

THE NETWORKED FAMILY: REFRAMING THE LEGAL  
UNDERSTANDING OF CAREGIVING AND CAREGIVERS

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#### INTRODUCTION

IN recent years, family law has been preoccupied with reconciling the legal construction of the family as a nuclear entity with the reality of nonconforming family arrangements.<sup>1</sup> In focusing on the demographic changes in the family, however, the law has overlooked another equally important aspect of life in American families: how these families actually function in providing care. Although family law understands caregiving to be the work of the nuclear family—and parents, in particular<sup>2</sup>—families routinely enlist the assistance of outside caregivers, who claim no parental role, to help discharge their caregiving responsibilities.<sup>3</sup> Family law

<sup>1</sup> See, e.g., Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owing*, 95 W. Va. L. Rev. 275, 287–88 (1992–93); Barbara Bennett Woodhouse, “It All Depends on What You Mean by Home”: Toward a Communitarian Theory of the “Nontraditional” Family, 1996 Utah L. Rev. 569, 576–84.

<sup>2</sup> See Martha Albertson Fineman, *The Autonomy Myth* 35–39 (2004) [hereinafter *Fineman, Autonomy Myth*] (observing that responsibility for care of dependents is assigned to the family); Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 Stan. L. & Pol’y Rev. 89, 92 (1998) (“The family is the institution to which children, the elderly and the ill are referred—it is the way that the state has effectively ‘privatized’ care for dependents who otherwise might become the responsibility of the collective unit or state.”).

<sup>3</sup> See Julia Overturf Johnson, U.S. Dep’t of Commerce, U.S. Census Bureau, *Who’s Minding the Kids? Child Care Arrangements: Winter 2002*, at 5, 12 (2005), available at <http://www.census.gov/prod/2005pubs/p70-101.pdf> (noting that, in winter 2002, “preschoolers spent an average of 32 hours per week in child care” and that “over

has been silent about the way in which families rely on networks of nonparental caregivers in order to provide care.

For many, the work of providing care to dependents (usually children) is not confined to parents or their family circle (however constituted).<sup>4</sup> Families routinely reach beyond their immediate membership for assistance in order to provide care. Indeed, they rely on a broad network of caregivers—extended family members, friends, neighbors, and paid caregivers—who assist with caregiving.<sup>5</sup> This network supports and facilitates parents and the nuclear family unit in providing care effectively.

As a general matter, however, the law does little to recognize that parents do not provide care as isolated islands, but as part of a broader network of caregivers. Instead, family law cleaves to the ideal of an exclusive and autonomous nuclear family in which parents alone care for their children. Under family law's construction of caregiving, caregivers are parents.<sup>6</sup> The fact that other persons assist parents in providing care is rarely contemplated. Indeed, when family law does recognize the efforts of nonparental caregivers who lack biological or legal ties to a child, it does so only where they have assumed completely parental roles and responsibilities.<sup>7</sup> That is, legal recognition is conferred when nonparents present themselves as parents. Family law is decidedly less comfortable recognizing nonparents when they are not functioning *as* parents, but rather, *with* parents in providing care.<sup>8</sup>

This preoccupation with parenthood as the model for caregiving and the inability to recognize more broadly networks of care is costly for parents, families, and the nonparental caregivers on

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half . . . of grade school-aged children were in a child care arrangement on a regular basis”).

<sup>4</sup> See, e.g., Dorothy E. Roberts, *The Genetic Tie*, 62 U. Chi. L. Rev. 209, 269 (1995) (noting that, as a prerequisite for caregiving, “[b]lood ties have not held the preeminent position in Black families that they have held in white families”).

<sup>5</sup> See *id.*

<sup>6</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

<sup>7</sup> For a discussion of the legal recognition of functional parents, see *infra* notes 40–50 and accompanying text.

<sup>8</sup> As I discuss below, see *infra* notes 51–65 and accompanying text, the legal debate over grandparental and third-party visitation exemplifies this tension.

whom they rely. By characterizing caregiving as the exclusive province of parents, the law overlooks the considerable efforts of caregivers who are not parents and therefore does little to facilitate and enable the care networks that support and assist parents.

In this Article, I examine the law's understanding of caregiving as a parental endeavor in order to highlight the disjunction between legal theory and the way that families *actually* perform their caregiving functions. I argue that because family law understands caregiving as parenting, it precludes recognition of the way in which parents and nonparents work together to discharge caregiving responsibilities. I further argue that broader recognition of caregiving networks and nonparental caregivers would better support parents, caregiving, and the private infrastructure of care. In so doing, I depart from other scholars who have argued for greater recognition of nonparents who function as parents.<sup>9</sup> Instead, in order to better support caregiving as it is practiced, I call for a broader legal understanding of caregiving that would acknowledge a wider range of caregiving efforts, not simply those performed by parents or those who function as parents.

This Article proceeds in five parts. In Part I, I briefly describe the way in which modern parents routinely rely on networks comprised of nonparental caregivers in order to provide care to dependents.

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<sup>9</sup> See, e.g., 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, 944 (1984) (proposing the concept of "nonexclusive parenthood," which, when the nuclear family is no longer intact, would offer parental rights and entitlements to nonparents who had developed a parent/child relationship with the child); Solangel Maldonado, When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After *Troxel v. Granville*, 88 Iowa L. Rev. 865, 869–71 (2003) (proposing legal recognition as "quasi-parents" for nonparents who assume the duties and responsibilities of parents); Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. L.J. 459, 464 (1990) (arguing for "expanding the definition of parenthood to include anyone who maintains a functional parental relationship with a child" under certain conditions); Alison Harvison Young, Reconceiving the Family: Challenging the Paradigm of the Exclusive Family, 6 Am. U. J. Gender & L. 505, 508–09 (1998) (arguing for "a reconceptualization of the family which would . . . encourage the involvement of those who, while not 'legal parents' in the usual sense, have nevertheless established a special relationship with the child").

In Part II, I examine the legal construction of caregiving. I contend that family law's understanding of caregiving as a parental enterprise is rooted in its association of caregiving responsibilities with the autonomy and legal authority afforded parents. Specifically, I argue that the linking of parental rights with caregiving responsibilities creates a set of extremes that label caregivers as either parents, vested with the rights and duties of that status, or legal strangers, with no rights and duties whatsoever. I then maintain that equating caregiving with parenting has important practical consequences that implicate the allocation of public and private benefits for caregiving and does little to support the ways in which families provide care.

In Part III, I argue that, as a descriptive and normative matter, the legal construction of caregiving as a parental enterprise is costly for parents, nonparental caregivers, and caregiving. By refusing to recognize the degree to which parents and nonparents form caregiving networks, family law fails to reflect the reality of family life. Moreover, the reluctance to recognize or acknowledge caregiving networks makes it more difficult for parents to assemble and maintain the networks needed to provide care.

In Part IV, I maintain that moving beyond the paradigm of parental caregiving towards legal recognition of caregiving networks is not impossible. As I demonstrate, in circumstances such as federal sentencing decisions, cases involving parental refusal of medical treatment, the Indian Child Welfare Act of 1978,<sup>10</sup> the federal food stamp program, and private contracts establishing caregiving networks, the law already recognizes—however inadvertently—that families provide care within a broader network of caregivers. These circumstances, I argue, make it clear that the law is capable of recognizing and validating the importance of care networks when it chooses to do so. And, more importantly, they suggest that decisions *not* to recognize caregiving networks may be driven by other normative choices.

In Part V, I call for a more expansive legal understanding of caregiving—one that would acknowledge both the importance of caregiving networks and the fact that caregiving encompasses more than just parental caregiving. In so doing, I sketch three possible

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<sup>10</sup> 25 U.S.C. §§ 1901–1963 (2000).

approaches that might serve as starting points for a more in-depth discussion of reframing the legal understanding of caregiving and caregivers. The approaches I discuss include: (1) expanding parenthood as a legal category; (2) creating alternative legal statuses that would coexist with parenthood in a legal regime for caregiving; and (3) dismantling parenthood altogether as a legal category. While I do not endorse any particular approach as a solution to the problem I have identified, I do discuss some of the potential advantages and disadvantages attendant to each. In particular, I consider the impact of each approach on the distribution of parental rights and the exercise of parental autonomy, as well as administrative concerns regarding implementation.

To be clear, any serious attempt to restructure the legal understanding of caregiving and caregivers will require input and consideration from a wide variety of voices and institutions. Accordingly, in this Article, my purpose is twofold: first, to make clear why family law should be attentive to and responsive to the question of how families actually perform their caregiving work, and second, to begin a conversation focused on reframing the legal understanding of caregiving to better enable the provision of family care.

#### I. HOW FAMILIES PROVIDE CAREGIVING

Throughout family law it is axiomatic that parents serve as caregivers to their children. Indeed, the law makes clear that both the legal rights and responsibilities for caregiving are vested in parents.<sup>11</sup> The reality of caregiving, however, is quite different from its legal construction. In actuality, parents routinely rely on those outside of the nuclear family to help them discharge their caregiving responsibilities.

According to recent census data, “[i]n a typical week . . . 11.6 million (63 percent) of . . . children under five years of age [a]re in some type of regular child care arrangement.”<sup>12</sup> These childcare arrangements include care by grandparents and other extended family, as well as day care, nursery schools, or third party in-home paid

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<sup>11</sup> See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”).

<sup>12</sup> Johnson, *supra* note 3, at 2.

childcare (nannies, au pairs, etc.).<sup>13</sup> While the bulk of children who experienced nonparental childcare were those whose primary caregiver was employed, even stay-at-home primary caregivers relied on caregiving assistance on a regular basis.<sup>14</sup>

Parents with the disposable income to engage paid caregivers are not the only ones who rely on third-party assistance. Those with fewer financial resources often share their caregiving responsibilities with extended family members and fictive kin.<sup>15</sup> Within the Af-

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<sup>13</sup> See *id.* Anecdotal accounts of caregiving are consistent with this empirical narrative. Although parents are primarily responsible for providing care, most—if not all—families routinely rely on third party assistance to help them with this monumental undertaking. On the popular website UrbanBaby, mothers share tips for identifying daycare programs and after-school care for children. See UrbanBaby, <http://www.urbanbaby.com/> (last visited Feb. 1, 2008). Elsewhere on the website, mothers debate the virtues of using a nanny, while still others advocate enlisting grandparents—“the granny-nanny”—and other extended family to help with caregiving. See *id.* Popular culture also has picked up on the reliance on outside caregivers, although it has been depicted as primarily an artifact of middle- and upper-middle-class homes. For example, the bestselling novel *The Nanny Diaries* details the interactions of wealthy parents and their child’s nanny. Emma McLaughlin & Nicola Kraus, *The Nanny Diaries* (2002). In the Oscar-nominated film *Babel*, the relationship between an undocumented Mexican nanny and her young American charges illustrates the complicated bonds between paid caregivers and the families they assist. *Babel* (Paramount Pictures 2006).

<sup>14</sup> See Johnson, *supra* note 3, at 3 (“[Eighty-nine] percent of the 9.8 million preschoolers of employed mothers and 31 percent of the 8.2 million preschoolers of non-employed mothers were in at least one child care arrangement on a regular basis.”). Even for those who remain in the home to serve as full-time caregivers, the burdensome nature of caregiving prompts occasional respites in which caregiving responsibilities are consigned to a nonparental caregiver for the short term. These brief respites are viewed as necessary periods of relaxation and rejuvenation that permit the parental caregiver to continue providing care in the long term. Indeed, the Lifespan Respite Care Act of 2006 recently was enacted in an effort to expand access to respite care services and “reduc[e] family caregiver strain.” 42 U.S.C.A. § 300ii-1(a)(3) (West Supp. 2007).

<sup>15</sup> See Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. Rev. L. & Soc. Change 441, 456 (1996) (“Many African-Americans have relied over generations on extended family networks for child rearing . . . when parents are unable to care for them for financial or other reasons.”). Indeed, law and public policy may prompt such measures. Under the 1996 welfare reforms, mothers receiving public assistance are required to transition from welfare to work. See 42 U.S.C.A. § 607(e) (West Supp. 2007) (providing, in the context of the Temporary Assistance for Needy Families Program, penalties for recipients who fail to meet welfare-to-work requirements). In order to accommodate their work responsibilities, many poor mothers must rely on nonparental caregiving for their children. See Angela Hooton, Note, *From Welfare Recipient to Childcare Worker: Balancing Work And Family Under TANF*, 12 Tex. J. Women & L. 121, 124

rican-American community, for example, parents frequently share caregiving responsibilities and material resources with community members in an arrangement known colloquially as “other-mothering.”<sup>16</sup> In Latino communities, *compadres*—literally “co-parents”—play a central role in the child’s spiritual upbringing and often are expected to share the parents’ caregiving responsibilities.<sup>17</sup>

Other groups also embrace caregiving networks. Historically, immigrants to the United States have relied on networks of extended family and friends in order to establish themselves in this country. These networks assist new immigrants and their families in guiding children, securing jobs, and providing emotional and financial support.<sup>18</sup> Similarly, gay and lesbian parents, some of whom

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(2002) (“The practical effect of [TANF] on single mothers is twofold: they need to find work and they need to find alternative sources of childcare.”).

<sup>16</sup> See Patricia Hill Collins, *Black Feminist Thought* 178 (2d ed. 2000) (noting that “othermothers—women who assist bloodmothers by sharing mothering responsibility—traditionally have been central to the institution of Black motherhood”); see also Carol B. Stack, *All Our Kin: Strategies for Survival in a Black Community* 62–66 (Basic Books 1997) (1974) (noting that maternal poverty in the African-American community has led to the institution of “child-keeping,” in which children are cared for by a network of family and close friends, rather than—or in addition to—their biological parents); Laura T. Kessler, *Transgressive Caregiving*, 33 Fla. St. U. L. Rev. 1, 18–19 (2005) (noting that othermothering “has operated not only informally, but also through well-developed institutions and movements such as black churches, black women’s clubs, black community service organizations, and the black civil rights movement”) (footnotes omitted); Maldonado, *supra* note 9, at 901–10 (noting that African-American grandparents often assume aspects of the parental role and reside with their grandchildren more frequently than do white grandparents); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 Cal. L. Rev. 1647, 1690 (2005) (noting that “for many Blacks and Latinos ‘family’ extends beyond the traditional nuclear-family model of mother, father, and children”); Roberts, *supra* note 4, at 269 (noting that “Blacks’ incorporation of extended kin and nonkin relationships into the notion of ‘family’ goes back at least to slavery”).

<sup>17</sup> See Oriol Pi-Sunyer & Zdenek Salzmann, *Humanity and Culture: An Introduction to Anthropology* 250–51 (1978) (describing the fictive kinship of godparents in the institution of *compadrazgo*); Woodhouse, *supra* note 1, at 591–92 (describing the use of *compadrazgo* in Latin American communities). In Puerto Rican families, the terms *hijos de crianza* and *padres de crianza* (literally, “children by raising” and “parents by raising”) refer to extended family members, often grandparents, who assist parents in caregiving. See Maldonado, *supra* note 9, at 905.

<sup>18</sup> See Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. Ill. L. Rev. 887, 934 (explaining that “interfamilial and ethnic

are estranged from their birth families, form caregiving networks comprised of intimate partners and friends.<sup>19</sup>

In families headed by single parents, extended family and friends may informally take on a substantial caregiving role.<sup>20</sup> While they make no claim to the legal status of parent, these nonparental caregivers assist the single parent in discharging her caregiving responsibilities. And in situations of extreme crisis, where, for example, criminal activity, illness, or drug use may impede a parent's ability to provide care, extended family and friends may assume parental caregiving responsibilities entirely, functioning as parents in all but name.<sup>21</sup> In many of these cases of de facto parenthood, although nonparents perform the functions of parents, there is little interest in actually becoming a parent through adoption or legal

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networks . . . form mediating structures for new immigrants to enter into the labor market and society”).

<sup>19</sup> See Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (Between Men—Between Women) 103–36 (1991) (arguing that gays and lesbians create “families of choice”—networks of friends and intimate partners—who assist in providing care to both adults and children); Nadine F. Marks & Sara S. McLanahan, *Gender, Family Structure, and Social Support Among Parents*, 55 *J. Marriage & Fam.* 481, 492 (1993) (observing that in nontraditional families, friends are the “most significant members of the social support networks”).

<sup>20</sup> Andrew J. Cherlin & Frank F. Furstenberg, Jr., *The New American Grandparent* 49, 153 (1986) (finding that grandparents are a source of caregiving support to single parents); Emmy E. Werner, *Grandparent-Grandchild Relationships Amongst US Ethnic Groups*, in *The Psychology of Grandparenthood: An International Perspective* 68, 73 (Peter K. Smith ed., 1991) (noting that, upon divorce, between twenty-five and forty-four percent of custodial mothers coreside with their mothers and that the grandmother often shares caregiving responsibilities and provides emotional support to the grandchild). The incidence of grandparental caregiving is race and class contingent. African-American grandparents are more likely than their white counterparts to serve as routine caregivers to their grandchildren. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 *Conn. L. Rev.* 1315, 1326–27 (1994).

<sup>21</sup> See Susan L. Waysdorf, *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 *Tex. J. Women & L.* 145, 182 (1994) (observing that many situations in which nonparents have fully assumed parental roles “arise after the death, divorce, incarceration, illness, or incapacity of the biological parent or parents”); Krissah Williams, *Life-Changing Decision: Growing Number of Grandparents Are Taking Up the Slack When Parents Fail*, *Hous. Chron.*, Aug. 2, 1999, at A15 (reporting that “drug abuse, AIDS, child abuse, divorce, unemployment and welfare reform that requires teen parents to live at home with an older guardian has led to more grandparents becoming primary guardians”).

guardianship.<sup>22</sup> In short, the arrangement is simply a more extreme, crisis-oriented form of the caregiving network that regularly is in place in most families.

All of these examples make clear that, for most families, the ideal of exclusively parental care is elusive. Personal preferences, responsibilities outside of the home, cultural commitments, and extreme crises all prompt parents to rely on nonparental caregiving, sometimes for defined periods of time, but often for more extended durations.

The reality of family life is thus that parents do not care for their children on their own. Instead, they routinely rely on nonparental caregivers to assist them in providing care. As I explain in the next Part, however, family law does not track this reality; instead, it characterizes caregiving as a parental endeavor and does little to recognize caregiving networks and the nonparental caregivers who constitute them.

## II. THE LEGAL CONSTRUCTION OF CAREGIVING

As many commentators and scholars have noted, the family serves important purposes as an entity within civil society.<sup>23</sup> But perhaps the most important function that the family serves is the

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<sup>22</sup> Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 *Cap. U. L. Rev.* 405, 447–51 (2005) (recounting the case of a great-grandmother who was reluctant to adopt her great-grandsons because doing so would require terminating the legal rights of their mother—her granddaughter—but ultimately did adopt the boys in order to gain access to increased public assistance); Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 *N.Y.U. Rev. L. & Soc. Change* 237, 250 (2004) (“A common barrier to adoption in the kinship care context has been the reluctance of many caregivers to cause a relative to lose her parental rights.”); Schwartz, *supra* note 15, at 456 (“[R]esistance to adoption is often deeply rooted in valued cultural traditions. . . . In none of these cultural traditions, is the biological parent intentionally alienated or exiled.”).

<sup>23</sup> See, e.g., Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* 20 (2006) (noting that families serve as “seedbeds of civic virtue,” responsible for training and developing children for civic participation); Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 *Tul. L. Rev.* 955, 1022 (1993) (explaining that families are pluralistic entities that foster and cultivate diverse cultural practices, creating “self-governing and self-regulating citizens rather than obedient subjects”); Anne C. Dailey, *Developing Citizens*, 91 *Iowa L. Rev.* 431, 432 (2006) (presenting “a comprehensive theoretical and empirical account of the connection between early caregiving relationships and the reasoned thinking of adult citizens”).

privatization of care for dependent members, usually children. The family—and parents, particularly—takes on this task, so that it is not primarily the public responsibility of the state.<sup>24</sup>

The law makes clear that, within families, parents are the persons responsible for providing care to children. As the Supreme Court has noted on multiple occasions, “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>25</sup> Because of the “natural bonds of affection” they share with their children, parents are presumed to act in their children’s best interests, and thus are the “natural” persons with whom to vest the responsibility for providing care.<sup>26</sup>

Attendant to this responsibility to care for children is broad discretion for parental decisionmaking. Accordingly, parents have the rights and authority to provide caregiving as they see fit.<sup>27</sup> The state

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<sup>24</sup> See Ruthann Robson, *Sappho Goes to Law School* 150–51 (1998) (arguing that marriage is a means of economic privatization that “seeks to encourage family responsibility while allowing the government to escape from its obligations” of care); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 Va. L. Rev. 2181, 2187 (1995) (noting that dependency is privatized within the family unit); Katherine M. Franke, *Taking Care*, 76 Chi.-Kent L. Rev. 1541, 1549 (2001) (asserting that, as an historical matter, postbellum recognition of African-American families was “motivated, in significant part, by a desire to privatize dependency”).

<sup>25</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (quoting *Prince*, 321 U.S. at 166).

<sup>26</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citing William Blackstone, 1 Commentaries \*447; James Kent, 2 Commentaries on American Law \*190). The idea that parents are particularly well suited to provide care has persisted in modern public policy. Progressive Era mothers’ pensions and their New Deal successor, Aid to Dependent Children, were organized around the idea that parental care—and maternal care, particularly—was essential to the proper development of children. Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare 1890–1935*, at 40 (1994). As such, these programs provided widows and abandoned wives with modest allowances that enabled them to forego paid work and remain in the home with their children. Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 Mich. J. Gender & L. 91, 98–99 (2002).

<sup>27</sup> Specific rights attendant to parental status include the right to make caregiving decisions regarding the child’s health, religious upbringing, and, within parameters established by state educational policies, schooling. See *Halderman v. Pennhurst State Sch. & Hosp.*, 707 F.2d 702, 712 n.1 (3d Cir. 1983) (Rosenn, J., concurring); Vivian Hamilton, *Principles of U.S. Family Law*, 75 Fordham L. Rev. 31, 63–64 (2006).

may intervene into the family to usurp parental decisionmaking authority only in limited circumstances, such as abuse, neglect, and abandonment.<sup>28</sup> Thus, family law vests parents with the duty to provide care and gives them almost unfettered discretion in this task.

#### *A. Covering Caregiving*

In giving parents broad autonomy to perform their caregiving duties—and deferring to parental caregiving decisions in most cases—the law effectively shrouds family caregiving decisions behind a veil of family privacy.<sup>29</sup> Or, to use another analogy, parental rights—and the deference owed their exercise—create a “black box” in which caregiving duties are accomplished. Within the black box of family privacy, the family’s quotidian functions and caregiving decisions are rendered invisible. Parents may elect to perform their caregiving duties alone, or alternatively, they may rely on assistance from other caregivers. In either case, the law is oblivious to the precise nature of these caregiving decisions. Caregiving is presumed to be a parental enterprise, and the law registers only whether the parent utterly has failed to discharge this responsibility—it is unconcerned with *how* the responsibilities actually are performed.

Parental rights and authority—and the state’s deference to this authority—do more than obscure the fact that parents function as parts of caregiving networks. They obscure the nonparental caregivers within these networks as well. In this way, the legal construction of caregiving as both a parental duty and a manifestation of parental rights and authority functions in a manner similar to legal

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<sup>28</sup> See Martha Albertson Fineman, *What Place for Family Privacy?*, 67 *Geo. Wash. L. Rev.* 1207, 1209 (1999); Clare Huntington, *Rights Myopia in Child Welfare*, 53 *UCLA L. Rev.* 637, 642 (2006).

<sup>29</sup> Other scholars have argued that family privacy and the presumption of family autonomy mask other things as well. See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 *Am. U. J. Gender Soc. Pol’y & L.* 13, 14 (2000) (arguing that family caretaking “masks the dependency of society and all its public institutions on the uncompensated and unrecognized dependency work assigned to caretakers within the private family”); Elizabeth M. Schneider, *The Violence of Privacy*, 23 *Conn. L. Rev.* 973, 981–82 (1991) (arguing that the expectation of family privacy has impeded state intervention to curb domestic violence).

coverture.<sup>30</sup> Under the common law principle of coverture, a wife's legal identity was "incorporated or consolidated into that of the husband: under whose wing, protection, and cover she perform[ed] everything."<sup>31</sup> Legally "covered" by her husband, a wife had no legal identity distinct from his.<sup>32</sup> He was the public face of the marriage, while she was rendered legally invisible and consigned to the private space of the domestic realm.

The legal construction of caregiving mimics that of marital coverture.<sup>33</sup> Just as feminist legal scholars argued that coverture

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<sup>30</sup> By analogizing the interaction of parental rights and caregiving responsibilities to coverture, I do not mean to suggest that coverture continues to exist in modern family law. Instead, I simply use coverture as a heuristic through which to think more deeply about the legal construction of caregiving and parenthood.

As many historians have chronicled, coverture was formally abolished in the 1840s with the enactment of the Married Women's Property Acts and Earning Statutes. Hendrik Hartog, *Man and Wife in America: A History* 110–11 (2000); Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 *Am. J. Legal Hist.* 3, 3 (1985). But cf. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *Yale L.J.* 1641, 1655 (2003) ("Long after the passage of married women's property acts . . . and the passage of married women's earnings statutes later in the nineteenth century, married women's legal and political identities continued to be defined and limited by their marital status."); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 *UCLA L. Rev.* 405, 428 (2005) (observing that while married women's property acts were passed in virtually every state beginning in the 1840s, "the ideology of coverture . . . lingered well past that date").

<sup>31</sup> 1 Blackstone, *supra* note 26, at \*442. For a robust description of coverture and its consequences, see Hartog, *supra* note 30, at 115–35.

<sup>32</sup> 1 Blackstone, *supra* note 26, at \*442 ("By marriage, the husband and wife become one person in law: that is, the very being or legal existence of the woman is in many respects suspended during the marriage, or at least is incorporated and consolidated into that of the husband."); see also Jill Elaine Hasday, *The Canon of Family Law*, 57 *Stan. L. Rev.* 825, 841–43 (2004) (explaining the principles of coverture); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 *Cal. L. Rev.* 204, 274 (1982) ("Until late in the last century, the doctrine of coverture gave legal substance to the view that a marital couple was a unit, a single entity controlled by the husband.").

<sup>33</sup> It is likely not coincidental that certain aspects of the coverture model are present in contemporary understandings of caregiving and parenthood. Like the husband/wife relationship embodied in the legal principle of coverture, the parent/child relationship also was understood as a domestic status relationship in which parents—and specifically, fathers—were sovereign over dependent children. See 1 Blackstone, *supra* note 26, at \*453 (reporting that at common law children lived in "the empire of the father" until they reached majority); see also Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 *Geo. L.J.* 299, 310 (2002) ("At common law, a father enjoyed an almost absolute right to the custody, labor, and

and its protection of family privacy prevented the state from identifying and remedying dysfunction within marriages,<sup>34</sup> parental rights create a zone of privacy that prevents the state from seeing into the black box of family life to understand how caregiving responsibilities actually are performed. While we understand that parents rely on other caregivers to help them discharge their caregiving duties, these shadow caregivers are “covered” by the legal identity of parents, who have the rights and responsibilities of caregiving and thus are the only caregivers whom the law recognizes. Regardless of how caregiving is performed, the parents are the public face of caregiving. The reality of how families actually perform their caregiving—and the nonparental caregivers that participate in this endeavor—remains a private matter.

### *B. Equating Caregiving with Parenting*

The coupling of parental rights with the responsibility for providing care to children shapes the legal understanding of caregiving as a parental enterprise. In this way, the legal construction of caregiving and its strong associations with parenthood create an all-or-nothing situation.<sup>35</sup> The law effectively has constructed a parent/stranger dichotomy in which one is either a parent, vested with the rights and responsibilities of caregiving, or one is a legal

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earnings of his minor children, and was in turn expected to maintain, protect, and educate them.”) (footnotes omitted). The parent/nonparent caregiver relationship that I analogize to coverture was never formally inscribed as a domestic relation with all of the legal baggage with which that term is associated. Nevertheless, the fact that nonparents are subordinated to parents within the current construction of caregiving reflects the dominant/subordinate dynamic that characterized other status relationships.

<sup>34</sup> See Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 *Ohio St. L.J.* 1, 18–34 (2000) (arguing that notions of family privacy—reflected most clearly in the doctrine of coverture—prevented an adequate legal response to domestic violence); Schneider, *supra* note 29, at 981–82 (arguing that the inadequate public response to domestic violence was rooted in the understanding of the family as a private enclave, free of state intrusion); Nadine Taub & Elizabeth M. Schneider, *Women’s Subordination and the Role of Law*, in *The Politics of Law: A Progressive Critique* 328, 328–33 (David Kairys ed., 3d ed. 1998) (concluding that the state’s refusal to intervene into private family life stems from the historic subordination of women within the family).

<sup>35</sup> See Polikoff, *supra* note 9, at 471 (“Customarily, legal parenthood is an all-or-nothing status. A parent has all of the obligations of parenthood and all of the rights; a nonparent has none of the obligations and none of the rights.”).

stranger without legal entitlements or obligations.<sup>36</sup> This approach permits no intermediate space to acknowledge the caregiving efforts of those who neither bear nor seek the legal status of parent.

The all-or-nothing characterization of caregiving and parenthood is reflected in family law's tortured attempts to acknowledge the caregiving efforts of nonparental third parties such as stepparents, functional parents, and grandparents. Although stepparents frequently serve as caregivers to the children with whom they cohabit, as a general matter, they are not recognized as legal caregivers in the manner of parents.<sup>37</sup> If the stepparent's relationship with the child's biological parent ends, ordinarily the stepparent lacks legal authority to seek visitation and is not required to pay child support.<sup>38</sup> In order to be legally recognized as a caregiver, stepparents must assume formally parental status through a stepparent adoption in which the child's noncustodial parent relinquishes his parental rights and obligations.<sup>39</sup>

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<sup>36</sup> See *id.*; David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 *Am. J. Comp. L. (Supp.)* 125, 131 (2006); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *Cardozo L. Rev.* 1747, 1781–82 (1993).

<sup>37</sup> See *In re Kieshia E.*, 859 P.2d 1290, 1295–96 (Cal. 1993) (holding that *de facto* parents, including stepparents, do not gain the status of parents); *id.* at 1299 (Kenard, J., dissenting on other grounds) (noting that the court's *de facto* parent doctrine further implies that such a caregiver obtains no visitation or custody rights); *In re Marriage of Engelkens*, 821 N.E.2d 799, 806 (Ill. App. Ct. 2004) (holding that stepparents have no common law right to visitation with former stepchildren); see also David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce*, in *Divorce Reform at the Crossroads* 102, 108 (Herma Hill Kay & Stephen D. Sugarman, eds., 1990) ("On the breakup of a marriage between the biologic parent and a stepparent, the stepparent [is] ignored by the law unless the child has been adopted."). Some jurisdictions, such as California, permit stepparents to petition for visitation with a former stepchild. These requests are granted if a court determines that they are in the child's best interests, and that they do not "conflict with a right of custody or visitation of a birth parent who is not a party to the [dissolution] proceeding." Cal. Fam. Code § 3101 (West 2004).

<sup>38</sup> See Mary Ann Mason & Nicole Zayak, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 *Fam. L.Q.* 227, 227–28 (2002).

<sup>39</sup> See, e.g., *In re Caldwell*, 576 N.W.2d 724, 725–26 (Mich. 1998) (noting that the court may terminate the noncustodial parent's rights in order to permit a stepparent adoption to proceed); Uniform Adoption Act (1994) § 4-103 cmt. (noting that, although a stepparent adoption does not alter the legal rights and obligations of the custodial parent (the stepparent's spouse), "rights and duties of the child's former non-custodial parent are," with limited exceptions, "terminated").

In limited circumstances, courts have been receptive to stepparents' claims for visitation and custody—both rights traditionally afforded only to legal parents. Tellingly, however, the stepparents in these scenarios were functioning as parents to their stepchildren, and framed their claims to rights as parental claims, rather than as nonparental claims. Thus, in *Kinnard v. Kinnard*, a stepmother successfully petitioned for shared custody of her stepdaughter.<sup>40</sup> In granting the request, the court distinguished the plaintiff from a nonparent by acknowledging that her relationship with her stepdaughter “was that of parent and child” and that she was the child’s “psychological parent.”<sup>41</sup> Similarly, in *Wills v. Wills*, a court awarded a stepmother visitation with her stepdaughter, noting that because the girl’s mother died when she was an infant, she “was raised by and knew [her stepmother] to be her mother.”<sup>42</sup> In granting stepparents these parental entitlements, the *Wills* and *Kinnard* courts clearly were persuaded by the fact that both stepmothers had assumed the place of a biological parent, and, more critically, had presented themselves as *parents*, rather than simply as stepparents.

Courts also have been receptive to “functional parent” claims in other contexts. For example, in some same-sex relationships, courts have granted the rights and obligations of parenthood to persons who have no biological or legal relationship to the child, but who have functioned as a parent in the context of a long-term intimate relationship with the child’s biological parent.<sup>43</sup> Courts also have embraced functional parenthood in heterosexual relationships. For example, in *In re Nicholas H.*, the California Supreme Court awarded custody of a minor to a man who was neither the child’s biological father, nor married to the child’s biological mother.<sup>44</sup> To

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<sup>40</sup> 43 P.3d 150, 151 (Alaska 2002).

<sup>41</sup> *Id.* at 154.

<sup>42</sup> 399 So. 2d 1130, 1131 (Fla. Dist. Ct. App. 1981).

<sup>43</sup> See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 662, 667–68 (Cal. 2005) (deeming plaintiff a legal parent on the ground that although she had “no genetic connection” to the children, she had brought them into her home and held them out as her and her partner’s natural children). But see *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (holding that a woman who had been in a long-term relationship with child’s mother and cared for the child and presented herself as a “de facto” parent was not a “parent” for purposes of visitation statute).

<sup>44</sup> 46 P.3d 932, 941 (Cal. 2002).

achieve this unorthodox result, the court concluded that although the man had no legal or biological connection to the child, he had “lived with [him] for long periods of time,” “provided [him] with significant financial support,” and “consistently referred to and treated [him] as his son.”<sup>45</sup>

At first blush, the court’s decision in *Nicholas H.* appears unconventional. Upon further reflection, however, it is entirely consistent with the law’s focus on parenthood as the site of caregiving. In seeking rights to the child, the plaintiff presented himself as a functional parent in a field in which there were no other attractive competitors for parental status. Critically, the child’s biological father “ha[d] not come forward to assert [his] parental rights,” and the child’s biological mother, who according to the court “ha[d] been a frail reed for [the child] to lean upon,” was “often homeless” and “ha[d] been in trouble with the law.”<sup>46</sup>

It is also worth noting that in all of these cases, parenthood was the end goal because there were no other legal alternatives in which to frame caregiving. Accordingly, all of the plaintiffs framed their claims as those of functional parents. That is, in order to gain any rights and entitlements, the plaintiffs presented themselves as individuals who had assumed the caregiving responsibilities associated with parenthood.

The emphasis on parenting as caregiving also is seen in policy initiatives intended to better reflect the changing composition of families. Announced in 2002, the ALI’s “Principles of Family Dissolution” attempted to bridge the gap between theory and practice by proposing two new statuses—de facto parent and parent by estoppel—that would accommodate those who functioned as parents but were not biologically or legally related to the child.<sup>47</sup> To be recognized as a de facto parent, the caregiver must, with the consent or acquiescence of the legal parent, live with the child and regularly perform a majority of the caregiving functions for the child for

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<sup>45</sup> Id. at 935.

<sup>46</sup> Id. at 935–36.

<sup>47</sup> Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03(1) (American Law Institute 2002). The ALI Principles have not been adopted widely; thus, a majority of jurisdictions continue to deal with issues involving the legal recognition of nonbiological parents on an individualized basis.

a period of at least two years.<sup>48</sup> Likewise, to qualify as a parent by estoppel, the caregiver must live with the child for at least two years and hold himself out as a parent of the child, assuming full and permanent responsibilities as a parent pursuant to an agreement with the child's legal parent.<sup>49</sup> Although these new statuses were fashioned with nonparental caregivers in mind, the caregiving model contemplated was informed by parenthood. In order to claim rights under the ALI Principles, nonparents must establish that, despite their lack of genetic or legal connections to the child, they nonetheless functioned as parents.<sup>50</sup> Thus, the ALI Principles simply underscore the degree to which the law understands parenthood to be the site for caregiving.

The law's preoccupation with parenthood as the identifiable vehicle of caregiving also is reflected in its discomfort with recognizing the claims of nonparents who seek rights but explicitly *do not* frame their claims in the language of parenthood. For example, during the 1990s, grandparents throughout the country began agitating for greater rights to their grandchildren.<sup>51</sup> Many argued that they provided material and emotional care to their grandchildren,

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<sup>48</sup> Id. § 2.03(1)(c).

<sup>49</sup> Id. § 2.03(1)(b)(iv).

<sup>50</sup> It is worth noting that the ALI Principles distinguish between the terms "parent" and "caretaker." As defined by the ALI Principles, a parent is one who is considered a parent under state law or who is required by law to support a child. Id. § 3.02(1). By contrast, a caretaker is "a person who is not a parent . . . but who nevertheless is allocated and exercises residential responsibility or custodial responsibility" for a child. Id. § 3.02(7). In this way, the ALI Principles make clear that the legal understanding of a caretaker can only be understood in relation to the parental role. Indeed, in explanatory commentary, the Principles note that caretaking functions "are the subset of parenting functions that involve the direct delivery of day-to-day care and supervision to the child." Id. § 2.03 cmt. g. While caretaking functions need not be performed by a parent, id. § 3.02(7), the commentary suggests that the distinction between caretaking functions and parental functions is intended to facilitate the determination of primary custody, and as such, is meant to apply to those who are, or who function as, parents. Id. § 2.03 cmt. g ("Because caretaking functions involve tasks relating directly to a child's care and upbringing, it is assumed that they are likely to have a special bearing on the strength and quality of the adult's relationship with the child. For this reason, . . . each parent's share of past caretaking functions [is made] central to the allocation of custodial responsibility at divorce.").

<sup>51</sup> See Karen M. Thomas, *Generations Apart: Grandparents Are Going to Court to Gain Right to Visit Grandchildren*, Dallas Morning News, Nov. 17, 1999, at 1C (noting that "[o]lder Americans have organized nationally and wield a considerable amount of political clout" in the struggle for grandparents' rights).

but had no legal recourse if one or both of the child's parents prevented them from visiting the child.<sup>52</sup> As a response, by 2000, every state in the country had enacted legislation affording grandparents—and in some states, other nonparents—the right to petition for visitation with a child.<sup>53</sup>

Parents reacted by arguing that these grandparent visitation statutes impermissibly infringed upon their parental rights. The Supreme Court agreed in the 2000 case *Troxel v. Granville*,<sup>54</sup> invalidating a Washington statute that allowed “[a]ny person” to petition for visitation rights “at any time.”<sup>55</sup> Under the challenged statute, state trial courts were permitted to grant visitation if it was in the child's best interests, even over the parent's objections.<sup>56</sup> In invalidating the statute, the Court conceded that, while “breathtakingly broad,”<sup>57</sup> the statute was intended to protect “the relationship . . . children form with . . . third parties” who undertake “duties of a parental nature in many households.”<sup>58</sup> In doing so, however, the statute trod impermissibly upon parental authority to determine who would and would not have access to the child.<sup>59</sup>

Since *Troxel*, some state courts have reversed decisions granting nonparental visitation.<sup>60</sup> However, a number of courts and legislatures have declined to interpret *Troxel* as entirely prohibiting statutes that permit nonparents to petition for visitation.<sup>61</sup> Instead, they

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<sup>52</sup> *Id.*

<sup>53</sup> Stephen Elmo Averett, Grandparent Visitation Right Statutes, 13 *BYU J. Pub. L.* 355 (1999) (collecting and describing statutes).

<sup>54</sup> 530 U.S. 57, 66–67 (2000) (plurality opinion).

<sup>55</sup> Wash. Rev. Code. Ann. § 26.10.160(3) (West 2005).

<sup>56</sup> *Id.*

<sup>57</sup> *Troxel*, 530 U.S. at 67 (plurality opinion).

<sup>58</sup> *Id.* at 64.

<sup>59</sup> *Id.* at 67.

<sup>60</sup> *Linder v. Linder*, 72 S.W.3d 841, 858 (Ark. 2002); *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 140–41 (Cal. Ct. App. 2001); *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476, 478 (Cal. Ct. App. 2000); *Roth v. Weston*, 789 A.2d 431, 434 (Conn. 2002); *Wickham v. Byrne*, 769 N.E.2d 1, 8 (Ill. 2002); *Santi v. Santi*, 633 N.W.2d 312, 320 (Iowa 2001); *Brice v. Brice*, 754 A.2d 1132, 1136 (Md. 2000); *Neal v. Lee*, 14 P.3d 547, 550 (Okla. 2000).

<sup>61</sup> *Jackson v. Tangreen*, 18 P.3d 100, 102 (Ariz. Ct. App. 2000); *DeGraeve v. Holm*, 50 P.3d 509, 512–13 (Kan. Ct. App. 2002); *Rideout v. Riendeau*, 761 A.2d 291, 294 (Me. 2000); *Zeman v. Stanford*, 789 So. 2d 798, 805 (Miss. 2001); *Douglas v. Wright*, 801 A.2d 586, 594 (Pa. Super. Ct. 2002); *Brandon L. v. Moats*, 551 S.E.2d 674, 676 (W. Va. 2001). Indeed, in the plurality opinion in *Troxel*, Justice O'Connor carefully explained that the inquiry was confined to the terms of the Washington statute, which

have concluded that *Troxel* simply prohibits visitation statutes that allow courts or third parties to usurp parental decision-making authority over children.<sup>62</sup>

*Troxel's* cryptic logic emphasizes the problems that result when nonparents make claims that are not framed in the guise of functional parenthood. As the discussion of stepparents and functional parents suggest, the law is relatively comfortable recognizing nonparental claims for rights when the claimants have functioned as parents and seek recognition as such, and where these claims do not interfere with the exercise of parental authority. The law is decidedly less comfortable recognizing nonparental caregivers who seek legal recognition as caregivers, but not as parents.

Because law equates caregiving with parenting, it identifies two extremes—parent and stranger—with which caregiving must comport.<sup>63</sup> The vast caregiving continuum that exists between these two poles is unexplored and unacknowledged. As *Troxel* makes clear, although nonparents provide care,<sup>64</sup> unless they do so in the manner of parents, or in a way that does not conflict with the exercise

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was “breathtakingly broad.” 530 U.S. at 67. The Court avoided the question of whether all grandparental visitation statutes might run afoul of the Constitution. *Id.* at 73 (“We do not, and need not, define today the precise scope of the parental due process right in the visitation context.”).

<sup>62</sup> See Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 *Fam. Ct. Rev.* 14, 15 (2003) (finding that state courts reviewing nonparental visitation statutes have rarely found them to be unconstitutional).

<sup>63</sup> Scholarly responses to *Troxel* also have adopted the parent/stranger binary, advocating legal recognition only for those nonparents who have functioned as parents. See Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?*, 32 *Rutgers L.J.* 783, 791 (2001) (arguing that, after *Troxel*, courts should draw the line between nonparents who are entitled to visitation rights and those who are not “at the point where a given adult has acted in the capacity of a parent to the child”); Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 *Rutgers L.J.* 825, 851 (2001) (urging courts “to see the difference between petitioners who have functioned as parents . . . and petitioners who have not”).

<sup>64</sup> *Troxel*, 530 U.S. at 64 (plurality opinion) (noting that, in “single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing”); see also *id.* at 63 (“The demographic changes of the past century make it difficult to speak of an average American family.”).

of parental rights, they are regarded as strangers whose legal claims are interpreted as impermissible intrusions on parental autonomy.<sup>65</sup>

### *C. Parenthood and Caregiving Benefits*

As the previous discussion demonstrates, in allocating rights, the law constructs caregiving as a parental enterprise. In so doing, family law ignores the role that care networks and nonparental caregivers play in raising children. Some might argue that the law's inability to recognize formally caregiving networks and nonparental caregivers does not affect day-to-day caregiving. After all, regardless of whether the law recognizes caregiving networks, within the black box of family privacy, nonparents and parents can continue working together to discharge family caregiving responsibilities. In most cases, these arrangements will never be subject to state scrutiny or oversight.<sup>66</sup>

I contend, however, that the law's myopic understanding of parenting as caregiving and its reluctance to recognize care networks and nonparental caregivers do have consequences. These consequences are felt in the quotidian choices that parents and nonparents make in discharging their caregiving responsibilities and in the ways in which caregiving is supported privately and publicly.

Both the state and private employers offer significant support for caregiving and caregivers through insurance benefits and other

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<sup>65</sup> Other scholars have criticized the rights-centered orientation of family law. In the context of the child welfare system, Professor Clare Huntington has argued that because it is wary of impermissibly intruding upon parental autonomy, the state takes a reactive, rather than a proactive, stance in identifying and addressing family pathologies that diminish the quality of caregiving. See Huntington, *supra* note 28, at 673 (advocating for a departure from the rights-based model of child welfare, in favor of a problem-solving model that "focuses proactively on the problems facing families"); see also Clare Huntington, *Mutual Dependency in Child Welfare*, 82 *Notre Dame L. Rev.* 1485, 1510 (2007) (proposing a "prevention-oriented" approach to child welfare that would employ a "new conception of family autonomy" based on encouraging engagement between families and the state). I agree with Huntington's assessment; however, I would go further by arguing that, even in intact families that are not involved in the child welfare system, the parental rights-centered understanding of caregiving prohibits the state from taking proactive measures to support the way in which families provide care.

<sup>66</sup> Indeed, state involvement in the family occurs only in cases of abuse or neglect, or when individual family members and caregivers choose to publicize their arrangements, as would be the case if a party chose to petition a court for legal rights as a caregiver.

employment perquisites, Social Security benefits, and more recently, the Family and Medical Leave Act of 1993.<sup>67</sup> However, these efforts to facilitate and enable caregiving are aimed at parents, whether formally or functionally defined. They rarely contemplate the network of nonparental caregivers on which many parents rely.

As part of their employment compensation packages, many private employers provide health and dental insurance to employees.<sup>68</sup> Other employers—typically educational institutions—may expand the array of employee benefits to include school tuition and child-care reimbursement for expenses incurred by employees for dependent children.<sup>69</sup> Under most plans, employees may seek insurance coverage or tuition reimbursements for those who are considered their dependents.<sup>70</sup> Dependents generally include the employee's biological or adoptive children, or those for whom the employee stands *in loco parentis*—that is, those to whom the employee has assumed the role of parent.<sup>71</sup>

Certainly, from an administrative perspective, defining dependents to include biological or adoptive children and those to whom the employee stands *in loco parentis* is a sensible choice.<sup>72</sup> However, this default does not capture the universe of caregiving ar-

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<sup>67</sup> 29 U.S.C. §§ 2601–2654 (2000 & Supp. IV 2004).

<sup>68</sup> See Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 *Duke J. Gender L. & Pol'y* 7, 20 (2006) (“[M]ost health insurance in the United States is provided through private employers.”).

<sup>69</sup> See Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 *Chi.-Kent L. Rev.* 1753, 1764–65 (2001) (noting that many universities offer generous tuition subsidies for faculty children).

<sup>70</sup> See *id.* (describing the University of Chicago's “generous” tuition benefit, which “send[s] [faculty] children, tuition-free, to any university in the nation, for the full range of undergraduate and graduate work. Nonparents, of course, have no equivalent benefit.” (quoting Elinor Burkett, *The Baby Boon: How Family-Friendly America Cheats the Childless* 40 (2000))).

<sup>71</sup> *In re Hart*, 806 A.2d 1179, 1185–86 (Del. Fam. Ct. 2001) (noting that one of the benefits to the child from adoption is eligibility for coverage under parents' health insurance); Katie A. Fougerson, Note, *Equitable Considerations for Families with Same-Sex Parents*, 83 *Neb. L. Rev.* 915, 931 (2005) (explaining that coverage under the parents' health insurance is among the many privileges afforded those in a recognized parent/child relationship).

<sup>72</sup> Later, I confront directly the argument that equating caregivers with parents is administratively easy. See *infra* note 241 and accompanying text.

rangements that might exist,<sup>73</sup> and it does not necessarily reflect the way in which employees might prefer to allocate their benefits or structure their caregiving responsibilities. For example, if a grandparent were providing substantial caregiving to a grandchild, but had not assumed completely the parent's role in the child's life, he would be unable to seek insurance coverage for the child as a dependent. Indeed, in order to gain coverage for the child, the grandparent either would have to adopt the child or, as a functional matter, assume completely the parental role.<sup>74</sup> The benefits scheme would not contemplate coverage if the grandparent and parents worked together as part of a caregiving network. For purposes of most private caregiving benefits, caregivers must present themselves as parents in order to be covered.

Similarly, the Family and Medical Leave Act ("FMLA"),<sup>75</sup> which was enacted in 1993 with the express purpose of facilitating caregiving,<sup>76</sup> also is structured in a manner that reflects an understanding of caregiving as a parental enterprise. The FMLA provides twelve weeks of unpaid leave to eligible employees in the event of the birth or adoption of a child or to care for a "spouse, or a son,

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<sup>73</sup> For a discussion of various caregiving arrangements, see Jennifer 8. Lee, *The Incredible Flying Granny Nanny*, N.Y. Times, May 10, 2007, at G1; see also Tamar Lewin, *Financially Set, Grandparents Help Keep Families Afloat, Too*, N.Y. Times, July 14, 2005, at A1 (describing families where grandparents subsidize mortgages, daycare, private school and college tuition, and provide caregiving); Joe Sexton, *Poor Parents' Summertime Blues; Choices for Children: Enforced Boredom or Street Roulette*, N.Y. Times, June 25, 1995, at 27 (noting that some working, low-income parents dispatch their children to extended family for the entire summer in order to provide care during the day).

<sup>74</sup> See *Garska v. McCoy*, 278 S.E.2d 357, 359 (W. Va. 1981) (observing that couple legally adopted their granddaughter's son because this was the only way to claim the child as a dependent on the grandparents' health insurance).

<sup>75</sup> 29 U.S.C. §§ 2601–2654 (2000 & Supp IV 2004).

<sup>76</sup> *Id.* § 2601(b) (2000). It should be noted that in *Nevada Department of Human Resources v. Hibbs*, the Supreme Court upheld the FMLA under § 5 of the Fourteenth Amendment on the ground that it was an appropriate remedy for "gender-based discrimination in the administration of [family] leave benefits." 538 U.S. 721, 735 (2003). The Court's understanding of the FMLA's role in remedying sex discrimination is not inconsistent with the statute's stated purpose of facilitating family caregiving. As the *Hibbs* Court observed, the discrimination targeted by the FMLA was based on mutually reinforcing stereotypes that "forced women to continue to assume the role of primary family caregiver," *id.* at 736, while presuming that men "lack [these] domestic responsibilities," *id.* at 722.

daughter, or parent.”<sup>77</sup> The FMLA, thus, expressly privileges caregiving that occurs within the parent/child relationship: an employee may seek a qualifying leave upon *becoming* a parent—whether by birth or adoption—or in order to provide care to a child or parent.

In defining the terms “parent” and “child,” the statute takes a functional approach to parenthood. Under the statute, a parent is “the biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a son or daughter.”<sup>78</sup> Similarly, a “son or daughter” is defined to include “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*.”<sup>79</sup> Indeed, the regulations accompanying the FMLA define the term *in loco parentis* to include “those with day-to-day responsibilities to care for and financially support a child.”<sup>80</sup> Thus, the FMLA covers parents and nonparents who have assumed a parenting role and stand *in loco parentis* to the child.

While the FMLA is quite liberal in defining the parent/child relationship, its view of caregiving is crabbed and unrealistically focused on parenthood as the locus of caregiving. The only caregiving arrangements contemplated are situations in which a parent will care for a child or a child will care for an aging or ill parent. The Act is oblivious to caregivers who provide care, but otherwise do not cohere with normative understandings of parenthood. Indeed, the only way that a nonparent can access FMLA benefits is by framing her relationship with the dependent as a parent/child relationship.<sup>81</sup> Even in the context of benefits explicitly understood to facilitate caregiving, no other caregiving arrangements are contemplated as legitimate.

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<sup>77</sup> 29 U.S.C. § 2612(a)(1)(A)–(C) (2000).

<sup>78</sup> *Id.* § 2611(7).

<sup>79</sup> *Id.* § 2611(12); see also *Dillon v. Md.-Nat’l Capital Parks and Planning Comm’n*, 382 F. Supp. 2d 777, 785 (D. Md. 2005) (“Plaintiff could only be entitled to FMLA leave to care for her grandmother if [the grandmother] stood *in loco parentis* to Plaintiff.”).

<sup>80</sup> 29 C.F.R. § 825.113(c)(3) (2007).

<sup>81</sup> *Sherrod v. Philadelphia Gas Works*, 57 Fed. Appx. 68, 72 (3d Cir. 2003) (observing that, although ordinarily employees may not seek FMLA leave to care for grandparents, plaintiff claimed that her grandmother raised her and served as her primary caregiver).

Having identified the disjunction between law's cramped understanding of caregiving and the resulting difficulties of this construction, I consider in the following Part why expanding the legal understanding of caregiving to include care networks would advance family law's stated interest in facilitating and enabling caregiving.

### III. MOVING BEYOND THE PARADIGM OF CAREGIVING AS PARENTING

*No man is an island, entire of itself;  
every man is a piece of the continent,  
a part of the main . . . .*<sup>82</sup>

Scholars in the fields of environmental law and public health have cited John Donne's "Meditation XVII" for the proposition that humans, though independent and autonomous beings, are nonetheless connected to one another in a complex ecology of mutual interdependence.<sup>83</sup> Donne's words also are relevant to family law, where parents and families are linked with other members of their caregiving networks in order to provide care. Presently, family law does not take account of the interdependence of parents and their caregiving networks. However, as I argue below, there are important reasons for family law to acknowledge this interdependence.

As a descriptive matter, expanding our understanding of caregiving would reconcile family law with the reality of family experience. As I demonstrated in Part I, family law's construction of caregiving as an exclusively parental enterprise is at odds with the way that families actually perform their caregiving responsibili-

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<sup>82</sup> John Donne, Meditation XVII, *in* Devotions Upon Emergent Occasions 86, 87 (Anthony Raspa ed., McGill-Queen's University Press 1975) (1624).

<sup>83</sup> See e.g., *County of Riverside v. Superior Court*, 66 P.3d 718, 730 (Cal. 2003) ("John Donne wrote, 'No man is an island, entire of itself.' So, too, no county is an island, entire of itself. No doubt almost anything a county does, including determining employee compensation, can have consequences beyond its borders." (citation omitted)); Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 Cal. L. Rev. 75, 114 (2004) (referring to the lack of consideration for the individual's influence on the community as the "John Donne effect"); Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. Pitt. L. Rev. 419, 447 (2000) (referencing Donne in the context of the harm caused by second-hand smoke).

ties.<sup>84</sup> Children frequently are cared for by those who are not their biological or legal parents; and even where parents do provide care, they are not necessarily the *only* caregivers involved. Regardless of how families are constituted, the reality is that parents do not perform caregiving as autonomous islands. Instead, they frequently function as part of a broader caregiving network that includes nonparental caregivers. The law's failure to acknowledge this truth about family life creates a disjunction between family law and policy and the reality of family life on the ground.<sup>85</sup> This disjunction means that family law does not address a sizable portion of families and their chosen methods for providing care. Instead, it remains focused on an idealized view of families as autonomous and independent.

For some, this disparity, by itself, would be reason enough to reconsider the legal construction of caregiving as a parental enterprise.<sup>86</sup> However, doing so makes sense beyond simply resolving this gap between doctrine and practice. As a normative matter, shifting the paradigm of caregiving from a parental enterprise to one that acknowledges the interdependence of parents and non-parents in providing care would benefit families and their dependents.

First, a more capacious understanding of caregiving would benefit parents. The law's understanding of caregiving as private and parental presumes that parents will be able to perform their tasks

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<sup>84</sup> See *supra* Part I.

<sup>85</sup> It also belies the degree to which families historically have been understood as communitarian institutions in which extended family and community members worked in tandem with parents to provide care. See John Demos, *Past Present and Personal: The Family and the Life Course in American History* 27–30 (1986). As legal historian Alison Morantz argues, the characterization of the family as a nuclear unit composed of a married couple and their children emerged in the aftermath of the Civil War. Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Construction of Family in Nineteenth-Century America*, 24 *Law & Hist. Rev.* 245, 294 (2006). Other historians view the shift towards the atomistic nuclear family as a more recent development. According to Professor Elaine Tyler May, the ideal of the nuclear family became firmly rooted in the American consciousness only after World War II. See generally Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (1999).

<sup>86</sup> See Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 *Yale J.L. & Feminism* 83, 85 (2004) (observing that most families do not comport with the nuclear family ideal venerated in family law, and criticizing law's "exclusive" family model on this basis).

for the long term.<sup>87</sup> Indeed, the state depends on the long-term privatization of care within families to ensure that care does not become a public responsibility. Yet, caregiving, though satisfying on many levels, is time-consuming and burdensome work.<sup>88</sup> All parents—whether because of external pressures like employment or internal pressures like stress or personal pursuits—must, at some time, seek help in order to continue providing care in the long term.<sup>89</sup>

For some, this might require the occasional babysitter. For others, nonparental caregivers may be established as critical components of the family's daily caregiving routine. In either case, if the family is to continue providing care in the long term, it requires a network of caregivers to assist in discharging caregiving responsibilities. Despite this reality, and perhaps because of the law's inability to recognize it, many parents experience incredible guilt and anxiety about their use of nonparental caregiving.<sup>90</sup> Legal recogni-

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<sup>87</sup> Anne Alstott, *No Exit: What Parents Owe Their Children and What Society Owes Parents* 52 (2004) ("Society expects parents to provide continuity, and . . . parents undertake to stay with their children for the long term.").

<sup>88</sup> See Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 161–64 (1995). The recently enacted Lifespan Respite Care Act of 2006, Pub. L. 109-442, 120 Stat. 3291, which provides states with additional resources for supporting respite care for those caring for chronically ill family members, acknowledges the degree to which family caregiving can be draining, difficult work. See *id.* sec. 2, § 2902(a)(1), 120 Stat. at 3292 ("The purpose[] of [the Act is] . . . to provide, supplement, or improve access and quality of respite care services to family caregivers, thereby reducing family caregiver strain."); S. 1283, 109th Cong. sec. 2, § 2901(a)(9) (2005) (noting that while "the family caregiver role is personally rewarding," it "can result in substantial emotional, physical, and financial hardship" for caregivers and their families). Although the Act focuses on those caring for chronically ill family members, the critical point remains—caregiving often is challenging and caregivers frequently require assistance in order to continue providing care in the long term.

<sup>89</sup> Fineman, *supra* note 88, at 163 ("[T]he very process of assuming caretaking responsibilities creates dependency in the caretaker—she needs some social structure to provide the means to care for others."); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 *Am. U. J. Gender Soc. Pol'y & L.* 13, 20 (1999) ("Caretakers have a need for monetary or material resources. They also need recourse to institutional supports and accommodation, a need for structural arrangements that facilitate caretaking.").

<sup>90</sup> One need only read the headlines from "the Mommy Wars" to understand the fevered pitch at which decisions to use childcare in order to participate in market work are denounced as inadequate, selfish, dangerous, or simply wrongheaded. See generally Leslie Morgan Steiner, *Mommy Wars: Stay-at-Home and Career Moms*

tion of caregiving networks would emphasize that these arrangements are common, accepted, and valued by the state.<sup>91</sup>

Additionally, shifting the legal paradigm of caregiving to include networked caregiving would facilitate and enable parents in providing care. In constructing caregiving as a parental enterprise, the law does little to consider how it might assist parents in supporting and maintaining the network of caregivers—parental and nonparental—that make the privatization of care within the family possible. As many feminist critics have observed, there is little public support for care, as it is assumed that families (and parents particularly) will absorb privately all responsibility for caregiving.<sup>92</sup> Further, as I have demonstrated in the context of the FMLA and private insurance, the limited benefits available to support caregiving do not necessarily provide parents and nonparental caregivers with the flexibility required to best support the way in which they choose to provide care.

Certainly, there are many ways for the state to enable and facilitate caregiving. As many have advocated, a public infrastructure of care consisting of family-friendly work policies and regulations, universal daycare, and universal healthcare would do much to assist parents in performing their carework.<sup>93</sup> However, what is missing from these policy prescriptions is some recognition of, and support for, the existing *private* infrastructure of care. Expanding the legal construction of caregiving would be an initial step towards

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Face Off on Their Choices, Their Lives, Their Families (2006); Lynda Richardson, No Cookie-Cutter Answers in 'Mommy Wars': Women Are Struggling With Their Choices About Having Jobs or Staying Home, N.Y. Times, Sept. 2, 1992, at B1.

<sup>91</sup> Of course, if legal recognition of caregiving networks resulted in the diffusion of parental decisionmaking authority between parents and nonparental caregivers, many parents would be reluctant to enlist the aid of a caregiving network. In Part V, where I set forth a variety of approaches for recognizing caregiving networks, I deal with this concern by noting that legal recognition of nonparental caregivers need not strip parents of decisionmaking authority or otherwise compromise parental autonomy.

<sup>92</sup> Fineman, *Autonomy Myth*, supra note 2, at 34; Linda C. McClain, Care as a Public Value: Linking Responsibility, Resources, and Republicanism, 76 Chi.-Kent L. Rev. 1673, 1679–80 (2001).

<sup>93</sup> See, e.g., Heather S. Dixon, National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success, 36 Colum. Hum. Rts. L. Rev. 561, 563 (2005); Nancy E. Dowd, Work and Family: Restructuring the Workplace, 32 Ariz. L. Rev. 431, 431 (1990).

supporting the ways in which families accommodate care within the private sphere.

Moreover, a broader understanding of caregiving would clarify our understanding of its role in society. Presently, because we focus on parents as caregivers, and fail to recognize the diversity of caregiving arrangements that exist, we overlook the ways in which policy choices concerning caregiving implicate those outside of the parent/child dyad. For example, as part of the ongoing debate on the repercussions of incarceration in minority communities, considerable attention has been paid to the effect of fatherlessness on minority children.<sup>94</sup> The attention to the effects of fatherlessness is laudable, but it does not account for the full measure of caregiving in these, and other, communities. In many minority communities, men who are not fathers may play an important role in “fathering” and mentoring young men and women in the community.<sup>95</sup> By focusing on parents as caregivers, the study of incarceration and its effects is unduly one-dimensional in that it does not account for the effect of nonparental absences in the community.

Finally, legal recognition of caregiving networks and the nonparental caregivers of whom they are comprised would give dignity to these caregivers and their efforts. As many have acknowledged, legal recognition is a powerful expression of the law’s acceptance of particular family arrangements as “normal” and worthy.<sup>96</sup>

The importance of this expressive imprimatur to caregiving should not be understated. Indeed, such validation can be ex-

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<sup>94</sup> See Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. Davis L. Rev. 991, 993–94 (2006) (discussing the wave of public policy attention that has been directed towards fatherlessness in the African-American community); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”*, 6 J. Gender Race & Just. 381, 383 (2002) (observing that the war on drugs has resulted in the mass incarceration of African-American fathers); Dorothy Roberts, *The Absent Black Father*, in *Lost Fathers: The Politics of Fatherlessness in America* 145, 146 (Cynthia R. Daniels ed., 1998) (observing that policymakers have treated “[f]atherlessness . . . as a distinctly Black problem”).

<sup>95</sup> See Nancy Boyd-Franklin & A.J. Franklin, *Boys Into Men: Raising Our African American Teenage Sons* 114 (2000); Danny Perez, *Group Mentors Young Black Men*, *Hous. Chron.*, Aug. 28, 2003, at 6.

<sup>96</sup> See, e.g., Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 *Law & Soc’y Rev.* 869, 904 (1999) (noting that “legal recognition and validation of rights communicate normative judgments about the underlying rights themselves and those who claim them”).

tremely important to those who are at the margins of law and society. For example, in minority communities, departures from the nuclear family ideal frequently are characterized as deviant and pathological, even though they are part of a larger cultural tradition of collaborative care.<sup>97</sup> In these families, an inability or unwillingness to adhere to the autonomous nuclear family ideal often serves as grounds for state intrusion and regulation.<sup>98</sup> Legal recognition of networked care would make clear that reliance on caregiving networks is not a sign of pathological dependence or deviance, but rather is an important aspect of providing care. In this way, legal recognition would honor a wider range of caregiving arrangements as valuable and worthy.<sup>99</sup>

In nonminority families the effect of legal recognition is no less pronounced. For nonparental caregivers, legal recognition acknowledges the hard work and effort that goes into providing care, even when one is not a parent. Legally invisible, nonparental caregivers have limited access to the benefits and support necessary to enable them to provide care both within the parent's network and for their own children within their own caregiving networks.<sup>100</sup> Certainly, paid caregivers receive many of the benefits and entitlements that accrue to paid workers through their employment.<sup>101</sup> However, *unpaid* caregivers—extended family members and

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<sup>97</sup> See, e.g., Office of Pol'y Plan. & Res., U.S. Dep't of Labor, *The Negro Family: The Case for National Action* 29–30 (1965) (identifying “pathologies” within black families, including a disposition towards a matriarchal, rather than nuclear, family form). This report, cowritten by Daniel P. Moynihan and subsequently known as the “Moynihan Report,” caused considerable controversy when it was released. See generally Lee Rainwater & William L. Yancey, *The Moynihan Report and the Politics of Controversy* (1967).

<sup>98</sup> Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 *Am. U. J. Gender & L.* 1, 14 (1993) (reporting that state agencies are more likely to intervene in black homes in part because they depart from accepted family norms).

<sup>99</sup> Cf. Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 *Geo. L.J.* 1871, 1875 (1997) (suggesting, in the context of same-sex relationships, that legal recognition “would . . . constitute a recognition that [such] relationships are normatively valuable”).

<sup>100</sup> See Arlie Russell Hochschild, *The Nanny Chain*, *Am. Prospect*, Jan. 3, 2000, at 32.

<sup>101</sup> These benefits are often quite meager, however. See Katharine Silbaugh, *Grounded Applications: Feminism and Law at the Millennium*, 50 *Me. L. Rev.* 201, 208 (1998) (observing that paid caregivers often receive neither “pay that reflects the importance of the work [nor] employment benefits”).

friends—lack both the status and entitlement of paid workers and parents. They are not eligible for the benefits and protections afforded to paid caregivers as a condition of employment; and because they lack the status of legal parents or guardians, they are ineligible for public caregiving benefits if they are providing care to someone who is not their child or legal dependent.

In short, broader recognition of the way in which parents operate within caregiving networks in order to discharge their caregiving responsibilities would make clear that caregiving responsibilities can be, and in fact are, shared between parents and other caregivers. Greater support for these care networks would honor the communitarian nature of caregiving and would empower and enable parents, and the caregivers upon whom they rely, in discharging these important responsibilities.

#### IV. RECOGNIZING CAREGIVING NETWORKS: LESSONS FROM UNLIKELY SOURCES

As the previous Part showed, there are many reasons to consider shifting the legal paradigm of caregiving from parenthood to one that accommodates caregiving networks and nonparental caregiving. Doing so, however, seems to be a considerable undertaking, as family law lacks a working vernacular for nonparental caregivers and caregiving networks. In this Part, however, I argue that this shift is not without legal precedent. In- and outside of family law, there are contexts where the law recognizes, sometimes purposely and at other times inadvertently, caregiving networks and the importance of nonparental caregiving. In this Part, I describe areas where the law acknowledges the ways in which family caregiving is performed within a network of caregivers. These examples, I argue, demonstrate that the law is able to recognize networks of care when it chooses to do so.

##### *A. Care Networks in Parental Refusal Cases*

Despite the legal understanding of parenting as caregiving, in some situations, the state is willing to look beyond the model of parental care in order to vindicate other interests. One such situation is where a parent refuses lifesaving medical treatment, such as a blood transfusion, on religious grounds. In determining whether or

not to permit parents to refuse lifesaving medical treatment, courts demonstrate acceptance of caregiving networks in the discharge of caregiving responsibilities.

As a general matter, a person's right to refuse medical care for herself for religious reasons is protected under federal and state laws.<sup>102</sup> However, that right is not absolute, and courts may override it if there is a compelling state interest in so doing.<sup>103</sup> The protection of innocent third parties, including children, "is one such interest."<sup>104</sup> Because "[t]he state, as *parens patriae*, will not allow a parent to abandon a child," it will not permit a parent to refuse medical treatment if doing so would result in the parent's death and the constructive abandonment of the child.<sup>105</sup> Accordingly, courts reviewing parental decisions to refuse medical care must balance the parent's right to refuse treatment against the state's interest in ensuring care for minor children.

In balancing these interests, courts presume that "abandonment" is any situation that would result in the child becoming a public charge or a ward of the state.<sup>106</sup> The court's inquiry, then, is focused on whether there is an alternative caregiver who could assume the

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<sup>102</sup> See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"); *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 301 (Ct. App. 1986) ("The right to refuse medical treatment is basic and fundamental."); *Bartling v. Superior Court*, 209 Cal. Rptr. 220, 224 (Ct. App. 1984) ("[A] person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment." (quoting *Cobbs v. Grant*, 502 P.2d 1, 9 (Cal. 1972))); *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 633 (Mass. 1986) ("The law protects [a person's] right to make [his] own decision to accept or reject treatment, whether that decision is wise or unwise." (alteration in original) (quoting *Lane v. Candura*, 376 N.E.2d 1232 (Mass. App. Ct. 1978))).

<sup>103</sup> See *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990) ("Cases decided by this Court have identified state interests in the preservation of life, the protection of innocent third parties, the prevention of suicide, and maintenance of the ethical integrity of the medical profession, and have balanced them against an individual's right to refuse medical treatment.").

<sup>104</sup> *In re Dubreuil*, 603 So. 2d 538, 540 (Fla. Dist. Ct. App. 1992).

<sup>105</sup> See *In re President and Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1000, 1008 (D.C. Cir. 1964).

<sup>106</sup> See *Wons v. Pub. Health Trust*, 500 So. 2d 679, 688 (Fla. Dist. Ct. App. 1987) (reversing decision to coerce medical treatment after concluding that "[w]ithout dispute, these children will not become wards of the state and will be reared by a loving family"), *aff'd*, 541 So. 2d 96 (Fla. 1989).

refusing parent's caregiving responsibilities.<sup>107</sup> In so doing, courts consider whether there is a surviving parent, extended family, or some other support network available to provide for the child's caregiving needs.<sup>108</sup> Where there are other caregivers to assume the parent's caregiving role, courts will permit her to refuse medical treatment.<sup>109</sup> But where alternative caregivers are absent, the state's interest in preventing the child's abandonment overrides the parent's interest in refusing medical treatment.<sup>110</sup> Thus, the court seeks alternative caregivers—who may include parents and nonparents—so that care will remain privatized and will not become the public responsibility of the state.

Beyond seeking alternative caregivers, the parental refusal cases also suggest that courts grappling with this question recognize the important support that caregiving networks and nonparental caregiving offer parents in providing care. For example, in *Public Health Trust v. Wons*, the Florida Supreme Court upheld the right of a Jehovah's Witness to refuse a blood transfusion, even though she was the mother of two minor children.<sup>111</sup> The court conceded that the state is obliged to intervene and require medical treatment when the mother's death will result in the child's abandonment; however, it determined that there was no evidence that the children would be abandoned upon their mother's death.<sup>112</sup> As the court noted approvingly, "in the unfortunate event she were to die, their two children would be cared for by [their father] and [their mother's] mother and brothers."<sup>113</sup>

In *In re Osborne*, the District of Columbia Court of Appeals affirmed a trial court's conclusion that the state's interest in protect-

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<sup>107</sup> See *Pub. Health Trust v. Wons*, 541 So. 2d 96, 103 (Fla. 1989); *Norwood Hosp. v. Munoz*, 564 N.E.2d 1017, 1024–25 (Mass. 1991).

<sup>108</sup> See *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666, 668–69 (Fla. Dist. Ct. App. 1985) (finding no abandonment where child currently resided with other parent and would continue to be cared for by other parent, with the assistance of both parents' families).

<sup>109</sup> See *Wons*, 500 So. 2d at 688 (Fla. Dist. Ct. App. 1987).

<sup>110</sup> *Id.*

<sup>111</sup> 541 So. 2d 96, 97 (Fla. 1989).

<sup>112</sup> See *id.* at 98 ("We hold that the state's interest in maintaining a home with *two* parents for the minor children does not override [the mother's] constitutional rights of privacy and religion."); see also *id.* (Ehrlich, J., concurring specially) (noting that "[t]here would be no abandonment in this case").

<sup>113</sup> *Id.* at 97 (emphasis added).

ing children was insufficient to override a father's decision to refuse medical treatment that conflicted with his religious beliefs.<sup>114</sup> The court agreed that although the father was his family's sole source of financial support, his death would not result in the abandonment of his children.<sup>115</sup> In addition to the children's mother, there was an extensive network of extended family members who were "prepared to [help] care for the children."<sup>116</sup>

The importance of care networks also is recognized in circumstances in which the refusing parent and her partner are estranged. In *In re Dubreuil*, a mother of four children (including a newborn) who was separated from her husband refused a life-saving blood transfusion.<sup>117</sup> The trial court rejected her refusal petition, reasoning that it was unclear whether the estranged husband would be available to care for their children.<sup>118</sup> On appeal, the Florida Supreme Court reversed, finding that "there was no proof . . . that an abandonment would have occurred," as the woman's husband—the children's father—would have assumed custody over the children in the event of her death.<sup>119</sup> But this invocation of the traditional parent/child relationship was not the only ground for the court's decision. The court also credited the fact that, beyond the children's father, there was a broad network of extended family, friends, and fellow church members who "were willing to assist in raising the children in the event of [the mother's] death."<sup>120</sup>

In the parental refusal cases, the court's inquiry into caregiving alternatives is revealing. In these cases, the courts make clear that while society has an interest in ensuring that children are properly cared for, caregiving is not—and need not be—the sole province of parents. Instead, courts recognize that parents work in tandem with nonparental caregivers to provide care successfully.

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<sup>114</sup> 294 A.2d 372, 373 (D.C. 1972).

<sup>115</sup> *Id.* at 374.

<sup>116</sup> *Id.*; see also *id.* (noting that there existed "a close family relationship . . . which went beyond the immediate members, [and] that the children would be well cared for, and . . . the family business would continue to supply [the children's] material needs").

<sup>117</sup> 629 So. 2d 819, 821 (Fla. 1993).

<sup>118</sup> *Id.* (reporting the trial court's conclusion that, in the absence of evidence of "the availability of proper care and custody of the four minor children," the "demands of the state (and society) outweigh[ed]" the mother's right to refuse medical treatment).

<sup>119</sup> *Id.* at 827.

<sup>120</sup> *Id.* at 828.

*B. Cultural Networks of Care: The Indian Child Welfare Act*

As the parental refusal cases demonstrate, courts routinely acknowledge caregiving networks when responding to profound crises in families. This recognition of caregiving networks is not, however, limited to emergency situations. Indeed, law recognizes that the use of caregiving networks may be affirmative choices animated by cultural and practical concerns.

In 1978 Congress enacted the Indian Child Welfare Act (“ICWA”).<sup>121</sup> The Act was a response to tribal concerns that state child welfare agencies were improperly intervening into Indian homes and removing children on the basis of neglect and abuse charges.<sup>122</sup> Upon removal, the children were routinely adopted by white families, severing their cultural ties to the tribe.<sup>123</sup> Finding “that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,”<sup>124</sup> The ICWA vested tribal courts with exclusive jurisdiction “over any child custody proceeding involving an Indian child who resides or is domiciled within” an Indian reservation.<sup>125</sup>

A critical facet of the policy debates surrounding the enactment of the ICWA was the importance of cultural caregiving traditions on the reservation. Prior to the ICWA, child welfare officials routinely would intervene and initiate removal proceedings in circumstances where Indian children were being cared for outside of their homes and by persons other than their parents.<sup>126</sup> The fact that Indian children were not being cared for by their parents was interpreted by child welfare agents as neglect.<sup>127</sup>

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<sup>121</sup> 25 U.S.C. §§ 1901–1963 (2000).

<sup>122</sup> See H.R. Rep. No. 95-1386, at 9 (1978), as reprinted in 1978 U.S.C.C.A.N. 7530, 7431–32; Barbara Ann Atwood, Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity, 36 UCLA L. Rev. 1051, 1055 (1989).

<sup>123</sup> See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–33 (1989) (referring to Senate’s finding that twenty-five to thirty-five percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions).

<sup>124</sup> 25 U.S.C. § 1901(3).

<sup>125</sup> *Id.* § 1911(a).

<sup>126</sup> See H.R. Rep. No. 95-1386, at 10, as reprinted in 1978 U.S.C.C.A.N. 7530, 7532.

<sup>127</sup> See *id.* (observing that the disproportionate removal of Indian children from their families resulted from ignorance “of Indian cultural values and social norms [in making] decisions that are wholly inappropriate in the context of Indian family life”); Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*,

Tribal advocates argued, and Congress agreed, that these removals were a result of cultural chauvinism.<sup>128</sup> That is, child welfare agencies were operating under Anglo-American middle-class family norms in which children were raised in a nuclear family setting by their parents.<sup>129</sup> These norms, in Congress's judgment, were out of step with tribal culture, which operated under a more communitarian ethos.<sup>130</sup> Tribal cultural traditions embraced cooperative caregiving in which tribal members shared caregiving responsibilities for children.<sup>131</sup> Accordingly, children growing up in the tribal setting might live with and be cared for by a range of caregivers, including their parents, extended family members, and tribe members.<sup>132</sup>

Indeed, the ICWA's provisions reflected directly this cultural understanding of collaborative caregiving. Not only did the Act vest tribal courts with exclusive jurisdiction over child welfare pro-

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31 Hastings L.J. 1287, 1294 (1980) (noting that "non-Indian professionals have considered leaving a child with persons outside the nuclear family as evidence of neglect and as grounds for removal of the child").

<sup>128</sup> See 25 U.S.C. § 1901(5) (finding "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families").

<sup>129</sup> See Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 Ark. L. Rev. 327, 375 (1986) ("Many social workers did not understand the Indian tradition of the extended family and the part relatives had always played in the upbringing of children. They viewed a mother's leaving her children with relatives as a sign of neglect.").

<sup>130</sup> See H.R. Rep. No. 95-1386, at 10, *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7532 ("[A]n Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.").

<sup>131</sup> See Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 Neb. L. Rev. 577, 640 (2000) (noting that in many tribes, "kinship systems—including uncles, aunts, grandparents, and other extended family members—play an essential role in the care and education of children").

<sup>132</sup> See *id.* at 640–41 ("While parents might assume responsibility for the basic guidance of the child, extended family members often have distinct child-rearing responsibilities."); see also U. S. Dep't of Health and Human Servs., *Strengthening the Circle: Child Support for Native American Children* 38 (1998) (noting that in tribes in the Southwestern United States, "grandparents are the disciplinarians of the children in the family" and that in the Jicarilla Apache Nation "maternal aunts are considered mothers to all maternally-related nieces and nephews").

ceedings involving Indian children domiciled on the reservation, it also instructed state courts, in those cases over which they retained jurisdiction, to make decisions in a manner that reflected Indian cultural traditions. Accordingly, in adoptive placements of Indian children under state law, states were instructed, in the absence of good cause to the contrary, to give preference “to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”<sup>133</sup> On the one hand, this mandate reflected the understanding that the survival of the tribes depended on their ability to retain and increase their membership.<sup>134</sup> On the other hand, to a certain extent, the mandate also reflected the structure of caregiving within the tribal system. By requiring state courts to place children with extended family members or other members of the tribes even when the state’s typical social services policies would have understood Indian caregiving arrangements to be deviant and neglectful, the ICWA’s specific order of preference for Indian adoptive placements underscored the propriety of the tribal caregiving network.<sup>135</sup>

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<sup>133</sup> 25 U.S.C. § 1915(a).

<sup>134</sup> It should be noted that in enacting the ICWA, Congress made clear that its legislative authority in the area stemmed from the peculiar nature of the relationship between the federal government and the tribes. H.R. Rep. No. 95-1386, at 13–17, *as reprinted in* 1978 U.S.C.C.A.N 7530, 7535–40 (arguing that the ICWA was justified as an exercise of Congress’s plenary authority over relations with Indian tribes). In this manner, one might argue that the ICWA’s endorsement of tribal caregiving norms constructs a dichotomy in which Anglo-American caregiving norms continue to be credited as mainstream, while tribal caregiving norms continue to be considered exceptional and are credited only for the purpose of honoring the unique relationship between the tribes and the federal government. Similar collaborative caregiving norms thus go unrecognized when they do not implicate the special relationship between the federal government and the Indian tribes. See *supra* notes 97–99 and accompanying text. This account, however, does not necessarily mean that there are no lessons to be drawn from the ICWA, but it does suggest that even in circumstances where departures from accepted caregiving norms are permitted, such validation is constrained by the continued force of the accepted understanding of caregiving and caregivers.

<sup>135</sup> Of course, § 1915(a)’s mandate also reflected the importance of raising Indian children within the tribal culture. As the Supreme Court noted, the ICWA was also animated by concerns regarding the self-preservation and sovereignty of tribes, both of which would be compromised if Indian children—“the only real means for the transmission of the tribal heritage”—were raised outside of the tribal setting. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) (quoting a Choctaw Tribal Chief).

At its core, the ICWA reflects acceptance of a cultural tradition in which networked caregiving, rather than autonomous parental caregiving, is the norm. By giving tribal courts jurisdiction in proceedings involving Indian children domiciled on the reservation, and mandating adoptive placements within the tribal caregiving network for those children not under tribal jurisdiction, the ICWA privileges the communitarian caregiving norms that pervade many tribal cultures. Moreover, the Act makes clear the importance of caregiving networks as both an artifact of and a vehicle for transmitting Native American culture.

*C. Recognizing Networks of Care in Public Assistance: USDA v. Moreno*

Legal recognition of caregiving networks goes beyond the cultural context identified by the ICWA to include more utilitarian concerns. In *United States Department of Agriculture v. Moreno*,<sup>136</sup> the Supreme Court acknowledged the importance of caregiving networks in the lives of the impoverished. In *Moreno*, the Court reviewed an amendment to the Food Stamp Act that excluded from participation in the food stamps program any household containing an individual who was unrelated to any other member of the household.<sup>137</sup> The class of plaintiffs challenging the amendment included Jacinta Moreno, a fifty-six-year-old diabetic, who shared a household with Ermina Sanchez and Sanchez's three children.<sup>138</sup> Although they were not biologically related, the two women "share[d] common living expenses, and Mrs. Sanchez help[ed] to care for [Moreno]."<sup>139</sup> The other two representative plaintiffs, like Moreno, shared a household with an unrelated person in order to provide care to one another<sup>140</sup> and "make the most of [their] limited

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<sup>136</sup> 413 U.S. 528 (1973).

<sup>137</sup> *Id.* at 530.

<sup>138</sup> *Id.* at 531.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 532 (noting that Appellee Sheila Hejny's household took in an unrelated "20-year-old girl" because they "felt she had emotional problems"); see also *id.* at 541 (Douglas, J., concurring) ("This case involves desperately poor people . . . who, though unrelated, come together for mutual help and assistance.").

resources.”<sup>141</sup> All of the plaintiffs risked losing their food stamp eligibility because their households included unrelated persons.<sup>142</sup>

The Court struck down the amendment, concluding that the restriction on household composition was “clearly irrelevant” to the Act’s stated purpose of alleviating hunger and malnutrition among the poor.<sup>143</sup> Indeed, as the Court noted, the amendment was a legislative attempt to restrict “hippies and hippie communes” from participating in the food stamp program.<sup>144</sup> The restriction had the desired effect, but “in practical operation, [it] exclude[d] from participation in the food stamp program” those “so desperately in need of aid that they [could not] even afford to alter their living arrangements so as to retain their eligibility.”<sup>145</sup>

While the *Moreno* Court did not specifically acknowledge the challenged household arrangements as caregiving networks, they obviously were. *Moreno* and the other representative plaintiffs banded together with those to whom they had no biological or legal ties, but who shared their desperate circumstances. Alone, they did not compromise their eligibility for food stamps, but they nonetheless struggled to meet their caregiving obligations. Coming together to share a household and financial and caregiving resources diverged from the ideal of the independent family, but it permitted the plaintiffs to stretch their limited resources and improve their situations.

In striking down the amendment, the Court recognized that, for those on the margins, banding together to care for one another in a shared home was an arrangement that served important emotional and material needs. And, importantly, the Court signaled that

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<sup>141</sup> *Id.* at 532 (noting that Appellee Victoria Keppler chose to share an apartment with an unrelated woman because it was located near the school where Keppler’s deaf daughter was a student, and that, otherwise, Keppler could not have afforded housing in the neighborhood).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 534.

<sup>144</sup> *Id.* at 537 (quoting with approval the California Director of Social Welfare’s “understanding that the Congressional intent of the new regulations are specifically aimed at the ‘hippies’ and the ‘hippie communes’”); see also *id.* at 534 (“The legislative history that does exist . . . indicates that that amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”).

<sup>145</sup> *Id.* at 538.

these caregiving networks were arrangements that the government should support, rather than impede.

*D. Contracting for Networks: Open Adoption and Genetic Donors*

In addition to these narrow circumstances where the state recognizes diverse caregiving situations, there also are scenarios where individuals obtain recognition of their caregiving networks by memorializing their arrangements in private contracts. In open adoptions and some same-sex parenting arrangements, the parties use contracts to go beyond the legal paradigm of parental caregiving to endow with responsibilities and rights caregivers who are not legal parents and thus would not otherwise obtain them.

The term “open adoption” refers to an adoption arrangement in which the adoptive parents and the birth parents agree to permit the birth parents or members of the birth family enforceable post-adoption visitation rights.<sup>146</sup> The practice developed in the late 1970s as an answer to the common practice of closed adoptions in which the birth parents’ legal ties to the child were severed, the original birth certificate destroyed, and a new birth certificate bearing the names of the adoptive parents issued.<sup>147</sup> Closed adoptions achieved finality in adoptions, creating a new set of parents and erasing the birth parents;<sup>148</sup> however, the practice was criticized on the ground that it infringed upon the privacy rights of the parties.<sup>149</sup>

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<sup>146</sup> See Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. Rev. 997, 1001 (1995); see also Young, *supra* note 9 at 508 (“[W]hile adoption traditionally severed all links with the biological family in favor of the new family, ‘open adoption,’ which allows the birth mother a continuing role, is becoming increasingly common.”).

<sup>147</sup> Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. Pa. J. Const. L. 150, 157 (1999). One might argue that the emphasis on finality and the creation of a new nuclear family reflects the legal construction of caregiving as an exclusively parental enterprise. That is, the emphasis on closure and finality in adoption procedures is designed to promote the severance of ties between the child and his or her biological family and the creation of new ties between the child and the adoptive parents who have assumed the responsibilities and obligations of caregiving. See Carol Sanger, *Separating from Children*, 96 Colum. L. Rev. 375, 441 (1996) (“Because our legal system permits a parent-child relationship to exist between a child and only one set of parents at a time, adoption requires a separation between the child and his natural parents.”).

<sup>148</sup> See Sanger, *supra* note 147, at 489.

<sup>149</sup> See Cahn & Singer, *supra* note 147, at 157–59. But cf. *Doe v. Sundquist*, 106 F.3d 702, 704 (6th Cir. 1997) (hearing an appeal in which birth mothers objected to a state

While adoptees were undoubtedly happy to have loving parents, many wanted more information about and contact with their birth parents.<sup>150</sup> Essentially, many longed for something the law did not allow: a caregiving arrangement that contemplated both parental caregiving and a relationship with someone who was not considered a legal parent. For their part, some birth parents chafed at terminating all contact with the child, as adoption required.<sup>151</sup> Instead, they wished to remain in contact with the child, even if they did not play a traditional parental role.<sup>152</sup> Accordingly, open adoption provided a workable solution. In participating jurisdictions, the parties memorialize their agreement for contact and visitation, and the agreement is then approved by the court as part of the final adoption decree.<sup>153</sup>

The concept of open adoption also helped shape the contours of same-sex parenting. Unable to adopt through public agencies,<sup>154</sup> many same-sex couples pursued private and independent agency adoptions, where open adoption is more common. In many cases where gay and lesbian couples adopted, there was an agreement to permit the birth parent some kind of post-adoption access to the child.<sup>155</sup>

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law disclosing closed adoption records on the ground that the disclosure violated their privacy interests in having the records remain confidential).

<sup>150</sup> See Appell, *supra* note 146, at 1015–18.

<sup>151</sup> See *id.* at 1018–19.

<sup>152</sup> *Id.*

<sup>153</sup> The following state statutes authorize courts to recognize private visitation agreements in certain specified situations: Alaska Stat. § 25.23.130(c) (2006); Cal. Fam. Code § 8616.5 (West 2004); Ind. Code Ann. § 31-19-16-1 (LexisNexis 2003); Neb. Rev. Stat. Ann. §§ 43-162 to 43-164 (LexisNexis 2005); N.M. Stat. Ann. § 32A-5-35 (West 2003); N.Y. Soc. Serv. Law § 383-c (McKinney Supp. 2007); Or. Rev. Stat. Ann. § 109.305(2) (West 2003); Vt. Stat. Ann. tit. 15A, § 4-112 (2002); Wash. Rev. Code Ann. § 26.33.295 (West 2005); W. Va. Code Ann. § 48-22-704 (LexisNexis 2004); Wis. Stat. Ann. § 48.925 (West 2003).

<sup>154</sup> See, e.g., *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (upholding law prohibiting adoption by gays and lesbians).

<sup>155</sup> See, e.g., *In re M.M.D.*, 662 A.2d 837, 840–41 (D.C. 1995) (describing the parties’ open adoption arrangements); Dan Savage, *The Kid: What Happened After My Boyfriend and I Decided to Go Get Pregnant* 172–76 (1999) (describing the process by which a birth mother and the adopting couple agreed to ongoing contact between the child, adoptive parents, and birth mother); cf. Esther B. Fein, *Secrecy and Stigma No Longer Clouding Adoptions*, N.Y. Times, Oct. 25, 1998, at A1 (discussing the open adoption arrangements between two heterosexual couples).

Open adoption also shaped the use of artificial reproductive technologies (“ART”) as a vehicle for parenthood within the same-sex community. Typically involving a sperm or ovum donation, or a gestational surrogate, ART routinely resulted in a new and different parenting paradigm.<sup>156</sup> Instead of the traditional mother/father dyad, there was a multiplicity of arrangements—two mothers and a sperm donor; two fathers and a surrogate; or two mothers, a sperm donor, and the sperm donor’s partner.<sup>157</sup> Further, there was no longer the expectation that a child would be created by technological innovation and third-party assistance and then parented in a traditional fashion. Instead, many donors and surrogates wished to maintain contact with the family they helped create; and many of those who became parents via ART actively solicited the presence and caregiving assistance of those who contributed to the creation of the child by providing genetic material or through gestation.<sup>158</sup> Using the contract principles employed in open adoption, same-sex couples and genetic donors and surrogates structured private agreements permitting donors and surrogates ongoing contact with the child, even as the couple assumed the status of legal parents.<sup>159</sup>

In this vein, agreements specifying contact between a child and someone who is not a legal parent can be read as an attempt to contract around a legal default that understands caregivers as parents.<sup>160</sup> In these circumstances, parents and nonparents formally

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<sup>156</sup> See Janet L. Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* 1–6 (1997); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 *B.U. L. Rev.* 227, 293–94 (2006).

<sup>157</sup> See John Bowe, *Gay Donor or Gay Dad?*, *N.Y. Times Magazine*, Nov. 19, 2006, at 66, 69.

<sup>158</sup> See *id.*; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 *J. L. & Fam. Stud.* (forthcoming 2008) (manuscript at 17–21), available at <http://ssrn.com/abstract=1012333>.

<sup>159</sup> Bowe, *supra* note 157, at 69.

<sup>160</sup> This is not the only context in which contract theory has been used to recognize legally relationships that do not comport with legal understandings of the family. See *Marvin v. Marvin*, 557 P.2d 106, 122 (1976) (recognizing an oral agreement for support between unmarried cohabitants); see also Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 *Yale L.J.* 1885, 1890–91 (1998) (explaining that nineteenth-century courts relied on contract principles in recognizing common law marriages). Contract, however, may be unavailing as a means of conferring legal recognition on unorthodox family situations. See, e.g., *In re Baby M*, 537 A.2d 1227, 1840–50 (N.J. 1988) (refusing to recognize a surro-

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agree upon some sort of limited role that the nonparent will play in the child's life. As with some same-sex couples and their donors, it may be a caregiving role complete with some rights and responsibilities. Alternatively, it may simply be an agreement for ongoing contact between the child and the nonparent. In either case, the agreements provide a way to recognize through law the network that exists between the legal parents, child, and nonparent.

More importantly, the agreements are a means of exploring the continuum that exists between the legal categories of parent and stranger. Through these contracts, the parties specify the scope of the caregiving role, delineating—and frequently, restricting—the nature of rights and responsibilities. Accordingly, these agreements contemplate a range of caregiving roles, making clear that caregiving and caregivers need not subscribe exclusively to the parental template.

*E. Recognizing Networks of Care in Federal Sentencing Decisions*<sup>161</sup>

All of the foregoing examples demonstrate that the law is capable of recognizing care networks, particularly when there are other normative commitments at stake beyond vindicating a particular understanding of family life. Additionally, all of the previous sce-

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gacy contract); see also Bowe, *supra* note 157, at 69 (noting that contracts for an ongoing caregiving relationship between a child and a genetic parent are of “little legal weight”).

<sup>161</sup>At the outset, I wish to make clear that my discussion of the way in which federal sentencing courts view caregiving in the sentencing calculus is not intended to rationalize or endorse the treatment of families and children under the Guidelines. As many federal judges have discussed, the sentencing calculus is often deeply insensitive to the consequences of incarceration for both the defendant and the defendant's family. See, e.g., Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 *Colum. J. Gender & L.* 169, 169 (1996) (describing the Guidelines as “so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep”); see also *United States v. Jurado-Lopez*, 338 F. Supp. 2d 246, 254 n.17 (D. Mass. 2004) (referring to the Guidelines as “cruel”). Indeed, a defendant's family circumstances “are not ordinarily relevant” in the calculation of his sentence. U.S. Sentencing Guidelines Manual § 5H1.6 (2006). In order to punish—and to standardize punishment across offenders—the Guidelines do not focus on the security of the family unit or the development of children, both of which are primary concerns in family law. That said, the Guidelines are nonetheless illuminating because they are an area where, in order to punish, law recognizes and acknowledges the degree to which families have relied—and may continue to rely—on the assistance of outside caregivers.

narios can be understood as situations in which the recognition of caregiving networks accrues to the benefit of either the family, or, in the parental refusal cases, at least to an individual within the family. The following example—the use of the extraordinary family circumstances departure in the United States Sentencing Guidelines (“the Guidelines”)—is more challenging precisely because it is one in which the recognition of caregiving networks does not have benign or beneficial outcomes for the family. Instead, the outcomes can be deeply problematic for families.

In offering this caveat, I do not mean to suggest that the sentencing cases are less effective examples of the legal recognition of networked caregiving than those previously discussed. Indeed, the sentencing context provides a useful venue for considering the way in which the state deviates from the prevailing understanding of parenting as caregiving. However, the sentencing context also makes clear that, as with so many aspects of legal regulation, recognizing networked caregiving may lead to benign *and* malignant effects. This is not to say that greater recognition of networked care is undesirable, or that lessons drawn from the sentencing context are inapt. Instead, using the Guidelines to consider greater recognition of networked care may be a way to “make lemonade” out of what is clearly a bitter and vexed circumstance. At the very least, the sentencing context demonstrates that inherent in legal recognition of relationships is the possibility that such recognition may be used for good or for ill.

Like the foregoing examples, the Guidelines mark an approach to dealing with the family that takes into consideration the use of family caregiving networks. While the Guidelines specify that “ordinarily” family circumstances will not factor into sentencing decisions,<sup>162</sup> courts have interpreted policy statements and statutory language to conclude that *extraordinary* family circumstances may be considered and may warrant departure from the prescribed Guidelines range.<sup>163</sup> In order to receive a departure for extraordi-

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<sup>162</sup> See U.S. Sentencing Guidelines Manual §§ 5H1.1–1.6 (2007) (listing several individual offender characteristics that are “not ordinarily relevant” to sentencing decisions, including age, educational and vocational skills, mental and emotional conditions, physical condition, employment record, and family ties).

<sup>163</sup> See, e.g., *United States v. Rivera*, 994 F.2d 942, 953 (1st Cir. 1993) (Breyer, C.J.) (noting that district courts have authority to depart “in ‘unusual cases’ and where

nary family circumstances, the defendant must establish that he is an “irreplaceable” caregiver<sup>164</sup>—that is, there are no “feasible alternatives of care that are relatively comparable to what the defendant provides.”<sup>165</sup>

In making this determination, the court, using information provided in the presentencing report, considers the defendant’s caregiving responsibilities and whether there are alternative caregivers who could assume the defendant’s caregiving responsibilities. In identifying an alternative caregiver, sentencing courts take a broad view of the way in which the defendant discharges his caregiving responsibilities. Courts will consider whether there is someone in the defendant’s immediate family (spouse, adult children) who would be able to assume her responsibilities if she were incarcerated; however, the courts also will consider whether there are other caregivers, such as extended family, friends, or paid caregivers, upon whom the defendant has relied in the past, and could rely on in the future, to help discharge her caregiving responsibilities.

For example, in *United States v. Pereira*, the U.S. Court of Appeals for the First Circuit vacated a downward departure on the

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family circumstances are out of the ‘ordinary’”); *United States v. Peña*, 930 F.2d 1486, 1495 (10th Cir. 1991) (“[T]here may be extraordinary circumstances where family ties and responsibilities may be relevant to the sentencing decision.”); *United States v. Sharpsteen*, 913 F.2d 59, 63 (2d Cir. 1990) (“The clear implication of section 5H1.6 is that if the court finds that the circumstances related to family ties and relationships are extraordinary, it is not precluded as a matter of law from taking them into account in making a downward departure.”). This conclusion relies on Guidelines § 5K2.0, which provides that characteristics or circumstances deemed “not ordinarily relevant” may nonetheless be relevant in determining whether to grant a departure from the otherwise applicable Guidelines sentence if “present to an exceptional degree.” U.S. Sentencing Guidelines Manual § 5K2.0(a)(4).

<sup>164</sup> *United States v. Bueno*, 443 F.3d 1017, 1023–24 (8th Cir. 2006) (concluding that, in contrast to other successful departure cases, defendant had not demonstrated that he was an irreplaceable caregiver to his wife); *United States v. Sweeting*, 213 F.3d 95, 104 (3d Cir. 2000) (“[T]here is nothing . . . indicating that [defendant] is so irreplaceable that her otherwise ordinary family ties and responsibilities are transformed into the ‘extraordinary’ situation warranting a departure . . .”); *United States v. Haverstat*, 22 F.3d 790, 797 (8th Cir. 1994) (granting departure because defendant was “an ‘irreplaceable’ part of [the physician’s] treatment plan for [defendant’s wife]”).

<sup>165</sup> *United States v. Pereira*, 272 F.3d 76, 83 (1st Cir. 2001); see also *United States v. Spero*, 382 F.3d 803, 805 (8th Cir. 2004) (departing on ground that defendant’s presence was “critical to a [developmentally disabled] child’s well-being”); *United States v. Scalamo*, 997 F.2d 970, 974 (1st Cir. 1993) (departing where defendant played “critical and unique” role in stepson’s mental health treatment).

ground that the defendant was not an “irreplaceable” caregiver to his elderly and disabled parents.<sup>166</sup> Although the defendant was the primary caregiver for his parents, performing shopping, household maintenance, food preparation, and personal care, the court determined that the record was “replete with evidence demonstrating alternative sources of care.”<sup>167</sup> Specifically, the defendant had adult siblings who were available to care for his parents, and, importantly, he routinely relied on a longtime family friend to help him with his caregiving responsibilities.<sup>168</sup> In short, the defendant had a caregiving network that assisted him in the past, and could be called upon to perform these tasks in the future. Similarly, in *Elliott v. United States*, the Fourth Circuit vacated a downward departure on the ground that the record disclosed that the defendant had a “strong family and community support network” that could care for her seriously ill husband during her incarceration.<sup>169</sup>

Critically, even where the defendant has a spouse or coparent able to assume her family caregiving responsibilities, sentencing courts also credit the fact that there is a broad support network in place to support the spouse or coparent during the defendant’s incarceration. In *United States v. McClatchey*, the court vacated a downward departure, finding that the defendant’s “constant presence in the home [was not] an indispensable part of his [emotionally disabled] son’s care.”<sup>170</sup> In so doing, the court acknowledged the difficulty of this task, but reasoned that, “[g]iven [defendant]’s net worth of more than \$1 million, additional caregivers could be hired to assist [defendant’s wife] if necessary.”<sup>171</sup>

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<sup>166</sup> 272 F.3d at 82.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> 332 F.3d 753, 769 (4th Cir. 2003).

<sup>170</sup> 316 F.3d 1122, 1132–33 (10th Cir. 2003).

<sup>171</sup> *Id.* at 1133; see also *United States v. Stefonek*, 179 F.3d 1030, 1038 (7th Cir. 1999) (speculating that professional educational psychologists were available to assist with defendant’s son’s learning problems); *United States v. Scoggins*, 992 F.2d 164, 166 (8th Cir. 1993) (affirming denial of downward departure and noting that, with proceeds from defendant’s spendthrift trust, defendant’s husband could engage paid caregivers to assist with childcare during defendant’s absence); cf. *United States v. Dominguez*, 296 F.3d 192, 199 & n.19 (3d Cir. 2002) (remanding and suggesting that where defendant was only available caregiver to ill, elderly parents and was unable to afford paid caregiving, circumstances might be sufficiently extraordinary to warrant departure).

Under the courts' analyses, it is only in rare cases where there is no alternative caregiver and no caregiving network in place that the defendant will be deemed "irreplaceable" and the family circumstances considered sufficiently extraordinary to warrant a departure.<sup>172</sup> In this way, the sentencing context, however inadvertently, makes a profound statement about the quotidian operation of family life. Although sentencing courts are baldly seeking an alternative that will allow the defendant to be punished, in so doing, they recognize the degree to which families routinely rely on caregiving networks in order to discharge their responsibilities. And although they do so to punish harshly, the sentencing courts credit the fact that caregiving responsibilities may be shared between nuclear family members and their broadly constituted care networks.

In short, federal sentencing law makes clear that the *ordinary* family is not the independent nuclear entity venerated in family law. Instead, parents and spouses within the nuclear family unit are part of a broader network of care that enlists extended family, friends, community resources, and paid caregivers to discharge caregiving obligations. In this light, caregiving networks are not extraordinary, but rather are part of the everyday rhythm of family life. In contrast, families in which nuclear family members perform their tasks in splendid isolation, with no caregiving networks upon which they may rely, are constructed *explicitly* as *extraordinary*. Such extraordinary situations, sentencing decisions suggest, may include single parents without available alternative caregivers in their extended families or community networks, and families in which potential alternative caregivers are unavailable or are simply unable—through mental or physical incapacitation or financial in-

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<sup>172</sup> *United States v. Archuleta*, 128 F.3d 1446, 1450 (10th Cir. 1997) (noting that only the "rare" case will justify a departure on the basis of extraordinary family circumstances); *United States v. Tucker*, 986 F.2d 278, 280 (8th Cir. 1993) (observing that departures are "intended to be quite rare" (citation omitted)). Indeed, in 2002, the last year for which statistics are available, departures based on family ties and responsibilities constituted a mere 3.7% of the 10,995 total departures. U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* 52, tbl. 25 (2002). Of course, the changes wrought by *United States v. Booker* now provide sentencing courts with broader discretion to depart in these circumstances. 543 U.S. 220, 245 (2005) (holding, in order to remedy the Sixth Amendment violation posed by the mandatory Guidelines system, that the Guidelines are now "effectively advisory").

ability—to shoulder the defendant’s caregiving responsibilities.<sup>173</sup> In either circumstance, sentencing law suggests that the ideal of the atomistic nuclear family caregiving unit is an aberration in modern family life.

#### *F. Choosing to Recognize Caregiving Networks*

From sentencing to open adoption, these disparate examples all stand for the proposition that expanding our understanding of caregiving to include legal recognition of caregiving networks and nonparental caregivers is not an impossible task. Indeed, when it chooses to do so, the law recognizes the importance of caregiving networks and nonparental caregivers in family life.

All of these situations might be seen as exceptional circumstances in that, in all of them, the recognition of networked care is in response to some sort of family crisis—criminal prosecution, the need for lifesaving medical treatment, the removal of children by the state. Indeed, it is perhaps unsurprising that in a situation where a parent faces death or incarceration, the state will recognize the role that nonparents have played in helping the parent discharge her caregiving responsibilities. In these circumstances, recognition of the parents’ caregiving network may be a means of supporting families during their most difficult moments.<sup>174</sup>

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<sup>173</sup> See, e.g., *United States v. Deutsch*, 104 Fed. Appx. 202, 203 (2d Cir. 2004) (affirming departure where defendant’s wife was “unemployed and had no skills or experience to obtain employment” and “suffered from a medical condition that prevented her from caring for the couple’s children without [defendant’s] assistance,” and where “none of the several relatives . . . was financially capable of caring for [defendant’s] wife and children for any extended period of time” because of their own family responsibilities); *United States v. Leon*, 341 F.3d 928, 932–33 (9th Cir. 2003) (upholding a departure where defendant’s wife was critically ill and unable to care for herself or financially support herself); *United States v. Galante*, 111 F.3d 1029, 1035 (2d Cir. 1997) (upholding departure where defendant provided substantial support for two children and defendant’s wife spoke only limited English, impairing her ability to seek and maintain employment); cf. *United States v. Smith*, 331 F.3d 292, 294 (2d Cir. 2003) (rejecting departure where defendant supported only one young child and his wife was capable of working, although she would have had to drop out of college to do so).

<sup>174</sup> It is worth noting that in all of the circumstances discussed, caregiving networks already were in place, but had gone unacknowledged by the state. Indeed, the state was prompted to recognize a caregiving network only because of a crisis within the family—criminal prosecution, the loss of food stamps, a need for lifesaving medical treatment, or the removal of a child from his family and community. The state’s will-

However, it is also worth noting that in these same situations—sentencing and parental refusal of medical treatment in particular—the state’s interest in recognizing caregiving networks may not be entirely altruistic or profamily. Indeed, in these circumstances, the state’s recognition of caregiving networks may be animated by other normative commitments. For example, in the sentencing context, while the state may recognize caregiving networks in an effort to bridge the caregiving gap created by a parent or family member’s incarceration, the gap itself is created by the state’s own normative commitment to punishment. Thus, the recognition of the caregiving networks and alternative caregivers also might be seen as evidence of the state’s decision to balance other normative commitments, like punishment, against family preservation and the best interests of dependents. Further, in both the sentencing and parental refusal cases, the state’s recognition of caregiving networks draws heavily on a cultural norm favoring privatizing care within the family unit.

Of course, the state does not recognize caregiving networks solely to achieve its own ends. In the parental refusal cases, the recognition of networks and nonparental caregivers also stems from a constitutional commitment to free exercise of religion and individual autonomy. And, as the ICWA and *Moreno* demonstrate, the state may choose to recognize caregiving networks to honor the culture and sovereignty of a group, or to acknowledge the utility of these arrangements for the economically marginalized. Whatever the context, recognizing caregiving networks and nonparental caregivers is a choice that the state makes, and this choice may be prompted by a range of values and normative commitments.

By the same token, when the law declines to recognize caregiving networks and nonparental caregivers, this too is a choice. Again, *Moreno* is instructive. As the Court noted, the amendment that prohibited unrelated households from participating in the food stamp program was not animated by a desire to penalize the poor.

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ingness to recognize networked care only where there is a crisis situation demonstrates the persistence of the norm of family privacy that attends family caregiving decisionmaking. As discussed earlier, families are free to structure their caregiving arrangements however they choose. But these arrangements are invisible to the state unless, as these circumstances suggest, a crisis prompts state intervention. See *supra* Section II.A for a discussion of the private character of caregiving.

Instead, it was motivated by anti-hippie impulses. Essentially, Congress wanted to prevent members of the counterculture, who rejected capitalism and its values, from accessing means-tested social welfare vehicles.<sup>175</sup> In refusing to recognize the caregiving networks formed by unrelated persons who shared a household, Congress was affirmatively rejecting the counterculture and its assault on traditional values.

And when the law is reluctant to recognize caregiving networks in other contexts, this too is a choice that may be motivated by other concerns. Legislators and judges might believe that parents are “natural” caregivers. Alternatively, the decision might be informed by normative commitments that favor marriage and the traditional parenting structures that it engenders. Whatever the catalyst, the point remains that when these networks are recognized—and when they are not—a choice has been made, and it is a choice that affects the ways in which families operate in providing care.

#### V. TOWARDS GREATER RECOGNITION OF THE NETWORKED FAMILY

As the foregoing account asserts, caregiving occurs through the efforts of parents and nonparents who function cooperatively as part of a broader caregiving network. In characterizing caregiving as an exclusively parental enterprise, family law acknowledges only the extremes of caregiving—parent or stranger. It is unable to acknowledge the vast caregiving continuum that exists between these two extremes. Yet, as we understand intuitively and practically, there are those who provide care, but who are neither parents nor strangers. How then should the law address and account for those who function in the interstices between these extremes?

In this Part, I argue that we can better understand and theorize this continuum, and the nonparental caregivers who occupy it, by reframing the legal understanding of caregiving and caregivers to acknowledge and recognize the degree to which caregiving is the cooperative enterprise of parents and nonparental caregivers. Certainly, as I suggested earlier, family law’s coupling of parental

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<sup>175</sup> *Moreno*, 413 U.S. at 534 (discussing the legislative history of the challenged amendment).

rights and caregiving responsibilities has thus far precluded a more developed legal account of caregiving networks and the caregiving contributions of nonparents.<sup>176</sup> However, as the examples offered in Part IV suggest, although the law generally ignores the existence of networked caregiving throughout family law, in some cases it is acknowledged purposefully. Here, I argue that the law could take a more intentional approach by acknowledging networked caregiving both in crisis situations, like the ones detailed in Part IV, and more generally in family life.

Accordingly, in this Part, I call for a theory of caregiving that acknowledges and recognizes caregiving networks as a means of facilitating and enabling caregiving. To be clear, in articulating the contours of how we might begin to theorize the continuum between parent and stranger, I do not advocate any particular solution. Instead, my goal is to sketch possible approaches for a broader theory of networked caregiving, and to identify possible implications of these approaches.

To this end, I first situate this imperative within existing family law literature and doctrine that seek to reconcile law with the reality of family life on the ground in order to better support families and caregiving. I then turn to contemporary attempts to retheorize adult intimate relationships in the context of marriage and alternatives to marriage as a means of articulating potential approaches for theorizing the caregiving continuum. Finally, I assess the parameters and implications of these approaches and invite further discussion and inquiry into this important, but relatively unexplored, area of family law.

#### *A. The Networked Family in Context*

A theory that acknowledges the degree to which parents function as parts of caregiving networks in discharging their caregiving obligations would comport with recent developments in family law scholarship and doctrine. Over the last thirty years, family law scholars and feminist legal theorists challenged many of the basic assumptions undergirding family law doctrine.<sup>177</sup> Taking seriously

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<sup>176</sup> See *supra* Part II.

<sup>177</sup> See Meyer, *supra* note 36, at 125 (noting that in the last four decades, American family law “has been undergoing a most dramatic transformation”).

the notion that family law should support the ways in which families operate, these scholars have challenged two of the major principles of family law—the legal understanding of the family as a marital, nuclear family, and the understanding that caregiving is a private, rather than public, responsibility.

As to the first principle, scholars noted the disjunction between family law's preference for the marital nuclear family and the fact that many families did not comport with the nuclear family ideal.<sup>178</sup> Accordingly, they called for a more expansive legal account of the family, one that would permit legal recognition of those who were not legally or biologically related.<sup>179</sup> These scholars argued that those who function in the manner of family members ought to be entitled to legal recognition as such.<sup>180</sup>

Scholars also took issue with the characterization of caregiving as a private family matter, rather than as a public responsibility.<sup>181</sup> Emphasizing the private character of caregiving, they argued, absolved the state of any responsibility to assist families in providing care, and, critically, contributed to the devaluation of caregiving and caregivers.<sup>182</sup> As many argued persuasively, if family law aimed

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<sup>178</sup> See, e.g., Janet L. Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* 4, 29 (1997) (acknowledging that few families comport with the traditional nuclear form); Mary Ann Glendon, *The Transformation of Family Law* 4–6 (1989) (noting the change in the institution of the family over time to include families in many forms); Kris Franklin, Note, “A Family Like Any Other Family:” Alternative Methods of Defining Family in Law, 18 *N.Y.U. Rev. L. & Soc. Change* 1027, 1032 (1990–91) (noting that the law incorporated the nuclear family as the cultural norm, but “the nuclear family as a cultural ideal does not accurately reflect the reality of many families today”).

<sup>179</sup> See, e.g., Mary Patricia Treuthart, *Adopting a More Realistic Definition of “Family,”* 26 *Gonz. L. Rev.* 91, 123 (1991) (acknowledging that “[v]arious options are available to formulate a workable and more realistic definition of the family”); Franklin, *supra* note 178, at 1032 (arguing that the legal definition of the family should reflect the social realities of different kinds of families).

<sup>180</sup> See, e.g., Franklin, *supra* note 178, at 1032.

<sup>181</sup> Alstott, *supra* note 87, at 49–72 (proposing public caregiving subsidies for parents); Martha Albertson Fineman, *Contract and Care*, 76 *Chi.-Kent L. Rev.* 1403, 1405–06 (2001) (challenging the understanding of caregiving as a private responsibility); McClain, *supra* note 92, at 1674–82 (arguing that caregiving should be regarded as a commonly-held public value); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1504–06 (1983) (noting that, historically, caregiving has been understood as a private, family responsibility).

<sup>182</sup> See, e.g., Kathryn Abrams, *The Second Coming of Care*, 76 *Chi.-Kent L. Rev.* 1605, 1609 (2001) (arguing that caregiving has been systematically feminized and devalued).

to enable and facilitate caregiving, then the state should publicly support the caregiving efforts of families.<sup>183</sup>

In response to this scholarship, family law doctrine has evolved to better reflect demographic changes in the structure of the family unit and more progressive and egalitarian norms in family life.<sup>184</sup> But even as family law acknowledges the proliferation of families that do not conform to the nuclear family model,<sup>185</sup> nuclear family norms—and particularly norms attendant to the institution of heterosexual marriage—continue to inform the legal recognition of families. Generally, the law has conferred legal recognition where nontraditional groupings appear to function in the manner of a traditional nuclear family—cohabiting, sharing financial burdens, and holding themselves out publicly as a family unit.<sup>186</sup> And, as I noted in the context of parenthood, courts have been receptive to the rights claimed by nonparents who have, over time, functioned as parents.<sup>187</sup>

Likewise, family law also has moved toward limited public support for caregiving. Recently enacted federal and state family leave

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<sup>183</sup> See, e.g., Fineman, *Autonomy Myth*, supra note 2, at 38.

<sup>184</sup> *Hann v. Hous. Auth.*, 709 F. Supp. 605, 610 (E.D. Pa. 1989); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53–55 (N.Y. 1989). But see *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (per curiam) (holding that woman who had live-in relationship with child's mother was not a "parent" for purposes of visitation statute); *Langan v. St. Vincent's Hosp. of N.Y.*, 802 N.Y.S.2d 476, 478–80 (N.Y. App. Div. 2005) (holding that surviving partner of same-sex civil union could not bring wrongful death action as a "spouse").

<sup>185</sup> See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."); *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."); *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985) ("The realities of modern living, however, demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded.").

<sup>186</sup> See *Hann*, 709 F. Supp. at 610 (noting that couple at issue functioned as spouses: "[t]he only thing missing is a marriage certificate"); *Braschi*, 543 N.E.2d at 55 (explaining that a same-sex couple "shared all [financial] obligations," maintained joint checking accounts from which they paid their bills, and "were regarded by friends and family[] as spouses"); see also *Principles of the Law of Family Dissolution: Analysis and Recommendations* ch. 6 (American Law Institute 2002) (defining domestic partners and enumerating their rights and obligations).

<sup>187</sup> See supra notes 40–50 and accompanying text.

policies and fiscal policies such as the Earned Income Tax Credit<sup>188</sup> facilitate family caregiving efforts by providing some public benefits to families.

But even as family law has become more liberal in recognizing nontraditional family arrangements, its understanding of caregiving remains stubbornly fixed on the idea of autonomous parental care.<sup>189</sup> Accordingly, an attempt to acknowledge and recognize the cooperative caregiving efforts of parents and nonparents would address an aspect of family life that has been overlooked in recent efforts to align family law with the reality of modern family life. Instead of focusing only on *who* counts as a family member, a broader theory of caregiving would consider *how* families actually function in providing care to their dependents.

By focusing on the *who* of the family, family law has moved closer towards acknowledging and supporting the ways in which families live their lives. But focusing on *who* is in the family does not go the whole way towards supporting families in performing their responsibilities to their dependents.<sup>190</sup> Family law's silence as to *how* families actually function has impeded its progress towards a more accurate account of family life, and has made it harder for the law to support and enable caregiving.

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<sup>188</sup> I.R.C. § 32 (2000 & Supp. IV 2004).

<sup>189</sup> See Meyer, *supra* note 36, at 125 (noting that amidst the “roiling sea of change” elsewhere in family law, “the idea of parenthood stood out as an island of relative calm”). Of course, as discussed earlier, there have been changes in the understanding of parenthood. See *supra* notes 40–50, 146–59, and accompanying text. However, there has been no attempt to move beyond parenthood as the legal frame in which to consider caregiving. See Meyer, *supra* note 36, at 126 (acknowledging attempts to expand the number of legally recognized parents and to recognize as parents those who lack a genetic, biological, or legal connection to the child).

<sup>190</sup> Other scholars have argued that family law's focus on family composition inadequately accommodates the changes in the modern family. As Professor Laura Rosenbury has argued, although family law scholars and reformers have focused on the personnel of the family, they have not challenged the understanding that parents and the state perform caregiving in the home and at school, respectively. Laura A. Rosenbury, *Between Home and School*, 155 U. Pa. L. Rev. 833, 833–34 (2007) (“[A] general principle has long been clear: . . . parents enjoy almost complete authority over their children at home, whereas the state may exercise authority over children at school . . .”). Rosenbury further asserts that focusing on the demography of caregiving, rather than the geography of caregiving, has prevented family law from acknowledging that caregiving occurs outside of the home and school. *Id.* at 890–91. In so doing, she argues, this misplaced focus has actually emphasized the private nature of care and complicated the understanding of family privacy. *Id.*

*B. The Networked Family in Practice—What About the Nanny?*

As I have considered the question of how law might recognize and enable the use of caregiving networks, I frequently have been beset with a series of standard questions. Invariably, those interested in this issue want to know what this would be like in practice, and more importantly, what this would mean for those who are parents. Accordingly, I am routinely peppered with the questions, “What about my nanny? Does this mean she should have rights, too?”

In this section, I sketch three possible approaches for recognizing caregiving networks and nonparental caregivers in the law. I do not intend these approaches to be exhaustive, nor do I intend to endorse or advocate on behalf of any particular option. Instead, in identifying potential approaches and the legal and practical implications attendant to deploying them in the law, I hope to shed some light on what legal recognition of caregiving networks would mean for family law, parents, and nonparental caregivers.

As an initial matter, it is important to understand that reframing the legal understanding of caregiving to include nonparental caregivers requires considering parenthood—the legal locus for care—as a status relationship accompanied by a particular set of rights and obligations.<sup>191</sup> Accordingly, in thinking about possible approaches for reframing caregiving, I am drawn to earlier efforts to reform another status relationship: marriage.

As mentioned earlier, part of the reform project that has been underway in family law has been the effort to reconcile heterosexual marriage as the normative model for adult intimate relationships with the reality of a diversity of adult intimate relationships. Reforms in this area have cleaved to three basic approaches.

First, there has been a move towards expanding the rights and benefits of marriage to include those who are unmarried, but who nonetheless comport with social norms and legal rules regarding how married couples function.<sup>192</sup> Attendant to the recognition of

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<sup>191</sup> I have elsewhere noted that historically, parenthood, like marriage and the master/slave relationship, was understood as a domestic status relationship. See *supra* note 33.

<sup>192</sup> *Hann v. Hous. Auth. of Easton*, 709 F. Supp. 605, 610 (E.D. Pa. 1989) (holding, for purposes of public housing, that an unmarried couple with children were entitled to family status); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53–54 (N.Y. 1989) (ex-

those who *function* in the manner of married couples has been legal enforcement of contracts that privately structure the rights and obligations of cohabiting intimates in ways that cohere to the normative understanding of marriage.<sup>193</sup> More recently, this trend has moved from simply conferring the benefits of marriage and family status to those who function as such and those who privately order their arrangements as such to explicitly expanding the domain of civil marriage to include those who formerly were excluded from it.<sup>194</sup>

Other attempts to reconcile the status rights and benefits of marriage with the reality of diverse intimate arrangements have involved constructing alternative statuses that coexist alongside marriage. For example, in the wake of *Baker v. State's* determination that the Vermont Constitution's Common Benefits Clause did not permit the exclusion of same-sex couples from marriage,<sup>195</sup> that state's legislature fashioned an alternative legal status for gay and lesbian couples: the civil union.<sup>196</sup> In 2005, the Connecticut legislature refused to extend marriage to same-sex couples, but voted to create an alternative civil union status that would provide gay and

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tending, in the context of an eviction protection statute, the term "family" to include "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence"); *Wilbur v. DeLapp*, 850 P.2d 1151, 1153 (Or. Ct. App. 1993) (extending community property rules to include an unmarried heterosexual couple); *Vasquez v. Hawthorne*, 33 P.3d 735, 737 (Wash. 2001) ("Equitable claims [to an intestate's estate] are not dependent on the 'legality' of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties."); *Connell v. Francisco*, 898 P.2d 831, 836 (Wash. 1995) (holding that "income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage"); see also *Principles of the Law of Family Dissolution: Analysis and Recommendations* ch. 6 (defining domestic partners and enumerating their rights and obligations). For a discussion of this phenomenon in the late nineteenth and early twentieth centuries, see generally Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 Colum. L. Rev. 957 (2000).

<sup>193</sup> See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 116, 122–23 (Cal. 1976) (permitting state enforcement of a contract for financial support between unmarried, cohabiting partners); *Boland v. Catalano*, 521 A.2d 142, 146–47 (Conn. 1987) (permitting state enforcement of a cohabitation contract between unmarried intimate partners).

<sup>194</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (expanding civil marriage to include same-sex couples); see also *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007) (enjoining county officials from refusing to issue marriage licenses to otherwise qualified same-sex couples).

<sup>195</sup> 744 A.2d 864, 886 (Vt. 1999).

<sup>196</sup> Vt. Stat. Ann. tit. 15, §§ 1201–1207 (2002).

lesbian couples with most of the legal rights, obligations, and benefits of marriage.<sup>197</sup> New Jersey recently followed suit,<sup>198</sup> as did New Hampshire.<sup>199</sup> Other jurisdictions have crafted domestic partnerships as an alternative status to marriage.<sup>200</sup>

In both expanding marriage to include formerly excluded groups and creating alternative statuses that coexist alongside marriage, some critics have argued that the reforms have done little to disrupt either marriage's entrenchment as the normative ideal for regulating adult intimacy or the gendered history with which it is associated.<sup>201</sup> Accordingly, some have advocated a more radical approach to reforming the regulation of adult intimate relationships: the abolition of civil marriage entirely.<sup>202</sup> That is, some scholars and reformers have championed getting the state out of the marriage business in order to retool the legal regulation of adult intimacy along more egalitarian lines.

In contemplating a theoretical frame for understanding the caregiving continuum, the three approaches seen in the legal reform of marriage are useful starting points. In the following Sections, I consider each approach, as well as possible implications for deployment in law.

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<sup>197</sup> Conn. Gen. Stat. Ann. §§ 46b-38aa to -38pp (West Supp. 2007).

<sup>198</sup> N.J. Stat. Ann. § 37:1-29 (West Supp. 2007); see also John Holl, As New Jersey Opens Door to Civil Unions, Couples Rush In, N.Y. Times, Feb. 19, 2007, at B4.

<sup>199</sup> N.H. Rev. Stat. Ann. §§ 457-A:1, :6 (LexisNexis Supp. 2007); see also Pam Bel-luck, New Hampshire Adopts Same-Sex Unions, N.Y. Times, June 1, 2007, at A16.

<sup>200</sup> See, e.g., Cal. Fam. Code § 297.5 (West 2004 & Supp. 2007).

<sup>201</sup> Katherine M. Franke, The Domesticated Liberty of *Lawrence v. Texas*, 104 Colum. L. Rev. 1399, 1414 (2004) (arguing that the legal reforms affording marriage and other protections of intimate life to gays and lesbians have "created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality"); Nancy D. Polikoff, We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage," 79 Va. L. Rev. 1535, 1546 (1993) (emphasizing the danger of "valu-ing one form of human relationship above all others," and noting that privileging marriage over other forms of intimate association may further entrench the gender assumptions with which marriage is associated); Michael Warner, Beyond Gay Mar-riage, in *Left Legalism/Left Critique* 259, 260 (Wendy Brown & Janet Halley eds., 2002) ("Marriage sanctifies some couples at the expense of others.").

<sup>202</sup> See, e.g., Fineman, *supra* note 88, at 228-30.

*1. Expanding the Status of Parent*

To the extent that family law has begun to consider reconciling the legal understanding of caregiving and caregivers, most efforts have focused on expanding the status of parent to include those who would not be considered parents under formal indicia. As I have discussed earlier, these efforts have focused on recognizing as legal parents those who *function* in the manner of parents in circumstances where there are no other competing claims for parental status.<sup>203</sup>

In recognizing “functional” parents, most courts have remained fixed on the concept that parenthood is exclusive and may only be shared by two people.<sup>204</sup> Recently, however, some courts have embraced the idea of parenthood that is shared equally between more than two parents.<sup>205</sup> In January 2007, an Ontario appellate court held that a five-year-old Ontario boy had three parents—his biological mother and father and the mother’s lesbian partner—all of whom were entitled to the full rights and obligations of parenthood.<sup>206</sup> Then, on April 30, 2007, a Pennsylvania appellate court concluded that two lesbian coparents and their child’s sperm donor were all parents with legal obligations to provide financial support to the child.<sup>207</sup>

In keeping with these recent decisions, some legal scholars have advocated expanding legal parenthood to include a wider number of caregivers as parents.<sup>208</sup> For example, scholars such as Professors

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<sup>203</sup> See *supra* Section II.B.

<sup>204</sup> See *Kristine H. v. Lisa R.*, 117 P.3d 690, 696 (Cal. 2005) (noting California’s public policy favoring “that a child have two parents rather than one”); *K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005) (recognizing as parents a lesbian couple, and noting that the decision did not depart from the norm of two-person parenthood); *Elisa B. v. Superior Court*, 117 P.3d 660, 667–70 (Cal. 2005) (deeming plaintiff a legal parent on the ground that although she had “no genetic connection” to the children, she had brought them into her home and held them out as her and her partner’s natural children); *Johnson v. Calvert*, 851 P.2d 776, 781 n.8 (Cal. 1993) (declining “[t]o recognize parental rights in a third party”).

<sup>205</sup> See *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007); *A.A. v. B.B.*, 83 O.R.3d 561 (Ont. Ct. App. 2007).

<sup>206</sup> *A.A.*, 83 O.R.3d at 563, 575; see also Ian Austen, *Canadian Court Rules Lesbian Partner Is a Parent*, N.Y. Times, Jan. 12, 2007, at A15.

<sup>207</sup> *Jacob*, 923 A.2d at 481–82.

<sup>208</sup> See, e.g., Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, Ga. L. Rev. (forthcoming 2008) (manuscript at 4) (advocating “less binary [parenthood]”), available at <http://ssrn.com/abstract=996160>; Jacobs, *supra* note 158, at 1–

Melanie Jacobs and Laura Kessler have argued for an expanded understanding of parenthood that would accommodate multiple legal parents—or as Kessler terms it, “community parenting.”<sup>209</sup> Others, like Professor Katharine Baker, do not necessarily endorse a particular model of multiple parenthood, but nonetheless would embrace a view of parenthood that was not contingent on vesting legal authority in only two people.<sup>210</sup> These proposals may be seen as analogous to the marriage reforms that have expanded—albeit on a very limited basis—the institution of civil marriage to include same-sex couples who previously were excluded from this status.<sup>211</sup>

In addition to these legal developments, there is also the prospect of expanding parenthood through greater use of private ordering. Of course, private ordering already plays a large role in the construction of caregiving networks that utilize *paid* caregivers. That is, in employing a paid caregiver, many parents rely on private agreements to delineate obligations and benefits that flow between parents and the nonparental caregiver. But even as these agreements have delegated some of the tasks and obligations of legal parents to nonparental caregivers, the law has stopped short of

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5 (arguing for multiple parenthood); Laura T. Kessler, *Community Parenting*, 24 Wash. U. J.L. & Pol’y 47, 49 (2007) (proposing “community parenting”—that is, a “more-than-two-parent” family).

<sup>209</sup> Jacobs, *supra* note 158, at 1–5; Kessler, *supra* note 208, at 49.

<sup>210</sup> Baker, *supra* note 208, at 1–4.

<sup>211</sup> Of course, even as civil marriage has been expanded to include same-sex couples, normative intuitions about the substance of marriage persist. For example, the limited expansion of marriage to include same-sex couples has not led to including other historically excluded groups like consanguineous relatives and those in polyamorous relationships. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948–49, 959, 961, 965, 969 (Mass. 2003) (describing marriage as an exclusive—that is, bilateral—institution); Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 Nw. U. L. Rev. 1543, 1557–60 (2005) (noting that in the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Goodridge*, many critics feared the decriminalization of incest and the broad liberalization of prohibitions on consanguineous marriages, both of which have not occurred); Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. Rev. L. & Soc. Change 277, 289–91 (2004) (concluding that legal reforms expanding marriage have not dismantled the understanding of marriage as a monogamous institution). This suggests that expansion of a legal status is still constrained by the social and normative intuitions that undergird the social construction of the status. Accordingly, one might argue that expanding the understanding of parent to include more than two people would not necessarily dislodge all of the normative assumptions that attend parental caregiving.

permitting parents to confer parental status—and its attendant rights and obligations—to third parties via contract.<sup>212</sup> Nevertheless, just as cohabitation agreements and the like have been used to secure some of the benefits of marriage to unmarried couples, private contracts still might be a promising way to provide benefits and some sort of legal recognition to nonparental caregivers.

As a general matter, the recent expansion of the legal concept of parenthood to include functional parents and multiple third parties, in tandem with the use of private agreements in structuring the provision of nonparental care, all are important developments in moving towards greater recognition of the caregiving continuum. However, in considering whether to expand the category of parent further, there are important consequences and costs that must be considered and weighed.

At a basic level, the expansion of parenthood as a legal category fundamentally changes the nature of parenthood as it has been known. To this end, some critics have objected to the expansion of parenthood to include multiple parents and functional parents on the ground that it departs from traditional understandings of the family and family morality more generally.<sup>213</sup> They fear that further expansion of the status of parent would obliterate the traditional understanding of what it means to be a parent entirely and would untether parenthood from marriage.<sup>214</sup> There is also the more general fear that expanding legal parenthood might allow nonparents to claim parental rights and status over the objections of biological and adoptive parents.<sup>215</sup>

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<sup>212</sup> See *T.F. v. B.L.*, 813 N.E.2d 1244, 1251 (Mass. 2004) (“‘Parenthood by contract’ is not the law in Massachusetts, and, to the extent the plaintiff and the defendant entered into an agreement, express or implied, to coparent a child [including the provision of child support], that agreement is unenforceable.”); *In re Baby M*, 537 A.2d 1227, 1240–43 (N.J. 1988) (refusing to enforce a private agreement transferring parental status and rights to a third party).

<sup>213</sup> See, e.g., William C. Duncan, “Don’t Ever Take a Fence Down”: The “Functional” Definition of Family—Displacing Marriage in Family Law, 3 *J.L. & Fam. Stud.* 57, 77 (2001); Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute’s “Domestic Partners” Proposal*, 2001 *BYU L. Rev.* 1189, 1228–29, 1233 (citing morality and tradition as bases for opposing the ALI’s proposed domestic partner status).

<sup>214</sup> See Wardle, *supra* note 213, at 1228–29, 1233.

<sup>215</sup> See *id.* at 1229 (suggesting that expansion of parenthood would transform custodial disputes into “community free-for-alls”); Bartlett, *supra* note 9, at 945 (noting

Others worry that expanding legal parenthood would diffuse the rights and obligations of parents too broadly.<sup>216</sup> In particular, critics fear that distributing parental rights equally among those recognized as parents may compromise efficient parental decisionmaking by vesting multiple persons with the authority to make (possibly conflicting) decisions about the welfare of children.<sup>217</sup> The resulting conflict, they argue, would be deleterious for parents and children and would require considerable state intervention to mediate and resolve.<sup>218</sup> Further, disaggregating parental functions could turn the family into a tragedy of the commons in which clarity and accountability in the performance of parental functions would be compromised.<sup>219</sup> Still others fear that expanding parenthood to include multiple parents would irreparably compromise family privacy.<sup>220</sup>

Private ordering might appear to alleviate these problems, as private agreements explicitly delineate the rights and obligations of each party and exist outside of the state's formal status regimes.<sup>221</sup> But contracting may lead to suboptimal outcomes—particularly if there is a power imbalance between the parties. Additionally, although many families have used private ordering outside of the paid caregiving context to confer limited rights and benefits to

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that broadening the category of legal parent involves “diluting the individual autonomy of parents”).

<sup>216</sup> See Bartlett, *supra* note 9, at 945 (asserting that legal recognition of nonparents “increases the number of adults making claim to a child”); Emily Buss, “Parental” Rights, 88 Va. L. Rev. 635, 635–36 (2002) (noting that recent efforts to acknowledge nonparental caregiving has resulted in “a diminution of parental rights to make room for these other relationships”).

<sup>217</sup> See June Carbone, The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity, 65 La. L. Rev. 1295, 1297 (2005) (contending that expansion of legal parenthood will result in “legally contentious cases” and “in the [re-creation] of the moral obligations of adults”).

<sup>218</sup> See *id.*

<sup>219</sup> See *id.*

<sup>220</sup> See David D. Meyer, Partners, Care Givers, and the Constitutional Substance of Parenthood, *in* *Reconceiving the Family* 47, 60–65 (Robin Fretwell Wilson ed., 2006); John DeWitt Gregory, Family Privacy and the Custody and Visitation Rights of Adult Outsiders, 36 Fam. L.Q. 163, 184–87 (2002).

<sup>221</sup> Of course, it has been established that even in the context of private bargaining, parties construct their agreements with an eye towards the requirements of legal regulation. For a discussion of this phenomenon, see Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979).

nonparental caregivers,<sup>222</sup> it is unclear that contracts for the provision of nonparental care would be widely enforceable.<sup>223</sup> More importantly, the use of private ordering would frustrate attempts to secure greater *public* recognition of nonparental caregiving and caregiving networks. By its very nature, private ordering exists beyond state control unless the state is required to intervene to enforce, or determine the enforceability of, the underlying agreement. Accordingly, greater use of private ordering would limit law's ability to communicate publicly its acceptance of caregiving networks and the public value of caregiving.<sup>224</sup>

In addition to all of the concerns discussed, there also are specific caveats that must be weighed in considering expanding parenthood—whether functionally, formally, or through private ordering. Although expansion of parenthood may be seen as departing too far from the traditional understanding of parenthood, it actually may have the effect of further entrenching the legal understanding of caregiving as parenthood. That is, just as decisions to expand the institution of civil marriage were criticized on the ground that they further entrenched marriage's place as the normative ideal for adult intimate relationships,<sup>225</sup> further expansion of the legal status of parent may ossify it as the exclusive vehicle for

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<sup>222</sup> See *supra* Section IV.D (discussing contracts between same-sex couples and those who donate to them genetic material).

<sup>223</sup> As a general matter, family law always has exhibited discomfort with the prospect of contracting within status relationships. See, e.g., *Graham v. Graham*, 33 F. Supp. 936, 938–39 (E.D. Mich. 1940); *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 18 (Ct. App. 1993). More recently, courts have been unwilling to recognize private contracts conferring financial obligations for children on those not recognized as legal parents. See, e.g., *T.F. v. B.L.*, 813 N.E.2d 1244, 1251 (Mass. 2004) (“‘Parenthood by contract’ is not the law in Massachusetts, and, to the extent the plaintiff and the defendant entered into an agreement, express or implied, to coparent a child [including the provision of child support], that agreement is unenforceable.”).

<sup>224</sup> See generally Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085–87 (1984) (critiquing private settlement agreements in part because they often preclude public explication of legal values and commitments).

<sup>225</sup> Franke, *supra* note 201, at 1413–16 (arguing that current gay rights' advocacy has cleaved toward the domestic, and in so doing, has reified marriage as the pinnacle of adult sexual expression); Marc Spindelman, *Homosexuality's Horizon*, 54 Emory L.J. 1361, 1371 (2005) (noting that “[m]arriage's heteronormative roots . . . remain unchallenged in *Goodridge*,” which extended civil marriage to same-sex couples in Massachusetts).

caregiving.<sup>226</sup> Instead of moving toward greater recognition of nonparental caregivers, the legal recognition of functional parents and multiple parents simply herds all caregiving efforts into the rubric of parenthood. Similarly, attempts to use contract as a means of recognizing nonparents also are unavailing, as they simply resurrect the private character of caregiving and shield nonparental caregiving efforts from public view. Thus, if we are interested in developing a theoretical framework that would encompass the continuum between parents and strangers, the expansion of parenthood through these vehicles may be too limited.

## *2. Creating Alternative Statuses*

While the creation of alternative statuses has been an important aspect of the drive to reconcile the institution of marriage with the reality of adult intimate relationships, there has been little effort to construct alternative statuses as a means of dealing with networked caregiving and nonparental caregivers. Nonetheless, the creation of alternative statuses may be particularly attractive in this venue for many of the reasons that alternative statuses were seen as an optimal approach for dealing with legal reform of marriage and other adult intimate relationships.

In the context of parenthood, the primary question in constructing an alternative status—or multiple alternative statuses—is the nature of the relationship between parenthood and the new alternative status. When the Vermont legislature fashioned the civil union status, it was responding to a judicial mandate that specified “a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples.”<sup>227</sup> Accordingly, the legislative effort to create a new status for adult intimate relationships focused on replicating the essential status obligations and rights attendant to marriage without actually expanding the category of marriage to include same-sex couples. Civil unions were constructed to be essentially like marriages—extending the rights and obligations of civil marriage to those formally excluded from its ambit. But they continue

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<sup>226</sup> For an earlier critique of the legal recognition of functional parents on this ground, see *supra* notes 49–50 and accompanying text.

<sup>227</sup> *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

to be understood as distinct from marriage because they do not confer the rhetoric and nomenclature of marriage to their participants.<sup>228</sup>

In the same way, an alternative status might be created to confer upon nonparental caregivers the same panoply of benefits and rights afforded to parents, while reserving the rhetoric of parenthood to those who are biologically or legally related to the child. Of course, doing so would engender many of the same concerns attendant to expanding the legal category of parent to include functional parents and multiple parents.<sup>229</sup> Creating a status that approaches parenthood, but is not parenthood, would undoubtedly create confusion in the legal understanding of both statuses. More importantly, as with expanding parenthood to include more than two parents, there would be a diffusion of caregiving rights and obligations between legal parents and those holding alternative statuses. This diffusion likely would create confusion in the discharge of parental obligations and the exercise of parental rights.

Of course, accommodating the continuum of caregivers and caregiving efforts by constructing an alternative status need not approach—or encroach upon—the terrain of parenthood. Instead of creating an alternative status that is essentially like parenthood, reform efforts might consider creating a status that affirmatively is distinct from parenthood. Such a status perhaps would explicitly acknowledge the range of caregiving efforts that are ancillary to, distinct from, and intended to support the primary efforts of parents.<sup>230</sup> In this vein, an alternative status—or multiple alternative statuses—might be constructed along a sliding scale that would ac-

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<sup>228</sup> *Rosengarten v. Downes*, 802 A.2d 170, 175 (Conn. App. Ct. 2002) (noting that a civil union was “not a marriage” because it did not involve a man and woman); *Lewis v. Harris*, 908 A.2d 196, 225–26 (N.J. 2006) (Poritz, C.J., concurring in part and dissenting in part) (acknowledging the distinction between civil unions and marriage and noting that “[w]hat we ‘name’ things matters, language matters”); see also *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 699–700 (Cal. Ct. App. 2005) (enumerating the differences between marriages and domestic partnerships and concluding that the legislature did “not create[] a ‘marriage’ by another name or grant[] domestic partners a status equivalent to married spouses”).

<sup>229</sup> See *supra* notes 213–26 and accompanying text.

<sup>230</sup> Professor Alison Young has argued for a similar approach. Specifically, she advocates for recognition of a “core” family unit, which ostensibly includes parents, as well as recognition of ancillary “support systems” made up of those who have played a parenting or creation role in the child’s life. See Young, *supra* note 9, at 516–18.

count for the wide range of caregiving efforts that exist along the caregiving continuum. Again, the example of marriage reform offers useful precedents.

In Vermont, for example, there are two alternative statuses that are available to confer state recognition to various adult relationships. As discussed, civil unions are offered as an alternative to civil marriage and are aimed specifically at same-sex couples who are prohibited from civil marriage.<sup>231</sup> But Vermont also offers reciprocal beneficiary status “to provide two persons who are blood-relatives or related by adoption” the opportunity to establish a state-recognized relationship eligible for some of the benefits and obligations offered spouses.<sup>232</sup> While civil unions are widely seen as being essentially like marriages, reciprocal beneficiary status has been understood as distinct, precisely because it is meant to account for adult relationships that do not bear the same romantic or intimate indicia with which marriages or civil unions are associated.

By the same token, although New Jersey now makes civil unions available to same-sex couples,<sup>233</sup> it also allows opposite-sex couples aged sixty-two and older the opportunity to enter into domestic partnerships.<sup>234</sup> The domestic partnership status provides “limited health care, inheritance, property rights, and other rights and obligations” but “[does] not approach the broad array of rights and obligations afforded to married couples.”<sup>235</sup> Thus, while New Jersey’s domestic partnership status is available to older couples in intimate relationships, it is understood as distinct from either marriage or civil union because the range of benefits and obligations it confers is more limited.

Creating a regime in which subordinate alternative statuses co-exist with parenthood is not without flaws or concerns. Because the

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<sup>231</sup> Vt. Stat. Ann. tit. 15, § 1202(2) (2002) (“For a civil union to be established in Vermont, it shall be necessary that the parties . . . [b]e of the same sex and therefore excluded from the marriage laws of [Vermont].”).

<sup>232</sup> Id. § 1301(a).

<sup>233</sup> N.J. Stat. Ann. § 37:1-30 (West Supp. 2007).

<sup>234</sup> Id. § 26:8A-4(b)(5).

<sup>235</sup> Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations, N.J. Att’y Gen. Formal Op. No. 3-2007, at 6 (Feb. 16, 2007), available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>.

alternative statuses do not offer the same rights and benefits as parenthood, and are understood as being distinct from and subordinate to marriage, their existence may reify the legal understanding of parenthood as the optimal caregiving arrangement.<sup>236</sup> Of course, for those who would prefer not to disrupt parenthood's privileged status as the primary site for providing care, this approach may be sensible and, indeed, desirable.

Another concern related to the creation of alternative statuses is the nature of the rights and benefits to be conferred. As discussed earlier, an approach that confers the same rights and benefits as parenthood might be undesirable because it diffuses parental rights and obligations too broadly.<sup>237</sup> Of course, conferring *any* of the rights and obligations of parenthood might be problematic for a number of reasons. Providing nonparental caregivers with decisionmaking authority vis-à-vis a child, however limited, inevitably would conflict with the exercise of parental decisionmaking, and likely would compromise the exercise of parental autonomy. Under such a scenario, parents understandably would be reluctant to structure a caregiving network if doing so would vest nonparental caregivers with legal decisionmaking authority. In the same vein, vesting nonparental caregivers with some of the obligations of parents also might impede the creation and use of caregiving networks. While many nonparental caregivers happily assist parents with caregiving, they might be less willing to do so if their actions affirmatively engendered legal obligations to the child and family.

One way to circumvent these potential problems is to take the issue of parental rights—and in particular, parental decisionmaking authority and legal obligations—off the table entirely. Instead, in constructing alternative statuses, our efforts would focus on enabling the creation and maintenance of care networks by offering legal recognition to nonparental caregivers in the form of caregiving benefits.

For example, the allocation of public benefits for caregiving could be expanded to accommodate the role of nonparental care-

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<sup>236</sup> Cf. *Lewis v. Harris*, 908 A.2d 196, 225–26 (N.J. 2006) (Poritz, C.J., concurring in part and dissenting in part) (acknowledging the rhetorical distinction between civil unions and marriage and noting that “[w]hat we ‘name’ things matters, language matters”).

<sup>237</sup> See *supra* text accompanying notes 216–220.

givers in providing care. As discussed in Part III, the Family and Medical Leave Act,<sup>238</sup> which was promulgated for the explicit purpose of facilitating caregiving, provides leave benefits only to those in parent/child relationships, whether formally or functionally defined. In reality, though, care is provided across a range of relationships, not just the parent/child dyad. Although society benefits enormously from these caregiving efforts,<sup>239</sup> which privatize the most burdensome aspects of care, they are ineligible for leave under the FMLA because they do not comport with the accepted understanding of caregiving.

In constructing an alternative status that is intended to recognize the efforts of nonparents, we might then consider expanding the relationships contemplated by the FMLA—and other public and private benefit schemes—to include more than just the parent/child dyad.<sup>240</sup> Expanding the universe of covered relationships to include other caregiving relationships would permit parents and their network of nonparental caregivers a greater degree of flexibility in determining how to use these caregiving benefits. Additionally, it would provide crucial incentives to nonparents to continue assisting parents in the provision of care, and, in so doing, would enable parents in constructing and maintaining their caregiving network.

That said, offering caregiving benefits to nonparental caregivers could yield administrative difficulties that must be resolved. As an initial matter, the costs of establishing a separate status for nonpar-

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<sup>238</sup> 29 U.S.C. §§ 2601–2654 (2000 & Supp. IV 2004).

<sup>239</sup> As President Bill Clinton acknowledged in 2000, family caregivers “are the major source of long-term care in America. By providing billions of dollars’ worth of caregiving services each year, they dramatically reduce the demands on our Nation’s health care system and make an extraordinary contribution to the quality of life of their loved ones.” Proclamation No. 7370, 3 C.F.R. 190, 190 (2000).

<sup>240</sup> Given the difficulty of passing the FMLA (small businesses balked at the prospect of offering leave to their employees) it might be difficult to further expand the legislation to include nonparental caregivers. See Lauren J. Asher & Donna R. Lenhoff, *Family and Medical Leave: Making Time for Family Is Everyone’s Business*, 11 *The Future of Children* 115, 117 (2001) (reporting that the small business lobby, among others, “led the charge against the FMLA”); Gail Landsman, *Negotiating Work and Womanhood*, 97 *Am. Anthropologist* 33, 33–34 (1995) (noting that “[o]pposition to the [FMLA] came primarily from the Chamber of Commerce and small businesses”). But irrespective of the FMLA, the expansion of public caregiving benefits might be used as a way to confer limited legal recognition to nonparental caregivers without compromising the traditional complement of parental rights and obligations.

ental caregivers and funding the expansion of public and private benefits to those in the alternative status would require considerable financial resources. Additionally, the effort to ensure that benefits are distributed only to those who serve as nonparental caregivers would require additional administrative and personnel resources. In this way, one advantage of viewing caregiving as parenting is that the legal regime engendered is relatively easy to administer. Parents are easy to identify from the moment of birth or adoption, making the conferral of rights, obligations, and benefits to them a straightforward affair.<sup>241</sup> Administering a regime that takes account of not only parents but those who occupy an alternative status as nonparental caregivers obviously is a more demanding enterprise.

However, as with alternative statuses in the context of marriage reform, creating an alternative status with licensing and registration requirements—as opposed to simply recognizing nonparental caregivers functionally—may serve as a means of curbing some of these administrative difficulties. With a formal alternative status, parents and nonparental caregivers could be required to register their arrangements with the state, and would be subject to state licensing requirements, including the payment of fees to fund the administration of the system. For their efforts, they would be formally recognized in the law, have a degree of predictability and assurance in the distribution of caregiving benefits, and a means of terminating the arrangement if it no longer proved viable. Additionally, a formal licensing structure has the benefit of requiring the consent of both parents and nonparents in order for the status relationship to be validly executed. Requiring the parties' mutual consent in this arena would help allay fears that any departure from the traditional understanding of parenthood inevitably would compromise parental autonomy or would conscript nonparents into the obligations of parenthood.

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<sup>241</sup> See *Nguyen v. INS*, 533 U.S. 53, 64 (2001) (“[T]he proof of motherhood . . . is inherent in birth itself . . .”). Additionally, while the fact of birth has long provided incontrovertible proof of maternity, technological advances now have facilitated the determination of paternity as well. See *Miller v. Albright*, 523 U.S. 420, 438 n.16 (1998) (“Congress has already recognized the value of genetic paternity testing.”).

### *3. Dismantling the Status of Parent*

The final option to be explored is the possibility of dismantling the legal understanding of parenthood entirely and reconstructing a new regime that accounts for the use of nonparental caregiving in family life.

Despite its destructive character, dismantling legal parenthood and rebuilding a new regime from the ground up may have distinct normative advantages over the other approaches that I have sketched. To the extent that parenthood and caregiving are replete with gendered norms and hierarchies,<sup>242</sup> dismantling the existing regime would offer an opportunity to construct a new legal apparatus with more egalitarian goals and norms. In the same vein, eliminating the current regime would permit us to extricate ourselves from the understanding of caregiving as a private enterprise,<sup>243</sup> and would enable the restructuring of caregiving as a public enterprise for which considerable public resources are required. Finally, dismantling parenthood would enable us to reconfigure the legal understanding of caregiving in a way that better comports with the realities of contemporary caregiving.

Despite these lofty aspirations, there are serious costs associated with jettisoning parenthood and starting anew. First, the legal structure of parenthood is deeply embedded in almost every aspect of family law, and indeed, in other areas of the law that implicate families. Accordingly, dismantling parenthood as a legal category would fundamentally disrupt the operation of family law, as well as immigration law and policy, tax law and policy, administrative law, and the like. Dismantling parenthood without a ready alternative to be deployed would have disastrous consequences.

And even if we were prepared to dismantle parenthood and replace it with some other, more desirable legal regime, there might still be difficulties moving beyond parenthood as a legal frame for caregiving. Just as amputees experience “phantom pains” at the

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<sup>242</sup> Katharine B. Silbaugh, *Women’s Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 *Fordham L. Rev.* 1797, 1805 (2007) (“Women spend more time with children and take more responsibility for planning for their care.”).

<sup>243</sup> See *supra* notes 23–24, 181–83, and accompanying text.

site of their lost limbs,<sup>244</sup> the law might reflexively respond to the concept of parenthood, even where it no longer exists.

#### *4. Towards a Theory of the Networked Family*

In sketching three possible approaches for theorizing the continuum of care that exists between parents and strangers, and articulating the benefits and pitfalls of these approaches, I do not mean to suggest that reform in this area will be effortless, nor do I mean to imply that it is impossible. As with any reform project, the prospect of change is fraught with difficulties and challenges. But there are also innumerable rewards in exploring and reforming the legal regime to better comport with our normative goals and descriptive realities.

As a broader matter, in identifying the difficulties caused by our current understanding of caregiving and outlining approaches that would address this problem by acknowledging networked caregiving and nonparental caregivers, I do not claim a ready solution. In highlighting this neglected area of family law theory and doctrine, I mean only to emphasize that the question of *how* families perform their caregiving work—and who they rely on in so doing—is an important one. Indeed, as my tentative responses suggest, it is not a question with easy answers, but one that demands—and deserves—sustained attention and inquiry by legal scholars and reformers.

#### CONCLUSION

In 1996, then-First Lady Hillary Rodham Clinton famously declared that “[i]t takes a village to raise a child.”<sup>245</sup> Clinton’s words, borrowed from an African proverb, resonated with commentators, politicians, and ordinary citizens.<sup>246</sup> That this should be the case is not entirely surprising. Parents face enormous pressures—work, school, and financial upheaval, to name but a few frequent stress-

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<sup>244</sup> 9 Am. Jur. Proof of Facts 3d Amputation Damages—Phantom Pain and Stump Pain § 4 (1990) (citing W.R. Henderson & G.E. Smyth, Phantom Limbs, 11 J. Neurology, Neurosurgery & Psychiatry 88 (1948)).

<sup>245</sup> Hillary Rodham Clinton, *It Takes a Village and Other Lessons Children Teach Us* 12 (1996).

<sup>246</sup> The book was a bestseller, and Clinton won a Grammy award for the audio recording. Jon Pareles, *Big Night for Love Songs at the Garden*, N.Y. Times, Feb. 27, 1997, at B7.

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ors—in discharging their caregiving responsibilities. Amid all of these competing demands, many parents have gone beyond the law’s conception of caregiving to assemble a network of nonparental caregivers to assist them in providing care. For many, the decision to rely on a network of nonparental caregivers is driven by a host of concerns, including the conscious choice to live a life in which extended family and friends—a modern-day village—collaborate and share in the pleasures and burdens of caregiving.

In recent years, family law consciously has tried to respond to the changing composition of the American family. Scholars frequently have noted family law’s conception of the family as a traditional, marital family has failed to keep pace with the proliferation of nontraditional family forms in society. But, in the quest to keep family law “relevant,” scholars and reformers have missed that the law’s understanding of how caregiving is done misconstrues the reality of families’ lived experiences. Although we know intuitively and empirically that parents are not the sole caregivers in families, the emphasis on parental rights, parental autonomy, and family privacy renders the caregiving efforts of nonparents invisible. The legal construction of caregiving makes clear that the law understands caregiving to be the work of parents. Those who are not parents are relegated to the category of strangers.

This Article calls attention to this oversight and invites others to join this important conversation. Recognizing the full spectrum of caregiving and caregivers would advance the goal of aligning family law with family life and would empower and enable families in their caregiving. As other contexts demonstrate, the law’s dogged adherence to parental caregiving may yield when goals and values other than a particular mode of caregiving are at stake. And legal reforms in other areas may serve as useful guideposts in charting a path for reform in the terrain of caregiving and parenthood.

As this Article suggests, there are important and valuable interests at stake in the law’s construction of caregiving as the work of parents. If family law takes seriously its mission to enable families in providing care, it must consider more deeply the role of caregiving networks and their absence in the legal account of families.