CHILDREN, KIN, AND COURT: DESIGNING THIRD PARTY CUSTODY POLICY TO PROTECT CHILDREN, THIRD PARTIES, AND PARENTS

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ABSTRACT

Millions of American children are raised primarily by people other than their parents, mostly by grandparents and other kin, and millions more are raised by third parties for some period of their childhood. In most such situations, informal arrangements negotiated by family members and kinship networks effectively provide care for these children. Many cases, however, require some formal legal arrangement; third party custody orders are needed to obtain necessary services and benefits for children whose parents are absent, and to protect children in the rare but still significant instances in which a parent is abusive or neglectful.

States currently have widely varying means of adjudicating child custody disputes between parents and third parties. One Supreme Court case, Troxel v. Granville, *addresses contests between parents and third parties. While* Troxel *ruled for the parent in that particular case, it neither represents a strong parents' rights opinion nor does it provide states with clear guidance on how to shape third party custody statutes. This Article argues that states should enact child custody statutes according to three primary points. First, due to the wide range of situations in which a third party custody order may be necessary, states should permit a broad set of individuals to seek custody. Concerns that broad standing provisions would lead to a flood of meritless lawsuits are not borne out by actual data in states that have had nearly unlimited standing. Second, recognizing the constitutional primacy of the parent-child relationship, states should hold third parties to a high substantive standard, and require them to prove that parental custody would harm the child in some way. Any lesser standard—such as the best interests of the child standard applied in some states—insufficiently protects relationships between parents and children. Third, recognizing that the core parental right of the "care, custody and control" of a child is at stake, states should generally hold third parties to a clear and convincing burden of proof. Most states apply a preponderance burden or have not specified a burden. One exception should apply: When a third party has acted as a parent for a significant time and a child's birth parent has not*

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done so, then that parent's constitutional rights are diminished, society's interest in maintaining the long-term bond between the child and third party is enhanced, and a lower burden of proof should apply.

reach legally enforceable agreements about the care of children. States can provide, for instance, for a custodial power of attorney.[222] Second, states through legislation and regulations can ensure that a custody order is not necessary to obtain services and benefits for children.[223] This task—both legislative and administrative—can reduce the number of situations in which families must make a detour to court to obtain services and benefits for children.

IV.
THE SUBSTANTIVE STANDARD: PARENTAL PRESUMPTION REBUTTABLE BY HARM TO THE CHILD

While millions of children have a third party as primary caregiver and millions more have a third party significantly caring for them, the norm remains that one or two parents have the full legal and physical custody of their children.[224] Parents have fundamental constitutional rights to the care and custody of their children[225] and the children, in turn, have a constitutionally cognizable interest in their relationship with their parents.[226] I have discussed the wide variety of situations in which third party custody is necessary to protect children's relationships with third parties and to protect the children from harm, justifying wider standing provisions than many states currently allow. Once admitted to court, however, courts must provide close scrutiny to third parties' cases to ensure that the desired custody order is really necessary to prevent the alleged harm to the child.

A. A Harm Standard Is More Appropriate than a Best Interests of the Child Standard

There can be no doubt that the Constitution requires states to apply a parental preference. The Court states in *Troxel* that states must accord "some special weight" to the parent's desires for his or her child and recognizes the presumption that a parent will act in his or

222. *See* D.C. CODE § 21-2301 (Supp. 2008).

223. *See, e.g.*, Safe and Stable Homes for Children and Youth Amendment Act of 2007, D.C. Act 17-70 § 3 (amending D.C. CODE § 4-251.03 (2007) by removing legal custody requirement for the Grandparent Caregivers Pilot Program).

224. While 2.9 million children do not live with either parent, more than 60 million live with at least one parent. CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: 2002, *supra* note 18, at 2 tbl.1.

225. Troxel v. Granville, 530 U.S. 57, 66 (2000).

226. *See* Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 1999) ("Parents and children have a well-elaborated constitutional right to live together without governmental interference.").

her child's best interests.[227] To rebut this presumption, states should require third parties seeking custody to prove that parental custody would impose some affirmative harm on the child, either by severing some particularly strong attachment with the third party or by some harm that will befall the child in the parent's custody. A best interest of the child standard—which asks judges to determine which individual would "best" serve a child's "interests"—does not provide sufficient "special weight" to the parent-child relationship.[228]

The best interest of the child standard is notoriously vague, a quality which leads to unpredictable and subjective judicial decision making, leading judges to consider factors such as "who offer[s] a better neighborhood, better schooling, more financial capability, or more stability."[229] It instructs judges to make subjective decisions about "the interaction and interrelationship of the child" with potential adult caregivers and the "sincerity" of the adults.[230] Wide segments of the legal community view the best interests of the child standard as providing, in the words of the New Jersey Supreme Court, a "judicial opportunity to engage in social engineering in custody cases."[231] The vagueness of the best interest of the child standard too often "invites the judge to rely on his or her own values and biases to decide the case," rather than a more principled basis.[232] A vague, subjective standard may lead to inconsistent rulings from court to court, and permit individual judges to make custody decisions (in favor of either a parent or a third party) without strict guideposts. It is true that courts could interpret a best interests of the child standard narrowly to satisfy constitutional concerns,[233] but using the standard itself signals to judges that they have the authority to decide a child's fate based on their own subjective evaluation of what is "best" for that child.

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227. *Troxel*, 530 U.S. at 70.

228. *See infra* note 231.

229. McDermott v. Dougherty, 869 A.2d 751, 808 (Md. 2005).

230. D.C. CODE §§ 16-914(a)(3)(C), 16-914(a)(3)(N) (2001).

231. *See* Watkins v. Nelson, 748 A.2d 558, 567 (N.J. 2000) (relying on other state courts' decisions criticizing the best interest standard as dependent more on judicial opinion of parents than on the rule of law (citing Turner v. Pannick, 540 P.2d 1051, 1054 (Alaska 1975) and *In re* B.G., 523 P.2d 244 (Cal. 1974)). *See also* Polikoff, *supra* note 42, at 511–16 (describing troublesome best interest analyses in several cases).

232. GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 117, at 40.

233. *See, e.g.*, *Troxel*, 530 U.S. at 84 n.5 (Stevens, J., dissenting) (noting the common use of the best interests standard in Washington statutes and court decisions "as if the phrase had quite specific and apparent meaning.").

One iconic family law case read frequently in law school courses illustrates the danger of applying a best interests of the child standard. In *Painter v. Bannister*, the Iowa Supreme Court applied a best interests of the child standard in its decision regarding a custody dispute between a child's father and grandparents.[234] The Court's reasoning illustrates the subjective considerations that a best interests analysis permits, as the Court awarded custody to the grandparents due to the Court's concerns about the father's "Bohemian" lifestyle.[235] None of the reasons cited by the Iowa Supreme Court address the three core benefits of a third party custody order discussed in Part I.B.

The vagueness and subjectivity of the best interests of the child standard raise constitutional problems when it is applied in a contest between parties on unequal constitutional footing. Following *Troxel*, judges must give "special weight" to the parent-child relationship.[236] A best interest of the child standard leaves too much room for individual judges' value judgments to render that "special weight" meaningless. The Maryland Court of Appeals explained this point well: "The best interest of the child standard is axiomatically, of a different nature than a parent's fundamental constitutional right."[237] States should reserve the best interest of the child standard, if at all, for legal contexts between individuals standing on an equal plane, such as one parent suing another for custody.[238] In contrast to the best interest of the child standard, the harm or detriment standard finds its roots in Supreme Court cases describing the contours of rights within a family. For more than sixty years, the Court has stated that parents' rights to do as they please regarding their children reach their limits when a serious risk of "psychological or physical injury" arises.[239] As a result, until harm to a child's physical or mental health is posed, the

234. Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966).

235. The Iowa court did not analyze the relationship between Harold Painter and his son Mark or Mr. Painter's ability to meet his son's needs. Instead, it contrasted the "stable, dependable, conventional, middle-class, middlewestern background" of Mark's grandparents (the Bannisters) with the "romantic, impractical and unstable" life that would result from his father's "Bohemian approach to finances and life in general." In short, during the middle of the 1960s, the court approved more of Mark's straight-laced grandparents than his "political liberal" father. *See id.* at 154–55.

236. *Troxel*, 530 U.S. at 70.

237. McDermott v. Dougherty, 869 A.2d 751, 808 (Md. 2005).

238. *See id.* ("In cases *between fit natural parents* who both have the fundamental constitutional rights to parent, the best interests of the child will be the ultimate, determinative factor.") (emphasis in original, quotation omitted).

239. *See* Parham v. J.R., 442 U.S. 584, 603 (1979) (noting the state's power to limit parental discretion "when [children's] physical or mental health is jeopardized"). *See also* Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972) ("To be sure, the power of the parent . . . may be subject to limitation under *Prince* if it appears that parental deci-

Constitution would likely prevent a judicial decree limiting a parent's right to custody. *Troxel* left that conclusion in some doubt, however, by declining to rule whether a third party must establish harm to the child to defeat a parent's opposition to visitation.[240] However, as the impact on a parent's rights is greater when custody is at stake than when visitation is at stake, the argument that a harm standard is constitutionally justified is stronger.

The constitutional roots of the harm standard signals to judges that they must make the presumption required by *Troxel* meaningful; they must require third parties to provide some significant proof of why a child's parents cannot be trusted to raise the child. Sending this signal to judges will add meaning to the checks on frivolous litigation discussed in the previous section and will help limit third party custody lawsuits to situations involving third parties significantly bonded to children or seeking to protect children from a significant harm.[241] If third parties must plead in detail the grounds of their lawsuit and judges, at an early stage in the litigation, measure those details against a harm standard (as opposed to a best interests standard), then third parties who clearly will not prevail can be more easily prevented from burdening parents and children with litigation. One reason that broad standing is acceptable is that the presence of a high substantive standard (especially when coupled with pleading requirements enforced by a high-quality judiciary) can reduce the harm posed by unmeritorious litigation.

Put another way, a harm standard tethers custody litigation to the three central needs of children and caregivers discussed in Part I.B. If the child needs a service and the parent is unavailable to consent to it, then (at least for some services, such as certain types of medical care), the child will face harm if the third party lacks authority to consent to that service.[242] If the parent is severely abusing or neglecting the child, parental custody would be harmful.[243] Finally, if the child has strongly bonded with the third party, to a significantly greater degree than the child has bonded with the parent, and the parent would sever the third party bonds, then parental custody would be harmful. Evidence short of these situations—especially the sort of subjective evidence that the best interest of the child standard—would not suffice.

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sions will jeopardize the health or safety of the child, or have a potential for significant burdens."); Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

240. *Troxel,* 530 U.S. at 73.

241. *See supra* text accompanying notes 218–23.

242. *See supra* notes 11–18 and accompanying text.

243. *See supra* note 21 and accompanying text.

Holding third parties to a harm standard helps to ensure that courts fairly adjudicate cases involving low income families, especially minority families that embrace extended kinship networks to help raise children. As explained in Part I.A. the large and increasing numbers of third party caregivers are especially prevalent within certain racial and ethnic groups as well as among low income families.[244] Given the large number of situations in which third parties are significant caregivers—including situations in which parents are largely absent, abusive, or neglectful—I have argued that it is important for third parties to have access to court if they believe a legal custody order is necessary.[245] But there is another side to this coin—the prevalence of third party caregiving also reflects the choice of many parents to engage an extended kinship network to help raise their children due to financial, cultural, and other factors.[246] This choice does not harm children in the least, so policymakers must craft substantive standards to ensure that merely taking on a significant role in a child's life does not entitle a third party to custody. Critics have charged that psychological theories relating to bonding and attachment as interpreted by the flexible and discretionary best interests of the child standard turns such theories and laws into "a weapon against low-income families of color."[247] A harm standard allows both the parties and the courts to shift the focus toward more appropriate questions.

Take a situation in which a third party has shared some significant childrearing duties with a parent; I have argued that such third parties should have standing to seek custody. But applying a harm standard makes clear that taking on significant child rearing duties is not, by itself, grounds for obtaining custody. Some other fact must be present. For example, as a result of being raised exclusively by the third party, the child's attachment to the third party may be so much greater than to the parent as to make parental custody harmful. Or the third party may have taken on child rearing duties because the parent is somehow incapable of taking care of the child adequately. Or perhaps the child needs a particular and important service and the parent is unavailable to provide consent. A harm standard demands that third

244. *See supra* note 25.

245. *See supra* Part I.

246. *See* Cooper Davis, *supra* note 47, at 350 (describing the "network of kin attachments" that many children form). *See also supra* note 25 (describing socioeconomic variations in third party caregiving, which suggest financial and cultural factors which lead to significant third party involvement).

247. *See e.g.*, GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 117, at 250 (describing harm to such families in neglect cases, which typically involve one form or another of a "best interest of the child" standard).

parties establish evidence of this sort. A best interests of the child standard, however, would lead some judges to evaluate qualitatively the third party's caretaking versus the parent's caretaking, without giving sufficient deference to the parent. Such subjective evaluations would be prone to far too many unjustified and arbitrary decisions. In situations in which a parent shares significant child rearing duties with a third party because the parent values extended kinship networks or "as a hedge against poverty,"[248] a harm standard would protect families against unwarranted judicial decrees.

B. A Harm Standard Is More Appropriate than an Unfitness Standard

An alternative substantive standard which states might consider would require a third party to prove that a parent is not fit to raise the child in question. An unfitness standard focuses on the parent's abilities: whether the parent has the minimum ability necessary to raise the child in a fit manner, rather than the effects of a custody decision on the child.

In most situations, there will be no functional difference between a harm standard and an unfitness standard. If a third party lives with a child and has tried but failed to find the child's parent for an extended time such that the third party cannot obtain important services for the child, then the parent's absence may amount to abandonment. Even if the parent's conduct falls short of abandonment, it may have been neglectful to the point of unfitness to have left the child in another person's care without providing some means to obtain important services. If a third party lives with a child and the child's parent and sues for custody to protect the child from the parent's abuse, that abuse renders the parent unfit.

However, in certain narrow circumstances, a harm to the child standard will differ from an unfitness standard. Such situations include third parties serving as long term primary caretakers, who are involved in custody disputes with parents, who at the time of the dispute, are fit.[249] Other situations may include those described in Part

248. Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 250 (2004).

249. *See* Bennett v. Jeffreys, 356 N.E.2d 277, 280 (N.Y. 1971) (applying a substantive standard other than the unfitness standard, using the terms "prolonged separation" between parent and child; such a separation might establish "extraordinary circumstances" that would justify granting a third party custody over a fit parent's objection). *See also* Martin Guggenheim, *Rediscovering Third-Party Visitation Under the Common Law in New York: Some Uncommon Answers*, 33 N.Y.U. REV. OF L. & SOC. CHANGE (forthcoming 2008) (discussing *Bennett*).

I.B.3–4 in which the third party has not been the child's primary caretaker for long and in which the parent may not have been away from the child long enough to have legally abandoned the child.[250] Yet the child may need a particular service in that time, and will be harmed if the third party cannot provide it.

In these situations, a harm to the child standard focuses the parties and the decision maker on the most important relationships involving the child. In reality, parents are not the only adults to have significant or even primary relationships with children; millions of children have such relationships with third parties.[251] A harm to the child standard recognizes the interests of children and third parties in such relationships and security in their living arrangements. Thus, a harm standard signals to courts that they must consider the child's existing relationship with the third party and whether that relationship is so great that custody with anyone else would harm the child. Additionally, there are significant numbers of children who have been away from their parent's care and in the care of a third party for a relatively short period of time.[252] Such children have important needs that should not go unmet for arbitrary time periods.[253]

One example demonstrates both the difference between a harm standard and an unfitness standard and why that difference is important. Consider a parent who recognizes that her drug addiction and severe mental illness prevents her from adequately caring for her newborn daughter. Wanting the best life possible for the child, she arranges for her sister, the child's aunt, to take care of her while she seeks to conquer her addiction and treat her illness. Relapses mark this effort, and the aunt cares for the child for years. During that time, the child's mother is a sporadic presence in her child's life. When the child is eleven, the mother reappears, sober, with her mental illness treated and managed. The mother is now unarguably fit to raise children, and she demands custody of her daughter and will not permit a

250. *See, e.g.*, D.C. CODE § 16-2316 (2008) (imposing a four month timeline on parental abandonment).

251. *See supra* Part I.A.

252. *See supra* note 51 and accompanying text.

253. This is not to say that any service a third party custodian wants to provide should be grounds for granting custody. A court should engage in some analysis into the importance of providing that service at that particular time rather than waiting for the parent's return or for the third party to have been a primary caretaker for a longer period of time. They should still inquire whether the lack of the particular service at the particular time will amount to a sufficient harm to the child to warrant a legal change in custody. And, absent a *present* service need, children away from their parents for a short period of time—too short to develop bonds equivalent to parent-child bonds—likely face no harm from the absence of a third party custody order.

continuing connection to the aunt. A fitness standard, as at least one court has interpreted it, would compel acquiescence to the mother's demand.[254] The harm or detriment standard would not automatically lead to that result. It would instead evaluate not only the parent's current status and functioning, but the entire history of the child's relationships with significant caretakers, including the effect transferring custody to the mother would have on the child and whether that would significantly harm the child by severing his bonds with his aunt.[255] Because the harm standard recognizes the preeminence of the parent-child relationship, the parent may still prevail in this case, especially if the aunt can maintain her role in the child's life and the child can be transitioned to the mother's care without harming the child. But those are large conditions. The harm standard gives the aunt the opportunity to prove that they will not be satisfied and to obtain legal recognition of the parental role she has taken on over the child's lifetime.

A harm standard treats fairly a parent who has willingly allowed a third party to develop a strong parent-like bond with the parent's child. Professor Martin Guggenheim, a leading critic of policies and legal doctrines developed in the name of "children's rights," has written convincingly on the subject of parents who ask a third party to take on a parental role:

> There is hardly anything unfair in saying to a parent who voluntarily invited someone else to share parenting and to develop a significant parent-child relationship with his or her children that the parent must allow the logical consequences of that choice to play themselves out. It is wrong both for parents and children to encourage the disruption of significant bonds for the sole reason that the biological parent prefers such a disruption.[256]

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254. *See* Clark v. Wade, 544 S.E.2d 99, 103 (Ga. 2001) (describing how under a since-revoked fitness standard, the courts had to focus on "the parents present fitness"). One could parse the term "fit" to declare the mother unfit to raise this particular child, given the years of absence. But the facts of real cases are often more complicated. The mother could very easily have been involved in the child's life just enough so that a state's definition of abandonment is not met. For instance, the District of Columbia defines abandonment as having "made no reasonable effort to maintain a parental relationship with the child for a period of at least four (4) months." D.C. CODE § 16-2316(d)(1)(C) (2008).

255. I note that the answers to these questions depend on the facts of each case, as does the ultimate result—full parental custody, full third party custody, or some form of joint custody. Even with such a long absence, parental custody might not harm the child. That conclusion is more likely if the parent has been significantly involved in the child's life, and the aunt and the child can develop a transition plan and continued contact with the aunt.

256. GUGGENHEIM, *supra* note 117, at 126.

adoption, in which clear and convincing evidence is required,[299] a custody case would leave parents with certain residual rights. A custody order could be modified at a later date and, more importantly, parents would retain the right to visit and communicate with the child.[300] Other parental rights may also remain after a third party custody order, such as reciprocal inheritance rights and the right to determine the child's religion.[301]

These courts' analyses do not withstand scrutiny. A parent's residual rights after losing a third party custody case are just that—residual. A parent's right to visitation and similar rights are important to both the parent and the child, but they are peripheral to the core of a parent's rights. When parents lose custody, they lose the care, custody and control of their child—the fundamental elements of the parent-child relationship recognized by repeated Supreme Court cases.[302] The modifiability of custody orders does not obviate the need for an elevated burden. *Santosky* itself noted that many "reversible official actions" require an elevated burden.[303] Seeking modification is a daunting task—the parent would have the burden of proving, for example, "that there has been a substantial and material change in circumstances" and that modifying custody "is in the best interests of the child."[304] Particularly after time has passed—time in which a third party has raised the child and formed stronger bonds with the child which a change in custody could damage—the slim prospect of modification provides little solace to a parent who has lost custody.

Accordingly, in disputes between most third parties and parents—especially parents protecting their existing custody of a child—the law should hold third parties to a heightened burden of proof. When the parents could lose the core of their parental rights, such a burden is generally constitutionally mandated.

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299. *See* Shurupoff v. Vockroth, 814 A.2d 543, 549 (Md. 2003).

300. *See id.* at 552.

301. *See, e.g.*, D.C. CODE § 16-831.10 (Supp. 2008) (listing parental rights that remain after a third party custody order); *Shurupoff*, 814 A.2d at 552 (noting reciprocal inheritance rights).

302. *E.g.*, *Troxel*, 530 U.S. at 66.

303. *See Santosky*, 455 U.S. at 759. The *Santosky* court noted that if some reversible actions received an elevated burden of proof, then surely an irreversible termination of parental rights decision should receive an elevated burden. *Id.* For present purposes, my point is merely that the reversibility or modifiability of a custody order does not alone justify a preponderance burden of proof.

304. D.C. CODE § 16-831.11(a) (2008).

A. *Preponderance of the Evidence for Long-Term Caretakers*

The general rule just described should differ when the third party has been the child's primary caretaker, and when the parent seeks to regain (or obtain for the first time) rather than retain physical custody. In such cases, the law should only hold third parties to a preponderance of the evidence burden of proof, for reasons similar to those that justify a harm to the child rather than unfitness of the parent standard.[305] Just as the harm standard balances the role of long-term primary caretaker third parties with the role of parents, so does a preponderance of the evidence burden of proof. Once a third party has established that he or she has been the child's primary caretaker by clear and convincing evidence, then the law should only require that individual to meet his or her burden of establishing that parental custody would harm the child by a preponderance of the evidence.

B. *Connection to Standing and Substantive Standard*

The burden of proof structure for which I have argued—preponderance of the evidence for long-term primary caregivers and clear and convincing evidence for everyone else—should not affect any debates regarding who ought to be able to file for custody of a child. There is relatively little controversy that longstanding primary caregivers—the only set of third parties who I argue should receive the preponderance of the evidence burden of proof—ought to be able to seek legal custody of a child. Debates regarding standing relate to who, other than longstanding primary caretakers, ought to be able to seek custody—and under the approach I advocate, those individuals would need to meet their substantive burden with clear and convincing evidence.

CONCLUSION

Third party caregivers are essential elements of life for millions of families. Millions of children live with third parties, often without clear legal relationships governing the relationships between third party caregivers and children. The result can be particularly chaotic disputes between third parties and parents over custody; unnecessary family disruption through the child welfare system; and, even when the third party's custody is undisputed, difficulties obtaining services and benefits to raise children—a disproportionate number of whom live in poverty or have a disability and thus particularly need access to

305. *See supra* Part IV.B.

services and benefits. State custody law regarding third parties, however, varies greatly, especially regarding which third parties are permitted to seek custody of a child. States should revise their laws to follow three core recommendations. First, states should permit a broad set of third parties to seek custody. States should check the small risk of meritless litigation through pleading requirements, assistance to pro se litigants, and removal of custody requirements. Second, states should require third parties to prove that parental custody is or would be harmful or detrimental to the child's physical, mental or emotional well-being. Third, in most cases, states should hold third parties to a clear and convincing evidence burden of proof. A preponderance of the evidence burden is appropriate only when third parties are a child's long-term primary caregivers.

Some states are close to these standards; California and the District of Columbia provide two good examples. But many are not. Many states limit who can seek custody too narrowly, leaving some children and their families left out of legal protection even when necessary to protect them from harm. On the other end of the spectrum, many states do not hold third parties to a sufficiently high burden, permitting them to prove their case by a flexible best interests of the child standard or by a minimal preponderance of the evidence burden of proof.

State policy makers should reconsider their third party custody laws in line with my suggestions above. The result, I believe, will be the provision of important legal options for the millions of children who are cared for by third parties, and more rigorous and consistent adjudication of difficult custody cases.