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PARENTAL AUTONOMY AND CHILDREN'S WELFARE

Elizabeth S. Scott*

A perusal of recent trends in child custody law reveals that interesting and somewhat puzzling patterns have emerged as lawmakers have responded to an increase in divorce and changes in family structure.¹ In general, these reforms aim to promote stability in children's lives and to reinforce relationship bonds with caretaking adults, yet they do not constitute a very coherent mix. Many of the recent legal developments reflect increasing deference to parental choices and an expanded recognition of parents' authority to decide how their children should be reared after the nuclear family dissolves. This purpose is prominent both in reforms of substantive custody law and in procedural innovations that encourage parents to take greater responsibility for deciding custodial arrangements. As Katherine Bartlett has observed, these developments are compatible with traditional deference toward parental autonomy,² a value that is viewed with some wariness by those who argue that the child's welfare should be the primary focus of legal policy.³ At the same time, other important legal developments appear to run counter to this expansive recognition of parental autonomy. The first is the increased emphasis on domestic violence as a factor in decisions about child custody and visitation. The second is the trend toward recognition of custody and visitation claims by grandparents and other nonparents. Through these developments, lawmakers seem

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¹ I was inspired to write this Essay by a paper on recent custody developments by Dean Katharine Bartlett, presented as part of a symposium on child custody at the University of Virginia School of Law. Dean Bartlett has served as the Reporter for the child custody chapter of the American Law Institute's recently adopted Principles of the Law of Family Dissolution. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 2 (2002) [hereinafter A.L.I. PRINCIPLES]. In the paper, later published in a symposium issue, she outlined many of the developments that are the basis of my analysis in this Essay. See Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5 (2002).

² Bartlett, *supra* note 1, at 51–52. In truth, as I will demonstrate, the reforms represent an extension to separated parents of the deference given to parental autonomy in the intact family.

³ See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

ready to intrude upon parental autonomy to a greater extent than was allowed by traditional law.

My aim in this Essay is to offer both a positive and normative account of these legal trends. The short form of my argument is as follows: Most of these law reforms — the ones regulating the parent-child relationship upon divorce or dissolution — can be understood as unplanned but coherent efforts to encourage divorcing parents to function more like parents in intact families rather than in the traditional roles of divorced parents. This goal is most likely to be achieved if parents are motivated to continue to identify their interests with those of their children and to maintain their commitment to fulfilling parental responsibilities. The reforms regulating dissolution of the intact family — the substantive and procedural innovations and the emphasis on domestic violence — can be understood as encouraging appropriate parental attitudes and behavior through a regulatory regime that, in effect, treats parents as fiduciaries entrusted with their children's welfare.⁴ A fiduciary model of parental regulation recognizes the importance of respect and autonomy in encouraging parents to dedicate themselves to their children's interests. Under a fiduciary model, legal regulation that diminishes parental autonomy in child rearing — by giving third parties custody and visitation rights without full parental status, for example — threatens the law's goal of promoting children's welfare through parental dedication. Thus, perhaps counterintuitively, reforms that seem to reinforce parental "rights" serve to protect children's interests, whereas those that are designed to promote the child's interest in relationships with important "parent"-like adults threaten to frustrate the child's most important bond: the relationship with her care-giving parent.

The model of parents as fiduciaries that informs my analysis is one that Robert Scott and I developed in a Virginia Law Review article several years ago.⁵ We argued that the relationship of parent and child has a lot in common at a deep structural level with those of fiduciaries and principals in other legal contexts, and that, to a considerable extent, the regulation of the parent-child relationship conforms to a fiduciary model. Like other fiduciaries (trustees, executors, guardians, corporate directors and managers, etc.), parents are agents whose legal responsibilities give them authority to make decisions that affect the interests of people who are not capable of looking out for their own interests or of monitoring whether the fiduciary is doing a good job.⁶ The law's challenge is to encourage

⁴ See generally Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (outlining a model for treating parents as fiduciaries and applying those principles to contemporary family law). The reforms do not create a formal fiduciary relationship between parent and child. Rather, the regulatory scheme is compatible with a fiduciary model of regulation.

⁵ *Id.*

⁶ This incapacity can be due either to incompetency, as is the case with children or mentally disabled wards, or to lack of information and expertise, as in the case of corporate

parents to act in the interests of their children rather than in their own selfish interests. Toward this end, in regulating the intact family, lawmakers have relied to a substantial degree on relatively effective and inexpensive informal mechanisms to constrain parental discretion and to encourage parents to fulfill their obligations; parents are compensated for doing a satisfactory job through legal deference to their authority. When the intact family breaks down, however, lawmakers traditionally have restricted parental authority and substituted more costly formal mechanisms to monitor behavior and encourage parental compliance.⁷ An unintended effect of this treatment may be to exacerbate parental dissatisfaction, leading to a downward spiral of detachment and disinterest that is destructive of the parent-child relationship.⁸

As this Essay will demonstrate, lawmakers have responded to the contemporary reality that large numbers of children live in divorced families by encouraging parents who do not live together to behave more like parents in intact families. In part, this means simply promoting the continued involvement of both parents in their children's lives.⁹ Many noncustodial parents have little contact with their children or fail to provide financial support; when this happens, children experience substantial costs.¹⁰ The unspoken premise of the recent reforms is that parents will

shareholders.

⁷ This is due, in part, to a view that relationship bonds and norms no longer function adequately to motivate optimal parental attitudes and behavior. Parental authority is also restricted and subject to formal oversight under state abuse and neglect supervision when parents fail to perform adequately. See *infra* note 24.

⁸ See *infra* notes 27–32 and accompanying text.

⁹ An express goal of modern custody law is to maintain relational bonds between children and both of their parents. The Iowa provision is typical. See IOWA CODE § 598.41 (2000) (“[T]he court . . . shall order the custody award . . . which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . . and which will encourage parents to share the rights and responsibilities of raising the child . . .”). This policy is evident in the availability of joint custody (an innovation of the last generation) and in the emphasis on parents promoting the child's relationship with the other parent as a factor in custody. See UNIF. MARRIAGE & DIVORCE ACT § 402 (holding that, in deciding custody between parents, court should consider “the ability of the custodian to encourage the sharing of love, affection, and contact between the child and the noncustodial parent”). See generally Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455 (1984).

¹⁰ Most concretely, children suffer significantly when noncustodial parents fail to support them financially. Despite improved enforcement mechanisms, compliance with child support orders has not improved greatly in recent years. See IRA ELLMAN ET AL., *FAMILY LAW: CASES, TEXTS, PROBLEMS* 573–74 (3d ed. 1997). Many parents also do not maintain contact with children with whom they do not live. See ROBERT E. EMERY, *MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT* 74–78 (2d ed. 1999) (describing trend toward reduced contact with noncustodial parents and impact on children); MAVIS HETHERINGTON, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* 117–23 (2002); Mavis Hetherington, *Divorce: A*

be more likely to continue to invest in their children's lives if the parental role is rewarding after the family dissolves, and that giving parents some semblance of the authority and respect that they enjoyed before divorce will increase satisfaction. This approach carries some risk, of course, because the informal mechanisms (powerful social norms and affective bonds) that regulate parents' behavior in intact families tend to become less effective when the family dissolves. Thus, it is particularly important not only to encourage parental satisfaction (and thereby enhance the relational bonds) in the post-dissolution family, but also to reinforce the norms against domestic violence and to exclude or formally monitor those parents who violate these norms. If the regulatory scheme succeeds, the payoff is substantial: Parents will continue to dedicate their efforts to fulfilling their responsibilities toward their children, parent-child relationship bonds will be better preserved, and children's welfare will be enhanced.

The fiduciary model also clarifies why the seemingly benign trend toward recognizing third party claims to custody and visitation can have pernicious effects. The allocation of custody or visitation to outsiders over the objections of responsible parents diminishes parents' authority to decide whether the continuation of those relationships serves their children's interests. Although children usually benefit from the continuation of loving relationships with those adults who have played a significant role in their lives, this may not be true if the parent objects. A fiduciary approach does not favor biological parents over those who attain parental status in some other way,¹¹ but it does argue that the adults who are given the legal status of parent with the attendant responsibilities of this role should be respected in the choices they make. Thus, although a sensible legal regime would allow partners or spouses of parents to formally attain parental status while the family is intact, it usually would not invite claims by nonparents on the basis of a past caretaking relationship.

The Essay proceeds as follows. In the next Part, I briefly describe the fiduciary model and sketch how it shapes the legal regulation of the parent-child relationship. Under traditional law, the model has worked quite effectively in the intact family, but less so after the family dissolves. Part II explains how the fiduciary model illuminates the direction of recent developments in custody law as a coherent but

Child's Perspective, 34 AM. PSYCHOLOGIST 851 (1979); Mavis Hetherington et al., *Effects of Divorce on Parents and Children*, in NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233 (Michael E. Lamb ed., 1982); Mavis Hetherington, *Effects of Father Absence on Personality Development in Adolescent Daughters*, 7 DEVELOPMENTAL PSYCHOL. 313 (1972).

¹¹ Nothing in my argument favors biological parents, although the trend toward recognizing third party claims grew in part out of frustration with the entrenched status of biological parents. Some third party claims — i.e., those for full parental status by a long time primary caretaker — are compatible with the fiduciary approach. See *infra* notes 80–81 and accompanying text.

uncoordinated effort to align the interests of parent and child and to promote parental investment in their children's lives. The last Part turns to the recognition of third party custody claims, a reform that destabilizes the fiduciary relationship and challenges the model. I conclude that replacing models of regulation based on either parents' or children's rights with one based on fiduciary principles will better serve both children's and parents' interests in their relationship.

I. A FIDUCIARY MODEL OF THE PARENT-CHILD RELATIONSHIP

Fiduciary relationships are grounded in the obligation of the fiduciary to the principal.¹² Thus, to understand the parent-child relationship in this framework is to shift away from the traditional focus of parents rights, and also from the more contemporary emphasis on children's rights, to one in which the relationship between parent and child has primary importance. Under a fiduciary model, the goal of regulation is to harmonize the interests of parents with those of their children and thereby to promote beneficial investment by the parents in the relationship. The law's ultimate goal, of course, is to assure that children's needs are met, which, it is assumed, will happen if parents are good fiduciaries.

A. A Brief Sketch of the Fiduciary Model

In regulating parents as fiduciaries, the law confronts a set of challenges that are inherent in these complex agency relationships in which satisfactory performance by the agent requires considerable discretion, but the principal, due to incapacity or other vulnerability, is not able to supervise or control that performance effectively.¹³ Agents in fiduciary relationships have unique opportunities and incentives to misbehave (either by shirking or cheating), incentives that lawmakers seek to change by encouraging the pursuit of collective, rather than personal, goals. Thus, fiduciaries are subject to strict and nonnegotiable duties of loyalty (no self-dealing) and care (reasonable diligence) in acting on behalf of their principals, and these duties define the standard of performance — although the strictness of the duties varies in different contexts.¹⁴

¹² See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1126–30 (1981) (describing “special duty” to protect principal's interest in fiduciary relationships).

¹³ Sometimes the principal is vulnerable due to a lack of information, expertise, or knowledge relative to the principal, which leaves the principal unable to effectively protect her interest. The relationship between corporate directors or managers and stockholders is representative of this kind of fiduciary-principal relationship.

¹⁴ See Scott & Scott, *supra* note 4, at 2419–24. In part, differences are based on the complexity and scope of fiduciary performance and need for discretion. Thus, the prohibition against self-dealing is stricter for executors and trustees than for corporate managers and

An array of informal and formal arrangements function to encourage fiduciaries to act in their principals' interests. These include both bonding mechanisms that align the fiduciary's interest with that of the principal and monitoring mechanisms to provide *ex post* accountability.¹⁵ For example, social and legal norms serve both bonding and monitoring functions that operate mostly at an informal level.¹⁶ Fiduciary law uses hortatory rhetoric to instill in fiduciaries a personal sense of moral obligation; courts speak of fiduciary duty in language that communicates strongly that this is not "business as usual."¹⁷ This rhetoric and the legal standard of performance are powerful signals that the role is one of the highest loyalty and trust.¹⁸ The fiduciary role enjoys respect in the community, and reputational costs attend violations of duty. Affective and familial attachment constitutes another bonding mechanism that is employed in many fiduciary settings. The tradition, often legally endorsed, of using family members as fiduciaries can be explained on the ground that a family member is more likely to identify her interests with those of the principal and less likely to abuse discretion.¹⁹ Family fiduciaries anticipate the costs of humiliation upon default that discourage self-interested behavior.

Informal bonding mechanisms are the least costly component of a regulatory scheme that seeks to deter self interest and promote responsible fiduciary behavior; but more intrusive and costly monitoring arrangements also are important. Many fiduciaries are subject to formal monitoring by courts or state agencies through

directors, who engage in a broad range of activities for the corporation. Under the business judgment rule, corporate managers are protected by a presumption of due diligence and good faith, but they will be sanctioned if the judgment is tainted by a conflict of interest or gross negligence.

¹⁵ Bonding mechanisms are precommitments undertaken by (or imposed on) the fiduciary *ex ante* to restrict her future actions (often through sanctions for default), so as to limit conflicts of interest with the principal and ensure faithful performance. Monitoring mechanisms provide *ex post* accountability through oversight, reporting, sanctions and the like. The functions of bonding and monitoring arrangements to promote diligent efforts by agents was described in Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

¹⁶ Norms serve a bonding function because individuals internalize behavioral guidelines and recognize that they will experience guilt upon violation. Community members monitor behavior and sanction violators through disapproval. Some legal norms are monitored by government officials.

¹⁷ See Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, in PRINCIPLES AND AGENTS: THE STRUCTURE OF BUSINESS, 55, 56-59 (John W. Pratt & Richard J. Zeckhauser eds., 1985) (describing the difference in rhetoric used in describing fiduciary obligations and those of ordinary commercial relationships).

¹⁸ *Id.* at 75-76. Fiduciaries also understand that violation of these legal norms, through self-dealing or lack of reasonable diligence, carries the threat of legal penalties.

¹⁹ Trustees, executors, guardians, and managers of close corporations are often family members. See UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT §§ 2-205, 2-309 (1982) (establishing the priority of a family member as guardian).

reporting requirements, and some fiduciary decisions are subject to court approval. In the corporate context, fiduciaries are subject to government oversight by the Securities and Exchange Commission. The sanction for serious fiduciary misbehavior is judicial termination of the relationship and replacement of the fiduciary.²⁰

What are the rewards for the fiduciary of a relationship structured primarily to serve the interests of the beneficiary? Although most fiduciaries receive financial compensation, an important component of role satisfaction is reputational reward and self esteem. The role of trustee, for example, invokes community respect; it signals that the individual has been given an important responsibility and is trustworthy and morally upright. Community recognition of these associated traits enhances the value of the fiduciary role.

B. Regulation of Parents in Intact Families

In regulating the parent-child relationship in the intact family, the government relies to a large extent on informal bonding and monitoring mechanisms to constrain parental discretion and to encourage parents to fulfill their obligations. Most important are powerful bonds of affection that lead most parents to identify with their children's interests and social norms that define societal expectations for acceptable parenting behavior.²¹ In contrast to other fiduciary contexts in which norms of obligation are legally constructed, norms regulating parental obligation are well established independently of law. Parents are subject to strong social pressure to care for their children and they internalize societal expectations as constraints on their behavior.²² Those whose parental performance is inadequate are subject to both guilt and societal disapproval. The law reinforces and encourages desirable norms by announcing expectations about parental behavior, often with little formal enforcement. For example, vehicle child restraint laws are effective even if few

²⁰ Although other principals have the power to terminate agency relationships, principals in fiduciary relationships often are not positioned to do so. See GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES*, § 527 nn.3 & 7 (rev. 2d ed. 1993) (citing statutes which define the powers of fiduciaries).

²¹ See Scott & Scott, *supra* note 4, at 2432–37 (describing extralegal mechanisms regulating parental behavior). Parents also are subject to preemptive legal rules that minimize potential conflicts of interest. For example, child labor and school attendance laws preempt parental authority.

²² Thus, parenting norms serve both as *ex ante* bonding arrangements (because parents assume the role anticipating guilt and external sanctions for violations) and as monitoring mechanisms (because relatives, neighbors, and others in the community monitor parents' behavior). See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000) (describing the powerful impact of "parental commitment" norms on parents' behavior).

parents are arrested.²³ Because informal norms (combined with affective bonds between parents and children) function quite effectively to encourage attitudes of obligation and adequate performance, lawmakers can define the boundaries of acceptable parental conduct through standards for abuse-neglect intervention, but otherwise utilize only a minimal amount of formal monitoring in intact families.²⁴ This balance protects family privacy without sacrificing children's welfare. State monitoring takes place indirectly through school attendance requirements and mandatory physical exams, and directly through child abuse reporting requirements for professionals who work with children.²⁵

Legal deference to parents' authority over child rearing plays a key role in the fiduciary model, because it serves as compensation for the job parents do. Parents are not paid to rear their children. They are entrusted with an obligation that is of critical importance to society and they are compensated only through the satisfaction that they get from their relationship with their children and from their role as parents. Legal regulation can enhance or reduce that satisfaction. Intrusive legal oversight of parents' behavior and rearing decisions would likely diminish role satisfaction considerably. Thus, the law's stance of deference to family privacy and its reliance on informal bonding and monitoring mechanisms recognizes the costs of government involvement in the family — costs to parents' perceptions of their role as one of trust and responsibility, and to their general sense of gratification in that role.²⁶ In this light, the standard criticism of parental rights as representing property-like claims by parents seems off base. The fiduciary model of regulation

²³ *Id.* at 1926–30. Legal rules can serve to clarify a norm consensus (about the importance of using vehicle child restraints, for example).

²⁴ When parents fail as fiduciaries by abusing or neglecting their children, they lose autonomy. At that point, formal state monitoring by social service agencies is invoked — with attendant reporting and judicial supervision — and parental control over rearing decisions is restricted or suspended until parents remediate the deficiencies that resulted in state intervention. Even then, they may be subject to continued state supervision as they resume their parental role. The loss of parental authority that follows state intervention in response to abuse or neglect is generally deemed to be a humiliating judgment about parents' failure to fulfill their basic responsibilities. Thus, in general, parents care for their children and make rearing decisions in the shadow of the state's power to intervene and strip them of respect and authority should they not perform satisfactorily. The state maintains a complex apparatus of regulatory machinery for the purpose of monitoring and supervising parents, but most intact families do not warrant (or get) official supervision. The extent to which the background threat of intervention will be salient to parents in their every day lives depends on social class and family structure (i.e., single parents who require financial assistance from the state will be much more threatened by this state power).

²⁵ School attendance requirements provide an opportunity for state monitoring, but this is not their primary purpose. See CAL. PENAL CODE § 11,166 (West 2000) (requiring physicians, teachers, and other professionals to report suspected child abuse).

²⁶ See Scott & Scott, *supra* note 4, at 2440.

clarifies that parental autonomy serves an important function as a reward for satisfactory performance of the obligations of parenthood. Parental rights also insure that the costly investment that parents make in rearing their children is afforded legal protection. This insurance constitutes an implicit promise that as long as parents do a satisfactory job, their authority and privacy will be respected. Thus, under the fiduciary model, parental rights and responsibilities are inextricably linked through a feedback effect that functions to promote the child's welfare.

In general, this approach to regulating parental behavior in intact families works well. Minimizing formal state supervision is cost-effective; it also protects family privacy and respects the authority of parents to make rearing decisions. Protection of parental autonomy functions as compensation for satisfactory fiduciary performance and encourages parental investment in relationships with their children.

C. Regulation after Family Dissolution

When the intact family dissolves, regulation becomes more formal, because there is less reason to be confident that parents will continue to identify their own interests with those of their children. Although custodial parents in separated families may have conflicts of interest with their children,²⁷ the problem is particularly acute for noncustodial parents. These parents may get less satisfaction from relationships with children not living with them, especially if contact with children is colored by hostile interactions with former partners. Reduced parental satisfaction may also be linked to the loss of child-rearing authority and the respect that is associated with the parental role. Finally, if a noncustodial parent leaves the social community in which the family has lived, he may be less subject to sanctions imposed on those who violate social norms promoting optimal parental behavior.²⁸

In general, legal regulation replaces informal mechanisms when the family dissolves and parental discretion and autonomy are diminished. This can be observed in several areas. First, upon dissolution, decisions about the child's future are either made by a court or, more typically, subject to judicial monitoring and control. Time with the child is formally divided under a custody-visitation order, and authority over child care and rearing decisions may also be formally assigned to one parent or the other — in general or on specific issues.²⁹ Further, although

²⁷ For example, the parent with whom the child lives may discount the interest of the child in maintaining a close relationship with the other parent.

²⁸ For example, consider the reaction of friends and neighbors to information that a non-custodial parent is not paying child support. If that parent moves to another town or has little contact with former family friends, he will not experience the costs of violation as acutely. See Scott, *supra* note 22.

²⁹ Thus, authority over religious upbringing or education may be awarded to the parent with physical custody, shared by the parents, or given to the noncustodial parent. See A.L.I.

parents are trusted to provide financial support for their children in intact families, after divorce this obligation is formalized under a support order and enforced by state agencies. Although parents in all postdissolution families lose some measure of authority, the extent of the diminution is inversely correlated with parents' ability to act cooperatively.³⁰ Moreover, although the authority of both parents is reduced, restrictions on noncustodial parents have been quite burdensome under traditional law.

Formal legal mechanisms are more costly than the informal means that operate in intact families and probably function less effectively to promote children's welfare.³¹ Indeed, it seems quite plausible that the following negative feedback cycle may emerge in response to the new regulatory arrangements: As regulation of the parent-child relationship becomes more formalized, deference to parental authority and discretion are reduced. This reduction in authority and respect makes the parental role less satisfactory, particularly for the noncustodial parent, whose time with the child is limited and authority largely subject to that of the other parent.³² Dissatisfied parents are likely to become less inclined to identify their children's interests with their own, which, in turn, diminishes their investment in the relationship and their enthusiasm for fulfilling their parental responsibilities. This, of course, reinforces the inadequacy of informal enforcement mechanisms (as affective bonds weaken) and increases the importance of formal legal regulation in the enforcement of parental obligations. This downward spiral ultimately may lead to a situation in which the parent complies with his financial child support obligation only in response to severe legal sanctions (if at all) and otherwise has a distant or nonexistent relationship with his child. Thus, formal regulation does not

PRINCIPLES, *supra* note 1, § 2.10, Reporters Notes cmt. a (describing the traditional law regulating parental decision-making authority on dissolution).

³⁰ Parents who litigate custody necessarily lose control over planning and decision making for their children, and must submit to a judge's decision about their child's future living arrangements and their roles in their children's lives. In the absence of evidence of power imbalance or domestic violence, courts are likely to ratify the agreement parents make. *See infra* text accompanying notes 53–54.

³¹ Consider, for example, the system of child support enforcement in this country, which includes an elaborate network of regulations enforced by local government agencies to assure compliance. *See ELLMAN ET AL., supra* note 10, at 573–80. Child support enforcement is extremely costly and not particularly effective. There is reason to believe that many parents who willingly provide financial support for their children when their families are intact become defaulters after divorce.

³² For example, parents may resent the restrictions on their relationship with their children when they are subject to a visitation schedule and are not authorized to make child-rearing decisions. M. ROMAN & WILLIAM HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY* 1 (1978). This makes it difficult to function in an ordinary parental role. The designation "Disneyland Daddy" characterizes the unsatisfying postdivorce status of many noncustodial fathers.

function as an effective substitute for the informal means that regulate intact families. Indeed, it carries costs that may be detrimental to children's welfare, costs that were inadequately recognized until recently.

II. LEGAL REFORMS OF CUSTODY LAW IN A FIDUCIARY FRAMEWORK

Many of the legal reforms of child custody law over the past decade or so can be understood as an effort to reverse this downward spiral. A policy consensus has emerged during this period that an overriding goal of child custody law should be to encourage the continued involvement of both parents in their children's lives after divorce, as a means to promote the best interests of children.³³ Lawmakers implicitly acknowledge that the traditional approach to child custody has undermined this goal by diminishing the status and authority of parents (particularly noncustodial parents) and by deterring cooperation. To remedy this problem, contemporary lawmakers employ lessons of the more successful fiduciary regime governing the intact family to minimize conflicts of interest between parents and their children after dissolution and to encourage parents to perform their duties with diligence.³⁴ The fiduciary model recognizes the need to minimize regulatory burdens on the parent-child relationship, the importance of respect and autonomy to parental role satisfaction, and the reciprocal relationship between role satisfaction and fulfillment of responsibility. The model also recognizes, however, that a regime that defers to parental autonomy and relies heavily on informal bonding and monitoring mechanisms must clearly establish outer boundaries of acceptable parental behavior. Although it would be fanciful to suggest that lawmakers have sought explicitly to operationalize the fiduciary model, contemporary law increasingly reflects its insights.³⁵

This is evident in both substantive and procedural regulation of custody. Substantive reforms include an increased emphasis on past parenting roles as a basis for future custody, a focus that respects parental choices and protects their investment in rearing.³⁶ Other developments, such as the growing popularity of joint legal custody and the extension of parental privileges to both parents, serve to elevate the noncustodial parent role into one with increased status and authority. Recent procedural developments also fit comfortably within the fiduciary model by encouraging parents to cooperate in taking responsibility for planning their

³³ See *supra* note 10 (describing evidence of harm to children when relationships with both parents are not maintained). Lawmakers may be driven by practical considerations as well. Parents who continue to be involved with their children may be more inclined to fulfill their child support obligation voluntarily, reducing government enforcement costs.

³⁴ Scott & Scott, *supra* note 4, at 2430.

³⁵ *Id.*

³⁶ Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 650 (1992).

children's future (as they would in intact families) and by giving legal recognition to the decisions they make. For example, judicial deference toward parents' agreements and the increased use of custody mediation, parenting plans, and divorce counseling all promote parental responsibility. Finally, the growing importance of past domestic violence, both as a factor in designing custody and visitation arrangements and as a constraint on the process employed, is a critical component of a trend toward greater autonomy for divorcing parents.³⁷ Parents who engage in violent family behavior reveal that they are not trustworthy fiduciaries and that they should not be rewarded with the respect and authority that the parental role carries.

A. Reforms Directed at the Allocation of Custody and Responsibility

The indeterminate best interest of the child standard has long been the target of criticism, and its shortcomings are well documented.³⁸ Recently, efforts to improve the predictability of custody decisions and to limit open-ended fact finding and broad judicial discretion have led courts and legislatures to focus on the importance of past care-taking roles as a key factor in allocating custody.³⁹ The American Law Institute takes this approach in adopting an "approximation" standard in its recently adopted Principles of the Law of Family Dissolution.⁴⁰ Under the A.L.I. standard, custody after divorce is allocated between parents in proportion to the care-taking roles that each parent assumed in the intact family.⁴¹ This standard defers to the choices that parents made when dividing the responsibilities of child rearing in the intact family.⁴² If both parents invest equally in caring for the child, they will continue to share responsibility when they divorce, whereas if one parent assumes

³⁷ Bartlett, *supra* note 1, at 26–27.

³⁸ See Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975); Scott, *supra* note 36.

³⁹ COLO. REV. STAT. § 14-10-124(1.5)(a) (2002) (“[T]he court shall consider . . . [w]hether the past pattern of involvement . . . with the child reflects . . . time commitment . . .”); N.J. STAT. ANN. § 9:2-4(c) (West 2002) (“[T]he court shall consider . . . the extent and quality of the time spent with the child . . .”); W. VA. CODE ANN. § 48-9-206 (Michie 1999) (adopting A.L.I. standard); see *infra* note 41 (discussing the A.L.I. standard); see also *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992) (holding that the court should consider which parent was primary caretaker).

⁴⁰ See A.L.I. PRINCIPLES, *supra* note 1, § 2.09. The designation “approximation” was coined by the author of the standard. See Scott, *supra* note 36.

⁴¹ Under Section 2.08(1) of the A.L.I. PRINCIPLES, courts are directed to “allocate custodial responsibility so that the proportion of custodial time each child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation . . .” A.L.I. PRINCIPLES, *supra* note 1, § 2.08(1).

⁴² Scott, *supra* note 36.

primary responsibility, that role will continue after divorce.⁴³ Although the A.L.I. standard is neutral toward the choices parents make, it encourages them to invest in child rearing with the promise that the investment will be protected should they separate or divorce. Moreover, the approximation standard assumes that parents' real (rather than strategic) preferences about care-taking, as well as their competence, are more likely to be reflected in the choices they made about child rearing in the intact family than those that are expressed in the midst of a custody dispute. If so, this standard may lead to postdissolution arrangements that protect the continuity of children's relationships and offer more stability than one under which parents assume unfamiliar roles after divorce.⁴⁴

A custody standard that focuses on past parenting roles is compatible with a fiduciary model of regulation in that it rewards investment in child rearing in the intact family with parental status and authority after divorce. In contrast to the best interest standard, which allows judges to decide child custody on the basis of any consideration deemed relevant, approximation maintains the critical connection between satisfactory performance of parental care-taking duties and continued authority and deference.⁴⁵ It also defers to parents' decisions about the allocation of child-rearing responsibilities made at a time when they presumably cooperated to promote their children's welfare, instead of seeking to evaluate parental intentions and preferences asserted in the midst of a family breakup. As a custody rule, approximation represents the best available means to incorporate respect for parental autonomy into the determination of future custody and parental authority. It also provides a template for the reconstituted family that is most likely to function as the intact family did.

Policymakers frequently emphasize that a core goal of modern custody law is to encourage the continued involvement of both parents in the child's life.⁴⁶ In service of this goal, several reform initiatives seek to improve the status and role satisfaction of the parent (usually the father) who does not have primary custodial authority after divorce. For example, the A.L.I. custody standard abolishes the hierarchical designations of custody and visitation, and replaces these categories with straightforward allocations between the parents of time with the child and decision-making responsibility.⁴⁷ Thus, although the child may spend more time

⁴³ *Id.*

⁴⁴ See Scott, *supra* note 36 (arguing that "approximation" produces benefits such as these). Robert Mnookin and Eleanor Maccoby, in a study of divorcing parents in Marin County, described a "drift" to the mother's residential custody under joint custody arrangements. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992). It seems likely that, in these families, the mother provided more care before separation. *Id.*

⁴⁵ Bartlett, *supra* note 1, at 16.

⁴⁶ See *supra* note 9.

⁴⁷ See Bartlett, *supra* note 1, at 18.

living with the primary caretaker under a custody order, the other parent simply has a smaller allocation of time — he is not a “visitor.” In this way, the approximation standard recognizes the parental status of both parents and avoids the signal of second-class status carried by the term “visitation.” (Who wants to be a visitor in his child’s life?)

Along the same lines, under the recent trend, parents who do not have primary residential custody are given authority to make some rearing decisions and are afforded privileges that go with parental status, such as access to medical and school records.⁴⁸ The apparent goal is to recognize the status of parents who were marginalized and disenfranchised under traditional custody law — to the extent that this recognition can be offered without interfering unduly with the authority of the primary caretaker. The ultimate expression of this impulse is the growing popularity of joint legal custody under which parents share authority to make important decisions.⁴⁹ This trend has been criticized as “symbolic” politics,⁵⁰ but it signals powerfully that both parents continue to inhabit parental roles and that both have the authority to make the important decisions for their children.

These developments are readily understood under a fiduciary model of regulation. Much anecdotal evidence confirms what the model predicts — that many noncustodial parents are humiliated and resentful at the loss of authority and respect that they experience under traditional custody law.⁵¹ Parents who have limited contact with their children and who also lack the authority to make basic decisions about their children’s medical treatment and education are likely to find the parental role less rewarding. Their marginalized status may undermine their identity as parents and lead them to withdraw from the parent-child relationship and abandon their responsibilities. In effect, under traditional law, noncustodial parents lost important rewards that are owed to parents for satisfactory performance —

⁴⁸ Increasingly, parents are given decision-making authority during the time when they have responsibility for the child (which includes visitation time). For example, many courts allow noncustodial parents to involve children in religious services during visitation. See *Pater v. Pater*, 588 N.E.2d 794 (Ohio 1992) (reversing an order restricting a noncustodial mother from exposing her child to Jehovah’s Witness beliefs, without a showing of harm to the child). Under modern statutes, noncustodial parents have access to school, medical and law enforcement records. See IOWA CODE ANN. § 598.41(1)(e) (West 2000); WIS. STAT. ANN. § 767.24(7) (West 2001).

⁴⁹ See MACCOBY & MNOOKIN, *supra* note 44 (noting that approximately eighty percent of divorced parents in the study had joint legal custody). The A.L.I. PRINCIPLES include a presumption favoring an allocation of joint decision-making authority to the parents, although it is not designated joint legal custody. See A.L.I. PRINCIPLES, *supra* note 1, § 2.10(2).

⁵⁰ See Bartlett, *supra* note 1, at 25 (arguing that legislatures and courts want to appear supportive of joint custody because of political pressure, but they are skeptical about how it works).

⁵¹ See Mavis Hetherington, *Divorced Fathers*, 25 FAM. COORDINATOR 417 (1976) (studying the disruption and adjustment of fathers after divorce); see also *supra* note 10.

authority and respect — at a time when the parent-child relationship itself often was less rewarding than it was before the family dissolved. In contrast, modern regulations that recognize parental status and its attendant authority encourage these parents to continue to be good fiduciaries after dissolution and reward them for satisfactory performance. The reforms emphasize the continued importance of parents' relationships with their children despite the family breakup and acknowledge the connection, for many parents, between role satisfaction and the willing fulfillment of parental duties.

B. Procedural Reforms in a Fiduciary Framework

Several reforms over the past decade or more have changed the process by which child custody decisions are made. These initiatives give parents greater authority and control over both the process and the outcome, encouraging them to act as responsible fiduciaries for their children in planning for the future. Lawmakers have recognized that the process by which a family is reconstituted — from an intact unit to one in which the parents no longer live together — may be critically important to the future roles of parents in their children's lives. The traditional adversarial approach to resolving custody disputes could be offered as a prescription for undermining parental commitment.⁵² In contrast, under the contemporary approach, parents are reminded of the obligations of their fiduciary role and then given authority and discretion to make plans for their child's future together. The expectation and hope is that the process will reinforce parents' commitment to their children and encourage them to continue to function cooperatively as responsible parents.

Some of the reforms have been emerging for decades. Since no-fault divorce became the norm in the 1970s, courts increasingly have deferred to parents' authority to make custody agreements. In some jurisdictions, courts *must* defer to the custody arrangements that parents decide upon, absent a finding that the arrangements are not in the child's interests.⁵³ The *A.L.I. Principles* contain the

⁵² Many observers have commented on the costs to children's welfare of resolving custody disputes through an adversarial process, whether adjudication or negotiation. See Elizabeth Scott & Robert Emery, *Child Custody Dispute Resolution*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES AND EXPERTISE* 24 (Lois A Weithorn ed., 1987); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987). This framework promotes hostility between the parents and invites parties to act strategically and spitefully in bargaining. If custody is decided through adjudication, control over the outcome is within the discretion of the court, and parties are invited to demonstrate each others' deficiencies as parents.

⁵³ See Bartlett, *supra* note 1, at 3–4 (describing the trend toward greater deference toward parenting plans). Many states continue to give courts discretion to accept or reject the parents' custody agreement, but an increasing number require that the agreement be adopted

strongest version of this position, directing courts to order custody on the basis of a knowing, voluntary custody agreement by parents unless it is harmful to the child.⁵⁴

A second development of more recent origin is the promotion of parenting plans under statutory provisions in many states.⁵⁵ Many states encourage courts to order parents to plan for their children's future, working together (if possible) to delineate with some specificity their mutual expectations about the future custody arrangements.⁵⁶ Under typical formulations, parenting plans define each parent's authority and responsibilities, and include provisions for financial support, the child's living arrangements, schooling (including support for college education), travel plans, holidays and vacations, health care, and procedures for communication and dispute resolution between parents.⁵⁷ Psychologists advocate comprehensive planning at the time of divorce as a means to promote future cooperation between parents by reducing the potential for uncertainty and misunderstandings that can lead to later conflict.⁵⁸ Ideally, the process of creating a parenting plan involves both parents working together to make decisions about the child's future and

unless it harms the child's interests. *See* N.J. STAT. ANN. § 9:2-4(d) (West 2002) ("The court shall order any custody arrangement which is agreed to by both parents unless it is contrary to the best interests of the child.").

⁵⁴ *See* A.L.I. PRINCIPLES, *supra* note 1, § 2.06.

⁵⁵ For an analysis of the impact of the early comprehensive Washington statute mandating parenting plans in every case, see Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65 (1990).

⁵⁶ Almost half of the states require parenting plans. In a few states, they are mandatory in every case. *See, e.g.*, WASH. REV. CODE ANN. § 26.09.181(1) (West 1997). In others, plans are required when joint custody is sought. *See* MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1998). In the rest, courts have statutory authority to order parents to submit parenting plans.

⁵⁷ Many statutes include a detailed list of requirements for matters to be covered in the parenting plan. WASH. REV. CODE ANN. § 26.09.184 (West 1991); VT. STAT. ANN. tit. 15, § 666 (1985) (stating that a plan must include: "(1) physical living arrangements; (2) parent child contact; (3) education of the minor child; (4) medical, dental and health care; (5) travel arrangements; (6) procedures for communicating about the child's welfare; and (7) . . . procedures for resolving disputes").

⁵⁸ EMERY, *supra* note 10.

commits both to the agreements they reach.⁵⁹

Under many recent statutes, courts have authority to order divorcing parents to participate in classes that provide instruction about the impact of divorce on children. Parenting classes are designed to be educational and not therapeutic. The curriculum includes information about how children respond to divorce at different developmental stages and instruction regarding interparental dispute resolution, cooperative parenting, and stress management for parents and children.⁶⁰ These classes are designed in part to focus parents' attention on their children's welfare in the midst of family crisis and to remind them of the importance of cooperation as they make decisions about their children's future. Some evidence suggests that they serve these purposes.⁶¹

Finally, mediation has become increasingly popular as the process for resolving disputes and making decisions about custody. In many states, courts by statute are either directed or authorized to order mediation of custody disputes.⁶² The process of making decisions about custody in mediation differs substantially from the conventional mode of adversarial negotiation or adjudication. In an adversarial model, dispute resolution is structured as a zero sum game whereas, in mediation, parents are encouraged to take responsibility for reaching a cooperative outcome that will serve their children's interest, rather than simply to maximize their

⁵⁹ According to Jane Ellis, legislative drafters of the Washington law, a prominent statute mandating parenting plans, had multiple goals. First, they sought to encourage parents to take responsibility for creating a plan that reflected their individualized needs, rather than having families subject to court-devised formulas. See Ellis, *supra* note 55, at 81–82. They also aimed to encourage continued participation of both parents in their children's lives through shared parenting. *Id.* at 82–86. Beyond this, the legislature sought to focus parents on their future parental responsibilities. *Id.* at 87–90. Finally, the requirement of parenting plans was designed to reduce conflict. *Id.* at 90–94. All of these goals are compatible with the fiduciary model.

⁶⁰ Parenting classes typically are required for all divorcing parents with minor children unless a court determines that the class is not necessary. See CONN. GEN. STAT. § 46b–69b (1994). Some statutes describe the content of the classes and emphasize that the purpose is not therapeutic. See DEL. CODE ANN. tit. 13, § 1507(h) (2001) (stating that the purpose of classes is to “educat[e] divorce litigants on the impact on children of the restructuring of families”); TENN. CODE ANN. § 36-6-408(a) (2000) (stating that a parental educational seminar “shall be educational in nature and not designed for individual therapy”).

⁶¹ Jack Arbutnot & Donald Gordon, *Does Mandatory Divorce Education for Parents Work? A Six Month Outcome Evaluation*, 34 FAM. & CONCILIATION CTS. REV. 60 (1996); Andrew Schepard & Stephen Schlissel, *Planning for P.E.A.C.E.: The Development of Court-Centered Education Programs for Divorcing Families*, 23 HOFSTRA L. REV. 845 (1995).

⁶² A significant number of states, including California, require mediation of most custody disputes. See CAL. FAM. CODE § 1370 (West Supp. 2001); WIS. STAT. ANN. § 767.11(5) (West 2001); N.J. CT. R. 1:40-5 (2000). Many others give courts authority to order it at the court's discretion. See COLO. REV. STAT. § 13-22-311(1) (1998); PA. STAT. ANN. tit. 23, § 3901(b) (West Supp. 1998).

individual self-interest.⁶³

These procedural reforms can function to mitigate the destructive impact of the adversary process on the future performance of parents as responsible fiduciaries. Under the traditional practice, courts decide custody or monitor and supervise the agreements that parents reach, and parents are dislodged from their position of respect and authority. Instead of acting as fiduciaries entrusted with the duty to make decisions that promote their children's interests, they become contestants in an ugly battle over a valuable prize. The incentive for parents to act selfishly and strategically in disregard of their children's interests is powerful, even if the custody decision is ultimately resolved through negotiation. If custody is adjudicated, a judge, rather than the parents, makes the important decisions about what residential arrangements and allocation of authority best serve the child's interests. After the exchange of mutual accusations of malfeasance and incompetence that characterizes the typical custody adjudication, the loser may have a difficult time resuming his former role as a cooperative responsible parent. He has been formally designated the inferior parent (or at least may perceive the judgment in this way) and, as suggested above, many of the rewards of satisfactory performance have been withdrawn.

The recent procedural developments seek to change this dynamic and to provide the means for parents to accomplish the necessary change of family status without generating a damaging conflict of interest between parent and child. The reforms maintain in the divorce setting the incentive structure that encourages parents to be good fiduciaries in the intact family. Parents are given the freedom and encouragement to plan for their children's future after the family breaks down, just as they did before. In this extraordinarily stressful context in which the incentive to act selfishly is great, parents are urged to remember that they are entrusted with important responsibilities and are given the collective authority to make decisions that inhere in their fiduciary role. By respecting parents' autonomy and discretion in the divorce setting, these reforms encourage parents to continue to function in their established roles, with the implicit promise that, if they are successful, legal deference will continue after divorce or dissolution. This stance reinforces that both parents have an ongoing and important role in the reconstituted family, just as they did when the family was intact.

Each of these developments encourages parents to make decisions about their children's future lives cooperatively and to commit to following the plans they make. In the fiduciary model, the process by which parents plan and reach

⁶³ For a comparison of the process of mediation and adversarial dispute resolution, see generally Scott & Emery, *supra* note 52. For a comprehensive discussion of custody mediation, its goals, processes and impact, see generally ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* (1994) (describing longitudinal study comparing adjudication and mediation).

agreement serves an important bonding function, forming individual precommitments to future performance. When parents work together to create a parenting plan, for example, they consider the logistics of the reconstituted family that they are about to become and anticipate problems that may arise in future cooperation. Each parent participates in making decisions on the child's behalf; the participation itself presumes that both parents will continue to function in their parental roles, and it encourages commitment by each to the successful execution of the plan. Moreover, each parent may be more inclined to cooperate in the implementation of the plan — first, because it will be more likely to account for her preferences than one imposed by a third party, and second, because she anticipates feelings of guilt should she default.⁶⁴ Compare these responses to that of a parent to a court order dictating outcomes in which the parent had no voice. Much the same can be said of mediation, which is structured to encourage the parties to take responsibility for reaching mutually satisfactory outcomes and which recognizes that the parties will continue to deal with one another after the dispute is resolved.⁶⁵ Further, parental commitment is reinforced in mediation by the pervasive emphasis on reaching decisions that are optimal for the parties' children. This creates a very different dynamic from the self-interested stance of parties in adversarial negotiation.⁶⁶

In general, the execution of parenting plans, participation in custody mediation, and enrollment in parenting classes all serve to focus parents' attention on their children and to remind them that, as parents, they must give their children's interests and welfare the highest priority. This reinforcement of parental obligation comes at a critical time, when many parents may be inclined to forget their fiduciary role and focus on their own selfish interests. All of these procedures and programs aim to bolster the alignment of parents' and children's interests at a time of vulnerability and uncertainty about the direction of the future relationship of the child with each of her parents. The assumption, supported by the research evidence, is that these reforms may shape the roles of parents in the postdissolution family to increase parental investment and cooperation while minimizing disruption.⁶⁷

⁶⁴ For a discussion of the purposes and implementation of parenting plans under a comprehensive statute, see Ellis, *supra* note 55.

⁶⁵ It has long been recognized that adversarial dispute resolution is suboptimal for parties involved in ongoing relationships, such as employers and employees or family members. See Scott & Emery, *supra* note 52. This is particularly true for custody dispute resolution, which, if resolved through adjudication, is likely to generate hostility between the parents as each tries to prove the other the inferior parent. Custody mediation typically is structured to discourage strategic behavior by parties and to facilitate their ability to discover overlapping interests, which may be less likely in an adversarial setting.

⁶⁶ Robert Emery found that both mothers and fathers believed that mediation was better for children. See EMERY, *supra* note 63.

⁶⁷ In his longitudinal research comparing postdissolution families in which custody

D. Domestic Violence as a Factor in Custody Decisions

A striking development in custody law in the last decade is the intense focus on domestic violence as an important factor in the custody determination as well as in the process by which custody decisions are made. Prior abuse of the child has always been an important consideration under the best interest standard, of course, constituting straightforward evidence that the parent has failed as a fiduciary. More recently, legislatures and courts increasingly assume that the parent who has acted violently against the other parent is not a suitable fiduciary.⁶⁸ Such parents are subject to restrictions on their authority to plan the child's future and on their freedom to exercise parental functions after divorce.

This trend can be seen in a number of recent developments. In most jurisdictions, mediation is deemed inappropriate where there is evidence of prior domestic violence by one party, a view that has strong support in the mediation literature.⁶⁹ Deference to parental agreements and requirements for parenting plans may be suspended if evidence of domestic abuse is presented.⁷⁰ Courts often are

disputes were resolved by mediation versus adjudication, Robert Emery found that, years later, the mediation parents had less conflict and more cooperation in co-parenting. The families in Emery's study were well-matched because all sought judicial hearings, but half were diverted to mediation. See EMERY, *supra* note 63.

⁶⁸ Traditionally, courts (and legislatures) assumed that domestic violence against the other parent was irrelevant to the determination of child custody. See *Collinsworth v. O'Connell*, 508 So. 2d 744, 746 (Fla. Dist. Ct. App. 1987) (holding that a father's violence against his wife was unrelated to fitness as parent); see also Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1072-74 (1991).

⁶⁹ The situation in which one parent has been the victim of the other's violent behavior is the extreme version of a more general concern about mediation, which is that one party may be vulnerable to threats or coercive influence by the other because of a power imbalance in the relationship. Feminists generally have been critical of mediation, arguing that women are disadvantaged. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988). It would appear that an emerging consensus of state legislatures supports the notion that, in relationships in which there has been domestic violence, mediation is never (or seldom) appropriate. Most statutes prohibit mediation in these cases. See MINN. STAT. ANN. § 518.619(2) (West 2002); OHIO REV. CODE ANN. § 3109.052(A) (Anderson 2002) (stating that, in such cases, "the court may order mediation only if the court determines that it is in the best interests of the parties to order mediation and makes specific written findings of fact to support its determination"); VA. CODE ANN. § 20-124.4 (Michie 1995) ("In assessing the appropriateness of a referral, the court shall ascertain upon motion of a party whether there is a history of family abuse."). Some states require special procedural protections when child abuse is alleged. See CAL. FAM. CODE § 3181(a) (Deering 2003).

⁷⁰ See WASH. REV. CODE § 26.09.191(1) (2003) (holding that no mutual decision making is required under a parenting plan where a parent has engaged in domestic violence).

subject to statutory compulsion to appoint guardians *ad litem* to represent the child's interest in cases involving domestic violence.⁷¹ This factor also is important as a substantive criterion in custody and visitation decisions. Under statutory presumptions in some states, custody will not be awarded to the parent who is the perpetrator of domestic violence; in others, it is simply a negative factor to be considered in the custody decision.⁷² In a substantial majority of states, joint custody is presumed to be inappropriate when one parent has engaged in acts of domestic violence.⁷³ Some laws restrict visitation for the parent who has engaged in domestic violence. These parents may be limited to daytime visitation or to visitation supervised by state social service agents or other authorized persons, and in some states, they must clearly demonstrate that they can be trusted with their children.⁷⁴

These reforms play an important role in a model of family regulation that treats

⁷¹ This requirement generally focuses on abuse directed toward the child. *See, e.g.*, MINN. STAT. ANN. § 518.615 (West 2002) (stating that a guardian *ad litem* will be appointed if the court has reason to believe that the child has been a victim of domestic abuse).

⁷² Some statutes include a rebuttable presumption that the perpetrator of domestic violence should not be awarded custody. *See, e.g.*, DEL. CODE ANN. tit. 13, § 705A(a)-(b) (Supp. 2000) (stating that there is a rebuttable presumption that no perpetrator of domestic violence shall be awarded joint or sole custody); GA. CODE ANN. § 19-9-1(a)(2)(A) (Harrison 2002); MASS. GEN. LAWS ch. 209A, § 3 (2001) (stating that a serious incident of domestic violence creates a rebuttable presumption that awarding custody to the abusive parent is not in the best interests of the child); MICH. COMP. LAWS ANN. § 722.25 (West Supp. 2001) (stating that there is a rebuttable presumption against custody for a parent convicted of a domestic violence crime). Under statutes that do not include a rebuttable presumption, domestic violence constitutes a negative factor for custody. *See* MICH. COMP. LAWS ANN. § 722.23(k) (West 2002) (stating that a court should consider domestic violence "regardless of whether the violence was directed against or witnessed by the child"); N.J. STAT. ANN. § 9:2-4(c) (West Supp. 2001) (stating that a court shall consider history of domestic violence); PA. CONS. STAT. ANN. tit. 23, § 5303(a)(3) (West 2001) (stating that a court should consider "present and past violent or abusive conduct").

⁷³ In many states, domestic violence is an exclusionary factor for joint custody (whereas it is more typically only a negative factor in sole custody). *See* FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 2002) (stating that there is a rebuttable presumption against joint custody for a parent convicted of domestic violence crime); TEX. FAM. CODE ANN. § 153.004(b) (Vernon 2002) (stating that a court may not appoint parents as joint managing conservators when there is a history of past domestic violence). The greater concern about joint custody is based in part on the increased need for cooperation in joint custody arrangements. It may also reflect some lingering ambivalence about whether spousal-partner abuse disqualifies the abuser for custody when the child has not been targeted. In general, however, the increased focus on domestic violence suggests that law makers think that an abusive spouse is not likely to be a good parent.

⁷⁴ A majority of jurisdictions authorize court ordered counseling as a condition of visitation. Some courts have required evidence that the violent parent no longer represents a threat. *See* Krank v. Krank, 541 N.W.2d 714, 717 (N.D. 1996).

parents as fiduciaries.⁷⁵ First, policies that make domestic violence an important negative factor in determining custody and in setting the conditions of parent-child contact send a powerful signal about the boundaries of appropriate behavior in the intact family. This signal can reinforce the informal norms that define society's expectations for acceptable behavior in the family, norms that play an important role in this private setting where effective monitoring is difficult. The recent focus on domestic violence in the custody context is premised on an assumption that has substantial empirical support — that children are harmed psychologically when they are exposed to family violence, regardless of whether they are the targets of attack.⁷⁶ For these children, the dissolution of the intact family represents a positive change in removing them from a harmful setting.⁷⁷ The emphasis on domestic violence in custody disputes is a powerful statement that the perpetrator of violence against *any* family member engages in unacceptable behavior that violates his fiduciary obligations as a parent — and that he should expect to be sanctioned. This signal was far from clear under traditional custody law, when violence against a partner often was not deemed probative of parenting.⁷⁸ In general, the reforms in custody law can be seen as part of a larger legal initiative to strengthen norms against domestic violence, an initiative that includes police training and intervention, increased use of prosecution, and stricter enforcement of protective orders.

The emphasis on past domestic violence also functions as a monitoring mechanism, formally sanctioning the parent who has engaged in a gross breach of his fiduciary duty. Punishing domestic violence in the intact family is difficult as

⁷⁵ The motivation of lawmakers for making domestic violence an important factor in custody disputes is complex. In part, these developments reflect a powerful political response to behavior that has only recently come to be viewed as unacceptable. *See* Cahn, *supra* note 68. Advocates played an important role in heightening public awareness of domestic violence and changing the norms from tacit acceptance to disapproval. *See id.* Together with heightened awareness of the incidence of domestic violence is increased recognition that children can be harmed by exposure to family violence, even when they are not targets. *See id.* at 1044.

⁷⁶ *See* Robert Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310 (1982) (describing the harmful effects on children of exposure to parental conflict); Janet Johnston, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decisionmaking*, 33 FAM. & CONCILIATION CTS. REV. 415 (1995) (describing the harm to children of observing physical violence between parents).

⁷⁷ Emery, *supra* note 76; *see also* PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* (1997) (citing a longitudinal study which indicated that children in high-conflict families benefit from their parents' divorce).

⁷⁸ *See supra* note 68. Vestiges of this attitude can be seen in the initial ruling in the O.J. Simpson custody case. The trial court excluded evidence that Simpson had murdered his wife, a ruling reversed on appeal. *In re Guardianship of Simpson*, 79 Cal. Rptr. 2d 389 (Ct. App. 1998).

long as the victim parent wants the family to remain together; violence is often revealed only when the family breaks down. The recent focus on violence as a part of the decision about custody and visitation strengthens this monitoring mechanism, likely increasing its effectiveness in deterring unacceptable parental behavior. Moreover, the victim parent may be more likely to initiate dissolution of the union with the understanding that the partner's behavior will be sanctioned in a custody proceeding as a breach of parental duty.⁷⁹ Under the recent reforms, courts treat the violent parent as one who has committed an intolerable default of his fiduciary duty and revealed that he does not deserve the respect given to parents who perform their roles satisfactorily. In many states, he will not be permitted to engage in planning for his children's future or to play an active parental role in his children's lives, unless he clearly demonstrates his trustworthiness once again. As to these parents, the informal mechanisms that promote fulfillment of fiduciary duties are suspended, and the duties that remain (such as financial support) are subject to formal legal enforcement.

Finally, the increased focus on domestic violence plays a key role in implementing the larger ambition of the recent custody reforms. If I am correct that contemporary custody law encourages parents living apart to dedicate themselves to their children's welfare by treating them more like parents in intact families, then it is critically important to reinforce good parental attitudes and to monitor or exclude those parents who threaten their child's welfare. The general policy goal of promoting the continued relationship of both parents with the child after divorce creates a unique challenge. The best means to encourage parents to maintain their commitment and fulfill their responsibilities is to give them autonomy, discretion, and respect as parents. This approach carries a risk, however, because the informal means of encouraging parents to be good fiduciaries in intact families may not function as well in the postdissolution setting — particularly for those parents not living with the child. Thus, rules that limit a parent's access to his child on the basis of past violence against a family member establish in the postdissolution setting a clear boundary between those parents who deserve the respect and autonomy that is accorded to parents in their fiduciary role and those who do not. Those who have engaged in a serious breach are not given the benefit of the optimistic assumption that extending some of the rewards of parental status after dissolution (*i.e.*, treating parents like parents) will promote good fiduciary behavior. For these parents who have engaged in what is deemed the most extreme form of selfish behavior, the risk is too great.

⁷⁹ Under traditional law, victim parents who have fled the family home in response to domestic violence may be fearful of severing the relationship with the partner and formally seeking custody because of a concern that their uncertain living arrangements may count against them in court. Such parents instead may return to the violent partner under these circumstances. *See Cahn, supra* note 68.

The ultimate goal of the recent reforms, of course, is to reinforce parents' commitment to the responsibilities of their role and to preserve the parent-child relationship bond over the years ahead in the child's life. Legal regulation can not coerce parents to continue to love their children or to spend time with them. It can coerce financial support, but enforcement costs are high. It seems plausible that parents are more likely to continue to invest in their children's lives and development without coercion if they identify their own interests with those of their children — as they did when the family lived together. The recent legal developments recognize the importance of autonomy, discretion, and respect for the parental role in achieving that end.

III. THIRD PARTY CUSTODY CLAIMS

Increasingly in recent years, lawmakers have recognized the claims of non-parents to custody or visitation over the objections of parents. These reforms have occurred in several contexts; they involve claims by former spouses and gay partners of parents, grandparents, other relatives, and long time caretakers. To some extent, this trend simply expresses increased dissatisfaction with the traditional idea that parental rights exist on the basis of biology alone; it recognizes that functional parents may deserve parental status and authority. Thus, when parents fail to fulfill their responsibilities and another adult steps in to serve as a child's long term primary caretaker, courts increasingly conclude that it is appropriate to transfer parental rights and responsibilities to that new parent.⁸⁰ Along the same lines, courts may award custody to a stepparent who has lived in an intact family with the child and her custodial parent, rather than to an uninvolved noncustodial parent who comes forward after the custodial parent dies or becomes incapacitated.⁸¹ These reforms recognize that, because of the complexity of modern

⁸⁰ *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976), was an early case which held that third parties could be awarded custody in disputes with parents under "extraordinary circumstances." *Id.* at 284. In *Bennett*, the third party claimant had cared for the child for eight years. *Id.* at 280; *see also* *Price v. Howard*, 484 S.E.2d 528 (N.C. 1998) (holding that when a parent voluntarily relinquished his child to a nonparent, with whom the child subsequently lived for a substantial period, the presumption favoring the parent is set aside, and the best interest test applies); *C.R.B. v. C.C.*, 959 P.2d 375 (Alaska 1998) (holding that the parent seeking to regain custody of his child from grandparents with whom the child lived for several years — with little parental contact — must meet the same standard of showing a substantial change in circumstances that would be applied in a contest with the other parent). One Pennsylvania court upheld custody by the child's aunt and uncle, remarking that the parent's interest must get "special consideration," but expressing some uncertainty about whether that interest creates a presumption or is a "factor to be weighed." *McDonel v. Sohn*, 762 A.2d 1101, 1107 (Pa. Super. Ct. 2000).

⁸¹ *See* *Charles v. Stehlik*, 744 A.2d 1255 (Pa. 2000) (upholding a custody award to a stepfather based on a clear showing that the stepfather's custody was in the child's best

family structure, children form true parent-child bonds with care-taking adults other than their biological parents. Affording legal protection to these relationships also promotes parental investment in child rearing and signals that shirking or deficient biological parents will lose parental status and authority. To this extent, the trend toward awarding custody to nonparents is compatible with the fiduciary model.

Two more problematic legal developments involving custody claims by nonparents have captured much attention in recent years. The law is increasingly open to claims by what Emily Buss calls "quasi-parents"⁸² that they should have ongoing contact with children with whom they have established relationships, even though the parent — who has the responsibility for rearing the child — objects. First, over the past two decades, legislatures in virtually every state have enacted statutory reforms facilitating visitation claims by grandparents, and often by others as well.⁸³ Some of these statutes allow grandparents and other adults to gain access to children over the objections of parents in intact families. In *Troxel v. Granville*, the Supreme Court rejected Washington's expansive statutory recognition of third party claims on the ground that it gave little weight to the interest of a fit custodial parent in the visitation decision.⁸⁴ Nonetheless, the Court was sympathetic to the policy of preserving children's ties with grandparents and declined to offer any strong endorsement of parental rights. Thus, although *Troxel* rejected the application of a legal standard that ignores parental authority altogether, it left much room for courts to override parental choices about their children's associations with persons outside the immediate family.⁸⁵

interest); *Brown v. Burch*, 519 S.E.2d 403 (Va. Ct. App. 1999) (involving a contest between a mother and stepfather in which the court awarded primary physical custody to the stepfather and joint legal custody to the stepfather and father).

⁸² Emily Buss, "Parental" Rights, 88 VA. L. REV. 635 (2002).

⁸³ See ELLMAN ET AL., supra note 10, at 728 (discussing grandparent visitation statutes).

⁸⁴ 530 U.S. 57 (2000). The Washington statute employed a straightforward best interest standard in deciding third party visitation claims, giving no presumptive weight to the custodial parent's wishes. The statute also gave standing to any person desiring visitation.

⁸⁵ The plurality opinion in *Troxel* was quite narrow and far from clear about the extent to which the state might be restricted in ordering grandparent visitation over the objection of parents in other situations. The statute was not held facially unconstitutional, although the opinion criticized its stunning breadth. The Court suggested that more carefully crafted statutes that required consideration of the custodial parent's choice might well pass constitutional muster. For a discussion of statutory enactments and case law after *Troxel v. Granville*, see IRA ELLMAN ET AL., FAMILY LAW: CASES, TEXTS, PROBLEMS (2002 Teachers' Supp.). Some courts have found no constitutional deficiency in statutory provisions that provide (or imply) that the custodial parent's decision be considered in weighing the grandparent's petition. See *Zeman v. Stanford*, 789 So. 2d. 798 (Miss. 2001); *State ex rel. Brandon L. v. Moats*, 551 S.E.2d 674 (W. Va. 2001) (upholding the test of best interest and no substantial interference with parental authority by grandparent). Other courts have read *Troxel* to establish a constitutional mandate that fit parents have authority to decide with whom their children will associate. See *Linder v. Linder*, 72 S.W.3d 841 (Ark. 2002);

The other category of third party claims is represented by the American Law Institute's provision giving standing to "*de facto*" parents and "parents by estoppel" to seek custodial authority. Parents by estoppel hold themselves out as parents either because they believe they are legal parents or because they have a co-parenting agreement with the legal parent that they will be treated as such.⁸⁶ The claim is based in part on the conduct or assurances of the child's parent, who has encouraged the individual to assume the parental role. A prime example is the partner of a gay parent, who together with that parent decided to establish a family. *De facto* parents are adults who have functioned in the role of caretaker for the child, with the agreement of the parent (but without financial compensation).⁸⁷ Gay partners and stepparents who later divorce the custodial parent receive protection under this provision, as do other adults who reside with the family over an extended period of time. Under the *A.L.I. Principles*, which abolish the categories of custody and visitation, these "parents" are not relegated to a second-class status but acquire a portion of custodial authority which, at least in theory, can be divided among multiple claimants — including the legal parents — who have rearing responsibility.⁸⁸ Many courts have recognized claims by *de facto* parents, usually by awarding visitation with the child.⁸⁹

Wickham v. Byrne, 769 N.E.2d 1 (Ill. 2002).

⁸⁶ See A.L.I. PRINCIPLES, *supra* note 1, § 2.03(1)(b).

⁸⁷ See *id.* § 2.03(1)(c). *De facto* parents must live with the child for two years, performing child care functions with the acquiescence of the parent.

⁸⁸ Under the A.L.I. PRINCIPLES, parents by estoppel have the same standing as legal parents, whereas *de facto* parents cannot be allocated primary custodial authority. *Id.*

⁸⁹ Some courts responded to these claims by announcing generally applicable tests for determining *de facto* parent status, drawing on the A.L.I. standard and earlier Wisconsin case law that established a similar standard. See *In re H.S.H.-K.* 533 N.W.2d 419 (Wis. 1995); see also *V.C. v. M.J.B.*, 748 A.2d 539, 551–55 (N.J. 2000) (establishing a four-part test that includes: 1) consent or fostering by the legal parent of claimant's parent-like relationship with child; 2) claimant lived in the same household with the child; 3) claimant fulfilled the obligations of parenthood, taking responsibility for the child's care, education and development, without expectation of financial compensation; and 4) claimant occupied parental role for sufficient time period to form a bonded parent-child relationship). Unlike the A.L.I. PRINCIPLES, the New Jersey test does not set a fixed period of time, directing courts to evaluate whether parent-child bond had been established. The court emphasized that a party's status as the child's legal parent was a factor that usually should be given substantial weight in evaluating the child's best interest, because children will eventually be interested in their roots. Thus, under ordinary circumstances, the legal parent is likely to be awarded custody, but a presumptive rule favors visitation for psychological parents. Other courts have recognized the visitation claims of *de facto* parents, often citing with approval the A.L.I. PRINCIPLES or New Jersey tests. See *E.L.O. v. L.M.M.*, 711 N.E.2d 886, 896–99 (Mass. 1999) (upholding recognition of lesbian domestic partner as *de facto* parent, citing A.L.I. standard, and awarding visitation); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (enforcing a written visitation agreement after determining that the domestic partner was the child's *de facto*

The ready endorsement of grandparent visitation claims and the recognition of "quasi-parents" represent a worrisome trend in custody law, one that undercuts the fiduciary relationship of parents and children.⁹⁰ These developments are not surprising, and for the most part, they are quite well intentioned.⁹¹ In an ideal world, children usually will benefit from maintaining relationships with those adults who care deeply about them. But sadly, that may not hold true when the parent opposes contact between the child and the relative or former caretaker. The lesson of the fiduciary model is that policies of fragmenting custodial rights may come at a high cost to parental autonomy, family privacy, and ultimately to children's welfare.

Interference with parents' freedom to make rearing decisions, including decisions about who their children should spend time with, makes the job of being a parent less rewarding. It signals a lack of respect for parental judgment and a lack of trust that parents will make decisions that are in their children's interests. A parent who is subject to these visitation orders must tolerate on an ongoing and indefinite basis a relationship that she has decided is not in her child's interest. The parent is left with the responsibility for rearing and supporting her children, but without the autonomy that most parents enjoy in intact families — and, increasingly, after the family dissolves. To be sure, parents will not always make these judgments wisely; some parents will simply misjudge the contested relationship, and others will be motivated by spite. Nonetheless, there is little reason to believe that, on balance, courts will do a better job deciding whether

parent). To date, as the New Jersey court implicitly suggested, courts see *de facto* parenthood status in domestic partner cases as implicating visitation and not custody rights. *See also* Youmans v. Ramos, 711 N.E.2d 165 (Mass. 1998) (declaring aunt who cared for child to be the *de facto* parent); T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001) (awarding a mother's domestic partner visitation under *in loco parentis* doctrine).

⁹⁰ Emily Buss, in an excellent critique of this trend, argues that the Constitution gives states considerable latitude in determining who will be accorded the status of parents — but much less freedom to interfere with the freedom of those who are designated parents to rear their children — as long as they are doing a decent job. *See* Buss, *supra* note 82. Buss's analysis of this trend is consistent with the fiduciary model.

⁹¹ Although the motivation of individual claimants may be based on a legitimate desire to maintain an important relationship with a child, the legislative movement to give grandparents standing has been highly politicized. An intense and well-organized lobbying effort, led by interest groups such as the A.A.R.P., has largely been responsible for the enactment of grandparents' visitation statutes across the country. *See Grandparents Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 102d Cong. 3 (1991) (statement of Rep. Thomas Downey) (remarking that senior citizens are "the most active lobby in this country, and when it comes to grandparents there is no one group more united in their purpose"). At a minimum, it would seem that the primary concern of this political initiative is the interest of grandparents. The A.L.I.'s recognition of third party claims, in contrast, represents a sincere and careful effort to designate a group of deserving claimants, with established relationships with the children.

children should have contact with other adults than will parents who know their children and who are entrusted with responsibility for their care.⁹²

Ironically, the legal recognition of third party custody and visitation claims could well have the effect of inhibiting the willingness of parents to encourage relationships that enrich children's lives. If nonparents are routinely awarded custodial access, parents will become aware that the development of important bonds between their children and other adults may become the basis of a legal claim should the parent at some point become intolerant of the relationship. Some parents may respond by limiting the relationship between children and grandparents or step-parents, or by declining to allow their children to reside with a relative when the parent is ill or incapacitated.⁹³ Thus, rather than protecting and reinforcing the relationship bonds between children and loving adults, the recognition of these non-parent claims may impede or destabilize these relationships.

Most third party claims, in my view, are qualitatively different from the claims of noncustodial parents whose relationships with their children must usually be tolerated by parents with primary custodial responsibility. First, the parental relationship usually has a unique meaning to the child, both as a core psychological attachment and as a social construction.⁹⁴ For most children, the loss of the relationship with either parent would be very costly. Second, adults with the legal status of parents have important responsibilities for rearing their children and, as I have shown, their inclination to fulfill their responsibilities may be linked to the legal construction of their role. For the most part, third parties who have custodial access under the recent reforms do not attain full parental status;⁹⁵ they have neither the obligations nor the authority of parents. Indeed, as Emily Buss has pointed out,

⁹² Emily Buss explains why courts cannot be assumed to be better decisionmakers than parents about these matters. Emily Buss, *Children's Associational Rights?: Why Less is More*, 11 WM. & MARY BILL RTS. J. 1101 (2003). For a critique of court-ordered grandparent visitation from the perspective of child development, see Andre Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced*, 55 AM. J. ORTHOPSYCHIATRY 277 (1985).

⁹³ Buss makes this general point in her critique. See Buss, *supra* note 82.

⁹⁴ See Michael E. Lamb, *The Role of the Father: An Overview*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* (Michael E. Lamb ed., 1976) (challenging the assumption that only the bond to the mother is important to the child and describing the importance of the father-child relationship).

⁹⁵ The recent cases recognizing third parties as *de facto* parents generally award visitation rights, not custody. Although some courts suggest that *de facto* parents have full parental status, this assertion is qualified by the recognition that, under the best interest test, legal parenthood usually will weigh heavily, resulting in a custody award to the legal parent. See *supra* note 89. The exception is the parent by estoppel under the A.L.I. PRINCIPLES. See *supra* note 1. Included in this category are parents who have financial child support duties and parents by agreement. In my view, the latter group should be given formal parental status while the family is intact. See *infra* text accompanying notes 97-98.

this may contribute to the readiness of courts to recognize these claims and, in doing so, undercut parental authority. It will be easier to give pieces of custodial access when full parental status is not part of the package.⁹⁶

Among those third parties who may benefit from the recent reforms, some have particularly compelling claims. The stepparent who has cared for the child over a period of years and the gay person who has participated fully in rearing her partner's child until the couple's relationship breaks down likely have played as important a role in the lives of these children as other parents in intact families. In my view, instead of limiting these "parents" to *ex post* claims of custodial access, lawmakers should extend formal parental status *ex ante* to partners and stepparents who function as parents. Awarding formal parental status when the family is intact (and with the consent of the legal parent) signals that this adult is truly a parent and deserves the respect and authority given to this role. Formal parental status gives security to the relationship between the gay partner or stepparent and the child, and encourages investment in the responsibilities of parenthood by one who otherwise has an uncertain (or nonexistent) legal status. Such an approach has many advantages over a legal response that recognizes the relationship between a stepparent and child only if a court determines *ex post* that it meets the criteria for protection.⁹⁷ The approach adopted by the A.L.I. and some contemporary courts depends on complex judicial determinations made when the parties are in conflict and evaluation of the relationship between the child and the nonparent may be difficult.⁹⁸ In this context, the former partner or spouse is motivated to challenge the veracity of the nonparent's account of her relationship with the child and the claim that continued contact is in the child's interest. The outcome is unpredictable, and parental status is uncertain until the dispute is resolved. In contrast, if the gay partner or stepparent is granted formal legal status while the family is intact, no uncertainty surrounds her parental role — or her rights and responsibilities to the child.

⁹⁶ Buss, *supra* note 82, at 682.

⁹⁷ The A.L.I. PRINCIPLES were limited to an *ex post* approach to determining parental status by the jurisdiction of the larger project. As the Principles of Family *Dissolution*, the Principles could not deal with issues of family formation. This is unfortunate in its impact on the custody principles and also on the Domestic Partnership Principles (in Chapter 6) regulating cohabitation relationships. A.L.I. PRINCIPLES, *supra* note 1, ch. 6. In both contexts, the principles propose elaborate multi-factored standards by which relationships are evaluated to determine whether they deserve legal protection.

⁹⁸ The test adopted by the A.L.I. to determine whether an adult qualifies as a *de facto* parent requires a judgment about whether the claimant performed a majority of child-care responsibilities, with the agreement of the parent to form a parent-child relationship with the child, while living with the child for at least two years. A.L.I. PRINCIPLES, *supra* note 1, § 2.03(1)(c). Judicially created standards do not even include a fixed time period to limit fact finding. See cases cited *supra* note 89.

The fiduciary approach to third party claims clarifies why a focus on either children's or parents' rights can lead to outcomes that ultimately undermine children's welfare. From the children's rights perspective, it may appear that the child's interest in maintaining relationships with grandparents and others should trump parents' preferences about their children's associations. From a parents' rights perspective, third parties should never (or almost never) be able to supplant parents. The fiduciary model is not primarily concerned with rights; it focuses instead on the core relationship between the child and those adults who occupy the role of parents. It recognizes that legal protection of that relationship — by giving parents who are doing a satisfactory job the discretion and autonomy to make child-rearing decisions — is the best available means of promoting the child's welfare. Although parents have rights under the model, these rights serve an instrumental purpose; they are compensation for satisfactory performance and conditioned on continued fulfillment of parental obligations. This approach, in my view, works better to accomplish the social purpose of promoting the welfare of children than one that is based on inherent rights.

CONCLUSION

Any discussion of family law today emphasizes that family forms have changed and legal regulation must respond to these changes. This is certainly true, and the recent developments in child custody law respond to the important changes represented by increases in divorce and family dissolution. These reforms (for the most part) also recognize that although the form has changed, the functions of families and of parents in rearing their children have not. Treating parents as fiduciaries encourages them to invest in this role in ways that will serve their children's interests.