁹ Thus, since a natural parent's choice about whom his or her child should associate with involves these personal issues and reflects the ideas that the parent holds about childrearing, the courts should not be able to step in arbitrarily and declare a parent's choices and ideas to be wrong. Such intrusion violates parents' constitutional rights and is appropriate only when the state can show that a natural parent is unfit. Otherwise, to protect the principles of free speech and freedom of religion, courts should always defer to the decisions of fit natural parents, even if the courts feel they can make better decisions.¹²⁰ The next Section examines a case where the Supreme Court did defer to the decisions of the natural parent.

B. TROXEL V. GRANVILLE: PARENTAL RIGHTS AND THIRD-PARTY VISITATION

The U.S. Supreme Court most recently reiterated parents' rights in the 2000 case of *Troxel v. Granville*.¹²¹ In *Troxel*, the Court dealt specifically with parental rights in the context of third-party-visitation statutes and the issue of whether the courts could award visitation to a third party over the objections of the natural parent.¹²² The main issue that the Court faced was the breadth of parents' constitutional right to direct the upbringing of their children.¹²³

In *Troxel*, Tommie Granville and Brad Troxel had two children together but never married.¹²⁴ About two years after the couple ended their relationship, Troxel committed suicide.¹²⁵ Before his death, and for a while thereafter, Troxel's parents saw the two children, their grandchildren, on a regular basis.¹²⁶ However, Granville eventually informed Troxel's parents that she wanted to restrict the children's visits with them to "one short visit

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119. GUGGENHEIM, *supra* note 91, at 32 (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 636 (1980)).

120. *See Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (plurality opinion) (“[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”).

121. *See id.* at 66 (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

122. *See id.* at 64–65 (describing third-party-visitation statutes and the issue presented).

123. Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & FAM. STUD. 71, 100 (2006).

124. *Troxel*, 530 U.S. at 60 (plurality opinion).

125. *Id.*

126. *Id.*

per month.”¹²⁷ The grandparents then petitioned the courts for more extensive visitation rights under a Washington statute.¹²⁸ Though the lower court granted visitation exceeding the limits requested by Granville, the Washington Supreme Court struck down the statute as unconstitutional, and the U.S. Supreme Court affirmed that decision.¹²⁹

The plurality ruled that the statute was overbroad because it allowed any person—related or unrelated to a child—to petition the court at any time for visitation rights.¹³⁰ This gave courts the power to review any visitation decision that a parent made.¹³¹ Furthermore, the Court held that for three reasons, the lower court used an incorrect method in applying the statute.¹³² First, the lower court did not give deference to the fit parent’s view of what was in the best interests of the children.¹³³ The Court recognized that there is a “traditional presumption that a fit parent will act in the best interest of his or her child,” and the lower court’s decision did not take into account that presumption.¹³⁴ Second, the Court stated that if a parent takes care of his or her children in an adequate manner, there is no reason for the state to get involved and second-guess the ability of the parent to make good decisions.¹³⁵ Finally, the Court found it significant that the lower court gave no weight to the mother’s original request merely to limit visitation rather than to cut it off completely.¹³⁶ The lower court, in effect, “rejected Granville’s proposal” and substituted its own judgment about what was best for the children, and such substitution was unacceptable.¹³⁷ These three factors worked together to infringe on the mother’s constitutional right to exercise parental autonomy.¹³⁸

Although *Troxel* upheld a parent’s right to make decisions about third-party visitation, it did not define the scope of that right very clearly.¹³⁹ For

127. *Id.* at 60–61.

128. *Id.* at 61. The relevant statute provided that “[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings.” *Id.* (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

129. *Troxel*, 530 U.S. at 61–63 (plurality opinion).

130. *Id.* at 67.

131. *Id.*

132. See Sandra Martinez, *The Misinterpretation of Troxel v. Granville: Construing the New Standard for Third-Party Visitation*, 36 FAM. L.Q. 487, 490–91 (2002) (highlighting these three reasons).

133. *Troxel*, 530 U.S. at 69 (plurality opinion).

134. *Id.*

135. *Id.* at 68–69.

136. *Id.* at 71.

137. *Id.*

138. Martinez, *supra* note 132, at 490.

139. See *Troxel*, 530 U.S. at 73 (plurality opinion) (“We do not, and need not, define today the precise scope of the parental due process right in the visitation context.”).

one, the plurality did not address the issue of whether harm or potential harm must exist before the state interferes in parental decisions.¹⁴⁰ Also, the Court did not articulate a standard of review with respect to the constitutionality of the statute, though Justice Thomas advocated for strict-scrutiny review in his concurrence.¹⁴¹

While the splintered decision¹⁴² has puzzled courts and legal scholars,¹⁴³ it generally emphasizes the rights of parents to make decisions about their children and the fact that those rights are deeply rooted in constitutional law. Because *Troxel* does not have a majority opinion and because even its plurality opinion is somewhat confusing, it is easy to see why state courts are confused over the issue of third-party visitation. The UPA could be used as a vehicle to clear up this confusion, but it must be used in a way that protects and upholds parents' fundamental rights as recognized in *Troxel* and previous Supreme Court cases. If the UPA, whose history and purposes are discussed below, were changed to define "parent" as limited to biological or adoptive parents, thus explicitly rejecting the psychological-parent and de facto-parent doctrines, states would have guidance on how best to protect parental rights in the third-party-visitation context.

IV. THE HISTORY AND PURPOSES OF THE UNIFORM PARENTAGE ACT

The National Conference of Commissioners on Uniform State Laws ("Conference"), whose purpose is to create uniformity among the great diversity in state laws, has existed since 1892.¹⁴⁴ The Conference drafts model legislation, and the commissioners attempt to get their home states to adopt the legislation.¹⁴⁵ State courts also use uniform laws to guide their

140. *Id.*; see also Lawrence, *supra* note 123, at 103–04 (discussing the plurality opinion and suggesting that the plurality would have upheld a "more narrowly drawn third-party visitation statute").

141. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in the judgment); see also Davis, *supra* note 6, at 751 (noting both the plurality's failure to articulate a standard of review and Justice Thomas's argument for strict-scrutiny review).

142. *Troxel* consists of one plurality opinion, two concurring opinions, and three dissenting opinions.

143. See generally, e.g., Buss, *supra* note 29 (arguing that *Troxel*'s attempt at compromise between parental rights and third-party claims is not helpful); Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?*, 32 RUTGERS L.J. 783 (2001) (discussing possible state-court reactions to *Troxel*); Meredith Ruston, "Splitting the Baby" in *Troxel v. Granville*, 14 J. CONTEMP. LEGAL ISSUES 347 (2004) (analyzing the *Troxel* decision and suggesting that its definition of the parental right was not helpful).

144. WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 11 (1991).

145. Frederick H. Miller et al., *Introduction to Uniform Commercial Code Annual Survey: The Centennial of the National Conference of Commissioners on Uniform State Laws*, 46 BUS. LAW. 1449, 1450 (1991) ("Once a draft has received approval, commissioners are responsible for working for adoption of the completed proposal in their respective states.").

interpretation of the law.¹⁴⁶ The Conference is now considered by those in the legal profession to be “a major contributing factor to better legislation in government.”¹⁴⁷ Courts and legislators generally view uniformity in a positive light for a number of reasons, ranging from helping individuals who travel or move between the states to promoting economic growth for companies that transact business in multiple states.¹⁴⁸ Accordingly, the uniform laws produced by the Conference carry great weight.¹⁴⁹

The Conference approved the first version of the UPA in 1973.¹⁵⁰ The original purpose of the Act was to create uniformity in the law concerning children born out of wedlock.¹⁵¹ At the time it was passed, a great need existed for such legislation because much of the state law concerning illegitimate children was either unconstitutional or very questionable under the Equal Protection Clause of the Fourteenth Amendment.¹⁵² Under the Equal Protection Clause, the Supreme Court demanded “equal legal treatment of legitimate and illegitimate children in a broad range of substantive areas.”¹⁵³ The Act clearly conveyed the message that “[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.”¹⁵⁴ The technicalities of the Act dealt with determining the paternity of children, setting up a “network of presumptions” regarding paternity, and resolving child-support issues.¹⁵⁵

A new UPA was approved in 2000 and amended in 2002, mostly to address issues brought about by developments in reproductive and scientific technologies—specifically the use of DNA testing to determine a child’s

146. See William H. Rehnquist, *Foreword* to ARMSTRONG, *supra* note 144, at 1, 1 (“[T]he supreme courts of the states retain their authority as to what a state uniform law means, but they have every incentive to interpret it to conform to the holdings of other courts construing the same law.”).

147. ARMSTRONG, *supra* note 144, at 131.

148. See Miller et al., *supra* note 145, at 1451 (listing numerous reasons for the success of the Conference).

149. The 2000 UPA has the endorsement of the Family Law Section of the American Bar Association, the American Academy of Matrimonial Lawyers, the National Child Support Enforcement Association, the Eastern Regional Interstate Child Support Association, the Academy of American Adoption Attorneys, and the Organization of Parents Through Surrogacy. Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 44 (2001).

150. UNIF. PARENTAGE ACT (1973) historical notes, 9B U.L.A. 377 (2001).

151. *Id.* prefatory note, 9B U.L.A. 378.

152. *Id.*; see U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

153. UNIF. PARENTAGE ACT (1973) prefatory note, 9B U.L.A. 378 (2001).

154. *Id.* § 2, 9B U.L.A. 390.

155. *Id.* prefatory note, 9B U.L.A. 379–80.

genetic parent and the use of technology to aid in conception.¹⁵⁶ The 2000 Act recognized the use of DNA testing to identify parentage, contained new definitions, and included new sections regarding the status of children born with the help of assisted reproduction.¹⁵⁷ The 1973 Act defined the parent-child relationship as “the legal relationship existing between a child and his natural or adoptive parents.”¹⁵⁸ The 2000 Act changed the definition to incorporate reproductive technology, but it still defines the parent-child relationship as biological or adoptive.¹⁵⁹ In fact, the current Act states that the Conference expanded the definition “to include *all possible bases* of the

156. See New, *supra* note 90, at 778 (discussing the attempt of the 2000 UPA to deal with the “explosive development and widespread application of scientific technology”); see also Nat’l Conference of Comm’rs on Unif. State Laws, A Few Facts About the Uniform Parentage Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp (last visited Jan. 21, 2009) (noting that the purpose of the 2000 UPA is to “modernize[] the law for determining the parents of children, and facilitate[] modern methods of testing for parentage”).

157. See New, *supra* note 90, at 778–79 (discussing the most significant changes in the 2000 Act); see also Jayna Morse Cacioppo, Note, *Voluntary Acknowledgements of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 488 (2005) (“[T]he UPA 2002 is ‘both more streamlined and comprehensive than the original’ in response to the realities of modern society, including artificial reproduction procedures, adoption and gestational agreements.” (footnote omitted) (quoting Press Release, Nat’l Conference of Comm’rs on Unif. State Laws, New Uniform Parentage Act Now Available (Nov. 25, 2002), available at <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=84>)).

158. UNIF. PARENTAGE ACT (1973) § 1, 9B U.L.A. 387 (2001).

159. See UNIF. PARENTAGE ACT (2000) § 201 (amended 2002), 9B U.L.A. 15 (Supp. 2008). The text of section 201 reads:

- (a) The mother-child relationship is established between a woman and a child by:
 - (1) the woman’s having given birth to the child[, except as otherwise provided in [Article] 8];
 - (2) an adjudication of the woman’s maternity; [or]
 - (3) adoption of the child by the woman[; or]
 - (4) an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law].
- (b) The father-child relationship is established between a man and a child by:
 - (1) an un rebutted presumption of the man’s paternity of the child under Section 204;
 - (2) an effective acknowledgment of paternity by the man under [Article] 3, unless the acknowledgment has been rescinded or successfully challenged;
 - (3) an adjudication of the man’s paternity;
 - (4) adoption of the child by the man; [or]
 - (5) the man’s having consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child [; or]
 - (6) an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law].

Id. (brackets in original).

parent-child relationship."¹⁶⁰ Eight states have thus far adopted the 2000 UPA, and another one introduced it to its legislature in 2008.¹⁶¹

As mentioned above, some scholars now want another update to the UPA to redefine the parent-child relationship to include third parties who have parent-like relationships with children. This change, however, should not happen. If anything, the UPA should be amended to increase its protection of natural parents by explicitly refusing to give psychological parents equal standing with natural parents.

V. ARGUMENTS FOR AMENDING THE UPA TO EXCLUDE THE DOCTRINES

The Conference should not amend the UPA to include psychological parents; rather the Conference and courts should continue—or begin again, as the case may be—to define “parent” as a biological or adoptive parent. The UPA should explicitly incorporate the natural parental right that the Supreme Court recognizes by clarifying its definition of “parent” as being limited to biological or adoptive parents and rejecting a psychological-parent definition. There are many reasons to defer to natural parents’ decisions about whom their children should associate with. First, the psychological-parent and de facto-parent doctrines infringe on the fundamental right of natural parents to make decisions about their children without government interference—a right that the Supreme Court has repeatedly affirmed.¹⁶² Second, these doctrines create a slippery slope in visitation and custody cases because it is difficult to see where courts will draw the line for psychological parents. Finally, these doctrines create such instability, confusion, and insecurity in children’s lives that courts cannot reliably identify the rare instances when providing visitation to third parties would benefit a child.

A. INFRINGEMENT ON NATURAL PARENTS’ FUNDAMENTAL CONSTITUTIONAL RIGHTS

As discussed in Part III above, the Supreme Court has long recognized natural parents’ fundamental right to make decisions regarding the upbringing of their children.¹⁶³ When such a fundamental right is the

160. *Id.* § 201 cmt. (amended 2002), 9B U.L.A. 15 (Supp. 2008) (emphasis added).

161. Nat’l Conference of Comm’rs on Unif. State Laws, *supra* note 156. Alabama, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming adopted the 2000 UPA, and New Mexico began considering it in 2008. *Id.* Nineteen states adopted the original 1973 UPA. KAREN F. GREIF & JON F. MERZ, CURRENT CONTROVERSIES IN THE BIOLOGICAL SCIENCES: CASE STUDIES OF POLICY CHALLENGES FROM NEW TECHNOLOGIES 89 (2007).

162. *See supra* Part III (tracing the development of parental rights in Supreme Court cases and giving several examples of cases that uphold those rights).

163. *See supra* notes 95–101 and accompanying text; *see also* Brief of Family Research Council as Amicus Curiae Supporting Defendant-Appellant at 2–3, *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008) (No. 122) [hereinafter FRC Brief], available at <http://www.telladf.org/UserDocs/JaniceMAmicus.pdf> (“For nearly 100 years, the U.S. Supreme Court has recognized

subject of legislation, the Supreme Court applies the strict-scrutiny test to the law in question.¹⁶⁴ To pass strict scrutiny, the law must serve a compelling governmental interest and must be narrowly tailored to achieve that interest.¹⁶⁵ “Compelling interest” is a high standard to meet; indeed, it is rare for a law to pass strict scrutiny.¹⁶⁶ As Justice Thomas noted in *Troxel*, the state does not have a compelling interest that justifies questioning a fit parent’s decisions relating to a child’s visitation with third parties.¹⁶⁷ Supreme Court precedent supports the idea that as long as a parent is fit, there is “no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”¹⁶⁸ Judicial intrusion where there is no danger to the child’s health or safety is unnecessary and second-guesses parental decisions, infringing upon parents’ constitutional rights.¹⁶⁹ A judge may think that a parent has made a bad decision, but the judge’s personal judgment cannot mandate that a parent raise his or her children in a certain way.¹⁷⁰

The Court also recognizes that parental autonomy creates optimal situations for children and, therefore, produces the best citizens.¹⁷¹ Even though it is called the “parental right,” it is not merely about parents,

and steadily guarded the fundamental liberty interest of parents in making decisions concerning their children’s upbringing.”).

164. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54 (1983) (stating that the Court applies strict scrutiny when “government action impinges upon a fundamental right protected by the Constitution”).

165. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 686 (1977). The *Carey* Court, which struck down a state law restricting the sale and advertisement of contraceptives, *id.* at 681–82, used strict scrutiny as the standard of review “because . . . access [to contraceptives] is essential to exercise of the constitutionally protected right of decision in matters of childbearing.” *Id.* at 688.

166. See *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (“[I]t is the rare case in which we have held that a law survives strict scrutiny.”).

167. *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment).

168. *Id.* at 68–69 (plurality opinion).

169. See *id.* (“[S]o 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 inject itself into the private realm of the family to further question the ability of that parent to make the best decisions” (emphasis added)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[Supreme Court] decisions have respected the private realm of family life which the state cannot enter.”); FRC Brief, *supra* note 163, at 4 (claiming that requiring less than a clear showing of parental unfitness or harm to the child would strip the substance from the parental right).

170. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents”); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.”).

171. See *infra* note 172 and accompanying text.

because honoring that right most often creates the best situations for children. Courts generally agree that deferring to the decisions of parents usually serves the children's best interests.¹⁷²

Within the right of parents to direct the upbringing of their children falls the right to control the people with whom their children associate.¹⁷³ The Court has repeatedly recognized that this right belongs specifically to natural parents.¹⁷⁴ It follows that including the psychological parent within the UPA's definition of "parent" would necessarily take away from natural parents' fundamental rights by regulating their visitation choices or by altogether stripping them of the right to make such choices regarding their children.¹⁷⁵ Equating psychological parents with natural parents would create situations in which government officials would have the power to trump natural parents' decisions, violating their constitutional rights.¹⁷⁶ As Maryland's highest court has recognized:

172. For instance, in *Parham v. J.R.*, the Court stated:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham, 442 U.S. at 602.

173. See *Troxel*, 530 U.S. at 78 (Souter, J., concurring in the judgment) ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character.").

174. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) ("A natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference."); *Santosky*, 455 U.S. at 753 (discussing the "fundamental liberty interest of natural parents in the care, custody, and management of their child"); see also *Lehr v. Robertson*, 463 U.S. 248, 270 (1983) (White, J., dissenting) ("[T]he interest that a natural parent has in his or her child . . . has long been recognized and accorded constitutional protection."); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 38–39 (1981) (Blackmun, J., dissenting) ("[T]he Court has accorded a high degree of constitutional respect to a natural parent's interest both in controlling the details of the child's upbringing and in retaining the custody and companionship of the child." (citations omitted)).

175. The Court has recognized that the Fourteenth Amendment's Due Process Clause has "a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel*, 530 U.S. at 65 (plurality opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

176. See FRC Brief, *supra* note 163, at 1–2. The Family Research Council states:

[Without] clear and convincing evidence of compelling circumstances involving actual or potential harm to children or parental unfitness, . . . the federal Constitution . . . should [not] tolerate government intrusion into the parent-child relationship for the purpose of the state evaluating parents' child-rearing decisions, on the basis that the state or third parties believe there to be "better" alternatives.

Id.

Where the dispute is between a fit parent and a private third party, . . . both parties 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.¹⁷⁷

The psychological-parent and de facto-parent doctrines can also take away the right of parents to change their minds, confining them to choices that they might have made years ago. It is natural for circumstances and decisions about childrearing to change over the years, but the psychological-parent and de facto-parent doctrines may not allow these changes to occur. Once a natural parent gives a parent-like role to another person, that parent could be indefinitely locked into that choice if a court utilizes the doctrines to grant visitation.¹⁷⁸

Therefore, if the natural parent is fit, the government does not have a compelling interest in making decisions for that parent. Consequently, including psychological parents in the UPA’s definition of “parent” would be unconstitutional. Instead, the UPA should protect the constitutional rights of natural parents by expressly limiting its definition of “parent” to biological or adoptive parents. This clarification would act as a guide for states as they enact their own third-party-visitiation statutes.

B. THE SLIPPERY SLOPE

The psychological-parent and de facto-parent doctrines are also prone to creating a slippery slope for courts that embrace them. Going beyond the biological-adoptive standard exposes parents to claims from numerous third parties who might petition the courts for visitation with their children. Expanding the definition of “psychological parent” to include more and more people could potentially lead to situations in which someone like a child’s day-care provider asks for visitation. This expansion is likely to occur; courts have recognized that “no matter how narrowly court[s] define[]

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

178. See FRC Brief, *supra* note 163, at 12 (stating that the proposed de facto-parent test “works as a one-way ratchet and thus does not adequately protect a parent’s fundamental right . . . to reevaluate and change [the child’s] associations after a period of time”); see also Press Release, Alliance Def. Fund, ADF Attorneys File Friend-of-the-Court Brief in Maryland “Psychological Parenting” Case (Mar. 21, 2007), available at <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=4044> (“Under [the psychological-parent doctrine], once a parent involves a third party in her child’s life for a significant period of time, she can inadvertently lose the right to decide later that the association is no longer in the child’s best interests”) (quoting Chris Stovall, Alliance Defense Fund Senior Legal Counsel).

'parent,' allowing persons claiming parent-like relationship[s] to seek visitation rights could expose legal parents to litigation from long-standing day-care providers, relatives, successive sets of stepparents, or close family friends."¹⁷⁹

For example, if a court set the standard that a child must have a "substantial relationship" with a third party for the third party to have the right to seek visitation, it is easy to see how a multitude of third parties could acquire the right. Surely, to begin with, live-in grandparents could acquire the rights. They would likely spend a considerable amount of time with the children, help the parents meet the children's needs, and emotionally support the children. However, once courts grant live-in grandparents the right, it would be hard for them to distinguish between live-in grandparents and live-in nannies. And once live-in nannies have the right, it would be difficult to deny the rights to regular day-care providers, who would also, just like the grandparents, spend a considerable amount of time with the children, care for the children's needs, and provide emotional support for them while they were at day care. Courts may attempt to set limits on the type of third parties entitled to visitation, but such limits would be hard to define and would invariably result in increased litigation for parents.¹⁸⁰ The American College of Pediatricians agrees, stating in a recent amicus brief to the Supreme Court that "[t]his new concept of common law parentage includes no limitations on the number of legally recognized parents a child may have—thus creating a group form of parenting."¹⁸¹

As one appellate-court judge observed, "[u]nrestrained application of the 'psychological parenthood' theory can lead to absurd results."¹⁸² Although courts have attempted to limit the doctrine,¹⁸³ they often base those limitations on subjective inquiries such as the intent of the biological parent or whether the third party assumed parental obligations. For example, to be a psychological parent in New Jersey, "the legal parent must

179. *Titchenal v. Dexter*, 693 A.2d 682, 688 (Vt. 1997) (interpreting *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991)).

180. *See id.* ("[A]ny such [fact-based] test would not prevent parents from having to defend themselves against the merits of petitions brought by a potentially wide range of third parties claiming a parent-like relationship with their child.")

181. Brief of American College of Pediatricians as Amicus Curiae supporting Petitioner at 13, *Britain v. Carvin*, 547 U.S. 1143 (2006) (No. 05-974), 2006 WL 869896 [hereinafter ACP Brief].

182. *Montgomery County Dep't of Soc. Servs. v. Sanders*, 381 A.2d 1154, 1164 (Md. Ct. Spec. App. 1977). The court in *Sanders* gave the example of kidnappers who take good care of the kidnapped child for an extended period of time. *Id.* A psychologist testified in that case that it would be in the best interests of the child to stay with the kidnappers "since psychologically they would be his family." *Id.*

183. *See Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 435–36 (Wis. 1995) (laying out the requirements that must be met for a third party to be recognized as a psychological parent).

consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and . . . a parent-child bond must be forged.”¹⁸⁴

These factors are difficult to determine because they are subjective and ambiguous, requiring courts to quantify human emotions that they cannot feel for themselves and to evaluate witnesses who cannot possibly verbalize the nuances of long-term human relationships in a single hearing. Adding the psychological-parent and de facto-parent doctrines to the UPA would result in courts making judgment calls that inevitably expand the doctrines and whittle away parental rights.¹⁸⁵ The better standard is to honor the decisions of natural parents unless there is a clear showing of parental unfitness or harm to the child. This rule is clear, has a bright line, honors the fundamental rights of parents, and avoids judicial parenting.

C. *THE BEST INTERESTS OF CHILDREN*

Finally, the UPA should not include the psychological-parent and de facto-parent doctrines because, except in unusual circumstances, it is in the best interests of children to be with their biological parents. In general, the law favors biology as the basis for giving individuals the status of legal parents.¹⁸⁶ In fact, as the biological parents of a child, “the mother and father are automatic legal custodians of their child.”¹⁸⁷ Courts can deny custody to biological parents upon the child’s birth only if a court terminates the parents’ rights or if the child is adopted.¹⁸⁸ Courts may terminate the rights of natural parents only for compelling reasons that place the child’s health or welfare in danger.¹⁸⁹ As Justice Stewart stated:

If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest, I should have little

184. *V.C. v. M.J.B.*, 748 A.2d 539, 551 (N.J. 2000).

185. *See* GUGGENHEIM, *supra* note 91, at 38 (discussing the fact that government bureaucracy is “inept” at making childrearing decisions because “childrearing requires exquisite attention to each child’s special needs”).

186. *See id.* at 18 (“[T]he law privileges biology as the presumed basis for conferring legally recognized parenthood.”).

187. SUSSMAN & GUGGENHEIM, *supra* note 92, at 6.

188. *Id.*

189. *Id.* at 7.

doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter."¹⁹⁰

There are at least two strong rationales underlying the natural-parent presumption.¹⁹¹ The first is that biological parents are generally more motivated and predisposed to act in the best interests of their children than are third parties.¹⁹² This is because "biological parenthood inclines parents to protect and care for their children."¹⁹³ Most people would agree that parents have a natural affection for and emotional attachment to their offspring.¹⁹⁴ The Supreme Court has declared that the "natural bonds of affection lead parents to act in the best interests of their children."¹⁹⁵

This reasoning is backed by a wealth of research showing that the safest and healthiest situation for a child is living with his or her biological parents, as opposed to living in other situations.¹⁹⁶ Social scientists have found that "[b]oth abuse and police apprehension [are] least likely for children living with two natural parents."¹⁹⁷ One study found that preschoolers living with one stepparent and one natural parent were forty times more likely to be abused than preschoolers who lived with both natural parents.¹⁹⁸ Children growing up with their biological parents are also less likely to be heavy drinkers, to use drugs, to be sexually active, to be unemployed, and to do

190. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in the judgment) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

191. GUGGENHEIM, *supra* note 91, at 35.

192. *Id.*

193. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2433–34 (1995).

194. John Locke stated in his treatise that "[t]he affection and tenderness which God hath planted in the breasts of parents towards their children[] makes it evident that this is not intended to be a severe, arbitrary government, but only for the help, instruction, and preservation of their offspring." JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (1690), reprinted in *POLITICAL WRITINGS OF JOHN LOCKE* 261, 349 (David Wootton ed., 1993); see also GUGGENHEIM, *supra* note 91, at 35 (quoting the same Locke passage).

195. *Parham v. J.R.*, 442 U.S. 584, 602 (1979), quoted in GUGGENHEIM, *supra* note 91, at 35.

196. See, e.g., DAVID POPENOE, *WAR OVER THE FAMILY* 9 (2005) ("[S]ubstantial evidence exists that childrearing is most successful when it involves two parents, both of whom are strongly motivated for the task."); Christopher Marlborough, Note, *Evolution, Child Abuse and the Constitution*, 11 J.L. & POL'Y 687, 687 (2003) ("The presence of a non-genetic parent in a child's home is the largest single risk factor for severe child maltreatment yet discovered."); *id.* at 694–97 (discussing statistics and studies showing the risks to children living with nonbiological parents).

197. Martin Daly & Margo Wilson, *Child Abuse and Other Risks of Not Living with Both Parents*, 6 *ETHOLOGY & SOCIOBIOLOGY* 197, 197 (1985). Daly and Wilson's study was the "most direct evidence to date of a substantial elevation in the risk of child abuse for children living in households other than with the two natural parents." *Id.* at 205.

198. *Id.*

poorly in school.¹⁹⁹ Thus, allowing the definition of “parent” to expand beyond natural parents so as to give equal rights to these third parties opens the door for children to be put in harmful situations.

The second rationale underlying the natural-parent presumption is based on evidence showing that children generally desire to have their biological parents raise them and have a need to know their natural parents.²⁰⁰ This suggests that a genetic link is stronger than a non-genetic link and that the genetic link goes beyond the love that a parent shows a child.²⁰¹ These desires are reflected in the large number of adopted children who, as adults, make efforts to find their birth parents.²⁰² Additionally, individuals conceived by reproductive technology have begun to go to great lengths to determine the identity of their biological parents, even though they were merely sperm or egg donors.²⁰³ Often, adopted and technologically conceived children want to make a connection with their biological parents even when they have had a loving environment in which to grow up.²⁰⁴ This suggests, again, that the genetic bond is not easily broken and that, if possible, a child should be with his biological parents.

Normally, as discussed above, the best place for a child to be is with his or her biological parents.²⁰⁵ It has long been understood that children are not mature or experienced enough to make difficult decisions about life.²⁰⁶ Biological parents have usually been with the child since birth, they know the child’s personality and family history, and the natural bond of affection

199. Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 239 (2006) (quoting Helen Sweeting et al., *Teenage Family Life, Lifestyles and Life Chances: Associations with Family Structure, Conflict with Parents and Joint Family Activity*, 12 INT’L J.L. POL’Y & FAM. 15, 38 (1998)).

200. GUGGENHEIM, *supra* note 91, at 35–36; see POPENOE, *supra* note 196, at 9 (“Virtually every child desires two biological parents for life . . .”).

201. See SCOTT B. RAE, *THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES?* 83 (1994) (“There is something significant about the genetic tie that frequently compels adopted children to go to great lengths simply to be reunited with their natural parents, even though they have no intention of living with them.”).

202. GUGGENHEIM, *supra* note 91, at 35.

203. See Peggy Orenstein, *Looking for a Donor to Call Dad*, N.Y. TIMES, June 18, 1995, § 6 (Magazine), at 28 (“[A] growing number of adult donor-inseminated offspring are undertaking intensive searches for their biological fathers.”).

204. See RAE, *supra* note 201, at 83 (discussing the connection between adopted children and their biological parents).

205. See *supra* notes 196–99 and accompanying text (highlighting the fact that children are safest and healthiest when they live with their biological parents); see also *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion) (“[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.” (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979))).

206. See *Parham*, 442 U.S. at 602 (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”).

due to biological ties generally drives them to make decisions that are best for the child.²⁰⁷

Another issue is the stability and security of children. As one prominent scholar has noted, one goal of society should be to raise children to be healthy adults with good self-esteem.²⁰⁸ A sense of security is essential in the development of that self-esteem, and if it is easy for the state to take children away from their parents, then that sense of security is lost.²⁰⁹ Professor Freud and her co-authors agreed, stating that "[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development."²¹⁰ Freud further noted that for children to develop properly, the family must be free from interference by the government.²¹¹ A child's security comes from having stable and consistent relationships.²¹² The psychological-parent and de facto-parent doctrines would not encourage that stability because a child could end up in a confusing situation with multiple "parents" and an ever-changing "family."

A child could also easily become confused if the parent were to get into and out of relationships continuously. It is not hard to imagine a situation where several adults would have visitation rights to the same child. As Professor Guggenheim puts it, "In a modern American family, a child might have one legal mother, one legal father, one stepmother, and perhaps two other men who lived with the mother for a significant period of time."²¹³ That sort of arrangement is unhealthy and unstable for the child. Additionally, this type of "group parenting" makes it difficult to coordinate all of life's practical details, which creates further instability.²¹⁴ Although

207. See Scott & Scott, *supra* note 193, at 2434 ("The affective bond provides powerful grounding for a parental precommitment to care for the welfare of one's children.").

208. GUGGENHEIM, *supra* note 91, at 37.

209. See *id.* ("By making it difficult for state officials to intrude in the family and remove children from their parents' custody, the parental rights doctrine helps cement a child's sense of security.").

210. BEST INTERESTS I, *supra* note 40, at 31–32.

211. See BEST INTERESTS II, *supra* note 40, at 189 ("The Child's physical and mental development . . . requires family privacy, free from outside control or coercive intervention by the state.").

212. See ACP Brief, *supra* note 181, at 17 ("[I]magine the chaos where a child's welfare is dependent on a group of parents. The obvious lack of permanency, instability, and potential harm to the welfare of a child must not be disregarded.").

213. GUGGENHEIM, *supra* note 91, at 130. Professor Guggenheim states that one could argue that "recognizing de facto parents' visitation rights . . . poorly serve[s] children because children may end up feeling like balls in a pinball machine, getting bounced all around the place." *Id.*

214. See ACP Brief, *supra* note 181, at 14 ("Practically, when one considers the issues of child support, visitation, decision-making, relocation and termination of parental rights, [group parenting] presents further significant negative consequences for children, causing their stability, legitimacy and self-esteem to be in grave danger.").

some argue that taking these parent-like relationships away from children harms them,²¹⁵ there is greater instability and harm in the situations mentioned above.²¹⁶ A standard that gives visitation-decisionmaking rights only to biological or adoptive parents and that leaves the issue to their discretion reduces the confusion and increases the stability in children's lives. Therefore, to avoid this sort of turmoil for children, the psychological-parent and de facto-parent doctrines should not be added to the UPA.

VI. CONCLUSION

Children are the future of our nation, and most adults in this country desire that these future citizens grow up healthy and happy. Although it may seem like the psychological-parent and de facto-parent doctrines accomplish that goal, in the end, they harm children more than help them. It is difficult and painful for both adults and children to end relationships with people they care about, and it is easy to see why these third parties want to continue their relationships with others' children. However, just because something is difficult and painful does not mean that it is ultimately a bad decision. The children in this country need adults to look past their own pain and do what is truly best for the children.

The UPA should not include the psychological-parent and de facto-parent doctrines. These doctrines take away from the fundamental constitutional rights of parents and put decisions about intimate family relationships in the hands of judges. The addition of these doctrines to the definition of "parent" in the UPA would not line up with Supreme Court jurisprudence and would further fracture and harm families. Courts have the important job of protecting children when they are in harmful situations, but courts also must not intrude into intimate family relationships when the courts simply disagree with the natural parents' decisions about their children's upbringings. Americans do not want the government to

215. See Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 347 (1996) ("Psychological parent theorists argue that a child is inevitably and deeply harmed by separation from a primary caregiver and by any interference with that caregiver's parental authority.").

216. See ACP Brief, *supra* note 181, at 17 ("The more parents a child has, the less likely [it] will be that any of them will be devoted to the child's well-being or will provide the constant love and attention that the child will need."); Wardle, *supra* note 199, at 234-35 ("[T]he most important causal factor of [recent declines in American] child well-being is the remarkable collapse of marriage, leading to growing family instability and decreasing parental investment in children." (second alteration in original) (quoting Bruce C. Hafen, *Bridle Your Passions: How Modern Law Can Protect the Family*, Address Before the World Congress of Families (Mar. 22, 1997), in 63 VITAL SPEECHES OF THE DAY 633, 635 (1997))). Professor Wardle highlights "poverty, high-risk personal behaviors[,] . . . disadvantaged socialization, and increased criminal activity" as the most significant dangers of fragmented family life. Wardle, *supra* note 115, at 10.

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dictate how they must run their homes and families; thus, courts must abandon these doctrines, and the UPA should reject them.