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***83 REWRITING THE LEGAL FAMILY: BEYOND EXCLUSIVITY TO A CARE-BASED STANDARD**

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***84** Introduction: Negotiating the Post-Modern **Family**

The immediate **family** in which I grew up began with two adults and their two biological sons. During my childhood, however, it included (at various times) two households, shared custody, lesbian mothers, heterosexual stepparents, a foster child, and three stepsiblings, all in the same small town. I have ex-step-grandparents. A typical day when I was ten might have begun in the home of my mother or my father, who shared equal custody of my brother and me. If that day began at my mother's house, we would have risen early so that my mother, a teacher, could head to work across the river. My mother's female partner, Lisa, who was one of our three parents, would have driven my brother, me, and our foster brother to my father's house across town. There, because my father did not have to go to work until later, we would eat breakfast and board the bus to school. After school we would head back to my mother's house and stay with a neighbor until my mother or Lisa got home. If we were staying at my father's house that week, our foster brother (who lived with my mother) would be dropped off in the morning to join us for breakfast and, in the evening, my father would pick us up from my mother's after he got off of work.

Our **family** also included a community of adults on whom the children in the **family** could and did regularly rely for care, support, and guidance--who stood in various relationships to various children. Some were close **family** members who provided direct care, while others were more peripheral. Christmas in my **family** was always a joyous **family** occasion, with the dinner table set for 20 or more--almost none of whom were blood relatives, but many of whom were close members of our **family** network.

Our **family** changed during my childhood--homes moved, stepparents and children were added and subtracted, and new adults came into our lives. It was not always easy in our **family**--there were difficult times and difficult relationships, as in any **family**. What remained stable, however, was the abundance of care provided to children by different adults--through interwoven, supportive connections. Mine was a **family**, built on changing relationships, that provided the children with an incredibly supportive and healthy environment in which to grow, learn, and become adults.

***85** My **family** is surely unrecognizable to many Americans, given all of the rules about gender, sexuality, and number of caregivers it has broken. Nonetheless, my **family** represents a combination of the real-life, post-modern **family** constructions that are increasingly common throughout the United States--stepparents, gay parents, and caregivers whose bonds with children are not based on adult sexual relationships.

The American legal system, however, has its own narrative of what a **family** looks like. Had my **family** come in contact with that system, our story would have been drastically re-written. From a cast of several children, multiple parents, and innumerable other caregiving adults, the state would have stepped in to rewrite my **family's** story to meet its formal model. We would have been a **family** with two children and two divorced parents.

Our current **family** law and politics would prescribe that my two (and only two) parents of opposite sexes assume full responsibility for the care of their own children. If there were ever a dispute about custody, several of the caregivers in our lives would have held no legal standing. Attempts by my mother's partner to enroll me in school or bring my brother to the doctor might have met official suspicion and requirements that the legal parents be present. My brother and I would have had to sit silently by as policymakers, lawyers, judges, and our "rights-bearing" parents argued about the constituent relationships of our lives.

This is the rule of the "exclusive" family [FN1] and is a central problem in **family** law in the United States. In this article, I will deal primarily with this legal construction and present a three-fold argument. First, our current law is based on a state-imposed model of the **family** that is harmful to children, **families**, and the public interest. It bases decisions on an intentionally, but unnecessarily, limited vision of parenthood that distorts the narrative of too many people's lives. Identified and critiqued by several feminist legal theorists, [FN2] it nonetheless persists in the legal sphere, which lacks comprehensive alternatives. Second, our political decision-making process should seriously consider the systems of care that exist in our society--who does the caring work, who is in need of care, and how the needs of both groups may be provided for. As a central element of social existence, the giving of care and its day-to-day implications should be the starting point for our public policy decisions. Finally, and most importantly, this article will bring together the problem of the **exclusive family** construction and the radical potential of a *86 care-based standard of decision-making. The problem is not simply that systems of care are not considered in public policymaking, but that care is wholly situated in the imagined construction of the **exclusive, private family** in law and public policy. [FN3] As long as this is the case, care cannot be considered the truly public issue that it is. Most central to this article, without care as a legitimate and guiding consideration, we cannot generate a comprehensive alternative to the **exclusive** legal **family**. In this article, I propose a new legal standard, based on the real-life systems of care in **family** relations, which could begin to guide our child custody decisions in an inclusive, truly pro-**family** direction. [FN4]

This article will examine a variety of cases, focusing on the Supreme Court's most recent stepparent case, Michael H. v. Gerald D.; [FN5] two New York cases involving queer parents, Thomas S. v. Robin Y. [FN6] and Alison D. v. Virginia M.; [FN7] and the recent Supreme Court case involving grandparent visitation, Troxel v. Granville. [FN8] These diverse cases illuminate the problems with the **exclusive family** model. In adhering strictly to the private **family** model, the courts in these cases failed to respect the lives and caregiving systems already in place. After discussing these cases, I will apply the principle I propose to each of them to demonstrate how real lives might better be respected through a care-based legal standard. Finally, I will discuss new options for legal constructions using this principle-- focusing on the potential legal construction of "co-guardianship" orders.

I will spend most of the article dealing with issues of child custody. Though custody cases and law deal with only one small part of **family** politics, the understanding of **family** embodied in custody law is important to our societal understanding of parenthood. If we are to make the radical shift from care as a private issue to care as a public concern, we must begin by challenging the exclusivity of parental rights to, and responsibility for, children. The standard I propose could be extended as a basis for public policy decisions and move us more concretely toward the conclusions feminist theorists advocate in a wide variety of contexts. [FN9]

*87 The standards I propose here attend to the lessons that real **families** teach--especially **families** on the margins [FN10] and those that survive in spite of living in **family** structures that are not offered state protection or, at times, directly contradict laws. [FN11] These **families** can and should guide us toward a new understanding of **family** that is both eminently practical and revolutionary.

I. Writing The **Family** in Law & Politics

A. Current Constructions of **Family**

Parenting and caregiving in the United States is too often understood as work to be done in isolation and in pri-

vate. Mainstream political discussions locate the care for children largely in the private, two-parent nuclear **family**. [FN12] Here, our discourse suggests that all care is to be given and all responsibility is to rest. Our society's gender norms further assign most of this care and responsibility to women--mothers--who do the majority of our caring work. [FN13] Sometimes middle and upper-class women are able to hire others to do this caring work, but the mother is most often the one who does the hiring and oversees the caregiving. [FN14] Since caring work is not generally valued in our society, the people hired to care for children are usually women, often poor women, women of color, or migrant women from the global south who are paid comparatively little for their labor. [FN15] Thus, caring work is simply shifted from *88 white, upper-class women to women with less class, race, or geographic privilege. Working-class parents, for their part, have no choice but to work outside the home. All the care and authority needed by their children is nonetheless presumed to be provided exclusively by them, unless they are fortunate enough to find affordable day-care programs. [FN16]

Positioning care as a “private” concern suggests that the **family** is outside the purview of the state. [FN17] In many legal instances, a doctrine of privacy is both right and realistic. In the recent *Lawrence v. Texas*, [FN18] for example, the majority found that the state had no place criminalizing consensual adult sexuality because “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence.” [FN19] Belief by the legislature about the morality of certain relationships, the Court found, does not rise to the level of a compelling state interest.

When it comes to issues of **family** construction and child custody, however, the state can and does intrude into “private” **family** relationships. [FN20] When it does so, it regularly uses a values-based standard of **family** to frame some forms of **family** as right and others as wrong. As I will discuss below, the results of state intrusion are directly related to how closely a **family** fits the state-imposed vision of **family**.

As Katharine Bartlett identified in 1984, a legal doctrine of “exclusivity” pervades **family** law in the United States. [FN21] Under this doctrine, legal **families** have two defining features. First, children have two, and only two, parents. These parents preferably are married and are, almost without exception, of opposite sexes. [FN22] Second, adults stand in relation to children either as full legal *89 parents or as strangers. [FN23] Parents generally have **exclusive** control over and access to children, without the possibility of some access or limited control or input. [FN24]

Justice Sandra O'Connor wrote in the recent Supreme Court case, *Troxel v. Granville*, “the 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.” [FN25] Instead of translating this into a doctrine that includes a variety of **family** forms, many courts, including the Supreme Court, have translated this fundamental interest into an **exclusive** status. Decisions under this doctrine are made in reference to the fundamental rights of these two parents in relation to their children. [FN26]

This **exclusive family** model provides the basis for much of the states' interaction with, protection of, and intrusion into the **family**. Courts arbitrate and enforce the rights of the child's two-and-only-two parents in matters of custody. [FN27] Government agencies enforce the rights of children's **exclusive** parents to make medical, educational, religious, legal and other choices for their children. [FN28] Police agencies apprehend and return runaway children to their parents, even against the child's wishes. [FN29]

Parents are given the affirmative duty to care for and support their children. [FN30] Courts step in to require that even non-custodial parents provide child support [FN31] and intercede to ensure that parents do not mistreat their children. [FN32] As Bartlett notes,

*90 [t]he state, however, does not condition parental status upon compliance with all of these duties In fact, only if the parent abandons the child or seriously violates his parental duties will the state terminate his parental status. **Exclusive** parenthood is then pursued through the legal substitution of other parents who obtain **exclusive** rights to the child. [FN33] All of these decisions base state intrusion on beliefs by the state about what a **family** should look like

and the rights and the responsibilities of just two members of that **family**. [FN34] Nowhere is there space for the voices or relationships of those who are not one of the two parents. [FN35] Nowhere are the constituent relationships of children's lives given full protection or the voices of these children fully heard. [FN36] Procedurally, much attention is paid to the best interests of the child, but hardly ever may those best interests include relationships not included in the **exclusive family**. [FN37]

*91 B. Insider **Families**: The Right Side of the Law

Today, nearly one-third of first marriages end within ten years. [FN38] One in three women giving birth is unmarried. [FN39] Only sixty-nine percent of children in the United States live in two-parent **families**. [FN40] Conservative estimates suggest these **families** include over six million stepchildren, meaning the **exclusive biological family** represents the lives of less than sixty percent of children in the United States. [FN41] At least seventy-five thousand same-sex couples in the United States have children in their homes. [FN42]

Twenty-eight million children in the United States grow up in **families** in which care is not provided exclusively by two heterosexual opposite-sex parents. [FN43] Instead caregivers increasingly include gay and lesbian **families**, single parent or "cohabitating" parent **families**, **families** with grandparents (either as primary caregivers or in addition to primary caregivers), and various other formations.

We can clearly disagree about whether these aspects of **family** life in the United States are good, bad, or mixed, but refusing to recognize them legally will not help matters. Despite the reality that US **families** take a great many forms, we continue to base our legal decision-making on a model that is not reality for a huge proportion of the affected population.

Some supporters of the **exclusive family** argue that **exclusive** parenthood is an inherent natural right. [FN44] We know, however, that American **families** have changed radically throughout our history and belie the reality that the **exclusive** *92 legal **family** structure is somehow "natural." In the common law era, fathers were seen to have a responsibility to provide for their children and a "perfect" right to their custody and their services. [FN45] Even during the common law era, though, the category of "father" was a functional one, with legal rights that were transferable to others including a stepfather or an apprentice's master. [FN46] The "**families**" over which white fathers had legal control often included what would today be considered "other people's" children--apprentices, blood-related and non-related poor children who were "bound out," servants, and others. [FN47] The nuclear **family**, so exalted by today's conservatives, is hardly "traditional." With its two parents, one breadwinner, and dependant biological children, this **family** type only came into being in the 1950s and was understood to be a novelty at the time. [FN48] Even in its heyday, millions of American **families** did not have access to the wealth, racial privilege and geographic location necessary to establish the idealized nuclear **family**. [FN49]

Cross-culturally, too, we see that what is held up by some as "natural" is hardly so. In the United States many urban African-American **families** and Native American **families** have, throughout American history, made significant use of shared parenting roles that fall far outside of the **exclusive** model. [FN50] Outside of the United States, parenthood is often seen as a shared experience and responsibility: "Among the Zapotec, sharing children is seen as natural and beneficial for the children, the godparents, and the community as a whole. Parenthood is understood in terms of multiple roles performed by different people according to their personal gifts and abilities. For the Zapotec, having children means sharing children." [FN51] This understanding--that parenthood does *93 not come in one form--stands in sharp opposition to the **exclusive family** model used in American law.

Other proponents of the **exclusive family** system argue that **exclusive families** are our best social institutions to serve the interests of those involved-- parents, children, and the state. As such, our laws should encourage or, in the words of Carl Schneider, "channel" **families** into those forms. [FN52]

The idea, though, that these **exclusive families** are successful and independent units for the provision of care to children is truly a myth. As a practical matter, most nuclear **families** simply cannot provide complete care for children by themselves.

The **family** wage has never been a reality for most **families** and the idea of the working father and stay-at-home mother is equally fictitious for all but an upper-class, largely white minority. [FN53] Today, less than one fifth of American children live with a “stay-at-home” parent of either gender. [FN54] Most **families** rely on outside caregivers, be they **family**, friends, neighbors, hired help, or day-care programs. In 1999 over two thirds of pre-school children in the United States were cared for in regular arrangements with people other than their parents. On average these children spent thirty-seven hours a week in the care of others. [FN55] Many social scientists have found that this contact with caregivers, including those outside the **exclusive**, nuclear **family**, is important and beneficial to children. [FN56]

There is an important state interest in assuring that children's care will be handled in an orderly way--making sure that the messiness of the twenty-first century American **family** does not result in gaps in children's care or in chaos. Some argue that the **exclusive family** is the best way to assure this. Without this construction, a free-for-all would ensue, overburdening the state with arbitration and failing to assure that children have caregivers who possess the necessary legal authority and who the state can easily identify. [FN57] To this end, exclusivity does not simply function to enforce existing nuclear **families**. Even *94 after divorce, parental death and other interruptions of nuclear **families**, legal exclusivity is generally preserved and works to assure that children have no more than two parents and that those two parents have complete control and access. [FN58] This is seen as a continuation of the state interest in easy, orderly identification of **family** authority. [FN59] After nuclear **family** interruption, and until it can be restored, it is in the state's and **family's** best interests to continue exclusivity.

The reality that **families** do have multiple outside caregivers cannot and should not be ignored. When stepparents, grandparents, gay and lesbian parents, and a variety of other caregivers and potential caregivers are written out of the legal narrative of **family**, they are discouraged or prevented from making and maintaining positive relationships with the children. If the goal is to decrease the burden on the state and maximize the care available to children, this would hardly seem helpful.

Grandparents are one demographic example of the issue at stake here, looking simply to economics as an indicator of state interest. In March 2002, over sixteen million children lived in “mother only” households. Whether this resulted from marriages and relationships that ended or that never existed, as a whole thirty-eight percent of these children lived below the federal poverty line and twelve percent received public assistance. [FN60] By contrast, of children living with a grandparent and a parent (usually a mother) only fifteen percent lived in poverty and eight percent received public assistance. [FN61] Indeed, the presence of a grandparent in the home is, in many situations, economically and emotionally helpful to mothers and children-- sometimes even more so than a father. [FN62] The law, however, provides no help in these cases--preserving the legally imagined **exclusive family** based on one mother and one father rather than protecting the existing multigenerational **family**. Grandparents who may act as primary caregivers are written out of the narrative of children's lives in favor of biological parents, regardless of the real relationships of the **family**.

There are ways in which we can preserve the practical legal authority that children need in their lives and create ways for the state to identify caregivers, without resorting to rewriting the story of children's lives. I will outline one such suggestion below.

*95 When **families** step outside of the legal fiction of how **families** should look, the state, instead of taking the **families** as they find them, begins enforcing rights based on its fictional model. That model is harmful to **families** and amazingly, at times comically, unrealistic. In the United States, “outsiders” are too often judged to be peripheral to the **family**. Though grandparents, aunts, neighbors, **family** friends, grown children, and a multitude of people may be available for and/or already doing the work of caring for children, they are too often legally and politically invisible members of many children's caregiving network. [FN63] Parents are encouraged to view their children as their own--their property over which they have rights. They are expected to provide all the care needed by their children and they alone are empowered to exercise legal authority in children's lives. [FN64] These notions of ownership, grounded in a capitalist understanding of property, also encourage others not to care about or care for children who are not their own. [FN65] We should instead strive to build networks of care that do not assume that women will do all the caring work. We must move toward seeing children as individuals with needs and with voices about those needs. This goal does not mean that we should not give parents and **families** practical authority, but it does mean that we should not use the isolated class- and racially-privileged **family** as the presumptive model. Instead,

we should create law that encourages creativity in **family** building to deal with the practical challenges of twenty-first century American life.

It is possible to imagine another framing of the state's role--away from enforcing imagined constructions of **family** in the private sphere to one of supporting **families** as they exist. As one psychologist phrased it:

From a psychological perspective, it is hard to imagine the value of defining any major social group that is not physically or emotionally harming itself or others as deviant or undesirable. . . . Social policies need to support people as they enter into, reside within, and move to whatever pair-bond structures fit their needs and goals. People living in a particular pair-bond structure should not be advantaged, nor should their offspring. Social policies must be based on respect for *96 people's right to choose--to live alone or to live within any particular pair-bond structure. [FN66]

If we reconceptualize American **family** law to give caregiving a place in the public realm, the state could serve as an effective tool for all **families**--a radical change from current practice.

C. Learning from Outsider **Families**

Life in the United States in the last half-century has been characterized by rapid economic, technological, social, and political changes that are having dramatic effects on **families**. Americans are working more and traveling farther and more frequently. [FN67] In 1950, fifteen percent of mothers of children under the age of seven had outside jobs; today, sixty-five percent do. [FN68] In addition to caring for children, an increasingly large number of Americans are caring for elderly **family** members living in their homes. [FN69] All of these factors have resulted in a dramatic shortage of care in the United States and shifting dynamics about how care is managed in **families** and society. [FN70]

Many **families** have responded to these changes by building broader webs of care. More economically privileged **families** are able to make up for this lack of care through hiring paid caregivers. As such, despite the fact that their **family** depends a great deal on care by outsiders, such **families** maintain the illusion of conforming to purely nuclear **family** structures and, thus, enjoy the privileges of the **exclusive family**.

Other **families**, by necessity or by choice, have created qualitatively different kinds of **family** that cannot maintain this illusion and are not best served by the law's dependence on exclusivity. Some communities--queer communities, African-American communities, and others--have long histories of creating **families** to meet pressing needs and in creating more intersecting webs of care. [FN71] In making the revolutionary shift away from the individualist notions of parents raising their own children in isolation we can find models in the many who have built and are building their **families** and their care-networks on the margins.

*97 Some African-American communities, for example, have created non-nuclear **family** forms to meet their needs. [FN72] Dealing with the historical legacy of slavery, segregation, and discrimination and without the luxury of forgoing wage labor, Black women, throughout American history, have used a variety of connections to ensure that their children are well cared for. Informal community child-care arrangements, care by grandparents and the elderly, and informal or temporary adoptions within **families** or neighborhoods have all been used and respected. In such cases, caregivers (in the eyes of their community) may assume partial or temporary rights with respect to children based on their parenting work. These caregiving constructions radically challenge assumptions that children can have only two parents and show that complex webs based on relationship and responsibility are possible and beneficial.

Queer communities similarly have built care networks to deal with their position on the margins--lacking state protection for most of their relationships. As Kath Weston notes in **Families We Choose**, queer communities have created categories of "fictive kin," which have both rights and responsibilities tailored to the specific needs of the relationship. [FN73] In confronting the AIDS crisis, groups of individuals including lovers, ex-lovers, lovers' ex-lovers, neighbors, **family**, and friends all created networks to care for the sick. [FN74] In caring for children, unique **family** formations similarly have been created by queer parents that depart from the norm of the isolated **family**. Children co-parented by more than two parents or more than

one couple, and children with known sperm-donors, show that the presumptive **family** is not the only option. [FN75] These relationships are especially important in showing that adults can stand in a variety of relationships simultaneously--both to each other and to children. Structured around real needs, these relationships need not fit into all-or-nothing categories like "parent" or "outsider."

These two communities demonstrate just a few of the creative ways that **families** have worked and are working to meet their needs for care by building new and different types of relationships. These new **family** forms bring distinct benefits. First among them is that they provide care to those who need it. *98 Research consistently has shown that having dependable, authoritative, and actively involved caregivers is key to the successful development of children. [FN76] As social and economic realities make such caregiving increasingly difficult, outsider **families** have found creative ways to provide this care--ways that move beyond the **exclusive** nuclear **family**. As researcher Froma Walsh writes:

Family cultures and structures are becoming increasingly diverse and fluid. Over an extended **family** life-cycle, adults and their children are moving in and out of increasingly complex **family** configurations, each transition posing new adaptational challenges. Amid social, economic, and political upheavals worldwide . . . many **families** are showing remarkable resilience in creatively reworking their **family** life. [FN77]

In so doing, they often also provide children with a depth and diversity of relationships that prepares them for the increasingly diverse communities and experiences that await them in the United States. **Families** that provide children with deep relationship pools--from which children can pull the support needed for new and different challenges--ensure that conflict or abuse in a single relationship will not leave children without support. These **families** model relationships that will equip children well for a globalizing world in which the ability to adapt is an essential life skill. [FN78] New **family** forms, however, currently leave **families** open to interactions with the legal system that distort their lives and fail to protect the relationships that are created to meet that **family's** individual needs.

I use my own **family** and those similar to it as a guide toward a new legal construction of **family** that should be able to recognize the multiplicity of our relationships in totality and offer appropriate legal protection and support.

*99 II. Exclusivity in Case Law

In a great many cases, the paradigm of the **exclusive family** plays out in hurtful, damaging ways. **Families** that do not fit the rigid narrative enforced by the concept of exclusivity find that the realities of their lives cannot be expressed within the legal sphere. The legal system writes out care-takers, includes children only as objects, and in many cases, the legal system exacerbates problems, leaves **families** in crisis.

A. Writing Out Stepparents

One of the clearest examples of these cases, and perhaps the most commonplace, is that of stepparent **families**. Because under the law a child cannot have a third parent, the biological mother's or father's legal relationship with the child must be terminated through stepparent adoption in order for the stepparent to be legally significant to the child. [FN79] This technicality leaves biological parents, who may or may not have had a relationship before the move toward adoption, with only two choices: They may either give up all rights to a legal relationship with their biological offspring or they must oppose the action and assert their rights as full (albeit non-custodial) legal parents. [FN80]

Without this termination, stepparents, who are often important caregivers in their **families**, usually have no legal responsibility for their stepchildren. Their relationships with stepchildren have little or no protection, as stepparents generally lack legal standing in visitation and custody cases. [FN81] The limited common law doctrine of in loco parentis applies to some, though certainly not all, stepparents. [FN82] Under this concept, an adult who voluntarily steps into the *100 role of parent to a child may incur limited responsibilities for and, at times, rights to that child. [FN83] This concept, however, is not the same as legal parenthood, since the stepparent's obligation often terminates upon divorce from the biological parent, upon the biological parent's death or when the child no longer resides in the stepparent's home (voluntarily or by choice of the stepparent).

[FN84] Also, while providing limited obligation, the in loco parentis doctrine generally provides little protection to the step-parent-stepchild relationship. As one Vermont court found, regardless of the relationship that might exist, a court cannot award custody to a stepparent over a parent unless “clear and convincing evidence that the natural parent is unfit or that extraordinary circumstances exist.” [FN85] This becomes especially problematic if the biological parent dies, as the legal relationship and responsibility of even the most involved stepparent disappears, leaving neither stepparent nor child protected. Thus, stepparents have standing only because of and in relation to their relationship with the child's biological parent, not truly because of their relationship to the child. The child still has two and only two parents.

In a series of cases the Supreme Court has defined the relationship of stepparents (all fathers) to biological parents and to the children and **families** with which they are involved. [FN86] In so doing the Court has set general parameters for parenthood and demonstrated the limitations of the **exclusive** parenthood model. [FN87]

In 1972, in *Stanley v. Illinois*, the Court found that unmarried fathers have a Fourteenth Amendment Due Process right to a legal relationship with their illegitimate children. [FN88] In 1978, in *Quilloin v. Walcott*, an uninvolved biological father sought to stop the adoption of his child by the child's stepfather. [FN89] The Court recognized the rights of unmarried fathers established in *Stanley*, but found that those rights were not in force when the father did not have a significant relationship with the child. Thus, the Court ordered that the adoption proceed and the biological father's rights be terminated to make room for the stepfather. A year later, the Court in *Caban v. Mohammed* *101 supplemented its *Quilloin* finding. [FN90] The Court found that Mr. Mohammed's request to adopt his wife's children over the objections of Mr. Caban, their involved biological father, violated Mr. Caban's equal protection guarantees. Here, the stepfather's legal relationship with the child was denied by preserving the biological father's significant relationship. Later, in *Lehr v. Robertson*, the court clarified and reasserted the position that, while the biological father has the opportunity to be a legal parent, he must have a significant relationship with the child before he can exercise parental rights. [FN91] The Court again terminated an uninvolved biological father's rights in order to create a legal relationship for the stepfather and child.

Throughout these cases, though they overtly addressed establishing the boundaries of unwed fatherhood, the secondary finding was that parenthood is an **exclusive** status. In each case fatherhood was declared to be an all-or-nothing endeavor. There were no means through which biological fathers could pursue their relationships with children except **exclusive** parenthood. Thus, the recognition of the stepfather's legal relationship with the child rested not on the realities of that relationship, but on whether the court found that the child already had a father. If so, the stepparent could not also be a father, so was instead a legal stranger.

The most interesting, and most recent, in this series of cases was *Michael H. v. Gerald D.*, which was decided in 1989. [FN92] The facts of the case were extraordinary, as Justice Scalia noted, but only insofar as they clearly brought to light a variety of pieces of postmodern **family** relationships. [FN93]

Carole D. (an international model, we are told) married Gerald D. (a top executive) in 1976 and the couple lived in California. In 1978, Carole began an affair with her neighbor, Michael H. (no career cited in the decision). Carole became pregnant and Victoria D. was born in 1981, with Gerald listed as her father on the birth certificate. Though Gerald “held Victoria out to the world as his daughter,” Carole told Michael she believed he was Victoria's biological father shortly after she was born. [FN94] Five months later, Gerald moved to New York and Carole and Victoria lived intermittently with Michael, who, in turn, “held Victoria out as his child.” [FN95] Over the next few years, Carole and Victoria lived for various amounts of time with both Gerald and Michael, moving back *102 and forth between New York, California, and St. Thomas, where Michael lived much of the time.

At one point, while living together, Michael and Carole each had blood tests that proved that Michael was Victoria's biological father and each signed stipulations to that effect. Carole later reconciled with Gerald and, rebuffed in his attempts to contact Victoria, Michael filed a filiation action in California Superior Court to establish paternity and visitation rights. After some delay the suit went forward and Victoria, through her appointed guardian ad litem, also filed, seeking to maintain her relationship with both Michael and Gerald.

In May 1984, after a court-appointed psychologist recommended that Carole retain sole custody while Michael be granted limited visitation, the Superior Court agreed and entered an order of visitation. Shortly thereafter, however, Gerald filed and won a summary judgment challenging Michael's standing. Under California law, a child born to a woman living with her legal husband is the presumptive child of that husband unless the woman or husband petitions the court for a determination of paternity. [\[FN96\]](#) Given this requirement, Michael had no standing as a parent and the court rejected the claims of both Michael and Victoria, reversing the visitation order pending appeal. On appeal the California Court of Appeals affirmed the lower court ruling, upheld the statute, and declined to revisit the issue of visitation. [\[FN97\]](#) The California Supreme Court denied review and, in 1988, the U.S. Supreme Court agreed to hear the case.

In the plurality opinion, the Court upheld the lower court decision and found that Michael's interest as a biological father in this case did not rise to the level of a fundamental liberty interest and was not sufficient to warrant the interruption of the unitary (nuclear) **family**. Opining for the court, Justice Scalia wrote, “[T]he legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected **family** unit under the historic practices of our society, or whether on any other basis it has been accorded special protection.” [\[FN98\]](#) He went on to declare that there is no such protection; instead, “our traditions have protected the marital **family** . . . against the sort of claim Michael asserts.” [\[FN99\]](#)

Several members of the court disagreed with Justice Scalia's methods of finding a liberty interest. [\[FN100\]](#) Others disagreed with his interpretation of previous findings. The dissenters found instead that Michael did have a fundamental *103 liberty interest in continuing his relationship with Victoria based on the standard of “biology, plus relationship” applied in earlier cases. [\[FN101\]](#)

I agree with the dissenters that Justice Scalia's logic and interpretation were, at best, questionable. The most important issue this case for our purposes, however, is its implications for exclusivity. Here, we have a case in which a child has two fathers and a mother--a reality that Victoria's guardian ad litem tried unsuccessfully to bring to the Court's attention. Both Gerald and Michael were known to Victoria as her father; each financially and emotionally supported the child; each lived with her for a significant amount of time. One was Victoria's biological progenitor; the other was her mother's husband and the man with whom she resided at the time. It is difficult to imagine a case in which a child could more clearly have two, non-cohabiting de facto fathers.

The Court, however, was unable to translate this reality of Victoria's life into a de jure recognition of her essential parent-child relationships. “California law,” wrote Justice Scalia, “like nature itself, makes no provision for dual fatherhood.” [\[FN102\]](#) “Here, to provide protection to an adulterous natural father is to deny protection to the marital father, and vice versa. If Michael has a ‘freedom not to conform’ (whatever that means), Gerald must equivalently have a ‘freedom to conform.’ One will pay a price for asserting that ‘freedom.’” [\[FN103\]](#) Justice Brennan, dissenting, used somewhat better legal logic, but reached a similarly **exclusive** conclusion, finding in favor of Michael. “[Cal. §621] is a law that stubbornly insists that Gerald is Victoria's father, in the face of evidence showing a 98 percent probability that her father is Michael.” [\[FN104\]](#) Here, Brennan found that the law violated Michael's liberty interest, but in granting Michael's fatherhood, would deny any recognition of legal parenthood to Gerald.

Interestingly, the only one who interrogated the problem of exclusivity was Justice Stevens. While concurring with the decision, he suggested that perhaps Michael could seek visitation under an “other” category of interested person. [\[FN105\]](#) There seems to be little basis for this assertion and Justice Stevens did not expand upon just how Michael could successfully pursue such a claim. Nonetheless, Stevens is the only member of the court who seemed truly wary of writing out either of Victoria's fathers. Instead, he searched, though with little support, for an alternative to the model of **exclusive** parenthood.

It is important to note, too, that the only reason Michael was pursuing the order of filiation was to secure visitation--to preserve his significant *104 relationship with his daughter. [\[FN106\]](#) There is no indication that Michael was seeking custody or decision-making power in Victoria's life. As Justice Scalia noted, however, “if Michael were successful in being declared

the father, other rights would follow--most importantly, the right to be considered as the parent who should have custody . . . a status which ‘embraces the sum of parental rights.’” [\[FN107\]](#)

The exclusivity that all but one Justice considered a given left no room for the articulation and affirmation of Victoria's real **family**. Michael could not have preserved his relationship with his daughter in any way other than by claiming to be her one and only father--a solution far more drastic than he truly desired. Gerald was forced to oppose Michael's suit completely, for, if Michael had been declared Victoria's father, Gerald would then have been a legal stranger to her. Victoria, for her part, was deprived of a happy outcome by the Court. Through her guardian she sought to preserve her relationships with both of her fathers but, while the Court warded over which father's rights prevailed, her **family** structure was forced into a preconceived mold that required that Victoria lose one father. In the end, Michael was written out of the legal narrative of Victoria's life--he was not her father.

B. Writing Out Lesbian & Gay Parents and Sperm Donors

Lesbian and gay parents are another important category of **family** written out of the legitimate legal sphere. The system of exclusivity fails gays and lesbians and their children when they, like Michael H., do not fit into the model of the nuclear **family** with one mother and one father. This happens even when they closely resemble nuclear **families**. The further these **families** stray from this model, as we shall see, the more the legal arena distorts the narrative of their **families**. [\[FN108\]](#)

In the New York case of *Alison D. v. Virginia M.*, a lesbian couple had a son together, A.D.M, who later became the subject of an intense custody battle. [\[FN109\]](#) In July 1981, Virginia gave birth to A.D.M. She and her partner, Alison, had planned the conception together and agreed to co-parent the child, sharing all rights and responsibilities. For the next three years, they did so. Alison shared equally in the emotional, physical, and financial work of parenting A.D.M., who called both women “mommy.” In 1983 the couple ended their relationship and, for several years, A.D.M. visited Alison several times a week. Alison, meanwhile, continued to provide financial support to *105 A.D.M. and Virginia. In 1986, however, Virginia began limiting Alison's contact with her son and, after Alison moved to Ireland, Virginia cut off all contact.

Alison filed suit in New York State Supreme Court seeking visitation. The court dismissed the case, finding that Alison had no standing in the case, as she was not a “parent.” The appellate court affirmed the judgment.

New York's highest court, the Court of Appeals, heard the case in 1991 and agreed with the lower courts. The court found that, “[I]n this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where a non-parent has exercised some control over the child with the parents' consent.” [\[FN110\]](#) Despite the possibility that contact with Alison might be in the best interests of the child, the majority of the court refused to interpret the word “parent” in the domestic relations statute in a way that might define her as a parent. [\[FN111\]](#) Since a child can only have one mother and A.D.M.'s one-and-only mother was a fit parent, Allison had no standing to ask for protection for her relationship with the boy she had raised as her son. Like Michael, Alison was written out of her **family**.

Courts in some parts of the country, including the same New York high court that rejected Alison's case, have allowed gay and lesbian partners to adopt the biological children of one of the partners in cases of unknown sperm donors. [\[FN112\]](#) Thus, even the New York court has affirmed the possibility of having two mommies. These courts, however, have not addressed cases in which the gay or lesbian partner seeks adoption when the donor is known or where the child has potentially more than two parents. Such cases would challenge two-parent exclusivity in ways these others have not. [\[FN113\]](#)

Another New York case, *Thomas S. v. Robin Y.*, [\[FN114\]](#) presents such a challenge. The case revolves around the lesbian **family** of Sandra R. and Robin Y., who decided to have children together. They enlisted the help of a gay male friend, Jack K., who agreed to be a sperm donor with no expectation of parental rights or responsibilities. He also agreed to make himself known to the child at a later time if so desired by the co-mothers or the child, Cade R.-Y., to whom Sandra gave birth in 1980. Following the birth of Cade, Sandra and Robin again enlisted the help of a gay male friend, this time Thomas S., in *106 order to impregnate Robin Y. Again, all those involved agreed that the child would be raised by Sandra and Robin.

Thomas, as sperm donor, would have no rights or obligations as a parent. He, too, agreed to be known to the child later in life.

Ry R.-Y., born in 1981, was raised as Cade's sister by their two mothers, Sandra and Robin. As Robin and Sandra had constructed their **family**, they were the only two parents. They were also open about the existence of “the men who helped make” the children and the children seemed to have no confusion about the difference between these men and their parents. [FN115] The R.-Y. **family** had no significant contact with Jack K. or Thomas S. until 1985 when Cade began asking about her biological origins. At this point, the mothers contacted both Jack and Thomas and, when both agreed to meet the children, the R.-Y. **family** traveled to San Francisco for the meeting. It went well and they began a continuing relationship, although later, when it became apparent that Jack had a drinking problem, he became much less involved. All understood and acted in accordance with Robin's and Sandra's roles as mothers.

Thomas S. and the R.-Y. **family** met several times a year over the next six years, always at the discretion of Robin and Sandra. Eventually, however, Thomas apparently came to want a deeper relationship with his biological daughter, Ry. In 1991 he insisted on bringing Ry to meet his biological relatives, outside the presence of Robin and Sandra. He also asked to bring Cade. When the mothers refused his request, he filed a case in **family** court seeking an order of filiation and visitation. A court-appointed psychiatrist opposed the motion, finding that Ry “understands the underlying biological relationships [of her **family**], but they are not the reality of her life.” [FN116] The court appointed a law guardian who also opposed the order of filiation.

Family Court Judge Kaufman, using the common law principle of equitable estoppel, ruled that Thomas S. could not move to interrupt the R.-Y. **family**, having agreed to and acted in accordance for many years with an agreement that he would not exercise parental rights or responsibilities. Judge Kaufman found that Robin would never have chosen Thomas as sperm donor, and Ry would never have been born, had Thomas not agreed to these terms and, as such, Thomas was estopped from claiming paternity. He further found that it would be a severe violation of Ry's interests to order filiation and visitation for Thomas. “This attempt has already caused Ry anxiety, nightmares and psychological harm. . . . For her, a declaration of paternity would be a statement that her **family** is other than what she knows it to be and needs it to be.” [FN117]

*107 Again, however, one of the central problems of this case is exclusivity. On appeal, the majority in the appellate court argued that custody was not at issue in this case, only visitation. [FN118] However, both the appellate dissent and Judge Kaufman of the trial court understood legal fatherhood as a singularly **exclusive** status. [FN119] If given an order of filiation and declared to be Ry's one-and-only father, exclusivity would put Thomas in the position of any other non-custodial father--with all the rights included therein. This includes the right to petition for custody at some point, even if such a suit seemed unlikely at the time of this case. Though declaring that custody was not at issue, the majority appellate decision negates its own point on the very same page. “Merely because petitioner does not have custody of his daughter,” writes the court, “does not compel the conclusion, embraced by the dissent, that he may not assert any right to maintain a parental relationship with her.” [FN120] These words from the court suggest that “petitioner” Thomas's lack of custody is an arbitrary or temporary situation among equally entitled parents. Indeed, though unlikely at the time of trial, changes in Ry's **family** situation (like the death of Robin Y.) could mean that Thomas or his relatives could bring a successful suit for custody.

Exclusivity is further operating throughout the decisions and the varying narratives told by the differing courts. The trial judge and the appellate dissent both characterize the participants as a nuclear **family**, which excludes Thomas S. In this case, that characterization may come close to reality. In their move to protect the R.-Y. **family**, though, the judges find it difficult to articulate a position for Thomas other than complete outsider. [FN121] Regardless of whether his request for legal protection should fail, the Judges are pinned by the exclusivity rule into the untenable position of either ignoring Thomas's unique position of known, involved sperm donor or declaring him a parent and acting accordingly.

The appellate majority picks up on this limitation of the trial court's argument and goes the other way--declaring that Thomas's biological relationship does in fact count for something. “The notion,” writes the majority, “that a lesbian mother should enjoy a parental relationship with her daughter but a gay father should not is so innately discriminatory as to be unworthy of comment.” [FN122] Thus, finding that Thomas does indeed have a relationship that the majority would label pa-

rental, Sandra disappears from the legal **family** just as **Family** Court Judge Kaufman had worried she would. [\[FN123\]](#) *108 Sandra thus faces the same possibility as Alison in the case above--she is no longer a "parent."

Parental exclusivity, in this case, operates on both sides. Ry's **family** is complex and, because it doesn't fit the mold, it is twisted into an unrecognizable shape. Sandra and Robin were clearly Cade and Ry's parents. However, as Kath Weston demonstrated in **Families We Choose**, queer **families** can and do create new and creative **family** forms from their position outside mainstream institutions. [\[FN124\]](#) By choosing a known sperm donor and making a place for him in relation to their immediate **family**, the R.-Y. s' created a new and potentially empowering **family** relationship. The appellate majority would turn Thomas into a parent. The **family** court and appellate dissents have written out Thomas's relationship altogether in order to protect Robin's and Sandra's parental position. Both, under the doctrine of exclusivity, distort the radical and potentially empowering reality of the R.-Y. **family** and provide no rational basis on which to evaluate the true form and needs of the **family**.

C. Writing Out Grandparents

Grandparents are another prominent example of "outsiders" who may be in a position to provide care to children. Many grandparents play a peripheral role in children's lives--making occasional visits and perhaps providing children with a special familial and historical bond. Some grandparents, however, are much more involved in the day-to-day work of parenting children. In the urban African-American community Carol Stack studied, for example, grandmothers were often important sources of caregiving, especially for the children of teenage mothers. [\[FN125\]](#) In some cases, grandmothers took over as the primary caregivers of grandchildren whom they viewed as in need of better or more care. As Karen Czapanskiy documents, psychosocial research has shown that relationships with such highly involved grandparents can be very important and beneficial to children's development. [\[FN126\]](#)

In the legal realm, one exception to the complete exclusivity of parenthood has been the recent emergence of grandparent visitation statutes. Since they are not "parents" under common law and parental exclusivity assumptions, grandparents hold no standing to seek visitation. However, all fifty states have, mainly in the past ten years, passed some sort of legislation giving grandparents third-party standing and granting them visitation rights in certain *109 circumstances. [\[FN127\]](#) Most of the statutes require death, divorce, or loss of parental rights by at least one parent in order for grandparents to have standing to ask for visitation. For example, in one Nevada case grandparents who had previously had little contact with their grandson (because the parents of the child worried about their erratic behavior) were able to bring a successful suit for visitation after the parents' divorce--an option they had not had when the parents were married. [\[FN128\]](#)

In many cases, too, courts or statutes have imposed a "same-line" limitation. Under this limitation, a grandparent may not seek visitation if his grandchild is in the custody of his child--thus precluding claims against non-divorced or joint custody **families**. A few states allow courts to order visitation regardless of **family** situation if it is in the best interests of the child. Only a handful of states require that the grandparent have a substantial relationship with the child before they seek visitation rights. [\[FN129\]](#)

These statutes specifically infringe upon parental exclusivity. Because of this infringement and the growing numbers of grandparents seeking visitation, the statutes have been the focus of great public and legal controversy. The statutes and the legal challenges to them represent an important area in which parental exclusivity is being questioned. These statutes, however, are hardly comprehensive challenges to the problematic paradigm of parental exclusivity. The statutes are usually limited to grandparents, allow only for visitation, and operate only in very limited circumstances. They usually cease to operate if a child regains a nuclear **family**. [\[FN130\]](#) Most importantly they continue to be based not on real relationships with children, but on biology and the presence of a biological parent.

The most well known case involving grandparent visitation was *Troxel v. Granville*, [\[FN131\]](#) which reached the Supreme Court in 2000. This case involved the children of Tommie Granville and Brad Troxel. Granville and Troxel never married, and upon their separation in 1991 Tommie had primary custody of the children. Brad's parents, with whom he lived,

were very involved with the children, Natalie and Isabelle, during their regular visitation with their father. Brad committed suicide in May 1993.

At first after Brad's death, the Troxels continued to see their grandchildren on a regular basis. A few months later, however, Tommie Granville informed *110 the Troxels that she wished to limit their visitation with the children to once a month. The Troxels filed a petition for visitation under a 1994 Washington statute that declared: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interests of the child whether or not there has been any change of circumstances." [FN132] The Troxels asked for two weekends of visitation per month and two weeks during the summer. Granville instead asked that the court award only one day of visitation per month with no overnight stay. The Superior Court that heard the case found that the Troxels had a right to visitation under the statute and that visitation would be in the children's best interests. Splitting the difference, the trial court ordered visitation of one weekend per month, one week during the summer, and four hours on each of the petitioning grandparent's birthday. [FN133]

On appeal the case found its way to the Washington Supreme Court. The Court found that the Troxels did have standing under the statute to ask for visitation. The statute, however, they found to be unconstitutional, holding that it violated the fundamental right of parents to raise their children as guaranteed under the Fourteenth Amendment. They found the statute was unconstitutional on its face because (1) it swept too broadly and (2) it did not, as they believed the Constitution demanded, require a showing of harm to the child if the order is not entered. [FN134]

The Supreme Court agreed in a 6-3 decision that produced six separate opinions. Justice O'Connor, writing for the plurality, held that the Washington statute did violate the liberty interest of parents "in the care, custody, and control of their children . . . perhaps the oldest of the fundamental liberty interests recognized by this Court." [FN135]

Given the facts of this case, and the fact that the Washington Statute was, as Justice O'Connor notes, "breathtakingly broad," I believe results of this case were sound. [FN136] The law, as written, effectively allowed any person at any time to contest the decisions of a child's parent(s) with respect to visitation and subjected those decisions to judicial review. It provided no concrete way to differentiate between those who deserve standing from those who do not. Indeed, Justice Souter, in his concurring opinion, argued that the Court should affirm the Washington Supreme Court's facial invalidation because of the breadth of the statute and stop there. [FN137] However, neither the Washington *111 Supreme Court nor the United States Supreme Court plurality opinion stops at the facially unconstitutional breadth of the statute. Both examine the specific case and other issues involved and, in so doing, apply extremely problematic visions of parental exclusivity to grandparent visitation.

Justice O'Connor found that there is a legitimate judicial presumption that fit parents are acting in the best interests of their children. Thus, "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the realm of the **family** to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." [FN138]

On its face, this is not an unreasonable assumption. However, applied here in the context of grandparent visitation, it asks the question of exactly how and when such "third party" visitation might be in order. O'Connor does not set out parameters for visitation when the parent is fit, but by extension her opinion supports the Washington Court's finding that the only way for "non-parents" to infringe on parental exclusivity is to show that the child will be harmed without this order. [FN139] Thus, unless grandparents (and all others) can prove harm, they have no standing and their relationships warrant no legal protection.

Additionally, the statute, the Washington Court, and the Supreme Court plurality pit grandparents' rights as outsiders--non-parents--against the rights of parents. Under their rhetoric, the basis for any grandparent standing and surrounding legal discussion is not their specific relationship with the child, but instead the simple biological fact of begetting the child's parents. [FN140] Despite the court's finding in *Quilloin v. Walcott* that biology by itself was insufficient to warrant legal protec-

tion of relationships, none of the high court decisions even identified the relationship of the grandparents as a factor in deciding the fate of this **family**. All grandparents here are treated the same--putting grandparents who may have lived with and acted as a functional parent to the children in the same position as a more removed grandparent. [\[FN141\]](#)

What the Court does not question in the Troxel case, despite their opportunity, is the basis and boundaries of parental exclusivity with respect to the interdependency of real **family** lives. Instead, the court only debated the *112 merits of limiting one interest in favor of another. Justice Kennedy, dissenting, saw this failing of the plurality opinion:

The holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear **family** ought to establish the visitation standard for every domestic relations case. [\[FN142\]](#)

In this, as in many of the cases discussed above, the Court applied a generalized view of **family** that cannot possibly include "outsiders"--here grandparents--as central caregivers. Distorting the reality of a great many **families**, this application of exclusivity sees parental authority as inherently opposed to grandparent involvement instead of the interdependence of caregiving which such relationships often entail. It writes caregivers unnecessarily out of the picture. While this particular statute clearly had problems, the model applied by the Court was itself problematic.

D. Writing Out Everybody Else

Stepparents, lesbian and gay parents, and grandparents are only a few of the many caregivers who, as members of outsider **families**, run up against the rule of parental exclusivity. [\[FN143\]](#)

In addition to sperm-donation, as seen in Thomas S., new reproductive technologies have spurred a pluralism of **family** forms. Surrogacy cases, for example, in which a woman carries and bears a baby then gives it to others to be raised as their own, pose a number of challenges. In such cases, whether the baby is conceived from the surrogate mother's own ova, or from a donor ova as in "complete" surrogacy, the baby's parentage is far from legally clear. [\[FN144\]](#) The *113 "Baby M." case, for example, which gained national attention in the late 1980s, illustrated many issues related to indeterminate legal parenthood. [\[FN145\]](#) Mary Beth Whitehead changed her mind about giving the baby she carried to William and Elizabeth Stern, the couple with whom she had made the surrogacy contract. [\[FN146\]](#) After a police chase through several states, the case wound up in a New Jersey court. There the courts eventually found the contract and Mrs. Stern's adoption of Baby M. invalid and awarded custody to Mr. Stern as the father with visitation by Ms. Whitehead, the mother. Elizabeth Stern was left out of the decision entirely. As this case illustrates, surrogacy arrangements do not fit the nuclear-**family** model, often despite the best attempts of the receiving **family**. Once in the legal system, however, the narrative is rewritten under the rules of exclusivity and either the birth mother or the intended mother must be written out. [\[FN147\]](#)

Another phenomenon that calls into question the two-and-only-two parent rule is the movement toward open adoption. This sometimes takes the form of simply "unsealing" adoption records, but increasingly it also involves **families** who adopt children and agree to varying levels of contact and relationships with the birth mother, including visitation. [\[FN148\]](#) As Mary Lyndon Shanley points out, children no longer have to be constructed as "parentless" in order to create new parenting relationships. Open adoptions "undercut the blood-based understanding of **family** bonds" and, instead, consciously construct familial relationships with multiple parents. [\[FN149\]](#) These **family** constructions defy traditional assumptions, just as the R.-Y. **family** did in the Thomas S. case. And, similarly, the **exclusive family** model does not fit in these cases. As **families** construct new and varying places for birth mothers, the law is unable to construct similar support for these relationships, demanding instead the continued myth that the birth mother no longer exists in the life of the child.

E. Hard Cases, Hard Choices

Some may be inclined to ignore the problems presented by these cases as abnormalities--outlier examples that do not warrant revisioning our thinking. It is true that these situations present hard cases and the law cannot hope to *114 solve all

the individual or social problems that underlie them. What the law can and should do, however, is to seek to solve conflicts in ways that most benefit both participants and society as a whole. Most of all, the law should not cause more harm.

These cases illustrate what happens when some of the 28 million children living in outsider **families** [\[FN150\]](#) come into contact with legal models that do not have room for their lives. In the Michael H case, for example, the situation was clearly upsetting--an extramarital affair and ensuing tug-of-war over mother and child. It was the law, however, that forced both Michael and Gerald, at risk of being written out their daughter's life, to seek the elimination of the other through claiming to be Victoria's one father. It was the law that made no room for Victoria's clearly articulated desire and need to maintain her real relationships with both men.

Increasingly, these cases represent reality. Today, demographers estimate that less than 50 percent of children will spend their entire childhood in a two-parent, married couple biological **family**. [\[FN151\]](#) As such, it is no longer makes sense to respond to conflicts in the lives of the six million stepchildren in the United States by pretending their stepparents are not parts of their lives. It is no longer reasonable to respond to the increasing presence of grandparents in children's lives by granting the same legal standing to those grandparents who are primary caregivers and those who are not. It no longer makes sense to provide only subjective and unpredictable "equitable estoppel" and de facto bases with which to decide if the second parent has rights in the household of the 2.5 million children who live with "co-habiting" parents, be they straight or queer. [\[FN152\]](#)

Where there is no conflict, happily, **family** law plays much less of a role in the lives of American **families**. But when disputes do occur, as in the cases described (and the others cited) here, we need a law that looks to increase care for children. **Families** should have the right to find the forms that work for them in the economic and social realities of the twenty-first century. The law should be able to respect relationships that exist and hear from those who inhabit them.

*115 III. Beyond Exclusivity

A. Moving Away

Several legal and political scholars have addressed the problem of exclusivity. Their alternatives and ideas about changing specific aspects of exclusivity have been important in envisioning other ways of constructing parenthood without the assumption of exclusivity.

One of the first and most insightful authors to fully address the problem was Katharine Bartlett in her article, Rethinking Parenthood as an **Exclusive** Status. [\[FN153\]](#) Bartlett proposes a concept of "non-**exclusive** parenthood" that would legally recognize as psychological parents all those who: (1) have had custody of the child for at least six months; (2) are understood to be a parent by the child; and (3) began their relationship with the child with the support and consent of the child's legal parent. [\[FN154\]](#)

Bartlett's is among the most comprehensive plans to challenge exclusivity. Her proposal, however, does not provide a concrete basis of support for non-conforming **families**. Her plan would continue to tie the rights of exclusivity to the nuclear **family**, which she sees as the best way of assuring parental autonomy and "encouraging parents to raise their children in the best way they can by making them secure in the knowledge that neither the state nor outside individuals may ordinarily intervene." [\[FN155\]](#) Bartlett does not explore an alternative basis for parental authority that is not linked to nuclear **families**. More importantly, Bartlett's proposal would only allow considerations of non-**exclusive** parenthood at the breakdown of the nuclear **family**. "Absent the failure of the premise of the nuclear **family** underlying traditional **exclusive** parenthood, the state should not intervene in **families** to create new parental rights." [\[FN156\]](#) Despite the reality, recognized by Bartlett, that children can and do form parental relationships outside the nuclear **family**, such extra-**family** relationships only deserve protection, in her view, if the nuclear **family** model has broken down.

These assumptions continue to privilege the nuclear **family** and continue to write-out important caregivers from the lives

of children. Gay and lesbian **families** might be open to “intrusion” whereas heterosexual couples would not. Uninvolved grandparents might find standing for visitation in divorced **families** whereas grandparents who have acted in the role of daily caretakers to **families** with married parents would be denied protection. **Families** involving *116 surrogacy, sperm donors, and open adoption would have a difficult time gaining recognition for the complex realities of their lives under a doctrine that continues to privilege the nuclear **family**.

Nancy Polikoff provides another influential vision of alternative parenthood. In discussing the legal status of lesbian co-mothers and their children, Polikoff proposes a functional definition of legal parenthood. Under her conception, legal parents would include “anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature.” [\[FN157\]](#) This definition challenges the two-and-only-two parents rule. It radically redefines parenthood and recognizes the real parental relationships of children's lives, which may involve multiple parents of any gender.

However, Polikoff explicitly preserves the parent versus non-parent dichotomy of exclusivity. [\[FN158\]](#) Though she allows for more than two parents, adults either have all the rights and responsibilities of parenthood or are legal strangers. As such, many grandparents and other caregivers would continue to be written out of the stories of children's lives, no matter how important a role they play. [\[FN159\]](#)

Alison Harvison Young, suggesting another option, calls for the concept of an “authoritative core” **family**, which would have autonomous control in children's lives. [\[FN160\]](#) It would both be inclusive of all those acting as parents and allow limited rights of visitation for those important individuals in children's lives outside that core. This concept is instructive, but lacks a practical principal upon which to decide who should and should not qualify for standing as part of this core.

Courts have shown some willingness to follow some of these proposals. In a recent Iowa case, for example, the Iowa Supreme Court found a possibility for parenthood outside the **exclusive** model where a man mistakenly thought he was the child's biological father. [\[FN161\]](#) He raised her as his daughter, but risked losing custody when the mother revealed he was not the biological father. [\[FN162\]](#) The court in Gallagher held that the man could establish “equitable” parenthood by demonstrating that (a) he was married to the mother when the *117 child was conceived; (b) he had believed he was the child's father; (c) he had established a parental relationship with the child; and (d) it was in the best interests of the child to recognize the relationship. While such an “equitable” parenthood idea is an exciting step forward it still fails to meet the full needs of **families** and recognize their real lives in a complete way.

Building on all of these insightful proposals, we need a concept of non-**exclusive** parenthood that makes room for multiple forms of functional parents. We also need a principal on which to create stable legal **families** that include both core, authoritative parents and other limited forms of parenthood.

B. Moving Toward

The first step in this process is to stop looking to the rights of parents in opposition to others. Instead, we should truly look to the interrelationship of various **family** members and the ways in which real **families** create relationships.

I agree that we need to empower and protect parent-child relationships from unwarranted and potentially damaging outside infringement. We can do this, however, while imagining fully inclusive **families**. The basis for this, as I will show below, is an element not explicitly included in other analyses -- care. If care and caregiving relationships are central to the lives of children, then this care should be clearly at the center of decisions--legal and political--about their lives. The assumption that parenthood per se bestows legal rights regarding their children should be replaced with the idea that rights flow from relationships between caregivers and children. If a conception of care is moved to the center of our legal analysis, we will see that exclusivity cannot continue and more comprehensive alternatives will become available.

IV. Creating a Care-Based Theory for Children and Custody

Families and communities are characterized by systems of care--intersecting webs of people who give care, people who receive care, and, primarily, people who both give and receive care. These systems are active in everyday life in obvious ways, such as the work of parenthood, and in less visible ways, such as those whose work makes it possible for parents to care for their children. The current paradigm of **family** law, however, fails to recognize care outside of the **exclusive family**. It fails children because it does not provide support or encouragement for the caregiving that children need--indeed it discourages care by "outsiders." It fails **families** because it does not provide room for the interrelated realities of caregiving and receiving care.

As discussed earlier, paradigms of recognized familial relationships have changed throughout American history. Many of the changes have been *118 positive, such as the movement away from literal ownership of slave children, the complete legal control of white children by fathers, and the exclusion of women as legal actors and parents. However, the nineteenth century also saw the problematic move of all caregiving, and especially care-for-children, into the private sphere and the gendered realm of women. [FN163] Not only has care been isolated in the private realm, it has been further isolated exclusively within the two-parent **family**.

Changes throughout history refute the concept, posited by many conservative commentators, that such privatization is "natural" to the **family**. [FN164] Indeed, so long as we limit the realm of care, children will not be able to benefit from all that society has to offer. Too often children are left wanting for care because the notion of **exclusive** parental responsibility denies them access to caregivers. It is now time for another historical shift--a shift away from exclusivity. This shift can happen if we refocus our attention on care and caregiving and use a feminist "ethic of care" to rethink the bases for our custody decision-making.

A. Care, Thought, and Politics

As is well documented by feminist theorists, historically the standard subject of law, theory, research, and writing has been white, male, and heterosexual. [FN165] The questions asked and the answers "discovered" have been accomplished from a historically male perspective, excluding the experience, lives, and knowledge of women and people of color.

In 1982, Carol Gilligan published *In A Different Voice*, a challenge to Lawrence Kohlberg's widely respected description of universal stages of moral development. [FN166] Identifying Kohlberg's methodological and theoretical gendered assumptions, Gilligan argued that women often speak and deliberate using a "different moral voice." Departing from the "ethic of right and justice" espoused as universally higher thinking by Kohlberg, Gilligan found that women more often used an "ethic of care" in their moral reasoning. This ethic focused on three key concepts as central to decision-making: "responsibility *119 and relationships" rather than individual autonomy; specific and concrete circumstances--"contextual and narrative" ways of thinking--rather than abstract ideology; and a basis in actions and activities over purely conceptual considerations. Gilligan's work has come under criticism, most importantly for the racial and class assumptions embedded in her model. Nonetheless, these concepts and the possibility of alternative modes of thinking and prioritizing have served as an important departure for feminist theory.

Gilligan's work came in the context of what Mona Harrington identifies as the "collapsing care system." [FN167] As white women have moved en masse into the workforce, the assumptions that women would silently provide the caring work necessary for society could no longer be assumed. The system of care, however, did not change with these changes in the work-force and the home. Indeed, as Harrington notes, we do not even see care as a system:

When things go wrong, when a mother leaves children alone because she cannot afford day care while she works, when marriages fail under the stress of job and **family** demands, when unsupervised teenagers in cities and suburbs turn to sex and drugs, we generally see specific problems--moral, economic-- but not an entire care system in trouble. [FN168] Attention to this collapse, combined with Gilligan's important suggestion that care was ignored in public thinking, lead to new attention by white American feminists to the issue of care.

An ethic of care, however, is not a new idea. [FN169] As bell hooks notes in her essay, “Revolutionary Parenting,” Black women have not had the historical luxury of forgoing work for wages outside the home. [FN170] As such, the dilemma of articulating and balancing the work of caregiving with extra-familial pressures has been a continual focus of their attention. “Historically, black women have identified work in the context of **family** as humanizing labor, work that affirms their identity as women, as human beings showing love and care, the very gestures of humanity white supremacist ideology claimed black people were incapable of expressing.” [FN171]

Patricia Hill Collins's book, *Black Feminist Thought*, shows how care, at the intersection of race, gender, and sexuality, can become an explicit consideration in social and political matters. The ethic of care long espoused by *120 many Black women has required that individual expressiveness and the capacity for empathy to be central tools for decision-making in Black civil society. Among the most important aspects of the Black feminist philosophy identified by Collins is the importance of and respect for “othermothers”:

Children orphaned by sale or death of their parents under slavery, children conceived through rape, children of young mothers, children born into extreme poverty or to alcoholic or drug-addicted mothers, or children who for other reasons cannot remain with their bloodmothers have all been supported by othermothers. . . who take in additional children even when they have enough of their own. [FN172]

“Othermothering,” as support and/or replacement for “bloodmothers,” demonstrates a public ethic of care and caregiving. Indeed, community-based child care and decision-making about children has been a hallmark of many African-American communities. [FN173] Importantly, this caregiving has been a public consideration. [FN174] The care of children must be considered in decisions about work, **family**, and society--who will live where, work where and when, and, as a result, what kind of community member she will be perceived as. “By seeing the larger community as responsible for children and by giving othermothers and other nonparents ‘rights’ in child rearing, those African Americans who endorse these values challenge prevailing capitalist property relations.” [FN175]

Collins also shows how black feminist activists, in the role of “community othermother” use an ethic of care in the public sphere. These women construct their arguments and priorities in terms of: connectedness and webs of care; personal accountability; real-life experience and work as the basis for knowledge-claims; and a focus on the most vulnerable members of the community. [FN176]

These concepts, similar to those articulated by Gilligan, have been picked up by a group of feminist theorists and applied to political theory and policy. Left out in white male-centered analyses of liberal political theory, an “ethic of care” gives us a new way to approach and analyze the “public good.” [FN177] Instead of viewing people as “autonomous, equal, rational actors each pursuing separate ends,” Joan Tronto argues for a vision of “interdependent actors, each *121 of whom needs and provides care in a variety of ways and each of whom has other interests and pursuits that exist outside the realm of care.” [FN178]

The ideal of equality, as Eva Kittay argues, is insufficient in describing and dealing with a society in which everyone is, at some point, dependant on others. Those who do the caring work--“dependency workers”-- cannot compete on equal footing with those who are not required to do caring work for others. Kittay points out that, “it is in their role as dependency workers that women have been made vulnerable to poverty, abuse, and secondary status.” [FN179] Instead, the care theorists argue for a vision of equality and personhood that takes relationships of care and dependency into account and views care as an important and necessary public good:

Starting with the value of care as a national priority, liberals need to break away from the idea that care in that context consists only of ministering to people who for some reason--age, illness, disaster, poverty-- are helpless and cannot take care of themselves. A liberal conception of care would include all of the thought and work that organizes all of the caring that supports everyone's everyday life. [FN180] The feminist care theorists have also questioned the positioning of justice as a supreme and universal moral principle, separate and superior to the particularistic considerations of care. Care, as a moral good, is incomplete without considerations of justice, but so too is justice incomplete as tool of public good if it ignores care. As Tronto writes, “with a different sense of the relationship of how humans are

interdependent. . . . the relationship between justice and care can be a relationship of compatibility rather than hostility.” [FN181]

The ethics of care ask that we rethink how we make decisions and balance justice claims with considerations of care--trying to find the intersections where justice and care come together.

In considering custody, then, we might move away from our purely justice-oriented perspective--that of rights-bearing adults seeking justice for themselves--and toward a theory and practice that does justice to the real caregiving that underpins custody cases. Below I will try to map this border between justice and care and look at ways that a just care-based ethic could inform a new paradigm of child custody.

*122 B. Bringing Care into Custody

I propose that we use care as the basis for a new theory and practice in the realm of law and public policy related to children. The considerations and priorities that come out of the lived ethic of care, along with the issues raised by considering care within a feminist political ethic, provide a guide by which just such a concept can be constructed.

An ethic of care brings three major considerations to the task of constructing a new paradigm for child custody: attention to connectedness; a basis in concrete and real-life circumstances; and a focus on the vulnerable.

Connectedness

A central aspect described by both Collins and Gilligan, attention to connectedness requires that we recognize and attend to systems of care. Connectedness requires an expansive vision of **family**--one that recognizes all of the varying contributions, responsibilities, and positions of **family** members in all forms of **families**. Any new custody principle should not presume to write-out relationships, but should look to write-in all those who give care. With an eye to maximizing the good care received by children, we must acknowledge the varying ways to do caregiving. Our new construction must recognize that care is not an all-or-nothing endeavor and allow for the pluralism of who and how people provide care.

In each of the cases discussed above, the law assumed that caregiving relationships were limited to the recognizable few--an assumption with problematic effects for the parents and the children involved. Instead, an ethic of care requires that courts and laws encourage increased care and recognize it where it exists. This ethic recognizes that this caregiving is essential to functional **family** systems and looks to maximize the good that caregiving brings to all parts of this system.

Basis in Real-Life

The nuclear **family**, a privileged construction that is a reality only for a minority of Americans, is an insufficient model for caregiving. Basing legal decision-making on this model discounts the historical and current **family**-making of some communities of color, queers, and others. It privileges those with the economic means to meet their caregiving needs through hiring paid caregivers while discounting those who choose other paths. The white-supremacist, classist, and heteronormative presumptions embedded in the legal **exclusive family** are anathema to a true ethic of care. Instead, an ethic of care requires that we base decisions on real **families**.

*123 To accomplish this shift we must be guided by a basis in reality--on the acts of caregiving actually occurring in the individual **family** in question. All of the participants in the cases discussed above had the narratives of their **families** recast by the legal system to fit a strict model. Rather than basing the facts of the cases and the participants' claims in the reality of their **family** lives, those involved were forced to misrepresent their relationships in order to preserve them. An ethic of care instead identifies the starting-point of decision making: the real **family**. Only after looking at the actual relationships, as findings of law, can we make judgments about the legal situation.

Individuals should not be assumed to be outside the **family** structure, nor should they be assumed part of the **family**. In-

stead, individuals should be required to show relationships based on the acts they perform and given privileges and rights based on those actions. Such a design encourages care and requires that the legal system grant support to care where it occurs.

An ethic of care points us to needs as the best basis for judging individual's actions. [\[FN182\]](#) Who has needs for care and who is able and prepared to provide for those needs are central questions. For our discussion, the main questions that arise concern the needs of children and the adults who are available to meet those needs. We should also ask, however, about the needs of caregivers--for help in meeting child's needs and for help in meeting their own needs so that they actually can be available to care for the child.

This basis in the concrete stands in opposition to the "parents' rights" talk engaged in by parents, lawyers, judges, and lawmakers. [\[FN183\]](#) In case after case, as we have seen, the needs of all involved were subordinated to the "rights" of parents. Unmarried fathers, birth mothers, grandmothers, and other caregivers must argue that they have rights, rather than seeking recognition and support for the actual relationships and the ways they have provided for the needs of children and **families**. Rather than my child, a new approach would allow center on the child with whom I stand in a caregiving relationship.

In challenging the prevailing capitalist notions of children as property, a new care-based standard would focus on relationships. [\[FN184\]](#) It would be these *124 relationships, rather than rigid statuses like "parent" or even "grandparent," that would be protected.

Focus on the Vulnerable

Finally, an ethic of care asks that we focus primarily on those who are most vulnerable--the recipients of care. "Only in a democratic process where recipients are taken seriously, rather than being automatically delegitimized because they are needy, can needs be evaluated consistent with an ethic of care." [\[FN185\]](#)

The focus must be moved from parents to their children. Despite the concern for children's "best interests," the parameters of legal discourse have been based on parents' rights to their children instead of on a child's right to be parented. Children's dependent status means that, in general, they lack standing to exercise their own rights, relying instead on their parents to exercise them. [\[FN186\]](#) As such, children will inevitably be disadvantaged in a rights-based system.

Martha Minow has argued that children must be granted a privileged position in order to assure that their needs will be met. "Neither the government's interests nor the interests of the adults supply the justification for regulating otherwise private and intimate concerns. The needs of vulnerable and developing children supply that justification." [\[FN187\]](#) I agree with this evaluation and believe that a child-centered focus is required by an ethic of care. Without such a focus, it is impossible to assure that the needs of those most vulnerable, and most often silenced, will be heard and met.

This focus does not, however, mean looking only at children to the exclusion of considering caregivers. The needs of caregivers are integral to systems of care. Caregivers cannot do their best for children if they are not taken care of by themselves and by others. Thus, their lives must be considered. However, where needs conflict, the needs of the child must take precedence, for as a legal dependant she has no other alternatives.

The other aspect of taking seriously the needs of caregivers is realizing that they need support. The **exclusive legal family** has encouraged the myth that *125 only a child's two parents are capable of providing complete care. The public is quick to realize that a single parent may need help, but assumes that two-parent **families** do not. In neither case, though, does the legal system do its best to provide parents that help. Instead, it excludes, writes-out, and misnames other caregivers and potential caregivers.

Exclusivity

Considerations of connectedness, claims of real-life knowledge, basis in concrete actions and meeting needs, and focus

on children and their systems of care all require that we eliminate the rule of **exclusive** parenthood. Seen from the position of a political ethic that takes care seriously, exclusivity is clearly opposed to the goals of providing the most and best care possible to all children. If we are to take our commitment to children seriously they must be put at the center of the analysis and exclusivity must be abolished. If we are to make a real commitment to caregivers, we must protect their relationships and provide them the support they need--in part by recognizing the "others" who are part of **family** systems of care. Thus, we clearly need a new standard for decision-making in child custody cases.

C. Rewriting the **Family** in Child Custody Law

A feminist ethic of care can and should guide us in building a new paradigm of child custody law. The question that then arises, is what such a shift would look like? What kind of principle could we create that would recognize and protect the relationships of my **family**, or the multitude of other **families** that do not fit the prevailing notions?

A change in legal paradigm is needed in order to provide for the needs of children and allow **families** the freedom to invent forms that will best meet their needs. **Families** with multiple caregivers, serving qualitatively different roles in children's lives, should have the full support of our laws. We thus need a more precise principle that can be used in both deciding individual cases and in creating legal and legislative policies. The challenge is creating such a principle that will:

1. truly and practically incorporate an ethic of care;
2. successfully bring children's voices into the decision-making and make children central to the process and outcome; and
3. recognize and protect the various caregiving relationships in children's lives--making more adults available to children, allowing these relationships to be creatively constructed to fit real **families'** needs, and ensuring authoritative decision making; and
- *126 4. simultaneously provide security to **families** and ensure that true outsiders cannot challenge their **family** construction.

A New Standard

If we remove parental exclusivity from the picture, we are left with the "best interests" test. As many have noted, however, as the sole legal basis for decision-making this concept is insufficient, overly vague, and too open to manipulation. [\[FN188\]](#) Instead of subjecting children and **families** to unrealistic models of **family** and the biases of judges, we need a way to provide **families** with legal support and authority based on their real lives and a principle that can be practically applied and that has predictable outcomes.

The proponents of functional and non-**exclusive** parenthood are moving in the right direction. As discussed earlier they do not, as I believe is necessary, start at all times with the real-life **family**. Nor do they focus on needs over rights, with the child at the center of the analysis. Other standards that focus on care have been suggested, like Martha Fineman's "Mother-Child Dyad," but these novel constructions move us in the wrong direction. While creating novel and more feminist ways of telling the legal story of a **family**, they nonetheless continue to misrepresent the lives of those who do not fit a certain model. [\[FN189\]](#)

Instead, a needs-based analysis lets the lives and needs of children dictate the framework of **family** law. Barbara Bennett Woodhouse's work *Hatching The Egg* argues convincingly that such an endeavor is possible. [\[FN190\]](#) She notes, "[R]ather than seeking to provide adults for the children who need them, law seems intent on securing children for adults who claim them." [\[FN191\]](#) Instead, she advocates a child-centered perspective and suggests that if we take children seriously and use their own words and stories as oppositional narratives we can implement a practical legal analysis that moves children to the

center.

***127** D. A Care-Based Standard

Moving beyond the “best interests” standard, a new principle should guide our decision-making with respect to children and their custody. I propose that both legal decision-making and legislation be based on a new principle:

Mutual caregiving relationships, [\[FN192\]](#) in which an adult provides for the needs of a child, should be legally recognized. The level of legal protection accorded should be appropriate for, reflective of, and limited to that which is beneficial and necessary to protect and support the established caregiving relationship. Further, the legal protection accorded should be granted in accordance with the protection for practical parental decision-making authority necessary for life of each child.

Recognition & Standing

This test is based firmly in the concrete and connectional. It uses the language of needs, rather than of interests or rights to establish legal recognition and standing. It also rests on a demonstrable question: the provision of care--when and in what ways did the person actually give care and provide for needs?

The requirement that the relationship be mutual would establish that the bond is “real.” I do not use the word mutual to mean that caregiving in the relationship occurs equally--which should certainly not be the case in a caregiver-child relationship. Instead, I use mutual to signify a relationship that is understood to be an important caregiving relationship by both parties-- the caregiver and the child. This would, necessarily, involve the direct consideration of the child's point of view, where that child was old enough. [\[FN193\]](#) Listening to the story of **family**, as told by the child, would be central to determining if the relationship is mutual. The best test would be exactly how the child understands the relationship--as parental, as auxiliary, as non-**family**, etc.--thus, recognizing the child's real-life **family**. This will take tailored attention to how children construct narratives and caution must be used to assure the child does not become a pawn for parents. I believe, however, that this can happen and, in listening to children, that we can do justice to their caring relationships. [\[FN194\]](#)

Second, in a mutual caregiving relationship, the caregiver chooses to do the work out of her or his connection to the person, for non-selfish reasons, and ***128** with the object of providing for their needs. As Katharine Bartlett notes in her discussion of mutuality in parental relationships, “[a]lthough self-interest is not altogether incompatible with parenthood, society expects parents to act out of concern for the welfare of their children.” [\[FN195\]](#) Thus, the requirement of mutuality would mean that paid caregivers and other self-interested parties would not warrant legal recognition. [\[FN196\]](#)

While excluding those who have not given care toward meeting children's needs, or who have done so for selfish reasons, this new principle would include all those who have done this important work. The channeling function of law, described by Carl Schneider, could be used, not to limit options, but instead to encourage creative **family** formations that maximize care. This principle would channel adults into caregiving roles instead of channeling **families** into rigid forms.

This principle would recognize the caregivers in children's lives, regardless of their number and regardless of their gender, sexuality, blood relationship, or socially assumed role. This would move the ideas of mother and father away from **exclusive** concepts with culturally and politically embedded sex roles and toward, as in some other cultures, [\[FN197\]](#) a linguistically gendered word that includes many people and varying forms of caregiving.

Perhaps most importantly, this would not invest rights in parents. Instead, it would invest relationships and caregiving with right-generating power.

Protection

The first part of the test described above would guarantee legal standing to all those who fit the requirements outlined. However, standing does not guarantee legal protection. The second part of the principle--the requirement that the legal situation fit the relationship--is essential. It would establish two concepts. First, it would recognize the varying relationships that exist within **families** and create room for new categories of caregivers who are not necessarily all-or-nothing figures in children's lives. Second, it would provide the tools by which courts could both recognize a relationship exists and in some cases decide that individual should not, for various reasons, be granted custody or visitation.

This second part of the proposed principle extends the functional concept of **family** and creates practical guidelines for its construction. To deserve *129 physical custody and decision-making power, adults would have to show a relationship consistent with such a role. "Primary caregivers" or legal "parents" would be those who live with and provide for the needs of a child on a daily basis and whom the child recognizes as her full-fledged parent. [FN198] All of these, but only these, people would be invested with full decision-making power in children's lives.

Each child needs adults with sufficient authority and autonomy to make practical decisions about their lives. As many worry, if too far diluted or if too many individuals are given access to this authority, children's lives will become chaotic and their sense of security and predictability of their **family** may be undermined. [FN199] It is possible, and indeed not difficult, to establish an authoritative "core **family**" without resorting to exclusivity or privileging a nuclear **family**. [FN200] With the understanding that each child needs such located authority and tying this to those who meet the standard for full parenthood, we can assure that authority is balanced with an inclusive, care-based conception of **family**. As I will discuss below, I also believe that legislatures should use this principle to develop new ways in which parental authority can be designated and broadened, specifically with the help of the original legal parents.

I specifically would not, as some have, require that this protected relationship be created by the legal parent with the explicit intent that the relationship be parental in nature. [FN201] Since "parents" would continue to be invested with authoritative decision-making power, they already have the ability to initiate relationships for their children. [FN202] It is unlikely that a true mutual caregiving relationship could begin without parental knowledge and, at least tacit, approval. Further, parents would not have to worry, under this principle, that an "outside" caregiver would challenge them for custody or decision-making power, since these privileges would be based truly on an adult's relationship with the child. The presumption that an adult's relationship (sexual or otherwise) with a parent creates a caregiving relationship between *130 that person and the child does not fit with my attention to an ethic of care. [FN203] It again focuses too strongly on parental "rights" and presumptive statuses.

Other caregivers would clearly not have access to what is currently the full range of parental rights. They would not, however, be written out. Other caregivers would be granted recognition based on what their actual relationships with the child are, in the context of the overall **family** system. Traditional status such as grandparent or biological progenitor would not inherently entitle, nor would they limit, the legal relationship. Instead, they would serve as the social basis through which a protected legal relationship might or might not develop.

In addition to mutuality and attention to needs and authority, I would require that the recognized relationship be beneficial before warranting protection. In addition, the legal protection must be appropriate. This is important to serve as protection against abuse, manipulation, or situations that would be simply too disruptive. Courts could well view a relationship as present, but not beneficial, or find that a threat to the child's **family** (such as abuse of mother) negates any beneficial potential. Here, though recognition exists, negative or non-beneficial relationships are not granted overly broad protection. This preserves much of the central tenet of the "best interests" standard, but uses it in a context that is presumptively inclusive rather than one based on choosing between competing rights-bearers.

There is clearly a tension here between the desire for stability and for inclusion within **families**. Many have argued that **family** stability and autonomy require that parents have the right to dictate who is or is not entitled to a relationship with their children. [FN204] I agree that one reason that protection of certain relationships is not warranted is that they would be too

disruptive and are therefore not “beneficial” to children.. The perspective of those recognized as the child's primary-caregivers/parents should be central to deciding if this is the case. However, I am not arguing here that true “outsiders”--those without a significant relationship--should be given entrance into the **family**. I am arguing only that law should recognize the insiders, even when they do not fit the nuclear/ **exclusive** model or the full definition of “parent.” The relationship, here, is the central consideration. Adults who do not have a relationship with the child--with or without biological ties-- would no longer be a threat to the **family**. Only those with fully parental relationships, as described above, would have access to decision-making authority so parents could be more secure in constructing their **families**.

*131 Under the principle I have proposed, I would argue that, unless parents show a distinct problem, those who have been recognized and judged to have beneficial caregiving relationships with children should warrant appropriate protection. Just as, in most cases under our current system, one parent cannot eliminate the other from the life of the child without cause, caregivers with clear and established relationships should not be arbitrarily eliminated. Again, though, this only pertains to people with true, significant relationship. This fits the understanding of many courts, as described by Karen Czapanskiy, that “peace treaties are possible.” [\[FN205\]](#) It encourages creative caregiving relationships and encourages adults to attend to caregiving within their **families** as they build relationships. It does, however, mean a subtle shift away from understanding **families** as parents and their “own” children--which may make some people uncomfortable. [\[FN206\]](#)

V. Applying the Principle

If given support in legislation and by judges, this principle of recognizing care-based relationships and providing appropriate protection could transform the way custody cases are understood, argued, and resolved.

A. Parental Authority at Birth, Unmarried Fathers and Stepparents

Under the principle I have proposed, biology alone would not provide “fathers” who are not actually involved in caregiving with the standing to assert parental rights--a concept that coincides with existing Supreme Court principles. [\[FN207\]](#) Instead, the principle requires the identification of care. Before birth this would be difficult. We can look, though, to the practical matters involved in preparing for a child and, thus, see intent to care for a child. In carrying the baby to term, the mother has established her intent to care for the *132 child. This, I would argue, is sufficient to establish a presumptive parental status. [\[FN208\]](#)

For their part, biological fathers would be required to show similar intent through their actions in order to be recognized as presumptive parents. [\[FN209\]](#) Building on the insightful proposal by Mary Lyndon Shanley, I would suggest that biological fathers be given presumptive parental status if they show intent to care through involvement in prenatal planning and care proportional to the relationship that exists with the mother. [\[FN210\]](#) After birth, cases where the biological father and mother are no longer involved or where the woman does not want such involvement, Shanley proposes a process of notification and registration. In this way fathers are given the ability to show intent to care. Without this demonstration, there is no relationship to warrant protection under the principle I have proposed and, as such, the biological father would not have standing. This might change later if support or care is provided.

For the purposes of preserving usable authority in children's lives, at birth I would limit the possible presumptive parents to the biological parents. This is not without its problems, but I believe this is the only way to assure practical decision-making authority and keep the state out of children's lives as much as possible. [\[FN211\]](#) After birth, it would be immediately possible for others to establish a parental or other caregiving relationship which would be judged based on their caring work. For example, the lesbian partner, who is clearly a caregiver to a child from the moment of birth, would have a claim to primary caregiver status. In a scenario, however, in which the biological mother breaks off a relationship before the child is born (and thus no caregiving relationship is *133 formed) I would allow the biological mother to make the decision not to create relationships for her child. This is consistent with the principles described above because it focuses on the child. This rule assures the child of at least one authoritative parent. It then distributes further legal protection based on caregiving relationships rather than on parental rights, which may or may not have been established before birth.

Parental status might also be established after birth through a guardianship order, a proposal that I will discuss later in this chapter. If neither biological parent is to be involved in caring for the child, then custody must be settled either through adoption or by courts, based on the principle above. In some **families** this proposal would provide that the child has only one legal parent. Uninvolved biological fathers would not meet the criteria for “parent” and would, thus, have no decision-making power. As under current law, this would not necessarily absolve unmarried fathers of responsibility and biological mothers and caretakers could still seek child support. However, biological fathers who did not meet the presumptive parent standard would warrant protection based only on their relationship. In cases where child support was the only relationship, the protection would be correspondingly limited.

Where stepparents establish a mutual caregiving relationship, that bond would warrant recognition and potential protection, with or without the existence of another involved father or mother. It would, in some cases, mean that the stepparent's relationship would warrant legal protection equal to that of the original parent. My requirement that the protection meet the actual relationship, however, would mean that protection afforded stepparent relationships could differ. The circumstances and understanding of the child would contribute to the legal protection and each case would have to be judged on its merits. In some cases, this would probably mean that stepparents who came into the child's life later and might not exercise the same authority in children's lives would be given less consideration than the original parent in cases of dispute. A mutual caregiving relationship would, however, be given protection. This principle creates room for varying levels of protection that stepparent relationships may be afforded from full authority and custody to occasional visitation.

In *Michael D. v. Gerald H.*, in which both men had given care, established relationships, and were seen by the child as parents, both would be able to claim legal recognition. [FN212] Michael would have been granted standing and probably would have been successful in seeking visitation appropriate with his relationship, all without threatening Gerald's position as Victoria's other father. Filiation would not have been an issue and Michael would not have had to argue that he was Victoria's “real father” to warrant protection. Rather than *134 Michael's rights, the existing relationship and real-life fact-finding would have been the basis for the case.

Further, the court would have explicitly recognized Victoria's needs. As it was, her perspective was completely lost in the case. Victoria, through her guardian ad litem, petitioned the court, seeking to preserve her relationship with both men. [FN213] Her position was dismissed as impossible by the plurality and ignored by the dissent and most commentators. Under the proposed principle, Victoria's needs would have been the central area of inquiry and her own narrative of **family**, though complex and undesirable to some members of the court, would have been respected.

B. Queer Parents

Under the new principle, the issue of the gender and sexuality of the child's parents would not be a matter of legal concern and lesbian and gay parents would be subject to the same tests as all others. The relationship between adults would not be at issue. Instead, the central focus of any legal inquiry would be the relationship with the child.

The case of Alison D., who sought visitation of a child who she had co-parented for several years, would have been treated similarly to some of the stepparent cases. [FN214] The question would not have been whether she was A.D.M.'s one-and-only statutory “mother.” Instead, the court would have looked to her actual relationship to establish whether it was sufficient to warrant recognition. In finding a mutual caregiving relationship, understood as such by both Alison and A.D.M., Alison would have been granted standing. The court could have then moved on to decide--probably favorably--whether that relationship warranted the protection of visitation. Under this principle, Alison might also have sought partial or joint custody as someone who was, indeed, one of A.D.M.'s primary caregivers--an option that is unthinkable under the rule of the **exclusive family**.

The other New York case, *Thomas S. v. Robin Y.*, in which a sperm donor sought a filiation and visitation order, would also have been decided differently under my proposed principle. [FN215] Sandra and Robin, the lesbian mothers in the case,

would have been understood by the court to be the co-parents, raising two daughters. Because each clearly met the standard of full parental authority, there would have been no worry of losing custody of Ry, the couple's daughter, even upon the death of Robin, her biological mother. Thomas, the sperm donor, would never have had standing as a “father”—having clearly failed to establish a parental relationship of care. Thus, custody would have been fully *135 off the table. In order to have standing, Thomas would have had to argue that he had a mutual caregiving relationship where he provided for Ry's needs. This would have been difficult to prove at best. As Judge Ellerin rightfully noted,

While the child has always known that petitioner [Thomas S.] is her biological progenitor, it had consistently been demonstrated by petitioner himself that this factor did not confer upon him any authority or power over her life, that it did not mean that Sandra R. was less her mother than Robin Y., and it did not mean that her sister was not her full sister. [FN216] In centering on Ry's life, the court would see that she did not view Thomas as a caregiver. As such, Thomas's petition for visitation should fail.

Some scholars have suggested that children have a need for identity or a “story of origin.” [FN217] Though this has largely been posited in reference to adoption, providing for this need is probably the best way to describe Thomas's relationship with Ry. It poses the interesting possibility that, under this new principle, he could ask the court for appropriate protection of the relationship—to allow him to be known to the child, probably when she reaches majority. However, this is obviously already the case here. Thus, there would be no legal change and no protection for Thomas.

C. Grandparents

The principle I have proposed would work its greatest change in regard to grandparent visitation statutes. The status of grandparent itself would not, under this principle, guarantee a protected relationship, as many laws declare. Instead, only those grandparents with significant relationships would warrant protection, and even in those cases, specific protection would vary. Judges would be able to recognize grandparents who have lived with children and acted as parents as different from grandparents who play a significant, but peripheral, role in children's lives.

In Troxel, the arguments would have been shaped quite differently under a care-based standard. [FN218] The overly broad Washington statute would still have been declared constitutionally invalid on its face. But, looking beyond the breadth of the statute, it would have been clear that harm is not necessary to award grandparents visitation. So long as grandparent visitation did not infringe too far on the basic practical authority of parents, it would be a *136 perfectly possible outcome in cases of involved grandparents. The Troxels, and all grandparents, would not have been framed as presumptive “outsiders,” but instead as individuals who may stand in as caregivers, regardless of their genetic ties. Their relationships with their grandchildren would have been the focus of inquiry, not their natural rights as grandparents in opposition to the rights of the parents.

The children, completely absent from the narrative of the Supreme Court decision that directly addressed their lives, would have been brought into the discussion. Their understandings of their relationship with the Troxels would have been established and valued and, hopefully, the case would have made clear the problems in the **family** system, rather than deepening them.

D. Other Cases

In the case of surrogacy agreements, the child would, at birth, have two presumptive parents: the biological mother and, assuming that the biological father had shown intent to parent as required of any other biological father, he too would be a presumptive parent. [FN219] After birth, if the child is placed with the couple, the wife or partner of the biological father would have the opportunity to establish a legally protected relationship. The presumptive parental opportunity of the surrogate mother, if she decided to give up the child, would be extinguished as with any adoption.

Families making use of open adoptions would also benefit from increased flexibility. Once the adoption takes place, the birth mother has clearly chosen not to exercise her presumptive parental opportunity. The adoptive parents would, based on

the care they are providing, become the “parents.” There would also, however, be room to construct limited legal relationships. **Families** could carve out a place for the birth mother without threatening the clear parental relationships they build. Visitation and other arrangements could be created without any confusion as to who the child's parents are. [\[FN220\]](#)

*137 E. “Traditional” **Families** and an Inclusive Doctrine

This proposal would not, as some worry, threaten those **families** that do conform to the current **exclusive** model. Instead, I would argue that it would make their lives more predictable when it comes to custody law.

Where parents have shared caregiving work—including that of working to put food on the table—both parents would have continuing, protected relationships. The “mutuality” and caregiving tests would assure that true outsiders would not have claims on or with children. Temporary or part-time caregivers would have no claim on decision-making authority, unlike under the current **family** law regime in which rights are not based on actual relationships, but on statuses like grandparent or biological father.

This inclusive doctrine looks to write in rather than write out. Involved parents would not have to worry about losing custody. Absent parents would know that they would not have claims to custody, and joint custody would continue to be based on the same difficult but achievable balances.

For those **families** in which abandonment or abuse exist, this new care-based doctrine could provide new progress. Women who have truly been the only caregiver would know that they would not face challenges from the “natural” but not relational father. Abuse and care are in clear opposition to one another and, as now, would be a reason to end existing relationships.

VI. Beyond the Courtroom

I believe that the principle I have proposed will be useful in resolving legal disputes. Most importantly, it moves beyond exclusivity to base decision on real caregiving and respects pluralistic **family** forms.

Real **families**, however, need protection not only when disputes arise. An ethic of care's attention to concrete lived realities suggests that protection should be extended to the day-to-day dealings of caregivers and children. The proposed principle can also be used as a tool to provide such support of law to caregivers.

Part of the power of **exclusive** parenthood is the **exclusive** ability to make decisions including medical, education, legal, etc. These decisions, made daily, are important to children's lives and are part of giving care. The paradigm of exclusivity, however, severely limits who can make such decisions. As I have said, autonomy and practicality do dictate the centralization of decision-making power in a core-**family** unit—the primary “parents.” For some **families**, however, the rules of exclusivity go too far and are overly restrictive—meaning that children's needs are not met and they are prevented from getting the full care that would otherwise be available to them.

*138 Parents dealing with disabilities, sickness, divorce, or a multitude of other difficulties are often unable to meet fully their children's needs. For other parents, especially those in single-parent, working-class and poor **families**, the requirements of daily life may make it impossible to meet their children's needs. Even for middle-class **families** with two healthy parents and healthy children, the presumption that all of the needs a child might have can be met within the context of the **exclusive family** is unrealistic. An ethic of care requires that we attend to the difficulties that **families** face, both ordinary and extraordinary, and give parents all of the assistance we can to help meet their needs and the needs of their children. One aspect of the difficulties may well be that parents are unable to exercise their authority effectively in their children's lives. In other **families** it may be the case that, while the original parent is fully capable, the parent is not the only or primary person dealing with authoritative needs of the children. Under the current system of exclusivity, however, only “parents” may exercise authority. For example, only parents may authorize non-emergency medical care, make educational and religious deci-

sions, or invoke children's legal rights. [\[FN221\]](#)

For some **families** this exclusivity of authority may work. But to assist those for whom this restriction results in unmet needs, it is incumbent upon the government to provide **families** with ways to effectively exercise adult caregiving authority that fits the needs of the individual **family**. Flexibility is badly needed in this area to assure that authority can be exercised equally well by **families** regardless of class, race, geography, sexuality, etc. Here, the law should facilitate rather than prevent the effective use of authority within **families**.

A. Co-Guardianship

We need to create a way for **families** to exercise authority in ways outside the **exclusive** parenthood paradigm. Karen Czapanskiy has suggested a legal construction for use in the case of sick and disabled parents who live with their own parents. As she shows, grandparents often act as parents in such cases. They are not, however, able to exercise authority unless the child's parent is divested of their rights:

Because simultaneous co-guardianship is essentially unavailable, co-parenting parents and grandparents who need to protect a child from legal vulnerability have only untenable choices. One choice is to leave *139 **exclusive** parental rights with an ill or disabled parent . . . [in which case] the child may be denied medical care, admission to school, or legal assistance because no person with parental authority can act on behalf of the child's behalf. A second choice is to move the **exclusive** parental rights [from the mother] to the grandmother . . . a course that most grandmothers are unwilling to pursue . . . because the emotional cost is so great. [\[FN222\]](#)

Czapanskiy suggests creating contracts for co-guardianship that would allow grandparents in such cases to exercise parental authority in the child's day-to-day life; however, major decisions like adoption would not be granted under the contract. Her contract proposal is a good model for what I wish to accomplish, although I would suggest a few changes and expansions to make it better fit a care-based model.

First, Czapanskiy limits her analysis to grandparents. If the concept is a useful one, it should be extended to all those in similar circumstance, regardless of their kin relationship. Aunts, **family** friends, and even grown siblings may well be in a position to provide the needed assistance in some **families** and should be given the support to do so. Second, Czapanskiy's proposal would be characterized by a contract between the parent and grandparent. While this seems logical, the language of contract and the exclusion of the child from the analysis are bothersome. Finally, her contracts would only be allowed where the parent is incapable of providing for the legal needs of the child and there is no non-custodial biological parent available or capable to take up the work. While I am concerned with children who have no other options, I am also concerned with recognizing the full realities of children's **families** and providing the best and most care possible to each child. Any such agreement must be able to include **families** where the parent is physically capable, but nonetheless the **family** would themselves invest another with authority. Further, even if there is a non-custodial biological parent somewhere, removal from the care of the original parent and the caregiver (grandparent or other) assisting that original parent is not the only, nor necessarily the best, option.

B. Co-Guardianship Orders

I propose a concept slightly different from Czapanskiy's, the "co-guardianship order." [\[FN223\]](#) This co-guardianship order would essentially be a finding, based on the custody-care principle proposed above, that an individual *140 stands in a quasi-parental relationship with the child and, as such, should be granted limited authority. It would, as Czapanskiy suggests, be limited to decisions that do not fundamentally alter the child's life status, as would adoption. The order would also impose limited responsibilities, including financial support, upon the caregiver. The focus would be on the child's needs.

Instead of a contract, a co-guardianship order could be obtained as an administrative legal function, similar to that of legal marriage. [\[FN224\]](#) A declaration by the child's legal parent and the caregiver seeking the order would be required, stating that the caregiver: (1) lives with the child or has similar daily contact; (2) stands in a mutual caregiving relationship, in

which the adult provides for the needs of a child; and (3) has a relationship with the child consistent with parental authority. The order would then be in effect, giving the caregiver decision-making power, so long as neither the original parent nor the co-guardian officially refutes these facts (at which time, if there is a dispute, courts would need to intervene to apply these principles).

Grandparents and their children, co-parenting a child, would be able to gain a co-guardianship order. So, too, would gay and lesbian parents and stepparents. [\[FN225\]](#) Since an adult's relationship to the already-recognized parent would not result in a legal relationship under the principle I have proposed, the co-guardianship order would be a way to assure recognition and decision-making authority for changing **families** without involving courts. Orders could be only temporary--to deal with illness, or other relatively short-term **family** problems. Or they could be permanent ways of assuring practical caregiving by multiple adults.

The co-guardianship order would provide for the practical needs of both children and adults. By empowering legal parents to attest to the relationships of others in their **family** system, it respects their authority and it values their just claim to have knowledge about and agency in constructing their **families**. At the same time, it gives **families** a way to make their legal **family** fit their lived **family**--emphasizing connectedness over constrictive "rights." The co-guardianship order centers on the child and creates legal protection for child-based relationships of care in important new ways. It expands caregiving available to children and encourages and affirms adults who are willing to take on that work.

*141 Conclusion: Expanded **Families**, Webs of Care

Families should have the right to create caregiving relationships that best meet their needs. We know that children grow up healthiest when they have attentive, involved, and dependable caregivers in their lives. When **families** provide such an environment to children by including people other than a child's two **exclusive** parents, the law should recognize and respect these relationships. To do so, courts should develop a coherent basis on which to make decisions.

There is some reason to hope that courts will begin changing their views. In *Atkinson v. Atkinson*, the court found a category of "equitable parent" to be valid in cases where the husband of the mother believed he was the biological progenitor of the child. [\[FN226\]](#) The court found that such a relationship should be protected, and treated as a "natural" parental relationship where:

(1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has co-operated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. [\[FN227\]](#)

Atkinson was narrowly tailored to deal only with cases in which the father was "deceived" into thinking he was the child's parent. It did not reflect a broad move toward a non-**exclusive** care-based standard. What we do see here, though, is a court grappling with the need to preserve a long-standing relationship from being ignored and thus annihilated by a legal standard. Though the court knows full well that there is "another" father out there, it suggests that the caregiving relationship should be preserved nonetheless. Most exciting, the *Atkinson* court bases its decision on the factual finding of a "mutual" relationship that was parental and based on caregiving.

The court is looking, here, for a basis on which to recognize and respect a relationship. What it needs, though, is a broader standard--a way to be able to recognize overtly those who have created caring relationships, not out of a mistaken impression of biological progeny, but because of the benefits such relationships provide.

Based on the knowledge and experience of those who have historically done the caring work in our society, and especially those who have done so from the margins, a political ethic of care can and should guide our decisions *142 about children and custody. The **exclusive** categories of "mother" and "father" must be replaced by people in-relation who actually do

the work of parenting.

Central to the argument I have made here is the rewriting of our definition of **family**. The concept underlying the proposals I have made, and coming out of an ethic of care, is that **families** are essentially networks of care. A radical adjustment is needed in the understandings and actions of our legal and political systems to reflect this fact. Under this new analysis, the starting point in **family** law would be the “real” **family**. The state would recognize caregiving work and **families** where they actually exist instead of imposing its own presumptive models. Government decisions would then truly be “pro-**family**.”

Eliminating the rule of the **exclusive family** and instead focusing our custody law on these networks of care is a first step. By shaping our legal discussions around the recognition of the real networks of care, and by using the power of the state to recognize and support creativity in **family** problem-solving, perhaps we can encourage parallel changes across the American socio-political landscape.

Basing our understanding of **family** on networks of care means that **families** are not centrally about individual rights, but are instead about relationships. The needs and relationships of children should be the center of our understanding of the **family**, and there are ways, even within the legal system, to act upon this understanding. The proposals made here help us to shift our analysis away from recognizing the assertions of individual adults of their rights to children and toward recognizing caregiver-child relationships and the recognition and protection such relationships are due. This also allows us to move away from capitalist notions of ownership within the **family** and the tendency to view children as “property.” Instead, by bringing children to the very center of our analysis, we can build law and politics based on the needs of their day-to-day lives.

Bringing children and their needs to the center, these proposals seek to provide children with practical and authoritative caregiving. Importantly, the principles enunciated here do not lose sight of the goal of providing children with as much good care as possible. The end of the **exclusive family** would make an unprecedented variety and diversity of care available in children's lives.

I have also attended here to the needs of caregivers for help in their work. Non-**exclusive**, care-based legal **families** would encourage “others” to take part in children's lives, allow them to do so in creative ways, and give them the legal support necessary to do so effectively. The construction of co-guardianship orders and similar legal devices would empower caregivers to create diverse and authoritative **families** that meet their real needs.

In my **family**--to take just one example of a **family** with real needs--we created a variety of caregiving relationships to fit those needs. This new vision *143 of **family** and a care-based, non-**exclusive** legal principle would recognize those needs. Through co-guardianship orders, my parents could have taken proactive steps to assure that all of the parents had equal access and responsibility for the children in their **family**. We also would not have been left to wonder if, because we had transgressed imagined boundaries, we were vulnerable to intrusion. In reality, though, had one or the other of my parents died, Lisa (my mother's partner) could have been written out of the picture despite years of primary caregiving. In contrast, my grandparents, who were never significant caregivers in our lives, might have been able to demand custody and visitation. Under the new construction I have described, this sort of intrusion would not have been a worry, and we all would have been more secure.

The rewriting of **family** in the legal child-custody sphere can be the first step toward a radical redefinition of **family** in our greater political sphere. If we begin to see the **family** as a web of caregiving relationships--many of which we may not be able to fit into neat categories--then we may also be able to reinvent the ways we create public policy for **families**. The ways in which the state gives help to **families** should be analyzed with an eye to diverse **family** formations. [\[FN228\]](#) Day care, **family** leave, health coverage, and many other social policy issues should be re-examined, attending to the ways in which the state can help maximize the caregiving available to children and **families** in all of their forms.

The rewriting of the definition of “**family**,” and a move away from the **exclusive family** paradigm has radical potential. It challenges the systems of domination based on class, race and sexuality that serve as the basis for too much of our **family**

law and public policy. Instead, structuring the role of the law and state as one of support rather than **family**-model enforcement begins to bring care into our political sphere. Re-casting the legal language of **family** in a flexible, care-based way means that all **families** can be recognized, protected, and supported in the actual caregiving work that they are doing--a public policy that is good for parents, children, the state, and society as a whole. Children's lives are complex and, with solid networks of care, children can and do negotiate complexity. The law should aspire to do the same.

[FNd1]. Program Director for foster care and juvenile justice programs, Street Law, Inc.; incoming doctoral student, Harvard Graduate School of Education. Many thanks to Mary Lyndon Shanley for her support and guidance in this and many other endeavors, Deva Kyle and Vanessa Brocato for their thoughtful readings, Luke Charles Harris for comments on a previous incarnation, and Tom Sylvester, Leah Fletcher, Fadi Hanna, and the YJLF staff for their editorial help. Finally, thanks to my own non-**exclusive family** for providing a model of how radical, care-based constructions of **family** can and do thrive.

[FN1]. A term coined by 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. 897 (1984).

[FN2]. See Bartlett, *id.*; Alison Harvison Young, [Reconceiving the Family: Challenging the Paradigm of the Exclusive Family](#), 6 *Am. U. J. Gender & L.* 505 (1998); Nancy D. Polikoff, [This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-traditional Families](#), 78 *Geo. L.J.* 459 (1990); and others discussed in Section III.A below. All explain the basic construction of **family** embodied in U.S. caselaw in which only a very limited view of **family**--usually two and only two parents--is legally viable.

[FN3]. As I will discuss below, what I mean by the “**exclusive, private family**” is the fictional structure that the law seeks to push **families** into-- that of two parents, unconnected to a larger community or group of adults.

[FN4]. The proposals in this article flow from, and would be impossible without, the work of several feminist scholars, including Katharine Bartlett, Patricia Hill Collins, Mona Harrington, bell hooks, Eva Feder Kittay, Nancy Polikoff, Mary Lyndon Shanley, Joan Tronto, Alison Harvison Young, and others whom I am certain I miss. My hope is that, in bringing together two somewhat distinct lines of feminist thinking, practical legal constructions that build on this good work can be explicitly advanced.

[FN5]. [491 U.S. 110 \(1989\)](#).

[FN6]. [599 N.Y.S.2d 377 \(Fam. Ct. 1993\)](#).

[FN7]. [77 N.Y.2d 651 \(1991\)](#).

[FN8]. [530 U.S. 57 \(2000\)](#).

[FN9]. For example, the ways we talk about women's poverty and welfare in the United States would be very different if we were required to consider all of the caring work done by women as well as all of the work that each child needs to survive as a public good. See, e.g., Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* 41 (1999) (discussing the changes such a shift in thinking could produce in the **Family** and Medical Leave Act).

[FN10]. I refer, here, to those **families** that are not included in our public discussions because they fall outside the imagined construction used as its basis. Their exclusion may result from a number of causes, including race, culture, class, sexuality, structure, and number of caregivers.

[FN11]. For example, caregivers must “pretend” to be the legal parent in order to interact with school officials or medical personnel.

[FN12]. The recent rhetoric of welfare reauthorization places the two-parent nuclear **family** as a problem-solver on both liberal and conservative sides. Jonathan Rauch, *The Widening Marriage Gap: America's New Class Divide*, 33 Nat'l J. 1471 (May 19, 2001) (arguing that “what afflicts America is no longer first and foremost a poverty problem or a race problem but, rather, a marriage problem”); Robert Pear, *Bush Urges Work and Marriage Programs in Welfare Plan*, N.Y. Times, Feb. 27, 2002, at A18. But see Stephanie Coontz & Nancy Folbre, *Marriage, Poverty, and Public Policy: A Discussion Paper from the Council on Contemporary Families* (Apr. 26, 2002) (unpublished manuscript, prepared for the Fifth Annual CCF Conference), available at <http://www.contemporaryfamilies.org/briefing.html>.

[FN13]. See Anita Iltis Garey, *Weaving Work and Motherhood* (1999); Naomi Gerstel, *The Third Shift: Gender and Care Work Outside the Home*, 23 Qualitative Soc. 467 (2000); Mona Harrington, *Care and Equality: Inventing a New Family Politics* (1999).

[FN14]. See, e.g., Teresa Arendell, ‘*Soccer Moms*’ and the New Care Work (Berkeley Ctr. for Working **Families**, Working Paper No. 16, 2000).

[FN15]. See, e.g., *Global Women: Nannies, Maids, and Sex Workers in the New Economy* (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002) [hereinafter *Global Women*]; Patricia Baquedano-Lopez, *A Stop at the End of the Bus Line: Nannies, Children, and the Language of Care* (Berkeley Ctr. for Working **Families**, Working Paper No. 51, 2002); **Families in the U.S.: Kinship and Domestic Politics** (Karen V. Hansen & Anita Iltis Garey eds., 1998) [hereinafter **Families in the U.S.**].

[FN16]. See, e.g., Mary Romero, *Who Takes Care of the Maid's Children?: Exploring the Costs of Domestic Service, in Feminism and Families* 151 (Hilde Lindemann Nelson ed., 1997); Anita Iltis Garey, *Constructing Motherhood on the Night Shift: ‘Working Mothers’ as ‘Stay-at-Home Moms’*, in **Families in the U. S.**, supra note 15, at 51; Marjorie L. DeVault, *Affluence and Poverty in Feeding the Family*, in **Families in the U.S.**, supra note 15, at 13; *For Crying Out Loud: Women's Poverty in the United States* (Diane Dujon & Ann Withorn eds., 1996).

[FN17]. See, e.g., [Stanley v. Illinois, 405 U.S. 645, 651 \(1972\)](#) (holding that “[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection”) (emphasis added); [Chant v. Chant, 725 So. 2d 445 \(Fla. Dist. Ct. App. 1999\)](#) (holding that “[custody] decisions should usually be made by the parents in private”) (emphasis added).

[FN18]. [123 S. Ct. 2472 \(2003\)](#).

[FN19]. [Id. at 2475](#).

[FN20]. See, e.g., [United States v. Loy, 237 F.3d 251 \(3d Cir. 2001\)](#) (“[A]lthough parents have a fundamental right to raise their children, this right can be overridden by the state's ‘compelling interest’ in ensuring children's safety.”); [Ruffalo v. Civiletti, 702 F.2d 710 \(8th Cir. 1983\)](#) (holding that the “rights of parents to care, custody and management of their children are not absolute and compelling public necessity can justify their termination if proper procedures are followed”).

[FN21]. See Bartlett, supra note 1. For general discussion on the concept of the **exclusive family**, see Polikoff, supra note 2; Young, supra note 2.

[FN22]. See, e.g., [Michael H. v. Gerald D., 491 U.S. 110, 118 \(1989\)](#) (holding that “nature itself” makes no provision for more than one mother and one father).

[FN23]. See, e.g., *id.* (indicating that Michael was given the choice of either arguing that he was Victoria's one and only fa-

ther, or nothing to her).

[FN24]. See, e.g., Bartlett, *supra* note 1; Young, *supra* note 2.

[FN25]. [530 U.S. 57, 63 \(2000\)](#) (citing development of a fundamental liberty interest in parenthood in [Meyer v. Nebraska, 262 U.S. 390, 399 \(1923\)](#), [Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 \(1925\)](#), and [Prince v. Massachusetts, 262 U.S. 390, 399 \(1944\)](#)).

[FN26]. See, e.g., [Michael H. v. Gerald D. 491 US 110 \(1989\)](#).

[FN27]. See, e.g., *id.*; [Lehr v. Robertson, 463 U.S. 248 \(1983\)](#); [Caban v. Mohammed, 441 U.S. 380 \(1979\)](#); [Quilloin v. Wallcott, 434 U.S. 246 \(1978\)](#).

[FN28]. See, e.g., [In re Gault, 387 U.S. 1 \(1967\)](#) (upholding parental rights to file habeas corpus petition on behalf of their child); [Pierce v. Soc'y of Sisters, 268 U.S. 510 \(1925\)](#) (extending the rights of parents to choose their children's religion and primary language of instruction); [Meyer v. Nebraska, 262 U.S. 390 \(1923\)](#) (locating the right of parents to direct children's education in Due Process Clause); [Machadio v. Apfel, 276 F.3d 103 \(2d Cir. 2002\)](#) (allowing parents to request social services on behalf of children); [Halderman v. Pennhurst State Sch. & Hosp., 707 F.2d 702 \(3d Cir. 1983\)](#) (affirming that parents have the right to make medical decisions for their children); see also Carl E. Schneider, The [Channeling Function in Family Law](#), *20 Hofstra L. Rev.* 495, 503 (1992).

[FN29]. This policy is not necessarily bad, though in some circumstances it can be disastrous, especially when help from outside the **family** (social services, counseling, etc.) is not available. See, e.g., *Two Teenagers in Twenty: Writings by Gay and Lesbian Youth* (Ann Heron ed., 1995) (relaying stories of queer teenagers returned again and again to emotionally abusive **families**).

[FN30]. See, e.g., [Troxel, 530 U.S. at 68 \(2000\)](#).

[FN31]. See, e.g., [Feiock v. Feiock, 485 U.S. 624 \(1988\)](#); [Sisson v. Sisson, 193 F.2d 923 \(D.C. Cir. 1952\)](#); [In re Allison, 182 B.R. 881 \(Bankr. N.D. Ala. 1995\)](#) (dealing with the use of criminal charges to enforce support obligations).

[FN32]. See, e.g., [Santosky v. Kramer, 455 U.S. 745 \(1982\)](#); [Stanley v. Illinois, 405 U.S. 645, 649 \(1972\)](#) (finding that the state has a “right-- indeed, duty--to protect minor children through a judicial determination of their interests in a neglect proceeding”).

[FN33]. Bartlett, *supra* note 1, at 886.

[FN34]. [Meyer v. Nebraska, 262 U.S. 390, 399 \(1923\)](#) (finding that the right to “establish a home and bring up children” is fundamental under the Fourteenth Amendment); [Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 \(1925\)](#) (declaring that parents “have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations”); [Prince v. Massachusetts, 262 U.S. 158, 166 \(1944\)](#) (finding that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder”); [Parham v. J. R., 442 U.S. 584, 602 \(1979\)](#) (finding that “[o]ur jurisprudence historically has reflected Western civilization concepts of the **family** as a unit with broad parental authority over minor children”); [Lassiter v. Dept. of Soc. Serv., 452 U.S. 18, 27 \(1981\)](#) (stating that “[a] parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection”); [Troxel v. Granville, 530 U.S. 57, 65 \(2000\)](#) (tracing the history of the due process rights of parents and concluding that “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children”). As will be discussed below, Troxel represented a small departure from the two-parent mold, though not a true challenge to the **exclusive** two-and-

only-two parent model. See Section II.A for a more expansive discussion of the various Court decisions on fatherhood and other decisions firmly establishing **exclusive family** principles.

[FN35]. While it is true that biological parents constitute the major relationships of many children's lives, for millions of children other relationships may be as or more important.

[FN36]. It is well established that children have rights with respect to the state. See, e.g., [Planned Parenthood v. Danforth](#), 428 U.S. 52 (1976); [In re Gault](#), 387 U.S. 1 (1967). Strangely, with respect to **family** matters, children's rights are trumped wholly by parental rights. See, e.g., [Prince v. Massachusetts](#), 321 U.S. 158, 166 (1944).

[FN37]. See, e.g., [In re A.R.A.](#), 919 P.2d 388 (Mont. 1996). In *In re A.R.A.*, the state supreme court considered a custody dispute between a biological father and stepfather to whom the mother willed custody of the child. The court found that a court may determine best interests only after a showing of abuse by the parent, and that to consider giving custody to a step-parent over a biological parent without such a showing violates that biological parent's rights.

[FN38]. Centers for Disease Control and Prevention, *Cohabitation, Marriage, Divorce, and Remarriage in the United States: Data From the National Survey of Family Growth (2002)*, available at <http://www.cdc.gov/nchs/>; see also William M. Pinsof, *The Death of "Till Death Us Do Part": The Transformation of Pair-bonding in the 20th Century*, 41 *Fam. Process* 135 (2002).

[FN39]. NIH, *Proceedings from the Conference on Counting Couples: Improving Marriage, Divorce, Remarriage, and Cohabitation Data in the Federal Statistical System (2001)*, available at <http://www.childstats.gov/countingcouples>.

[FN40]. U.S. Census Bureau, *Children's Living Arrangements and Characteristics (2003)*, available at <http://www.census.gov/population/www/socdemo/children.html>.

[FN41]. See U.S. Census Bureau, *Adopted Children and Stepchildren (2003)* (estimating that census numbers of 4.4 million stepchildren include only about two-thirds of the actual total). As such, the ninety percent of stepchildren in married households comes to approximately six million. Other sources suggest higher numbers. The Stepfamily Association of America reports that that one in three Americans is a member of a stepfamily. See <http://www.saafamilies.org>.

[FN42]. Pam Belluck & Adam Liptak, *Gay Parents Find Big Legal Hurdles in Custody Cases*, *Wash. Post*, Mar. 24, 2004, at A1.

[FN43]. See U.S. Census Bureau, *supra* note 40. Twenty-eight million includes approximately six million stepchildren and twenty-two million children not living with two parents, which includes children living with neither parent, "cohabitating partners," or "single"-parent **families**, which themselves may contain other adults like grandparents. Not included, but worthy of note, are the children growing up in what Arlie Russell Hochschild calls "almost single" homes in which mothers may technically be married but because of abuse, alcohol and drug addiction, and other reasons, are de facto single mothers. See Arlie Russell Hochschild, *Love and Gold*, in *Global Women*, *supra* note 15, at 15.

[FN44]. See, for example, [Michael H. v. Gerald D.](#), 491 U.S. 110, 118 (1989), in which Justice Scalia found that "nature itself" makes no provision for more than one mother and one father.

[FN45]. James Kent, *Commentaries on American Law (1867)*, reprinted in *1 Children and Youth in America: A Documentary History* 363 (Robert H. Bremner ed., 1970).

[FN46]. Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States 18-39 (1994)*; Linda Nicholson, *The Myth of the Traditional Family*, in *Feminism and Families*, *supra* note 16, at 27.

[FN47]. Mason, *supra* note 46, at ch. 1; John Demos, *Past, Present, and Personal: The Family and the Life Course in American History* 28 (1986).

[FN48]. Stephanie Coontz, *The Way We Never Were: American Families and the Nostalgia Trap* 27 (1992); Nicholson, *supra* note 46.

[FN49]. Judith Stacey, *Brave New Families: Stories of Domestic Upheaval in Late-Twentieth-Century America* 9-11 (1998).

[FN50]. See, e.g., Alissa M. Wilson, [The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in *In Re S.S. and R.S.*, 28 *Loy. U. Chi. L.J.* 839, 841 \(1997\)](#) (describing how in some Native American families “[g]randparents, great-aunts or great-uncles, aunts or uncles, or cousins frequently raised children not because of the neglect or inability of the children’s parents, but because of familial obligation to the extended family.”); see also Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* 178-92 (2d ed. 2000) (describing how in some African-American communities biological “bloodmothers,” “othermothers,” and “women-centered networks” of care all have parts to play in assuring that children are well cared for); Carol Stack, *All Our Kin* (1974); Suzanne Carothers, *Catching Sense: Learning from Our Mothers To Be Black and Female*, in *Uncertain Terms: Negotiating Gender in American Culture* 232, 240 (Faye Ginsburg & Anna L. Tsing eds., 1990).

[FN51]. Nicole L. Sault, [Many Mothers, Many Fathers: The Meaning of Parenting Around the World](#), 36 *Santa Clara L. Rev.* 395, 404 (1996); see also Dan Mullins, *So Exactly What Is a ‘Household’?*, *Links: Oxfam’s Newsl. on Gender* (July 2000), at http://www.oxfam.org.uk/what_we_do/issues/gender/links/0700house.htm.

[FN52]. See, e.g., Joseph Goldstein et al., *Beyond the Best Interests of the Child* (1973); Schneider, *supra* note 28, at 498.

[FN53]. See Coontz, *supra* note 48.

[FN54]. U.S. Census Bureau, *supra* note 40. Note that this number is based on the total sixty million children under fifteen years old, not only on those in two-parent households as presented by the report.

[FN55]. U.S. Census Bureau, *Who’s Minding the Kids? Child Care Arrangements: Spring 1999* (2002).

[FN56]. E.g., Judith S. Wallerstein & Joan B. Kelly, *Surviving the Breakup: How Children & Parents Cope With Divorce* 247-48 (1996) (finding that children with contact with even erratic, hurtful parents suffer less from divorce than children without any contact with non-custodial parent); See also Carol S. Bruch, *Forms of Exclusion in Child Custody Law*, 7 *Ethology & Sociobiology* 339 (1986) (surveying the social sciences research that finds continued contact with caregivers to be important and beneficial to children).

[FN57]. E.g., Laura Beresh Taylor, [Protecting Children’s Need for Stability in Custody Modification Disputes Between Biological Parents and Third Parties](#), 32 *Akron L. Rev.* 371 (1999); see also Polikoff, *supra* note 2 (arguing for eschewing the nuclear family, but preserving exclusivity so as to preserve authoritative parenting).

[FN58]. See Young, *supra* note 2, and the cases discussed below, including [Michael H. v. Gerald D.](#), 491 U.S. 110 (1989).

[FN59]. See, e.g., Schneider, *supra* note 28, at 498.

[FN60]. U.S. Census Bureau, *supra* note 40.

[FN61]. *Id.* Note that, of all children, about 4% receive public assistance but 17% fall below the poverty line, slightly higher

than the figures for children living with in parent/grandparent households.

[FN62]. See, e.g., Frank Furstenberg et al., *Adolescent Mothers in Later Life* (1987); Holly S. Kleiner et al., *Grandparents Raising Grandchildren: Implications for Professionals and Agencies* (1999); Jane L. Pearson et al., *Black Grandmothers in Multigenerational Households: Diversity in **Family** Structure and Parenting Involvement in the Woodlawn Community*, 61 *Child Dev.* 434 (1990).

[FN63]. This occurs throughout United States caselaw, which I will discuss in Part II, *infra*. An excellent example of this limited vision of **family** can be found in the **Family** and Medical Leave Act of 1993, [29 U.S.C. § 2612 \(2000\)](#), which allows **family** leave to care for a rather expansive group of children or parents, but defines spouse only as “a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.” [29 C.F.R. § 825.800 \(2004\)](#).

[FN64]. Obviously, various types of “authority” exist in the lives of children--and are exercised by teachers, police officers, and the like. Here, I am referring to the legal authority--the ability to make everyday educational, religious, medical, and other decisions for children that is restricted to the official legal parents of the child.

[FN65]. See bell hooks, *Revolutionary Parenting*, in *Feminist Theory: From Margin to Center* 133-46 (1984), for a discussion on this point.

[FN66]. Pinsof, *supra* note 38, at 140.

[FN67]. U.S. Dep't of Labor, *Future Work* (2000).

[FN68]. Anita U. Hattiangadi, *The Changing Face of the 21st Century Workforce: Trends in Ethnicity, Race, Age & Gender* (2001), Executive Summary available at www.epf.org/racegend.htm.

[FN69]. U.S. Dep't of Labor, *supra* note 67.

[FN70]. See Harrington, *supra* note 13 (describing this shift in general). See Hochschild, *supra* note 43, for a description of how the care shortage in the United States has been filled increasingly by a migration of middle-class women from the global south, and how this, in turn, has created a dynamic in which poorer women in those countries are leaving their children in the care of others in order to take jobs caring for the children of middle-class migrant care workers living in the north.

[FN71]. See generally **Families** in the U.S., *supra* note 15, at 16 (presenting a series of sociological and anthropological essays on this topic); see also *infra* notes 76-83.

[FN72]. See hooks, *supra* note 65; Stack, *supra* note 50; Collins, *supra* note 50; Bonnie Thornton Dill, *Fictive Kin, Paper Sons, and Compadrazgo: Women of Color and the Struggle for **Family** Survival*, in **Families** in the U.S., *supra* note 15, at 433 (discussing extended **family** networks in Chinese and Chicano **families**). Note that this is obviously not the form of all African-American **families**, but one example of ways that some have historically challenged the value of exclusivity.

[FN73]. Kath Weston, **Families** We Choose: Lesbians, Gays, Kinship (1991).

[FN74]. Frank Browning, *Why Marry?*, in *Same Sex Marriage: Pro and Con: A Reader* 132-34 (Andrew Sullivan ed., 1997).

[FN75]. See [Thomas S. v. Robin Y.](#), 618 N.Y.S.2d 356 (App. Div. 1994) (involving a **family** with a known sperm donor); Weston, *supra* note 73; Dan Savage, *The Kid: What Happened After My Boyfriend and I Decided to Go Get Pregnant: An Adoption Story* (1999) (relating how he was asked by a lesbian neighbor to become the biological and limited social father of

her child and, later, how he and his boyfriend entered an open adoption relationship).

[FN76]. Emmy Werner, Protective Factors and Individual Resilience, in *Handbook of Early Childhood Intervention* (Jack P. Shonkoff & Samuel J. Meisels eds., 2d ed. 1999) (“Despite the burden of parental psychopathology, **family** discord, or chronic poverty, most children identified as resilient have had the opportunity to establish a close bond with at least one person [not necessarily the mother or father] who provided them with stable care and from whom they received adequate and appropriate attention during the first years of life.”); see also, e.g., Michael Rutter et al., *Fifteen Thousand Hours* (1979) (showing the primary importance of caregiving relationships in children’s lives through adolescence).

[FN77]. Froma Walsh, **Family** Resilience: A Framework for Clinical Practice, 42 *Fam. Process* 1, 17 (2003).

[FN78]. Few children today grow to adulthood in the kind of sheltered, homogenous communities for which they would best be prepared by having only one or two major caregiving relationships. Instead, having multiple caregivers, each of whom stands in a unique relationship to the child, can equip young people to deal with different people and different relationships. See, e.g., Eliese L.E. Robinson, Hilde Lindemann Nelson, & James Lindeman Nelson, *Fluid Families: The Role of Children in Custody Arrangements*, in *Feminism and Families*, supra note 16, at 90 (discussing how blended **families** provide such support).

[FN79]. Bryce Levine, [Divorce and the Modern Family: Providing In Loco Parentis Stepparent Standing To Sue for Custody of Their Stepchildren in a Dissolution Proceeding](#), 25 *Hofstra L. Rev.* 315 (1996).

[FN80]. See, e.g., [Michael H. v. Gerald D.](#), 491 U.S. 110 (1989).

[FN81]. See, e.g., [In re A.R.A.](#), 919 P.2d 388 (Mont. 1996). Most states’ statutes limit standing to parents, grandparents and sometimes siblings. See generally Levine, supra note 79. When second parents are in the picture, stepparents have a hard time gaining standing. There has been some move to give stepparents standing. Delaware, for example, grants stepparents standing upon death or disability of the natural parent where the child lives with the stepparent. See [Del. Code Ann. tit. 13, § 733](#), which was upheld in [Tailor v. Becker](#), 708 A.2d 626 (Del. 1998). Some states like Hawaii, [Haw. Rev. Stat. §571-46](#) (2003), and Connecticut, [Conn. Gen. Stat. §§ 46b-57](#) to -59 (2003), have broad visitation and/or custody statutes under which standing would not be an issue. Under [Troxel v. Granville](#), 530 U.S. 57 (2000), however, these statutes, which lack a cogent basis upon which to award custody, are of questionable constitutional status and certainly are not law.

[FN82]. See [Niewiadomski v. United States](#), 159 F.2d 683, 686 (1947) (“At common law a parent is charged with the duty of educating and supporting a minor child, and with a continuing obligation thereafter in certain cases of physical or mental disability. A parent has the right to the custody and control of a minor child together with the authority to take such disciplinary measures as are reasonably necessary to discharge the parental duty. A parent who is providing a home for his minor son and supporting him is entitled to his services and earnings.”); [Meisner v. United States](#), 295 F. 866 (1924) (showing that “intention” of parenthood is the basis for this doctrine).

[FN83]. For a discussion of stepparents and in loco parentis interpretations, see Polikoff, supra note 2, at 502-08, and Bartlett, supra note 1, at 913.

[FN84]. E.g., [Fuller v. Fuller](#), 247 A.2d 767 (D.C. 1968); [Grubb v. Sterrett](#), 315 F.Supp. 990 (N.D. Ind., 1970); [Clifford S. v. Superior Court](#), 45 Cal. Rptr. 2d 333 (Ct. App. 1995).

[FN85]. [Paquette v. Paquette](#), 499 A.2d 23, 92 (Vt. 1985). But see [Carter v. Brodrick](#), 644 P.2d 850 (Alaska 1982) (applying the in loco parentis concept to award visitation).

[FN86]. See [Michael H. v. Gerald D.](#), 491 U.S. 110, 158-59 (1989) (White, J., dissenting) (giving a synopsis of the basic findings resulting from the stepparent cases, as articulated by Justices White and Brennan). But see [id. at 123](#) (Scalia, J., dis-

sending) (stating an extreme exclusionary interpretation that these cases instead represent categorical support for relationships within the “unitary **family**”).

[FN87]. See Mary Lyndon Shanley, *Making Babies, Making Families* 44-75 (2001) (describing unmarried fathers' rights versus those of stepparents and biological mothers in various Supreme Court decisions).

[FN88]. [405 U.S. 645 \(1972\)](#).

[FN89]. [434 U.S. 246 \(1978\)](#).

[FN90]. [441 U.S. 380 \(1979\)](#).

[FN91]. [463 U.S. 248 \(1983\)](#).

[FN92]. [491 U.S. 110 \(1989\)](#).

[FN93]. While the facts here--a pregnancy due to extramarital affair--are certainly out of the ordinary, they reflect realities of American **family** formation that cannot be ignored. Estimates suggest that over half of marriages end in divorce, resulting in millions of blended and interwoven **families** in which there is more than one clear “father.” As of 2002, for example, over six million stepchildren lived in the United States. U.S. Census Bureau, *supra* note 41.

[FN94]. [Michael H., 491 U.S. at 113-14](#).

[FN95]. [Id. at 114](#).

[FN96]. [Cal. Evid. Code § 621 \(West Supp. 1989\)](#) (originally enacted 1872 in much the same form), quoted in [Michael H. v. Gerald D., 491 U.S. at 117](#) (giving history and exact wording).

[FN97]. [Michael H. v. Gerald D., 191 Cal. App. 3d. 995 \(Ct. App. 1987\)](#), *aff'd*, [491 U.S. 110 \(1989\)](#).

[FN98]. [Michael H., 491 U.S. at 124](#).

[FN99]. [Id.](#)

[FN100]. [Id. at 132](#) (O'Connor, J., joined by Kennedy, J., concurring in part) (finding that interrogation of “historical traditions” is not a valid method of discovering fundamental rights and liberty interests); [id. at 136-37](#) (Brennan, J. joined by Marshall & Blackmun, JJ., dissenting) (finding same).

[FN101]. [Id. at 141-42](#) (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) [id. at 158-60](#) (White, J. joined by Brennan, J., dissenting).

[FN102]. [Id. at 118](#).

[FN103]. [Id. at 130](#) (emphases and parentheses in original).

[FN104]. [Id. at 148](#) (Brennan, J. joined by Marshall & Blackmun, JJ., dissenting).

[FN105]. [Id. at 133](#) (Stevens, J., concurring).

[\[FN106\]](#). *Id.* at 116.

[\[FN107\]](#). *Id.* at 118.

[\[FN108\]](#). Besides the cases discussed below, see Belluck and Liptak, *supra* note 43, for a discussion of several recent cases in which the lives of same-sex couples are incompatible with the legal narrative of **family**.

[\[FN109\]](#). [77 N.Y.2d 651 \(1991\)](#).

[\[FN110\]](#). *Id.* at 656.

[\[FN111\]](#). But see [id.](#) at 662 (Kaye, J., dissenting).

[\[FN112\]](#). See, e.g., [In re Tammy](#), [619 N.E.2d 315 \(Mass. 1997\)](#) (adoption statute did not preclude same-sex cohabitants from jointly adopting child); [In re Jacob](#), [660 N.E.2d 397 \(N.Y. 1995\)](#) (affirming the right of a woman's lesbian partner to adopt Dana, a child planned by both partners and conceived by artificial insemination with an unknown donor). But see [In re Angel Lace M.](#), [516 N.W.2d 678 \(Wis. 1994\)](#) (holding that a woman in a lesbian relationship had no standing to adopt her partner's child).

[\[FN113\]](#). For a persuasive argument that cases of lesbian-mother-adoption have opened the door to third-parent adoption in New York, Vermont, and Massachusetts because, with same-sex prohibitions thrown out, there is nothing in the statutes to prevent it, see Elizabeth Rover Bailey, *Three Men and a Baby: Second-Parent Adoptions and their Implications*, 39 B.C. L. Rev. 569 (1997).

[\[FN114\]](#). [599 N.Y.S.2d 377 \(Fam. Ct. 1993\)](#).

[\[FN115\]](#). *Id.* at 379.

[\[FN116\]](#). *Id.* at 380.

[\[FN117\]](#). *Id.* at 382.

[\[FN118\]](#). [Thomas S. v. Robin Y.](#), [618 N.Y.S.2d 356, 361 \(App. Div. 1994\)](#).

[\[FN119\]](#). *Id.* at 368 (Ellerin, J., dissenting); [Thomas S. v. Robin Y.](#), [599 N.Y.S.2d 377, 379-80 \(Fam. Ct. 1993\)](#).

[\[FN120\]](#). [Thomas S.](#), [618 N.Y.S.2d at 361](#).

[\[FN121\]](#). See *id.* at 368; [Thomas S.](#), [599 N.Y.S.2d at 382](#).

[\[FN122\]](#). [Thomas S.](#), [618 N.Y.S.2d at 361](#).

[\[FN123\]](#). [Thomas S.](#), [599 N.Y.S.2d at 379](#).

[\[FN124\]](#). Weston, *supra* note 73.

[\[FN125\]](#). See Stack, *supra* note 50.

[FN126]. Karen Czapanskiy, [Grandparents, Parents, and Grandchildren: Actualizing Interdependency in Law](#), 26 Conn. L. Rev. 1315, 1323-31 (1994).

[FN127]. See David T. Whitehouse, [Grandparent Visitation Rights: North Dakota Declares Grandparent Visitation Statute Unconstitutional](#), 76 N.D. L. Rev. 191, 198 n.54 (2000) (offering a full list of state statutes and dates).

[FN128]. This holding later was overturned on appeal. [Steward v. Steward](#), 890 P.2d 777 (Nev. 1995) (reversing the lower court and holding that grandparent visitation statute created presumption against court-ordered grandparental visitation when divorced parents with full legal rights to children agreed that it was not in child's best interests to see them).

[FN129]. For a list of which the states follow each model, see Whitehouse, supra note 127, at 196-98 & nn.78, 83 & 86.

[FN130]. Czapanskiy, supra note 126, at 1347.

[FN131]. [530 U.S. 57 \(2000\)](#).

[FN132]. [Wash. Rev. Code §§ 26.09.240, 26.10.160\(3\)](#) (1994), quoted in [Troxel v. Granville](#), 530 U.S. 57, 54 (2000).

[FN133]. Troxel, 530 U.S. at 54, citing [In re Smith](#), 969 P.2d 21, 23 (Wash. 1998).

[FN134]. [In re Smith](#), 969 P.2d at 23.

[FN135]. Troxel, 530 U.S. at 56.

[FN136]. Id. at 57.

[FN137]. Id. at 62-65.

[FN138]. Id. at 58.

[FN139]. Justice O'Connor, writing for the plurality, suggests that she is passing on the question of harm, id. at 61, but her opinion in reference to this specific case (which she selected specifically speak to) suggests that some boundary must exist between third-party visitation and fit-parents wishes. The Washington court states that harm is the relevant standard. See [In re Smith](#), 969 P.2d at 28-30. Another reading of Justice O'Connor's opinion would be that no such third party intrusion is justified when a parent is fit.

[FN140]. See Troxel, 530 U.S. at 55 (O'Connor, J.) (identifying grandparents as inherently “persons outside the **family**,” and failing to examine or call for the examination of more involved relationships); see also id. at 71 (Stevens, J., dissenting) (accusing the plurality of ignoring relationships and treating children “as so much chattel”).

[FN141]. See Czapanskiy, supra note 126.

[FN142]. [Troxel](#), 530 U.S. at 76 (Kennedy, J., dissenting).

[FN143]. When relationships are not based on the sexual involvement of the adults involved, this is especially true. In one Iowa case, for example, James Ash was clearly a parental figure in the life a young girl. Her mother lived with and was supported by James intermittently from the child's birth. He cared for the child and, after the child's mother no longer lived with

him, James continued to visit and financially support the girl, even providing her health insurance. When the mother decided she did not want this to continue, and James sued for visitation, the court found that “James is a stranger to the child. He is an interested third party. He is not the child's biological father. He is not her adoptive father. He is not her stepfather. He is not her foster parent. He never married the child's mother.” [In re Ash, 507 N.W.2d 400 \(Iowa 1993\)](#).

[FN144]. See, e.g., [Johnson v. Calvert, 851 P.2d 776 \(Cal. 1993\)](#) (holding provider of the ovum to be the mother in a parental status dispute between surrogate mother and biological mother). But see *Baby Girl*, 9 Fam. L. Rep. 2348 (1986). For a full discussion of the practical matters of surrogacy, see Lawrence J. Kaplan & Carolyn M. Kaplan, *Natural Reproduction and Reproduction-Aiding Technologies*, in *The Ethics of Reproductive Technology* 27-28 (Kenneth Albern ed., 1992). For a good accounting of the potential harm to society, children, and women see Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 *Law Med. & Healthcare* (1988).

[FN145]. [In re Baby M., 525 A.2d 1128 \(N.J. Super. Ct. Ch. Div. 1987\)](#), aff'd in part and rev'd in part, [537 A.2d 1227 \(N.J. 1988\)](#).

[FN146]. Paula Span, *The Fierce War of Longing over Baby M: A Childless N.J. Couple and a Surrogate Mother, Battling Over an Infant She Bore*, *Wash. Post*, Oct. 14, 1986, at E1.

[FN147]. See Uma Narayan, **Family** Ties: Rethinking Parental Claims in the Light of Surrogacy and Custody, in *Having and Raising Children: Unconventional Families, Hard Choices and the Social Good* 65-86 (Uma Narayan & Julia J. Bartkowiak eds., 1999) [hereinafter *Having and Raising Children*] for a full discussion of the need for recognition of multiple parents in the context of surrogate motherhood.

[FN148]. See, e.g., Barbara Yngvesson, *Negotiating Motherhood: Identity and Difference*, 1 *Law & Soc'y Rev.* 31 (1991); Savage, *supra* note 75 (detailing his experience with open adoption).

[FN149]. Shanley, *supra* note 87, at 23.

[FN150]. For data, see U.S. Census Bureau, *supra* note 41 and related discussion.

[FN151]. Kate Rice, *Structure Shakeup: Approaches for Dealing with the New ‘Non-Traditional’ American Family* (Jan. 19, 2004), at [http:// abcnews.go.com/sections/Living/21stCenturyFamily/ family_structure_040119-1.html](http://abcnews.go.com/sections/Living/21stCenturyFamily/family_structure_040119-1.html).

[FN152]. U.S. Census Bureau, *supra* note 41.

[FN153]. Bartlett, *supra* note 1.

[FN154]. *Id.* at 946-49.

[FN155]. *Id.* at 879.

[FN156]. *Id.* at 946.

[FN157]. Polikoff, *supra* note 2, at 464.

[FN158]. *Id.* at 472-73.

[FN159]. In the Michael H. and Thomas S. cases, for example, both men would still have to ask for recognition as full parents with potential access to custody and all other parental rights. See [Michael H. v. Gerald D., 491 U.S. 110, 130 \(1989\)](#);

[Thomas S. v. Robin Y.](#), 618 N.Y.S.2d 356, 361 (App. Div. 1994). Had the Michael H. case not required Thomas to claim to be a parent perhaps “[t]he legal dispute would have mirrored the **family** dispute rather than exacerbated it. The court could have focused solely on Ry’s relationships with the adults in her life, rather than the adult’s biological ties to and agreements about her.” Brad Sears, *Winning Arguments, Losing Themselves: The (Dys)functional Approach in [Thomas S. v. Robin Y.](#)*, 29 *Harv. C.R.-C.L.L. Rev.* 559 (1994).

[FN160]. Young, *supra* note 2.

[FN161]. *In re Marriage of Gallagher*, 529 N.W.2d 49 (Iowa 1995).

[FN162]. *Id.*

[FN163]. Demos, *supra* note 47, at 32-38.

[FN164]. See, e.g., Robert R. Selle, *Advocate for Family Values*, 14 *World & I* 76 (1999) (describing James Dobson Jr. and the Focus on the **Family’s** work to preserve “the immutable principles of **family** integrity”). See also Roy Beck, *Washington’s Profamily Activists*, 13 *Christianity Today* 20 (1992) (describing the “private” and “pro-**family**” agendas of the Concerned Women for America, **Family** Research Council, and Christian Coalition).

[FN165]. See, e.g., Simone DeBouvoir, *The Second Sex* (1953); hooks *supra* note 65; Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in *Sister Outsider* 114, 114-23 (1984); Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in *Critical Race Theory: The Key Writings that Formed the Movement* (Kimberle Williams Crenshaw et al. eds., 1995).

[FN166]. Carol Gilligan, *In A Different Voice: Psychological Theory and Women’s Development* (1982).

[FN167]. Harrington, *supra* note 13.

[FN168]. *Id.* at 26.

[FN169]. See hooks, *supra* note 65 (discussing an ethic of care with respect to women of color); Collins, *supra* note 50; see also, e.g., Audre Lorde, *Man Child: A Black Lesbian Feminist Response*, in *Sister Outsider* 72-80 (1984); Isabelle R. Gunning, *A Story from Home: On Being a Black Lesbian Mother*, in *Critical Race Feminism: A Reader* 159, 159-62 (Adrien Katherine Wing ed., 1997).

[FN170]. hooks, *supra* note 65, at 130.

[FN171]. *Id.* at 133-34.

[FN172]. Collins, *supra* note 50, at 180.

[FN173]. See Stack, *supra* note 50.

[FN174]. “Public” here refers not to the government, but to community and local decision-making.

[FN175]. Collins, *supra* note 50, at 182.

[FN176]. See *id.* at 189-92.

[FN177]. See Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 34-57 (1993) (pointing out the limitations of liberal moral and political thinking in the context of care, including the works of Francis Hutcheson, David Hume, Adam Smith, Immanuel Kant, and others).

[FN178]. *Id.* at 168.

[FN179]. Kittay, *supra* note 9, at 41.

[FN180]. Harrington, *supra* note 13, at 49.

[FN181]. Tronto, *supra* note 177, at 106-07.

[FN182]. See Tronto, *supra* note 177, at 138 (discussing the centrality of needs as a point of analysis for care ethics); Kittay, *supra* note 9, at 57-58 (discussing the centrality of needs as a point of analysis for care ethics).

[FN183]. See Katharine Bartlett, *Re-Expressing Parenthood*, 89 *Yale L.J.* 293 (1988) (arguing against rights-based discussions). In an approach in accord with the ethic of care argument discussed here, Bartlett would require parents to frame claims in terms of responsibility. But see Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, in *Critical Race Theory: The Key Writings That Formed The Movement* 63, 66-67 (Kimberle Crenshaw et al. eds., 1995) (showing the importance of rights-based arguments for marginalized communities). I do not, however, believe that Matsuda's approach is the best framing in child custody matters, where children are generally unable to compete in rights-based environments and where rights cannot correctly contain the reality of **family** relationships.

[FN184]. See hooks, *supra* note 65 (arguing for a more communal understanding of child rearing as an antidote to the property-based system at present); Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11.1 *Hypatia* 4 (1996).

[FN185]. See Tronto, *supra* note 177, at 139. See also Collins, *supra* note 50, at 189-94 (arguing that Black feminist activism supports the most vulnerable and looks to aid the entire community).

[FN186]. See Laura M. Purdy, *Boundaries of Authority: Should Children Be Able To Divorce Their Parents*, in *Having and Raising Children*, *supra* note 147 (describing children's rights). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (Scalia, J.) (finding that the court has yet to decide whether a child has a liberty interest in maintaining relationships with her parents, as the child argued she did in the case, and declines to decide the matter in this case).

[FN187]. See Martha Minow, *Redefining Families: Who's In and Who's Out*, in *Families in the U.S.*, *supra* note 15, at 16; Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *Cardozo L. Rev.* 1747 (1993) (arguing that a child-centered perspective is the only way to meet the needs of the child).

[FN188]. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody*, 101 *Harv. L. Rev.* 727 (1988) (arguing that the current system devalues women's position as mothers and places too much power in the hands of "professional" child-experts); Laurence D. Houlgate, *Family and State: The Philosophy of Family Law* 174 (1988) (arguing that the "best interests" standard is "inherently discretionary" and indeterminate as a test).

[FN189]. Martha Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (1995). Fineman argues, rightly, that women have done the work of caring, which is too often obscured in present custody decisions. She thus suggests redefining the **family** as a protected "nurturing unit" based on the model of the "Mother-Child Dyad." This limits **families** even further, however, and in the cases described here would continue or exacerbate the problem. Instead, I

would suggest that we focus on the work of caring. In so doing, it will surely become clear that women often do that work and, thus, deserve support.

[FN190]. See Woodhouse, *supra* note 187, at 1811 (describing a child-centered analysis based on “the interdependency of **family** relationships and the essential dependency of children”). Importantly, Woodhouse describes just what a child-centered perspective might look like in operation. Her model comes closest to meeting the criteria I have set forth for a care-based theory. Though she does not provide a guiding test, her suggestions have helped shape the principle I will describe below.

[FN191]. *Id.* at 1812.

[FN192]. By mutual, I mean understood to be an important caregiving relationship by both the caregiver and child.

[FN193]. See *infra* Section V.A (discussing “presumptive parenthood” at birth).

[FN194]. See Woodhouse, *supra* note 187, describing the potential problems of a bringing children to the center of the legal analysis and outlining the pieces of a successful child-centered approach.

[FN195]. Bartlett, *supra* note 1, at 947.

[FN196]. I would not necessarily exclude all paid caregivers where those caregivers had a relationship with the child prior to the paid relationship and where an unpaid relationship continues. Specifically, in situations where **family** members may act as paid caregivers at times, I would not exclude them inherently. The burden would be theirs to show that payment was not the main motivation for the relationship.

[FN197]. See Sault, *supra* note 51, describing the various cultures, including those in which parenthood is a varying status assumed by many individuals in many forms.

[FN198]. This statement is not meant to be a specific, definitive rule. Indeed, the specific standards would have to be worked out by judges, lawmakers, and child-development experts. The issue of co-residency, for instance, would have to be more clearly specified. Bartlett and Polikoff both suggest a requirement of at least six months, while Czapanskiy, *supra* note 126, at 1367, suggests that co-residency or “a similar degree of involvement” should be enough in conjunction with a parental relationship.

[FN199]. See, e.g., Polikoff, *supra* note 2, at n.51 (arguing against Bartlett’s “willingness to dilute the legal significance of parenthood so that nonparents can obtain protection”).

[FN200]. The idea of a “core **family**” not tied to exclusivity comes from Young, *supra* note 2.

[FN201]. See, e.g., Polikoff, *supra* note 2; Bartlett, *supra* note 1 (requiring that all potential relationships be consented to and specifically created by parents for the express purpose of being parental, or quasi-parental).

[FN202]. See *infra* Section V.A (explaining how and why I would give presumptive parent status to birth parents at birth).

[FN203]. See Fineman, *supra* note 189, at ch. 6 (challenging the presumptive link currently made in law between a sexual relationship, usually marriage, and parental status; and advocating for abolishing marriage as a protected institution and, instead, protecting caregiving relationships).

[FN204]. See, e.g., Polikoff, *supra* note 2; Bartlett, *supra* note 1 (making this argument within a feminist anti-**exclusive**/functional approach).

[\[FN205\]](#). Czapanskiy, *supra* note 126, at 1341.

[\[FN206\]](#). Anita Allen, for example, worries that the move toward open adoption and the “fusion” view of parenting may infringe on the necessary right of parents to “substantially exclude birth parents, even kind and generous birth parents, from their daily lives.” Anita Allen, *Open Adoption: Not for Everyone* 18 (Feb. 28, 2001) (unpublished manuscript, on file with the author). I agree with her that **families** should not be forced into choosing an open adoption relationship. However, once a relationship between the birth mother and the child has been well established, I do not necessarily agree that it should be able to be terminated simply to assure that adults feel secure in a **family** of their own. Indeed, I want to challenge the idea of ownership within the **family** and, while preserving autonomous decision-making power, I want to create law which encourages attention to children's lives and relationships over the individualistic rights of adults.

[\[FN207\]](#). See above discussion of [Quilloin v. Wallcott, 434 U.S. 246 \(1978\)](#), and [Lehr. v. Robertson, 463 U.S. 248 \(1983\)](#) (holding that biology alone does not suffice to establish a father's rights).

[\[FN208\]](#). Note that I am specifically talking about the intent to care. This idea grows out of a suggestion made by Shanley, *supra* note 87, at 64-67, that I find persuasive. However, Shanley argues that the mother has provided care to the fetus, raising questions about the ethics of abortion. For my purposes, I would not identify pregnancy as caregiving to be recognized under law. I believe it is unnecessary to establish a presumptive parental status. Instead, I use the phrase “intent to care.”

[\[FN209\]](#). This would not, I hasten to add, free biological fathers from support obligations where requested by the mother or other caregiver. As with current law, child support and custody are not necessarily tied. However, insofar as a limited relationship may develop through the provision of child support, biological fathers may indeed have a relationship worthy of protection. This would not, though, be assumed to be the case.

[\[FN210\]](#). Shanley, *supra* note 87, at 64-73. Note that I diverge from Shanley's proposals to establish intent to care where she would establish care itself, see *supra* note 209. It is possible to argue that fathers, too, can care for a fetus by caring for the mother. It is easier and clearer, however, to require a father to show intent to care--through prenatal assistance, care to mother, etc. Fathers who no longer have a relationship with the mother might be given the chance to register with the state to demonstrate their intent to care. See Shanley's book for an excellent practical analysis of how this might work. Shanley, *supra* note 87.

[\[FN211\]](#). I do not believe that opening the door at birth for anyone to show intent to parent is practical--could a grandparent show intent to parent by providing all the help to the mother that a spouse might? Would the grandparent then gain the right to veto adoption? Thus, I would recognize biology as necessary to have access to presumptive parent status, though only at birth. I also recognize that most children are born to involved biological parents and that there is an importance to biology in humans' lives. As such, I think it is proper to give deference at birth to these two presumptive parents. After birth, the biological presumption, however, no longer makes sense.

[\[FN212\]](#). [491 U.S. 110 \(1989\)](#).

[\[FN213\]](#). *Id.* at 131.

[\[FN214\]](#). [Alison D. v. Virginia M., 77 N.Y.2d 651 \(1991\)](#).

[\[FN215\]](#). [Thomas S. v. Robin Y. 618 N.Y.S.2d 356 \(App. Div. 1994\)](#).

[\[FN216\]](#). *Id.* at 367 (Ellerin, J., dissenting).

[FN217]. See Shanley, *supra* note 87, at ch. 1; Yngvesson, *supra* note 148, at 31.

[FN218]. [Troxel v. Granville, 530 U.S. 57 \(2000\)](#).

[FN219]. As stated above in Section V.A., for the purpose of ensuring the practical authority of parents I would provide only the biological parents with the possibility of presumptive parental relationship at birth. This might lead to fewer surrogacy arrangements, though I am not convinced that this is truly a problem.

[FN220]. But see Allen, *supra* note 206 (arguing that this approach would be problematic since parenthood should include the right to exclude others). I, however, do not see this as a right of parenthood. Instead, viewed from a just, care-oriented, child-centered perspective, I would argue that relationships should be recognized where they exist and decisions should be made about them based on the real-life caring work being done. The rights flow from the relationship, rather than from status, and the child, not the parent, should be the center of the analysis. Authoritative parenting is an important aspect of creating functional **families** and, as I have demonstrated above, can be integrated into a truly non-**exclusive** custody approach.

[FN221]. See Lynn Pasquerella, Protecting Faith Versus Protecting Futures: Religious Freedom and Parental Rights in Medical Decision Making for Children, in *Having and Raising Children*, *supra* note 147, at 177; Julia J. Bartkowiak, Fear of God: Religious Education of Children and the Social Good, in *Having and Raising Children*, *supra* note 147, at 193.

[FN222]. Czapanskiy, *supra* note 126, at 1318-19.

[FN223]. This is closer to The Children Act of Great Britain, discussed by Czapanskiy, which allows the spouse or cohabiting partner to request a “residence order,” granting them daily authority over the child. This Act, however, only includes individuals in marital/sexual relationships. Czapanskiy, *supra* note 126, at 1353.

[FN224]. This builds on Fineman's idea of publicly identifying caregiving units, though it does so in an affirming, inclusive way. Fineman, *supra* note 189.

[FN225]. I include gay and lesbian parents here because, even if the child is planned by two or more parents, at birth the only presumptive parent would be the biological one. Both queer and straight non-biological parents, though, could have full parental rights after birth if they establish a parental relationship through the proposed co-guardianship order.

[FN226]. [Atkinson v. Atkinson, 408 N.W.2d 516 \(Mich. App. 1987\)](#).

[FN227]. [Id. at 519](#).

[FN228]. I agree, though, with Minow, *supra* note 187, at 16, that we need to be very careful about our reconceptualizing of **family** when it comes to regulating **families'** lives--especially when it comes to qualifying for assistance or, in Minow's example, being expelled from housing because of the actions of one's “**family**.”