REDEFINING PARENTHOOD: REMOVING NOSTALGIA FROM THIRD-PARTY CHILD CUSTODY AND VISITATION DECISIONS IN FLORIDA

Sarah E. Kay*

I. INTRODUCTION

Sharon and Kirk met in a business finance class at the University of Tampa. They were young and fell in love. Three years later, they graduated, married, and settled down in a small starter home in Tampa, Florida. Soon thereafter, Sharon gave birth to three beautiful children: Kirk, Jr., Tammy, and Geni. Sharon became a full-time homemaker in order to play a key role in their children's upbringing and to reduce childcare costs. Meanwhile, Kirk worked long hours to provide the family with financial stability.

Unfortunately, the young family's blissful days disappeared shortly after the birth of Geni when Sharon developed severe depression. Sharon withdrew from her family and the world as an internal darkness consumed her. Kirk quickly realized that he was unable to manage the additional family responsibilities on his own. After much debate, Sharon and Kirk asked Linda, Sharon's widowed mother, to move in with them to assist with the child rearing and daily household chores. Linda and the three children developed a close bond over the next five years as the children came to rely on Linda for their daily emotional, psychological, and physical needs. Then, early one morning, Sharon killed herself.

 B.S., *summa cum laude*, Gordon College, 1999; M.Ed., Worcester State College, 2003; M.B.A. Candidate Stetson University, 2010; J.D. Candidate, Stetson University College of Law, 2010. The Author would like to thank her advisor, Professor Bohl, Caroline Black, Esq., and Alexander Caballero, Esq. at Mason Black & Caballero, P.A. in Tampa, Florida, and the members of *Stetson Law Review* for their contributions to this Article.

Kirk was distraught over the unexpected turn of events. Filled with overwhelming emotion, Kirk sold the family home less than a year after Sharon's intimate memorial service. He and the three children moved to Lakeland, Florida, closer to his parents. Linda began to make arrangements to follow her grandchildren, but Sharon's suicide left Kirk spiteful and angry. Kirk denied Linda any visitation as he desperately tried to close this painful chapter in his life. If Kirk had his way, Linda would never see her grandchildren again. Currently, Florida law does not afford Linda or her grandchildren any relief.[1]

The third party's lack of standing to request visitation or custody repeats throughout cases involving stepparents,[2] grandparents,[3] and former hetero-[4] and same-sex[5] couples.[6] Often these

1. *See Cranney v. Coronado*, 920 So. 2d 132, 134 (Fla. 2d Dist. App. 2006) (finding that the grandmother had no right to visit her deceased daughter's children over the biological father's protests). The story of Sharon and Kirk is a complete fabrication of facts.

2. *See e.g. Meeks v. Garner*, 598 So. 2d 261, 262 (Fla. 1st Dist. App. 1992) (ruling that a stepfather did not have standing to request visitation with his stepchildren after his wife's death); *O'Dell v. O'Dell*, 629 So. 2d 891, 891 (Fla. 2d Dist. App. 1993) (finding that, because no biological or adoptive connection existed, a man who raised his wife's child from birth did not have a right to visitation after his wife died).

3. *See e.g. Beagle v. Beagle*, 678 So. 2d 1271, 1277 (Fla. 1996) (ruling that the state has no right to intervene on a family unit consisting of the married biological parents and their children); *Williams v. Spears*, 719 So. 2d 1236, 1241 (Fla. 1st Dist. App. 1998) (ruling that court-ordered grandparent visitation violated the biological parent's right to privacy); *Lonon v. Ferrell*, 739 So. 2d 650, 653 (Fla. 2d Dist. App. 1999) (finding that the court could not order grandparent visitation over a divorced mother's protests because she had a right to privacy); *Coryell v. Morris*, 730 So. 2d 373, 373 (Fla. 3d Dist. App. 1998) (ruling that the state could not order grandparent visitation against the surviving biological parent's wishes); *Ocasio v. McGlothin*, 719 So. 2d 918, 919 (Fla. 3d Dist. App. 1998) (finding that although the biological mother never married, she had a right to privacy); *Russo v. Persico*, 706 So. 2d 933, 933 (Fla. 4th Dist. App. 1998) (finding that the court could not impose a maternal grandmother's visitation on a widower son-in-law).

4. *See e.g. Taylor v. Kennedy*, 649 So. 2d 270, 271–272 (Fla. 5th Dist. App. 1994) (finding no visitation rights existed even though a man lived with the biological mother for most of a six-year period, and the parties previously entered into a visitation and support agreement).

5. *See e.g. Wakeman v. Dixon*, 921 So. 2d 669, 670, 673 (Fla. 1st Dist. App. 2006) (ruling that a former lesbian partner has no right to request custody or visitation over the biological mother's protests).

6. One exception to this barrier is if a threat of harm to the child exists. *See e.g. Simmons v. Pinkey*, 587 So. 2d 522, 524 (Fla. 4th Dist. App. 1991) (stating that the biological parent's right to custody is superior to all others except when it would be detrimental to the child). Even then, courts are cautious in intervening. *Sragowicz v. Sragowicz*, 603 So. 2d 1323, 1324–1325 (Fla. 3d Dist. App. 1992). The other exception where Florida courts rule in favor of third parties over a biological parent's wishes is when the biological parent relinquished his or her parental rights a significant time before filing the case. *See e.g.*

persons fulfill key maternal and paternal roles for large portions of the children's lives only to have courts invalidate the bonds because the persons lack a biological[7] or adoptive link to the child.[8] This Article proposes that Florida's treatment of biological parents as the only *true* parents is a misinformed nostalgia[9] for the nuclear family[10] that is unnecessarily more restrictive than the religious,[11] historical,[12] and constitutional[13] foundations upon which the courts have based the preference. As an alternative to strict biology, Florida should take advantage of the United States Supreme Court's more encompassing guiding principle of third-

State ex. rel. Weaver v. Hamans, 159 So. 31, 33 (Fla. 1935) (ruling in favor of the third party because the biological mother gave up her parental rights several years beforehand); *Robertson v. Bass*, 42 So. 243, 244–245 (Fla. 1906) (finding that the "ties of companionship" trumped the biological mother's rights because she had given two of her children to a third party several years earlier).

7. *See e.g. Frazier v. Frazier*, 147 So. 464, 466 (Fla. 1933) (stating that the most "sublime" relationship that exists is the "natural relationship of love and affection which normally exists between parent and child").

8. Stacy A. Warman, *There's Nothing Psychological about It: Defining a New Role for the Other Mother in a State that Treats Her as Legally Invisible*, 24 Nova L. Rev. 907, 907 (2000) (stating that the children will call these individuals by different names such as "mom" or "grandpa" even though the law may see them as "strangers," "third parties," or "non-parents"). For clarity, this Article will assume from this point forward that the rights of adoptive and biological parents are equal. Fla. Stat. § 63.032(2) (2008) (defining adoption as the creation of a "legal relationship between parent and child where it did not exist, thereby declaring the child to be legally the child of the adoptive parents . . . entitled to all the rights and privileges and subject to all the obligations of a child born to such adoptive parents in lawful wedlock"); Fla. Stat. § 744.301 (2006) (stating that "[t]he mother and father jointly are natural guardians of their own children and of their adopted children, during minority" with the exception that unwed fathers must actively establish their paternity).

9. Nostalgia is "a bittersweet longing for things, persons, or situations of the past." *The American Heritage Dictionary* 1202 (4th ed., Houghton Mifflin 2006).

10. This Article defines "nuclear family" as a mother and father with biological children. *See* Stephanie Coontz, *The Way We Never Were: American Families and the Nostalgia Trap* 9 (Basic Books 2000) (describing the nuclear family as a husband and wife with biological children).

11. *State ex. rel. Sparks v. Reeves*, 97 So. 2d 18, 20 (Fla. 1957) (stating that a parent has a "natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring").

12. *Foster v. Sharpe*, 114 So. 2d 373, 376 (Fla. 3d Dist. App. 1959) (finding that a biological parent's right to "the custody, care and upbringing of their children is one of the most basic rights of our civilization").

13. *Cranney*, 920 So. 2d at 134 (ruling that a court order permitting grandparent visitation over the objections of the biological father would violate the father's fundamental right to raise his children free of governmental interference); *see also supra* nn. 2–5 (providing additional Florida caselaw decided after 1980 that contemplated the constitutional right to privacy).

party visitation and custody decisions in the child's best interest plus something more.[14] Thus, Florida courts should support a statutory construction[15] that allows third parties visitation or custody when the requesting party is actively fulfilling a maternal or paternal role in the child's life due to a parent-like biological, custodial, psychological, or economic connection.

Section II explores the more flexible treatment of parenthood afforded by religion, history, and the United States Constitution. Section III discusses the problematic outcomes of the biological preference. Section IV proposes an alternative to the biological trump through a more encompassing legal definition of parenthood.

II. THE MORE FLEXIBLE CONCEPT OF PARENTHOOD WITHIN RELIGION, HISTORY, AND THE UNITED STATES CONSTITUTION

Florida courts have vested ultimate and virtually exclusive rights in biological parents because of religion, history, and a constitutional right to privacy.[16] A careful academic study of each of these pillars reveals that, although biology plays a significant role, each cited pillar treats parenthood as a more flexible concept, extending and evolving the definition to meet society's needs. This Section will (a) discuss the religious roots of parenthood upon which the Florida courts have based their decisions; (b) explore the historical roots of parenthood within the United States; and (c) analyze the United States constitutional treatment of the right to privacy, which serves as the guideline to Florida's constitutional right.

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14. *See Troxel v. Granville*, 530 U.S. 57, 64, 68 (2000) (criticizing the lower court for failing to justify the state's interference with the biological parent's fundamental right to childrearing on special factors while upholding the constitutionality of visitation statutes for "statutorily specified persons").

15. A non-biological parent cannot invoke visitation without a corresponding constitutional statute. *Forbes v. Chapin*, 917 So. 2d 948, 953 (Fla. 4th Dist. App. 2005). Despite the divorced parents' right to privacy, however, Florida statutes permit judges to decide custody in divorce cases even though neither parent has acted in such a way as to cause any question regarding his or her fitness as a parent other than seeking a divorce. J. Catherine Bohl, Von Eiff v. Azicri*: An Important Step in the Refinement of Grandparent Visitation Analysis*, 15 St. Thomas L. Rev. 367, 386 (2002).

16. *See supra* nn. 11–13 and accompanying text (discussing the foundations of Florida third-party custody and visitation caselaw).

A. Extended and Adaptable Family Structures in Judeo-Christian Practices and Teachings

The Florida Supreme Court has cited Judeo-Christian[17] teachings as a controlling reason why biological parents' wishes should supersede all others in third-party visitation and custody decisions. In *State ex. rel. Sparks v. Reeves*, the Florida Supreme Court in 1957 found that Cain's birth to Adam and Eve created a "natural God-given legal right to enjoy the custody, fellowship and companionship of [their] offspring."[18] More than forty Florida cases have discussed the *State ex. rel. Sparks* case and its idea of the God-given, or natural, right of biological parents to their children.[19] Those cases interpret God's creation of the family to mean the nuclear unit.[20]

Contrary to Florida courts' narrow interpretation, the concept of family and parenthood found in the Old and the New Testament is more expansive than the nuclear unit.[21] The Old Testa-

17. This Article defines "Judeo-Christian" as the religious beliefs found in the Old and New Testaments. Rémi Brague, *Sin No More: Liberty, the West, and the Judeo-Christian Heritage*, Am. Spectator (May 2008) (stating that the Judeo-Christian heritage centers on the teachings of the Tanakh, which Christians know as the Old Testament, and the New Testament).

18. 97 So. 2d at 20 (Fla. 1957) (citing *Genesis* 4:1). The Florida Supreme Court has alluded to the Judeo-Christian teaching of "no man can serve two masters" to rule against rotating custody. *Phillips v. Phillips*, 13 So. 2d 922, 923 (Fla. 1943) (This biblical text is from *Matthew* 6:24 and *Luke* 16:13.).

19. *See e.g. Richardson v. Richardson*, 766 So. 2d 1036, 1039 (Fla. 2000) (quoting the language of *State ex. rel. Sparks*); *Paul v. Lusco*, 530 So. 2d 362, 363–364 (Fla. 2d Dist. App. 1988) (quoting the controlling bond a "natural parent" has to custody and companionship of his or her children); *Reiner v. Wright*, 942 So. 2d 944, 945 (Fla. 5th Dist. App. 2006) (quoting the language of the "natural" right of biological parents to custody of their children).

20. *See e.g. Davis v. Weinbaum*, 843 So. 2d 290, 293 (Fla. 5th Dist. App. 2003) (discussing the biological parent's God-given right to custody of their children and stating that a court should deny the natural parent's right only when the parent's custody would cause the child harm); *Johnson v. Richardson*, 434 So. 2d 972, 973 (Fla. 5th Dist. App. 1983) (interpreting the biological parent's God-given right to custody to mean that a court can deny a biological parent custody only when the parent is unable or unfit to care for the child even though other family members are better able to fulfill the parental responsibilities).

21. Jack O. Balswick & Judith K. Balswick, *The Family: A Christian Perspective on the Contemporary Home* 87 (3d ed., Baker Academic 2007); Lisa Miller, *Our Mutual Joy*, Newsweek 28, 30 (Dec. 15, 2008) (quoting Barnard University biblical scholar Alan Segal as characterizing the Old Testament tradition of marriage as polygamist, existing between "one man and as many women as he could pay for"). Florida's preference for the nuclear family unit is more akin to the Greek family structure which was geocentric, rigid, and

ment (OT) family unit included multiple generations in addition to brothers, sisters, and their children.[22] The Israelites connected to the overall society through the extended family unit, identifying themselves in terms of their parents, grandparents, and great-grandparents through the generations.[23] Although the biological parents had primary responsibility, extended families and the communities played active roles in childrearing.[24] The OT community strengthened the family unit while the family reciprocated by strengthening the overall community.[25] The extended family, in OT times, served as the basic social unit.[26]

The New Testament (NT) expanded the OT definition of family beyond bloodlines. Jesus Christ redefined family to have God alone as the head and opened membership to all persons, regard-

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maintained a static equilibrium within the individual family unit. Kalman J. Kaplan, M.W. Schwartz & Moriah Markus-Kaplan, *Man and Woman in the Classical and Biblical Worlds*, 8 J. Psych. & Judaism 99, 109 (1984). Like Florida's preference for the biological parent, the Greek culture prized individualization and a constant desire to fulfill one's own needs regardless of the impact on others. Kalman J. Kaplan, M.W. Schwartz & Moriah Markus-Kaplan, *Individuation and Attachment in Greek and Hebrew Thought*, 8 J. Psych. & Judaism 120, 120 (1984).

22. *Numbers* 1:4, 36:1 (New Intl.); 1 *Kings* 8:1 (New Intl.); 2 *Chronicles* 1:2 (New Intl.).

23. *Leviticus* 25:10, 27:16 (New Intl.) (discussing family property belonging to the extended family unit); *Numbers* 2:32, 4:40 (counting individuals according to their extended family unit). In addition, the Old Testament family heads normally served as community leaders. *Nehemiah* 7:5 (New Intl.) (registering of families included the entire extended family unit). Furthermore, the Israelites often identified themselves not only by the family heads, but also by their bloodlines and the greater extended family unit. *See e.g. Ecclesiastics* 26:19–21 (King James) (stating that the extended family unit preserved blood relationships, wealth, and an individual's honor); *Numbers* 13:3–25 (New Intl.) (choosing scouts according to their extended family units and identifying individuals as descendants of earlier generations).

24. *See Deuteronomy* 4:9 (New Intl.) (requiring the Israelites to teach their children and "their children after them" what they had seen); *Deuteronomy* 6:6–9 (New Intl.) (requiring the Israelites as a community to teach the Commandments); *see also Leviticus* 20:1–2 (New Intl.) (requiring that the community hold the biological parents accountable for how the parents treated their children); *Leviticus* 20:9 (New Intl.) (requiring that the community hold the children responsible for how they treated their biological parents).

25. Balswick & Balswick, *supra* n. 21, at 99.

26. Likewise, United States culture frequently misperceives Old Testament family roles. While often mistakenly seen as rigid and inflexible, original Old Testament teachings uphold interchangeable and malleable family roles for all the members. Kalman J. Kaplan, M.W. Schwartz & Moriah Markus-Kaplan, *Interpersonal Distancing Styles in Hellenic and Hebraic Personalities: On Reconciling Possibility and Necessity*, 8 J. Psych. & Judaism 90, 93 (1984). Old Testament families were open and dynamic, as members helped each other with daily tasks. *Id.* at 94. The Old Testament culture considered family a gift for the community as much as it was a gift to the family's members. Balswick & Balswick, *supra* n. 21, at 99.

less of gender, class, or race; the only limitation was the shared commitment to God's will.[27] The NT taught society's members to care for each other as family.[28] This idealistic expansion of family to incorporate all who shared the common purpose was contagious during the early years of the fledgling church;[29] however, the ideal began to fracture over time because the Jewish-Christians and Greek-Christians had differing lifestyles.[30]

In the name of the biological parents' God-given rights, Florida courts have also refused to grant custody or visitation to former same-sex partners.[31] Judeo-Christian teachings condemn

27. David E. Garland & Diana R. Garland, *Flawed Families of the Bible: How God's Grace Works through Imperfect Relationships* 208–209 (Brazos Press 2007); Miller, *supra* n. 21, at 30. During one of his sermons, Jesus Christ received word that his mother and brothers awaited outside, and he responded by declaring that those who worked towards the will of God were his family. *Mark* 3:33–35 (New Intl.).

28. Balswick & Balswick, *supra* n. 21, at 317.

29. *Acts* 2:44–47 (New Intl.).

30. Garland & Garland, *supra* n. 27, at 211. This resulted in a fracturing of the church family according to bloodlines and cultures despite Jesus Christ's teaching to the contrary. *Id.* at 213 (likening the Christian family's need to blend family cultures to the creation of a stepfamily).

31. *Wakeman*, 921 So. 2d at 670 (finding that the non-biological parent did not have standing to visitation or custody despite parenting the two children for five and seven years and signing multiple parenting and guardianship agreements with the biological mother); *Music v. Rachford*, 654 So. 2d 1234, 1234 (Fla. 1st Dist. App. 1995) (ruling against visitation and custody for a non-biological mother in a four-year lesbian relationship even though she and the biological mother jointly decided to parent the child, attended birthing classes together, and gave the child the non-biological woman's surname). This raises a unique legal issue because under current Florida law, same-sex couples do not have a right to adopt, and courts have consistently failed to recognize any other form of same-sex parenting; therefore, the non-biological parent in a dissolved same-sex relationship has no visitation rights to the child. Fla. Stat. § 63.042 (2009). The 2008 Florida Senate and House of Representatives Bill that would have made homosexual individuals eligible to adopt a child under specifically enumerated circumstances died in committee on May 2, 2008. Fla. Sen. 0200, 2008 Sess. (Mar. 4, 2008); Fla. H. 0045, 2008 Sess. (May 2, 2008). Likewise, the 2009 House and Senate Bills died in committee on May 2, 2009. Fla. Sen. 0500, 2009 Sess. (May 2, 2009); Fla. Sen. 0460, 2009 Sess. (May 2, 2009); Fla. H. 413, 2009 Sess. (May 2, 2009). Nevertheless, there is indication of a potential changing tide in Florida's judiciary's recognition of homosexual individuals' ability to parent. Florida's Eleventh Judicial Circuit Court recently ruled that Florida's statutory ban on homosexuals' ability to adopt violates the foster children's right to permanency under federal and state laws and violates the foster parent's and children's equal protection rights under Article I, Section 2 of the Florida Constitution without satisfying a rational basis for the discrimination. *In re Adoption of Doe*, 2008 WL 5070056 at *22 (Fla. 16th Cir. Ct. Aug. 29, 2008); *In re Adoption of Doe*, 2008 WL 5006172 at *29 (Fla. 11th Cir. Ct. Nov. 25, 2008). This is not a settled issue; for further discussion, see generally Laura A. Turbe, *Florida's Inconsistent Use of the Best Interests of the Child Standard*, 33 Stetson L. Rev. 369 (2003) (arguing the need to bring Florida's adoption statutes in line with its foster family guidelines). This issue has even further implications for intestate succession. For further discus-

homosexual acts.[32] However, unlike Florida courts that have declined to acknowledge changing times, several contemporary religious circles have started teaching that Christians should not condemn the same-sex preference but rather a person's decision to act upon those preferences.[33] Others either tolerate monogamous expressions between consenting same-sex adults while still holding that such sexual relationships are contrary to God's original design[34] or have adopted more accepting views of homosexual practices.[35] The Judeo-Christian groups that do not tolerate same-sex individuals or their practices maintain more rigid beliefs regarding families that are focused on biology rather than a sense of community.[36]

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sion, see generally Lindsay Ayn Warner, *Bending the Bow of Equity: Three Ways Florida Can Improve Its Equitable Adoption Policy*, 38 Stetson L. Rev. 577 (2009) (discussing the effects of Florida's rigid approach to adoption, particularly in cases involving same-sex couples, where the law bars adoption, which leads to inequitable results when persons filling parental roles die intestate).

32. *See 1 Corinthians* 6:9–10 (New Intl.) (declaring that those who engage in homosexual relations are ineligible to inherit God's kingdom); *Leviticus* 18:22 (New Intl.) (prohibiting men from having homosexual relations); *Leviticus* 20:13 (New Intl.) (condemning to death men who act on homosexual urges); *Romans* 1:26–27 (New Intl.) (stating that men and women who act on homosexual desires commit "indecent" acts of "perversion").

33. Balswick & Balswick, *supra* n. 21, at 231. Not all Christian groups share this belief; however, further discussion on this topic is outside the scope of this Article. For additional discussion, see David F. Greenberg & Marcia H. Bystryn, *Christian Intolerance of Homosexuality*, 88 Am. J. Sociology 515 (1982) (providing a historical overview of Christianity's treatment of homosexuality).

34. Balswick & Balswick, *supra* n. 21, at 231; *but see generally* Peter Kenny, *Disagreement on Same-Sex Relations Riles Lutheran Body*, 124 Christian Century 11 (Apr. 17, 2007) (discussing the division in the religious community over views on the roles of same-sex couples).

35. Miller, *supra* n. 21, at 30 (stating that some contemporary biblical scholars have interpreted New Testament passages regarding men who lust for each other as a condemnation of "self-delusion, violence, promiscuity and debauchery" rather than of homosexual practices); *see* Christina Capecchi, *Lutherans May Permit Noncelibate Gay Pastors*, N.Y. Times A17 (Aug. 21, 2009) (reporting that the Lutheran denomination is debating whether to allow ordination of homosexual pastors); Laurie Goodstein, *Episcopal Vote Reopens a Door to Gay Bishops*, N.Y. Times A11 (July 15, 2009) (reporting that the Episcopal Church overwhelmingly voted to permit the consecration of more openly gay bishops).

36. James C. Dobson, *Two Mommies Is One Too Many*, Time 123, 123 (Dec. 12, 2006). These teachings of family are similar to Greek traditions. *See supra* n. 21 (discussing Greek perspectives on family and family roles); Miller, *supra* n. 21, at 30–31 (arguing that modern concepts of marriage are rooted in customs rather than biblical teachings).

B. Changing and Adaptive Family Units throughout United States History

The Florida Supreme Court held that the biological parent's right to raise his or her child is one based on history.[37] The Court additionally held that, with the exception of those cases where there is a danger of harm to the child, public policy required maintenance of the biological ties.[38] Yet, a careful review of United States history reveals that no nuclear "familial utopia" has ever existed.[39] Instead, the United States family unit evolved throughout time according to the economic and social needs of the families' members and society.[40]

Beginning in the Colonial and Post-Colonial Eras, the three major ethnic groups in the United States each organized their societies around the extended family unit. Native Americans used the extended family unit as the basis for their religion, economy, and politics.[41] Afro-American families emphasized the extended family as the basis for their society despite laws prohibiting slave marriages.[42] Likewise, the European colonists were primarily agricultural, and their extended family units often cohabited, work-

37. *Foster*, 114 So. 2d at 376 (stating that the biological parents' right to custody is one of the foundational pillars of western civilization).

38. *In re Guardianship of D.A. McW.*, 460 So. 2d 368, 370 (Fla. 1984) (observing the difference between the best-interests-of-the-child standard between biological parents and the biological-connection standard for visitation and custody decisions involving third parties).

39. The colonial era had a high mortality rate, creating a large number of mixed families. Coontz, *supra* n. 10, at 10. During the Victorian era, high rates of employment for all genders and ages, including the increase in child labor outside the home, split many nuclear-family bonds. *Id.* at 11. By the 1920s and 1930s, there was a stark difference between the idealized family and the true hardships faced by many household units. Simone Cinotto, *"Everyone Would Be Around the Table": American Family Mealtimes in Historical Perspective, 1850–1960*, 111 New Directions for Child & Adolescent Dev. 17, 27–28 (2006).

40. Coontz, *supra* n. 10, at 10–14 (providing a brief overview of the evolving family dynamics often cited as times of "traditional families").

41. Steven Mintz & Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* 28 (The Free Press 1988). The extended family unit served as the basis for Native American society as a whole and all members actively contributed to the preservation of the society. *See id.* at 30 (providing examples where men were encouraged to marry their deceased brothers' widows to continue bloodlines).

42. *Id.* at 35. This was especially evident on larger plantations. *Id.* Ultimately, Afro-Americans established strong extended family patterns adaptable to their challenging circumstances. Shirley A. Hill, *Marriage among African American Women: A Gender Perspective*, 37 J. Comp. Fam. Stud. 421, 425–426 (2006).

ing together towards survival.[43] Each new United States family unit mixed continuity and change to permit the members to adapt to new times and environments.[44] Thus, by the early- to mid-nineteenth century, United States families began to abandon the extended family unit due to urbanization and industrialization.[45]

Although United States families appeared nuclear in the twentieth century, they were more complex.[46] Instead of the extended family, the United States family unit started to rely more heavily on external parties and institutions for economic, educational, and health-care support to meet its needs.[47] By the end of the Second World War, the government and society began broadcasting idealized versions of the "true American family" through shows such as *Leave It to Beaver* and *Donna Reed* attempting to boost United States pride[48] as citizens coped with difficult times.[49]

The social evolution continued into the twenty-first century. The most distinguishing characteristic of today's United States

43. Mintz & Kellogg, *supra* n. 41, at 40. Often the larger plantations had estates where families, children, relatives, and slaves created micro-communities by conducting business together and socializing. *Id.* Although most married individuals established independent households in the transition between the eighteenth and nineteenth centuries, some children continued living with their parents into adulthood, creating intergenerational households. Steven Ruggles, *The Transformation of American Family Structure*, 99 Am. Historical Rev. 103, 124 (1994) (arguing that census data reveals that family living arrangements where at least one child continues residing with aging parents to care for them was the predominant arrangement in the United States during the nineteenth century).

44. Mintz & Kellogg, *supra* n. 41, at 41.

45. *Id.* at 52, 87; *see also* Linda J. Waite, *The Family as a Social Organization: Key Ideas for the Twenty-First Century*, 29 Contemp. Sociology 463, 463 (2000) (stating that increases in real income, urbanization, the market economy, changes in education, and an idealization of individualization have all reduced the role of the family in the organization of society).

46. Coontz, *supra* n. 10, at 25–29 (discussing the novelty of the United States family unit during the 1950s).

47. Cinotto, *supra* n. 39, at 19–20; Coontz, *supra* n. 10, at 69–70; Mintz & Kellogg, *supra* n. 41, at 107–108, 246; Waite, *supra* n. 45, at 463–464 (arguing that families have changed social functions over time due to evolving societal structure, the national economy, and technology).

48. Coontz, *supra* n. 10, at 14. The idealized nuclear family was a form of wartime propaganda during the World War II era. Cinotto, *supra* n. 39, at 28. In the face of food shortages and full-time working women, images of "the proper family mealtime [was] a reassuring icon of social stability in a time of anxiety and turmoil." *Id.*

49. Coontz, *supra* n. 10, at 14, 31–37 (arguing that, although the 1950s may have brought a decline in divorce and an increase in economic prosperity, the period also brought a decrease in marital satisfaction and increases in domestic violence, alcoholism, and tranquilizer use among women).

family is its increased diversification.[50] Fewer marriages are taking place now than in the past,[51] and more couples are opting, instead, to cohabit.[52] There is a growing number of single-individual households,[53] female-headed households,[54] and alternative-family households.[55] In 2002, more than half of all United States births took place within the bonds of marriage.[56]

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50. *Troxel*, 530 U.S. at 63–64 (observing that "[t]he demographic changes of the past century make it difficult to speak of an average American family." Thus, "persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing"); Mintz & Kellogg, *supra* n. 41, at xiii–xiv, xvii. Current statistics signify a change to, rather than a decomposition of, the family unit. *See* Sam Roberts, *Most Children Still Live in Two-Parent Homes, Census Bureau Reports*, N.Y. Times 14 (Feb. 21, 2008) (reporting that, according to the Census Bureau, approximately 70% of children lived with two parents, whether biological parents or non-biological individuals fulfilling the parenting role). This statistic does not differentiate between biological parents and other non-biological individuals fulfilling the parenting role. The 2000 Census likewise showed that about 5% of all households with children included minor stepchildren. U.S. Census Bureau, *Adopted Children and Stepchildren: 2000: Census 2000 Special Reports* 4, http://www.census.gov/prod/2003pubs/censr-6.pdf (Oct. 2003).

51. U.S. Census Bureau, *Statistical Abstract of the United States: 2007: Population 50 tbl.* 54, http://www.census.gov/prod/2006pubs/07statab/pop.pdf (accessed Feb. 19, 2009) [hereinafter *2007 U.S. Census Abstract*] (noting that the percentage of the total population that had never been married increased from approximately 22% in 1990 to nearly 25% in 2005); *see also* Lydia Saad, *Americans Have Complex Relationship with Marriage*, http://www.gallup.com/poll/23041/Americans-Complex-Relationship-Marriage.aspx (May 30, 2006) (reporting a high rate of marriage in the 1960s—77% of American adults); *see also* Matthew J. Astle, Student Author, *An Ounce of Prevention: Marital Counseling Laws as an Anti-Divorce Measure*, 38 Fam. L. Q. 733, 734 (2004) (discussing the movement toward covenant marriage laws where legislatures implement heightened marriage and divorce requirements in hopes of building stronger communities).

52. Marilyn Gardner, *A Quiet Revolution in Support of Marriage*, Christian Sci. Monitor 2 (June 30, 2000).

53. *2007 U.S. Census Abstract*, *supra* n. 51, at 52 tbl. 57. Furthermore, as of 2000, 3.7% of all United States households were unmarried couples cohabiting. U.S. Census Bureau, *America's Families and Living Arrangements: Population Characteristics* 12, http://www.census.gov/prod/2001pubs/p20-537.pdf (June 2001). This number, however, may be under-representative of the true population of unmarried partners in the United States, as the number is self-reported and not all unmarried partners cohabitate. *Id.* This number also does not distinguish between same-sex and heterosexual couples. *Id.*

54. *2007 U.S. Census Abstract*, *supra* n. 51, at 52 tbl. 57 (reporting that female-headed family households increased from approximately 11% of total households in 1980 to slightly over 12% in 2005).

55. *Id.* (reporting that the combined total of nonfamily households and unmarried family households increased by approximately 9% as a percentage of total households while "married couples with own children" decreased by approximately 7%).

56. Natl. Ctr. for Health Statistics, *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, 23 Vital & Health Statistics no. 25, 8, http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf (Dec. 2005) (reporting that 34% of United States births in 2002 were to unmarried women). Approximately 35% of births in the United States over the five years before the 2002 in-

Contemporary Florida families reflect this increased diversification; Florida has also experienced a decrease in the marriage rate.[57] In 2006, slightly fewer than half of Florida residents lived in married households.[58] Within non-married households, roughly half were residing with their own minor children.[59] In addition, as of 2006, grandparents who lived with their minor grandchildren comprised 2% of Florida's population, and 39% of those grandparents were responsible[60] for the care of their grandchildren.[61] Florida's children are growing up in more diversified settings than the law currently recognizes.[62]

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terviews were to unmarried women. *Id.* at 53 tbl. 18. Thus, approximately 34% of births in 2002 and 35% of births prior to the interviews occurred outside of marriage. *Id.* at 8, 53 tbl. 18. Non-biological individuals possibly cared for the children.

57. U.S. Census Bureau, *Florida: Selected Social Characteristics in the United States: 2006*, http://factfinder.census.gov/servlet/ADPTable?_bm=y&-context=adp&-qr_name=ACS_2006_EST_G00_DP2&-ds_name=ACS_2006_EST_G00_&-tree_id=302&-redoLog=false&-all_geo_types=N&-geo_id=04000US12&-format=&-_lang=en (accessed Feb. 19, 2009) [hereinafter *2006 Florida Census*]; U.S. Census Bureau, *Florida: Selected Social Characteristics: 2002*, http://factfinder.census.gov/servlet/ADPTable?_bm=y&-context=adp&-qr_name=ACS_2002_EST_G00_DP2&-ds_name=ACS_2002_EST_G00_&-tree_id=302&-redoLog=false&-all_geo_types=N&-geo_id=04000US12&-format=&-_lang=en (accessed Feb. 19, 2009) [hereinafter *2002 Florida Census*]. In 2006, 53% of males fifteen years of age or older were currently married. *2006 Florida Census* (reporting that 57% of female householders and 45% of males lived with their own children). Of the 47% of non-married males, 31% never married, 2% had separated, 3% were widowers, and 11% had divorced. *Id.* Of the 51% of non-married females, 24% never married, 3% had separated, 12% were widows, and 13% had divorced. *Id.* These statistics do not distinguish between first and second marriages. In contrast, in 2002, males of this age range reported that 57% were currently married while 51% of females reported being married. *2002 Florida Census*. Of 43% of non-married males, 28% never married, 2% had separated, 3% were widowers, and 11% had divorced. *Id.* Of the 49% of non-married females, 21% had never married, 3% had separated, 12% were widows, and 13% had divorced. *Id.* These statistics do not distinguish between first and second marriages.

58. *2006 Florida Census* (stating that households with married couples comprise 49% of the population and the other 51% consists of male or female householders with no spouse or "nonfamily households"). This statistic does not distinguish first and second marriages.

59. *Id.* (reporting approximately 54% of single heads of household live with their own children younger than 18 years of age).

60. This statistic does not identify if the responsibility is legal or unofficial in nature.

61. *Id.* Of those responsible for the children, 53% had been responsible for three or more years. *Id.* These numbers remained constant from the 2002 U.S. Census results, which reported that 2% of the total population were grandparents who reported living with their own children younger than 18 years of age; 53% were grandparents that reported being responsible for three years or more. *2002 Florida Census*. Although the number does not reflect growth, it appears to be holding constant, thus representing a firm segment of Florida's population.

62. *See supra* nn. 2–5 and accompanying text (discussing Florida's recognition of the

C. The Supreme Court's Flexible Adaptation of Parenthood in Constitutional Interpretation in the Face of Changing Demographics

The final pillar upon which Florida courts base the supremacy of biological parents is the Florida constitutional right to privacy.[63] In 1980, Florida amended its constitution to include this right based on the United States Supreme Court's finding that the Fourteenth Amendment of the United States Constitution encompassed a right to privacy.[64] Yet, since its introduction, Florida courts have applied the right to privacy in third-party custody and visitation decisions much more conservatively than the United States Supreme Court.

Although the Supreme Court found that a biological parent's right to the custody, nurture, and care of his or her child[65] is "cardinal"[66] and an "American Tradition,"[67] and has thus carefully protected this right,[68] the Court also ruled that this right is coupled with a duty.[69] The Court ruled that the parental custodial right does not exist simply because of a biological connection, but also because the parent has established a relationship with the

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biological family as the only true family).

63. *See supra* n. 13 and accompanying text (listing Florida caselaw citing the biological parents' constitutional right to privacy as a controlling reason for the denial of third-party visitation and custody requests); *see also* Fla. Const. art. I, § 23 (stating "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein").

64. William A. Buzzett & Deborah K. Kearney, *Commentary to 1980 Addition and 1998 Amendment: 1980 Committee Substitute for House Joint Resolution 387*, Fla. Stat. Ann. Const. art. I, § 23 (West 2004).

65. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that the Fourteenth Amendment right to liberty includes the individual's right to "establish a home and bring up children").

66. *Troxel*, 530 U.S. at 65.

67. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1971) (stating that "[t]he 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.").

68. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (stating in a parental termination case that "[t]he 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 or have lost temporary custody of their child to the State").

69. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (observing that "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations").

child.[70] The Court stated, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[71] In finding an Illinois law that recognized only married biological fathers as parents unconstitutional, the Court suggested that "relationships are a defining feature of parenting."[72] The Court explained:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.[73]

The Court further articulated the need for active relationships in *Quilloin v. Walcott*,[74] when it upheld a lower court's decision to allow a stepfather to adopt a child over the biological father's protests because the biological father "had not taken steps to support or legitimate the child over a period of more than [eleven] years."[75]

The Supreme Court recognized that, although they are at a cost to parental rights, non-parenting statutes nationwide exist

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70. *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (finding that the state may constitutionally give "categorical preference" to a stepfather over a biological father when the child of an adulterous relationship was born into a marriage); Mellisa Holtzman, *The "Family Relations" Doctrine: Extending Supreme Court Precedent to Custody Disputes between Biological and Nonbiological Parents*, 51 Fam. Rel. 335, 341 (2002) (observing that in the series of unwed father cases, the Supreme Court ruled that biology "[i]n and of itself" was not a determinative factor).

71. *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (upholding the rights of a biological father to block an adoption proceeding initiated by the child's biological mother and her new husband); *see also Parham v. Hughes*, 441 U.S. 347, 355–356 (1979) (affirming as constitutional a Georgia law that requires a biological father of an illegitimate child to take an active interest in his offspring in order to have paternal rights).

72. Holtzman, *supra* n. 70, at 338.

73. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

74. 434 U.S. 246 (1978).

75. *Id.* at 253 (ruling in favor of a stepfather seeking adoption over the protests of the biological father because the stepfather had taken an active role in the child's life while the biological father had not).

due to the changing demographics within the United States.[76] In *Troxel*, the Supreme Court struck down a Washington grandparent-visitation statute as unconstitutional because of the sweeping breadth of the statute; however, the Court left open the possibility that other, more specifically articulated statutes may be constitutional.[77] The Court established an open standard in deciding third-party visitation and custody decisions, ruling that constitutional statutes provide "special weight" to the biological parent's decision in addition to determining the child's best interests.[78]

III. THE PROBLEMATIC OUTCOMES OF FLORIDA'S BIOLOGICAL TRUMP

When compared to other states, Florida appears to be more reluctant to amplify non-biological parental visitation and custody rights.[79] This adherence to tradition[80] is problematic as the State originally established these standards because they served the people of the time,[81] and the times have since changed.[82] Social

76. *Troxel*, 530 U.S. at 64 (stating that enactments of "nonparental visitation statutes" throughout the United States are due to a national recognition of the changing structures of American families). The Court further observed that, because of the increased number of non-biological individuals assuming maternal and paternal roles, "[s]tates have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties" and that states recognize "that children should have the opportunity to benefit from relationships with statutorily specified persons." *Id.*

77. *Id.* at 67 (criticizing the statute because it puts the child's best interests in the judge's hands by permitting any individual to seek visitation rights any time they so desire); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 Va. L. Rev. 385, 403–404 (2008) (observing that some states have interpreted *Troxel* to prohibit only the visitation statutes that permit either courts or third parties to take over a parent's authority to make decisions regarding his or her children).

78. *Troxel*, 530 U.S. at 69 (stating "[t]he problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the biological parent's] determination of her daughter's best interests"); Bohl, *supra* n. 15, at 368–369 (observing that the Supreme Court provides the states "little specific guidance" in requiring only that states provide "special weight" to biological parents' decisions without articulating what "special weight" is).

79. Bohl, *supra* n. 15, at 371; *see* Linda Kelly, *Family Planning, American Style*, 52 Ala. L. Rev. 943, 944 (2001) (observing that state populations adhere to the nuclear family unit to varying degrees while discussing the domestic custody laws in light of immigration laws).

80. "Tradition" is a past custom that influences present practices. *Black's Law Dictionary* 727 (Bryan A. Garner ed., 3d pocket ed., West 2006).

81. *See* Rebecca L. Brown, *Tradition and Insight*, 103 Yale L.J. 177, 182 (1994) (defining "tradition" as a historical practice that society continued because it contained some-

behavior and norms change while biology does not.[83] Florida's legal practices, thus, should change with the changing times.[84]

Florida is perpetuating stereotypes of acceptable and unacceptable family structures by holding fast to historical and religious traditions. Legal recognition of only biological relationships validates just one type of family and communicates that children of non-nuclear families cannot and do not form emotional bonds with their caretakers.[85] Although common law, generally, has deeply engrained roots in religion and history,[86] judges must consider religious and historical traditions carefully[87] and rely on them as just two nonexclusive sources of guidance.[88] To decide custody and visitation cases entirely on historical and religious traditions in order to maintain or advance those traditions is a bias and is, therefore, improper.[89]

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thing the society valued).

82. *See supra* nn. 50–62 (discussing the rapidly changing demographics of the United States and Florida populations).

83. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 890 (1984).

84. Brown, *supra* n. 81, at 183 (arguing that traditions are valid sources of insight, but they should not be binding on current decisions).

85. Charlotte J. Patterson & Raymond W. Chan, *Families Headed by Lesbian and Gay Parents*, in *Parenting and Child Development in "NonTraditional" Families* 194 (Michael E. Lamb ed., Lawrence Erlbaum Assocs. 1999).

86. *D.F. v. Dept. of Rev. ex rel. L.F.*, 823 So. 2d 97, 101 (Fla. 2002) (Pariente, J., concurring). Common law has internalized the traditional Judeo-Christian religious and moral belief systems so extensively that many consider them a social norm. *See* Sanja Zgonjanin, *Quoting the Bible: The Use of Religious References in Judicial Decision-Making*, 9 N.Y.C. L. Rev. 31, 35 (2005) (stating that Judeo-Christian teachings are so engrained in United States laws that they hold a largely invisible and sustained power).

87. *See* Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 Wm. & Mary L. Rev. 923, 928 (2006) (criticizing the Supreme Court's application of tradition in decisions protecting fundamental rights).

88. *See* Harold J. Berman, *The Interaction of Law and Religion*, 8 Cap. U. L. Rev. 345, 345 (1979) (advocating for the necessity to consider the religious foundations of the legal system, particularly because the majority of the nation professes religious beliefs and many participate or subscribe to the teachings of organized religions including Christianity, Judaism, and Islam); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 Ohio St. L.J. 491, 614 (2004) (finding that judicial religious bias existed when religiously affiliated judges decided religious freedom cases). The extent of religion's influence on judicial decisionmaking as a whole is outside the scope of this Article.

89. Teresa S. Collett, *The King's Good Servant, but God's First: The Role of Religion in Judicial Decisionmaking*, 41 S. Tex. L. Rev. 1277, 1291 (2000); Scott C. Idleman, Student Author, *The Role of Religious Values in Judicial Decision Making*, 68 Ind. L.J. 433, 483

Florida's biological trump is also contrary to a slow but evident shift, which has begun in other jurisdictions, to a more non-traditional legal definition of parenthood. As the Vermont Supreme Court observed:

> When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. . . . [O]ur paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children's financial support and emotional well-being by developing theories of parenthood, so that "legal strangers" who are de facto parents may be awarded custody or visitation or reached for support.[90]

This shift is noticeable in recent rulings, such as when a Michigan court recognized the rights of a non-biological parent as the "natural and legal father of a child" over the protests of a biological parent based on the facts of the case.[91]

Several states have legally expanded parenthood to include de facto and psychological parents.[92] States such as Alabama,[93]

(1993). "Bias" is partiality, inclination, or prejudice. *Black's Law Dictionary*, *supra* n. 80, at 69. As lawmakers participate in their own family units, assessing family units from a broader perspective can be significantly challenging. Balswick & Balswick, *supra* n. 21, at 37, 87 (noting that personal customs or culture can influence a person's legal interpretations).

90. *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1275–1276 (Vt. 1993) (ruling that a biological mother's lesbian partner could adopt the children, thus permitting the children to have two legal mothers).

91. *Sinicropi v. Mazurek*, 729 N.W.2d 256, 264 (Mich. App. 2006) (finding an "equitable-like parent" existed when a man executed a valid acknowledgment of parentage even though he was not the biological parent); *Killingbeck v. Killingbeck*, 711 N.W.2d 759, 766 (Mich. App. 2005) (upholding the custody arrangement excluding a biological parent in order to minimize unwarranted changes from the established environment).

92. A "psychological parent" is an individual whose conduct, according to the child's perception, has placed the individual in the position traditionally filled by a biological

Indiana,[94] Maryland,[95] Nebraska,[96] New Hampshire,[97] Ohio,[98] Pennsylvania,[99] and Utah[100] have all upheld the constitutionality of their respective grandparent-visitation statutes when the facts demonstrate a close parent-like relationship between the grandparents and the grandchildren.[101] In addition, states such as California,[102] Colorado,[103] Massachusetts,[104] Rhode Island,[105] Ver-

parent. *Swain v. Swain*, 567 So. 2d 1058, 1059 (Fla. 5th Dist. App. 1990) (Sharp, J., dissenting). Often this individual is the only father or mother that the child knows. *Id.* A de facto parent is an individual who, with the biological parent's consent or due to the parent's failure to act, has lived with the child and provided parent-like care and nurturing. *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.03(1)(c) (ALI 2002).

93. *See e.g. Dodd v. Burleson*, 932 So. 2d 912, 920 (Ala. Civ. App. 2005) (discussing the 2003 amendments to the visitation statute, which included the legislature's abandonment of the harm standard and its endorsement of the judiciary's case-by-case approach to grandparent visitation).

94. *See e.g. Spaulding v. Williams*, 793 N.E. 2d 252, 262 (Ind. App. 2003) (granting grandparents visitation over the biological father's protests because they fulfilled parent-like roles on a daily basis).

95. *See e.g. Koshko v. Haining*, 897 A.2d 866, 878 (Md. Spec. App. 2006) (finding that the children's best interests is the guiding standard for visitation and custody decisions, and, therefore, grandparents are not required to show harm to the child in a petition for visitation).

96. *See e.g. Hamit v. Hamit*, 715 N.W.2d 512, 517 (Neb. 2006) (affirming the lower court's grant of grandparent visitation over the widow's protest because the paternal grandparents had cared for their grandchildren while the biological parents were occupied with work).

97. *See e.g. In re R.A. & J.M.*, 891 A.2d 564, 583 (N.H. 2006) (finding that the state's grandparent statute is constitutional on its face and further observing that certain circumstances permit judges to award custody to stepparents or grandparents).

98. *See e.g. In re C.R.*, 843 N.E.2d 1188, 1192 (Ohio 2006) (stating that it is not necessary to find a parent unfit when the decision does not involve awarding a non-biological individual permanent custody, and, therefore, "does not divest parents of residual parental rights, privileges, and responsibilities").

99. *See e.g. Hiller v. Fausey*, 904 A.2d 875, 886 (Pa. 2006) (affirming the lower court's grant of partial custody to a maternal grandmother who cared for the child during the mother's illness, stating that the state's longstanding, compelling interest has been to protect the children's emotional and physical welfare).

100. *See e.g. In re Estate of S.T.T.*, 144 P.3d 1083, 1094 (Utah 2006) (affirming the constitutionality of an award of visitation to live-in grandparents who cared for the child after the mother died). The Utah Grandparent Visitation Statute presumes that the parents' decisions are in the child's best interests, and the grandparents have the burden to overcome this presumption through demonstrating special circumstances. *Id.* at 1092. The Utah Grandparent Visitation Statute has existed since 1975. Utah Code Ann. § 30-3-5(5) (West 2007).

101. *See* Murray, *supra* n. 77, at 404 (observing that the law is more comfortable in situations where the grandparents making claims for legal rights to the child have fulfilled a parental, rather than simply a caregiver, role).

102. *See e.g. Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005) (finding that the child could legally have two mothers); *see generally* June Carbone, *From Partners to Par-*

mont,[106] and Washington[107] have granted adoption, custody, or visitation rights to same-sex partners.[108] Some states have gone so far as to acknowledge the possibility of three legal parents[109] existing in order to collect child support.[110]

The most remarkable evidence of other states' responses to the changing society is their recognition of same-sex couples' rights to create a family. In 2000, Vermont created the civil union to recognize legally same-sex couples' relationships;[111] New Jersey

ents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood? 7 Whittier J. Child & Fam. Advoc. 3 (2007) (discussing California's adoption laws in light of same-sex relationships).

103. *See e.g. In re E.L.M.C.*, 100 P.3d 546, 553 (Colo. App. 2004) (ruling that the same-sex partner could petition for time-sharing with the child because the standard of requiring the non-biological party to prove a parent-like relationship is constitutionally sufficient).

104. *See e.g. E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999) (affirming the lower court's decision to consider the child's nontraditional family in awarding time-sharing to the biological parent's former same-sex partner).

105. *See e.g. Rubano v. DiCenzo*, 759 A.2d 959, 968 (R.I. 2000) (ruling that the former same-sex partner had rights to seek custody and visitation with the child).

106. *See e.g. Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 969 (Vt. 2006) (finding that the biological parent's former same-sex partner was a parent entitled to full legal rights and responsibilities to the child).

107. *See e.g. In re Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005) (holding that individuals "who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life" have "legal parity with an otherwise legal parent").

108. *See e.g.* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: ERISA, Jurisdiction, and Third-Party Cases Multiply*, 40 Fam. L.Q. 545, 585–588 (2007) (providing an overview of third-party visitation and custody cases decided in the United States in 2007).

109. Canadian courts are now considering the possibility of recognizing three parents. *See generally A.A. v. B.B.*, (2007), 83 O.R. (3d) 561 (Ont. C.A.) (allowing the appeal for a same-sex partner to request legal recognition as a partner while the biological mother and father retain full legal rights); Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 Hastings Women's L.J. 171 (2008) (discussing the possibility of legal recognition of a third "social parent" in Canadian law); Fiona Kelly, *Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law*, 21 Can. J. Fam. L. 133 (2004) (exploring various ways Canadian courts handle child custody and visitation decisions for dissolved same-sex families).

110. *See e.g. Smith v. Cole*, 553 So. 2d 847, 854 (La. 1989) (ruling that Louisiana law can presume that the biological mother's husband is the child's legal father while recognizing the biological father's actual paternity); *State on Behalf of J.R. v. Mendoza*, 481 N.W.2d 165, 172 (Neb. 1992) (stating that children who are now born outside of a marriage hold a more favorable legal status than in the past, and, therefore, there is less of a need to create legal fictions, such as dual paternity to meet the children's needs).

111. 2000 Vt. Acts & Resolves (available at http://www.leg.state.vt.us/Docs/2000/ACTS/ACT091.htm) (finding that the state created civil marriage to promote "close and caring

followed suit in 2006[112] as did New Hampshire in 2007.[113] In 2004, Massachusetts was the first state to recognize same-sex marriage;[114] California followed suit on May 15, 2008;[115] Connecticut on October 10, 2008;[116] Iowa on April 24, 2009;[117] Vermont on September 1, 2009;[118] and New Hampshire on January 1, 2010.[119] Maine's Governor approved a law on May 7, 2009, permitting

families" and protect its citizens from the negative outcomes of divorce or abandonment); Vt. Stat. Ann. tit. 15, § 1201(2) (West 2008) (defining a "civil union" as two individuals who establish a relationship and are eligible to receive the spousal benefits and assume the related responsibilities).

112. N.J. Stat. Ann. § 37:1-28 (West 2006); MSNBC, *New Jersey Governor Signs Civil Unions into Law*, http://www.msnbc.msn.com/id/16309688/ (Dec. 21, 2006).

113. N.H. Rev. Stat. Ann. § 457-A:2 (West 2007); Noah Bierman, *Gay N.H. Couples Celebrate, Gain Status in Civil Unions*, http://www.boston.com/news/local/articles/2008/01/02/gay_nh_couples_celebrate_gain_status_in_civil_unions/ (Jan. 2, 2008). However, as of January 1, 2010, New Hampshire will no longer issue civil unions, and members of civil unions prior to January 1, 2010, may apply for marriage licenses or will automatically be deemed married by January 1, 2011. N.H. Rev. Stat. § 457:46 (2009).

114. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969–970 (Mass. 2003) (finding that the state's ban on same-sex marriages violated the state's constitution and staying the judgment for 180 days to allow the legislature time to react). The Massachusetts House of Representatives, however, added a referendum question to the November 2008 ballot that would advance a constitutional amendment to define marriage as only between a man and a woman. Pam Belluck, *Same-Sex Marriage Setback in Massachusetts*, N.Y. Times A12 (Jan. 3, 2007).

115. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); David G. Savage, *California Gay Marriage Ruling Isn't Seen as Trend*, L.A. Times A10 (May 26, 2008). Prior to permitting same-sex marriages, California established domestic partnership statutes to recognize legally same-sex relationships. Cal. Fam. Code § 297.5(d) (West 2005).

116. *Kerrigan v. Commr. of Pub. Health*, 957 A.2d 407, 481–482 (Conn. 2008) (ruling that the court must consider the state's citizens' changing expectations and needs while interpreting the state's constitution to find laws banning same-sex marriage as a violation of the state constitution's guarantee of equal protection). Connecticut has offered civil unions for same-sex couples with benefits and rights similar to heterosexual marriages since 2005. Lisa W. Foderaro, *Gay Marriages Begin in Connecticut*, N.Y. Times A31 (Nov. 13, 2008).

117. *Varnum v. Brien*, 763 N.W.2d 862, 907 (2009); Associated Press, *Iowa Supreme Court Legalizes Gay Marriage*, http://MSNBC.msn.com/id/30027685 (Apr. 3, 2009).

118. 2009 Vt. Sess. Ls. No. 3 (S. 115) (amending title 15 of Vermont Statutes Session 8 to define marriage as between two people); Andrea Stone, *VT Lawmakers Legalize Gay Marriage*, USA Today 3A (Apr. 8, 2009). Vermont's constitution states that Vermont's government is for the people's benefit and they have an "indubitable, unalienable, and indefeasible right" to reform it for their welfare. Vt. Const. ch. 1, art 7.

119. N.H. Rev. Stat. § 457:1-a (defining marriage as a union between two people, effective January 1, 2010); Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. Times A19 (June 4, 2009) (available at http://www.nytimes.com/2009/06/04/us/04marriage.html). For a brief history of the same-sex marriage court cases and legislation through August 3, 2009, see New York Times, *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (last updated Aug. 3, 2009).

same-sex marriage;[120] however, when or if couples will be allowed to marry remains to be seen.[121] California citizens subsequently passed Proposition 8 on November 4, 2008 banning same-sex marriage;[122] however, California continues to allow domestic partnerships,[123] and the marriage issue is far from settled.[124] Massachusetts[125] is permitting non-residents to marry, consequently forcing other states to address the legality of same-sex marriages and their related custody and visitation issues.[126] New York,[127] District of Columbia,[128] and Rhode Island[129] have re-

120. 2009 Me. Legis. Serv. ch. 82 (S.P. 384) (L.D. 1020) (redefining marriage as a union of two people); Abby Goodnough, *Maine Governor Signs Sex-Sex Marriage Bill*, N.Y. Times A21 (May 7, 2009) (available at http://www.nytimes.com/2009/05/07/us/07marriage.html).

121. Glenn Adams, *Maine Gay Marriage Opponents Submit Challenges*, http://abcnews.go.com/US/wireStory?id=8221559 (July 31, 2009).

122. Jessica Garrison, Cara Mia DiMassa & Richard C. Paddock, *Voters Approve Proposition 8 Banning Same-Sex Marriages*, http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,4876367,full.story (Nov. 5, 2008).

123. Cal. Fam. Code Ann. § 297 (West 2008).

124. *See* Jonathan Darman, *Hoping That Left Is Right*, Newsweek 44 (Jan. 26, 2009) (describing the efforts of San Francisco's mayor Gavin Newsom to institutionalize the rights of same-sex couples to marry in California); Janet Kornblum, *California Same-Sex Marriage Ban Faces Three Lawsuits*, USA Today 9a (Nov. 6, 2008) (discussing three lawsuits brought immediately after the passage of Proposition 8 to counter the ban on same-sex marriages); Anna Quindelin, *The Last Word: The Loving Decision*, Newsweek 68, 68 (Nov. 24, 2008) (citing *Loving v. Virginia*, 338 U.S. 1, 12 (1967)) (likening the states' prohibition of same-sex marriages to the prohibition of interracial marriages prior to the *Loving* decision, which held that the prohibition violated the Due Process Clause of the Fourteenth Amendment of the Constitution).

125. On August 1, 2008, Massachusetts Governor Deval Patrick repealed the Massachusetts law that prohibited the state from issuing marriage licenses to non-residents whose home states would not legally recognize their marriage. Michael Levenson, *Same-Sex Couples Applaud Repeal*, Boston Globe A1 (Aug. 1, 2008).

126. *Id.* (reporting many same-sex opponents' speculation that the legalization of non-resident same-sex couples' marriage licenses will begin a cascade across the United States); *see e.g. Wilson v. Ake*, 354 F. Supp. 2d 1298, 1301–1302 (M.D. Fla. 2005) (ruling on a case where a lesbian couple married in Massachusetts and sought to have Florida recognize their marriage); *see generally* Robin Cheryl Miller & Jason Binimow, *Marriage between Persons of Same Sex—United States and Canadian Cases*, 1 A.L.R. Fed. 2d 1, 1 (2005) (providing an overview of United States and Canadian cases where same-sex couples have argued for the right to marry).

127. *Lewis v. N.Y. St. Dept. of Civ. Servs.*, 872 N.Y.S.2d 578, 584 (N.Y. App. Div. 2009) (holding that recognition of same-sex partners' legally obtained out-of-state marriages is not contrary to New York law because New York has not enacted any laws and there is no binding precedent that expressly precludes legally obtained out-of-state same-sex marriages); *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008).

128. D.C. Code § 46-405.01 (2009) (recognizing people legally married in another state as "married" regardless of gender); Associated Press, *Washington, D.C. Recognizes Same-Sex Marriages*, N.Y. Times A17 (July 8, 2009) (available at http://www.nytimes.com/2009/07/08/us/08marriage.html).

sponded by passing laws recognizing certain out of state same-sex marriages. These decisions, at a minimum, indicate potential future changes in other jurisdictions.[130]

There are already some hints within Florida's legislature and judiciary that the biological trump should change. According to social-welfare laws, the Florida legislature intends for families to be strong and self-sufficient.[131] For purposes of social welfare, the legislature established a much more encompassing definition of "family" to include individuals "resid[ing] in the same house or living unit."[132] These statutes expansively include as family members non-cohabiting and cohabiting partners, present and former spouses, blood relatives and in-laws, those who presently live as a family or have done so in the past, and those who have a child in common.[133]

Furthermore, Florida's inflexibility in third-party custody and visitation cases is contrary to its own paternity laws and cases. Florida's paternity laws allow for the possibility that a non-biologically related man can be a legal father by automatically assuming a married woman's husband is a child's father and establishing paternity through an affidavit signed by the mother and the man claiming to be the father.[134] The law allows a challenge to the paternity.[135] Nevertheless, Florida courts have con-

129. Katie Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, http://www.nytimes.com/2007/02/22/us/22rhode.html (Feb. 22, 2007) (reporting that the Rhode Island Attorney General issued an opinion saying that Rhode Island should recognize same-sex marriages legally performed in Massachusetts); Edward Fitzpatrick & Steve Peoples, *Lynch: R.I. to Recognize Mass. Gay Marriages*, http://www.projo.com/news/content/same_sex_marriage_02-22-07_EI4H8S5.116f4b1.html (Feb. 22, 2007) (reporting that although the Rhode Island Attorney General's opinion is not binding and does not mean same-sex couples can marry in Rhode Island, the Attorney General has said couples can use his legal opinion in future court cases).

130. *See* Levenson, *supra* n. 125 (reporting that many anticipate the Massachusetts governor's decision to allow all non-residents to obtain marriage licenses will affect other states); Jeremy W. Peters, *Advocates on Both Sides Seek Momentum on Same-Sex Marriage in New York and New Jersey*, N.Y. Times A22 (Apr. 9, 2009) (reporting that advocates and opponents to same-sex marriage in New York and New Jersey are using recent decisions in other jurisdictions for their home-state campaigns).

131. Fla. Stat. § 414.025(1) (2008) (stating "[i]t is the intent of the Legislature that families in this state be strong and economically self-sufficient so as to require minimal involvement by an efficient government").

132. *Id.* at § 414.0252(5).

133. *Id.* at § 414.0252(6).

134. Fla. Stat. § 382.013(2)(a), (c) (2008).

135. A biological parent can challenge a legal father's paternity under Florida Statutes

sistently commented that the disestablishment of a legal father's paternity is intrusive, potentially causing irreparable harm to the child, and therefore courts are reluctant to permit such an action.[136] The Florida Legislature should bring the third-party custody and visitation holdings in line with its own recognition of the importance to maintain non-biologically bonded families in paternity suits.

Florida's legislature attempted to expand the concept of family in the custody and visitation laws through Florida Statutes Sections 61.13(3) and 752.01.[137] The first provision outlined each situation that would permit courts to order visitation when requested by the biological grandparents.[138] In a series of rulings, various Florida courts found each aspect of this statute unconstitutional under the Privacy Clause.[139] The second provision allowed grandparents to have custody when their grandchildren were residing with them.[140] Florida courts likewise found this

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Section 742.10(4). A legal father may challenge his paternity under the social policy that his right to avoid responsibility of a child, that is not biologically his, trumps that child's best interest. *Daniel v. Daniel*, 695 So. 2d 1253, 1254 (Fla. 1997). Nevertheless, the legal father must raise this challenge in a timely manner or else the law will oblige him to continue fulfilling his parental obligations and responsibilities, despite the lack of a biological connection. *Lefler v. Lefler*, 776 So. 2d 319, 324 (Fla. 4th Dist. App. 2001).

136. *Dept. of Revenue ex rel. Chambers v. Travis*, 971 So. 2d 157, 159 n. 1 (Fla. 1st Dist. App. 2007); *Dept. of Revenue ex rel. T.E.P. v. Price*, 958 So. 2d 1045, 1046 (Fla. 2d Dist. App. 2007); *Allison v. Medlock*, 983 So. 2d 789, 790 (Fla. 4th Dist. App. 2007); *Callahan v. Dept. of Revenue ex rel. Roberts*, 860 So. 2d 679, 680, 683, 684 (Fla. 5th Dist. App. 2001).

137. The primary controlling child-custody statute enumerates the factors for consideration when deciding on the child's best interests in custody decisions between biological parents. *Id.* at § 61.13(3). The legislature radically altered this statute effective October 1, 2008, modifying custody decisions to focus, instead, on developing parenting plans and eliminating the prior terminology of primary and secondary residential parents. 2008 Fla. Laws ch. 61. The other statute relating to child custody permits judges to order rotating custody if it is in the best interests of the child. Fla. Stat. § 61.121 (2007). The Session Law signed by the Governor on May 28, 2008 has eliminated the presumption against rotating custody in light of the new parenting plans. 2008 Fla. Laws ch. 61. As these statutes focus on custody arrangements between biological parents, they are outside the scope of this Article.

138. Fla. Stat. § 752.01(1)(b) (1997) (establishing the best-interests-of-the-child standard relating to biological grandparents' visitation requests). This was facially unconstitutional because it required only the best-interests standard. *Belair v. Drew*, 776 So. 2d 1105, 1106 (Fla. 5th Dist. App. 2001).

139. *Sullivan v. Sapp*, 829 So. 2d 951, 951–952 (Fla. 1st Dist. App. 2002); *Cranney*, 920 So. 2d at 134; *K.A.S. v. R.E.T.*, 914 So. 2d 1056, 1062 (Fla. 2d Dist. App. 2005); *In re S.D.*, 869 So. 2d 39, 40–41 (Fla. 2d Dist. App. 2004); *Forbes*, 917 So. 2d at 953; *Smith v. Koolidge*, 780 So. 2d 1025, 1026 (Fla. 4th Dist. App. 2001).

140. Fla. Stat. § 61.13(7) (1997) (permitting the courts to grant biological grandparents

statute to be unconstitutional under the Privacy Clause.[141] In 2008 and again in 2009, the Florida Senate attempted to amend Florida Statutes Section 752.01 in hopes of reinstating grandparent-visitation rights, but the bill died in committee.[142]

Florida courts have also begun to recognize society's changes and the need for a legal response.[143] The Florida Supreme Court stated that a parent's biological link with a child does not automatically guarantee constitutional protection if the parent failed to establish a relationship with the child.[144] The Fourth District Court of Appeal called the legislature to action, stating that the court cannot grant visitation to a third party unless it has a constitutional statute upon which it may base its decision.[145] There-

standing equal to that of a biological parent in cases where the child in question is stably living with a grandparent). This statute was also facially unconstitutional because it required only the best-interests standard. *Richardson*, 766 So. 2d at 1043.

141. *Cranney*, 920 So. 2d at 134; *K.A.S.*, 914 So. 2d at 1062; *Forbes*, 917 So. 2d at 953.

142. Fla. Sen. 2644, 20th Leg., 110th Sess. (Feb. 29, 2008). It was appropriate for this bill to die because it used only the best-interests-of-the-child standard to award grandparent visitation. *See Troxel*, 530 U.S. at 68 (requiring special factors be present in addition to the grandparent visitation being in the child's best interests in order to pass constitutional muster under the Fourteenth Amendment); *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998) (ruling that the grandparent visitation statute was unconstitutional because it instituted only the best-interests-of-the-child standard without requiring a demonstration of harm to the child). Fla. Sen. 2644, 2009 Sess. (May 2, 2009). This version included the requirement of harm to the child and additional provisions deferring to the legal parents. *Id.* It passed the Committee on Children, Families, and Elder Affairs and the judiciary committee and died in the Committee on Criminal and Civil Justice Appropriations. The Florida Senate, *Senate 1052: Relating to Grandparental Visitation*, http://www.flsenate.gov, *under* "Jump to bill," *select* "2009," and *search* 1052. The House had a similar Bill, Fla. H. 1521, 2009 Sess. (May 2, 2009) that also died in committee. Florida House of Representatives, *HB 1521—Grandparental Visitation*, http://www.myfloridahouse.gov, *under* "Bill finder," *select* "2009," and *search* "1521."

143. *Wakeman*, 921 So. 2d at 674 (Van Nortwick, J., concurring) (citing a concern that the needs of children in non-traditional households may not be addressed when those relationships dissolve).

144. *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 966–967 (Fla. 1995) (citing *Lehr*, 463 U.S. at 261) (stating that, with careful deference to biological rights, protection under the due process clause is available only to a biological father who shows a complete dedication to parental responsibilities through bringing up his child).

145. *Forbes*, 917 So. 2d at 953. Florida Courts have found all third-party visitation and custody statutes unconstitutional because they have used the best-interests-of-the-child standard. *See supra* nn. 131–140 and accompanying text (discussing the Florida legislature's attempt to expand the concept of family). This is not unusual as several other states have recognized that it is the legislature's responsibility to deal with this question. *See e.g. In re Thompson*, 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999) (holding "absent statutory authority establishing such a third-party's right to visitation, parents retain the right to determine with whom their children associate"); *Titchenal v. Dexter*, 693 A.2d 682, 690 (Vt. 1997) (holding that a state statute conferring jurisdiction to the courts is necessary for the

fore, the judiciary placed the burden on the Florida legislature to prepare a constitutional statute to meet the needs of the changing Florida society.

IV. DEFINING PARENTHOOD BY CONSIDERING BIOLOGY IN LIGHT OF ACTIVE CONSTRUCTION IS CONSTITUTIONAL AND BENEFITS ALL INTERESTED PARTIES

The Florida legislature's challenge is to establish guidelines that will respect biological parents' rights while granting standing to non-biological third parties who fulfill parent-like roles to request custody and visitation. The legislature should start the change by abandoning the best-interests-of-the-child standard for third-party visitation and custody statutes and seek a more viable alternative.[146] The Florida judiciary already found the best-interests standard inadequate in these cases because it unconstitutionally elevates the child's interests over the biological parents' rights to privacy.[147] Furthermore, the best-interests standard does not meet contemporary society's needs as it allows for only one winner, thus leaving the majority to lose in situations where multiple individuals could have valid parental claims.[148] The alternative that the Florida legislature should seek must establish a compelling state interest[149] and allow less adversarial, more equitable[150] outcomes according to the each case's unique circumstances.[151]

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courts to decide third-party visitation decisions).

146. *See* David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 Wm. & Mary Bill Rights J. 857, 857 (2006) (arguing that United States family law has been focused primarily on the best interests of the adults rather than the best interests of the children and exploring the constitutionality of establishing parentage based on the best interests of the child).

147. *See e.g. Kazmierazak v. Query*, 736 So. 2d 106, 109 (Fla. 4th Dist. App. 1999) (stating that all prior precedents that did not specifically address the question of the biological parents' right to privacy from governmental intrusion under the United States Constitution, must be considered in light of this right).

148. Holtzman, *supra* n. 70, at 336 (arguing that the child can actually lose when only one person gets custody because the child's routines, living arrangements, and world may be disrupted with the best-interests outcome).

149. *See Von Eiff*, 720 So. 2d at 515 (establishing a compelling-state-interest standard for third-party custody and visitation cases).

150. In family law, there is a difference between equal and equitable division of marital assets where "equal" is dividing mathematically 50% to husband and 50% to wife, and

Identifying an active relationship with a child is a better determinant of a parental relationship than genetics.[152] The United States Supreme Court identified active parent-child relationships as those with "custodial, personal, or financial" connections.[153] Florida courts have already used a similar standard in paternity cases where unwed fathers seek to establish guardianship of and time-sharing with their children.[154] Thus, the Florida legislature should establish a third-party visitation and custody statute that uses biology as a starting point for an investigation into the relationship and then continues on to identify viable active parental relationships through the child's psychological, custodial, and economic bonds.[155] This active-parental-relationship approach to

"equitable" is a division in a just and fair manner as the circumstances dictate. *See* Fla. Stat. 61.075(1) (2007) (stating that the court must start with an equal division of marital assets and abandon that only when the presented evidence justifies otherwise).

151. Jason D. Hans, *Stepparenting after Divorce: Stepparents' Legal Position regarding Custody, Access, and Support*, 51 Fam. Rel. 301, 301 (2002) (stating that, because each case is unique, the legislature should allow courts sufficient latitude to make each decision fact-specific).

152. *See generally* Margaret K. Nelson, *Single Mothers "Do" Family*, 68 J. Marriage & Fam. 781 (2006) (arguing that the infinitive "to do" better describes a family than the infinitive "to be"). "Active construction" is regular participation in daily activities such as caring for each other's physiological, psychological, emotional, and social needs; attendance at important events including school and extra-curricular activities; and regular communication. *See* Linda C. McClain, *Family Constitutions and the (New) Constitution of the Family*, 75 Fordham L. Rev. 833, 875–876 (2006) (describing some differences between the traditional, biological family and the "constructivist" family of contemporary society). Such actions exhibit an intentional creation of a family unit. *See* Jenni Millbank, *The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family*, 22 Intl. J. L. Policy & Fam. 149, 165 (2008) (arguing that intentionality should be a controlling factor in defining parenthood in custody and visitation cases involving dissolved same-sex couples).

153. *Lehr*, 463 U.S. at 267.

154. Florida Statutes Section 744.301(1) provides that a biological father is recognized as the natural guardian when the court so orders. The Fifth District Court of Appeal has held that an unwed father assumes natural guardianship when he "demonstrates and carries out the requisite settled purpose to be a father." *State v. Earl*, 649 So. 2d 297, 298 (Fla. 5th Dist. App. 1995) (citing *DeCosta v. N. Broward Hosp. Dist.*, 497 So. 2d 1282, 1283 (Fla. 4th Dist. App. 1986)). The court went on to define a father as "a male who has come forward, declared his paternity and acted as a parent in providing emotional, physical, and financial support to his child." *Earl*, 649 So. 2d at 298 (citing *DeCosta*, 497 So. 2d at 1283–1284).

155. Lorri Ann Romesberg, *Common Law Adoption: An Argument for Statutory Recognition of Non-Parent Caregiver Visitation*, 33 Suffolk U. L. Rev. 163, 176, 184 (1999) (arguing that the state legislature, rather than the judiciary, should create the guidelines to validate the non-biological parents, to maximize uniform decisions and minimize conflict, and to return the focus to the child); *see generally* Judith A. Seltzer et al., *Explaining Family Change and Variation: Challenges for Family Demographers*, 67 J. Marriage & Fam.

third-party custody decisions is the Florida legislature's best option because (1) it constitutionally recognizes the child's and biological parent's rights, and (2) it benefits society overall.

A. Requiring Active Construction of a Parental Relationship with the Child Recognizes the Child's and Biological Parent's Rights

Both the Florida judiciary[156] and the United States Supreme Court[157] have already recognized that third-party custody decisions require consideration of both the biological parents and the children.[158] The biological trump assumes that biological parents are always speaking in the child's best interests; however, this is not always true.[159] By using biology as a starting point and then requiring further investigation of the possibility of a parent-child relationship, the legislature will acknowledge the rights of the biological parents.[160] By establishing active participation in the child's life as the deciding factor, the legislature will acknowledge the rights of the child.[161]

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908 (2005) (stating that demographers study families in five ways: biology, psychology, anthropology, society, and economics, and to focus on a single element diminishes the validity of the other four).

156. *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting) (stating that, in addition to the interests of the parents and the government, the child's interests are implicated in every custody and visitation case); *In re Guardianship of D.A. McW.*, 429 So. 2d 699, 702 (Fla. 4th Dist. App. 1983) (stating that, in third-party custody and visitation decisions "the rights of the parent as well as the welfare of the child must be considered").

157. *Supra* nn. 65–78 and accompanying text (discussing the Supreme Court's treatment of the constitutional decisions regarding parenthood).

158. *Troxel*, 530 U.S. at 90 (Stevens, J., dissenting) (stating that courts should balance the child's fundamental interests in preserving family-like bonds instead of arbitrarily applying the rights of the biological parents in every situation); Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. Chi. Leg. Forum 319, 323 (2004) (observing that, in custody and visitation decisions, the judiciary must entertain the question of the substantial rights of the child when deciding which relationships to maintain). With the proper fact pattern, the child's rights can supersede the parents'. *Fitzpatrick v. Youngs*, 186 Misc. 2d 344, 347 (N.Y. Fam. Ct. 2000).

159. *Troxel*, 530 U.S. at 86 (Stevens J., dissenting) (stating that "even a fit parent is capable of treating a child like a mere possession").

160. *See* Lucinda Ferguson, *Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation*, 22 Intl. J. L. Policy & Fam. 61, 77 (2008) (stating "[t]he genetic tie does not determine the nature of the relationship that will endure between the adult and child, but merely suggests a likely outcome. One might reply that the genetic tie serves as a proxy for investigation into the nature and quality of any particular parent-child relationship").

161. *See Wisconsin v. Yoder*, 406 U.S. 205, 245–246 (1972) (Douglas, J., dissenting)

The Supreme Court recognized that children have rights, interests, and legal identities that are distinct from their parents'.[162] Children need and develop bonds with individuals who actively participate in their lives regardless of biology.[163] To break those bonds exclusively because they lack a biological link is analogous to punishing the child for the parent's behavior and, therefore, is a violation of a child's constitutionally protected rights.[164] Thus, by investigating active relationships instead of relying solely on biology, judges will better treat the children as the full-fledged citizens that they are.[165]

(observing that the child should be considered because it is his future, and in order for the Bill of Rights to have full meaning, the child's rights must be honored). Critics may argue that judges lack the proper training to render these types of decisions; however, the Florida Appellate Court has found that it is within the court's discretion to develop a visitation schedule and to decide whether to follow the child custody evaluator's recommendations for custody and visitation decisions for biological parents. *Matheny v. Briggs*, 889 So. 2d 944, 945 (Fla. 5th Dist. App. 2004). The court can use this same discretion to determine an individual's active participation in the child's life. *See* Lawrence Moloney, *The Elusive Pursuit of Solomon: Faltering Steps toward the Rights of the Child*, 46 Fam. Ct. Rev. 39, 45 (2008) (stating that the judge's task in custody and visitation decisions should not be identifying who is right and wrong and creating winners and losers, but rather encouraging all involved parties to seek a more child-centered focus). Furthermore, the goal in any custody or visitation decision is not perfection, but rather establishing decisions that are good enough in less-than-ideal situations. *Id.* at 46.

162. *See Plyler v. Doe*, 457 U.S. 202, 222 (1982) (holding unconstitutional the state's withholding educational funds for children because it deprives the children of economic, social, psychological, and intellectual well-being); *see generally* Steven Mintz, *Placing Children's Rights in Historical Perspective*, 44 Crim. L. Bull. 313 (2008) (describing five phases of the development of children's rights in United States history).

163. Moloney, *supra* n. 161, at 45; Michael E. Lamb, Kathleen J. Sternberg & Ross A. Thompson, *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, in *Parenting and Child Development in "NonTraditional" Families* 131 (Michael E. Lamb ed., Lawrence Erlbaum Assocs. 1999); *see* Balswick & Balswick, *supra* n. 21, at 137, 328 (stating that children are social creatures and, in order to develop human characteristics and embrace social norms, attitudes, and values, children must participate in a human social environment, and such development does not take place simply due to biology). In considering the active participation, the court should examine the relationships in light of the child's developmental stages. *See* Andrea Corn & Howard Raab, *Age-Appropriate Time Sharing for Divorced Parents*, 81 Fla. B.J. 84, 87 (2007) (arguing that each developmental stage in the child's life presents unique issues, needs, and conflicts that must be resolved, and incorporation of these stages in the court's approach to custody decisions is crucial to the child's overall well-being).

164. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (ruling that it is unconstitutional to punish the child for the actions of his or her parent); *Weber v. Aetna Cas. & Sur.*, 406 U.S. 164, 175–176 (1972) (finding that the Fourteenth Amendment also affords children equal protection; therefore, laws that differentiate among children due to their parents' marital statuses are unconstitutional).

165. Holtzman, *supra* n. 70, at 340; Moloney, *supra* n. 161, at 45.

B. Eliminating the Biological Trump Benefits Society

This active-relationship approach more accurately deals with the variety of contemporary family structures. Identifying parental figures through active participation in a child's life instead of strictly by biology acknowledges, respects, and preserves nontraditional family relationships that result from ethnicities, religious traditions, sexual orientation, and social classes.[166] Considering economic contributions as strong indications of a possible parent-child relationship balances tensions between the stay-at-home and working parental figures.[167] Finally, although this approach may result in more than two individuals having legal parental claims,[168] such an outcome is beneficial, as it will more accurately reflect both the unique family structures that currently exist[169] and the emerging trends in other jurisdictions.[170]

Expanding parenthood beyond an exclusive biological connection will validate and benefit all family members of the nontraditional families, including half-siblings and stepsiblings. Sibling relationships, regardless of their biological connection, are as

166. Balswick & Balswick, *supra* n. 21, at 178. For example, Asian societies tend to be more multi-generational; accordingly, in recognizing only the nuclear family unit, Florida law excludes the Asian cultures and their families. *Id.*; *see* Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of Equitable Adoption Doctrine*, 43 Wake Forest L. Rev. 223, 269 (2008) (arguing that the law's failure to consider the cultural and sociological roots of family structures in favor of a presumption towards the nuclear family has resulted in a unbalanced exclusion of culturally rightful heirs in intestate minority successions).

167. Ferguson, *supra* n. 160, at 75 (stating that material support is among one of the key responsibilities of childcare and, therefore, a hallmark of a parent-child relationship); Holtzman, *supra* n. 70, at 340–341 (observing that this approach will deemphasize quantity and refocus on quality, ultimately reducing the importance of custodial versus noncustodial roles).

168. *See id.* (observing that the family-relations approach to parenthood is likely to result in the legal recognition of multiple parental relationships); s*ee generally* Margaret K. Nelson, *Families in Not-So-Free Fall: A Response to Comments*, 68 J. Marriage & Fam. 817 (arguing that, although critics may argue that recognizing more than two legal parents will allow a limitless number of possible arrangements, only a finite number of family patterns exist across societal groups).

169. *Supra* nn. 50–61 and accompanying text (discussing the current changing demographics within the United States and Florida).

170. *Supra* nn. 92–110 and accompanying text (discussing the emerging trend of legal recognition of multiple parents). Although the Supreme Court has previously criticized the possibility of a plurality of legal parents, it did so not on the basis of law but only because such a concept had no founding in history or tradition. *Michael H.*, 491 U.S. at 130–131.

much a family bond for the child as a parent-child relationship.[171] A state's failure to recognize non-biological parental relationships often results in the separation of half-siblings who may have spent a majority of their lives together.[172] Often siblings of all kinds develop secondary-caretaker roles, assisting each other in tackling problems and developing effective coping skills.[173] Sibling relationships serve crucial roles in a child's social and moral development, and preserving the existing bonds benefits everyone involved.[174]

By promoting active family relationships, the courts will also contribute to the reduction of long-term psychological, economic, and emotional issues in the children.[175] Secure attachments established early in the child's life with biological and non-biological individuals alike provide the child with the tools necessary to continue building emotional and psychological bonds later in life.[176] Conversely, disrupted family relationships are sources for psychopathological and psychological maladjustment in children.[177]

171. Robin L. Marshall, *In the Best Interest of the Child: Establishing a Right of Half Siblings to Remain Together after the Death of the Common Parent*, 22 J. Juv. L. 100, 101 (2002).

172. *Id.* at 105 (arguing that, due to shared experiences, half-siblings raised in the same home by a common parent will share the same bond as full biological siblings); Ellen Marrus, *Where Have You Been, Fran?*, 66 Tenn. L. Rev. 977, 997 (1999); *see e.g. O'dell*, 629 So. 2d at 891 (when a mother and stepfather divorced, the mother denied the former stepfather visitation although the child had a half-brother).

173. Marrus, *supra* n. 172, at 985–986.

174. *Id.* at 981 (observing that sibling relationships are among the first relationships a person develops and, therefore, maintaining these relationships is crucial to a person's healthy development).

175. Bartlett, *supra* n. 83, at 902–903 (stating that children benefit when they are able to maintain continuity, regularity, and consistency in relationships); s*ee also* Roberta G. Sands, Robin S. Goldberg-Glen & Heayong Shin, *The Voices of Grandchildren of Grandparent Caregivers: A Strengths-Resilience Perspective*, 88 Child Welfare 25, 38–39 (Mar./Apr. 2009) (finding that grandchildren under the care of their grandparents draw strength from the support and attention they receive from their grandparents as well as their extended families, peers, school, and social workers); Amira Y. Sharaf, Elaine A. Thompson & Elaine Walsh, *Protective Effects of Self-Esteem among At-Risk Adolescents*, 22 J. Child & Adolescent Psychiatric Nursing 160, 165 (Aug. 2009) (finding that family support ameliorates the risk of suicide and increased social support may result in improved physical and mental well-being in adolescence during stressful events, but failing to distinguish between differing types of families.)

176. Balswick & Balswick, *supra* n. 21, at 327.

177. Bartlett, *supra* n. 83, at 909 (observing that children who are unable to maintain contact with the non-custodial parent suffer harm at all developmental stages while those who maintain contact are able to adapt to new situations more easily); Holtzman, *supra* n. 70, at 340. Disruptions in bonds are a source of behavior problems, substance abuse,

Although issues resulting from disruptions may be short-term due to many children's resilience, smoother, less disruptive transitions diminish the likelihood of long-term effects.[178]

Florida will additionally promote the families' financial stability by recognizing parenthood through active construction. A non-custodial parent's willingness and likelihood to provide financial support increases through more frequent contact with the child.[179] Regular payment of child support decreases the likelihood and severity of the economic destabilization that many transitioning families experience.[180] Children who are in an economically stable environment are more likely to have an improved overall well-being.[181] Ultimately, promoting active involvement in children's lives has the potential effect of minimizing the family's dependency on social programs.[182]

Encouraging active parental roles will develop the community as well.[183] In contemporary United States culture, individuals create community through social networks including friends, coworkers, and members of their social groups, such as churches.[184] Through promoting active parental relationships, families will be encouraged to regard themselves as inclusive rather than exclusive, developing themselves and, ultimately, the overall community.[185] This approach will reinforce the community by deempha-

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delinquency, decreased school performance, and psychosocial stress. Maggie Gallagher, *Case for the Future of Marriage*, 17 Regent U. L. Rev. 185, 187 (2005); Lamb, Sternberg & Thompson, *supra* n. 163, at 127.

178. Balswick & Balswick, *supra* n. 21, at 306.

179. Jonathan Bradshaw et al., *Absent Fathers?* 192 (Routledge 2002) (stating that surveys of non-custodial fathers reveal a linear correlation between the amount of contact between fathers and their children and the likelihood of child support payment).

180. Lamb, Sternberg & Thompson, *supra* n. 163, at 127.

181. Irwin Sandler, Jonathan Miles, Jeffrey Cookston & Sanford Braver, *Effects of Father and Mother Parenting on Children's Mental Health in High- and Low-Conflict Divorces*, 46 Fam. Ct. Rev. 282, 283 (Feb. 2008).

182. Coontz, *supra* n. 10, at 280–281 (stating that families hardest hit by economic troubles subscribe to the traditional family ideal while stigmatizing the non-traditional structures).

183. *See* Murray, *supra* n. 77, at 435–436 (arguing that parents serve a role in the overall network of caregivers).

184. Balswick & Balswick, *supra* n. 21, at 344; Coontz, *supra* n. 10, at 288 (observing that the most successful families have solid networks beyond their own biological boundaries).

185. Coontz, *supra* n. 10, at 288 (stating that community and political involvement is one of the best ways to promote families).

sizing individual biological rights and encouraging the development of social networks.[186]

Finally, through the active-parental-relationship approach, the State promotes cooperation between the parties, thereby decreasing conflict. Heightened judicial scrutiny in the third-party custody and visitation cases will potentially motivate the parties to reach a resolution of their own accord.[187] Custody and visitation agreements best serve the children when the parties can establish them through mutual and timely consent.[188] Through a mutual resolution, communication increases while hostilities decrease, thus strengthening the relationships among all involved.[189] Reaching mutual agreements also promotes the likelihood that the parties will follow the provisions.[190] The reduction in conflict will improve stabilization of the family after the traumatic event and will lessen the long-term negative effects of the initial destabilization.[191]

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186. *See id.* at 358 (stating that family life should be structured to provide a haven of emotional support). This will ultimately return to the Judeo-Christian and historical practices where families and the community worked in harmony. *See supra* nn. 17–49 and accompanying text (discussing how the Judeo-Christian teachings and United States historical practices integrated the family unit within the greater community).

187. *See generally* Ralph A. Peeples, Suzanne Reynolds & Catherine T. Harris, *It's the Conflict, Stupid: An Empirical Study of Factors that Inhibit Successful Mediation in High-Conflict Custody Cases*, 43 Wake Forest L. Rev. 505 (2008) (analyzing the benefits of mandatory mediation for custody cases).

188. Tonya Inman, Patricia Carter & John P. Vincent, *High-Conflict Divorce: Legal and Psychological Challenges*, 45 Hous. Law. 24, 25 (2008) (stating that high-conflict divorces contribute to long-term psychological and emotional problems for children and parents alike); Lamb, Sternberg & Thompson, *supra* n. 163, at 127. Through cooperation, parties can develop more stable agreements in less time than through litigation. Peeples, Reynolds & Harris, *supra* n. 187, at 527–528.

189. Sanford L. Braver, Jeffrey T. Cockston & Bruce R. Cohen, *Experiences of Family Law Attorneys with Current Issues in Divorce Practice*, 51 Fam. Rel. 325, 327 (2002); Robert Hughes, Jr. & Jacqueline J. Kirby, *Strengthening Evaluation Strategies for Divorcing Family Support Services: Perspectives of Parent Educators, Mediators, Attorneys, and Judges*, 49 Fam. Rel. 53, 54 (2000).

190. Hughes, Jr. & Kirby, *supra* n. 189, at 54.

191. Corn & Raab, *supra* n. 163, at 84. Although custody and visitation cases can be volatile, only between 15% and 30% of all divorcing couples exhibit intense conflict. Inman, Carter & Vincent, *supra* n. 188, at 25. In one survey of non-custodial fathers, 71% reported having some contact with the custodial parent, and nearly half of all surveyed reported the relationship as amicable. Bradshaw, *supra* n. 179, at 87 (reporting that 49% of the fathers stated their relationship was amicable). An amicable relationship promotes continued communication, and the frequent contact between the parents helps, instead of hurts, the children. Lamb, Sternberg & Thompson, *supra* n. 163, at 129. This research, however, studied the relationship of former spouses, and further research relating to non-biological

V. CONCLUSION

As family compositions change to include "full- or part-time children," stepfamilies, foster families, cohabiting hetero- and homosexual couples, and grandparents, it is no longer safe for courts to assume that every family is comprised of two biological parents with their children.[192] One of the hallmarks of modernity is the dissolution of traditions with their corresponding values, expectations, and behavior.[193] Therefore, as non-biological families grow, the law must grow with them.[194]

The purpose of the law is not to establish rigid ties to prescribe the behaviors of society, but rather to outline the behavior that society has deemed acceptable.[195] To see the law as fixed may afford certainty and economic stability; however, it develops an intrinsic inertia that stagnates society.[196] Instead of taking a fixed antecedent rule, such as identifying true parents as only those with a biological connection to the child, and mechanically using it to determine that only biological parents should have custody and visitation rights, the Florida judiciary should take a more reasoned and analytical approach.[197] If the Florida judiciary

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parental relationships in custody situations is necessary.

192. Balswick & Balswick, *supra* n. 21, at 319. "Full-time" and "part-time" children reference children participating in time-sharing schedules where they spend varying amounts of time with their parents. *Id.*

193. *Id.* at 339.

194. Warman, *supra* n. 8, at 932; *see also* Balswick & Balswick, *supra* n. 21, at 339 (stating a responsibility to develop new institutional structures accompanies the breakdown of the traditions in modern times).

195. *See* John Dewey, *Logical Method and Law*, 10 Cornell L.Q. 17, 26 (1925) (arguing that legal principles are more analogous to working hypotheses rather than rigid rules). This philosophy is part of a larger debate about the functionality of law, which is outside the scope of this Article. For additional discussion, *see generally* Lee Anne Fennell, *Between Monster and Machine: Rethinking the Judicial Functionality*, 51 S.C. L. Rev. 183 (2000) (discussing legal theory and differing schools of thought).

196. Dewey, *supra* n. 195, at 20. Claiming that because of the uncertainty and irregularity of life it is highly unlikely that existing rules will cover every new case. *Id.* at 26.

197. *Id.* at 22, 25. This is an instrumental view of the law that considers the law as a tool for lawyers and judges to use. Brian Z. Tamanaha, *The Tension between Legal Instrumentalism and the Rule of Law*, 33 Syracuse J. Intl. L. & Com. 131, 133 (2006). The contrary is the view that the government sets legal standards to which the people must conform. *Id.* at 132; James M. Boland, *Constitutional Legitimacy and the Culture Wars: Rule of Law or Dictatorship of a Shifting Supreme Court Majority?* 36 Cumb. L. Rev. 245, 276 (2006) (stating that viewing rules of law as fixed causes a "written impediment," and judges instead, "have chosen to retain the old form [of the Constitution] while changing the major premise case by case as sociological circumstances warrant").

chooses to accept that legal rules and principles are working hypotheses that require constant testing in their application, they will easily avoid turning past liberalisms into stagnant, nostalgic principles in the present.[198]

It is time for Florida to forego its nostalgic perceptions of religious, historical, and constitutional norms and recognize the reality that the nuclear family is an idealized myth.[199] The Florida legislature should, instead, embrace contemporary society by considering biological parenthood in light of an active relationship with the child. The judiciary then must implement the United States Supreme Court's constitutional interpretation of privacy[200] and support the legislature's change. Foregoing the status quo is necessary because, in its zeal to preserve families, Florida has harmed that which it has been fighting to protect.

198. Dewey, *supra* n. 195, at 26.

199. *See* Coontz, *supra* n. 10, at xiii (stating that "[n]ostalgia . . . fosters historical amnesia" and deforms understanding of the truth).

200. In looking to the legislature to reshape the old rules, the judiciary fails to recognize that statutes rarely keep up with the novelty and subtlety of society's changes. Dewey, *supra* n. 195, at 26.