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INTERDEPENDENCIES, FAMILIES, AND CHILDREN

Karen Czapanskiy*

I. INTRODUCTION

Law addresses the needs and miseries of children through a variety of interventions designed to protect or advance a child’s best interests. The term “best interests,” however, lacks content: how can one to tell whether a proposed intervention protects or advances a child’s “best interests?” The solution I propose in this article is called “interdependency theory.”

Interdependency theory rests on the belief that every child needs a caregiver, and every caregiver needs support from other people and institutions. The role of law, whether family law, juvenile justice law, public benefits law, tax law, or employment law, should be to respect the caregiver’s...

* Professor, University of Maryland School of Law; BA, University of California at Berkeley; JD, Georgetown University Law Center. Thanks are due to many people who have helped me cultivate this article. I am especially grateful to the students in my 1996 seminar at the University of Maryland School of Law and to my research assistants, Susan Testa, Joe Henry, Paul DeSantis, Nancy Hochberger, and Meverette Smith. Particularly helpful readers have included Kate Bartlett, Peg Brinig, Naomi Cahn, June Carbone, Dana Czapanskiy, Martha Fineman, Elizabeth Samuels, Becky Sander, Jana Singer, and Joan Williams. I have been enriched by the insights of audiences at the Nags Heart Conference in 1995, the ISFL meeting in 1997, the AALS Program in 1999, the Donley Lecture at the West Virginia University Law School, and a faculty forum at Southern Methodist University Law School. Research stipends have been provided by the University of Maryland Foundation. My deepest thanks are due to my clients and to people in their supportive circles who have taught me so much about what law needs to say.

1. The examples in this article arise in family law, but other fields are fertile for examination. In juvenile justice, for example, one could examine the relationship between a charge that a parent has neglected a child and a charge that a parent who has been abused has failed to protect a child. See Jane Murphy, Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law, 83 Cornell L. Rev. 688, 745 (1998). In
commitment, hard work, and knowledge and understanding of the child by according him or her maximum autonomy, authority, and assistance. At the same time, law needs to encourage and support people and institutions that provide help to the caregiver, who in turn helps the child to grow. According to the theory, a proposed legal intervention is acceptable only when it supports caregivers in maximizing their ability to care for a child. A proposed legal intervention is unacceptable when it impedes a caregiver’s ability to do what is best for a child.

In this article, I explore interdependency theory as it applies to family law, in the context of visitation with a child.

Public benefits law, one could examine the welfare-to-work requirements in relationship to a caregiver’s decisions about a child’s needs. 42 U.S.C.A. § 601 et seq. (West Supp. 1998). In tax law, one could compare the earned-income tax credit with the dependent care credit to determine whether both operate in ways that support caregivers. Compare 26 U.S.C.A. § 32 (West Supp. 1998), with 26 U.S.C.A. § 21 (West Supp. 1998). In employment law, one could examine the impact of the employment at will doctrine as well as the nature of a voluntary quit in unemployment law. See Sharon Dietrich et al., Work Reform: The Other Side of Welfare Reform, 9 STAN. L. & POL’Y REV. 53, 62 (1998) (explaining that two thirds of states require the reason for leaving a job to be job-related; 32 states explicitly disqualify those who leave to perform domestic obligations). See generally JOAN WILLIAMS, RECONSTRUCTING GENDER (forthcoming 1999) (arguing that Title VII may provide a remedy for workers who need to combine paid employment with parenting); Martin H. Malin, Unemployment Compensation in a Time of Increasing Work-Family Conflicts, 29 U. MICH. J.L. REF. 131 (1996); Deborah Maranville, Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm, 43 HASTINGS L.J. 1081 (1992). In a similar vein, Professor Jane Rutherford proposed that children be represented in the political process through proxy voters, usually their parents. Jane Rutherford, One Child, One Vote: Proxies for Parents, 82 MINN. L. REV. 1463, 1502-06 (1998).

A personal experience could have become an insurance law problem. When I was pregnant with my younger child, I developed carpal tunnel syndrome, which left both hands temporarily crippled to the point that I was unable to hold a glass of water, much less an infant. Doctors predicted that the condition would abate within a few months after the child’s birth, but, in the meantime, everyone agreed that it would be safer if someone else, such as a home healthcare worker, carried my child. My insurance company took the position that the health problem was mine rather than my child’s. Since the healthcare worker was needed for the care of someone who was not sick, insurance was not available. However, if I dropped the child and he was injured, then he would have a health problem covered by insurance. Fortunately, the condition abated quickly and I enjoyed substantial family support in the meantime, so the baby was not dropped. What the insurance company did, however, is a perfect example of a negative interaction with a caregiver/child unit. The insurance company failed to see us as a unit with an integrated health problem and refused to see its own role as supporting the unit.
by a person not living in the child's household. Future articles will address the application of the theory in other settings, such as public benefits and alimony.

Law is often oblivious to the needs of caregivers despite the fact that society relies on caregivers to raise children. The following four examples, drawn from my clinical practice, illustrate this point.²

Example 1

A father of two preschoolers is HIV+. Although not yet seriously ill, he wanted to make plans for the children if he dies before they are grown, as is likely. Their mother, also HIV+, abandoned the children when they were infants, sees them infrequently, and remains involved with illegal drugs. In Maryland, a non-marital biological father can legally adopt his children to establish his legal fatherhood and terminate the legal parenthood of the biological mother. Termination of the mother's rights is permitted if she has deserted the child, so it would be permitted in this case.³ As the sole legal parent, the father would enjoy the exclusive right to decide who cares for the children after his death. Otherwise, the mother's rights would remain equal to the father's rights.⁴ Hopeful that the mother will change, the father wanted an intermediate path allowing her the dignity of the title of, and an incentive to act in any way as a mother, but allowing him, the children's caregiver, the peace of mind of knowing that someone he trusts will look after the children. The law, however, gives him no intermediate path.⁵

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². Because my clients suffer from many of the problems that accompany poverty, these examples may seem extreme, so additional examples appear throughout the article.
³. Bridges v. Nicely, 497 A.2d 142 (Md. 1985) (holding that a natural father of nonmarital child permitted to adopt child); see MD. CODE ANN., FAM. LAW § 5-312 (Supp. 1997) (allowing adoption without the consent of the natural parent if a child is in the care of a relative for more than six months who is seeking an adoption and the natural parent has deserted or harmed the child).
⁴. MD. CODE ANN., FAM. LAW § 5-23 (1991) (stating that parents are joint natural guardians of a minor child).
⁵. The closest thing to an acceptable solution is the Standby Guardian Law that permits a terminally ill parent to create a guardianship activated upon the death or disability of the parent. MD. CODE ANN., ESTATES & TRUSTS §§ 13-901 et seq. (Supp. 1997). The other parent retains the right to revoke the guardianship, however, even if he or she agreed to its establishment. Id. at § 13-904(h).
**Example 2**

A mother of an elementary age child divorced her husband after enduring several severe beatings. Unable to prove that visitation between the child and the father would put the child at risk,\(^6\) she agreed to a visitation order and cooperated with visitation. Throughout the child's early adolescence, the father preached to the child that the child's mother had deserted the father for no reason and had used the divorce to steal his family's home. In middle adolescence, the child went to live with the father. During a visit to the mother's home to retrieve some belongings, the child attacked the mother. He left her bruised and nursing a broken finger. Although the mother and child eventually reconciled, their relationship remains difficult and the child, now a young man, is quite troubled.

**Example 3**

A child was born to a woman and man as the result of a sexual encounter during a brief relationship. When the child was born, the woman was seeing another man, with whom she established a long-term relationship. The child regarded the mother and her partner as her parents, and their children as her siblings. Because the family applied for public benefits when the child was young, the woman was required to assign her rights to child support and cooperate in establishing the paternity of the child's biological father.\(^7\) Paternity was established and a child support order entered, but few payments were made, and the biological father made little effort to see the child. The woman died after a long illness while the child was still young. She identified the stepfather as the person who should act as the child's guardian, but the guardianship was at risk of being terminated if the biological father should ever object.\(^8\) The stepfather sought to adopt the child. The process took over a year, however, largely because the law required the caregiver to obtain the consent of the biological father or demonstrate that finding him was

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6. The case arose before 1991, when Maryland law was amended to require the court to take into account the safety of the custodial parent when ordering visitation. *See* MD. CODE ANN., FAM. LAW § 9-101.1(c) (Supp. 1997).
8. *See supra* note 5.
impossible. The fact that the biological father had not contacted the child or kept the mother or caregiver apprised of his location was not sufficient proof that adoption by the caregiver was proper.

Example 4

A woman adopted a young child whose biological mother was too disabled by mental illness to care for her. As she grew, the child developed a similar mental illness. Although it was extremely difficult, her adoptive mother provided care and mental health treatment. Nonetheless, as a teenager, the child engaged in some risky activities, including a relationship with an abusive, older man, who was convicted of assaulting her. During the same time period, another man raped the teenager and was later convicted. One of the men impregnated the teenager. She was unable to care for the baby, so the grandmother, with the teenager's consent, began caring for the baby as her own. When the teenager was about to turn eighteen, the grandmother became concerned that the teenager might change her mind about leaving the baby in her care. The court refused to consider the grandmother's petition for guardianship, however, unless she served the two men who might be the biological father. The grandmother withdrew the petition to avoid subjecting the mentally fragile teenager to the trauma of testifying again about the assault and the rape she had endured.

In representing these caregivers, I became convinced that the law gave them a raw deal. They assumed the care of children and stuck with them through some extremely hard times. They were respectful of other people and institutions that were part of the children's lives. They have done their very best. Yet, their best is never enough. Other people and institutions, with the help of the law, can intervene in the relationship of the caregiver and child. And other people and institutions, with the help of the law, bear no responsibility to

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9. Because the biological father had been adjudicated as the legal father in a paternity proceeding, the adoption could not proceed without his consent unless there were unusual circumstances. See Md. Code Ann., Fam. Law § 5-312 (Supp. 1997). Even though state child support officials had been unable to locate the father for years, it was up to petitioner to demonstrate by clear and convincing evidence that his efforts to locate the absent parent were adequate. See Md. Code Ann., Fam. Law § 5-312(c)(2)(iii) (Supp. 1997).
support the caregiver in helping the child. The caregiver alone raises the child, bears the risk of losing the relationship, and has no right to demand support, or even respect, for the caregiving he or she provides.

Society needs to address the reality that these roadblocks to caregiving harm not only the caregivers, but also the children in their care. Society entrusts children to caregivers because we believe that society cannot raise children as well as individuals can. Caregivers cannot perform their job, however, without the promise and the reality of social and legal support.

When the caregiver’s needs are neglected, the caregiver cannot meet the children’s needs. Our collective failure to attend to the caregiver’s needs helps explain some of the misery, deprivation, and abuse suffered by children in the United States. A fifth of children in the U.S. live below the poverty line.

In the context of family relations, the best interests of the child test is used to determine whether an outcome is desirable. Interdependency theory challenges current


11. FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL BEING 10, 70 (1998) (illustrating that in 1996, 31% of children under the age of 18, who were related to the householder, lived under 150% of the poverty line, while 21% lived below the poverty line).

12. 442,000 children were in foster care at the end of the 1992 fiscal year. HOUSE COMM. ON WAYS & MEANS, 103 CONG., 2D SESS, OVERVIEW OF ENTITLEMENT PROGRAMS: 1994 GREENBOOK 640 tbl. 14-14 (1994).

13. CHILDREN'S DEFENSE FUND, Facts on Youth, Violence, and Crime (June 18, 1998) <http://www.childrensdefense.org/safestart_facts.html> (indicating that in 1996, 8,100 juveniles were being held in adult jails; while in 1995, 69,075 children were held in juvenile public custody facilities).

14. The best interests of the child is a multi-factored test that requires the court to exercise its discretion after considering evidence of factors such as the child’s and parents’ wishes as to custody; the child’s primary caretaker; the nature and extent of the child’s relationship with parents, siblings and community; the child’s age, maturity, gender, mental and physical health, culture and religion; the parents’ fitness, economic status, maturity, morality, religion, physical and mental health, dedication to the child, the effect on the
versions of the best interests test because it requires that the child be viewed as a member of a care-giving unit, not as an independent being whose "best interests" can be determined separate from the need to be cared for. Interdependency theory dictates that the child's life be viewed in its entirety, beginning with the fundamental connection of the child to the specific person or people who care for the child every day because they have a long term commitment to the child's development and well being. The theory also challenges the "best interests" notion by recognizing that no caregiver acts alone. Caregivers depend on other adults and institutions, just as society depends on caregivers. Also, under interdependency theory, supporting adults are not identified by status, such as spouse or grandparent. Instead, they are identified by their supporting behaviors, a change that valorizes and gives content to the role of the supporting caregiver.

Under interdependency theory, opportunities for private parties to use courts to intervene in the lives and decisions of caregivers would be far fewer than they are today. Interventions would be allowed only to reward someone who has behaved as a supporting caregiver. A claim based solely on status or a legal relationship would not be cognizable. Consequently, a variety of claims that could succeed under the current best interests test would be eliminated. Examples include certain parental and grand-parental visitation claims where the proposed visitors have no history of supporting the lead caregiver.

Restricting judicial intervention would improve the life of the child at a practical level by reducing opportunities for conflict.\textsuperscript{15} Further, the lead caregiver could insist that people who want contact with the child provide the caregiver with

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\textsuperscript{15} See \textsc{Paul R. Amato \& Alan Booth, A Generation at Risk: Growing Up in an Era of Family Upheaval} 78, 202 (1997) (negative effects of divorce on children are mediated by maternal and paternal support during adolescence and amplified by post-divorce conflict over custody, child support, visitation and child-rearing); \textit{see also} \textsc{Janet M. Bowermaster, Relocation Custody Disputes Involving Domestic Violence}, 46 \textsc{Kan. L. Rev.} 433, 447-48 (1998).
support, since providing support to the caregiver is the only route of access to the child. On an emotional level, the theory contributes to the sense of respect a lead caregiver can enjoy, because the work he or she does for the child and his or her deep knowledge of the child gain a more prominent role. He or she regains some of the authority that a lead caregiver needs to perform the work of caring for a dependent child. Further, restricting intervention adds to the lead caregiver's security by eliminating judicial contests over claims by people who have not provided assistance and support. At the same time, it contributes to the financial security of the caregiver/child unit by eliminating the need for the lead caregiver to defend against some judicial challenges.

Some adults who can now intervene in the child’s life would be precluded from doing so. Examples include those who qualify for visitation orders solely because of their status as a legal or biological parent or as a grandparent, those who are allowed to exercise visitation without regard to whether their behavior toward the caregiver is respectful or abusive, and those who are unreliable about exercising visitation rights. The costs of their exclusion are outweighed by the benefits to the child of supporting the caregiver/child unit. By restricting judicial intervention to those who have behaved as supportive caregivers, the child is ensured of continuing contact with people who are committed to the child’s well-being, and recognize that the security and well-being of the caregiver are important to the child. Restricting judicial intervention provides an incentive for more people to behave supportively toward the lead caregiver on whom the child depends, and for fewer people to behave as if the adult’s desires were all that mattered.

Interdependency theory would improve the lives of many caregivers, including those I have represented. Improving the lives of the caretakers also improves the lives of the children they care for. In the case of the HIV+ father concerned about his children’s future, the father would be empowered to name the person who would become the children’s guardian after his death. Their mother would be able to see the children, but would not be able to use the law to disrupt their placement. In the case where the former husband used violence to assert his authority over the mother and taught their young child the same behavior, the mother would have
authority to restrict the father's access to the child until the child reached adolescence. At that point, the father would have the right to contact the child and invite a relationship. The stepfather whose continued guardianship of the child he raised was threatened by the child's absent biological father would be relieved of that concern. The biological father would lose the right to intervene because of his absence from the child's life and lack of support for the child/caregiver unit. And the grandmother whose commitment was a lifeline to her daughter and granddaughter, would not have to struggle with absent, uncommitted, and potentially violent putative fathers in order to continue caring for her grandchild.

Social commentators are split as to whether the help that children need should come from-inside or outside their families, or from society at large. For some, the principal explanation for children's misery is the structure of their families. These commentators focus on the fact that parents divorce or never marry and attribute much of the decline in children's well-being to the single-parent structures of their families. For others, the principal explanation for children's misery is found in the economic and social structures that provide parents with inadequate resources and substandard conditions for raising children. These commentators find the sources of children's misery in the nature of work, poverty, social benefits, educational systems, and in social practices such as racism and sexism.

The first group, whom I call interventionists, proposes remedies that intervene in the family life of children. They may seek to limit access to divorce, prefer joint custody of children, and often insist on enhancing the enforceability of visitation orders. The second group, whom I call protectionists, propose solutions that simultaneously shelter the homes of children from tampering by government and third parties while enlarging public resources dedicated to children and the people who care for them.

Both groups have identified only a portion of a solution.

16. Interventionist thinkers discussed in this article include David Blankenhorn, Sylvia Hewlett, and Cornel West. See infra note 111.
17. Protectionist thinkers discussed in this article include Joseph Goldstein, Anna Freud and Albert J. Solnit. See infra note 72. Martha Albertson Fineman is discussed as a protectionist thinker. See infra note 62. Finally, Nancy D. Polikoff is also discussed as a protectionist thinker. See infra note 87.
Interventionists understand that children need more of society's resources than they currently receive. They identify nonresidential fathers as the best source of additional resources, and understand that persuading adults to share resources with children requires a combination of encouragement and coercion. The protectionists understand that parenting is a difficult job that requires freedom and autonomy. Structural constraints on parental freedom result in more, rather than fewer, difficulties. Protectionists also understand that, in general, women get little respect for nurturing, no matter how well they might do it. Finally, they recognize that society in general needs to devote more resources to children.  

Both groups, however, fail to understand other fundamentals. Reforms proposed by interventionists increase the burdens on custodial parents, even though these adults are the ones demonstrating a daily commitment to children. At the same time, some interventionists ignore the many people other than non-custodial parents who join custodial parents to provide for children. Many deny or downplay the need for the government or business to provide more financial support for children. Protectionists, on the other hand, fail to acknowledge the need to reward people who help single parents. Simply freeing caregivers from hierarchical controls does not provide them with the help they need, whether that help comes from other adults or from institutions. In other words, one group relies too heavily on controlling caregivers, while the other group over-emphasizes individualism. One group advocates governmental interventions that would impair the abilities of caregivers; while the other group seeks to limit interventions that might provide caregivers with needed assistance.

Interdependency theory attempts to strike a balance by

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18. Professor Naomi Cahn argues that convergences such as these constitute a new morality that is emerging in family law. Naomi R. Cahn, The Moral Complexities of Family Law, 50 STAN. L. REV. 225 (1997). In her view, the new morality "addresses family values, promotes acceptance of broader definitions of family, and draws on notions of fairness and equality." Id. at 245. Interdependency theory is both a part of, and critical of, the new morality envisioned by Professor Cahn. While embracing the notion that the care of children is the central task of families, however constituted, I remain concerned that both autonomy and connection needs of caregivers may be under emphasized. See id. at 269-70 (discussing similar concerns).
measuring the appropriateness of a proposed intervention against the needs of a child and caregiver, considering them as a single unit. The caregiver's job is to help the child mature, to the best of the caregiver's ability. Because the typical child is raised by caregivers, rather than communally, society is dependent on caregivers to provide for children, and it acts on children, especially younger ones, through their caregivers. No caregiver raises a child completely alone; however, every caregiver depends on a variety of people and institutions to provide support of many kinds. Under interdependency theory, interventions into the caregiver-child unit are permitted only to the extent necessary to recognize and support the interdependency of the unit, as well as those people and institutions who support the caregiver and on whom the caregiver depends. 19

Under interdependency theory, the question of whether and how law should intervene in the caregiver-child unit is measured by whether the intervention is supportive of the caregiver-child unit. 20 “Supportive” means that the intervention assists, or at least does not impede, the caregiver in doing the best job she or he can do for the child. What the theory rejects is the claim that society can successfully intervene directly in the life of a young child without going through the caregiver. Interdependency theory assumes the opposite: that the caregiver stands at the threshold between a child and society. Society is dependent on the caregiver to care for the young child; thus what society can do best for the child is to support the caregiver.

In this article, I examine the intervention question in the context of visitation rights. When a court enters a visitation order, it intervenes into the caregiver-child unit by telling the caregiver who the child will spend time with and when. The

19. The cases at issue here do not include situations where the child should be removed from the caregiver because of abuse, assuming that the removal would be proper. See infra note 50 and accompanying text.

20. I am assuming legal systems consisting of rewards and punishments have a role in encouraging and discouraging certain behaviors. Under interdependency theory, behaviors that are encouraged are those leading adults and institutions to support caregivers in ways that permit caregivers to do the best job of which they are able for the dependent child. Behaviors that are discouraged are those impairing or impeding caregivers. So the question for law is, does a proposed legal intervention serve to assist caregivers, or does it get in the way?
intervention is measured under the "best interests of the child" standard. What constitutes the best interests of the child is the subject of a debate between two irreconcilable positions. The dominant position identifies the child's best interests with continuing contact between the child and both parents. The other position identifies the child's best interests with support for the child's primary caregiver. Neither position is fully satisfactory. Alternative principles are needed to determine the relationships between adults and children who do not live together. Interdependency theory is an effort to articulate those principles.

Under the dominant best interests theory, the ability to get a visitation order depends largely on the adult's status in relationship to the child. A non-custodial parent is rarely denied visitation. Likewise, a grandparent of a child living in a single parent home will rarely be denied visitation rights. A non-adoptive stepparent, on the other hand, has


22. Legislation provides for "grandparent visitation" in forty-nine states. See, e.g., ALA. CODE § 30-3-4 (Supp. 1997); ALASKA STAT. § 25.24.150 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-409 (West 1998); ARK. CODE ANN. § 9-13-103 (Michie 1998); CAL. FAM. CODE § 3104 (West 1994); COLO. REV. STAT. ANN. § 19-1-117 (West 1997); DEL. CODE ANN. tit. 10, § 1031(7) (Supp. 1996); FLA. STAT. ANN. § 752.01 (West 1997); GA. CODE ANN. § 19-7-3 (Supp. 1998); HAW. REV. STAT. § 571-46(7) (Michie 1997); IDAHO CODE § 32-719 (Michie 1996); 750
more difficulty obtaining a visitation order, as do others in relationships with the caregiver or child that are not defined by blood or marriage.  


23. Currently legislation provides explicity for stepparent visitation in only eight states. See, e.g., CAL. FAM. CODE § 1301 (West 1994); KAN. STAT. ANN. § 60-1616(b) (Supp. 1997); LA. CIV. CODE ANN. art 136 (West Supp. 1998); N.H.
Interdependency theory rejects status as a basis for visitation decisions. The theory relies instead on function, by focusing on whether the potential visitor has a history of providing the child-caregiver unit with support in a reliable and respectful way, and whether that supportive relationship will continue. In addition, if a person with a visitation order ceases to behave in a supportive, reliable, and respectful manner, the visitation order would be rescinded. Thus, under interdependency theory, some formerly married non-custodial parents and many grandparents would be denied visitation, whereas some people who are unrelated to a child would be granted visitation. On the other hand, where a person has a history of providing the caregiver-child unit with support in a reliable and respectful manner, interdependency theory authorizes visitation even though the caregiver might disagree. Such a constraint on any individual caregiver is needed to encourage support for all caregivers. Rather than calling the caregiver a “custodian” and the supporting adult a “visitor,” the roles are renamed “lead caregiver” and “supporting caregiver.” The next section explores the meanings of these and other terms.

II. The Terms of Art

A. Who Qualifies as a “Child”?

Interdependency theory applies when a child needs an intermediary for interactions with the world outside the home. Infants obviously qualify, as do children too young for school. A child’s ability to negotiate the world without a caregiver’s intervention increases as the child develops.24 For

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24. See Penelope Leach, Children First: What Our Society Must Do—And Is Not Doing—For Our Children Today 68, 90-91, 144-45 (1994): Somebody must laugh at first jokes, applaud first steps, read stories and steer her between the rock and the hard place of toddlerhood so that she can emerge unscathed into socialized childhood and the new
most children, there comes a point in adolescence when caregivers have little to do in terms of intermediation between the child and the world at large. At that point,

 joys of “my friends” and “my teacher.” And even then, somebody must be there to welcome her home and then launch her again on each fresh leap into life.

Id. at 68.

25. Professor Janet Dolgin has described and raised concerns about recent moves in the law to distinguish adolescents from younger children. Janet L. Dolgin, The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship, 61 ALBANY L. REV. 345, 350 (1997). In her view, the law is inclined to protect children, even though imperfectly, while adolescents are more likely to be viewed as autonomous and in need of little protection or support. Id. at 428. While the law could be refined to offer a more nuanced balance between autonomy and protection, it seems more likely to Professor Dolgin that the separation of adolescence from childhood will lead to a redefinition of children, excluding infants, as being “little adults” who will be increasingly indistinguishable under the law. Id. at 428-29, 431. The results appear dire:

If society continues to understand children as inherently different from adults, as vulnerable, immature, and in need of adult guidance, then children face the risk that, without the support of enduring familial settings, they will never mature, that they will in effect, remain adolescents throughout life . . . . But if, instead of relying on parental substitutes, society redefines children, and if, further, the almost unrelenting generalization and elaboration of individualism within American culture does lead to the amalgamation of childhood and adulthood, the consequences for children will likely be unfortunate, unless - and little beyond whim or hope suggests this to be the case - children really are “little adults” almost from the start.

Id. at 430-31.

I agree with Professor Dolgin’s dire prediction as well as with her call for a more nuanced legal approach to the process of maturity. I understand one of her central points to be the need to trust families more so that the adults in a child’s life can be trustworthy substitute decisionmakers for the child. It is critical to interdependency theory that one or more adults who are committed to the child be given the authority needed to act in the child’s interest. I argue against the distribution of that authority to courts and to other adults (including a nonresidential parent) unless it is clear that the shared authority supports a co-resident adult’s care-giving for the child. My prediction is that the trust placed in the lead caregiver will translate into better caregiving for the child. As Professor Dolgin notes, a child needs the “support of enduring familial settings” to successfully make the leap from childhood to adulthood. Id. at 430 (emphasis added).

Where I disagree with Professor Dolgin is in the idea that law is better off not distinguishing between children and adolescents, because I think that the slope need not be as slippery as she describes. For example, giving an adolescent some independence in regard to his or her relationship to a nonresident parent, as I propose, is not a valid reason to view that adolescent as capable of making all of his or her medical or educational decisions or to hold him or her criminally liable as an adult. Instead, it is an appropriately measured introduction into one of the many responsibilities of adulthood, that
interdependency theory is less salient, although it should continue to be applied in some circumstances. Most such circumstances lie outside the realm of family law, so they will be explored elsewhere.26

B. Who is the "Lead Caregiver"?

Rights and responsibilities under interdependency theory begin in the child-caregiver unit, so it is critical to determine who the lead caregiver is. For many children, the answer to the question is simple: they live with one adult, usually the mother, who assumes responsibility for their care, and for interdependency purposes, is the lead caregiver.

Most children live in two-parent homes and some live in homes with two adults. As between the two parents or adults, who is the lead caregiver? So long as the household continues unchanged, there is no need to identify a lead caregiver because more than one adult can qualify if each is committed to the child, performs caregiving responsibilities as well as he or she can, and acts respectfully toward other caregivers. From the perspective of the child's wellbeing, as viewed through interdependency theory, the best thing society can do is support co-residential caregivers in their mutual commitment to caregiving work.

If the household composition changes, however, under interdependency theory the lead caregiver will be the one vested with the larger share of authority in regard to the child. At that point, therefore, it is important to identify the lead caregiver. Custody law offers a variety of possible rules, but the one most congruent with interdependency theory is

26. Another issue affected by the age of the child is how one determines the lead caregiver when the child is a newborn. No adult has had an opportunity to demonstrate a commitment to the child, and several people may be prepared to make and carry through with a commitment. If they do not share a household, who should be selected? This is a question intimately connected with complex adoption questions and too involved to address fully here. See generally Joan Hollinger, Adoption and Aspiration: The Uniform Adoption Act, The De Boer-Schmidt Case, and the American Quest for the Ideal Family, 2 DUKE J. GENDER L. & POL. 15 (1995). For the moment, it will have to suffice to say that a decision needs to be made early in the life of the infant and that, at the same time, the ability of adults to make an unambiguous commitment to a newborn should not be overestimated. Therefore, the performance of caregiving must remain central and should supplant legal or biological parenthood when necessary.
an "approximation" rule. Such a rule looks to the prior caregiving practices of the adults and seeks to approximate those practices in the future by allocating caregiving responsibilities along the same lines, to the extent that is possible. For interdependency theory purposes, the lead caregiver is the adult who is allocated the bulk of caregiving responsibilities are allocated.

An approximation rule is congruent with interdependency theory for a number of reasons. First, it recognizes the importance to the child of maintaining as stable a life as possible. The departure of one of the adults in a household cannot leave a child untouched, but a child suffers less if the adult who remains is the one who usually cared for the child. Entrusting the child to that person may enhance the child’s sense of security and stability.

Second, giving the lead caregiver a legal privilege identifies his or her caregiving work as something important and worthy of reward. Third, it provides all the adults in a child’s life with greater incentives to put the child’s needs first, because their opportunities to spend time with the child and to make decisions for the child after a separation depend on their caregiving practices before the separation. Fourth, it


29. Two researchers reported recently that states that permit courts to order joint custody also experience significantly lower rates of divorce than states that do not. Margaret F. Brinig & F. H. Buckley, Joint Custody: Bonding and Monitoring Theories, 73 IND. L.J. 393, 393 (1998). They argue that the reason for this is that a spouse who is likely to lose custody under a sole custody regime—the father—is more likely to engage in the many daily events that lead to bonding with his children when he is given reason to be optimistic that, in the event of a divorce, he will be awarded joint custody and thereby remain an important presence in the lives of his children. Id. at 394-96. Moreover, such participation in family matters also leads to further bonding with his wife, thus lowering the likelihood of divorce. Id. at 411-417, 423.

I agree with Brinig and Buckley that the possibility of joint custody should
discourages each caregiver in a joint household from behaving disrespectfully or unsupportively toward another caregiver, because such conduct may lead to separation or divorce and the predictable consequences of less time with, and diminished authority over, a child.

Sometimes parents or other adults who share a home with a child allocate their child-rearing roles badly. For example, where traditional gender roles are the basis for the allocation decision, a father more inclined toward nurturing may still spend more time at work and less time at home than a mother less inclined toward nurturing.30 If the moment of separation is also the moment when the father decides to change his lifestyle so that he can spend more time with the children, it may seem logical to give him a larger share of parental responsibility and authority after separation than an approximation rule would provide. Indeed, the parents may see the logic of that result and decide to allocate responsibilities in exactly that way. If they do, interdependency theory would prevent a court from second-

lead to lower rates of divorce, but I think their analysis is inadequate in one important respect. Brinig and Buckley portray the prospect of joint custody as merely reducing the father's fear of losing access to his child after divorce. Id. at 402. This implies that joint custody itself does not provide any incentive to the father to invest in the child, but rather removes the disincentive created under a sole custody regime. If joint custody were awarded to every divorcing father solely on the basis of his fatherhood, Brinig and Buckley's reasoning would suffice. It is not the case, however, that joint custody is awarded in most states purely on proof of marital paternity. The more common rule requires the court to examine the prior caregiving practices of both parents. Where a father has engaged in few or none of the daily tasks that lead to bonding, that father is unlikely to be awarded joint custody. See, e.g., COLO. REV. STAT. § 14-10-124(1.5) (1987) (court considers whether the past roles of the parents “indicate an ability as joint custodians to provide a positive and nourishing relationship with the child”); LA. CIV. CODE ANN. art. 134(12) (West Supp. 1996) (courts required to consider the caregiving roles previously exercised by both parents); VA. CODE ANN. § 20-124.3(5) (Michie 1995) (courts must consider “role each parent has played and will play in the future, in the upbringing and care of the child”); Taylor v. Taylor, 482 A.2d 164 (Md. 1985) (considering prior parental caregiving in a joint custody decision).

A more complete hypothesis, therefore, would be that divorce rates are lower in states permitting courts to order joint custody because fathers can be optimistic about their post-divorce contact with their children, and because they are aware that their chances for joint custody improve as they can demonstrate that they have done caregiving work before the separation.

guessing their decision, because the theory demands that courts respect the decisions of caregivers. After all, it would be exceptional for a child’s caregivers not to know better than outsiders, including courts and court-appointed experts, what is best for the child in their care.

Even though interdependency theory would uphold a parental decision to vary from historical parenting patterns at the time of separation, the theory does not require that the less-nurturing mother cede to the more-nurturing father a greater degree of responsibility and authority than their history of caregiving practices would reflect. Although it seems counter-intuitive, few children are likely to benefit from giving courts the authority to reject the approximation rule, even where parents have made less-than-optimal allocation decisions. First, the judicial process requires that someone investigate and present evidence about those decisions to the court. This can be invasive and destabilizing to both caregivers and children, at a time when both need predictability. Second, even if a court could obtain all the knowledge and expertise that the caregivers and others have about the child, and if the investigation process were not itself destabilizing, there is little certainty that a court would make a better decision than the flawed decision the parents made. Like parents, courts have biases in favor of some kinds of parenting and against others. Although most judges would want to refuse to second-guess parental decision-making, case law has shown that judges are apt to second-guess parental decisions in favor of the best interest of the child.31

31. Ford v. Ford, 371 U.S. 187, 193 (1962) (stating that custody agreements made by divorcing couples are often clouded by emotions and prejudice and as a result may not be in the best interest of the child); Taylor v. Taylor, 482 A.2d 164 (Md. 1985) (awarding joint custody of child despite the fact that joint custody was not sought); Miller v. Miller 620 A.2d 1161 (Pa. Super. 1993) (holding that trial courts are not bound by an arbitration award concerning child custody determination). Many states require courts to give deference to parental arrangements unless the parent’s decision would adversely affect the child. See, e.g., D.C. CODE ANN. § 16-911(a-2)(6)(A) (Supp. 1997) (court should uphold “any custody arrangement that is agreed to by both parents unless clear and convincing evidence indicates that such an arrangement is not in the best interest of the minor child”); GA. CODE ANN. § 19-9-5(b) (Supp. 1998) (court must uphold a parental agreement unless the court makes specific written factual findings . . . that . . . the agreements would not be in the best interests of the child”); LA. CIV. CODE ANN. art. 132 (West Supp. 1998) (“If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different
As I discuss more fully in the next section, the disappointed father is not without recourse in terms of his ongoing role with the children. First, if he behaved consistently with his nurturing personality before the separation, the approximation rule should produce a caregiving order that enables him, as the "supporting caregiver," to continue to spend time with, and have some decision making authority for, the children. Second, if he continues to behave consistently after the separation, it is likely that the children themselves will decide to spend increasing amounts of time with their father as they grow older. Nothing in interdependency theory prevents this outcome once the children reach adolescence. Third, allowing courts to correct gender allocation practices when a couple separates only serves to reinforce gendered practices during marriage. Leaving the parties with the consequences of their decisions may inspire some changes so that more couples begin to allocate child-rearing responsibilities according to their talents rather than according to their gender.

C. What About the Other Adults in the Child’s Life?

Fundamental to interdependency theory is the reality that caregivers cannot succeed without the involvement of other adults and institutions. For the purpose of applying interdependency theory to families, it is important to focus on the adult who, like the lead caregiver, is committed to the child, reliably performs caregiving work for the child, and is respectful of the caregiving work of others. This adult is identical to the lead caregiver in terms of commitment, reliability, and respectfulness, but different from the lead caregiver because he or she is less involved in caring for the child, and more involved in supporting the lead caregiver. To emphasize the importance of support, this adult is called the supporting caregiver.

Role specialization between a lead caregiver and a supporting caregiver is not inevitable, as many families have found. Where two adults have equally shared the caregiving, the approximation rule would result in both qualifying as award."}; N.J. STAT. ANN. § a:2-4(d) (West Supp. 1998) ("court shall order any custody arrangement which is agreed to by both parents unless it is contrary to the best interests of the child").
lead caregivers. After a separation of the household, both would share the responsibilities and authority that accompany the role. Family law must recognize, however, that the dominant form of child-rearing practice involves the unequal allocation of caregiving. By applying the same approximation rule, interdependency theory recognizes role specialization and continues it into the future lives of the adults and children.

Generally, the supporting caregiver would be the lead caregiver's husband. In many households, the supporting caregiver would be an unmarried partner of the lead caregiver or the mother of the lead caregiver. On rare occasions, the supporting caregiver would be a paid sitter or housekeeper. Most often, the simplest way to identify the supporting caregiver is to ask whether he or she has lived with the lead caregiver and the child long enough to establish a pattern of committed, reliable, and respectful caregiving and supportive behaviors. The period of co-residency may

32. JOSEPH PLECK, WORKING WIVES/WORKING HUSBANDS (1985). From the 1975-1976 National Study of Time Use, it was determined that, of the total time devoted to “child care as a primary activity,” husbands accounted for 20%-33% in households where the youngest child was aged 6 to 17 (depending on whether the mother was employed outside the home), and 17%-26% where the youngest child was aged zero to five. See also ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989); cf. THOMAS F. JUSTER & FRANK B. STAFFORD, INSTITUTE FOR SURVEY RESEARCH, TIME, GOODS AND WELL BEING (1985) (tracing changes in paternal involvement in family activity from 1975-1981); Graeme Russell, Primary Caretaking and Role Sharing Fathers, in THE FATHER'S ROLE: APPLIED PERSPECTIVES 29-57 (Michael E. Lamb ed. 1986); Karen Czapanskiy, Volunteers and Draftees: The Struggle for Parental Equality, 38 UCLA L. REV. 1415, 1433-36 (1991).

33. The most common family type in the workplace is the dual earner family that is composed of a primary male wage earner and a secondary female wage earner. Nancy E. Dowd, Work and Family: Restructuring the Workplace, 32 ARIZ. L. REV. 431, 445 (1990). In addition to this family type, another 10% of families are composed of a male wage earner and a female who stays at home. Id. at 439.

34. There are a growing number of gay and lesbian parents raising children in families composed of homosexual partners. Nancy D. Polikoff, This Child Has Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 461, n.2 (1990).


36. See infra note 68 and accompanying text.

37. See Czapanskiy, supra note 22, at 1368-69 (discussing custody and
vary with the age of the child.

On rare occasions, a person who never shared the household may qualify as a supporting caregiver. This would be highly unusual, however, given the behaviors that the role requires. For example, a child may spend every weekday with a grandparent while the child's parent works. In addition to the usual daycare tasks required for a young child, the grandparent, after fully consulting with the parent, also takes care of routine medical and dental appointments, school contacts, play group arrangements, and clothes shopping. Consequently, the parent can spend more time interacting with the child as fewer of the parent's evening and weekend hours need to be spent on errands. In addition, the grandparent does not charge for the daycare services, so the parent may be able to afford to spend fewer hours at work, live in a safer neighborhood, and drive a more reliable car. The parent-child relationship flourishes because of the grandparent's generous and respectful support of the parent. The fact that the child goes home with a parent at the end of each weekday should not be a bar to a finding that the grandparent is a supporting caregiver.

Whether co-residential or not, the supporting caregiver's involvement is directly and indirectly beneficial to the child. Direct benefits are evident in the grandparent example: the young child receives care from the grandparent, identifies a

visitation standards for grandparents, and proposing similar coresidency test on basis of usefulness in fostering interrelationship); A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (Tentative Draft No. 3 1998):

A de facto parent is an adult, not the child's legal parent, who for a period that is significant... has resided with the child and... regularly has performed a majority of the caretaking functions for the child, or a share of caretaking functions at least as great as that of the parent with whom the child primarily has lived.

Id. Professor Barbara Woodhouse proposes a different test for distinguishing “kinship of responsibility” from other associations of choice that are not durable enough to justify legal recognition as family-equivalents. She suggests looking at the religious and cultural traditions in which the group operates to determine the intentions of the members. Barbara Bennett Woodhouse, “It All Depends on What You Mean by Home:” Toward a Communitarian Theory of the “Nontraditional” Family, 1996 UTAH L. REV. 569. Such an inquiry into context is no doubt illuminating, but the indeterminacy of the test can be harsh for family groups that are poorly resourced. Further, the substantive results are unlikely to vary from a co-residency test, at least in the examples Professor Woodhouse offers.
second adult as a reliable person in his or her life, and trusts a second adult to provide care similar to what the lead caregiver provides. The indirect benefit, which is usually the more substantial part of the role, occurs when the supporting caregiver supports the caregiver financially, emotionally, and physically so that the lead caregiver can be more attentive to the child’s needs. The grandparent’s decision not to ask for payment for daycare, for example, means nothing directly to the child, but it is still a substantial indirect benefit because of the impact on the parent’s capacity to devote himself or herself to the child.

D. What are the Responsibilities and Rights of a Lead Caregiver and a Supporting Caregiver?

Interdependency theory identifies the lead caregiver as the person entrusted with the principal responsibility of caring for the child. For that person to do the job to the best of her or his abilities, the lead caregiver needs authority as well as responsibility. The lead caregiver also needs the assistance of people and institutions beyond the caregiver/child unit. The extent of the lead caregiver’s authority needs to be sufficient, then, to permit the lead caregiver to act responsibly on behalf of the child, but not so extensive that people beyond the caregiver/child unit are discouraged from providing appropriate assistance to the caregiver for the child.\(^38\)

\(^38\) A similar argument is made by Professors Elizabeth and Robert Scott, who assert that the idea of parental rights in family law is best understood in the context of a fiduciary heuristic. Elizabeth S. Scott and Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995). That is, the law entrusts children to their parents to raise with the knowledge that raising children is both a joy and a burden. Parents will not always act out of selfless devotion to the child; occasionally, acting in their own self-interest, they will do things that are less than optimal for the child. *Id.* at 2413. Society will intervene in two-parent families only if the parents step too far out of the mainstream, that is, behaving in a manner that meets the standard of harm or neglect, such as by failing to send the child to school or be vaccinated, putting a young child to work, etc. *Id.* at 2438-39. So long as parents remain reasonably mainstream, the law does not attempt to manage the parent-child relationship to protect the child from the effects of the parental conflicts of interest. *Id.* at 2439. The Scotts identify the law’s forbearance as *ex ante* compensation for undertaking the job of parenthood. *Id.* at 2429-30, 2449.

Interdependency theory begins in a similar place in the claim that society needs to entrust parents with substantial authority over children. I differ from the Scotts, however, in rejecting their claim that only two-parent families
The autonomy of the lead caregiver must be respected. Autonomy, in this context, has a meaning drawn from feminist theory.\textsuperscript{39} That is, it is the self-governing autonomy of a connected person who both draws from and gives to others, rather than the autonomy of a separate person who is entitled to the respect, but not the involvement, of others.

The rights and responsibilities of the supporting caregiver complement those of the lead caregiver. That is, he or she has the responsibility of assisting the lead caregiver to do the best job he or she can for the child. The supporting caregiver also has whatever authority is needed congruent with his or her responsibilities. In addition, because it is important to encourage people to commit their energies to the child and because the supporting caregiver role is difficult but important, the rights should be as broad as possible so long as they do not intrude inappropriately into the autonomy of the lead caregiver.

As the person primarily responsible for the child's well being, the lead caregiver has the duty to make decisions for...
the long-term care of the child. In addition, he or she has the
duty to make most of the daily decisions. The supporting
caregiver will have to make decisions while the child is in his
or her care. Because the lead caregiver has the long-term
responsibility, the supporting caregiver must be careful to
make decisions that are respectful of the lead caregiver and
his or her authority. Otherwise, the supporting caregiver can
cause the child to lose respect for the lead caregiver and cause
the lead caregiver unnecessary problems. Likewise, the lead
caregiver must respect the supporting caregiver by
acknowledging the importance of the their support for the
child. Undermining the relationship between the child and
the supporting caregiver does not benefit the child. 40

The introduction of a new partner into the life of the lead
or supporting caregiver is a good example of how problems
would be analyzed differently under interdependency theory
than under the best interests test. A difficult case is the
example of In Kelly v. Kelly, 41 in which the custodial parent
objected to her nine-year-old twin boys spending the night
with their father when their father's girlfriend also spent the
night. The mother framed her objections in terms of religious
dictates that extramarital sex was sinful, and she did not
want the boys to be exposed to sinful conduct.

The appellate court gave no weight to the religion
argument. According to the court, the best interests of the
children were served by allowing the father overnight
visitation in the presence of the girlfriend. The court
suggested that the mother and children see a therapist in
order to help the boys adjust to and tolerate their father's
decisions about his life. 42

The court's decision is fully consistent with dominant
social mores that adults should be allowed to live their own
lives and make whatever decisions are appropriate for them,
unless a particular decision is not in the best interests of the
child. 43 Only a minority of modern family law commentators

        App. April 28, 1998) (granting sole custody of child to father after mother had
        continued to make baseless charges that father was abusing child).
41. 524 A.2d 1330 (1986).
42. Id. at 1335.
43. This understanding is reflected in statutes giving deference to parental
        agreements that allow parents to make decisions on how they will live their
        lives. See generally Dowd, supra note 33. The understanding is also reflected in
and judges would argue that the court should require the father to comply with the mother's moral judgments. Under interdependency theory, however, the focus shifts from the relationship of the father and children to a focus on the mother and children. In *Kelly*, the mother is the lead caregiver and the person primarily responsible for the children. She needs the support of the father, the supporting caregiver, in order to raise her children as well as she can. Interdependency theory dictates that the supporting caregiver respect the lead caregiver's deeply held values. Otherwise, the supporting caregiver could undermine the children's trust in their mother's judgment, and it is their mother on whom they rely each day.

Obviously, children in modern America are exposed to multiple sets of values, both inside their homes and out. Sometimes their parents do not share the same values. When a person important to a young child requires the child to reject or seriously question values important to the lead caregiver, however, the young child may experience a loss of trust in the lead caregiver. For that reason, it is important that the supporting caregiver try to avoid putting a young child in that kind of anxiety-ridden situation. In the *Kelly* case, therefore, interdependency theory would instruct the court to begin by examining the relationship between the parents. The father wants to have a romantic relationship and the mother wants the children to grow up regarding extramarital sex as sinful. Both parents, as lead and supporting caregivers, owe a duty of respect to each other. Since the children are relatively young and live with the person who finds the sexual relationship sinful, the first question should be whether the father, out of respect for the mother's values, could adjust his lifestyle so that his desire for a romantic relationship does not involve the children. For example, he might avoid having his girlfriend spend the night when the children are present. He might consider marriage,

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44. See Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 508-19 (discussing tendency of his students not to hold anyone to anyone else's moral judgment except his or her own, and how this reflects typical contemporary bourgeois morality).
since the mother’s objection was allegedly about his non-marital sexual relationship, not about his possible remarriage. The mother, however, also owes a duty of respect to the father. Therefore, if he continues the non-marital relationship, but conducts it out of sight of the children, she needs to avoid condemning or even mentioning his conduct to the children.

To some, this outcome may appear to be simply a new rationale for justifying controlling behaviors by former spouses or partners. Certainly, the theory produces that result in some cases. Those cases should be uncommon, however, because the focus is on mutual respect, not unilateral control. For example, if Mrs. Kelly had never expressed much interest in religion prior to Mr. Kelly’s new relationship, the court should be suspicious of her interest in transmitting religiously based moral claims to the children. The court is entitled to question whether the values she expresses are deeply held and important to her. Similarly, if Mrs. Kelly objected to Mr. Kelly’s non-marital relationship while at the same time engaged in such relationships herself, a court could assume that her concern is about controlling Mr. Kelly and has nothing to do with the children developing a moral sensitivity consistent with her own.

By giving weight to the lead caregiver’s moral values, interdependency theory could open the door to a variety of politically sensitive claims about parental behavior. For example, if Mrs. Kelly’s objection to Mr. Kelly’s paramour is that she is African-American, should the claim be allowed? Assuming that such a claim is cognizable after Palmore v. Sidoti, the question would be tested in the same way as any other claim by a lead caregiver. That is, does the supporting caregiver’s conduct undermines the lead caregiver’s ability to share important and deeply held values with a young child? In this situation, the lead caregiver’s claim would fail. In a culture that asserts race-neutrality as a fundamental and

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45. Cf. Palmore v. Sidoti, 466 U.S. 429, 433 (holding that “the reality of private biases and the possible injury they might inflict” are impermissible considerations for change of custody) with A.L.I. Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.14 (Tentative Draft No. 3 1998) (requiring courts to disregard race of parent, child or other family member unless it pertains to parent’s “ability to care for a child, including meeting a child’s need for a positive self-image”).
largely uncontested ideological stance, the lead caregiver’s ability to teach racial exclusiveness to a young child is undermined at every turn; the supporting caregiver’s race-neutrality adds little to the children’s reason to distrust the lead caregiver on the question.

A more difficult question would arise if Mrs. Kelly objected to Mr. Kelly’s paramour because he is male. Disapproval of homosexuality remains an acceptable value in many social, religious, and cultural settings, so young children are not likely to be exposed to views contradicting their mother’s. The question then becomes whether Mrs. Kelly’s views about homosexuality constitute deeply held and important values or simply opinions that she can keep to herself without violating a sense of her own integrity. If they are such important values, Mr. Kelly should be ordered not to interfere with Mrs. Kelly’s caregiving and not insist that Mrs. Kelly and the children accept his relationship. For example, overnight visitation in the presence of his paramour might be prohibited. Mrs. Kelly cannot demand that Mr. Kelly stop seeing his paramour or that the paramour not be present when the children are with Mr. Kelly. Further, any constraints that a court might impose must end when the children enter adolescence, an age when they begin to assert their own values.

In addition to mutual respectfulness, both the lead caregiver and the supporting caregiver have duties toward each other and the child in regard to reliability. It is particularly important for young children that people are reliable, although even for older children, unreliability is distressing. When a supporting caregiver is responsible for the physical or financial care of a child, he or she must be reliable in carrying out those responsibilities. A child notices when someone important fails to show up at an appointed

46. There are challenges to the custodial and visitation rights of parents who are in relationships with same sex partners. See 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).

47. Both of my children can clearly recall the one or two occasions when their father or I failed to collect them on time from school or failed to be at an appointed spot to meet them after a meeting or event. However, neither child can recall with similar clarity all other occasions when their father or I were at the right spot on time.
time, and the child’s disappointment is a harm directly inflicted by an unreliable supporting caregiver. Failures not personally experienced by the child also have an impact, because the lead caregiver learns from those failures that he or she cannot be secure about receiving promised support.

Reliability is also an essential part of the lead caregiver’s role because it demonstrates that the lead caregiver values the help of the supporting caregiver. Thus, for example, the lead caregiver has the duty of making sure that the child is ready for a visit with the supporting caregiver whenever one is scheduled.

E. Who Qualifies as a Lead or Supporting Caregiver?

Family law in the United States identifies biological or legal parents as the people usually entitled to exercise legal authority in regard to a child. \(^{48}\) Interdependency theory, on the other hand, identifies caregivers with less regard to their biological or legal parenthood. Instead, what counts is the caregiver’s commitment to the child, coupled with reliable and respectful performance of caregiving for the child. \(^{49}\)

While privileging function over status may appear to be a threat to those parents, interdependency theory is a threat only to legal or biological parents who fail to meet their responsibilities as parents. \(^{50}\) Since legal and biological

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48. See Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion) (denying opportunity to establish paternity to child’s biological father, based upon legal presumption that man married to biological mother at time of conception is the child’s father). “[O]ur traditions have protected the marital family . . . against [intrusion from third parties].” Id. at 124. See also Schneider & Brining, supra note 21, at 688-89 (“It is standard American law that in a custody dispute between natural parents and ‘strangers,’ that natural parents are to be accorded special status”); John F. Fader II & Richard J. Gilbert, Maryland Family Law 208 (2d ed. 1995); Leslie E. Harris et al., Family Law 1081 (1986); Walter O. Weyrauch et al., Cases and Materials on Family Law: Legal Concepts and Changing Human Relationships 670-71, 841 (1994); Naomi R. Cahn, Reframing Child Custody Decisionmaking, 58 Ohio St. L.J. 1, 14-18 (1997).

49. Professor Naomi Cahn prefers a similar but more inclusive test for who should be recognized as parents: those who have declared a willingness to assume responsibility for the child, and have a legal connection based either on biology or already having cared for the child for a significant period of time. Cahn, supra note 48, at 48-53.

50. I do not mean to underplay or ignore the reality that racism and sexism in law and society means that children have been, and continue to be, removed from caring and competent parents after being unjustly accused of neglect or abuse. See, e.g., Peggy Cooper Davis, Neglected Stories, The
parents typically satisfy the mandates of interdependency theory, most current visitation orders would stay the same. What interdependency theory adds is a reason to sustain the rights and responsibilities that legal and biological parents ordinarily enjoy. It rewards people who express a commitment to children in a way that present law cannot, since present law so often privileges people based on status rather than on performance.

Because it privileges function over status, interdependency theory supports some results in visitation disputes that differ from current law. First, it does not matter if the person seeking time with a child is a parent. Any formerly co-resident adult may qualify, so long as the person qualifies as a supporting caregiver. In other words, post-separation contact with a child depends on pre-separation behavior, not legal status. Parents and non-parents who behave the same are treated the same. At the same time, post-separation contact with a child is not available to a formerly co-resident adult—whether a parent or not—who did not perform as a supportive caregiver prior to separation.

There are many justifications for the differences. First, many children live in functional families that contain, at most, one biological or legal parent. Where another adult is

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CONSTITUTION AND FAMILY VALUES 142-55 (1997) (noting long history of prejudicial assumptions of whites concerning abilities of African-Americans to parent); Jane C. Murphy, Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law, 83 CORNELL L. REV. 688, 702-13 (1998). My argument assumes, however, that those systems have begun to respond to their critics. Even in the many places where reform has not occurred, interdependency theory should be preferable to the less determinate tests now used in neglect and abuse cases because it requires that potential interventions be tested by whether they support the caregiver’s ability to do the best he or she can for the child. The most influential voice in this assessment should be the mothers, not the voice of the expert who “knows better” than the mother what she needs for the child. See DONNA L. FRANKLIN, ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN-AMERICAN FAMILY (1997) (discussing new social work practice paradigm where the social worker helps the mother clean the home rather than removing children from the dirty home); Ann Shalleck, Child Custody and Child Neglect: Parenthood in Legal Practice and Culture, in MOTHERS IN LAW 309-325 (Fineman and Karpin, eds. 1995) (discussing difficulty of persuading court to attend to mother’s desire to transfer guardianship of children to grandmother once mother found neglectful).

51. Of children born in 1992, more than half are likely to spend some or all of their childhood living separately from one of their parents. SARA
present, that person has no legal or biological ties to the child. To a young child, the difference between the two adults need not be vital; what is vital for the child is to have someone to rely on. When an adult makes a commitment to a child, reliably performs caregiving functions and works respectfully with other caregiving adults, the child benefits. Further, from the child’s perspective, losing contact with the supporting caregiver after separation can cause suffering, whether or not the adult is a parent.

Second, interdependency theory seeks to reward people who help young children thrive. It does so through paying attention to the needs of people who care for young children. When a caregiver with a child decides to take up residence with a third person, she presumably sees the situation as one that not only serves her own interests but which also aids her in helping her child. Presumably, the third person understands that the shared residence will contain a child along with the caregiver. By agreeing to share the residence, the third person agrees to help the caregiver, at least by tolerating the presence of a child, and at most by contributing emotional involvement, money, and time. As the caregiver benefits from the shared residence, so does the child. The third party providing the support should have some expectation that the sacrifices will not go unnoticed. A legally enforceable promise of continuing access to the child in the event of a separation recognizes the reasonableness of that expectation.

Privileging claims of parental access over claims of non-parental access is commonly accepted in the United States. The presumption is that a child’s legal or biological parents care more about the child than anyone else. Sub silentio,

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52. Courts typically favor parents over third parties in claims for custody unless the parents are unable or unfit to care for the child. See supra note 47; Schuh v. Robertson, 788 S.W.2d 740, 741 (Ark. 1990) (holding that a third party must show that “the parent is not a suitable person to have the child” in order to deny that parent custody); Petersen v. Rogers, 445 S.E.2d 901, 902 (N.C. 1994) (holding that parents have constitutional right to custody of children barring unrelated third parties from bringing claims for custody); McDonald v. Wrigley, 870 P.2d 777, 779 (Okla. 1994) (holding that a third party must show that a parent is unfit in order to successfully bring custody claim).

53. See SCHNEIDER & BRINIG, supra note 21, at 596 n.24 (“Parents are simply presumed to act in their children’s best interest . . . and are given almost
privileging parental entitlement is also grounded in the quid pro quo idea that a person who bears a financial responsibility for a child should have a reciprocal right of access. Parental caregiving, however, is simply not the reality for many children. Nearly three million children live in homes with no parents, and many more live in homes where one parent is present and the other has not been seen or heard from in years. Privileging uncommitted and non-participating parents over committed and participating non-parents makes no sense for children in these circumstances.

Non-parental claims for access to the child are likely to come from four sources: 1) non-marital partners, including same sex couples who have intentionally created a parent-child relationship together and then separate; 2) grandparents; 3) former lovers of a single parent; and 4) babysitters. Each situation raises somewhat different but interrelated issues.

The simplest situation involves the nonmarital couple who intentionally creates a parent-child relationship together. Often, these couples are legally prevented from marrying because they are the same sex. If permitted to

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54. See Karen Czapanskiy, Child Support and Visitation: Rethinking the Connections, 20 RUTGERS L.J. 619, 650 (1989) ("[T]he central metaphor is that contact with a child is a commodity to be bought and sold.").

55. The Department of Commerce found that, in 1995, 70,254,000 children were under the age of eighteen. Four percent of these children (approximately 2.8 million) did not live with either parent. U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 65 (1996).

56. See Czapanskiy, supra note 54, at 637 (nearly half of children in national sample had not seen the nonresidential parent during prior five years).


No state, territory or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record or judicial proceeding of any other state, territory or possession of the United States, or Indian Tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, territory or possession of the United States, or Indian Tribe, or a right or claim arising from such relationship.

Id. See also 1 U.S.C. § 7 (West 1997) (definition of 'marriage' and 'spouse'). But see Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993) (challenge to Hawaii's statutory prohibition against same-sex marriage; court held statute was presumptively unconstitutional because it created a sex-based classification, and remanded; "Marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship"); Baehr v. Miike, 23 FAM. L. REP. 2001 (Haw. Cir. Ct., Dec. 10, 1996) (upon remand, holding statute unconstitutional; "if same-sex marriage is
marry, each would have the same legal relationship to the child.\textsuperscript{58} Post-separation access would be presumed, as it is for divorced parents.\textsuperscript{59} Because they are prohibited from marrying, however, only the one who bore or adopted the child is a legal parent with an enforceable right of access.\textsuperscript{60}

Interdependency theory supports according both former partners appropriate rights of access\textsuperscript{61} if each qualifies as a lead or supporting caregiver. By creating the parent-child relationship together, each member of the couple expresses a commitment to the child. Assuming that the commitment did not change during the relationship, and that each partner reliably performed caregiving functions and treated the other

allowed, the children being raised by gay or lesbian parents and same-sex couples may be assisted, because they may obtain certain protections and benefits that come with or become available as a result of a marriage\textsuperscript{62}).

Some affected couples would be people of different sexes who do not marry because of personal preferences or because of prohibitions on their marriage such as bigamy or incest. If both are the biological parents of the child, however, modern family law would find each to be a legal parent with custody and access rights like those of a married couple, so their situation need not be considered one of access by a nonmarital partner.


\textsuperscript{61} That is, the same approximation rule would apply to them as would apply to formerly married parents whose conduct qualifies each to some authority in regard to the child. Many states already recognize some visitation rights for people who have acted like parents. See John DeWitt Gregory, Blood Ties: A Rationale for Child Visitation by Legal Strangers, 55 WASH. & LEE L. REV. 351 (1998).
respectfully, there is no reason to deny either one the applicable degree of responsibility for, and authority over, the child after a separation.

Interdependency theory comes to the same result with respect to post-separation access by co-resident adults other than the partner of a caregiver. As Martha Fineman has forcefully argued, supporting caregivers are often drawn from the ranks of adults who have a relationship to the caregiver based in something other than a sexual relationship. An ever-increasing number of the grandparents of young children act as supporting and even lead caregivers. Ensuring them a continuing role in the grandchild's life after the need for a three-generation household has passed is a way of encouraging and rewarding the altruism that caregivers and their children need when they are in crisis. Three-generation households are not without danger for some children, since a caregiver can become too dependent on his or her parents. But for most, having a place of refuge is critical, and interdependency theory recognizes its importance to the child.

It is also possible that interdependency theory would produce a poor result for a child whose caregiver cohabitates with a heterosexual partner, and the relationship lasts long enough to give the partner an opportunity to establish him or herself as a supporting caregiver. After the household breaks

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62. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 85 (1995). See also Nadine F. Marks & Sara S. McLanahan, Gender, Family Structure, and Social Support Among Parents, 55 J. MARR. & THE FAM. 481, 492 (1995) ("It appears that friends, not other kin, are the most significant members of the social support networks of nontraditional families. Both mothers and fathers (with the interesting exception of stepmoms) in nontraditional families, if anything, have higher probabilities of social support relationships with friends than traditional family parents.") (emphasis added).


64. See Czapanskiy, supra note 22.

65. In her study of poor African-American families, Donna Franklin suggests that three generation households, especially those in which a single grandmother and single mother are relatively close in age, may cause role conflicts. Such conflict may cause stress, anxiety, and depression in the mother, which could lead to inconsistent parenting and ultimately developmental problems. FRANKLIN, supra note 50, at 199-01, 226-27; see also FRANK F. FURSTENBURG, ET AL., ADOLESCENT MOTHERS IN LATER LIFE 126, 136 (1987).
up, the approximation rule would require that the lead caregiver permit the former partner some role in the child's life unless the former partner never became a supporting caregiver. For example, if the former partner never performed any caregiving tasks, shared few financial resources with the lead caregiver, or resorted to violence, a court should find that the partner is not a supporting caregiver. Allowing the former co-resident access to court to argue for rights, however, creates a problem for the lead caregiver and child even when the former co-resident loses. The judicial process increases the insecurity of the caregiver and child, reduces the household's financial resources, and opens the door to a settlement under which the child may end up spending time with a person who did not care enough while living with the child to behave as a supporting caregiver.

One solution to the problem is to deny supporting caregiver status to all non-marital co-residents of caregivers and children. This solution, however, undercuts the point of interdependency theory that the law should make it attractive for adults to support caregivers. Equally important, this solution suggests that marital co-residents should be treated more favorably than non-marital co-residents regardless of conduct as caregivers. Since interdependency theory seeks to enlarge incentives for adults to take care of children, privileging marital partners who do no caregiving work is unacceptable. Similarly, distinguishing among non-marital co-residents would give people in some status groups greater rights to supporting caregiver status than others solely because of their status and not because of their conduct. While this might be appealing politically, it is hard to see how it improves the lives of young children who are dependent on caregivers. For example, it might be attractive to give grandmothers or stepfathers more rights than same-sex partners, but the caregiver and child receive

66. Even though a new relationship holds the potential of improving the caregiver and child's financial and emotional situations, the result is not guaranteed. See AMATO & BOOTH, supra note 15, at 159-60.

67. Telephone interview with Sally Goldfarb (July 23, 1998) (arguing that visitation rights should be awarded to a parent's cohabitant only if the parent affirmatively agreed to consider the cohabitant as a co-parent); see Cahn, supra note 48, at 54-55.
no greater benefit in the arrangement. Further, the lead caregiver in the same-sex relationship does not, simply because of the status of the partner, have a greater claim to a larger degree of post-separation autonomy than the lead caregiver who has relied on a grandmother or a husband for support. Indeed, if the same-sex partners undertook the decision to raise a child together, their intentions probably included some form of relatedness, at least during the child's minority. The supporting grandmother or husband probably entered into no similar explicit agreement with the caregiver before the child was born.

It would be a rare event under interdependency theory for a paid babysitter to qualify as a caregiver or supporting caregiver, but the possibility should not be ruled out. The situation would be rare because few babysitters live with their charges long enough for the relationship to ripen into a caregiving or even supporting caregiving claim. Where a young child is left with a babysitter for long periods of time, however, a supporting caregiver relationship might result, because the babysitter might become committed to the child and perform most of the caregiving work which the child needs. The child is likely to begin looking at the babysitter as, at least, a supporting caregiver. Simply receiving payment to care for a child is no incentive for most people to undertake this kind of commitment to a child. A paid babysitter who does so is probably a very special person for the child in any event. Giving the lead caregiver full authority to deny the babysitter access to the child in these rare circumstances would not be in accord with interdependency theory, because the lead caregiver allowed the relationship to develop, presumably in full knowledge that the child was growing increasingly close to the babysitter. If a visiting relationship is established and the

68. See generally Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Nontraditional Families, 78 GEO. L.J. 459, 533-36 (1990).


70. A more complex but not unrelated form of this problem may arise when a foster parent develops a long-term and strong relationship with the child in his or her care, and then the child's legal parent regains custody. The possibility that the foster parent could be a supporting caregiver cannot be ruled out, but it would be rare, given the characteristics of most foster care
lead caregiver finds that the former babysitter fails to support her as the lead caregiver, the caregiver can move to end the relationship.

III. HOW DOES INTERDEPENDENCY THEORY COMPARE WITH OTHER FAMILY LAW THEORIES?

In the context of family law, interdependency theory should be viewed as an attack on the best interests test. Although the best interests test is stated in a variety of ways, a common element is the claim that a court acts out of its *parens patriae* power with regard to the child alone. The test requires that the court examine the life of a child without regard for any caregivers who are committed to and responsible for the child's care and on whom the child depends. Interdependency theory, in contrast, requires that courts examine the life of a young child as the child experiences it, that is, through the relationship of the child to the child's caregiver(s). The presumption under interdependency theory is that no court knows as much about a child's best interests as the child's caregiver(s). Therefore, the court should defer to the caregiver(s)'s assessment. Where possible, the court should also help the child by helping the lead caregiver gather resources needed to do the best he or she can for the child.

Interdependency theory resonates with aspects of what "protectionists" say about family law while not ignoring insights of "interventionists." Doctors Joseph Goldstein, Anna Freud, and Albert Solnit, and Professors Martha Fineman, Nancy Polikoff, and Barbara Woodhouse, in somewhat different ways, have been noted advocates for protectionist perspectives. Professors Cornel West and Sylvia arrangements. The child's legal parent may have placed the child in the state's care voluntarily, but more likely the placement was involuntary from the parent's perspective. Further, the state, rather than the caregiver, selects the foster parent. The state would be involved in any visitation that might occur, which could cause bureaucratic difficulties. Finally, the caregiver might view the former foster parent as a threat to his or her own parenting, especially if the state is involved in setting up the visitation. See David Finkel, *Now Say Goodbye to Diane*, WASH. POST MAG., May 4, 1997, at 8.

Hewlett and author David Blankenhorn have been among the most articulate proponents of the interventionist approaches. In the following section, interdependency theory is examined in light of their ideas.

Requiring courts to defer to the caregiver was proposed over twenty-five years ago in a book by Doctors Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child.*

While similar in many respects, interdependency theory differs markedly from the view asserted by Goldstein, Freud, and Solnit. Their view of the child's life is limited to the child's immediate household, usually made up of the child and one or two parents. Their view is entirely correct in the sense that the child, particularly a young child, is likely to see the world almost entirely through the lenses of the parents or caregiver on whom the child is directly dependent.

A problem with the view of Goldstein, Freud, and Solnit, however, is that no child's life is as narrowly constrained as they describe. Although the child may be unaware of it, parents and caregivers constantly interact with other people and institutions for the benefit of the child. Without these interactions, parents or caregivers cannot garner the resources necessary to provide for the child's needs.

For example, parents cannot fulfill their financial responsibility for a child without money. Usually, earning money is not seen by young children directly, but it is vital if the child is to eat, have shelter and wear clothing. In some

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73. *But see KAGAN, supra note 28; HARRIS, supra note 28.*
Infants have individual personality traits which form the child's temperament. The temperament shapes how an individual reacts to his surrounding environment. If the relationship between the environment and the individual's temperament is discordant, behavioral problems will ensue. Certain types of temperaments, may however, allow a child to develop in a healthy manner despite severe disturbances in the child's environment.

74. *Cf. David L. Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 MICH. L. REV. 477 (1984) (arguing that empirical evidence that child should always be placed with primary caregiver insufficient, though clinical observations suggest it is apt for children under 5 years old); Peggy C. Davis, The Good Mother: A New Look at Psychological Parent Theory, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996) (children thrive with a familiar "milieu and a network of attachments").
families, parents specialize. One parent provides more caregiving and becomes the child’s psychological parent, while the other parent provides more of the household’s economic sustenance. Under the family law policies advocated by Goldstein, Freud, and Solnit, if the parents separate, the parent who specialized in economic production would have no right of access to the child. Under interdependency theory, on the other hand, the parent who specialized in caregiving would be the lead caregiver and the other parent would be the supporting caregiver. Both must perform their roles for the child’s life to remain secure.

When considered solely in terms of the psychological parent theory propounded by Goldstein, Freud, and Solnit, shared authority between lead and supporting caregivers cannot be justified. Instead, it must be justified on the basis that the child’s attachment to a lead caregiver is only one part of a scenario that serves a child’s needs. The scenario is incomplete unless one also looks at the support that the lead caregiver receives and depends on. Parents who provide some caregiving but spend most of their time engaged in economic activity must be recognized for the support they provide to the child through their support of the lead caregiver. Their “reward” is the opportunity to have an ongoing relationship with the child that the lead caregiver cannot control or eliminate.

Professor Fineman argues that the exclusive family unit that should be recognized in law is the “mother/child dyad,” a metaphorical term that includes the caregiver and any dependent person, whether that person is a child or an adult who is ill, disabled, frail, or elderly. In her view, dependency is inevitable, universal, and inherent in the human condition in that everyone at some point in life is dependent on someone else’s care. The most obvious examples are infants and young children who depend on caregivers for survival. It is also inevitable, Fineman asserts, that caregivers cannot perform their caregiving work without the assistance of others, which she calls derivative dependency. According to

75. GOLDSTEIN, supra note 72, at 38.
76. FINEMAN, supra note 62, at 230-31.
77. Id. at 162.
78. Id.
79. Id. at 163.
Fineman, derivative dependency could be constructed in a variety of ways. But in this culture, Fineman argues, it is the private, uncompensated, and hidden responsibility of women. She concludes that society should compensate caregivers, rather than hide their work and penalize them for performing it.

Up to this point, Fineman and I are in agreement. Her diagnosis of the processes that create derivative dependency and the ways in which caregivers are ignored and devalued is entirely accurate. Clearly, as Fineman demonstrates, caring for children requires commitment and performance, and no caregiver can perform to the best of his or her abilities without the assistance of other adults and institutions. I fully agree with Fineman that dependent children cannot thrive when their caregivers are suffering from isolation, poverty, and deprivation. To care for the children, one must care for the caregivers. We differ on several points about how to cure the problems created by inevitable dependency.

First, Fineman argues that the only "family unit" that should be validated in law is the mother/child dyad. Even though she identifies the term as a metaphor that need not be gender-specific or adult/child specific, the idea remains unpersuasive. One of the problems faced by many derivative dependents is that they live in single-parent families, a family structure condemned in both law and culture, while the married two-parent family structure is valorized and rewarded. Making the mother/child dyad the only legally recognized family form reinforces the notion that some family structures are inevitably better and worthier than others are. Family structure alone, however, does not determine whether dependents are cared for or whether their caregivers enjoy the support they require. At least as important to both dependents and their caregivers are their relationships with each other and with other individuals and institutions outside of the immediate relationship. People structure these relationships in an immense variety of ways, determined in part by the ages of the people involved, their cultural heritage, race, gender, geographic locations, and historical context. When the law prefers one structure over another,

80. Id. at 162-63.
81. Id. at 165-66.
even a structure as deserving of priority as the mother/child dyad, other structures that perform just as well or better are devalued by many who might otherwise use them for their own and society's benefit.

A more complicated issue is Fineman's views on the right of access to a child. She and I agree that access law has enlarged the rights of people who have demonstrated no responsibility for the children they now have rights to see. Expansion of rights has been based largely on one's status as a legal or biological father, rather than on one's conduct. We also agree that the impulse behind expanding access rights has more to do with controlling the conduct of mothers than with improving the well being of children.

Where we part company is on the test for allowing access. Professor Fineman would permit access where the father has been a mother "in the stereotypical nurturing sense of that term, that is, engaged in caretaking." In contrast, I argue that a supporting caregiver achieves that status and the concomitant right to access through a combination of behaviors, only some of which involve directly caring for the child (stereotypical mothering, in Fineman's terms). The other qualifying behaviors include supporting the lead caregiver financially, physically, and emotionally—behaviors the child does not experience directly. I come to this conclusion because I think that caregivers both need and value the support they receive. What they lack is tools to get support. Denying the right of access to people who have never nurtured the child, as Fineman prescribes, is a good and necessary first step, because it relieves caregivers of the fear that they must share a child with someone who has never proven himself to be a capable and reliable nurturer. But it does not go far enough, because it defines for caregivers the nature of the support they can demand—only that which nurtures the child directly. Caregivers may also want indirect support, whether financial, some time off, or a second person at school for a parent-teacher conference. Caregivers need the law to help them when they seek support of all kinds, just as they need to have options for structuring their own caregiving, consistent with their unique abilities and their specific needs in regard to the particular child.

82. FINEMAN, supra note 62, at 234-35.
Interdependency theory, therefore, tests the legitimacy of a legal intervention by asking whether the proposed intervention supports the caregiver in doing the best job he or she can. Access is available for those with a history of reliable, respectful support for the caregiver as a way of encouraging people to choose to help caregivers. Promising the reward of a continuing relationship with a child is a critical element of that encouragement. Fineman would argue that according such rights to supporting caregivers who do little nurturing is impossible because courts would use the opening to re-impose on women the patriarchal powers that men currently enjoy. \(^8\) In other words, the best protection from patriarchy is insulation of the mother/child dyad from judicial intervention, except where the child, in effect, has two mothers.

Fineman's critique is serious. Multiple and repeated studies of different state courts demonstrate that women and men receive different treatment in the judicial system and that women's caregiving is systematically devalued. \(^84\) It is possible, therefore, that interdependency theory would, in operation, be less desirable than a more complete bar to intervention. It is fair to say, however, that many women who raise children with partners and many women who raise children alone, value connections with people who help them care for the children. They see their participation in such communities as a positive aspect of their lives as well as a potentially threatening one. \(^85\) Such women would understand that the willingness of any individual to participate in

\(^83\) Id. at 83, 212-13, 223.

\(^84\) In a study of custody cases, Professor Mary Becker concluded that judges were biased against women when they were sexually active, forced to work, earning a lower income than the father, homosexual, involved in an interracial marriage, or were single when the father was remarried. By focusing on these characteristics, judges have ignored the mother's abilities as a caregiver and as a result, have devalued that role. See Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 REV. OF L. & WOMEN'S STUD. 133, 175 (1992).

Caregiving might well depend on the opportunities to maintain relationships with children they help care for. Interdependency theory seeks to give voice to the positive experiences of caregivers who share in the care of children, while preventing threats of judicial intervention that undermine and threaten their capacity to care for children. It is a delicate balance, but one worth seeking.\(^\text{86}\)

A protectionist who differs from Professor Fineman is Professor Nancy Polikoff, who argues that when a man and a woman agree that the woman should be the sole legal parent of their biological child, that agreement should be honored in court and the man's paternal rights terminated.\(^\text{87}\) She explores her idea by comparing two cases in which the biological mother conceived through sperm donated by a man who agreed to forego parental rights. Subsequent to the birth

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86. Like Fineman, interdependency theory can be criticized for confining women to the role of caregiver to the detriment of all women, whether or not caregivers. Several replies are possible. First, Fineman is right when she argues that ignoring women's caregiving work has not benefitted women unless they occupy the small category of women who do no caregiving. The problem, it seems to me, is not whether to valorize caregiving, but whether to confound womanhood with caregiving. Interdependency theory avoids this by identifying caregivers by function rather than biology.

If acceptable caregiving under the theory includes only those practices associated with certain kinds of parenting, however, it is still subject to the criticism that the categories of woman and caregiver are so overlapping as to be identical, to the detriment of those in either category who are not both. That is, if one must be a stay-at-home mom in order to qualify as a caregiver, then working moms and dads must, upon birth of a child, either give up the job or give up the parenthood.

Acceptable caregiving, under the theory, is not limited to that kind of parental time commitment. What it requires and privileges is responsibility for responsiveness to children. What constitutes responsiveness to children is, beyond certain minimums, a socially-constructed concept. While every baby needs nourishment, not every nine-year-old needs a parent on the sidelines of every soccer game. Interdependency theory avoids essentializing children as needing extensive care for many years. It is limited to the times when children are developmentally incapable of self-care and need a caregiver to provide essential nourishment or to intermediate between the child and the larger society outside the family. Further, interdependency theory does not privilege one kind of parenthood over another, so long as minimally acceptable parenting is performed. Beyond that minimum, caregivers are free to identify for themselves appropriate parenting practices. The role of the law is to protect their autonomy in regard to their selected practices rather than to select their practices.

of the child, and with the mother's consent, the biological father developed a relationship with the child. In each case, the biological father began to act contrary to the wishes of the biological mother in terms of how he should behave toward the child, and the biological mother terminated visitation. In both cases, the biological fathers sued for an order of paternity and to establish visitation rights. In *Thomas S. v. Robin Y.*, the New York trial court ruled against the father and was reversed on appeal, while in *Leckie v. Voorhies*, the trial court ruled against the father and was sustained on appeal.

Polikoff argues that the *Leckie* court's approval of private ordering of parental relationships is the preferable route when the goal is to create and sustain stable and secure families for children. An even more desirable legal option, she argues, would be the routine acceptance of single-parent adoption in situations where one parent is prepared to be the exclusive parent and the other biological parent approves. Like Fineman, Polikoff argues that women must be free to raise children without the control of a man. She argues that opposition to motherheaded families has little to do with the emotional well being of a child in a secure parent-child relationship. Instead, opposition is based in the proposition that children's economic support must be found within the private resources of their biological progenitors. In other words, once a child has an identified father, society can be assured that the child will be taken care of. The existence of the father eliminates the need to acknowledge even a partial public responsibility toward the child. If single motherhood were honored, society would also have to acknowledge the limitations of private financial support for children, rather than simply blame the fathers and mothers who fail to provide it.

Polikoff's argument that mothers should be allowed to become the exclusive legal parents of their children is well-placed in situations where the mother is the lead caregiver and any supporting caregivers have abandoned their roles.

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89. 875 P.2d 521 (Or. App. 1994).
90. POLIKOFF, *supra* note 87, at 393.
91. *Id.* at 389.
92. *Id.* at 375-78.
Unfortunately, her carefully crafted solution does not go that far. It is limited to situations where both biological parents explicitly agree to the arrangement. It does not address the situation where, early in the child’s life, both the mother and father would happily acknowledge exclusive parenthood in the mother and both behave consistently with that desire, but the father changes his mind before an explicit agreement has been entered into. Polikoff argues against permitting an exclusive parenthood order to be entered on the basis of an implied contract, because she fears privileging the common and irresponsible behavior of a biological father who, acting alone or without the freely-given consent of his sexual partner, wants to legally avoid parental responsibilities.

Although Polikoff does not say so, her limitation on the availability of exclusive parenthood to those with an express contract is also consistent with an individualist perspective. That is, it favors those who act with intention to take advantage of contractual opportunities. It disfavors those who fail to protect their interests by negotiating an express contract. Consistent with the individualist perspective, Polikoff argues that the principal benefit of recognizing the express contract for exclusive parenthood is that individual women will have the freedom to create the family structure they wish.

Under interdependency theory, both implied and express contracts for exclusive parenthood would be recognized. Polikoff’s point that mothers should have the freedom to create their own family structures is important, but not solely to satisfy individual needs. For the purposes of interdependency theory, her freedom is important because it enhances her capacity to be the best caregiver she can. Freedom provides the lead caregiver with the security of knowing that nobody has the right to disrupt the household she has organized and that she need not defend her household arrangements in court. In other words, the rationale is not based solely on the woman’s claim for autonomy separate from her parenthood.

Equally important, both sorts of contracts for exclusive

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93. *Id.* at 393.
94. *Id.* at 376.
95. *Id.* at 377-78, 393-94.
parenthood give the lead caregiver freedom to enter into a relationship with a new supporting caregiver. Without a contract, she faces the risk of multiple court orders requiring her to share time with, and authority over, the child with several people. In addition, unless she can exclude prior claimants for parenthood, she cannot create in the supporting caregiver the authority that person may need to exercise on behalf of the child.

The importance of recognizing implied as well as express contracts cannot be overstated. First, most parents do not enter into the types of explicit contracts present in Thomas S. and Leckie. Second, the implied contract scenario is common in communities affected by HIV and AIDS. Both the values and the practices of these communities need to be validated in law. In many of the families I have represented, the single father or mother acted as the lead caregiver until he or she became too ill. Frequently, the other biological parent was never a supporting caregiver. Indeed, in some cases, the other biological parent had little acquaintance with the child. Someone else came to be the parent's supporting caregiver. This was the parent's mother, sister, husband, boyfriend, or a close friend. Both the parent and the supporting caregiver want the child to remain with the supporting caregiver after the parent's death, but the continuing parental rights of the other biological parent poses a substantial barrier to accomplish this legitimate goal in any reliable and predictable way. The only solution is eliminating the parental rights of the absent parent and placing exclusive parental rights in the caregiving parent. The exclusive parent can then decide whether to designate the supporting caregiver as the child's guardian after the caregiver's death or, as happens in some cases, to consent to the adoption of the


child by the supporting caregiver before the parent's death. The right of the absent biological parent to second-guess the decision and to embroil the family in a judicial dispute is eliminated totally. 98

A difficulty with recognizing implied contracts is exactly the problem identified by Polikoff. 99 Since many biological fathers behave as if they have no responsibilities toward their biological children, and since the absence of public funding leaves many children financially dependent on biological fathers, recognizing implied contracts that free biological fathers from fatherhood based on their abandoning behaviors could put even more children at economic risk. This would happen, for example, if a biological father fails to support the mother physically, emotionally, or financially for a year after the baby is born and then demands visitation. When the mother denies visitation and is upheld by a court, the father could, under an implied contract of exclusive parenthood theory, demand that he be relieved of all parental responsibility for support of the child he is not allowed to visit. Despite the mother's denial that she is interested in

98. In one case I was involved in, the mother had a child ("A") with a man who rarely contacted her after the child was born and who paid support only when forced to by the child support collection authorities. His paternity was established because the mother was required to cooperate in paternity establishment and assign her rights to child support when she applied for AFDC. MD. CODE ANN., Art. 88A, § 50(b)(2) (Supp. 1997). When the child was an infant, the mother began a relationship with another man, who behaved as a father to "A" as well as to the children that he had subsequently with the mother. The mother and he married shortly before she died. Before she died, she named her husband as A's guardian and expressed her desire that he adopt A, which he wanted to do. Adoption was needed because, if A's biological father ever reappeared, he would have a superior right to A's custody. MD. CODE ANN. FAM. LAW § 5-203 (1991). Although A's biological father could not be found, it took more than a year after the mother's death for the adoption to be approved. Much of the time was spent trying to find the father and persuading the court that he could not be found.

99. Another problem with implied agreements is the difficulty of predicting whether a court will find one to exist, and if so, on what terms. Unpredictability increases insecurity in the life of the caregiver, with attendant costs to the child's wellbeing. What must be weighed against the security issue are the gains realized by caregivers from recognizing quasi-parental non-contractual relationships. My prediction is that recognition of implied contracts would usually help caregivers garner the support they need. While recognizing the increase in insecurity for some caregivers who are challenged by people wrongly asserting implied contracts, the balance favors recognition. Until courts begin to recognize express and implied contracts, however, there is no way to test the prediction.
exclusive parenthood, a court might find the argument appealing on the ground that a person who is not permitted to have a relationship with a child should not be required to support the child. Most states have rejected the reciprocal theory, but the basis for the rejection often has little to do with whether the child would benefit from having ties to the abandoning parent. Instead, the rationale is that the state should not have to support the child when the child has a biological parent available to do the job.\(^\text{100}\)

Interdependency theory provides a solution to this conundrum. Since interdependency theory provides that the right to spend time with and make decisions for children depends on a person's history of involvement with the child, the abandoning behaviors of a biological father should be the basis for an order that denies visitation. That order, however, need not relieve the biological father of a financial duty toward the child, nor does it prevent the possibility of a relationship with the child when the child grows older. When the mother of a one-year-old denies an interest in exclusive parenthood, therefore, a visitation order would not be entered. However, the mother would still be subject to the duty of informing the biological father of the child's location when the child reaches adolescence and to permit the child and biological father to be in contact if the child wishes. A mother who wants exclusive parenthood, on the other hand, would be able to obtain such an order on the basis that the father's abandoning behavior constitutes an implied agreement on his part not to be a legal father. Her decision would end the biological father's rights to further legally sanctioned interventions in the child's life as well as his duty to provide financial support.\(^\text{101}\)

It should be said that, as


101. The proper analogy, it seems to me, is to the situation of a divorced parent who remarries, and the new spouse wants to adopt the child. In many states, the failure of the legal parent to visit or support the child constitutes abandonment. Stepparent adoption is then permitted without the consent of the legal parent. See e.g., Cal. Fam. Code § 8604 (West 1994) (stating that consent of presumed father is not required if he has failed to communicate with and pay support for his child for one year); N.Y. Dom. Rel. Law § 111(1)(a)
always, the father has the same opportunities as others to be a part of the child’s life if he offers his support to the mother and she accepts his support, and he reliably and respectfully performs the supportive caregiving role he has undertaken. By arguing that the mother agreed to become the exclusive parent, however, he loses the right to force her to accept his involvement in the child’s life by way of judicial intervention.

Under interdependency theory, therefore, the mother has an incentive to agree to an implied contract for exclusive parenthood only when she believes she needs certainty about the other parent’s involvement throughout the child’s minority. If all she needs is freedom to raise a younger child without being vulnerable to interference by an otherwise uninvolved second parent, interdependency theory protects her interests without mandating that she sacrifice financial support.

Professor Polikoff is correct in recognizing that implied contracts for exclusive parenthood means more children will be left without court orders requiring their biological fathers to provide financial support. I disagree, however, about whether this is a bad thing. For instance, it appears that orders entered solely on the basis of biology against a person who has no interest in being involved in the child’s life are more difficult to enforce, so the amount of money lost to children’s households may be fairly small. Given the proximity to poverty in which many children live, however,

(McKinney 1988) (stating that a father of a child over six months old must maintain “substantial and continuous repeated contact” with his child to veto adoption). I am grateful to Jana Singer for suggesting the analogy.

102. See Frank F. Furstenberg, Jr., et al., The Life Course of Children of Divorce: Marital Disruption and Parental Contact, 48 AM. SOC. REV. 656, 664 (1983) (showing that there is less child support paid when the contact between the father and the child is less frequent). See also DAVID BLANKENHORN, FATHERLESS AMERICA (1996) (“Ultimately, meaningful child-support payments will come only from men who see themselves as fathers. For, despite our cultural script’s unusual insistence in this instance on strategies of coercion and vilification—calling them deadbeats, circulating Wanted posters aimed at humiliating them—the evidence clearly shows that the mature of child support payments depends primarily upon the nature of the father-child bond. Typically, a stronger relationship equals more payments.”). See also Marygold S. Melli et al., Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin, 1997 U. Ill. L. Rev. 773, 794-96 (explaining that after three years, child support compliance is higher in cases where parents agreed on shared custody than in cases where parents had experienced substantial conflict over custody).
even a small loss should be avoided unless other interests are more important. In this case, the other interests are incomparably more important, since exclusive parenthood rights entitle the lead caregiver to make ongoing and predictable decisions to assure the child's security and care. Making a compelling case for the public support of these children is not difficult. Practically speaking, however, getting anyone to listen to the argument remains difficult, so it is important to recognize that most of the lead caregivers who will agree to exclusive parenthood are unusually well-off or are terminally ill and likely to qualify during the child's minority for disability benefits.

The Thomas S. case discussed by Professor Polikoff has also prompted comment by Professor Barbara Woodhouse, who has argued that what law ignores is the child's voice. She advocates that children be viewed as rights holders, but differently from adults as rights holders. She argues that children's rights are "needs-based" and must begin in a child's rights to identity and continuity.

Professor Woodhouse has explored the application of her needs-based rights theory by examining several cases, including the trial court's decision in Thomas S. v. Robin Y. The child, Ry, was born to Robin Y., a lesbian who intended to raise the child with her partner, Sandra R. The biological father was a gay man, Thomas S., who had agreed not to assert parental rights in the child, but to be available if the child wanted to have a relationship. Sandra R. bore a child named Cade under similar circumstances. Because both

103. See infra notes 111-115 and accompanying text.
104. See 42 U.S.C.A. 416(i) (1997) (The term "disability" means: [the] inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to last for a continuous period of not less than 12 months); Justice v. Shalala, 842 F. Supp. 251 (E.D. Tex. 1993) (holding that a finding of disability is automatic because AIDS is categorized as a "listed impairment" in the Code of Federal Regulation); Naomi R. Cahn, Representing Race Outside of Explicitly Racialized Contexts, 95 Mich. L. Rev. 965, 992-93 (1997) (arguing that welfare recipients should have same choice as wealthy women about whether to pursue child support).
children became curious about their origins when they were four and five, Robin and Sandra contacted the biological fathers. Thomas began to visit and write letters, and the informal arrangement was sustained for several years. Sandra and Robin told Thomas that they believed it was important for him to treat the two girls equally and to respect their family definition. When Ry was nine, however, Thomas asked Robin and Sandra if he could take Ry alone with him to California to visit his family. They refused permission and Thomas sued, seeking a declaration of paternity and court-ordered visitation.

The trial court denied the petition in part on the ground that the family Ry perceived as her own did not include Thomas as a "functional third parent." To disrupt that family by allowing Thomas to redefine it as including him would be harmful to Ry. The father's petition for a paternity declaration was denied.

Woodhouse approves of both the outcome and the court's rationale. She argues that the alternative of allowing the father to establish paternity, later adopted by the appellate court, can be justified only on the basis of the father's biological rights. When the trial court denied his demand for a paternity declaration, Woodhouse says the court was protecting Ry's own understanding of her family and valuing that understanding over the biological alternative.

Interdependency theory would also deny Thomas's demands for contact with Ry, but for somewhat different reasons and through a somewhat different process. First, while Ry was able to explain her family definition to the court, putting her through that experience should not have been necessary. Instead, interdependency theory trusts Ry's caregivers to speak for her. Having done the caregiving work for a decade, they were the adults in the best position to know in any depth what Ry felt and experienced, and their opinions about what was good for her should have been respected. They believed that what was good for her was to have all the adults who wanted close relationships with Ry to respect the family they had defined.

It is not surprising that Ry's definition of her family echoes those of her caregivers. At age nine or ten, she was

108. See Woodhouse, supra note 105, at 335.
not yet old enough to have her own separate and fully formed family definition. Interdependency theory recognizes this reality by giving the child's voice its own hearing only when the child is old enough to have developed an independent point of view.

The second difference between interdependency theory and the trial court's order in *Thomas S.* is that it would not matter whether a paternity decree were entered. Woodhouse takes the position that the only way to protect Ry from a visitation order that would undermine her family identity was to deny Thomas a decree of paternity. Under present law, Woodhouse's conclusion is correct. In a formal sense, a decree of paternity need not undermine Ry's family life because the decree would merely empower Thomas to seek a court order of visitation. No court would be required to grant the request if visitation were found contrary to the child's best interests. The problem is that the best interests test attempts to assess what is best for the child independently of the caregiver. By viewing the child out of her context, the test allows a court to ignore how the child's sense of herself is connected to her sense of her family. Following the best interests test, most courts would order visitation so that the biological father could have an opportunity to connect Ry to a different family, and that would not be seen as a harmful result. By arguing that the only solution for Ry was to deny her biological father a paternity decree, Woodhouse confirms this flaw in the best interests test.

Under interdependency theory, on the other hand, the petition for paternity could be granted with less risk for Ry's definition of family. The court would be required to examine what is best for the relationship between the child and the child's lead caregiver. The court could not order visitation as Thomas wanted it, taking only Ry to visit his family of origin, because it would place the child in a loyalty conflict between

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109. *See* Cahn, *supra* note 48, at 1-2, 35-37 (suggesting decision to find person is a parent is conflated inappropriately with decision to permit visitation).

110. *See* e.g., *Skeens v. Paterno*, 480 A.2d 820 (Md. Ct. Spec. App. 1984) (finding that it is in the infant's best interest to have contact with father and the father's family despite the fact that the father and the mother never married); *see also* Posey v. Powell, 956 S.W.2d 836 (Ky. Ct. App. 1998) (finding it in best interest of nonmarital child to have visitation with paternal grandparents).
her lead caregivers and a supporting caregiver over family definition. Further, and equally as important, the child's caregivers communicated their deeply-held values to Thomas and asked him to respect them. When he behaved contrary to those values, he was disrespectful of them as caregivers. That is another reason to deny him judicial assistance to intervene in the decision of Ry's caregivers. In other words, interdependency theory requires that judicial interventions be limited and that judicial power not be exercised in favor of a person, whether a biological relative or not, who refuses to behave in ways that respect the caregivers in doing their work on behalf of the child.

Although interdependency theory would come to the same result as Professor Woodhouse, the differences in her analytical route are significant. By making the claim that the child's needs and identity should be ascertained by speaking directly with the child, Woodhouse opens the door to Thomas being awarded what he sought. For example, if Ry had been three years old instead of nine or ten when the suit was brought, she would have lacked the capacity to make a persuasive case about what she believed to be the appropriate definition for her family. Allowing Thomas to decide, contrary to the wishes and practices of Ry's caregivers, that three-year-old Ry should be a part of his family of origin would have been just as disruptive to Ry's sense of continuity and to her caregivers' sense of security and control. Under Woodhouse's theory, however, Thomas could be granted an order of visitation because the child's definition of her family at three is perhaps less clear and certainly less articulate than it would be at ten.

Under interdependency theory, the ability of the caregivers to decide on and to practice the family definition they think preferable for themselves and for the child cannot be disrupted by someone like Thomas, whose only claim is biological and who has never participated in caring for the child. If Thomas earns the right to make a claim by committing to the child and by reliably and respectfully participating in the child's life, then he can earn the right to seek an order of visitation. If he does not, he can wait until the child is older and then exercise his right to structure his relationship directly.

Although Woodhouse's child-centered theory may be
criticized for paying insufficient attention to the appropriate voice of the caregiver, she is far more restrained in permitting interventions than some theoreticians who identify themselves as family-centered, such as David Blankenhorn and Professors Cornel West and Sylvia Hewlett. In their important recent book, *The War Against Parents*, Hewlett and West powerfully make the argument that American society has largely abandoned the notion that families need support in order to raise children. They demonstrate, correctly in my view, many ways that current policies and practices affecting work, taxation, education, and the economy are punitive toward parents raising children. Their analysis compares present policies with those in place for the postwar generation of parents raising the baby boom generation. Among their many telling examples is the change in value of the earnings of low-income families. The minimum wage, at one time, was high enough that a single wage earner working a forty-hour week could earn enough money to support a family of four at or above the poverty line. Today, a single parent of two children working full-time at the minimum wage does not earn enough to keep her family at the poverty line. As Hewlett and West note, the standard of living of a low-income family is an important indicator of societal support for all families, because parents of young children tend to be among the youngest and lowest-paid workers.

Hewlett and West also explore the declining value of government benefits for families, including tax policies and educational and housing subsidies. The most recent attack is on welfare. As "reformed," welfare not only provides single mothers with less money, but they are guaranteed benefits for no more than five years, regardless of the children's needs.

111. SYLVIA ANN HEWLETT & CORNEL WEST, THE WAR AGAINST PARENTS, WHAT WE CAN DO FOR BELEAGUERED MOMS AND DADS (1998); see also BLANKENHORN, supra note 102.
112. HEWLETT & WEST, supra note 111, at 29-30.
114. HEWLETT & WEST, supra note 111, at 67.
115. Id. at ch.4.
116. Id. at 103-08. See also FRANKLIN, supra note 50, at 195 (stating that the real value of welfare benefits (including food stamps) for a family of four with no other income fell from $10,133.00 in 1972 to $7,657.00 in 1992).
for their mother's time and energy. Together, welfare reform and the low minimum wage guarantee that children born to young or low-skilled mothers will rarely see their mothers because maintaining the family at the poverty line requires that the mother work at least one full-time job. Indeed, given trends in the distribution of work, only the lucky children will have mothers working a single full-time job. More likely, the mother will cobble together a living from several part-time jobs, none of which guarantee her access to health insurance, family leave, or unemployment compensation.

Running parallel with their trenchant and convincing economic analysis, Hewlett and West argue that American culture is also harming children by devaluing fathers in the media and in legal practices. The result, they argue, is the increased acceptance of non-marital childbearing and high divorce rates among parents of young children. They argue that the trend toward fatherlessness impairs children by separating them from the economic, social, and emotional support of their fathers, impairs fathers by keeping them from their children, and impairs society by increasing the number of men who lack the transforming and gentling experience of living in a family.

117. 42 U.S.C.A. §608(a)(7). See also HEWLETT & WEST, supra note 111, at 235 (attacking the lifetime cap on the basis that it is "designed to force welfare mothers into the labor force" and in doing so causes the mothers to spend a great amount of time away from their children who are already lacking fathers).

118. For example, under the A.L.I. draft on child support, payments made to a custodial parent earning $800 by a non-custodial parent earning $1,600 a month would raise the custodial parent's household to 149% of the poverty line and reduce the non-custodial parent to 150% of the poverty line. A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.05 37 (Tentative Draft No. 3 1998). Under the current Maryland statute, a custodial parent with three children, working forty hours a week at minimum wage, would still fall below the poverty line if the children's father was working twenty hours a week at minimum wage and paying full child support. Md. CODE ANN., FAM. LAW. § 12-204(e) (Supp. 1997).


120. HEWLETT & WEST, supra note 111, at 175-81.

121. Id. at 167-72. Their arguments echo some of those made by Blankenhorn.
solutions are proposals to limit access to divorce. Except in rare circumstances, parents would be required to remain married for the sake of the children. Interdependency theory parts company with Hewlett and West on the use of legal force to define families around the presence of fathers.

The theory begins with the proposition that children cannot thrive, or even survive, unless at least one adult takes responsibility for them and commits to provide them with care. Because the notion of responsibility is central to both interdependency theory and to Hewlett and West, it is possible to imagine that limitations on parental divorce might be compatible with interdependency theory. The theory, however, turns on rights following responsibilities, not preceding them. Limiting divorce by parents is likely to empower people who have not accepted primary responsibility for children and to impose burdens on those who have. Under interdependency theory, the person who has taken on the primary responsibility for the child must be supported, not burdened. Burdens are allowed only to the extent that they are necessary to encourage supportive conduct. So the question is, does limiting divorce by parents place rights before responsibilities?

Limiting divorce appears to burden both parents equally. Because women initiate more divorces, however, limiting divorce statistically poses more difficulties for women than men. But a gendered outcome is not a sufficient reason under interdependency theory to oppose divorce limits if children would benefit. The question one must ask, therefore, is how keeping a mother in an unhappy marriage benefits the child.

In considering why women divorce, several things stand out. Generally, a mother and her children suffer financially upon divorce. Sometimes they suffer poverty even if the mother is fully employed and the father is paying child support. Knowing that her standard of living will decline upon divorce and may never recover, why would a woman

122. Id. at 242-43. See Scott & Scott, supra note 38 (suggesting where parties have children, it is appropriate to impose limitations on divorce at will, such as a cooling-off period, mandatory counseling, mediation, and appointment of guardian ad litem).

123. DEMIE KURZ, FOR RICHER, FOR POORER 43 (1995).

124. See KURZ, supra note 123, at 77-112.

125. See supra note 118 and accompanying text.
with children threaten or initiate a divorce? A careful study suggests that the situations that lead women to divorce are often the same situations that pose problems for the children of the marriage. The parents may be in severe conflict. The husband may physically or emotionally abuse the wife or children. He may make little money, gamble, or spend money in pursuits that please him but do nothing for his family. He may refuse to participate in household maintenance or child-care.\(^\text{126}\)

In other words, most mothers do not lightly make the decision to leave a marriage.\(^\text{127}\) Removing or limiting the right to divorce gives the father more opportunities to behave irresponsibly, because the mother cannot threaten divorce. The right to divorce, in other words, may give mothers a stronger hand to persuade fathers to become more responsible members of the household for her sake and for the benefit of

\(^{126}\) See AMATO & BOOTH, supra note 15, at 168, 219-20, 230 (negative effects on children associated with parent conflict, lack of paternal involvement in household and child care, failure to support mother in marriage and as partner and may be related to father's other problematic characteristics); KURZ, supra note 123, at 43-75 (discussing the various causes of divorce). In Kurz's survey of divorced women, 19% of the women reported “violence” as the principle reason for the divorce, 19% reported “personal dissatisfaction,” 19% reported “other woman,” 17% reported “hard-living,” 16% reported no reason, 7% reported some other reason, and 3% did not know the reason. Id. at 45. Despite the widespread entry of women into the workforce, wives continue to be over-burdened with the housework, an additional source of frustration for many women and sometimes even a reason for divorce. Id. at 20. See ARLIE RUSSELL HOCHSCHILD, THE SECOND SHIFT 211-15 (1989).

\(^{127}\) Why men decide to divorce is, of course, equally as complex as why women decide to divorce, and legal constraints are only one aspect. Also pertinent are emotions, economics, moral beliefs, social norms, and physical and mental health, and they may point in different directions for the same person. While divorce is likely to enhance a man's standard of living, when measured in purely economic terms, his affectionate life and, it appears, the quality of his physical and mental health, is likely to decline. See Gary S. Becker et al., An Economic Analysis of Marital Instability, 85 J. POL. ECON. 1141, 1156 (1977) (explaining that economic instability increases probability of divorce). In addition, the decision to divorce may differ depending on the race of the partner, as well as the sex. One recent study found that African-American men, more often than white men, decided to divorce because of the anxiety they experienced about being able to provide adequately for their families. Courtland Milloy, Black Men Must Learn Bottom Line is Family, WASH. POST, June 3, 1998, at B1. Also, the availability of desirable new wives may be even greater for African-American men than for white men. Id. Movements such as Promise Keepers and events such as the Million Man March emphasize moral arguments that men need to commit to family life. See Blankenhorn, supra note 102.
the children. A similar story can be told about unconditional visitation enforcement over the objections of the caregiver, another proposal of reformers who argue that keeping fathers and children in touch with one another is valuable for children, for fathers, and for society. Interdependency theory is strongly supportive of judicial intervention in support of visitation, but only where it is part of ongoing, responsible, committed, and respectful relationships between the caregiver and the child and between the parents. These reformers do not stop there, however. They advocate

128. Another proposal in which Hewlett, West and Blankenhorn concur is to give preferences to families with two married parents for some kinds of public benefits. Such preferences, however, are more likely to burden mothers than to give men incentives to become more responsible and committed fathers. Like divorce limitations, economic benefits dependent on marriage tie to mothers might improve only if the mother can make a credible threat of departure. For women who are already single parents, allocating scarce social spending to married parents will only make the economic situation of their children more desperate. See FRANKLIN, supra note 50, at 219-38 (arguing that responsible social policies require the provision of benefits to single parents because doing otherwise is impractical and inevitably harms poor children).

The only group of women who would be likely to benefit from the preference probably would be single women who are willing to marry, because the prospect of economic enhancements based on marriage could help her persuade an otherwise reluctant potential partner to marry. Since men have few other economic inducements to marry, this help could be quite useful. If the couple then produces children, however, maintaining access to the benefit could harm the children, since their mother could not credibly invoke the threat of divorce to bolster her demands for improvements in their father's behavior. In short, mothers end up bearing the burden of a benefit designed to change men's behavior, but women lose the possibility of changing men's behavior. But see Amy L. Wax, The Two Parent Family in the Liberal State: The Case for Selective Subsidies, 1 MICH. J. RACE & LAW 451 (1996).

129. See BLANKENHORN, supra note 102, at 34-36 (suggesting fatherhood is an inhibitor to male violence); see also HEWLETT & WEST, supra note 111, at 167-73 (claiming unattached males have a greater chance of becoming violent).

130. Professors Scott and Scott argue that family law is properly moving in the direction of awarding joint custody more commonly to divorcing parents and to order frequent contact between the child and the noncustodial parent. SCOTT & SCOTT, supra note 38, at 2450. Their claim is that, although the custodial parent needs to retain greater decisionmaking authority "as ex ante compensation for the fulfillment of more expansive obligations," the noncustodial parent should be accorded rights as a way of encouraging him or her to stay involved. Id. at 2449.

If maintaining a relationship with the noncustodial parent is important to the child's welfare, then the ex ante bargain must provide for enhanced role and relationship rewards for the parent as well as encourage responsible conduct. Moreover, enforcement costs will be reduced if parents are inclined voluntarily to meet their parental
obligations, and voluntary compliance will increase with greater role satisfaction and relationship rewards. Fiduciaries in other contexts (including custodial parents) are motivated in part by reputational and other non-pecuniary rewards. Non-custodial parents similarly will respond to recognition that they have an important parental role.

Id. at 2450.

Interdependency theory differs in two respects from this position. First, I reject the proposition that ex ante compensation in the form of legally enforceable rights and recognition is needed to keep non-custodial parents involved with their children. Second, rights should be accorded on the basis of past performance, rather than on the more speculative claim that future performance can be encouraged through legal entitlements disconnected from performance.

The 25-year report on Judith Wallerstein's groundbreaking longitudinal study of children of divorce is strong evidence for the interdependency approach. Judith S. Wallerstein & Julia Lewis, The Long-Term Impact of Divorce on Children, 36 FAMILY AND CONCILIATION CTS. REV. 368 (1998). The young adults whose parents divorced when they were young reported that they did not perceive a benefit from judicial intervention, including visitation orders. Even those who regularly spent time with their noncustodial parents did not necessarily develop longlasting or strong relationships, because many of these parents failed to tune in to their children's needs or interests. A court order, if anything, exacerbated the problems:

A subgroup of young people who were intensely angry at the father as children and remained angry as adults were those who, while growing up, were under court orders of a strictly enforced agreement to maintain a particular schedule of visits. If the court's goal was to promote a close a relationship between the father and child, the policy of court-ordered visiting, in which the child had no input, not only failed but boomeranged badly. No single child who saw his or her father under a rigidly enforced court order or unmodified parental agreement had a good relationship with him after reaching adulthood.

Id. at 376-77. Evidence of the lack of responsiveness of the noncustodial parent is best evidenced in Wallerstein's information on how they treated their children in regard to something not required by the law—college education. As Wallerstein puts it:

Our data do not support the advice that many parents receive; that is, that fathers who see their children regularly, who are financially secure, and who value education, will provide the financial assistance necessary for their children's high education. Two thirds of these young people had fathers who were well-paid professionals or successful businessmen. Although many had regular contact with their children, not one of these men supported their son or daughter in full. And, in fact, only one third of the fathers provided consistent part-time support. The majority provided partial, inconsistent support. One quarter of the fathers refused outright to provide any financial support at all after their children turned 18. These data are surprising, because many of the fathers were men for whom education had been the stepping stone to their own achievements. Some men of culture and learning showed little interest in their children's education... Seven young people were helped financially by stepfathers. It is interesting that those stepfathers who paid for college did so consistently and more generously than the fathers.
unconditional visitation enforcement in virtually every situation, short of parental abuse of the child. In my view, unconditional visitation enforcement reinforces parental irresponsibility because, like divorce limitations, it deprives both the responsible caregiver and the court of opportunities to challenge irresponsible conduct and make effective demands for change.

A relatively mild but common example helps to illustrate the point. Assume that a married couple divorces after seven years. They have two children, ages six and four. Both parents were involved with caring for the children before the separation, with the mother doing the larger share of daily care and arranging for daycare, medical attention, and so on. Under an approximation theory, the mother is given residential responsibility for seventy percent of the time and the father for thirty percent of the time. The father and mother both work at jobs with predictable weekday schedules and little travel. The father is scheduled to see the children on alternate weekends and holidays, a month during the summer, and for dinner one evening a week. He is responsible about seeing the children as scheduled for a year following the divorce. Then a new relationship and more responsibilities at work start to interfere. By the end of the second year, he is seeing the children, on average, one weekend a month. The mother advises the father that the children are upset with him and miss their time together, but his behavior does not change. The mother requests a conference with the father to discuss changing the visitation schedule to something they can both rely on. The father says that is not necessary and that she should continue to have the children available at all scheduled times regardless of whether he will actually be there at those times. The mother indicates her dissatisfaction and her disinclination to

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The majority of the young people who received money from parents received it from their mothers, many of whom provided consistent although partial support. Some women did so by mortgaging their homes. Only a few had salaries that enabled them to provide their youngsters with financial help without great sacrifice.

*Id.* at 373-74.

131. Hewlett and West would go further, making such visitations not just a judicially enforceable right, but a judicially enforceable responsibility, with fines for non-custodial parents who do not visit their children. *See* HEWLETT & WEST, *supra* note 111, at 244.
continue accommodating the visitation schedule. Still, the father’s behavior does not change. After a few more months, the mother begins to accept invitations for her and the children for activities during times when the children are scheduled to be with their father. He sues to enforce his visitation rights.

Under current law, the father would prevail in the visitation suit. Some would argue that, not only should the father prevail, courts should be empowered and required to use strong enforcement measures, including a change of custody, to enforce the father’s visitation rights. Ensuring that the father has continuing access to the children is the highest and, indeed, the only priority. The problem with this approach is that it punishes the parent who was acting responsibly toward the children and rewards the parent who was not. Further, it deprives the mother and the court of any means to require the father to improve his conduct. The father’s inalienable visitation rights give him a trump card, protecting him from examining or altering his own behavior.

Interdependency theory would not eliminate the father’s right to time with the children, but it would permit the mother the right to amend the schedule in light of the father’s behavior. If the mother is denied the right to limit his time, she is deprived of any method to insist that the father resume acting responsibly with regard to the children.

Hewlett and West propose unconditional legal interventions to preserve the father-child relationship in

132. See supra note 21 and accompanying text.
133. See Russell v. Russell, 948 P.2d 561 (Wyo. 1997); MD. CODE ANN., FAM. LAW § 9-105 (Supp. 1997) (stating that unjustifiable interference with visitation is grounds for changing custody); Karen PP. v. Clyde QQ, 602 N.Y.S.2d 709 (App. Div. 1993) (upholding change of custody from mother to father based on mother’s false accusations of sexual abuse to alienate the child from the father); Ludlow v. Ludlow, 201 P.2d 579, 582 (Cal. Ct. App. 1949) (changing custody from father to mother due to father’s admitted attempts to undermine the mother’s relationship with the child). Advocates use the term “Parental Alienation Syndrome” to describe a process “by which one parent consciously tries to divide the child, to pry the child loose from involvement with the other parent.” Kathleen Niggemyer, Parental Alienation Syndrome is Open Heart Surgery: It Needs More Than a Band-Aid to Fix, 34 CAL. W. L. REV. 567, 567 (1998). The originator of the phrase, Richard Gardner, states that it more frequently occurs in mothers brainwashing children against their fathers. Id. at 576. Parental Alienation Syndrome has been used by advocates to justify a change in custody to the alienated parent. Id. at 579; cf. BOWERMASTER, supra note 15, at 453-55 (criticizing change of custody cases).
situations far more extreme than the example just discussed. As one example of the failure of family law to sustain the father-child tie, they offer the story of John P. and John J., a father and son who, in separate situations, assaulted and killed women. They attribute the father's rage to his being deprived of contact with his son and the son's rage to being deprived of a father. It is a stunning story, all the more stunning for what the authors fail to ask or explain: why did the mother not want the father to see the child? Perhaps she was aware of the father's capacity for violence because she had been his target. Perhaps the son had been a witness. If she could have raised the issue when battling the father for six years over custody and visitation, perhaps he could have been required to take some responsibility for his violence. And, perhaps, he would have learned less violent ways to live in the world. Instead, his violence went unremedied in a visitation law regime that gave scant if any attention to the mother's need for physical security. Although many states allow inter-parental violence to be a factor in visitation

134. HEWLETT & WEST, supra note 111, at 170-72.
136. See Cahn, supra note 135, at 1062-64, 1072 (stating that domestic violence is usually deemed irrelevant to custody decisions, or not taken seriously); see also Czapanskiy, supra note 135, at 255-56 (stating that judges frequently view battered women as unstable and consequently unfit parents, which explains why lawyers often do not bring evidence of domestic violence to the attention of courts); BOWERMASTER, supra note 15, at 449-50; Ohio v. Brillhart, 1998 WL 470122 (Ohio App. 1998) (declaring invalid an order conditioning father's probation on not having contact with his family for two years, even though conviction was for assault on the mother in the presence of one of the children).
decisions, it is generally uncommon for visitation rights to be conditioned on behaviors between the parents, although conditions may be set to protect the mother from contact with the father during visitation. Instead, it is sufficient for a father like John P. to claim that his love for the child is enough to entitle him to have contact with the child. His love, however, should not be enough to sustain his claim. This child's primary dependence and need is on his custodial parent, the mother, and she needs the respectful support of the child's father if she is to do her job well. Because her need for personal security cannot be disconnected from her capacity to be a caregiver, his capacity for violence toward her and other women must be addressed before his visitation rights.\textsuperscript{137}

If indeed men need contact with their children in order to achieve their best selves, the contact must be, just as it must be for women, contact that is characterized by responsibility, not solely by rights. By facing the consequences of poor behavior, whether simple inattention or actual violence, men, like women, can change and grow. Allowing irresponsible fathers the legal right to behave badly and still have full access to their children is a prescription for allowing them to continue poor behavior.

Imposing greater risks on caregivers to ensure benefits for children could be acceptable under interdependency theory if it could be demonstrated that the interventions needed to create the benefits were appropriate. However, arguments that fatherlessness is the cause of children's misery, and that divorce limitations and unconditional visitation enforcement are the solutions rest on shaky empirical premises. The argument begins in the reality that, on average, children who spend their entire childhood in the

\textsuperscript{137} The enduring pain suffered by children who observe one parent beat the other was evidenced again in Wallerstein's study of young adults 25 years after their parental divorce. See Judith S. Wallerstein and Julia Lewis, The Long-Term Impact of Divorce on Children, 36 FAMILY AND CONCILIATION CTS. REV. 368, 371 (1998). The authors conclude: "the removal of the child from the violent home does not by itself rescue even the very young child from the lasting consequences of having witnessed the violence. Such children require intensive psychological treatment in addition to protection from further exposure." See Nancy Dowd, Rethinking Fatherhood, 48 FLA. L. REV. 523, 535 (1996) ("Any strategy that gives men more rights or power increases the risk of giving power where there is already significant and widespread abuse.").
same home with both of their biological parents have better prospects for success as adults than children who do not. Where the argument falters is in the claim that since children do better living with both a father and mother, they will also do better when they have substantial contact with their father after separation. The second proposition, however, does not necessarily follow from the first. Knowing that children do well in two-parent homes where the parents are committed to each other and to the children is not the same as knowing that children benefit from continuing contact with two parents who do not live together, do not behave in similar ways toward the child, and act disrespectfully toward one another. Before adopting a public policy affecting children in these situations, positive answers are needed to two critical questions. First, given that most children whose parents divorce and children whose parents stay together do about the same, is it fatherlessness that accounts for the differences between the two groups? Second, to the extent that fatherlessness is the explanation for some of the differences, do interventions such as divorce limitations and unconditional visitation enforcement solve any part of the problem?

The empirical evidence is less than clear, and does not provide much support for draconian interventions into the lives of caregivers and children. Professor Sara McLanahan summarized her research by concluding that about half of the differences in outcome turn on the poorer economic circumstances of children in single-parent families rather than on fatherlessness. Fatherlessness played a role, according to this researcher, in that children with the best outcomes had fathers and mothers that remained in the same household with them throughout childhood. What the research does not show, according to Professor McLanahan, is that post-separation contact between the child and the father

138. "Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both or their biological parents." McLANAHAN & SANDEFUR, supra note 51, at 2-3. "Children who grow up in a single parent household are twice as likely to drop out of school, twice as likely to get pregnant before the age of twenty and one and a half times as likely to remain "idle"—out of school and out of work—in their late teens and early twenties." Id. at 2.

139. Id. at 9-11, 61.
changes the child's odds for success.\textsuperscript{140} In other words, the father's presence with the mother may be a key, but the father's absence may not be.\textsuperscript{141} The research does not show that all fathers are the same.\textsuperscript{142} In particular, the father's presence is not associated with success for children if the father has exhibited violent behavior or if the father and mother are in severe conflict.\textsuperscript{143}

Because they lack a solid empirical basis, proposals for unconditional visitation enforcement should be rejected as

\textsuperscript{140}Id.; AMATO & BOOTH, supra note 15, at 218-21. See also FRANK F. FURSTENBURG, JR. & ANDRES J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 72-73 (1991).

\textsuperscript{141}AMATO & BOOTH, supra note 15, at 203 (stating that less contact with parent after divorce is not associated with any measures of psychological well-being); see also NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 29-32 (1997) (summarizing studies showing a “correlation but not causation between father absence and children’s difficulties”).

\textsuperscript{142}Indeed, Blankenhorn argues that the visiting father relationship is no cure for fatherlessness, although he demeans the role for more than it deserves in situations where the visiting father is a reliable and responsible presence for the child. BLANKENHORN, supra note 102, at 124-28. Blankenhorn’s theory is that fatherhood does not work if it is disaggregated into its component parts. Blankenhorn argues that to be of any value to his child, a father must do everything a father’s role is “supposed” to be involved with: be a breadwinner, live with the child and “sustain a parental alliance with the mother of his child.” Id. at 128. A father who fails to perform some part of the role or who shares the role with another is as good as no father at all. A father should not be just a wallet, therefore; nor should he share the role of provider with the mother.

Blankenhorn’s dismissal of fathers who perform the role differently and his rejection of the worth to children of families who allocate their responsibilities in other ways are polemical claims that are dangerous to the children in these many families and to the people who care for them. Further, his notion that the role of father cannot be disaggregated should be unpersuasive in a society that has grown accustomed to role disaggregation in so many other activities. Mothers, for example, no longer sew all the clothes for a family. Providing clothing is a role that is performed in part by a parent who selects and pays for clothing, in part by a store that retails it, and in part by a manufacturing company that creates it, not to mention the advertisers, etc. Food is not raised at home, nor are children exclusively raised there. If the role of the mother can be disaggregated with the result remaining satisfactory for the child, why is it impossible to recognize and accept that the role of father also has been disaggregation? Once the reality of the changes are seen, it becomes far easier to accept the further reality that parental roles do not need to be reaggregated in ways that reproduce gender or race-based cultural predisposition to “do parenting” in only one way.

\textsuperscript{143}See supra note 135 and accompanying text; AMATO & BOOTH, supra note 15, at 219-20 (“long-term consequences of interparental discord for children are pervasive and consistently detrimental,” where parents are in high conflict and divorce, children benefit).
experimental interventions into the lives of children. Children experience enough misery as it is; they should not be made into experimental subjects. Some things that children need are obvious, and providing for them is not an experiment. As Hewlett and West document, children need more resources. They need investment in their parents, caregivers, and communities. They need sound education and security at home. The people children know they can rely on are those who live with them and care for them. These are the people deserving of support in society and in family law.

Hewlett and West make a second argument for unconditional visitation enforcement over the objections of the custodial parent. Without visitation, they assert, the father is reduced to being a wallet. Lacking involvement in his child's life, he has no influence with the child, no affection from the child, and no incentive to remain involved. Unconditional visitation enforcement, therefore, is the natural complement to unconditional child support enforcement. Without the former there should not be the latter.

There is no doubt that Hewlett and West are right that the dominant fatherhood policy of the government is that fathers must provide financial support for their children. A

145. See supra notes 111-116 and accompanying text.
146. See FRANKLIN, supra note 50, at 219:
All available evidence shows that children minimally need one caregiver, with assistance from a supportive adult, to care attentively for them. Furthermore, the evaluation of the developmental outcomes of children who were from deprived economic backgrounds and grew up successfully suggests that they all had the common denominator of one adult who gave them inordinate attention. Policymakers will have greater of an impact on the lives of poor African-American children when they accept the irreversibility of the high levels of nonmarriage as a starting point for thinking about changes in public policy. If the mother is drug-free, motivated to be a good mother, and considered to be fit to rear her child, resources should be directed at fortifying the mother-child dyad by strengthening her parenting skills.
147. Blankenhorn parts company with Hewlett and West on the issue of responding to child support enforcement with visitation enforcement. He agrees that "deadbeat dads" are subject to a far harsher social critique than they deserve, but, he argues, "the only solution to the problem of Deadbeat Dads is fatherhood," i.e., being the breadwinner who lives with the child and "sustains a parental alliance with the mother." BLANKENHORN, supra note 102, at 124-28.
major component of welfare reform concerns enhancing child support collection efforts, and states are allowed to deny cash assistance to welfare recipients who refuse to cooperate in child support collection efforts. They are also correct to assert that more government funding must be dedicated to the needs of children, especially in families where parents lack the capacity to sustain the child. Indeed, for many of these families, government policy toward increasing reliance on private family support for children can only mean financial disaster for the children, as Hewlett and West demonstrate. They are misguided, however, in asserting that the proper response to unconditional child support enforcement and a government policy that overemphasizes the role of father as wallet is unconditional visitation enforcement over the objections of the child’s caregiver. More successful, from the child’s perspective, are policies that emphasize parental responsibility. This includes financial responsibility and, equally important, the parent’s commitment to the child and willingness to support the child, either directly or indirectly through the child’s caregiver.

Hewlett and West are correct that an involved parent is more likely to feel affection for the child, to want to do things for the child, and to be more willing to share his or her resources with the child. The question is whether unconditional visitation enforcement is the way to achieve involvement. Interdependency theory advocates giving the nonresidential parent incentives to support the residential parent, financially and otherwise. The child benefits in two ways. First, the residential parent, having more resources to draw on and less conflict to contend with, is able to devote more of himself or herself to the child. Second, the nonresidential parent, having shown his or her willingness to support the residential parent financially and with time and

energy, will be more welcome in the child’s home. The child will understand that he or she is important to both adults.

The contrast between the two approaches was demonstrated in a pair of newspaper articles in the Washington Post on the same day. One article described a fatherhood support program designed to help nonresident fathers of children on welfare obtain employment so they could provide child support. The program is not a father-as-wallet project, however, because it also helps the men learn how to be better fathers in other ways. The fathers in the program are poor and their child support obligations exceed their ability to pay. But some want to be involved in their children’s lives, and they are learning that the size of their wallet is not the only measure of their ability to be a good father. Rather than fight the mothers for visitation, they are learning to offer support, and it is this support that interdependency theory says should be encouraged. For example, one father of three children by three different mothers is described in the article as owing approximately $16,000.00 in back child support. He is unemployed, ill, and has a criminal record that includes assault charges. Knowing that he cannot be a wallet for his children has not convinced him to abandon them, however. He understands that the mothers of the children need help, since all are working, and he is offering to care for the children when the mothers are at work. As the program administrator says, although society wants these men to become wallets, it is an unlikely outcome. What the program can do is help men be involved in their children’s lives and develop civil relationships with the mothers. Nowhere in the article is there mention of unconditional visitation enforcement being necessary for this to happen.

The second article describes the creation of “child-transfer sites,” that is, supervised sites where impartial observers monitor the exchange of children when they leave one parent and go to another. Some parents cannot manage these transitions peacefully and, for others, it is a “difficult and emotional experience.” These sites are said to be

burgeoning.” One must ask, however, how a child feels when his or her parents are so alienated from one another that they cannot be civil to one another in front of their child. Perhaps the money that supports child-transfer sites would be better spent teaching parents how to be minimally respectful of one another so that they can manage their own transfers. And, where minimal respectfulness is impossible, interdependency theory would be a basis for terminating judicially-mandated visitation until the child is old enough to arrange his or her own transfers.

IV. INTERDEPENDENCY THEORY IN PRACTICE

Reforming the law to serve the needs of the caregiver/child unit for support is not a simple undertaking. In this part of the article, I show how the law would change under interdependency theory with regard to visitation. Currently, the law will almost never deny a parent’s right to visitation.151 While the presumption that favors visitation is a simple rule, interdependency theory identifies situations where visitation will impede caregiving. I will discuss three examples.

The first example is a father’s claim for visitation with a child born to a woman not living with him. For several years after the birth, the father does very little either to support the mother or relate to the infant. The mother and child form a secure caregiver/child unit and develop relationships with people and institutions in the community that support the mother’s caregiving work. The father realizes what he is missing and sues the mother to establish a visitation schedule.

The second example involves a claim for visitation by a father who was married to and living with the mother until the child was two years old. A visitation order was entered as part of the divorce decree, under which custody was awarded to the mother. The father spent alternate weekends with the child for the first year after the divorce. After that, at the father’s election, their time together became more irregular. When the child was four, the father remarried. That year, he saw the child on her birthday. The next year, he arranged no visits at all. Early the next year, when the child was six, the

151. See supra note 21 and accompanying text.
father told the mother that he would be taking the child on his family's summer vacation for three weeks in another state. When the mother told the child, the child said she did not want to go because she did not like her father any more. When the mother told the father about the child's reaction, the father said that was no reason for the child not to go. The mother said she would not allow the father to take the child and the father sued to enforce his right to visitation.

The third example is a claim for visitation by a grandmother with whom the father and the child lived from the time of the child's first birthday until the child was three. After the mother left and refused to pay child support, the father lost his apartment and moved in with the grandmother. The father's earnings, after daycare expenses, were insufficient to pay rent. The grandmother agreed to provide the father and grandchild with a place to live until the father improved his financial situation. When the father's salary increased and the child was able to attend a Headstart Center, he could afford to move out. His fiancée believed she could establish a better relationship with the child if the child spent less time with the grandmother, so the grandmother and grandchild saw very little of each other after he and the father moved out. When her son refused her request to see the child more often, she sued.

Each example raises two questions under interdependency theory. The first is whether the lead caregiver may permit the person who is seeking visitation to see the child. The answer is yes. The lead caregiver has that authority and probably will exercise it in favor of visitation if he or she believes that contact will benefit the child and support the lead caregiver's efforts in raising the child. The second question is whether a court should intervene if the lead caregiver decides against visitation. It is more difficult and involves both procedural and substantive issues.

All three cases require an examination of process, because the impact of judicial proceedings on a caregiver/child unit is not insubstantial. If judicial intervention is allowed, the lead caregiver will have the burden of asserting his or her position in court. This requires hiring and paying for a lawyer, missing work to go to court, and possibly hiring experts and recruiting fact witnesses. The time and money the lead caregiver expends on the legal effort is time and
money that cannot be spent on the child, so judicial intervention results in a material detriment to the caregiver/child unit. In addition, the legal process can be stressful, especially if the outcome is in doubt. An insecure lead caregiver is likely to transmit her fears and concerns to the child, who may suffer emotionally along with her.\(^\text{152}\)

The three examples differ somewhat in terms of how they would be treated at present in the United States. The law in most states permits visitation by a non-custodial parent unless the custodial parent can demonstrate that the visitation would be harmful to the child, usually because the non-custodial parent has been abusive or neglectful of the child, or because he or she engages in behaviors, such as substance abuse, that will endanger the child.\(^\text{153}\) So the two fathers are likely to prevail in their claims for visitation. The fact that the custodial parent believes that sharing the child’s time with the other parent will cause an unwarranted disruption in the successful routines of the caregiver/child unit is not a reason to deny visitation. Nor is it a reason to deny visitation for the custodial parent to show that the non-custodial parent pays no attention to her when she tries to explain what the child likes to do, who the child’s best friends are, or what the child likes to eat. And, it is not considered a good reason to deny visitation when the custodial parent shows that the non-custodial parent has repeatedly harassed or coerced her.\(^\text{154}\) Even if the conduct amounts to physical

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152. See BOWERMASTER, supra note 15, at 433-36 (detailing emotional, physical, and financial costs to a woman during 2 1/2-year effort to obtain court order allowing her to move with child away from abusive former husband).

153. See supra note 21 and accompanying text.

154. Courts typically uphold a parent’s right to visitation despite repeated harassment or coercion, but restraining orders may be issued in an attempt to protect the victimized parent. See, e.g., N.H. REV. STAT. ANN. § 458:16I(d) (1992) (courts may issue a temporary or permanent restraining order on parent to force that party to refrain from “harassing, intimidating or threatening the other party”); Petraglia v. Petraglia, 392 N.Y.S.2d 697 (N.Y. App. Div. 1977) (altering, but not denying, visitation rights in order to protect mother from ex-husband’s harassment when collecting his child for visitation); Bazzano v. Bazzano, 175 So. 2d 801 (Fla. Dist. Ct. App. 1965) (restraining father from harassing his ex-wife while still retaining his visitation rights with his child); MD. CODE ANN., FAM. LAW § 9-101.1(c) (Supp. 1997) (“If the court finds that a party has committed abuse against the other parent of the party’s child... the court shall make arrangements for custody or visitation that best protect the child who is the subject of the proceeding, and the victim of the abuse.”); A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND
violence or a threat of physical violence against the custodial parent, visitation will be allowed if arrangements can be made that are, in the eyes of the court, sufficient to protect her. 155

Two reasons are commonly given in support of judicial intervention: 1) contact with both parents is beneficial to the child, and 2) parents have a right to see their children. 156 The fact that the child lives in a caregiver/child unit is irrelevant to both rationales. Therefore, if judicial intervention impairs the caregiver's decisional autonomy and her sense of security and, as a result, impairs the caregiver's ability to care for the child, that is also irrelevant.

The twin rationales supporting judicially mandated visitation by uninvolved parents could serve equally well to support judicially mandated visitation by uninvolved biological parents after a child has been adopted. 157 In the case of adoption, contact with the biological parents could benefit the child. It might give the child a better sense of who he is or where she came from. It might provide the child with a more secure sense that the biological parents decided on adoption out of love rather than rejection. The biological

RECOMMENDATIONS § 2.20 (Tentative Draft No. 3, 1998) (if parent found to have engaged in [abuse], court may not allocate custodial responsibility or decisionmaking responsibility to that parent without making special written findings that child and other parent can be adequately protected from harm).

155. See supra note 154 and accompanying text.


157. The fact that an adoption has occurred and the adoptive parents have become the child's sole legal parents is not sufficient to distinguish the two situations, because courts have required adoptive parents to permit access to grandparents. See CZAPANSKIY, supra note 22; People ex rel. Sibley v. Sheppard, 429 N.E.2d 1049 (N.Y. 1981) (allowing grandparents to visit grandchild over adoptive parent's objections); In re Adoption of Anthony, 448 N.Y.S.2d 377 (Fam. Ct. 1982) (granting visitation to allow a twelve-year-old child to have contact with other siblings). See also Thrift v. Baldwin, 473 S.E.2d 715 (Va. Ct. App. 1996) (holding that grandparents and siblings have standing to seek visitation after adoption of relative). The legal parenthood title, therefore, is not without its limits. See Gilbert A. Holmes, The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy, 68 TEMP. L. REV. 1649 (1995).
parents might be able to give the child access to opportunities not available from the adoptive parents. Conversely, the biological parents could benefit from contact with the child. They could gain a sense of acceptance about their decision, especially if the child is thriving in the adoptive home. Their satisfaction with the adoption might be communicated to other people who might then contemplate adoption in a more favorable light and be motivated to place a child for adoption.

Despite all the potential benefits of judicially mandated visitation by previously uninvolved biological parents with an adopted child, courts and legislatures do not support it. Open adoption laws, in fact, take the opposite position. In the absence of a voluntary agreement by the adoptive parents to permit contact with the biological parents, adoptive parents generally cannot be ordered even to identify themselves to the biological parents during the child's minority. Why are adoptive parents insulated from intervention by biological parents? A major purpose is to enable adoptive parents to create and maintain the best possible caregiver/child unit. Allowing the judicial process to intervene in that relationship may result in a loss of autonomy and a sense of insecurity in the adoptive parents.158 Rather than allow interventions that might jeopardize the successful raising of a child, judicial intervention is not permitted, regardless of how beneficial it might be.

Interdependency theory posits that the lead caregiver in the caregiver/child unit must be accorded much more deference and the court much less latitude. In the case of the never-involved biological parent, in example one, the court could not order visitation while the child is young. A rule prohibiting judicial intervention would not prohibit the

158. In her examination of the dilemma of balancing the child's need for parental attachment against the child's need for a personal and cultural identity in the context of transracial adoption, Professor Woodhouse concludes, consistently with interdependency theory, that the child's need to attach to a family should have priority during the child's early years. As the child matures, she or he should have opportunities to identify as well with the family and group into which she was born. The duty of the adoptive parents and the society at large, therefore, would be to recognize and protect the young child's "need for continuity in her psychological or social family" while, simultaneously, recognizing and protecting the child's access to her or his heritage as the child matures. Barbara Bennett Woodhouse, "Are You My Mother?: Conceptualizing Children's Identity Rights in Transracial Adoptions, 2 DUKE J. GENDER L. & POL'Y 107, 128 (1995).
caregiver from deciding that visitation is beneficial to the child. It would, however, prohibit a court from making that decision for her. The caregiver would be treated like the adoptive parents who refuse to contract for an open adoption. Just as adoptive parents are given the privacy to raise their children without contact with previously uninvolved biological parents, single caregivers would be given the privacy to raise their children without contact with a previously uninvolved biological parent. Once the child has outgrown the need for the caregiver to intermediate between the child and the world, the need to protect and support the caregiver/child unit is less. At that point, the identity of an adopted child’s adoptive family can be revealed to the biological parents, and the identity of the biological parents revealed to the child. Similarly, once the child raised by a single caregiver is older, the previously uninvolved biological parent should be told the child’s location and permitted the opportunity to establish a relationship. Before that time, however, judicially mandated visitation should not be allowed.

What can the uninvolved biological father do to remedy the situation in the first example? Since he is denied the opportunity to use the courts to help him develop contact with the child, he must try to win the mother’s cooperation. He could try intimidation, but that will not serve his goals, because, under interdependency theory, no visitation will be ordered if the proposed visitor behaves disrespectfully towards the caregiver. His better option is to offer the mother some support in her role as lead caregiver. Perhaps she is in need of help with the child at particular times when he is free and she needs to be at work. Perhaps she needs some help persuading a school to provide the child with certain services. Perhaps she needs some financial assistance. When he begins to do supportive caregiving work, two things may begin to happen. First, he begins to develop a relationship through which the lead caregiver can see if he is reliable and respectful. Second, he begins to develop a claim for judicial intervention, because interdependency theory opens the door for an order of visitation to be entered in favor of someone who has behaved as a supporter of the caregiver for a period of time.

In the second example, where the father dropped out, the
mother should prevail under interdependency theory. Being a supporting caregiver is not easy. As many as half of parents with visitation rights fail to exercise them.\textsuperscript{159} Just as in the example, it is not an unusual pattern for the father to grow increasingly unreliable over several years.\textsuperscript{160} Interdependency theory would not take the first or second instance of unreliability as evidence that he has withdrawn from his role as supporting caregiver. But the theory does recognize that a supporting caregiver can, in effect, demonstrate that he has "resigned" over time by failing to exercise his visitation rights. His resignation imposes costs on both the child and the lead caregiver. The child loses contact with a person whom the child wants to trust and rely on. The lead caregiver loses a person who had provided support. Refusing to recognize a resignation and leaving the door fully open to the supporting caregiver—including access to judicial remedies—imposes additional costs. The lead caregiver owes certain duties to the supporting caregiver, such as respectfulness and reliability. When the supporting caregiver fails to perform the role, the lead caregiver needs to be relieved of the complementary responsibilities and get on with the task of raising a child in circumstances with less support. The lead caregiver may want to move to a different city, for example, and should not have to contend in court with opposition from a formerly supporting caregiver on the basis that he or she may want to resume a relationship with the child in the future.\textsuperscript{161} The lead caregiver may want to

\textsuperscript{159} CZAPANSKIY, \textit{supra} note 22, at 1449.

\textsuperscript{160} See CZAPANSKIY, \textit{supra} note 54; FRANK F. FURSTENBURG, JR. \& ANDREW J. CHERLIN, \textit{DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART} 17-18 (1991) (explaining that fathers are frequently discouraged from continuing contacts with their children after divorce); Judith S. Wallerstein \& Julia Lewis, \textit{The Long-Term Impact of Divorce on Children: A First Report From a 25-Year Study}, 36 \textit{FAM. \& CONCILIATIONCTS. REV.} 368, 374-75 (1998) (stating that non-custodial father's contact with children fluctuates wildly depending on his sense of success or failure); Constance R. Ahrons, \textit{Predictors of Paternal Involvement Postdivorce: Mothers' and Fathers' Perceptions}, J. DIVORCE, Spring 1983, at 55, 67 (suggesting that the relationship between the two parents has a significant effect on noncustodial father's involvement with children after divorce); Mary Ann P. Koch \& Carol R. Lowery, \textit{Visitation and the Nonresidential Father}, J. DIVORCE, Winter 1984, at 47, 62 (stating that noncustodial fathers report the need to compromise with custodial mother to maintain regular contact with their children).

\textsuperscript{161} When applying the change in circumstances test to decide whether a parent should be allowed to relocate with minor children, courts often examine
establish a relationship with another adult who could become a supporting caregiver, but she may be deterred by the continuing enforceability of the visitation order favoring the former supporting caregiver because the new relationship might also result in a visitation order and the combination would be too disruptive of her caregiving.\textsuperscript{162}

Again, a decision to deny a formerly supporting caregiver of judicially-enforceable visitation is not the same as a decision to cut off his or her contact with the child, although it may have the same impact. Some parents voluntarily arrange visitation with people, who have no legal right to see a child, especially if the parent sees the experience as an

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\item whether the non-moving parent will be able to continue to exercise the custodial responsibilities the parent is entitled to. If the non-moving parent has been absent from a child's life, however, relocation by the custodial parent should not satisfy the change in circumstance standard, as some courts and commentators have noted. See A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.20 (Tentative Draft No. 3, 1998); In re Marriage of Francis, 919 P.2d 776 (Colo. 1996) (concluding that it is necessary to focus on the “practical impact of a custodial order upon the children, not just the legal consequences”); Taylor v. Taylor, 849 S.W.2d 319 (Tenn. 1993) (reversing order prohibiting relocation of mother and minor because father had not made himself available for scheduled visitations).
\item 162. Professors Scott and Scott agree that it is appropriate to allow a single parent to terminate the visitation rights of an “Enoch Arden” parent, the noncustodial parent who disappears. SCOTT & SCOTT, supra note 38, at 2470-72. Continuing to accord such parents unconditional visitation rights, they argue correctly, serves to “vindicate parental rights without promoting responsibility and commitment, often at the cost of the child's relationship with a functional parent.” Id. at 2471. They differ from interdependency theory, however, in proposing an all or nothing solution. Terminating visitation rights for the Enoch Arden parent, in their view, requires terminating his parental rights. Id. Unless the custodial parent is willing to forego child support, therefore, she cannot deprive the disappearing parent of his right to unconditional visitation. As explained earlier, I view terminating parental rights as an unnecessary and destructive move that may disserve an older child and that serves to insulate a wealthy custodial parent from the demands of an Enoch Arden parent while leaving the economically vulnerable custodial parent exposed. In addition, a parent who has deprived a child of his or her personal involvement should not be rewarded financially. Indeed, there is better reason to increase his child support to cover costs of nonvisitation. See CZAPANSKIY, supra note 22; HEWLETT & WEST, supra note 111, at 243-44. Finally, in my view, the Enoch Arden parent should have the opportunity to connect with the child once the child is an adolescent, since such contact is not as likely to undermine the custodial parent's capacity to do his or her best for the child during the child's younger and more dependent years. I leave open the termination option, however, if the custodial parent is firmly convinced that later contact with the Enoch Arden parent is wrong for the child and worth the financial cost to the parent.
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appropriate and beneficial one for the child. The mother in the example may conclude, based on her deep knowledge of the child, that the child’s resistance to the father’s vacation plans has less to do with the child’s feelings for the father than it has to do with a reluctance to be away from playmates for so long. The mother could suggest that the father plan a vacation involving the child for only one week, and the child’s response may be more positive. On the other hand, if the mother is forced into accepting three weeks or nothing, based on a ruling by a judge who has much less information, and after a proceeding which has cost scarce funds, it is less likely that she will be moved to make the suggestion. The father may also try to improve his legal situation by attempting to see the child on a more regular basis. While the mother may refuse, it is more likely that requests for visits that complement her schedule will be well received. After spending some time as a supporting caregiver, the father will regain a legal entitlement to visitation. Further, when the child becomes older, probably in her early teens, she will have the right to decide for herself if she wishes to spend time with her father.

The grandparent visitation example is the one most likely to result in a visitation order under interdependency theory. At present, the rule in most states would result in a visitation award for the grandmother. The reasons, however, would differ from the reasons under interdependency theory. The typical situation in a grandparent visitation case now involves previously married

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163. H ewlett & West, supra note 111, at 157-59, presents one such example. A boy named Juan had a father who had been in prison for many years. His mother, not wanting him to forget his father, took Juan to visit his father in prison every weekend for years.

164. Of course, a custodial mother who remains angry with her ex-husband, for real or imagined reasons, is far less likely to cooperate, even if his requests are polite and he is willing to accommodate her schedule and needs. Everyone who has practiced family law or spoken with friends or family about their divorce knows at least one example. The number may be far smaller than we suspect, however, because legal actors are not accustomed to counseling noncustodial fathers about the importance of being consistent, reliable and supportive visitors, nor do we insist that visiting parents demonstrate courtesy or respect toward their former partners. Rather, we turn our attention toward entitlement. He has a “right” to visitation, so why must he be polite, supportive or reliable in exercising the right?

165. Czapanskiy, supra note 22, at 1331.
parents. The child is in the mother's custody and spends alternate weekends and holidays with the father. The father's parents want to spend more time with the child than the father affords. Their relationship with the child has been typical for grandparents in the United States. That is, they see the child on special occasions, approximately once a month. When their contact declines after divorce, courts in most states would award visitation. The formal standard is the best interests of the child, and the claim is that the child benefits from continuing contact with the father's family.166

Under interdependency theory, the grandmother's claim for visitation arises out of her willingness to support the lead caregiver in his time of need, as demonstrated by taking both father and child into her household. During their period of co-residency, she may have sacrificed privacy, money, and time. She may have become more involved with and quite devoted to the child. Children need people who are willing to support them and their lead caregivers in this way, or their lives become much more difficult. The altruism of these supporters needs to be recognized and encouraged. Thus, supporters should not be deprived of access to the child, unless they are incapable of being respectful of the caregiver.

The contrast between interdependency theory and the best interests test in most grandparent visitation decisions is about behavior as compared to status. There is little evidence that a relationship with grandparents per se is of great importance to most children.167 What is more important for the child is what the grandparents do, not who they are. And one of the most important things they can do is help the child's lead caregiver through a time of stress. Interdependency theory does not recognize grandparenthood as a status entitling a person to judicially enforced visitation. Instead, it recognizes the contributions a grandparent—or any other supporting caregiver—may provide as the basis for a judicially enforced visitation order.

V. CONCLUSION

Interdependency theory is a back-to-basics idea. A child needs a caregiver, and a caregiver needs help from other

166. Id. at 1348.
167. Id. at 1324, 1330.
people and from social institutions. Conversely, society is dependent on the caregiver(s) to raise the child well enough that the child joins society with reasonable physical and mental health and sufficient skill to be a productive member of the culture.

Viewing the child within the reality of the child's connection with, and dependency on, the caregiver, rather than as an independent actor, alters the ways law should intervene in the lives of children. Rather than claiming to intervene directly, legal actors must acknowledge that interventions run through the caregiver or caregivers, and that the caregiver's need for support as a caregiver must be the focus. In the context of visitation, interdependency theory mandates that the proposed visitor be a person who has more than an abstract, status-based claim to the child's time. The goal is to reward people who behave in supportive ways, so caregivers can do what the child needs. For a proposed visitor to be able to assert the force of law, therefore, he or she must demonstrate a history of supporting the child through supporting the caregiver. Further, the visitor must continue to behave supportively of the caregiver and child throughout the course of the judicially mandated visitation.

Interdependency theory has implications within family law in matters such as custody, child support, and alimony. It also has implications for other social policies that impact on the lives of children, such as public benefits, education policy, and conditions of employment. What is fundamental is that interdependency theory should serve to remind legal and policy decision-makers that people who care for children do society a great service. Caregivers are the people that we, as a society, have entrusted with the task of nurturing and protecting children. Without their commitment and devotion, children will either die or grow up without achieving their potential. Caregivers cannot do this alone. They need the village, to use a popular metaphor. The village, in modern American terms, may consist of family members, friends who have become like family, employers, educators, churches, and bureaucrats. If we allow the village to ignore caregivers, we are all diminished. Interdependency theory takes us back to the basic idea that the child needs the caregiver, the caregiver needs support, and we, the potential supporters, need the caregiver.