Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status

Pamela Loufer-Ukeles
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The law of custody and visitation is expanding to include the possibility of non-biological and non-adoptive parents' legal access to children. The concept of the psychological parent or functional caretaker is becoming increasingly prevalent and influential in state law. Moreover, the ALI Principles of Family Dissolution include two categories of psychological parents – parents by estoppel and de facto parents – in its proposed guidelines for who can petition for custody and visitation rights to children. Yet, both state law and the ALI Principles exclude caretakers who receive compensation – including foster parents, paid child care providers and surrogate mothers – from the categories of psychological parents to whom courts may grant such rights. In this article, I argue that the receipt of compensation for child care should not automatically disqualify caretakers from potentially achieving de facto legal status if the psychological bond is otherwise strong and the other requisites are met. In fact, I argue that such a rigid approach sacrifices significant benefits to children and caretakers. Excluding those who receive compensation for the care they give denigrates the value of care given by paid caregivers, misjudges the strength of the psychological bond between paid caregivers and children, and discriminates against the poor and racial minorities. While legitimate concerns regarding allowing a third party to use the power of the state to infringe on the parent-child relationship, as well as more general anxiety about mixing money and the personal relationship of care, must be addressed, I recommend a more nuanced approach to addressing these concerns. This approach takes into account both the paid nature of the relationship as well as the strength of the psychological bond involved. Just as feminists have argued that caretaking work needs to be compensated, compensated caretaking work needs to be legally recognized for the value it provides.

I. INTRODUCTION

Parenting is widely perceived to be the quintessential private, uncompensated and non-marketable activity. Parenting is done in the home,

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on weekends, and during leisure time. The majority of parenting work is done by women, and it is usually done by mothers. It is understood to be performed out of a sense of beneficence; from a feeling of love and caring for one’s offspring. It is admittedly hard work, particularly caring for young children, but it is fulfilling work. It is commonly perceived that the love for

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3. For instance, the November 2004 U.S. Bureau of Statistics Report indicates that approximately 30% of mothers stay out of the workforce full-time to care for children, compared with approximately 5% of fathers. U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS (2004), http://www.census.gov/population/www/socdemo/hh-fam/cps2004.html; see also Kemba J. Dunham, Stay-at-Home Dads Fight Stigma, WALL ST. J., Aug. 26, 2003, at B1 (“According to the U.S. Census Bureau’s March 2002 Current Population Survey, among two-parent households, there were 189,000 children with stay-at-home dads [compared with] 11 million children with stay-at-home moms . . . ”); Ira Mark Ellman, Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Martial Roles, 34 FAM. L.Q. 1, 21-31 (2000) (The proportion of women who are the primary breadwinners in U.S. families has stayed constant at about 5% from 1978-1998; the number of full-time non-working wives decreased from 32% to 20%; however, when a husband’s income is above $75,000 the vast majority of married mothers do not work full-time.); Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. REV. 1559 (1991) (The dominant family ecology has three basic elements: the gendered structure of wage labor, a gendered sense of the extent to which child care can be delegated, and gender pressures on men to structure their identities around work.).

4. See, e.g., Folbre & Nelson, supra note 2, at 129.

5. Despite some researchers’ insistence that mothers’ persistent choice to work less than their husbands outside of the home is caused by their domestic “burdens” and that if they really had a choice they would work more in the market, see DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN 171-73 (1996), social scientists have repeatedly found “that although dual-earner wives do two to three times the amount of domestic work their husbands do, less than one third of wives report the division of the daily family work as unfair.” See Alan J. Hawkins, Christina M. Marshall & Sarah M. Allen, The Orientation Toward Domestic Labor Questionnaire: Exploring Dual-Earner Wives’ Sense of Fairness About Family Work, 12 J. FAM. PSYCHOL. 244 (1998); Stacy J. Rogers & Paul R. Amato, Have Changes in Gender Relations

https://scholarship.law.missouri.edu/mlr/vol74/iss1/3
and emotional attachment with children are sufficient motivation; no other benefits are needed.

In fact, compensation for parenting is shunned. There is persistent and legitimate concern that it is in the best interests of children to be raised by those who act for altruistic as opposed to financial motives in order to ensure that their well-being is protected. Many fear that “economic incentives and [parenting] cannot coincide but are in fact oppositional.” Margaret Radin forcefully advocates the separation of the market and parenting because she fears that allowing a market in such personal and intimate activities as parenthood cheapens and monetizes personhood. Concerns about mixing compensation and traditional parental rights are related to concerns about a market in children, which is arguably inimical to human dignity and human pricelessness. In various contexts, the law clearly outlaws baby-selling in any form, including proscribing the purchase of parental rights and rejecting demands for payment from the state for parenting.

However, in other contexts involving children and compensation the law is emerging in a much more nuanced manner. Additionally, challenges to the traditional perspective that parenting work and compensation must never be combined are gaining momentum. It is impractical and disingenuous to attempt to separate money from parenting entirely, and commentators argue

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11. See, e.g., Ertman, supra note 10; Katharine Silbaugh, Commodification and Women's Household Labor, 9 Yale J.L. & Feminism 81 (1997); Mary Becker, Care and Feminists, 17 Wis. Women's L.J. 57 (2002); Cahn, supra note 1, at 15-22; Joan C. Williams & Viviana A. Zelizer, To Commodify or Not to Commodity: That is Not the Question, in Rethinking Commodification 362 (Martha M. Ertman & Joan C. Williams eds., 2005).
convincingly for a more subtle and nuanced view of the relationship between money and parenthood. This is true no matter how one defines parenting. If parenting is nurturing, taking care of children on a day to day basis, raising and counseling them—termed "functional parenting"—paid care is increasingly substituted, at least partially, for gratuitous motherly or fatherly care. The incidence of paid childcare has increased significantly with the increasing presence of women in the workplace. If, on the other hand, parenting means having legal rights to children, then such rights are also bought and sold in the marketplace in the context of artificial insemination and egg donor markets, as well through surrogate motherhood and, to a certain extent, private and even public adoptions. A myriad of other scenarios exist where money and parenting do mix—for instance, alimony and child support based on caretaking activities, foster parenting, and welfare payment distributions determined by the number of children in the home. Simply put, it costs money to raise children and people who raise children need money.

In this article, I will further challenge the reluctance to commingle parenting and compensation by arguing that paid caretakers should be able to obtain legal rights to custody and visitation of children in a manner comparable to unpaid psychological parents. Those advocating recognition of a more nuanced relationship between parenting and compensation have

12. See Williams & Zelizer, supra note 11, at 362-69.
13. As the court in V.C. v. M.J.B. stated in recounting the doctrine of "functional parenthood," the legal mother can choose to maintain her "zone of autonomous privacy," but once she abandons it and a "profound bond" between the non-legal parent and child develops, that bond may not then be "unilaterally terminated" by the legal parent. 748 A.2d 539, 552 (N.J. 2000).
14. See Silbaugh, supra note 11, at 113 ("[D]iscussions of whether home labor should be commodified proceed from the outset on a premise that insults the population of women who already perform domestic labor for pay. Quite simply, the market already exists.").
15. See Spain & Bianchi, supra note 5, at 152; Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 13-39, 124 (2000); see also Barbara Katz Rothman, Recreating Motherhood: Ideology and Technology in a Patriarchal Society 196-208 (1989) (discussing the advent of paid childcare fostered by women entering the workplace); Swartz, supra note 6, at 567 ("Because demographic shifts have escalated care needs at the same time as women, who have traditionally provided care in families, have moved into the labor market, care is becoming more frequently performed by paid workers. Consequently, one-fifth of the total workforce now works in the 'care industries.'").
18. See, e.g., Becker, supra note 11 at 63-64.
19. See infra note 37 and accompanying text for a definition of the term "psychological parent."
advocated valuing such intimacies in market terms or limited marketization. Here, I am discussing the reverse possibility: should the fact that intimate relations are based on market or compensated arrangements create an assumption that intimacies and attachments do not exist? I argue that the receipt of compensation for child care should not itself be sufficient to disqualify caretakers from potentially achieving de facto legal status if the psychological bond is otherwise strong and high standards similar to those of the ALI’s Principles of the Law of Family Dissolution (“ALI Principles”) for achieving de facto parental status are met.

In the last two decades, a trend has developed in state law and in scholarly commentary toward increasing openness to awarding parenting rights to third parties who have been functional caregivers to children, precipitating the adoption of de facto parenthood and parenthood by estoppel status in the ALI Principles. Such status allows caregivers other than legal parents under state law and biological or adoptive parents (or, in some states, parents by presumption), to have standing to seek custody and/or visitation of children for whom they have cared for a significant period of time. Such standing to seek custodial rights is granted either to a person who has explicitly taken on the traditional role of “parent” with the consent of a legal parent (parenthood by estoppel) or as a caretaker acting like a parent through caretaking alone (de facto parenthood). However, the ALI Principles, as well as state courts who have allowed for such third-party status, explicitly exclude compensated caregivers from attaining such status, prophylactically assuming that such caregivers do not act in the child’s best interests. Thus,

20. See supra note 11 and accompanying text.
21. For purposes of this article, the term “de facto parent” will be used to mean a person who although not formally or intended to be a legal parent acts “de facto” in a parental caretaking role for a child in a manner comparable to a legal parent for a substantial period of time and is thus given certain legal rights or obligations with regard to that child. See infra note 36. The PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000) [hereinafter ALI Principles] and state law use the term similarly to refer to third-party functional caretakers who act in a parenting/caretaking role with the knowledge of parents but are not treated or referred to as legal parents (as distinguished from parents by estoppel), and yet are given standing to obtain custodial rights to children. However, unlike in the ALI Principles, and more consistent with state law treatment, the term should not be read to have any particular durational, live-in requirement other than a strong psychological bond with a child for whom the de facto parent plays a parent-like role.
22. See infra notes 66-75 and accompanying text and 395-413 and accompanying text for discussions of the standards for de facto parenthood in the ALI Principles.
23. See infra notes 49-51 and accompanying text for a discussion of whether this openness alters the relationship between third parties and parental rights or whether it is altering the very nature of the concept of parenthood.
24. ALI Principles § 2.03.
25. See id. § 2.03 cmt. c(ii); see also infra notes 94-104 and accompanying text.
foster mothers, child care providers, and surrogate mothers cannot obtain custodial rights to children irrespective of the existence of a strong psychological bond between paid caregivers and the children for whom they care.

I argue that the rigid approach of excluding paid caregivers from the possibility of obtaining de facto status sacrifices significant benefits to children and caretakers. Once the law recognizes the benefits of psychological parenthood, excluding those who receive compensation for the care they give denigrates the value of care given by paid caregivers, misjudges the strength of the psychological bond between paid caregivers and children, and discriminates against the poor and racial minorities. While legitimate concerns regarding allowing a third party to use the power of the state to infringe on the parent-child relationship, as well as more general commodification anxiety, must be addressed, a more nuanced approach is recommended. Just as feminists have argued that caretaking work needs to be compensated, compensated caretaking work needs to be legally recognized for the value it provides.

In Part II, in order to provide context for my discussion of the possibility of awarding legal rights to paid caregivers, I describe the legal doctrines that provide custody and visitation rights to parties other than legal parents and the increasing legal recognition of functional parenthood in custody disputes and visitation petitions. I also discuss the potential constitutional limits on extending third-party rights as stemming from the Supreme Court’s opinion in *Troxel v. Granville.* In Part III, I discuss the exclusion of paid caretakers in more detail. I identify these caretakers and how they have thus far been treated in the case law when attempting to assert custodial rights. Although the primary paid caretakers I will discuss are foster parents, I will also discuss other paid caretakers and surrogate mothers. While there are significant differences between these categories of paid caregivers which potentially affect whether they should be granted legal status, I argue that the fact of compensation alone should not disqualify any of these caretakers from potentially obtaining legal rights to children.

In Part IV, I review the reasons for allowing paid caregivers to obtain de facto parental status and the reasons for opposing their ability to gain such status. I argue that a more complex understanding of the anxiety surrounding mixing money and care is necessary to reap the benefits yet avoid the drawbacks of intermingling money and parenting. In Part V, I apply this nuanced view, arguing that foster parents, paid caretakers, and surrogate mothers should be able, – depending on the circumstances and after a best interests hearing, to obtain visitation or even custody rights to children.

26. 530 U.S. 57 (2000). Because I deem the paid caregivers I discuss third-parties and not “parents” as discussed infra notes 49-51, the discussion of *Troxel* is integral. If, on the other hand, such caretakers are deemed parents, then there is nothing in *Troxel* itself that precludes such a broadened definition, although it is clear that *Troxel* refers to parents in the traditional biological or adoptive sense.
II. THE CONTEXT: THE ADVENT OF THE FUNCTIONAL PARENT

In this section, I will discuss how the law has gradually evolved from granting custody and visitation rights exclusively to biological or adoptive parents to granting such rights to unpaid functional caregivers in recognition of their contributions, albeit unpredictably. I will also discuss how the attitudes of society have similarly evolved. I will then describe the codification of this change in the ALI Principles. Finally, I will describe the uncertain constitutional limits on visitation and custody right for parties other than legal parents that the Supreme Court has imposed based on family privacy. This progression provides the necessary context for evaluating the legitimacy of awarding caregivers other than legal parents, whether paid or unpaid, legal status with regard to the children under their care.

A. State Law Recognition of Third-Party Rights to Custody

Traditionally, state law grants to legal parents all legal rights and responsibilities to children. Under this traditional doctrine of parental exclusivity, it is extremely difficult for a third party to obtain custody or visitation absent a showing of the legal parents’ unfitness or a showing that they relinquished or abandoned their parental rights.\(^{27}\) This exclusivity applies regardless of the potential benefit to children in having rights given to third parties.\(^{28}\)

However, the law is slowly becoming less rigid, recognizing the contributions of third-party functional caregivers as worthy of legal protection in limited scenarios. The various rights traditionally held only by legal parents that third parties seek based on functional caregiver status are custody, visitation, guardianship, and adoption. While discussing all of these forms of parental rights in some detail, this article focuses on rights to custody and visitation, which together entail what the ALI Principles describe as allocation of responsibility for children.\(^{29}\) Visitation – particularly when

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29. See ALI Principles § 2.03 cmt. e.
unsupervised, as it usually is – is just a more limited form of physical custody.\textsuperscript{30}

Many jurisdictions still follow the strong parental preference rule by granting physical custody to a third-party psychological parent only when the biological or adoptive parent is found unfit\textsuperscript{31} or, in a somewhat weaker version, upon a showing that parental custody will cause substantial harm to the child.\textsuperscript{32} However, changes are afoot. States have tentatively recognized various common law doctrines and have enacted statutes that allow judges to grant custody or visitation rights to third parties on the basis of the functional parenting they perform despite such caretakers’ lack of traditional legal status as parents. Third-party caregivers have been awarded custodial rights based on parens patriae power,\textsuperscript{33} parenthood by estoppel,\textsuperscript{34} the equitable parent doctrine,\textsuperscript{35} de facto parent doctrine,\textsuperscript{36} the psychological parent doctrine,\textsuperscript{37} the

\textsuperscript{30} See Ronald F.F. v. Cindy G.G., 511 N.E.2d 75, 77 (N.Y. 1987) (visitation is a limited form of custody); Jackson v. Fitzgerald, 185 A.2d 724, 726 (D.C. 1962) ("The right of visitation derives from the right to custody."); see also John Dewitt Gregory, 

\textsuperscript{31} See, e.g., Wis. STAT. ANN. § 767.41(3)(a) (West. Supp. 2008); Simons v. Gisvold, 519 N.W.2d 585 (N.D. 1994); Cotton v. Wise, 977 S.W.2d 263 (Mo. 1998) (en banc); Ex parte S.T.S., 806 So. 2d 336 (Ala. 2001).

\textsuperscript{32} See \textit{In re} Custody of Anderson, 890 P.2d 525, 526 (Wash. App. 1995) (awarding custody to parent over aunt and uncle who had custody over child for previous two years despite the finding that the aunt and uncle could offer a superior home environment); Lewis v. Donoho, 993 S.W.2d 1 (Tenn. 1999); Kinnard v. Kinnard, 43 P.3d 150 (Alaska 2002) (upholding shared custody based on stepmother’s demonstration that she was psychological parent to child and that severing bond would be detrimental); Froelich v. Clark, 745 N.E.2d 222 (Ind. Ct. App. 2001); CAL. FAM. CODE § 3041 (West Supp. 2009).

\textsuperscript{33} "Parens patriae" translates from Latin to "father of the people" and denotes the legal power of the State to act in the best interests of children, thereby usurping the power of natural parents to make independent judgments with regard to their children when the State feels their judgment is lacking or somehow impaired. Roberts v. Ward, 493 A.2d 478 (N.H. 1985) (using parens patriae power to determine whether visitation with grandparents would be in the best interests of the child).

\textsuperscript{34} See, e.g., Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677 (N.Y. App. Div. 1998) (finding mother estopped from denying her husband’s right to seek custody when she had publicly held out her husband as the child’s father, and the husband had accepted this role, despite the fact that both knew that husband was not the child’s biological father).

\textsuperscript{35} Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987); see also V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (same-sex partner of a biological mother who had assumed a parental role in helping to raise the biological mother’s child had established a "psychological parenthood" with respect to the child and thus had a legal right to petition for custody and visitation); Nancy D. Polikoff, \textit{This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in
in loco parentis doctrine, and grandparent visitation statutes. A few states have enacted statutes that explicitly provide for de facto status in allocating parental custodial responsibility and grant third parties custodial rights even as against natural parents. Other states have allowed functional parents to obtain custody or visitation under limited circumstances in light of their parental status through judicial decision. Limited visitation rights, it must be noted, are granted much more freely than more substantial access to


36. CAL. CT. R. 5.502(10) (A de facto parent is defined as “a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child’s physical and psychological needs for care and affection, and who has assumed that role for a substantial period.”); C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004); In re Custody of H.S.H.-K, 533 N.W.2d 419 (Wis. 1995).

37. Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App. 2006) (Mother’s ex-boyfriend who was allowed to visit and share custody of child for over nine years even after blood test proved that he was not the biological father of the child has standing to seek visitation as a psychological parent); In re E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004) (Former domestic partner has standing as psychological parent to petition for equal parenting time); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (Biological mother’s former same-sex domestic partner was children’s psychological parent and thus had standing to seek custody). 38. “In loco parentis” translates from Latin to “in the place of a parent” and reflects the imposition of certain legal obligations on persons or entities that stand in the place of parents. It is most commonly used in the context of schools and universities as well as for non-biological parents who act as parents. See Wallace v. Smyth, 762 N.E.2d 83 (Ill. App. Ct. 2001); In re Diana P., 424 A.2d 178 (N.H. 1980); Stacy A. Warman, Note, There’s Nothing Psychological About It: Defining a New Role for the Other Mother in a State That Treats Her as Legally Invisible, 24 NOVA L. REV. 907, 911 (2000); Carter v. Brodrick, 644 P.2d 850 (Alaska 1982) (acknowledging that stepparents who stand in loco parentis have ability to petition for visitation); Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979) (Person who stands in loco parentis may petition for custody). 39. See infra notes 80-92 and accompanying text.

40. OR. REV. STAT. § 109.119(10)(a) (2007); HAW. REV. STAT. § 571-46(a)(2) (LexisNexis 2008) (providing that “[c]ustody may be awarded to persons other than the father or mother whenever the award serves the best interest of the child”).

41. See, e.g., Charles v. Stehlik, 744 A.2d 1255 (Pa. 2000) (Presumption favoring natural parent was overcome by a clear showing that custody with stepparent was in child’s best interests.). In some jurisdictions the parental preference rule is applied only when the child is living with the parent, but is set aside altogether in favor of a best interest analysis in cases in which the non-parent has lived with the child and functioned in a parental role for some significant length of time. See, e.g., Price v. Howard, 484 S.E.2d 528 (N.C. 1997) (Where parent voluntarily relinquished child to non-parent, with whom child has lived for substantial period, best interest test applies).
children or physical custody. However, states diverge significantly as to who may be entitled to visitation rights and when. Grandparents and stepparents are the most frequent functional caregivers awarded custodial rights, but courts have also begun to recognize visitation rights of other functional caregivers, including homosexual partners. However, although courts increasingly recognize the importance of psychological parenthood by awarding visitation to third parties with psychological bonds to children, obtaining such rights remains an uncertain endeavor.

State laws differ not only as to who may seek visitation, but also regarding the circumstances in which visitation rights should be granted to non-parents and on the substantive standards that should govern the decision. For instance, states differ on whether or not a disruption in family relations – a crisis event of some sort, in the form of death or divorce – is a precondition for awarding visitation to non-parents, and whether other requirements, such as mediation, should also be met prior to such a decision. Depending on state law, third parties can seek custodial rights either by intervening in an ongoing custodial dispute – particularly if a crisis event is required – or by bringing a suit of their own in those states that recognize some form of third-party status. Visitation laws are extremely

42. See, e.g., V.C. v. M.J.B., 748 A.2d 539, 554-55 (N.J. 2000) (allowing for the possibility of a custody determination, but indicating that visitation is the more likely outcome for a psychological parent).
47. Most states do condition non-parents visitation on a prior disruption of family life and are reluctant to award visitation over objection of parents in intact nuclear families. See, e.g., Gregory, supra note 43, at 167-68. For states awarding grandparents visitation in cases of dissolution of the relationship between the child’s parents, or in cases of death of a parent or parents of the child, see, for example, MASS. GEN. LAWS ch. 119, § 39D (West 2008); NEB. REV. STAT. § 43-1802(1)(a)-(b) (2004); MINN. STAT. § 257C.08 (2007), invalidated in part by Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007); NEV. REV. STAT. § 125C.050(1) (2008); OHIO REV. CODE ANN. § 3109.11 (LexisNexis 2003); 23 PA. CONS. STAT. ANN. § 5311 (West 2001).
varied, and frequent changes in third-party visitation laws in various states cause further confusion.48

One could perceive such increased openness alternately as a matter of awarding to third parties rights traditionally reserved to parents, creating a kin-like familial structure that includes third parties who are awarded parental rights, or as transforming the very definition of legal “parent” to include non-biological or adoptive caretakers.49 I adopt the former approach, assuming for the sake of this article that parents are biological or adoptive while de facto parents and parents by estoppel (similar to grandparents) are third parties that are allowed to obtain some of the traditional rights reserved only for legal parents.50 This reflects the position taken by the ALI Principles, which preserve all rights and obligations for the separate status of “legal parent,” and disaggregate certain custodial rights that can under certain circumstances be obtained by de facto parents and parents by estoppel.51


50. I choose the former approach for two reasons. First, since my focus is specifically on considering the legal status of paid child care workers, I do not want to complicate the discussion by challenging the traditional legal definition of parenthood which is a separate and complicated inquiry. Second, I want to limit this discussion to visitation rights and not include issues of child support and other parenting rights and obligations, which are beyond the scope of this article and, though related, not integral to the discussion of visitation/custody rights alone, as parental rights and responsibilities can be disaggregated. Whether the paid caretakers I discuss in this article are considered third-parties with parenting rights – or parents under a broader and disaggregated concept of the legal status of parents – does not change my contention that such paid caregivers should be entitled to seek equivalent rights as caretakers who do not receive payment.

51. ALI Principles § 2.03 cmt. b.
B. Attention to the Importance of Functional Caregivers

Many have noted the trend, both in culture and law, away from the traditional immutable biological relationship and toward supporting and recognizing the functional family based on caregiving. While biological or adoptive parents still supply the core of child care, a growing minority of care is provided by various third-parties. Legal scholars are increasingly emphasizing the importance of the nurture function in caregiving in determining parental rights.

In light of the changing constructions of family, scholars are advocating more inclusive notions of family: “Individuals should not be assumed to be outside the family structure, nor should they be assumed part of the family. Instead, individuals should be required to show relationships based on the acts they perform and given privileges and rights based on those actions.”

The significance of such care relations is of pressing importance in today’s society for a number of reasons. First, same-sex families are gaining recognition and acceptance, and non-biological domestic partners are seeking and are increasingly successful in obtaining legal status towards the children.


54. See DiFonzo, supra note 27, at 933; Kavanagh, supra note 53 (arguing that family relationships are created by the care involved and that rights should reflect caretaking responsibility); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 188-202 (2004); Bartlett, supra note 27, at 961, 946-48 (proposing a concept of “non-exclusive parenthood” that would legally recognize as psychological parents all those who: (1) have had custody of the child for at least six months; (2) are understood to be a parent by the child; and (3) began their relationship with the child with the support and consent of the child's legal parent); Polikoff, supra note 35, at 464 (Legal parents would include “anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature.”); Alison Harvison Young, Reconceiving the Family: Challenging the Paradigm of the Exclusive Family, 6 AM. U. J. GENDER & L. 505 (1998) (introducing the concept of an “authoritative core” family, which would be inclusive of all those acting as parents and allow limited rights of visitation for those important individuals in children's lives outside that core); Czapanisky, supra note 52, at 991 (relying on interdependency theory to argue that functional caregivers should be given legal authority in order to encourage and reward good and continuous caretaking by third parties).

55. Kavanagh, supra note 53, at 123.
for whom they care.\textsuperscript{56} Second, the United States is an increasingly multicultural society, and different norms of caretaking are permeating our shared reality and thus influencing the law.\textsuperscript{57} Finally, technological developments and the increased use of reproductive technologies have created the potential for multiple potential biological as well as psychological parents for a single child.\textsuperscript{58}

Influential studies that have demonstrated the psychological benefits to children of continuity with functional caregivers also support recognition of the importance of functional caregiving.\textsuperscript{59} Goldstein, Freud, and Solnit coined the psychological tie formed by parent and caregiver as the "psychological family."\textsuperscript{60} Courts have given weight to such concerns.\textsuperscript{61}


\textsuperscript{57} See infra note 317 and accompanying text; see also Moore v. City of East Cleveland, 431 U.S. 494 (1977); Sam Roberts, \textit{New Demographic Racial Gap Emerges}, \textit{N.Y. TIMES}, May 17, 2007, at 21 (2006 United States Census Bureau claims that the minority population tops 100 million – about 33% of all American citizens; white non-Hispanics minority in 10% of U.S. counties).


\textsuperscript{60} See id.

\textsuperscript{61} See \textit{In re E.L.M.C.}, 100 P.3d 546, 548-49 (Colo. Ct. App. 2004); Roth v. Weston, 789 A.2d 431, 445 (Conn. 2002) ("[W]hen a person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, that child could suffer serious harm should contact with that person be denied or so limited as to serious disrupt that relationship."); Rideout v. Rendeau, 761 A.2d 291, 301 (Me. 2000) ("The cessation of contact with a grandparent whom the child views as a parent may have a dramatic, and even traumatic, effect upon the child's well-being. The State, therefore, has an urgent, or compelling, interest in providing a forum for those grandparents having such a 'sufficient existing relationship' with their grandchildren."); Youmans v. Ramos, 711 N.E.2d 165, 172-73 n.20 (Mass. 1999) ("The damage to the child, who cannot understand what is happening, from breaking these bonds is something which even competent
Oregon’s statute defining a child-parent relationship provides an example of the concept of “functional parenthood”:

[A] ‘[c]hild-parent relationship’ . . . [is one] in which . . . a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child’s psychological needs for a parent as well as the child’s physical needs.62

Emphasis on the importance of continuity of functional caregiving was the basis upon which courts originally evolved from a system in which paternal rights to children was the accepted norm towards valuing the functional care given by mothers. Reflecting the importance of the continuity of caregiving, in the past courts awarded custody on the basis of the tender years presumption63 or a primary caretaker presumption, although such presumptions have been abandoned.64 Courts, however, still attribute great

psychiatrists may be unable to predict. . . . [S]uch a breach should not be permitted lightly at the request of . . . [a] parent[. . . who [herself] created the unfortunate situation.”].


63. The tender years presumption awards custody of children of tender years (usually until the age of twelve) to the mother. It was introduced early in the nineteenth century as a carve-out to the paternal preference for custody of all children. See Devine v. Devine, 398 So. 2d 686, 689 (Ala. 1981).

64. In Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981), the West Virginia Supreme Court established a primary caretaker rule (which has since been abandoned):

In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, inter alia, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i. e. transporting to friends’ houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i. e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i. e. teaching general manners and
importance to emotional bonds and past caretaking in resolving custody disputes.65 The emphasis on functional parenthood as between biological parents has set the stage for increasing emphasis on functional parenthood even outside the bounds of biology.

C. ALI Principles of Family Dissolution

The 2000 ALI Principles represent an ambitious project both to capture and improve upon the highly varied state statutes and case law on family dissolution. Unable to actually make a model law of such disparate state systems, the objective was to make proactive recommendations while simultaneously capturing the best of what has already taken hold in the state systems.66 The ALI Principles indicate that although the drafters "attempt[] to avoid [making] unnecessary value judgments," they do make the following judgment, surrounding which they indicate there is "clear consensus": "the continuity of existing parent-child attachments after the break-up of a family unit is a factor critical to the child's well-being. Such attachments are thought to affect the child's sense of identity and later ability to trust and to form healthy relationships."67

The question of what constitutes a parent-child attachment is directly addressed by the drafters. The traditional bases of parenthood – biology and adoption – are deemed insufficient. What is needed is a rule "that allows continued contacts by de facto parents whose participation in the child's life is critically important to the child's welfare . . . [without unnecessarily intruding on] the autonomy of parents that is essential to their meaningful exercise of responsibility."68 The ALI Principles reflect increasing societal tolerance for alternate family lifestyles and the need to deal with family life that has grown beyond the traditional model of a mother and father with biological children.

The ALI Principles expand the definition of parenthood beyond the formal to embrace the functional by adding two additional concepts of parenthood to the traditional legal parent. The proposed structure creates three categories of parents: "legal parents," "parents by estoppel," and "de

65. See, e.g., Hollon v. Hollon, 784 So. 2d 943 (Miss. 2001) (Emotional ties with parents is one of the factors in determining best interests of the child in custody determinations.); Kjelland v. Kjelland, 609 N.W.2d 100 (N.D. 2000); Zepeda v. Zepeda, 632 N.W.2d 48 (S.D. 2001). Although the maternal presumption no longer operates, empirical evidence, albeit somewhat dated, suggests that focus on the caretaking relationship persists, as approximately 90% of primary caretakers continue to be awarded custody. See ELEANOR E. MACCOBY & ROBERT H. Mnookin, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 112-13 (1992).

66. See ALI Principles § 2.02; DiFonzo, supra note 27, at 923.

67. ALI Principles § 2.02 cmt. e.

68. Id. intro. at 5-6.
facto parents."\(^{69}\) According to the ALI Principles, both de facto parents and parents by estoppel are types of functional parents because without being legal parents, they are able to obtain legal status by demonstrating that they lived with the child and accepted parental responsibilities for the child. Parenthood by estoppel under the ALI Principles occurs when a person functions in a parental manner and has a legal parent’s consent to form a parental relationship with the child.\(^{70}\) De facto parenthood under the ALI Principles does not necessitate consent for a parental relationship, just a history of unconcealed caretaking.\(^{71}\) A de facto parent must live with a child for a significant period of time – not less than two years – and perform the majority of the caretaking function, or at least as much as a legal parent residing with the child, in order to obtain de facto parent status. This legal status in the ALI Principles is ground-breaking because the de facto parent does not take upon himself a parental role or substitute himself for a legal parent, like a parent by estoppel. Rather, a de facto parent is simply a caretaker, who in light of such caretaking potentially incurs custodial rights.

According to the ALI Principles, parents by estoppel and de facto parents may be legally entitled to continue their parenting activities.\(^{72}\) However, parents by estoppel have the potential of gaining greater parental rights. De facto parents cannot be allocated the majority of custodial responsibility over the objection of a legal parent or a parent by estoppel that is fit and willing to assume the majority of custodial responsibility.\(^{73}\)

The ALI Principles have been influential and, in some instances, are reflective of state law. The New Jersey Supreme Court in \(V.C. v. M.J.B.\) announced a test for when de facto parents can obtain custodial rights in a case involving lesbian co-parents that is similar to the test outlined in the ALI Principles; however, under \(V.C.\) no minimum time requirement is set, and visitation is expressly preferred to custodial responsibility as a general rule.\(^{74}\) Other state courts have cited the ALI Principles favorably when providing visitation to third-party claimants.\(^{75}\)

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\(^{69}\) *Id.* § 2.03(1).

\(^{70}\) *Id.* § 2.03 (1)(b).

\(^{71}\) *Id.* § 2.03 (1)(c).

\(^{72}\) *Id.* § 2.18.

\(^{73}\) *Id.*

\(^{74}\) 748 A.2d 539 (N.J. 2000).

\(^{75}\) See, e.g., 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 parent); E.N.O v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (upholding recognition of lesbian domestic partner as de facto parent, citing the ALI standard, and awarding visitation).
D. The Constitutional Limits: Troxel v. Granville

To some extent, parental privacy rights limit the ability of non-parents to obtain custodial rights over the objections of legal parents. As this constitutional limit can potentially affect a de facto parent’s ability to obtain custodial rights, the extent of this limit must be clearly understood in contemplating the rights of functional parents.76 The fundamental right to privacy – as derived from the Fourteenth Amendment’s due process clause – provides “heightened protection against government interference with certain fundamental rights and liberty interests.”77 Included among these fundamental rights is the parental right to make decisions regarding the upbringing of one’s children.78

The Supreme Court recently upheld this principle in Troxel v. Granville.79 In Troxel, the Supreme Court faced the issue of whether the constitutional protection of parental privacy would allow for third-party visitation with a child over the parent’s objections based on a court’s determination that such visitation was in the child’s best interest.80 The Court in Troxel considered a broad Washington statute that permitted “[a]ny person” to petition for visitation rights “at any time,” whenever the court decided such visitation was in the child’s best interest.81 Acting under authority of this statute, the trial court increased the paternal grandparents’ visitation rights over the objection of the mother because it determined that such visitation was in the children’s best interests.82 The Washington Supreme Court found that the statute was unconstitutional on its face because of how broadly it conceived of the possibility of awarding third-party visitation rights. The court held that third-party visitation could only be given over a parent’s objections based on a showing of harm to the child.83 The Supreme Court affirmed the Washington Supreme Court’s holding but issued six separate opinions. Justice O’Connor’s plurality opinion overturned the trial court judge’s decision based on the broadness of the statute and its application to the facts in the case, concluding that the Washington family

76. See supra notes 49-50 and accompanying text. Arguably, if de facto parents are deemed “parents” instead of third parties, they would not be subject to the same privacy concerns. In this article, however, I consider de facto parents as third-parties, different from traditional legal parents and thus a discussion of Troxel is proper.
78. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (identifying a “private realm of family life which the state cannot enter”).
79. 530 U.S. 57.
80. Id. at 67.
81. WASH. REV. CODE ANN. § 26.10.160(3) (West 2005); Troxel, 530 U.S. at 61.
82. Troxel, 530 U.S. at 61-62.
83. Id. at 62-63.
court had failed to show adequate deference to the mother’s wishes.\(^{84}\) While the plurality decision clearly states that the fundamental right of parents to direct the upbringing of their children was violated, the appropriate standard of review is not clearly articulated by the decision. Rather, the only guidance that is given is the need for a presumption — although the specific parameters of the presumption remains undefined — that as against non-parents, legal parents’ preferences as to custodial rights are in a child’s best interest.\(^{85}\)

The lack of a majority, the multiplicity of opinions, and the failure of the plurality to announce a clear standard of review has led to diverse and even contradictory interpretations of *Troxel*.\(^{86}\) Despite the lack of a clear holding on this issue by the Supreme Court, state courts have found similar statutes to be facially unconstitutional.\(^{87}\) State courts have interpreted *Troxel* variably to mandate: (1) a strict scrutiny approach to allowing third-party visitors over a legal parent’s wishes,\(^{88}\) (2) a finding of harm to the child in order to justify allowing third-party visitation,\(^{89}\) (3) a rebuttable presumption governed by the best interests standard,\(^{90}\) or (4) that the visitation is not a substantial interference.\(^{91}\) In many respects, *Troxel* seems to have triggered only further doubts regarding when visitation may be granted to third parties over legal parents’ objections.\(^{92}\)

Accordingly, although *Troxel* and the constitutional doctrine of family privacy limit de facto parents’ ability to obtain custodial rights over the objection of legal parents, the limit is uncertain and has been interpreted in a variety of ways. It is clear that a parent’s wishes must be given some

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85. *Id.* at 72-73. In his concurrence, Justice Thomas advocated using strict scrutiny to override a parent’s judgment, and the Washington Supreme Court used the standard that denial of visitation must be harmful to the child, but the plurality made no such determination. *See id.* at 80 (Thomas, J., concurring).


87. DeRose v. DeRose, 666 N.W.2d 636, 643 (Mich. 2003); Wickham v. Byrne, 769 N.E.2d 1, 8 (Ill. 2002); *In re Marriage of Howard*, 661 N.W.2d 183, 192 (Iowa 2003).


92. For an in-depth analysis of *Troxel*, see Dolgin, *supra* note 86.
deference, but it is not clear when third parties’ interests in maintaining emotional attachments with children can overcome those wishes. Given the potential flexibility and lack of certainty with regard to the Troxel opinion, the ALI Principles and similar awards of custody or visitation to de facto parents are not directly inconsistent with constitutional doctrine. The limit must be kept in mind, but as long as the place of biological or adoptive parents is considered and given a certain amount of deference, the Supreme Court has left the door open to giving legal status to other parental figures in children’s lives.

III. THE EXCLUDED: COMPENSATED CARETAKERS

In this section, I will engage in a closer analysis of the identity of compensated caretakers who are excluded from de facto parental status. First, I will analyze more closely the exclusion of paid caretakers in the ALI Principles. I will then parse out the different paid caretakers that would be excluded — foster parents, paid caretakers, and surrogate mothers — and consider how they have been treated under state law.

A. ALI Principles – De Facto Parental Legal Status in Focus

Commentators, state courts and state legislators agree almost instinctively that caregivers who act for “selfish,” i.e., monetary, motivations in performing their caregiving duties are disqualified from functional parental status. Likewise, the ALI Principles limit de facto parenthood status to those who perform caretaking for “reasons primarily other than financial compensation.” The comments to this section indicate that this provision is intended to exclude foster parents and other paid caretakers from obtaining de facto parental status. The Principles explain:

The law grants parents responsibility for their children based, in part, on the assumption that they are motivated by love and loyalty, and thus are likely to act in the child’s best interests. The same motivations cannot be assumed on the part of adults who have provided caretaking functions primarily for financial reasons.

93. Under the ALI Principles, grandparents who have not acted as de facto parents would not be entitled to visitation upon divorce since visitation and custody are merged. The question of whether grandparents should be awarded visitation is beyond the scope of this article.
95. ALI Principles § 2.03(1)(c)(ii).
96. Id. § 2.03 cmt. c(ii).
Thus, relationships to children formed by babysitters and other paid caretakers are not recognized under Paragraph (1)(c).97

The ALI Principles assume that paid caretakers are not creating legitimate emotional, parent-like attachments with children that will assure that they are acting in a child’s best interests. Caretakers for money are caretakers for hire (like wombs for hire)98 and are disposable and exchangeable.99 Therefore, paid caretakers are not entitled to legal status with regard to children.

How do you determine if one is acting “primarily for financial reasons?” Foster parents receive only modest compensation,100 have full physical custody of foster children and care for children when biological parents are unable to do so, and yet they are explicitly excluded from de facto parental status in the ALI Principles.101 Another example referenced by the Principles is in In re Hood, where a step-grandmother, who had a clear extended familial bond with the child, and who was paid for regular, long-term

97. Id.
98. See infra notes 148-51 and accompanying text.
99. See Barbara Bennett Woodhouse, Making Poor Mothers Fungible: The Privatization of Foster Care, in CHILDCARE AND INEQUALITY: RETHINKING CAREWORK FOR CHILDREN AND YOUTH 83 (Francesca M. Cancian et al. eds., 2002).
100. Barbara Bennett Woodhouse, Horton Looks at the ALI Principles, 4 J.L. & FAM. STUD. 151, 162 (2002); see also ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 86 (1999) (The “fostering stipend from the state is generally intended to cover no more than the minimal costs of supporting a child, while the costs of the care they actually provide often go far beyond the minimal.”). Such compensation is generally sufficient to cover only basic costs of caring for a child and provides little in terms of additional compensation to foster parents. According to one study in Connecticut, foster parents were reimbursed $586 per month for a child who was between the ages of six and eleven and $637 for a child who was twelve years or older. Rates are higher for children with severe behavioral and psychological problems, or for those with fragile medical conditions due to afflictions such as AIDS. See DANIELLE F. WOZNIAK, THEY’RE ALL MY CHILDREN: FOSTER MOTHERING IN AMERICA 60-61 (2002); see also CHILDREN’S RIGHTS, NAT’L FOSTER PARENT ASS’N, & UNIV. OF MD. SCH. OF SOC. WORK, HITTING THE M.A.R.C.: ESTABLISHING FOSTER CARE MINIMUM ADEQUATE RATES FOR CHILDREN 4-6 (2007), available at http://www.childrensrights.org/wp-content/uploads/2008/06/hitting_the_marc_summary_october_2007.pdf (last visited on Jan. 2, 2009) (collecting and comparing the reimbursement rates for foster care in all 50 states). Foster care stipends for children without special needs in the United States average $488 per month for a two year old, $509 for a nine year old, and $568 for a sixteen year old and range from as low as $271 in Missouri and $275 in Ohio to $869 in D.C. for two year olds. Id. The Report establishes recommended minimum stipends to cover basic costs of caring for a child such as shelter, food, clothing, daily supervision, insurance, and school supplies, which are well above state averages in all but five states. Id.
101. ALI Principles § 2.03 cmt. (c)(ii).
babysitting, was denied de facto status. Thus, it is hard to imagine situations in which those who are paid for caretaking functions would be eligible to achieve de facto parental status.

In considering the possibility of paid caretakers obtaining legal status under the ALI Principles, one must keep in mind that a de facto parent must have lived with the child and performed substantial caretaking functions for a significant period of time, defined as at least two years, and must perform either the majority of the caretaking functions or at least as much caretaking as a live-in legal parent. It is not only the occasional babysitter who is excluded under this provision; it is potentially a caretaker of significant influence and attachment. For the most part, however, this provision has remained widely unquestioned, with some notable exceptions.

Before further focusing on and challenging the rationales for preventing paid caretakers from obtaining de facto parental status, I first examine more closely who these paid caretakers are and what, if any, legal status they have already obtained as psychological parents for purposes of obtaining custody or visitation.

B. Foster Parents

In the comments to the Principles, foster parents are explicitly excluded from those who are defined as de facto parents: “Relationships with foster parents are also generally excluded, both because of the financial compensation involved and because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary, rather than indefinite, care for children.” Both of these rationales are weak. The compensation clearly disqualifies foster parents from obtaining de facto status, despite the modest remuneration foster parents receive. Moreover, while the system is set up to be a temporary safe haven, many children spend

103. Since this article is primarily concerned with the exclusion of compensated caretakers from the category of caregivers entitled to obtain de facto status, I do not consider or question the other requirements in the ALI Principles for obtaining de facto status until the end of the article in Part V, in which I apply the analysis of paid caregivers to a concrete set of rules.
105. ALI Principles § 2.03 cmt. c(ii). See infra notes 347-63 and accompanying text for a discussion of the potential drawbacks of breaking down the foster care system.
106. See supra note 100 and accompanying text.
significant periods of time, if not the bulk of their lives, in the foster care
system.\textsuperscript{107}

Foster care legislation, in particular the enactment of the Adoption and
Safe Families Act ("ASFA") in 1997, emphasizes the temporary nature of
foster care.\textsuperscript{108} Fundamentally, ASFA pushes for permanency and adoption in
lieu of foster care by putting rigid time frames (15 months) on state agencies
for initiating termination proceedings of parental rights to free children for
adoption, with limited exceptions.\textsuperscript{109} Any state that wishes to share in federal
funds earmarked for foster care and child protective services must follow the
ASFA guidelines; therefore, its principles have been readily adopted by the
states.\textsuperscript{110} ASFA does allow foster parents the right to be heard in court at

\textsuperscript{107} The House Subcommittee on Human Resources reported that children could
expect to stay in foster care for about three years. \textit{See} H.R. REP. NO. 105-77, at 8, \textit{as
reprinted in} 1997 U.S.C.C.A.N 2739, 2740. In some states long-term foster care is a
legally recognized permanency plan for foster children for whom adoption is not a
viable option. This plan changes the nature of the foster care slightly by eliminating
some administrative oversight, but the foster relationship remains under state control.
See, \textit{e.g.}, OHIO REV. CODE ANN. § 2151.353(A)(5) (LexisNexis 2007); \textit{see also} Judy
Fenster, \textit{The Case for Permanent Foster Care}, J. SOC. & SOC. WELFARE, June 1997, at
117; David J. Herring, \textit{The Multiethnic Placement Act: Threat to Foster Child Safety
and Well-Being?}, 41 U. MICH. J.L. REF. 89, 91-92 (2007). For further data on average
time foster children spend in foster care, see discussion of AFCARS, \textit{infra} notes 113-19
and accompanying text.

\textsuperscript{108} ASFA amends Title IV-B and IV-E of the Social Security Act, which
governs states' federally-funded child protection efforts. For representative
discussions of ASFA, see Stephanie Jill Gendell, \textit{In Search of Permanency: A
Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation},
39 FAM. & CONCILIATION CTS. REV. 25 (2001); Libby S. Adler, \textit{The Meanings of
HARV. J. ON LEGIS. 1 (2001); Woodhouse, \textit{supra} note 99.

\textsuperscript{109} As Barbara Bennett Woodhouse notes, the new legislation emphasizes the
importance of functional caregiving by stressing the good care that can be provided in
stable adoptive families over possible prior emotional attachments to birth parents.
\textit{See} Woodhouse, \textit{supra} note 99, at 91. If a state determines that termination is not in a
child's best interests or if a relative is caring for a child, a state can provide a
compelling interest as to why termination is not presumptively in the child's best
interest. Absent such a demonstration of a compelling interest (which requires state
agents to go out of their way to perform extra paperwork), ASFA requires states to
seek termination. \textit{See} Hilary Baldwin, \textit{Termination of Parental Rights: Statistical
Study and Proposed Solutions}, 28 J. LEGIS. 239, 261 (2002); Susan L. Brooks, \textit{The
Case for Adoption Alternatives}, 39 FAM. & CONCILIATION CTS. REV. 43, 44-45
(2001); \textit{see also} Woodhouse, \textit{supra} note 99, at 89. The move towards permanency is
also stressed by provisions that place a duty upon the state to make reasonable efforts
at permanency planning once adoption or permanent guardianship becomes the goal,
and by the concept of concurrent planning – the practice of planning simultaneously
for two mutually exclusive alternative goals such as adoption and reunification. 42

\textsuperscript{110} \textit{See} Woodhouse, \textit{supra} note 99, at 91.
review or permanency hearings regarding their desire to adopt or their beliefs regarding the best interests of the child, but it does not give them independent standing to seek custody or petition for adoption if the state has different plans for the foster child.111

Although such legislation makes issues related to long-term foster care appear less pressing, and the ALI Principles description of foster care as temporary more accurate, long-term foster care is still the reality for many, if not most foster children.112 This remains the case despite ASFA’s emphasis in terminating parental rights and pushing for adoption. The Adoption and Foster Care Analysis and Reporting System (“AFCARS”) has nearly national coverage and provides the most complete data regarding the fate of children in foster care, although it also has many shortcomings.113 While only incomplete data is available about the effects of ASFA,114 it is clear that although the number of adoptions is rising slightly, long-term foster care remains the norm.115 According to AFCARS, the mean number of months children remain in foster care did not change markedly in the initial years since ASFA was implemented, decreasing slightly from 32.6 months to 31.7 months.116 Children waiting to be adopted after parental rights have been terminated wait an average of forty-four months for adoption, without

111. See Woodhouse, supra note 100, at 162.
112. It is not my intention here to judge whether adoption is always to be preferred to long-term foster care – many have opined on this issue. See, e.g., supra citations in note 109. However, given the reality of long-term foster care, my argument is that alternative legal rights to foster children other than adoption should be considered.
114. Barth, Wulczyn & Crea, supra note 113, at 381 (“[A]ll available evidence offers only a blurry picture of ASFA’s impacts.”).
115. According to AFCARS, the percentage of adoptions increased from 16% in 1999 to 17% in 2000 and 18% in 2001. See id. at 382.
evidence of any significant change from 1998-2002. Moreover, while adoption is the goal for approximately 20% of foster children, long-term foster care or emancipation is still the goal for approximately 15% of foster children. While adoption rates increased somewhat from 15% to 18% over this time period, the number of children aging out of the system each year has risen from 17,310 to 20,358. In sum, long-term foster care is still the reality for many children regardless of the policy goals of ASFA or the explanation in the ALI Principles as to why foster parents should not be eligible for de facto parental status.

State courts that have addressed petitions for visitation or custody by foster parents in the absence of an explicit grant of standing by statute have been largely un receptive to foster parents’ pleas for continuing relations. Only one state statute explicitly allows standing to foster parents seeking visitation with former foster children, and there only if the foster child lived with the foster parents for at least eighteen months (or six months for psychological parents who are not foster parents). Perhaps because of their low success rate in gaining custodial rights subsequent to a foster placement, foster parents have infrequently sought visitation or custody. When foster parents have brought actions for custody or visitation, state courts have used the fact of compensation to discredit the emotional attachments involved. In Raschein v. Frey, the trial court dismissed for lack of standing a foster

117. Id. at 10.
120. OR. REV. STAT. § 109.119(1) (2007) (granting standing to “any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship . . . with a child”).
121. See Gregory, supra note 30, at 367; ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE 459-60 (3d ed. 1995).
parent’s petition for visitation of his foster child after the foster child was adopted by his ex-wife.122 Among the arguments presented was that the petitioner could not meet the parent-like relationship requirement for standing to seek visitation because, as a foster parent, he received financial compensation for his caretaking.123 In In re Diana P., although the court allowed for the possibility that foster parents stood in loco parentis to the child in order to gain standing in a custody proceeding, the court held that their status as foster parents who receive compensation for the care they provide may weigh against their claims of having obtained such stature.124 In Worrell v. Elkhart County Office of Family & Children, foster parents sought visitation with three of their former foster children, arguing that they had standing to request visitation since, as former foster parents, they had met the threshold requisite of a custodial and parental relationship.125 The court held that a foster relationship does not justify standing for visitation because “[u]nlike parent and step-parent relationships, foster relationships are designed to be temporary” and that the relationship is “contractual; the parents are reimbursed by the State for their care of the children.”126 Moreover, the court expressed concern that natural parents or future adoptive parents would have to contend with foster parents’ visitation claims.127

The general attitude of courts has been that “foster parents may not by pleading their love for the child escape their legal status.”128 But that is


123. Raschein, 2005 WL 1532039, at *4. The case was certified for appeal to the Wisconsin Supreme Court and has not yet been decided. Raschein v. Frey, 703 N.W.2d 381 (Wis. 2005). For examples of other cases denying visitation to foster parents, see Bessette v. Saratoga County Comm’r of Soc. Servs., 619 N.Y.S.2d 359 (N.Y. App. Div. 1994); In re Melissa M., 421 N.Y.S.2d 300, 301 (N.Y. Fam. Ct. 1979) (Former foster parents who cared for foster child “for virtually all of her first [four and a half] years of life” were denied standing to seek visitation after she was returned to her natural father.).


125. 704 N.E.2d 1027, 1028-29 (Ind. 1998). The three foster children, who were brothers, were living with different foster parents because of an incident between one of the foster children and the Worrell’s natural daughter. Id. at 1028.

126. Id. at 1029.

127. Id.; see also In re G.C., 735 A.2d 1226 (Pa. 1999) (Foster parents lack standing in custody proceedings.); In re McDaniel, Nos. 2002-L-158, 2002-L-159, 2004 WL 1144390 (Ohio Ct. App. 2004) (Foster parents have no standing to petition for custody.); In re Fell, No. 05 CA 9, 2005 WL 2420382 (Ohio Ct. App. 2005); In re Michael B., 604 N.E.2d 122 (N.Y. 1992); Swiss v. Cabinet for Families & Children, 43 S.W.3d 796 (Ky. Ct. App. 2001) (Foster parents are not de facto parents because the state agency provides financial support).

128. In re Adoption of Crystal D.R., 480 A.2d 1146, 1151 (1984) (By its very nature, the “foster parent/foster child relationship implies a warning against any deep emotional involvement with the child since under the given insecure circumstances
precisely the question – should love and attachment between the children and their caregivers, developed over an extended period of functional parenting, have the potential to change that legal status?

C. Child Care Providers

Paid caretakers such as nannies, babysitters, and financially compensated kin are also excluded under the ALI Principles and state law from obtaining de facto parental status. While the incidence of cases where paid caretakers seek visitation is rare, there are a few cases that do deal with the issue explicitly. In In re Hood, a child’s caretaker, who also happened to be kin (the grandmother of the child’s half-brother), sought standing to petition for visitation under a best interest of the child inquiry.129 The “day care provider” – as she was deemed by the court – sought visitation under the grandparent visitation statute in Kansas, as well as under a common-law right of visitation for third parties when in the child’s best interests, and when there has been a substantial relationship between the child and the third party seeking visitation.130 Despite the admittedly close relationship between the child and his “grandmother-like” caretaker, the court rejected the plea based, in part, on a fear of increased intrusion into parental privacy and family life more generally.131 The court also noted that “an unrelated third party could abuse the procedure, using the court system to harass parents.”132

In Argenio v. Fenton, a grandmother sought custody of her grandchild after the death of her daughter.133 The question in Argenio was whether a caretaker could act in loco parentis and thereby gain standing to seek custody. The court clearly demarcated the line between a parent and a caretaker:

Although we recognize and applaud appellant’s participation in the care-taking of her granddaughter, our review of the record before us and the arguments of the parties brings us to the same conclusion as that of the trial court that ‘[a]ppellant proved that she acted as no more than a care-taker, in effect, a baby-sitter for the child, albeit a frequent caretaker. That is not enough to confer standing.’134

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129. 847 P.2d 1300, 1302-04 (Kan. 1993) (Court declined to extend grandparent-visititation statute, or to recognize a common-law right of third-party visitation, to child’s day-care provider.).
130. Id.
131. Id. at 1303-04.
132. Id. at 1304.
134. Id. at 1044.
Thus, functional caretaking alone is disparaged when compared to a relationship in which parental authority is established or conferred, e.g., a step-parent or domestic partner.

Although the close emotional bond and logistical requirements required for de facto status under the ALI Principles or state law may be quite rare as between a paid caregiver and a child, and such status may be very infrequently sought,\(^{135}\) it is conceivable that such a bond could develop. There are two types of paid caregivers to consider – kin and non-kin. Clearly, an argument can be made that kin are more likely to act out of non-selfish reasons. Yet, both kin and non-kin caretakers may act for both altruistic, “non-selfish” reasons as well as “selfish” monetary interests, particularly those caretakers that seek custodial status. Paid caretakers who seek custodial status would not receive compensation for the caretaking provided during court ordered visitation and thus clearly have motivation to care for the child beyond the purely mercenary.\(^{136}\) The issue is whether monetary compensation should disqualify a caretaker otherwise eligible for de facto parental status where the bond between child and caretaker is strong and visitation is in the child’s best interests.

**D. Surrogate Mothers**

Despite the valuable gestational services they provide, surrogate mothers are excluded from de facto parental status for two reasons. First, gestation alone is not enough to satisfy the two year live-in requirement. Second, they are paid for their services. In order for surrogates to be considered de facto legal parents under the ALI Principles or state law, their time as surrogates must first be considered parenting or caretaking. As I have argued elsewhere, gestation should be considered a form of caretaking.\(^{137}\) First, gestation is caretaking because a significant bond forms between a pregnant women and the fetus.\(^{138}\) Second, because she has responsibility for the fetus and must take care of herself and provide for the growing fetus, a pregnant woman undertakes a tremendous physical and emotional

\[^{135}\text{See infra notes 261-63 and accompanying text.}\]

\[^{136}\text{See infra Part IV.B.4.}\]

\[^{137}\text{See Laufer-Ukeles, supra note 58, at 435-49.}\]

\[^{138}\text{ROBIN WEST, CARING FOR JUSTICE 127-28 (1997); ROTHMAN, supra note 15, at 35-36 (describing maternal rights based on gestation as a uniquely nurturing social as and physical relationship); Nancy S. Erickson, The Feminist Dilemma over Unwed Parents’ Custody Rights: The Mother’s Rights Must Take Priority, 2 LAW & INEQ. 447, 461-62 (1984) (basing the rights of the birth mother on the fact that “[s]he is not only the ‘primary caretak[ing] parent,’ [but also] the only caretak[ing] parent”). For scientific studies demonstrating this bond, see John C. Fletcher & Mark I. Evans, Maternal Bonding in Early Fetal Ultrasound Examinations, 308 NEW ENG. J. MED. 392, 392 (1983); John H. Kennell & Marshall H. Klaus, Mother-Infant Bonding: Weighing the Evidence, 4 DEVELOPMENTAL REV. 275, 281 (1984).}\]
commitment.\textsuperscript{139} It is not a detached relationship and although there are differences from after-birth caretaking, the similarities outweigh the differences for de facto parenthood purposes.

I have discussed elsewhere my belief that surrogate motherhood contracts should not be enforceable over the objection of the surrogate.\textsuperscript{140} If the surrogacy contract is enforced, all ties to the surrogate would be entirely severed by contract. However, even if the surrogacy contract is not enforced, the question remains as to what happens if the surrogate and the biological father and his wife (who may or may not also be the genetic mother) both desire custody of the child after it is born and a custodial dispute results.

Even when the parental relationship between the surrogate and the child is acknowledged, the compensated nature of the relationship undermines the legal significance of the bond. In \textit{In re Baby M}, the surrogate was a traditional surrogate – in other words, both the biological and gestational mother.\textsuperscript{141} Although the court found the contract unenforceable and therefore acknowledged the surrogate as the legal mother, after a best interests analysis the court awarded custody to the genetic father and his wife.\textsuperscript{142} The child had lived with and been cared for by her mother for the first four months of her life until the mother was required to relinquish custody.\textsuperscript{143} As a starting point, both natural parents were given equal weight under the State Parentage Act – the sole issue was which family would better serve the best interests of the child.\textsuperscript{144} In a best interests analysis, both the socioeconomic status of the surrogate mother and her initial willingness to give her baby away for compensation were factored against her.\textsuperscript{145}

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140. Laufer-Ukeles, \textit{supra} note 58, at 447. Rather, I argue that surrogate motherhood should be treated in a manner similar to adoption, in which the surrogate mother must voluntarily forfeit all rights and status towards her child after the child is born. I argue that this should be the law regarding both traditional surrogate motherhood, where the child is both the genetic and gestational mother, and under gestational surrogate motherhood, where the surrogate is the gestational but not the genetic mother. \textit{Id}.

141. 537 A.2d 1227, 1235 (N.J. 1988).

142. \textit{Id}. at 1234-35.

143. \textit{Id}. at 1236-37.

144. \textit{Id}. at 1256.

145. \textit{Id}. at 1258 ("Our custody conclusion is based on strongly persuasive testimony contrasting both the family life of the Whiteheads and the Sterns and the personalities and characters of the individuals. The stability of the Whitehead family life was doubtful at the time of trial. Their finances were in serious trouble (foreclosure by Mrs. Whitehead's sister on a second mortgage was in process). Mr.

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Courts are much less likely to even consider custody desires of a gestational (non-genetically related) surrogate because most courts do not recognize gestation as sufficient to confer parental status and are therefore more likely to enforce the contract or simply ignore the gestational mother regardless of contract enforcement. In determining parentage of children born to gestational surrogates, U.S. courts have either awarded custody to the intended parents based on biological connection or, more extraordinarily, based on sheer contractual intent. One court, which determined that the intended parents were the legal parents in a gestational surrogacy, further explained that the gestational surrogate was merely a caretaker, similar to a babysitter, wet nurse, or temporary foster mother, and therefore undeserving of legal status. Another court even called surrogate mothers “wombs for hire” because they engage in the pregnancy for money. Accordingly, surrogate mothers, both in custody battles or in objections to surrogate contracts, are penalized for their status as paid caretakers. Surrogate mothers – both gestational and traditional – provide valuable caretaking, the value of which is undermined in state law and the ALI Principles by the compensation they receive.

Whitehead’s employment, though relatively steady, was always at risk because of his alcoholism, a condition that he seems not to have been able to confront effectively. Mrs. Whitehead had not worked for quite some time, her last two employments having been part-time. One of the Whiteheads’ positive attributes was their ability to bring up two children, and apparently well, even in so vulnerable a household.”). One of the experts testifying on behalf of Mr. Stern and relied upon by the court listed as determinants for identifying the best interests of Baby M: “Was the child wanted and planned for,” and went on to explain that unlike Mr. Stern, Mrs. Whitehead did not have this child to raise but to give to another family for consideration. In re Baby M., 525 A.2d 1128, 1151-52 (N.J. Super. Ct. Ch. Div. 1987), aff’d in part and rev’d in part, 537 A.2d 1227.


147. See, e.g., Belsito, 644 N.E.2d at 762.
148. See Johnson, 851 P.2d at 783-84; Buzzanca, 72 Cal. Rptr. 2d at 288.
149. Johnson, 851 P.2d at 786.
150. See Smith, No. 85-53201402.
151. See infra notes 410-11 for a discussion of how the duration requirements should be considered.
IV. THE PUZZLE: PAID CARETAKERS AND LEGAL STATUS

In this section, I will explore the potential benefits and drawbacks of allowing compensated child caretakers such as foster parents, paid child care workers and surrogate mothers to obtain de facto parental status. Potential benefits include improving the status, quality and/or availability of vital caretaking services, recognizing the benefits to children from continuous attachments with good caretakers, and addressing problems of discrimination on the basis of gender, socio-economic class, race and ethnicity. The potential drawbacks of allowing paid caretakers to obtain de facto legal status are the invasion of privacy involved, the fear of harassment by paid caretakers, the breakdown of established systems of foster care and paid child care, and more general anxiety regarding the mixing of parent-like caretaking and money – feared to sully intimate human relations – which I will refer to as “commodification anxiety.”

I will focus mainly on foster parents and, to a lesser extent, paid caretakers and surrogate mothers. The argument for affording legal status to foster parents is strongest because foster parents act when natural parents are unable or unwilling to care for the children, whereas paid caretakers act under the authority of the natural parents. Thus, infringing on the privacy of natural parents is less problematic in the foster care scenario, as the state has already intervened.\(^\text{152}\) Moreover, foster parents are potentially the only parental figures available to such children, not just an additional parent figure. However, as I will describe below, there are similarities between foster care and paid child care. While foster parents will be the prime example of caretakers who would benefit from de facto parental status, in limited circumstances paid child care providers and surrogate mothers should also be considered as potential de facto legal parents.

In addition, because of ambivalence regarding the legality and advisability of surrogate arrangements generally, I will not discuss surrogate mothers in the context of arguments for incentivizing such caretakers.\(^\text{153}\) However, I will discuss the benefits of allowing legal status to surrogate mothers with regard to eliminating racial, gender and socioeconomic discrimination.

\(^{152}\) See supra notes 76-93 and accompanying text and infra notes 328-37 and accompanying text.

\(^{153}\) See Laufer-Ukeles, supra note 58, at 435-49.
A. Reasons to Support Legal Status for Paid Caregivers

1. Improving the Status, Quality and/or Availability of Vital Caretaking Services

In this section, I will discuss the potential benefit of improving the quality and/or quantity of caretaking services by allowing paid caretakers to obtain de facto parental status, thereby potentially allowing them visitation or custodial rights. When people hire caregivers, commission surrogate mothers, or when the state places children with foster parents, the hope is that these caregivers will act in the best interests of the child (or fetus), providing the love and support that the child (or fetus) needs. Caregiving is a bit different than other jobs: caregivers work for compensation but are expected to develop bonds and act selflessly for those for whom they care. The question is how to promote such a bond while ensuring the dignity of the caretaker – so that we ensure an adequate supply of quality caretakers.

a) Foster Care

Foster care is the provision of caretaking services for children who are temporarily or permanently in need of such care.154 Foster care may lead to adoption, long-term foster care until emancipation, transfer to a different foster home, or provide a temporary stay until children are able to return to their natural parents.155 Broadly, the goal of foster care is to promote the safety and well-being of children.156 Private foster homes are generally preferred to group homes both for efficiency reasons and because children feel more secure and less threatened, and are statistically safer than in group homes.157


156. See, e.g., Sandra Stukes Chipungu & Tricia B. Bent-Goodley, Meeting the Challenges of Contemporary Foster Care, FUTURE CHILD., Winter 2004, at 75.

157. See RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES (1996) (children more likely to be abused in group homes than foster homes); J. William Spencer & Dean D. Knudsen, Out-of-Home Maltreatment: An Analysis of Risk in Various Settings for Children, 14 CHILD. & YOUTH SERVICES REV. 485 (1992) (In group homes there was more than ten times the rate of physical abuse and more than 28 times the rate of sexual abuse as in the general population, in part because so many children in the homes abused each other.). But see Nat’l Coal. for Child Prot. Reform, Foster Care vs. Family Preservation: The Track Record on Safety and Well-Being, http://www.nccpr.org/newissues/1.html (last visited Jan. 19, 2008) (citing MARY I. BENEDICT AND SUSAN ZURAVIN, FACTORS ASSOCIATED WITH CHILD MALTREATMENT.
The AFCARS data for 1998-2002 indicates that in 2002 there were approximately 533,000 children in foster care in the United States. The average age of foster children is between nine and ten years old. The statistics for 2002 indicate that most children in state foster care are placed in a non-family foster home (46%) or in a kin foster home (24%) as opposed to in a group home or independent living situation. On average, a child stays in the foster system approximately thirty months before adoption, transfer, emancipation, or return to the natural home. The data have remained basically consistent in the preliminary report issued for 2005.

The foster care system depends on the availability of a large number of quality foster parents. The number of children in the foster care system is on the rise, while the number of eligible unrelated foster homes is decreasing. Quality foster parents are hard to find. Even if they are found, it is increasingly difficult to retain them. Therefore, a crisis is developing in...
foster care as the demand for quality foster care far exceeds the supply.\textsuperscript{166} As one commentator remarks, "[t]hose familiar with foster care today say that as the foster care population has increased in recent years, the population of qualified foster parents has decreased, forcing the state to reach out to marginal or even high-risk families to find places for all the children in need."\textsuperscript{167} No doubt as the quantity of non-kin foster care decreases, so will the average quality as child welfare agencies are forced to choose the best of the few available homes. Furthermore, the problems facing foster care are not only concerned with numbers, but with the sheer limitations of foster care in the face of contemporary problems facing foster children - infants and children with special needs, siblings groups and influxes of minority children.\textsuperscript{168} Foster care needs more participants, more support from within, and more external solutions.

Foster parenting is a big undertaking. Foster parenting includes, among other activities, providing for the daily needs of children, including their emotional and behavioral needs, arranging and transporting children to medical appointments, health counseling sessions, court hearings, and visits with birth parents and case workers, as well as advocating on behalf of foster children with regard to schools.\textsuperscript{169} Accordingly, if good, nurturing foster parenting is to be assured, incentives for foster parenting likely require motivation beyond the modest compensation to cover costs currently provided.\textsuperscript{170}

In considering the proper incentivization for foster care to contend with the shortage of quality foster parents, the nature of the undertaking must be fully explored. Foster parenting goes far beyond work for most foster parents in the same manner that caretaking of biological children is more than mere labor. Interviews with foster parents indicate that they describe their tasks as follows: "(1) knowing, loving, and making sacrifices for children; (2) instilling in children a sense of belonging[,] (3) adding them to the foster


\textsuperscript{167} BARTHOLET, \textit{supra} note 100, at 86.

\textsuperscript{168} See Schwartz, \textit{supra} note 166, at 442.

\textsuperscript{169} See, e.g., Chipungu & Bent-Goodley, \textit{supra} note 156, at 83.

\textsuperscript{170} See \textit{supra} note 100 and accompanying text; Dando & Minty, \textit{supra} note 165, at 385 (Unless a desire to parent or help children is present in foster parents, applicants are "rarely motivated to survive the usual stresses and strains involved in long-term fostering."); cf. RindFleisch, Bean & Denby, \textit{supra} note 166, at 20 (Complaints regarding low stipends tend to correlate with families remaining in the foster system.).
family; (4) offering or facilitating healing, and (5) advocacy.171 Loving, sacrificing and caring for foster children is most often described by foster parents as "an intrinsic component of [foster]172 work and was referred to as a 'natural' consequence of the [fostering] relationship."173 In fact, a recent study found that foster parents are most motivated to enter the occupation by "wanting to be loving parents and preventing children from harm."174 The complex nature of the arrangement is also evident from social workers' expectations that foster families will relate to children in a loving manner.175

Yet, implicit in the Department of Social Services' definition of foster care, as well as the ALI Principles and state law understandings of foster care,176 is the belief that foster relationships are essentially temporary in nature.177 Foster parents find the emotional involvement required of them makes it hard to look at fostering as "temporary." In interviews, foster parents often "objected to a connotation of impermanence, since the relationships they developed with children were always on some level permanent, important, and meaningful. Whether or not the child stayed in a particular foster home, the relationship endured for foster mothers."178 Foster mothers describe the ongoing relationship as an extended family or a kinship relationship: "A child's physical absence did not mitigate a woman's sense that a child belonged to her kin group."179 The kinship relationship is generated from the caregiving relationship and the love and sacrifice involved. Foster children do become functional family for many foster parents.180

171. WOZNIAK, supra note 100, at 106.
172. I insert "fostering" for the author's use of "mothering" (although the primary foster parent is usually a woman) because emotional ties can form regardless of whether a man or woman is doing the fostering.
173. WOZNIAK, supra note 100, at 106; see also Swartz, supra note 6, at 576 ("Based on a mothering model, . . . foster mothers reaped rich rewards as they built affectionate bonds and deep emotional attachments with foster children. Caring for foster children became integrally tied with caring about these foster children.").
174. Rodger et al., supra note 163, at 1137.
176. See supra notes 94-99 and accompanying text.
177. See WOZNIAK, supra note 100, at 31; Kathleen Eastman, The Foster Family in a Systems Theory Perspective, 58 CHILD WELFARE 564 (1979) (Foster parents must come to terms with a foster care system, which is temporary by nature.).
178. WOZNIAK, supra note 100, at 72.
179. Id. at 73; Brenda Smith & Tina Smith, For Love and Money: Women as Foster Mothers, AFFILIA, Spring 1990, at 66, 74 (describing fostering as a grandparent or extended-family relationship).
180. WOZNIAK, supra note 100, at 74-75, 161-63; cf. Susan A. Cole, Foster Caregiver Motivation and Infant Attachment: How Do Reasons for Fostering Affect
Interviews with foster parents also reveal that the perceived temporary and transitional nature of their status is communicated to foster mothers in their interactions with social workers, creating conflict between foster parents and those workers.181 As one researcher notes, foster mothers often “felt embattled in their relationships with social service personnel and felt that their relationships with children were denigrated or trivialized.”182 Another researcher comments,

The foster family must struggle between the opposite poles of not including the child enough, or including the child so completely that the child’s departure is extremely difficult to both. This difficulty extends beyond physical inclusion to the psychological inclusion or exclusion of the child in relation to the family.183

As one court explained, the “temporary nature of foster parent/foster child relationship ‘implies a warning against any deep emotional involvement with the child since under the given insecure circumstances this would be judged as excessive.”184 Being too attached could result in the removal of the child from the home because of conflict between a foster parent and social worker.185 In fact, the ideal foster mother is personified by social services as the unlikely person that can care for a child as her own, without too intense a need for compensation, but then let the child go immediately and completely and leave total discretion to the state without argument or input.186

On the other hand, foster parenting, just like any caretaking, is work.187 Many foster parents, usually mothers, previously provided informal fostering or child care services in exchange for money. “For example, many women

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181. See RindFleisch, Bean & Denby, supra note 166, at 7; WOZNIAK, supra note 100, at 31.
182. WOZNIAK, supra note 100, at 31.
183. Urquhart, supra note 175, at 194.
185. WOZNIAK, supra note 100, at 55; see also In re Jewish Child Care Ass’n, 5 N.Y.2d 222 (1959) (upholding removal from a foster home because foster parents had become too emotionally involved with the child.). But see BARTHOLET, supra note 100, at 85 (“While foster parents used to be discouraged from forming powerful attachments with their foster children, they are now often encouraged to do so; if children are freed up for adoption, foster parents who have developed such attachments are generally given priority as adoptive parent prospects.”).
186. WOZNIAK, supra note 100, at 59.
187. See infra notes 279-89 for a discussion of how low pay for foster care services and other caretaking reflects notions that caring for children is different from market work. See also WOZNIAK, supra note 100, at 45.
began as day care providers or baby-sitters and saw fostering as an extension of this work with the added benefit of having more input in children’s lives.”188 Many foster parents need the income to foster as they are foregoing other jobs to care for children, and therefore the income is a part of their motivation.189

The foster relationship is difficult to define and fraught with basic underlying tensions between permanent feelings and temporary status and between the financial compensation received and the uncontrollable feelings of emotional attachment that develop.190 On the one hand, foster parenting is temporary in design and foster parents are admonished not to get too attached.191 On the other hand, the provision of good foster parenting is dependent on nurturing and loving feelings from foster parents to ensure a child’s well-being.192

The Supreme Court acknowledged this tension in Smith v. Organization of Foster Families for Equality & Reform.193 In Smith, foster parents argued that state removal procedures, which had resulted in their foster children being removed from their homes, were unconstitutional on due process and equal protection grounds.194 The Court found that the review procedures in place for challenging removal of foster children in New York met constitutional standards.195 However, commenting on the unintended longevity of many children’s stays in foster homes, the Court notes, “[i]t is not surprising then that many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents

188. Wozniak, supra note 100, at 45; see also Swartz, supra note 6, at 573 (indicating that in her empirical study of foster parents, many “relayed a work history that detailed specific experiences through which they had developed the skills relevant to their informal careers as caregivers”).

189. See Swartz, supra note 6, at 573; see also id. at 571 (explaining that many foster mothers were motivated by the desire to “combin[e] paid labor and unpaid family labor in the same location” and that they viewed foster mothering “as their work, albeit a multifaceted kind of work”).

190. See Urquhart, supra note 175, at 194 (“[T]he foster family is expected to relate to the child in transition as openly and lovingly as possible. This puts heavy emotional demands on the family members to invest their feelings knowing the relationship must end. Consequently, there may be a natural reluctance to avoid deeper feelings even though emotional distance can be rejecting and damaging to all involved.”).

191. See Goldstein, Freud & Solnit, supra note 59, at 24-25 (advising against deep emotional involvement by foster parents to ensure that emotional bonds are held loose enough to be broken).

192. See, e.g., Urquhart, supra note 175, at 194.


194. Id. at 818-20. The foster parents argued that their protected liberty interests in their relationships with their foster children demanded greater due process than that which they received. Id. at 839.

195. Id. at 856.
during extended stays in foster care, often develop deep emotional ties with their foster parents."196 Furthermore, the Court explains that:

The development of such ties points up an intrinsic ambiguity of foster care that is central to this case. The warmer and more homelike environment of foster care is intended to be its main advantage over institutional child care, yet because in theory foster care is intended to be only temporary, foster parents are urged not be become too attached to the children in their care.197

Acknowledging the deep ties developed within foster families, the Supreme Court in Smith recognizes that such families are not a "mere collection of unrelated individuals" and therefore that some legal status in the form of a limited liberty interest does attach to foster families.198 Accepting biology as an important indicator of family, the Court nonetheless rejects biology as the sole determination of who is entitled to liberty interests attaching to family. Indeed, the Court explains, pointing to the great weight given to marriage in determining the existence of family:

Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promoting a way of life" through the instruction of children, as well as from the fact of blood relationship.199

The Court suggests that long-term foster parents are entitled to some due process protection in view of the emotional ties and mutual care developed in these relationships.200 Although long-term foster relationships are not entitled to the constitutional liberty interest afforded to natural families due to competing concerns, the Court does indicate the existence of foster parents’ "limited" liberty interest with regard to foster children.201 Consistent with the

196. Id. at 836.
197. Id. at 836 n.40 (citing Robert H. Mnookin, Foster Care in Whose Best Interests?, 43 HARV. EDUC. REV. 599, 613 (1973)).
198. Id. at 844-45.
199. Id. at 844 (internal citation omitted).
200. Id. at 845-46.
201. Id. at 846-47. The other concerns are the state-created contractual nature of the relationship and the countervailing interests of the natural parents. The limited liberty interest that attaches to foster parents was deemed satisfied by the process provided in New York procedures for removing foster children in Smith. The process included an independent administrative removal hearing at the request of foster parents where they could be heard regarding their beliefs as to the best interests of the children and defend themselves from any state agency concerns that might have led to the removal and required notice periods. Id. at 845-50; see also State ex rel. K.A.M., 763 So. 2d 695, 697-98 (La. Ct. App. 2000).
limited liberty interest recognized in Smith, a correlating legal status in the form of the potential to obtain de facto parental status can be derived from the protected attachments formed within the foster relationship, albeit a lesser status than legal parents.

States that give foster parents priority in adoption proceedings already legally recognize this interest and the attachments developed in foster families. In many states, foster parents who have had physical custody of a child for a significant period of time (usually one to two years) do receive preference to adopt once a child’s natural parents’ rights have been terminated. Other states grant no such priority. One study found that whether by law or in practice, 43 states and the District of Columbia did provide an adoption preference for foster parents. Approximately 60% of children adopted from foster care are adopted by their foster families. These statistics attest to the bond formed in these kin-like relationships.

But adoption is not an option for all foster parents. One main hurdle to adoption is the termination of parental rights. Even with ASFA’s push for termination of parental rights, some foster children are simply not eligible for adoption because the rights of natural parents have yet to be terminated. Unlike adoption, physical custody or visitation can be sought while the state or another family retains legal custody. Moreover, many foster parents foster for years and take in many children, providing a valuable service that leads to deep emotional bonds, but do not have the desire to expand their legal families. Many foster parents simply cannot afford to adopt. Unless the child is classified as having special needs, adoption halts financial stipends


203. See, e.g., In re Martin, Nos. 17432, 17461, 17464, 1999 Ohio App. LEXIS 3999 (Ohio Ct. App. Aug. 27, 1999) (indicating preference in adoption for foster parents and standing to intervene in any alternate custody or adoption proceeding if their adoption petition is denied); In re Adoption of C.D., 729 N.E.2d 553, 560 (Ill. App. Ct. 2000) (Illinois Adoption Act gives foster parents who have physical custody of a child for more than one year preference in adoption proceedings.)


205. See Proch, supra note 202, at 618-19.


207. See, e.g., Schwartz, supra note 166, at 450-51.

208. See id.; In re G.C., 735 A.2d 1226, 1228 (Pa. 1999) (“The agency, while transferring physical custody to the foster parents, remains responsible for the care of the child, and may at any time be required by the child’s interests to regain physical custody and terminate the foster parent’s relationship to the child.”); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 826-28 (1977); Priester v. Fayette County Children & Youth Servs., 512 A.2d 683 (Pa. Super. Ct. 1986).

and is an exclusive parental status.\textsuperscript{210} Recently-instituted adoption subsidies for placements that are deemed "special needs" provide stipends, but they are usually significantly less than foster stipends.\textsuperscript{211} Still other foster parents, usually kin foster parents, feel uncomfortable participating in the termination of their relatives' parental rights.\textsuperscript{212}

If the goal is to attract and retain quality foster parents, it is against the state's interests, as well as foster children's interests, to force foster parents to adopt foster children or to lose all contact with them entirely. Many foster parents indicate that they considered adoption because without it they would lose all contact with their foster children, even though it was not entirely the right choice for their family.\textsuperscript{213} One researcher reports that "[o]ne of the most difficult situations I saw working-class foster parents endure was when they were faced with the decision to adopt foster children they dearly loved at the cost of losing stipends they depended on as part of their monthly income."\textsuperscript{214} Foster parents complain that they raise these children as their own for years and are then given the choice to adopt or terminate the relationship entirely, which can be devastating.\textsuperscript{215} Sometimes (depending on state law) other parents are chosen to adopt and foster parents are not even given the option.\textsuperscript{216} In fact, a leading predictor for discontinuance of fostering has been found to be the desire coupled with the inability to adopt.\textsuperscript{217} In this context, foster parents are punished for precisely the emotions of attachment that are

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adoption subsidy program and remove the financial disincentives to states by providing federal dollars to be used as a portion of adoption subsidy payments for children previously eligible for the Title IV-E Foster Care Program. Since 1980, the program has grown dramatically – from no federal funding in 1980 to \$1.2 billion in 2000. Every state now has a state subsidy program with federal and state funds available for those who adopt special needs children. Generally, a special needs child is one that is eligible for adoption and that the state has determined, after making reasonable efforts to place the child, will not be placed without a subsidy. See 42 U.S.C. § 673 (2000).

\textsuperscript{210} See Swartz, supra note 6, at 583.

\textsuperscript{211} Id. at 583.


\textsuperscript{213} WOZNIAK, supra note 100, at 78, 82 (reporting that foster parents feel "blackmailed" by the social services push towards adoption); see also Swartz, supra note 6, at 583 (explaining how foster parents feel insulted when their failure to adopt causes social workers to question their motivations).

\textsuperscript{214} Swartz, supra note 6, at 583.

\textsuperscript{215} See id. at 583 (reporting that failure to adopt resulted from financial restraints and not from lack of emotional commitment).

\textsuperscript{216} See supra notes 202-06 and accompanying text.

\textsuperscript{217} See RindFleisch, Bean & Denby, supra note 166, at 15.
beneficial to the children.\textsuperscript{218} Researchers have pointed to such tension as creating a divisive and unconstructive environment for foster care.\textsuperscript{219} Moreover, studies have shown that the desire to adopt as a motivation for fostering can lead to problematic foster relationships precisely because of the insecurity and uncertainty surrounding the adoption process.\textsuperscript{220} In order to create a more positive environment for all concerned, foster parenting should create its own relational status, because as a segue to adoption, it is fraught with insecurity and conflict with natural parents or extended biological family.\textsuperscript{221} In other words, the liberty interest between foster parents and children discussed in Smith should find expression in legal status beyond the realm of adoption.

There are essentially two different paths to recognizing the attachments involved in foster parenting and easing the tension between the desires and realities of foster care, and thereby creating reform that may attract needed quality foster parents into the system. The first is to ease the tension by making the system more clearly professional: increasing foster payments, increasing funding and creating a legitimate and "efficient social service rather than a 'pretend' natural family home."\textsuperscript{222} This is the more popular path. Suggestions for reform of the family foster care system to encourage more families to enter the system, and to increase the quality of foster care, generally revolve around: (1) the possibility of increasing reimbursement rates, (2) providing more supervision and training of foster parents and (3) providing more resources and lower caseloads to state agency staff.\textsuperscript{223} Yet, treating the foster system more professionally does not make difficult

\textsuperscript{218} Wozniak, supra note 100, at 210 ("Perhaps the place to begin is to acknowledge that the current foster care system is in a state of crisis, evidenced, in part, by the pain emanating from those who participate in and construct the discourse."); Urquhart, supra note 175, at 195 ("The stress of separation can be accentuated when human feelings are lost in the urgency of agency plans. The foster family's real attachments to the child may be overlooked when a child is removed suddenly from their home.").

\textsuperscript{219} Smith & Smith, supra note 179, at 68-69.

\textsuperscript{220} See Cole, supra note 180, at 453 ("The uncertainty and lack of control over the ultimate disposition of the child may have prevented some caregivers from making the emotional investment necessary to develop a secure attachment with the infant. It may be more difficult to securely attach if the possibility of adoption is so uncertain.").

\textsuperscript{221} Id.

\textsuperscript{222} See Smith & Smith, supra note 179, at 68-69 (internal quotation marks omitted).

\textsuperscript{223} See, e.g., Chamberlain, Moreland & Reid, supra note 163, at 388; Claudia Campbell & Susan Whitelaw Downs, The Impact of Economic Incentives on Foster Parents, 61 SOC. SERV. REV. 599, 608-09 (1987) (Other reasons given for the shortage of foster parents include increased labor force participation of women, insufficient agency services to support foster parents, and an increasingly difficult-to-care for foster child population.).
emotional attachments that lead to loss at the end of foster relationships less likely to occur.

Moreover, the strategy of increasing financial compensation to foster parents to improve the foster system has been met with mixed results and is subject to substantial criticism.\textsuperscript{224} Foster parents generally report that financial gain does not incentivize them to provide foster care.\textsuperscript{225} A recent study found that the desire to increase family income was the least endorsed factor motivating successful foster parenting.\textsuperscript{226} In fact, studies have shown that two other motivations are consistently associated with successful foster placements and institutional perception of good fostering: desire to parent a child due to childlessness or to increase family size, and "identification with deprived or unhappy children, as a result of past personal experience during childhood."\textsuperscript{227} In one study, foster caregivers of infant children whose motivation for fostering was a desire "to increase their family size were three times more likely to have a secure attachment relationship with the infant in their care."\textsuperscript{228} While foster parents need compensation, attracting the best quality potential foster parents is not inhibited by keeping stipends moderate. Moreover, modest compensation will arguably ensure recruitment of quality foster parents that possess the combination of altruistic and financial motivations that have proven successful, since loving and caring for foster

\textsuperscript{224} Mary Callahan, Mercenary Motherhood: A Foster Mom Has Second Thoughts About Parenting for Pay, L.A. TIMES, Oct. 16, 2007, at A17 (arguing that offering too much compensation both potentially attracts the wrong type of foster parents and undermines the loving connection that develops between loving parents and their foster children); Chamberlain, Moreland & Reid, supra note 163, at 400 ("Simply increasing foster parent payments without tying the increase to a meaningful mission might not produce . . . positive benefits . . .").

\textsuperscript{225} Cole, supra note 180, at 448 ("A majority of both kin (91.3\%) and non-kin caregivers (79.4\%) strongly disagreed that financial gain was a motivation for providing substitute care.").

\textsuperscript{226} See Rodger et al., supra note 163, at 1139 (The study characterized successful fostering as those that met certain durational and quality assessments.). But see Chamberlain, Moreland & Reid, supra note 163, at 395 (arguing that increased stipends would have some positive effect on minimizing foster parent dropout).

\textsuperscript{227} See Dando & Minty, supra note 165, at 384.

\textsuperscript{228} See Cole, supra note 180, at 451. Other positive correlations were found between attachment and the motivation of social concern for community. See WOZNIAK, supra note 100, at 35-37 ("Women's reasons for fostering [fall] into five overlapping . . . categories: (1) altruism and social . . . responsibility, (2) . . . tradition, (3) social action, (4) the desire to increase the size of one's family, and (5) the need or desire for income or employment."); Chipungu & Bent-Goodley, supra note 156, at 83 ("Most individuals become foster parents out of a sense of social obligation and a desire . . . to fulfill a societal need, religious reasons, the need for supplemental income, foster care as a step toward adoption, increased family size, and substitution for a child lost through death.") (citing Baum, Crase & Crase, supra note 154, at 202-13).
children is an essential part of foster parents' responsibilities. In fact, foster mothers themselves often argue that market wages for day care work are not appropriate in the foster care setting and that a lower stipend should suffice in the context of a well-supported and low conflict foster system.

The second possibility for easing the tension inherent in foster care and increasing the attractiveness of the system for potential foster families is to recognize the familial, kin-like relations that exist between foster parents and children – thus transforming a "pretend" family into a real, alternate family scheme that allows for the possibility of custody or visitation rights after termination of the foster status. Helping to resolve the tension in this fashion by allowing continued contact between foster parents and foster children – thereby alleviating the sense of loss and distress experienced by foster parents – may do much more to provide quality foster care for the nation's neediest children than traditional suggestions for reform that seek to professionalize the system. Indeed, studies have shown that ameliorating and contending with loss and severance of ties can serve to retain and attract foster parents. Such studies suggest that attracting quality foster parents and retaining desirable foster parents would be positively impacted by "promot[ing] continuity and avoid[ing] unnecessary breaking of ties between foster parents and foster children."

Additional support for this second means of dealing with the foster care crisis are studies that suggest that such recognition would quell complaints about the amount of compensation proffered for foster parenting. In her

229. See Smith & Smith, supra note 179, at 75 ("The more foster care resembled a 'normal family,' the more they were likely to argue against market wages that are equivalent to other child care jobs. Despite their belief that the work called for considerable skill and was socially valuable, but underpaid, they thought that labor in the home that has its own intrinsic rewards and looks like mothering should not command a market wage."). Smith & Smith, supra note 179, at 75-76 (citing LYNN GAIN, EDNA ROSS & SARAH FOGG, A BALANCING ACT: FOSTER CARE IN NSW 125 (1987)) ("[H]alf the 2,000 foster parents . . . surveyed said their allowance did not adequately cover their costs, 78 percent said they were nonetheless satisfied with their pay.").

230. See infra notes 233-35 and accompanying text; Smith & Smith, supra note 179, at 75; WOZNIAK, supra note 100, at 47-48.

231. See Urquhart, supra note 175, at 206-08; see also BERT L. KAPLAN & MARTIN SEITZ, THE PRACTICAL GUIDE TO FOSTER FAMILY CARE 84-87 (1980) (The element of transition and severance of emotional ties is the most emotionally draining, upsetting and discouraging aspect of foster care.).

232. See Urquhart, supra note 175, at 207.

233. See WOZNIAK, supra note 100, at 49 ("That is, women were able to tolerate what they perceived as financial exploitation until it was paired with being emotionally and professionally unappreciated. Efforts by the state to show foster mothers appreciation, such as annual appreciation luncheons or special awards, were mentioned by some women as evidence that their services were not completely undervalued. But women overwhelmingly talked about their daily interactions with
study of foster parents, Swartz reports that while her findings indicated that modest stipends did not undermine altruistic and care-orientated motivations for fostering, another factor that did create dissatisfaction with foster work was state oversight that undermined foster mother competence, stressed their lack of authority, disrupted traditional families and raised suspicions about foster parents' caretaking due to financial motivations. In a study of a non-governmental foster agency that based its operations on cooperation between social workers, foster parents and natural parents, foster parents displayed a great degree of satisfaction despite modest financial stipends. Such studies suggest that combining reasonable but modest compensation with training, agency support and substantial recognition of the important work that foster parents are doing would be a more beneficial incentive for foster parenting than greater financial compensation.

In sum, the best response to the foster crisis is likely to recognize both aspects of foster parenting – work and nurture. Accordingly, keeping stipends moderate but reasonable, while providing legal and emotional recognition and support for foster parents' work, is likely to increase foster parent satisfaction and incentivize more and better foster parents to enter the system. Considerable improvement in foster care could be achieved by encouraging collaboration between natural and foster families by instituting a concept of "shared parenting" – recognizing a collaborative kinship relationship. When a court determines that continuation of ties with foster parents is in a child's best interests, allowing foster parents to obtain de facto status to petition for visitation would allow for the continuation of strong emotional ties where they exist, recognize extended family-like kin relations that have developed, and ease the pain of relinquishing the relationship with foster children – making foster parenting less fraught with emotional turmoil. The Supreme Court in Smith acknowledges the possibility of an intermediate

social workers and with agency policy as evidence of their devalued status.

234. Smith & Smith, supra note 179, at 73 ("You work as a team, not a hierarchy, you don't come from a position of superiority. They're conscious of the possibility of their being interpreted as middle-class professionals and they work pretty hard at resolving that kind of power relationship, and I appreciate that.").

235. See Rodger et al., supra note 163, at 1140 (The greatest dissatisfaction expressed among foster parents is the lack of recognition for the important services they provide.).

236. Smith & Smith, supra note 179, at 69.
relationship between foster parents and children that can translate into intermediate legal status. The exclusive all-or-nothing parental relationship is coming under attack even in intact families; it certainly is worthy of questioning with regard to children who have spent extended periods of time in foster care and often have complicated physical custody arrangements and divided, if any, emotional ties. Children in foster families do not live in the private bubble of a perfect nuclear family associated with the "privacy interest." If foster parents develop an attachment with their foster children, and it is acknowledged that such attachments are important to the children’s growth and proper development, the continuation of this attachment should be facilitated by the state even if the child is adopted by another family or returned to her biological parents.

Moreover, those wanting to encourage foster parenting must contend with the stigma and status associated with fostering. Foster parents feel their motivations are constantly questioned and delegitimized, and they feel disrespected by the system that employs them. Studies have shown that the poor public image of foster care is one of three major causes of decreased interest in foster parenting.

The potential to achieve the elevated status of kin/de facto parents, the sense of importance and justification that accompanies such status, and the potential continuing access to children derived from this status may well motivate more qualified foster parents to join the system. The sense of stigma and disrespect is arguably reflected in the disqualification of foster parents from de facto status. Foster mothers provide a much needed service and should not be questioned or stigmatized because they take state aid in return for increasing the size of their families, providing needed care, and taking in children who otherwise have no home to go to. One way to legitimize, acknowledge and afford foster parents greater status in the eyes of society is to give them status as extended kin and allow them to obtain de

237. See supra Part II for a discussion of the increasing move towards allowing third-party visitation.

238. See Mangold, supra note 119, at 836 ("Parental rights are shared by a child’s biological parents, the state as parens patriae and the foster parents who provide day-to-day care for the child under contract with a public or private agency.").

239. See supra notes 59-65 and accompanying text.

240. For a discussion of the criticism that allowing foster parents to obtain de facto legal status would negatively impact the foster care system and prospects for adoption, see infra notes 353-59 and accompanying text.


242. See WOZNIAK, supra note 100, at 85-90.

243. See RindFleisch, Bean & Denby, supra note 166, at 6. The other two major causes were changes in society, such as more women entering the workplace, and the lack of support for potential parents in dealing with the more complex emotional, behavioral and physical problems of today’s foster children. Id.
facto legal status in certain circumstances. Foster parents would thereby be recognized for being the caretakers and parental figures they are.

b) Child Care

Child care is like foster care in that caretakers perform parenting activities for compensation. Yet, child care workers act at the behest of legal parents, whose legal relationship with their children is entirely intact. However, these caretakers also provide valuable parenting functions, and the compensation they receive should similarly not disqualify them from obtaining de facto parental status if all other conditions of such status are met.

Ensuring the supply of quality child care is of utmost importance in today’s society. The demand for child care by parents in intact families has steadily increased as women continue to enter the workforce. Yet, the quantity and quality of child care is lacking. A 1995 study, called “Cost, Quality and Child Outcomes” looked at the quality of care provided by 410 child care centers. The results demonstrate a serious dearth of available quality child care services. Thus, it has been remarked that the United States is suffering from a “child care crisis.”

Two factors that have been

244. H.R. COMM. ON WAYS & MEANS, THE 2004 GREEN BOOK 9-2 (2004) (observing that “[t]he dramatic increase in the labor force participation of mothers is commonly regarded as the most significant factor fueling the increased demand for child care services”).


246. Smith, supra note 245, at 407. In her review of the study, Peggie Smith found that:

more than 80 percent of the centers ‘provided mediocre or poor-quality services’ and that the quality of 12 percent was so poor that the centers failed to meet adequately children’s basic health and safety needs and offered few learning opportunities. Overall, only one in seven centers in the study provided an environment that promoted the healthy development of children... Of the 226 family care providers [that were] evaluated in the Study of Children in Family Child Care and Relative Care, only 9 percent provided good quality care, 56 percent provided adequate care, and 35 percent provided care deemed inadequate.

Id. (footnotes omitted).

247. Id. at 399.
determined to correlate with quality care are "the skill attributes and [the] stability of the child care workforce." In turn, the problems with the nature of the workforce can be at least partly attributed to the low status of such workers and the modest financial compensation and recognition received for the work they perform.

With regard to child care, the quality, as opposed to quantity, of child care services is the focus of my argument. In the case of child care, as opposed to foster care, providing the potential for legal status may not directly incentivize a greater quantity of child care workers. To the contrary, it may cause fewer parents to hire long-term child-care workers as they will fear losing rights to their children to such workers. Accordingly, the emphasis in this section is on quality and status of child care workers and not quantity per se.

In order to further explore why the quality and status of child care workers is poor, a more detailed consideration of the nature of such work is necessary. Deborah Stone explains that while paid caregiving is clearly motivated at least in part by the money earned, in many ways that does not fully describe the nature of the relationship between paid caregivers and their wards. Stone explains that "[p]aid caregivers often come to regard their charges as kin, and commonly say they feel as if the person they take care of is their own mother, sister, brother, child." Not uncommonly, care providers self-identify as "second mothers," playing the motherly role while the legal mother is otherwise occupied at work or elsewhere. They are professionals in that they are paid, but they are also like kin because of the

attachments formed with those for whom they care. Stone remarks: "If anything, caregivers resist letting money affect their relations with the people they care for, and even try to deny that money is part of the relationship. They want to pretend money [is not] there."\textsuperscript{254} Furthermore, "[n]annies and \textit{au pairs} sometimes stay in jobs they loathe, accept poor pay and working conditions, and decline to confront their employers because they love 'their children.'\textsuperscript{255} Stone admits, of course, that not all caregiving relationships are perfect, but that

[m]uch of the time, despite the fact of pay, people take care of their clients exactly the way they take care of their relatives. And they love them, too. Maybe not exactly the same way, but so often they say they love their clients as if they were 'my own.'\textsuperscript{256}

For dependents that are in need of such nurturing care when blood relatives are not available to provide it, these relationships are essential.

Given the complicated nature of caregiving work described above, both economic and non-economic recognition of the work and the emotional bonds that are formed has the best chance of increasing the quality of care provided. Because paid caregivers are not legally kin of those for whom they care, their relationships with loved ones can be legally severed at any time regardless of their emotional feelings, which could be to the detriment of all involved. One researcher found that many providers develop an attitude of "detached attachment" to protect themselves from the pain of separation and loss when a child is removed from their care.\textsuperscript{257} While economic incentives are central to ensuring adequate child care, concern for the economic plight of caretakers should be coupled with broader consideration of the legal and social status of caretakers and recognition of the vital work they perform.

Peggie Smith argues that resolving the child care crisis demands "recognition of child care as an employment issue and an understanding of the critical connection between quality, affordable child care, on the one hand, and the economic status of the child care workforce, on the other hand."\textsuperscript{258} Smith recommends unionization of child care workers to enable them to increase the financial benefits of their labors.\textsuperscript{259} Smith remarks, "[i]n order to resolve the tension between the provision of affordable quality child care, on the one hand, and caring for child care workers, on the other hand,

\begin{flushleft}
\textsuperscript{254} Stone, \textit{supra} note 251, at 276.  \\
\textsuperscript{255} \textit{Id.} at 277.  \\
\textsuperscript{256} \textit{Id.}  \\
\textsuperscript{257} Nelson, \textit{supra} note 253, at 219-21.  \\
\textsuperscript{258} Smith, \textit{supra} note 245, at 400.  \\
\textsuperscript{259} \textit{Id.} at 402; \textit{see also} Tuominen, \textit{supra} note 251, at 194-206.
\end{flushleft}
child care needs to be conceived as a public good and treated as a public responsibility.  

This is a persuasive argument, but child care workers should also be afforded the potential for legal recognition of their caregiving and the emotional attachments that come along with it in order to improve their legal and socio-economic status and the perceptions of the importance of their work. In reality, paid caregivers are not likely to seek legal status nor in most instances will they meet the challenging standards applicable to becoming a de facto parent. However, money should not be the disqualifying issue. In the event of a crisis, it is conceivable that paid caregivers are the most stable and caring caretakers involved in a child’s life, and their work should not be belittled by disqualifying them from de facto status. Allowing paid caregivers who develop long-term relationships and deep emotional bonds with their charges to seek de facto legal status would send a clear message that their bonds with those for whom they care are valuable and supported by society in a manner congruous to how they are experienced by caregivers – both financially and emotionally.

2. Benefits to Children: Providing Attachments with Caring Adults that are Essential for Children

An alternative approach to framing the goal of improving the quality and status of child caretakers is to stress the importance of the stability and quality of attachments that develop between caretakers to children, regardless of payment. Barabara Bennett Woodhouse argues that while excluding compensated caretakers from potential de facto parental status might make sense from an adult-centered perspective, it does not promote children’s interest in continuing deep emotional attachments with caregivers. While neither foster care nor paid child care was intended to attach permanent rights


261. Smith, supra note 245, at 402 (citing studies that demonstrate “that when child care workers are treated with respect and dignity, they are more likely to provide quality care and to remain in their jobs”); see also J. Clasien de Schipper et al., Stability in Center Day Care: Relations with Children’s Well-Being & Problem Behavior in Day Care, 13 SOC. DEV. 531 (2004); Susanna Loeb et al., Child Care in Poor Communities: Early Learning Effects of Type, Quality, and Stability, 75 CHILD DEV. 47 (2004).

262. See infra notes 396-99 and accompanying text.

263. See Rothman, supra note 15, at 209-10 (arguing for the need to recognize the paid caretaker for the work she does, including allowing her visitation rights).

264. See supra notes 59-65 and accompanying text.

265. See Woodhouse, supra note 100, at 162.
or responsibilities, Woodhouse argues that this logic is inapplicable from a child’s perspective.\textsuperscript{266}

As explained in detail above, the literature, the law and experts in many fields have firmly established that attachments to loving adults are crucial to proper development in children.\textsuperscript{267} Foster care is preferred to institutional settings precisely because of the warmer, homelike environment provided and the emotional bonds that are forged.\textsuperscript{268} Child care provided to preschoolers by caring paid providers is considered the best alternative to full-time parental care.\textsuperscript{269} Children do form bonds with foster parents and with paid caregivers who may be the primary caregivers and the fact that money is received does not obviate those attachments: “The fiction that receiving money prevents the formation of attachments defies the reality of children’s lives.”\textsuperscript{270} Psychological studies demonstrate that attachment will occur between children and their primary caretakers based on the level of care regardless of payment.\textsuperscript{271} Admittedly, these strong bonds are much more common with foster parents, as paid caretakers will not often create long-term strong emotional attachments with children nor will they frequently meet the conditions necessary to be considered de facto parents as outlined in the ALI.
Principles. Yet, such attachments do occur with paid caretakers,272 and neither the money nor the rarity of these attachments should disqualify them. For many children, the most comprehensive and intimate attachments come from such third parties – foster parents, extended family or paid daycare workers. Children need these relationships.

In the foster care context, this need is particularly pressing. Many children have spent the bulk of their lives moving from temporary foster placement to foster placement, thus efforts to keep loose such bonds only hurt the children involved.273 Foster children often suffer because of the state’s authority to pull children out of a foster home when foster parents become too involved.274 As Woodhouse notes, “[u]nfortunately, agencies have been known to abuse their power to place and remove children at will, punishing foster parents who advocate too forcefully for the children in their care, and summarily removing children from families that wish to adopt them, for reasons unrelated to the welfare of the child.”275 The ALI Principles’ and state courts’ exclusion of paid caretakers from de facto status enforces a distinction between paid foster parents who have bonded with their children over many years and other psychological parents who act without payment in a manner that simply does not comport with either the child’s or the foster parent’s experience of the relationship.

3. Addressing Discrimination on the basis of Gender, Socio-Economic Class, Race and Ethnicity

a) Foster Care

The ALI Principles and state courts perceive the receipt of compensation for childcare work as a proxy for undermining confidence that a caretaker is acting in a child’s best interests and thereby delegitimating a paid caretaker’s attachment to a child.276 In practice, such a perspective stigmatizes277 and

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272. See Sagi et al., Security of Infant-Mother, supra note 271, at 274-75 (noting that the quality of attachment was consistent among children cared for by same paid caretaker indicating that quality of caretaking is indicative of level of attachment).

273. See supra notes 112-19 and accompanying text.

274. Catherine J. Ross & Naomi R. Cahn, Subsidy for Caretaking in Families: Lessons from Foster Care, 8 AM. U. J. GENDER SOC. POL’Y & L. 55, 60-61 (1999); BARTHOLET, supra note 100, at 82 (“Efforts have been made to reduce the duration of children’s stays, but many children today spend long periods in state care, and some graduate to adulthood without ever getting a permanent family.”)


276. See supra notes 94-99 and accompanying text.

277. See supra notes 241-43 and accompanying text.
discriminates against paid child care workers on the basis of sex, socio-economic class, race and ethnicity.\textsuperscript{278}

The stigma and lack of legal recognition associated with paid caretaking in the context of foster care is facilitated by ideologies that separate women’s domestic work and wage labor.\textsuperscript{279} As Teresa Toguchi Swartz notes, like all care work, “[f]oster parenting [is] heavily gendered, as foster mothers provide[] the majority of care to children and [bear] the daily responsibilities of organizing foster children’s lives, interacting with social workers, and managing relations with biological parents.”\textsuperscript{280} Minimizing the validity of compensated caretaking conforms with traditional notions that female work is truly legitimate only if gifted while traditional male work is legitimate only if sold.\textsuperscript{281} Like mothering generally, foster parenting is perceived to be appropriate as a form of “charity work” that does not require adequate financial compensation, since the love and affection of children should be sufficient.\textsuperscript{282} As Brenda and Tina Smith note in the context of welfare work and foster work: “Foster mothers are generally poorly supported and recompensed, and their highly skilled contribution to society goes largely unrecognized. As ‘supermoms,’ they are idealized for their nurturing skills but, paradoxically, hardly rewarded for their efforts.”\textsuperscript{283}

But such notions of a moneyless, private sphere of motherhood are inaccurate.\textsuperscript{284} Caretaking takes money, is hard work and is extremely important to society in general and, in particular, to children who are without care.\textsuperscript{285} Devaluing foster parents who take state aid for their work reinforces

\textsuperscript{278} See, e.g., Cahn, supra note 1, at 15-22 (“The devaluation of the poor, and particularly poor African-American women’s work within the home is well documented.”).

\textsuperscript{279} Silbaugh, supra note 11, at 104 (Women’s work, caretaking in this case, is “essentially non-marketable.”); see also supra note 11.

\textsuperscript{280} Swartz, supra note 6, at 571; see also Wozniak, supra note 100, at 45.

\textsuperscript{281} See Wozniak, supra note 100, at 46; Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983); see also Danielle F. Wozniak, Foster Mothers in Contemporary America: Objectification, Commodification, Sexualization, 6 Women’s Hist. Rev. 357, 362-63 (1997) (“Money paid to foster mothers threatens nuclear family autonomy by creating a relationship with the state based on financial dependency. Money within this context cannot reflect the middle-class ideal of ‘an honest dollar’ because it is payment for something that should come naturally to True Woman (love and devotion to children) . . . .”).

\textsuperscript{282} Smith & Smith, supra note 179, at 68; see also Tuominen, supra note 251, at 195 (“[C]are is defined as something other than work.”).

\textsuperscript{283} See Smith & Smith, supra note 179, at 67.

\textsuperscript{284} See Woodhouse, supra note 99, at 85 (commenting that the idea that “private” family operates without funding is an illusion, pointing to “invisible subsidies” afforded by the state including “tax breaks, social insurance, and public services”).

\textsuperscript{285} See Estin, supra note 269, at 787-802; Laura T. Kessler, The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits
outdated notions of women and women’s labor. Feminist scholars have forcefully argued against this dichotomy between altruism and payment, good care and caring for money. Cahn argues that “[w]hile parenting is generally an act of altruism, and foster parents often explain their actions as altruistic, adequate financial compensation is certainly a recognition of the important work that they do.” To admit that caretaking needs to be done, insist that it is done for little money, and then to condemn women who take such money is exploitative and discriminatory.

Moreover, devaluing paid care discriminates against the poor. The majority of foster parents are either lower or middle class. In addition, low income foster families disproportionately represent kinship foster parents. While wealthier grandparents would take care of grandchildren without

of Economic and Liberal Legal Theory, 34 U. Mich. J.L. Reform 371 (2001) (arguing that the importance of caregiving should be considered in shaping and interpreting the law of employment discrimination); Becker, supra note 11, at 61 (“We need to elevate care to this level of importance [a core value] for the basic reason that it is essential to human health and balanced development.”); Lucinda M. Findley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1118, 1176 (1986) ("Employers should bear the costs of [childbearing] responsibilities because childbearing and rearing are crucially important social functions that are connected to and have major impacts on the work world."); Martha Albertson Fineman, Contract and Care, 76 Chi.-Kent L. Rev. 1403, 1410-11 ("Caretaking labor preserves and perpetuates society and, therefore, collective response and responsibility is warranted.").

286. Tuominen, supra note 251, at 195.


289. “Congress debated the definition of the purpose of ‘Foster Care Maintenance Payments.’” Id. at 16 (citing Ross & Cahn, supra note 274). In 1980, the AACWA “defined foster care maintenance payments to foster parents as ‘payments to cover the cost of (and cost of providing) food, clothing, shelter, daily supervision, school supplies, personal incidentals.’” Id. “Controversy focused on the inclusion of payments to cover the cost of ‘daily supervision’ language drafted by the Senate. Although the House of Representatives ultimately agreed to the Senate language, it did so with reservations, underscoring that ‘payments for the costs of providing care to foster children are not intended to include reimbursements in the nature of a salary for the exercise by the foster family parent of ordinary parental duties.’” Id. (quoting H.R. REP. NO. 96-900, at 49-50 (1980) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. 1561, 1569-70). This is a clear official statement of the belief that parenting should be an act of altruism.

290. Id. at 17-18.

291. See WOZNIAK, supra note 100, at 47-48; Swartz, supra note 6, at 570; Kathleen M. Kirby, Foster Parent Demographics: A Research Note, J. Soc. & Soc. Welfare, June 1997, at 135, 137.

292. See Kirby, supra note 291, at 140.
compensation, poor grandparents need the money. Ultimately, poor people need the money more than rich people and thus they are the ones who will suffer from the paid caretaker exclusion. However, needless to say, poor people do not make worse parents nor do they have less substantial emotional ties with the children for whom they care. Thus, providing an alternative means for achieving legal status through de facto parenthood could alleviate this socio-economic discrimination.

Poorer foster parents are often blamed for not providing good care because they appear to be in it primarily for the money. Poorer foster parents are especially susceptible to disdain from social services because they are more likely to be inquiring about and demanding money from the state. Yet, a lack of wealth creates the need for money, both to provide for the children they are fostering and their households more generally. Poorer women need money more and thus they are more aggressive about receiving it – this does not necessarily mean they care less about the children they are fostering. Moreover, one logical reason for demanding the money is their desire to see their foster children well clothed and fed – it is only those who can afford to be that are careless about receiving the check from the state. In addition, not allowing paid caretakers to obtain custody or visitation discriminates against poorer foster parents who are less able or willing to adopt because they would have to then support children without financial help from the state. In sum, state agencies tend to regard poorer foster parents as less capable and less devoted to their foster children. However, the need for money does not translate into the inability to give care nor does it disqualify other altruistic motivations for providing care.

The difference in legal ramifications between guardianship and foster care demonstrates unambiguously how socioeconomic status affects legal rights to children and results in discrimination against poorer caretakers. Traditionally, guardianship was a judicially supported arrangement that allowed non-parental oversight of a wealthy minor’s property or interests when parents could not otherwise provide such assistance. Currently, upon a parent’s death or incapacity, a legal guardian can also be appointed custodian of a child as an alternative to putting the child in the foster care system. In order to appoint a legal guardian, the child’s parents must consent or a petition for the guardianship must be made directly to the court

293. WOZNIAK, supra note 100, at 52; Swartz, supra note 6, at 582.
294. See WOZNIAK, supra note 100, at 52-53.
295. See id. at 53 (“While middle-class women had the resources to purchase these items and wait until the reimbursement check arrived, poor women simply could not always adequately provide for a child without the state’s immediate help.”).
296. Id.
297. See Mangold, supra note 119, at 871-72; Schwartz, supra note 166, at 474-75.
298. See Mangold, supra note 119, at 871-72.
by a parent or next of kin.\textsuperscript{299} Often, this occurs through a will or other advanced planning document.\textsuperscript{300} Alternately, a social services agency can request that a court appoint a legal guardian other than the state and thereby avoid foster care.\textsuperscript{301} The legal guardian does not adopt the child nor do parental ties legally terminate between the child and his parents, but the guardian has legal custodial authority over the child.\textsuperscript{302} In other words, the legal guardian legally has final decision-making power over all fundamental aspects of a child’s life, including visitation with parents, unless the court provides a visitation order for the natural parents. A legal guardian does not need to seek visitation from the state because the status is legal and often lasts until a child is eighteen or twenty-one years old.\textsuperscript{303} Moreover, even if a guardianship ends for some reason, legal guardians are likely to be able to obtain visitation because they are not usually compensated and because guardianships enjoy greater status and recognition as familial and kin-like. In sum, “guardianship cements the bond between the child and the caregiver, localizes authority over the child, and endows the relationship with an expectation of continuity.”\textsuperscript{304}

Guardianships are more likely to be awarded in wealthier families who prepare wills setting up guardianships in advance and appoint guardians who are less in need of the greater stipends offered to foster parents.\textsuperscript{305} When children are removed from their homes due to abuse or neglect, or when parents are otherwise unable to care for children, kin can either become foster

\textsuperscript{299} Id. at 872.

\textsuperscript{300} It is common practice for parents drafting a will to name guardians for their children. See, e.g., Esther Appelberg, \textit{The Significance of Personal Guardianship for Children in Casework}, 49 CHILD WELFARE 6 (1970) (advocating that social workers and caseworkers encourage parents to draw up wills and name guardians for their children even when there is little or no property to pass on to children).

\textsuperscript{301} See Mangold, supra note 119, at 872.

\textsuperscript{302} See id. at 872-73; Schwartz, supra note 166, at 443 (“Guardianship is a permanent relationship between guardian and ward, but appointment of a guardian over a child does not require the formal termination of parental rights, so a relationship between child and parent can continue.”).

\textsuperscript{303} See Mangold, supra note 119, at 872.

\textsuperscript{304} Schwartz, supra note 166, at 458.

\textsuperscript{305} “Probate courts generally appoint guardians over . . . a minor child upon the death of both parents or when a child is otherwise in need of parental authority.” Id. at 475. Probate courts may also have jurisdiction “to appoint guardians when parents are deemed . . . unfit. However, in states following the Uniform Probate Code, the probate court [does not have] jurisdiction to appoint a guardian on the grounds of parental unfitness.” Id. Juvenile courts must take primary responsibility for such children, and many but not all juvenile courts can appoint guardians. Id. at 475-76; Mark Hardin, \textit{Legal Placement Options to Achieve Permanence for Children in Foster Care}, in FOSTER CHILDREN IN THE COURTS 128, 154-61 (Mark Hardin ed., 1983).
parents – a growing phenomenon with the state retaining legal guardianship, or they can be appointed as legal guardians. Generally, foster care and adoption legislation were not intended to affect the assumption of responsibility by relatives and friends for children whose parents could not provide needed care. However, foster parents are appointed more often when children are removed from a home due to abuse and neglect and in poorer families with fewer resources where the state wants to keep a watchful eye on the situation to ensure proper care. Foster care comes with more compensation to attract poor family members who need the support in order to care for children. In fact, studies demonstrate that kin foster families are less financially stable and have poorer health than unrelated foster care families. Guardianships are not currently subsidized in the vast majority of states and are not directly subsidized by the federal government.

306. See, e.g., Sandra J. Altshuler, Child Well-Being in Kinship Foster Care: Similar To, or Different From, Non-Related Foster Care?, 20 CHILD. & YOUTH SERVICES REV. 369, 369 (1998) ("The most striking increases have been in the number of children placed in kinship foster care."); Woodhouse, supra note 99, at 85 ("Kinfolk and extended family have been recruited to serve as paid foster mothers, and by 1998 at least half of the states’ placements of children was with relatives.").

307. See Schwartz, supra note 166, at 449.


309. 42 U.S.C. §§ 671, 673 (2000) (providing subsidy for adoptions but no subsidy for guardianship); Schwartz, supra note 166, at 457. Under ASFA, states receive $4,000 for each completed adoption over an initial baseline and $6,000 for adoptions of special needs children. 42 U.S.C. § 673b (2000). No such incentives exist for completed guardianships or successful reunifications. Some states do subsidize guardianships in limited circumstances, see, e.g., 110 MASS. CODE REGS. 7.303 (2007) (limited to children who have been in the custody of the Department of Social Services), but such subsidies are not reimbursed by the federal government in the same way that adoptions subsidies are. See infra note 311 and accompanying text. The current pro-adoption measures of the state and federal governments give incentives to kinship and guardian caregivers to adopt rather than participate in other programs. See generally Karen Syma Czapanskiy, To Protect and Defend: Assigning Parental Rights When Parents Are Living in Poverty, 14 WM. & MARY BILL RTS. J. 943 (2006).

310. See Brenda Jones Harden et al., Kith and Kin Care: Parental Attitudes and Resources of Foster and Relative Caregivers, 26 CHILD. & YOUTH SERVICES REV. 657, 666 (2004).

311. The idea of subsidized guardianship has been circulated for years but never adopted by the federal government. See, e.g., Marla Gottlieb Zwas, Kinship Foster Care: A Relatively Permanent Solution, 20 FORDHAM URB. L.J. 343 (1993); Schwartz, supra note 166, at 456-74. State laws allowing for subsidies for guardianship include: ALASKA STAT. § 13.26.062 (2006); ARIZ. REV. STAT. ANN. § 8-814 (2007); CAL. WELF. & INST. CODE § 11405 (West Supp. 2009); MONT. CODE ANN. § 41-3-444 (2007); N.M. STAT. § 32A-5-45(B) (2006); W. VA. CODE § 49-2-17 (2002).
legal guardians are entitled to receive welfare, social security and support payments for children, such payments are generally lower than foster payments.\textsuperscript{312} Moreover, the foster system disproportionately serves minorities. The number of black poor youths in the foster system is disproportionately high despite lack of any evidence that the black poor are more abusive parents.\textsuperscript{313} Furthermore, they tend to stay in the foster care system longer.\textsuperscript{314}

In sum, the lack of an available subsidy may prohibit poorer relatives from obtaining legal rights inherent in guardianship. The lower legal status of foster parents reflects disparate treatment of wealthy whites who are more likely to be appointed as legal guardians, as opposed to the poor and minorities who are more likely to become part of the foster care system and are less able or eager to adopt.\textsuperscript{315} Foster parents, even kin foster parents, are likely to have a much harder time accessing children after foster care ends if they cannot adopt their relatives, while legal guardians, at least under the ALI, will have much easier access if their guardianship ends due to their status as uncompensated parental figures. Even if welfare payments are made to legal guardians, such payments are likely to be perceived as incidental payments for care and not as disqualifying the guardians from acquiring California does allow AFDC-FC payments to non-related guardians. See Timmons v. McMahon, 286 Cal. Rptr. 620 (Cal. Ct. App. 1991). For powerful arguments in favor of subsidizing guardianship as an alternative to adoption, see Brooks, supra note 109, at 51; Mangold, supra note 119.

\textsuperscript{312} Guardians are eligible for welfare benefits under Temporary Aid to Needy Families, 42 U.S.C. § 601 (2000), but such subsidies are significantly less than foster care payments and are further regulated and harder to qualify for. Moreover, in limited circumstances, states can apply for federal waivers under 42 U.S.C. § 1320a-9 (2000) for limited time periods to receive federal subsidies for private guardianships as a supplement to subsidized adoptions. “Six States (California, Delaware, Illinois, Maryland, Montana, and North Carolina) have proposed programs that are intended to provide relatives and foster parents, who are providing care for children in the custody of the child welfare agency, with the opportunity to become the child’s legal guardian.” Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., Summary of IV-E Waiver Demonstrations (Jan. 1999), http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/1999/im9903c.htm (last visited Jan. 18, 2009). In all such programs, adoption has to first be ruled out as an option for a subsidized guardianship to apply. See id.; Mark F. Testa, The Quality of Permanence – Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption, 12 VA. J. SOC. POL’Y & L. 499, 500 (2005) (citing U.S. Dep’t of Health & Human Servs., Admin. for Children & Families, Waiver Terms and Conditions: Ill. Child Welfare Waiver Demonstration Project, § 2.2 (1996)).


\textsuperscript{314} See Brooks, supra note 109, at 49.

\textsuperscript{315} See supra notes 207-17 and accompanying text.
parental status. Allowing foster parents to obtain de facto parental status would eliminate the socioeconomic discrimination caused by the greater presence of poorer families in the foster care system.

b) Child Care

The disqualification of paid caregivers from visitation or custody rights similarly discriminates against women, the poor, and minorities in the child care context. Grandmothers or extended kin from poorer households are more likely to accept money from their kin to watch extended relatives.316 This has racial implications as well, as kin caretaking is much more common among racial minorities, who are also more likely to exchange money to help allow kin to take care of children.317 It is apparent that extended kin provide day care for pay when they cannot afford to provide such care otherwise. Thereby, the poor are penalized for their financial needs by then having parental pretensions questioned in light of such payments.

Apart from differential treatment of kin caretakers based on socioeconomic status, the ALI Principles and state courts’ exclusion of paid caretakers from potential de facto status acts to further marginalize an already marginalized labor market in child caretakers. Live-in nannies, who would most likely meet the residential requirement in the ALI Principles, are for the most part immigrant women who are isolated and are often separated from their own families.318 Mary Romero explains that “paid domestic labor is not only structured around gender but is stratified by race and citizenship status, relegating the most vulnerable worker to the least favorable working conditions and placing the most privileged in the best positions.”319 She

319. Romero, supra note 260, at 838-39 ("The solution of hiring a live-in domestic . . . serves to intensify inequalities between women: first, by reinforcing childcare as a private rather than public responsibility; and second, by reaping the
argues that women’s entrance into the workplace and arguable escape from “sex oppression” is thereby facilitated through the “revival of semi-indentured servitude” through in-home employment of foreign immigrants, who are often in the country illegally.320 While live-in nannies facilitate gender equality in the workplace, this system of childcare reproduces inequalities through problematic employment conditions.321 Such women work without job security, usually without much authority over the children for whom they care, must remain officially hidden because of their illegal status and receive poor pay for extended hours of work.322 These conditions are not only intolerable for immigrant women, but also perpetuate social class privilege and inequality.

Hence, although such immigrant in-home caregiving frees women to enter the workforce relatively unencumbered by childcare restraints, perhaps mimicking the ways in which husbands have worked for centuries,323 the question to consider is whether such conditions are too high a price to pay in terms of the consequences of their employment. Providing de facto status to long-term, live-in, paid caregivers would arguably improve their positions within the family by giving them concrete legal rights, ideally improving their work conditions and social and legal status. On the other hand, such rights could make them considerably less desirable as employees because of their potential to disrupt family privacy. Such workers would, if they are employed over extended periods and they provide demonstrable quality care thereby meeting the high ALI standards for de facto parenthood, either have to be embraced as extended kin-like members of the family with potential legal rights to access the children for whom they care, or such long-term, live-in, paid caregiving would have to be curtailed significantly. As is discussed in more detail below in the context of the potential drawbacks such status could have on the viability of the modern child care system, the benefits of avoiding stratified labor may outweigh the cost of having less live-in labor providing child care services.324

benefits gained by the impact of globalization and restructuring on third-world women.”).

320. Id. at 832-33 (citing Audrey Macklin, On the Outside Looking in: Foreign Domestic Workers in Canada, in MAID IN THE MARKET: WOMEN’S PAID DOMESTIC LABOR 34 (Wenona Giles & Sedef Arat-Koc eds., 1993)).

321. Id. at 835 (“Hiring a live-in immigrant worker is the most convenient childcare option for juggling the demands of intensive mothering and a career. Purchasing the caretaking and domestic labor of an immigrant woman commodificates reproductive labor and reflects, reinforces, and intensifies social inequalities.”); ROTHMAN, supra note 15, at 202-08 (discussing how power inequalities between men and women are recreated in the child care workforce).


323. See WILLIAMS, supra note 15, at 100.

324. For a discussion of how providing de facto status would affect the paid child care system, see infra notes 360-63 and accompanying text.
c) Surrogate Motherhood

There are significant socio-economic and racial undertones in surrogate motherhood disputes.\(^{325}\) Moreover, if the surrogate mother is ultimately awarded parental status, the best interest determination will determine custody, which also potentially reflects socio-economic and racial factors.\(^{326}\) In rhetoric or bias, if not explicitly, a woman is punished and deemed an unfit mother for being willing to sell her child in a surrogate contract.\(^{327}\) It is the poor who are likely to engage in such contracts, and, again, the poor are not necessarily bad parents. Rather, they are simply more attuned to the financial necessities of raising children and thus more susceptible to the penalties levied on those who commingle money and caretaking.

B. Reasons to Oppose Legal Status for Paid Caregivers

In this section I will explore various reasons to oppose allowing paid caretakers to obtain de facto parental status and potentially gain custodial rights to children. I will explore arguments that such a grant of legal status is too great an invasion of privacy, that allowing such status to paid caregivers creates too great a danger of harassment of legal parents, that such status would break down important systems in place to provide care for children and, finally, that the mere mixing of compensation and parenting sullies the very meaning of parenting and the inherent dignity of personhood and should therefore be avoided at all costs. I will conclude by arguing that the potential benefits of permitting paid caretakers to obtain de facto parental status outweigh the potential costs.

1. Invasion of Privacy

One justification for excluding paid caretakers from de facto parental legal status is the fear that such status would infringe significantly on the privacy interests of the biological or adoptive legal family – the traditional, nuclear family.\(^{328}\) Family privacy is of great concern in constitutional law, even after a child has been removed from his home because of abuse and neglect.\(^{329}\) Awarding de facto parental status to any third party potentially

\(^{325}\) See, e.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (black surrogate mother and white intended parents); see also discussion of the Baby M. case, supra notes 141-45 and accompanying text.

\(^{326}\) See supra notes 141-45 and accompanying text.

\(^{327}\) See supra notes 141-45 and accompanying text.

\(^{328}\) See supra notes 76-93 and accompanying text. This justification is also mentioned in the ALI Principles. See ALI Principles § 2.03 cmt. c.

\(^{329}\) See, e.g., Bartholet, supra note 100, at 59-83; Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (identifying a “private realm of family life which the state cannot enter”). While the
infringes on parental privacy.\textsuperscript{330} The ALI Principles and state court decisions have allowed third parties to obtain de facto parental status in particular situations, based on the concept of the psychological parent and the interest in preserving the important bonds between caretakers and children.\textsuperscript{331} However, such status is generally drawn with an eye towards excluding claims by "neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends."\textsuperscript{332}

Yet, the fact of compensation does not make a caretaker unable to become a psychological parent,\textsuperscript{333} and thus the fact of compensation should not make the status unobtainable for paid caretakers. It is not clear why, if all other conditions are met, and the psychological bond is strong, the fact of payment makes the invasion of privacy greater. Perhaps the greater invasion stems from the characteristics of the paid caretaker. Such a person is usually a stranger to the adult who hires them and a stranger to the family. They are potentially neither kin nor friend (but of course this provides no explanation for why paid kin would be excluded from de facto parental status). Over time, however, and assuming they meet the other conditions of the ALI Principles, they do become a close acquaintance at least of the child, if not the parents as well. The parents invite them both into the home and into the relationship with the children, and in many ways they are no longer strangers. On the other hand, it could be argued they still are not entirely trusted, and there are fears that they may try to infiltrate themselves into nuclear family life in bad faith and not because of the strength of the emotional tie with the children. This possibility is discussed in the following section.\textsuperscript{334}

Beyond constitutional concerns, allowing paid caretakers to initiate litigation over custody/visitation of children against the objection of legal parents may seem to be an ill-advised policy. If there are strained relations between parents and paid caretakers such that voluntary visitation with the children is denied, allowing the state to enforce such visitation may seem not to benefit children. If this is the case, that should be relevant at a best interests hearing depending on the context.\textsuperscript{335} For instance, a five year live-in

contours of family have been subject to some dispute, see, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 531, 541 (1977), biological or adoptive relationships have been deemed to be essential to creating such a family. See, e.g., Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843 (1977); Prince, 321 U.S. at 166 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

\textsuperscript{330} See supra notes 76-93 and accompanying text.

\textsuperscript{331} See supra notes 27-45, 66-75 and accompanying text.


\textsuperscript{333} See supra notes 269-75 and accompanying text.

\textsuperscript{334} See infra notes 338-46 and accompanying text.

\textsuperscript{335} See infra notes 400-09 and accompanying text.
nanny who has been the clear primary caretaker and who is denied visitation simply because the parents do not want to be bothered would have a stronger case than a shorter term babysitter who was fired because of disputes with the family. Similarly, a long-term caretaker who has been the only stable presence in a child’s life because of turmoil in the natural family has a stronger claim than as against a stable intact family. Furthermore, mediation or other forms of alternate dispute resolution may be the best option in such a familial setting and could be the first recourse ordered by a court.

Yet, it must be reemphasized that the issue here is not whether third parties can be psychological parents even when biological/legal families are in place and when such parents have not consented to a third-party undertaking a formal parental role – that is already set out by the de facto parenthood status in the ALI Principles.336 The infringement by third parties is allowed for the sake of the psychological bond between child and caretaker. The question is whether financial compensation should automatically mitigate that status when the majority of caretaking – or at least as much caretaking as a legal parent is providing – is being done by the third party over a significant period of time.337 If the psychological connection is sufficiently strong, de facto status should be obtainable regardless of payment.

2. Fear of Harassment

As mentioned in In re Hood, another fear is that permitting paid caretakers de facto parental status would allow third parties to potentially harass parents by threatening to assert their status against the parents’ will.338 This may be a more daunting threat when coming from an unrelated third party than from a grandparent, relative or stepparent where there is usually, but not always, familial relations that would make blackmail or harassment more unlikely.339 However, as discussed above, if parents have felt comfortable trusting the care of their children with these paid caretakers over a significant duration, such caretakers are no longer strangers or even casual acquaintances. It is unclear why the law is so suspicious as to disqualify well-intentioned, if paid, caretakers with emotional bonds to the children for whom they care without a best interests inquiry.

As one scholar remarks, “the specter of the kidnapper looms over the theory of functional parenthood.”340 In Montgomery County Department of

336. See ALI Principles § 2.03(1)(e).
337. Id. § 2.08.
338. 847 P.2d 1300, 1304 (Kan. 1993). For further discussion of this case, see supra notes 129 to 132 and accompanying text.
339. Of course, the opposite may also be true given the acrimony that can develop between fighting family members.
Social Services v. Sanders, the court granted custody to the biological mother over the objection of the foster family in which the child was living.341 The foster parents argued that due to the long-term nature of the foster placement and the psychological bond formed with the child, custody should be awarded to them.342 The court, referring to a hypothetical in which kidnappers became good psychological parents of a child held:

To allow a person to abscond with a child and then judicially condone the action after a pre-established time period has lapsed is to place a premium on disobedience of court orders and simultaneously to reduce the child to “personal property” to which any person can acquire by some sort of “squatters rights.”343

In Sanders, the foster parents had not even done anything illegal, but the court was fearful of a decision that could potentially legitimize bad behavior.344

However, this concept of legalized kidnapping or blackmail seems far-fetched. Of course, if kidnapping was the cause of the psychological bond, status could be denied in a best interests hearing. There are always ways to abuse the system, but fear of such abuse does not normally control doctrine, particularly when important emotional interests of children are involved.345 It is possible that a paid caretaker will assert rights against the biological parents in order to obtain a financial reward, but there are other means of discerning such bad faith by the court – for example, through a best interests hearing.346 Alternately, such rights could be easily annulled if not properly and regularly used, and a babysitter who is acting in bad faith when asserting legal rights is not likely to follow through in a consistent manner. The fear of abuse does not seem to justify ignoring the potentially significant emotional bond with a child. On the other hand, the judge’s disdain for analogizing the child to “personal property” to which any person could acquire rights sounds more like commodification anxiety, which will be discussed below.

342. Id. at 1156-57.
343. Id. at 1164.
344. Id.
346. See infra notes 400-09 and accompanying text.
3. Breakdown of Systems

One of the stated purposes in the ALI Principles for excluding foster parents from the category of persons entitled to obtain de facto parental status is that doing so would undermine the foster care system, intended only to be a temporary safe haven for children.\textsuperscript{347} In reality, as discussed above, a foster home can be a child’s home for a significant period of time, even until emancipation.\textsuperscript{348} In ASFA, Congress adopted the view that adoption in permanent families is the ideal outcome for foster children who cannot be reunited with natural families: “while family reunification might be the preferred goal for a particular child, caseworkers could also begin adoption planning, so that if family reunification is unsuccessful then termination of parental rights can be started immediately.”\textsuperscript{349} As a matter of policy, ASFA veers away from the use of long-term foster parents by expediting the termination of parental rights and thereby aiming to release more children for adoption: “Congress presumes that by terminating parental rights, children will be more attractive for adoption.”\textsuperscript{350} In fact, logically, it is not clear how making more children available for adoption is going to increase adoptions significantly if less than the number of desirable adoptions is already occurring.\textsuperscript{351} This is supported by adoption statistics since the passage of ASFA, which indicate that adoptions are rising only incrementally and that long-term foster care is still the reality.\textsuperscript{352}

Presumably, however, the reason for not granting visitation or custody rights to foster parents is to make children more attractive for adoption; encumbering foster children with potentially loving kin-like foster parents is arguably as burdensome for potential adoptive parents as allowing natural parents to retain rights. The problem with this argument is twofold. First, adoption is not the reality for numerous foster children, and breaking the possibility of any ties to long-term foster parents does not seem to serve the interests of long-term foster children, caring foster parents or the state. Identifying these long-term foster children could be done on an ad hoc basis, with custody or visitation awarded to foster parents when adoption is not otherwise an option or even the stated permanency goal.\textsuperscript{353}

\begin{footnotes}
\item 347. ALI Principles § 2.03 cmt. c.
\item 348. See supra notes 112-19 and accompanying text.
\item 350. Baldwin, supra note 109, at 262.
\item 352. See supra notes 113-19 and accompanying text.
\item 353. In such instances, foster parents may be able to continue to receive stipends yet also have a certain ongoing legal status with the child. See Schwartz, supra note 166, at 479. Alternatively, visitation could be awarded (without any compensation being involved) if foster children are assigned to alternate foster homes or institutions.
\end{footnotes}
Second, the nature of the foster system is much more complicated than it once was because foster parents are also preferred adoptive parents in 43 states and the District of Columbia, which is generally justified by the psychological bond that has been formed between foster parents and their foster children. If foster parents are given preference in adoption, the choice of an extended foster home is critical, and emergency placement found not to be suitable for the longer-term should be subsequently modified. Moreover, adoption is not infrequently subsidized, making the difference from foster care even less distinct. Thus, the line between adoption and foster care is neither as rigid as it once was, nor is the nature of the system being preserved so clear. While adoption may still be an optimal solution, the law must acknowledge the changing role it plays and the increasing need for foster care. Recognizing attachments formed between long-term foster parents and foster children and allowing those relationships to continue even after adoption with another family, when foster children are returned to biological families or when they graduate from the foster care system to independence, is part of that acknowledgement.

Similarly, it might be argued that the system of paid child care for intact families would be undermined by allowing paid caretakers to obtain de facto parental status. In fear of allowing a paid caretaker to obtain such status, parents may be anxious about entering the workforce and entrusting the child to paid care. One could argue that such concern could inhibit women from entering the workforce and becoming economically liberated. Live-in nannies, the most comprehensive of daycare options, would arguably no longer be attractive babysitters. Either such workers would become

In around 9% of cases, long-term foster care is still the stated goal for foster children and emancipation is the goal for another 6% of foster children according to AFCARS. Admin. for Children & Families, supra note 116, at 3.

354. See Proch, supra note 202, at 619; see also supra notes 202-06 and accompanying text.

355. See Proch, supra note 202, at 619; GOLDSTEIN, FREUD & SOLNIT, supra note 59, at 82-84 (arguing that foster parents become psychological parents during the extended periods of time when children have little or no contact with their biological parents).

356. See Proch, supra note 202, at 623 (suggesting that emergency placements be made for no more than 60 days before specialized diagnostic placement is arranged).

357. See supra note 209 and accompanying text.

358. See Proch, supra note 202, at 618 (describing how in the past foster agencies would prohibit foster parents from seeking adoption in order to preserve the nature of the system).

359. A legal connection in this last scenario can be especially beneficial to foster children who have no other adults in their lives upon obtaining independence. See Mangold, supra note 119, at 862-76.

360. See supra notes 323-24 and accompanying text. Of course, employers could ask paid caretakers to waive any possible rights to visitation or custody before
enveloped into the family unit through their kin-like relations with the family, affording them potential legal status and visibility, or they would perhaps be eliminated from use for fear of their infringement on family privacy.

However, if the fear is having to tolerate a longer-term relationship with a caregiver, most parents who have to choose a form of daycare for their children have a lot more to be afraid of (neglect, abuse, understimulation, poor quality child care) than an overzealous caretaker who actually wants to continue a relationship with a child after their employment ends.³⁶¹ Allowing a third party to have rights and attachments to a child because the parents forego caretaking for market work may simply be a necessary consequence of parents' decision to forego caretaking for market work.³⁶² Parents are free to fire paid caregivers – they cannot be bound to continue payment. But, if the attachment has persisted for a long enough period of time and the caregiver wants to continue the relationship, parents must face up to the reality and importance of that relationship and, if desired and found to be in the child's best interests, allow continued contact. Admittedly, it will not be common for a paid caregiver to want to continue the relationship without payment; however, if that desire exists, it should be encouraged. Furthermore, given the identity and lack of status of often immigrant live-in nannies – and the discrimination they face – finding substitute care (daycare, live-out babysitters, informal family care centers) may be beneficial both to children and childcare workers in the long-run.³⁶³

³⁶¹ See supra notes 244-49 and accompanying text.
³⁶² See supra notes 269-72 and accompanying text.
³⁶³ See supra notes 323-24 and accompanying text. Mary Romero argues that while immigrant live-in nannies are chosen for their "warmth, 'love for children,' and 'naturalness in mothering,"' they occupy a subordinate position in the home without authority to discipline children while performing the most menial household activities. Romero, supra note 260, at 818, 835. Caretaking without authority and status tends to teach children that the person minding them is a means and not a respected figure. Such treatment can teach patriarchal and hierarchal values to children. See id. at 836-37; see also Shellee Colen, "Like a Mother to Them": Stratified Reproduction and West Indian Childcare Workers and Employers in New York, in CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION 78 (Faye D. Ginsburg & Raya Rapp eds., 1995); Ida Susser, The Separation of Mothers and Children, in DUAL CITY: RESTRUCTURING NEW YORK 207 (John Hull Mollenkopf & Manuel Castells eds., 1991); JULIA WRIGLEY, OTHER PEOPLE'S CHILDREN (1995).
4. Commodification Anxiety: The Complex Problem of Mixing Care and Money

The disqualification of paid caretakers from de facto parental status reflects a complicated relationship between the perception of parenting as the ultimate altruistic and selfless enterprise and the financial compensation that is at times granted for such parenting services. This is the real puzzle. Because whatever complex motivations for caring for the child existed initially, once a caretaker desires to obtain unpaid de facto parental status, it is clear that the motivation and attachment to the child transcend monetary compensation.364 The question is whether the fact of the relationship having developed in a compensated environment can vitiate de facto parental status going forward. Feminists advocating commodification of personal relations have advocated valuing such intimacies in market terms and perhaps limited marketization.365 In this article, I am discussing the reverse possibility: should the fact that intimate relations are based on market or compensated arrangements create an assumption that intimacies and attachments do not exist?

Having examined and narrowed the other concerns with attaching legal status to paid caretakers, it appears that arguably the primary concern is commodification anxiety: the fear that the excessive mixing of money with personal activities such as parenting will "threaten human flourishing" and "sully" human relationships.366 In other words, monetary motivations simply cannot be coupled with acting for the welfare of a child in one's care. Indeed, commenting on the historical need to downplay compensation in the context of foster care, Wozniak notes that "[t]he construction of social incongruence between payment and motherhood therefore stands within a consistent historical tradition."367 Although the ALI Principles are willing to consider parenting based on functionality in the absence of biology, financial incentives still vitiate or conflict with any form of a parenting relationship.368 The ALI Principles exclude paid caretakers from the possibility of obtaining legal status based on the belief that it cannot be assumed that such caretakers

364. Unless the desire is in bad faith, which would have to be determined by hearing and/or by monitoring the behavior of the caretaker if visitation is allowed, see infra notes 400-09 and accompanying text.
365. See, e.g., supra notes 284-89 and accompanying text.
366. WILLIAMS, supra note 15, at 118 (arguing that "[c]ommodification anxiety serves to police traditional gender boundaries, as when the fear of a world sullied by commodification of intimate relationships feeds opposition to granting wives' entitlements based on household work").
367. Wozniak, supra note 281, at 363.
368. ALI Principles § 2.03(1)(c).
will act in the child’s best interests.\textsuperscript{369} Yet, certainly the state, when placing children with foster parents, does in fact assume, or at least hope, that they will act in the best interests of the children, as do parents who leave their children with paid caretakers. Regardless, parenting is considered a convention that emanates from biology first and foremost, but secondarily from love and selflessness and not from selfish or monetary motives. If money is involved, caretaking might be occurring, but de facto parenting that might lead to strong emotional bonds and legal rights is not.

Leading commodification theorist Margaret Radin expresses grave concern over marketizing or allowing payment for personal relationships such as parenthood and parenthood functions, sexuality and reproduction.\textsuperscript{370} In essence, her argument is that allowing a market for parenthood cheapens the children that are bargained over, and by extension personhood itself.\textsuperscript{371} Thus, she speaks out against black market adoptions and proposals of a market in children: “[c]onceiving of any child in market rhetoric wrongs personhood.”\textsuperscript{372} Radin explains that “[l]ike relationships of sexual sharing, parent-child relationships are closely connected with personhood, particularly with personal identity and contextuality, and the interest of would-be parents is a strong one.”\textsuperscript{373} Basically, “any contact between the two spheres [market and intimate] inevitably leads to moral contamination.”\textsuperscript{374} Therefore, in the context of de facto parenthood, the loving and nurturing relationship necessary for parenthood is contaminated by compensation.

At the other extreme, there are those who argue that a market in children is efficient and should be supported.\textsuperscript{375} They take the position that restraints on the adoption market have created a market in which too many children sit in foster care (older children and ethnic minorities) and not enough babies are available for adoption.\textsuperscript{376} In response to arguments that a free market in

\begin{footnotesize}
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\item \textsuperscript{369} ALI Principles § 2.03 cmt. c(ii). If such caretakers are not acting in the best interests of the children for whom they care, such caretakers should not be given legal status with regard to children nor should they be permitted to continue their childcare work. However, presumably such sub-par care would be identifiable through a best interests hearing. \textit{See infra} notes 400-09 and accompanying text.
\item \textsuperscript{370} RADIN, supra note 7, at 137-39.
\item \textsuperscript{371} Id.
\item \textsuperscript{372} Id. at 139.
\item \textsuperscript{373} Id. at 137.
\item \textsuperscript{374} Ertman, supra note 10, at 50.
\item \textsuperscript{376} See, e.g., Elisabeth M. Landes & Richard A. Posner, \textit{The Economics of the Baby Shortage}, in \textit{RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE} 46, 47-51 (Martha M. Ertman & Joan C. Williams eds., 2005); Epstein, \textit{supra} note 8, at 2330-34 (discussing the baby-selling analogy to surrogate motherhood and concluding that the analogy only strengthens the conclusion that
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children would not consider their best interests, which is a goal of the regulated adoption process, they counter that price has acted as just as good an indicator of child well-being as public screening measures.\textsuperscript{377} Elizabeth Landes and Richard Posner argue instead that pre-screening background checks like those used before licensing automobile drivers and assurances based on their belief that people who pay more money for a baby will be more concerned with its welfare would suffice.\textsuperscript{378} Criminal abuse statutes can punish the deviants who slip through the aforementioned safeguards.\textsuperscript{379}

But, is the scenario in which a market price is attached to available children a desirable effect of creating a more efficient market? Most would agree that society should not perceive children as goods for sale.\textsuperscript{380} Allowing children to be sold freely as commodities ignores a careful consideration of the independent interests of the children involved. How then can we take seriously concerns that a market for children may not be what is desirable for society, but a similar sense that mixing money with care is not all bad, and that such mixing may in fact be unavoidable? As I have discussed above, while accepting payment does not seem to justify discrediting the care work done, it should ultimately be ensured that real attachment and emotional concern drives caretakers to care for children when payment ceases.\textsuperscript{381}

The response to commodification anxiety should be complex: the emotional nature of caretaking must be recognized simultaneously with the monetary value of the work. Margaret Radin asks, can we "both know the price of something and [simultaneously] know that it is priceless?"\textsuperscript{382} Radin herself examines plural meanings in market transactions that deal in the personal (caretaking, children, body-parts, prostitution) in the form of incomplete commodification, but is more concerned with infringement of the market onto the personal realm than whether such coexistence is tolerable.\textsuperscript{383} Joan Williams and Vivian Zelizer have taken the possibility of incomplete commodification further and argued for a "differentiated ties" view of commodification.\textsuperscript{384} They take the position that recognizing "both economic dimensions and socioemotional relationships" within a given relationship or

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378. Id.
379. Id.
380. See Laufer-Ukeles, supra note 58, at 418.
381. See infra notes 400-09 and accompanying text.
382. See RADIN, supra note 7, at 102.
383. See id. at 102-14 (arguing that it is not inevitable that the market understanding will win out even in a personal interest that has been marketized and that space should be preserved for market inalienability through recognizing a continuum of incomplete commodification).
384. See Williams & Zelizer, supra note 11, at 369.
transaction is not only possible, but desirable. In other words, one could accept money for actions that are at least partially motivated by a sense of social connectedness or altruism and perform the job in a caring, selfless manner. This complex perspective seeks to recognize and legitimize both the market and the caring/selfless aspects of certain endeavors, refusing to see them as mutually exclusive: "[i]nstead of living in segregated spheres, people participate in dense networks of social relations that intertwine the intimate and economic dimensions of life."

A number of scholars have begun to apply this differentiated ties theory to markets for intimate relations such as parenthood and child care, and have determined that a complete ban on valuing such services does injustice to the service rendered. For instance, Martha Ertman argues that the sale of semen and eggs has, on the whole, created a positive benefit to society by allowing otherwise childless couples (including gay and lesbian couples) to become pregnant. While Ertman admits that there are potential drawbacks from such sales, she argues that society's response should be measured and cautious and should not jump to extremes by outlawing such markets entirely, instead imposing nuanced regulations. Similarly, Katharine Silbaugh argues for limited commodification of women's household labor to combat the problem of the "cashless woman," explaining that it is the sales of children and sex that are objectionable, not women's receipt of money for caretaking work. The important distinction is between the complete marketization of such goods or endeavors and attributing value to such endeavors. While conceding that regulation keeping these goods and services from being freely marketable remains relevant, Williams and Zelizer argue that banning all payment to impute value to such services is neither practical nor desirable.

The differentiated ties argument advanced by Williams and Zelizer aptly applies in this context in support of valuing such caretaking. Their complex perspective can recognize that paid caretakers create emotional,

385. Id.; see also Jeylan T. Mortimer & Jon Lorence, Social Psychology of Work, in SOCIOLOGICAL PERSPECTIVES ON SOCIAL PSYCHOLOGY (Karen S. Cook et al. eds., 1995) (arguing from a social psychology perspective that economic and altruistic motivations are not incompatible but are relatively independent dimensions); Folbre & Nelson, supra note 2, at 131.

386. See Folbre & Nelson, supra note 2, at 132 ("One could, of course, let self-interest overtake altruistic concerns and do the work in a cold-hearted way, but this is not implied a priori. One could, in fact, be exceptionally non-materialistic and generous.").

387. Williams and Zelizer, supra note 11, at 366.
389. Id. at 22.
390. Silbaugh, supra note 11, at 104-07; see also Becker, supra note 11, at 71-73; Cahn, supra note 1, at 1-28; Ertman, supra note 10, at 42-54.
391. Williams & Zelizer, supra note 11, at 371.
392. Id.
psychological and legally significant ties with the children they care for, while simultaneously acknowledging and taking into account the compensated nature of the relationship. As Zelizer discusses at length, money has always been involved in handling unwanted or uncared for children as a means of ensuring their care; to ignore this reality is to endanger the fate of these children. The increasing sentimental value placed on children in the past century is important, but the stigma that is attached to taking money for caring for children is overwrought. The relationship between paid caretakers and those for whom they care is a seminal “differentiated tie”—two motivations may exist simultaneously and one does not vitiate the other. Providing paid caregiving to children who need parenting does not delegitimize the parenting or indicate that children are not receiving valuable care. To the contrary, when the system works, it allows parents to parent and children to be parented. Paid caregiving does not delegitimize caretaking; it values it. Accordingly, paid caregivers deserve the potential to achieve de facto parenthood status if they so choose and, if they can prove that they have provided substantial quality care, they earn that legal potential when they parent those children and develop attachments to them.

V. THE SOLUTION: HOW TO DISTINGUISH A GOOD BABYSITTER FROM A DE FACTO PARENT?

I have argued that money is inherently involved in caretaking and that the question is how to balance valid concerns about commodification and the value such commodification provides. This requires thoughtful consideration in every context. In the context of de facto parental status, I recommend that paid caretakers should be eligible for de facto legal status in accordance with the factors and principles explained below.

A. A Crisis Event

In some jurisdictions, before a caregiver may petition a court for visitation or custody of a child, a precipitating crisis event must take place. In the ALI Principles, the crisis event is the dissolution of the marriage, the legal separation of parents who previously lived together, or the filing of a court


394. See id. at 176 (explaining that children were reenvisioned as sacred treasures to be valued for the emotional, sentimental rewards of raising them and not the economic benefits to the family).

395. Id. at 188-89 (explaining that the stigma has attached since 1924).
action by biological parents to determine custodial responsibility. This reflects the belief that something should occur to breach the natural family privacy inherent in family relations – either as a matter of constitutional law or public policy – other than the mere desire by a third party to have more time with the child, before the courts become involved in allocating parental responsibility.

My proposal balances that privacy interest against the interest of psychological parents in their emotional attachments with children. I propose a broader definition of “crisis event,” whereby divorce, death of a legal parent, removal proceedings for abuse and neglect, and modification of the physical custody of the child (including removal from a foster home) or legal custody of a child (including placement in state care) would justify such a petition. Therefore, foster parents would have standing to sue for visitation or custody when children are removed from their physical custody after being placed in their homes for a significant period of time. Other extraordinary circumstances, such as when a homosexual couple who have been jointly raising a child separate, or when another long-term live-in caretaker who satisfies the other requirements of a de facto parented listed below leaves, would also be considered a crisis event.

B. A Best Interests Hearing

Rather than assuming that a paid caretaker does not act in the best interests of the child, I propose that courts should make such determinations on a case-by-case basis in a best interests hearing before granting visitation or custody to a psychological parent. The ALI Principles provide for granting visitation or custody to any legal parent, de facto parent, or parent by estoppel in a manner proportional or approximate to the amount of caretaking each parent provided before the divorce or legal separation (the “Approximation Standard”) without engaging in the traditional best interests of the child

396. See ALI Principles §§ 2.01, 2.08, and for a discussion of existing state law regarding the requirement of a crisis event, see supra note 56 and accompanying text.


399. See, e.g., V.C. v. M.J.B., 748 A.2d 539, 547 & n.4 (N.J. 2000) (Psychological parent has standing to seek custody after break-up with legal mother.). See supra notes 31-51 and accompanying text for various state provisions for when third-parties can seek custody or visitation with a child.
determination.\textsuperscript{400} While elsewhere I contend that the best interests determination is too discretionary and argue instead for a primary caretaker presumption, in the case of de facto parents such an inquiry is the most suitable inquiry to determine the amount of physical custody that is appropriate.\textsuperscript{401} In a complex family in which multiple caretakers have taken significant part in raising a child over time, identifying one primary caretaker, or even trying to identify a stable past caretaking allocation, is usually inappropriate if not infeasible.

Moreover, while visitation is often awarded to non-custodial parents essentially as an entitlement unless serious harm can be demonstrated,\textsuperscript{402} in the case of de facto parents I recommend a more involved inquiry to contend with the concerns discussed above – the quality of the caretaking, the affront to the system, the potential for bad faith and the potential invasion of privacy. According to the ALI Principles, in order to be considered as such, a de facto parent must have spent at least as much time with a child as a live-in parent or be the primary caretaker, and thus under the approximation standard introduced in the Principles, a very high bar is set.\textsuperscript{403} Presumably, therefore, paid caretakers could seek visitation, and courts may be willing to award such visitation, but not to the extent of past caretaking. The ALI Principles do not allow de facto parents to have more physical custody than a legal parent or parent by estoppel in any event,\textsuperscript{404} a provision which seems suitable. Custodial rights for de facto parents should be reducible to a regular visitation schedule even if the caretaker had previously spent the majority of time with that child if such an arrangement is found to be in the best interests of the child. Moreover, the potential for conflict with parents and the effect on children must be carefully examined.\textsuperscript{405} In sum, the bar for visitation/custody should be set higher than for natural parents, but it should not be unobtainable. While such an inquiry is involved and highly discretionary, it is worthwhile for the sake of potentially preserving important emotional attachments with de facto parents.

Finally, to comply with constitutional standards, assuming de facto parents have third-party status and are not given the same accord as natural parents,\textsuperscript{406} in conducting a best interests inquiry a court would have to

\textsuperscript{400} ALI Principles § 2.08.
\textsuperscript{402} See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 407 (1998).
\textsuperscript{403} ALI Principles § 2.03(c).
\textsuperscript{404} ALI Principles § 2.18(1)(a) (“[The Court] should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility unless” such an arrangement would harm a child or a legal parent is not performing a reasonable share of parenting functions.).
\textsuperscript{405} See supra notes 335-37 and accompanying text.
\textsuperscript{406} See supra notes 52-55 and accompanying text.
comply with the requirements in Troxel when a legal parent objects to any third-party visitation.\(^{407}\) Accordingly, deference would have to be given to natural parents in the form of a presumption that that legal parents are acting in the best interests of their children.\(^{408}\) Such objections could occur with regard to foster parents when a child is reunified with his natural parents or adopted. However, since the state has already entered the relationship, and the children have not always been in the legal or physical custody of their natural parents, Troxel is distinguishable and a straight best interests analysis may be appropriate and permissible. On the other hand, with regard to giving other paid caregivers visitation rights after a best interests hearing, trial courts would have to apply a rebuttable presumption that the parents’ wishes are in the child’s best interests.\(^{409}\)

C. Quality of Care

During the best interests of the child hearing, the attachment between the child and the caretaker should be examined, including the preferences expressed by the child if possible. The level of attachment between the child and caretaker and evidence regarding the quality of the care that was given is directly pertinent to whether such legal status should be awarded.

D. Duration

The two years duration requirement for caretaking in order to obtain the status of a de facto parent is too cumbersome for a younger child.\(^{410}\) I recommend changing the requirement to the majority of a child’s life or two years – whichever is less – with a minimum of nine months. A caretaker who has been the primary caretaker for a one and a half year old infant for almost his entire life should be able to obtain de facto parental status. Moreover, for surrogate mothers who have gestated babies, the period of gestation should be sufficient to afford the possibility for achieving de facto parental status.\(^{411}\)

E. Residency Requirement

Similarly, the ALI Principles requirement of residency with the child for at least two years to obtain de facto parenthood creates too high a bar and should again be changed to two years or the majority of the child’s life.\(^{412}\) The reason stated in the Principles for this requirement is to exclude

\(^{407}\) See supra notes 79-85 and accompanying text.

\(^{408}\) See supra notes 79-85 and accompanying text.

\(^{409}\) See supra notes 79-85 and accompanying text.

\(^{410}\) See ALI Principles § 2.03 cmt. c.

\(^{411}\) See supra notes 137-39 and accompanying text.

\(^{412}\) ALI Principles § 2.03 cmt. c.
“neighbors, nonresidential relatives, or hired babysitters whom parents have relied for regular caretaking functions.” It is true that living with a child creates a more intimate relationship and should be involved to support de facto parental status. However, it does not need to be for as long as the duration of the caretaking relationship, just the entire two years or the majority of the child’s life.

F. Clear Evidence of Willingness and Ability to Care Without Compensation

Finally, if the attachment that has developed during the paid caretaking relationship is so strong as to warrant continuing the relationship past payment of foster dues or salary, the caretaker must demonstrate the ability and sincere desire to obtain visitation or partial custody without payment. Such evidence can be countered by evidence of inconsistency in carrying through with visitation when allowed. Moreover, demands for financial recompense would forfeit the ability to obtain de facto parental status.

G. Examples

In the following section I will give three examples intended to illustrate how my proposal would change the reality for children and their psychological parents. These examples are entirely hypothetical and intended only to illustrate the practical implications of my proposals. Any resemblance to actual cases is purely coincidental.

1. Sam

Imagine a scenario in which a one year old infant, “Sam,” is surrendered to the state child welfare system after the child’s seventeen year old mother is arrested for driving under the influence of a chemical substance. It is not her first arrest, and she has seriously injured another driver. She is incarcerated and ultimately placed in a mandatory drug rehabilitation center in lieu of extended jail time. Sam is placed in a non-kin foster home with a nurse, “Mary,” who is currently on disability leave for a work-related accident. Mary is dependent on the money she receives and would not care for Sam otherwise. Sam is in her care for a little less than two years when her disability leave is terminated and she must return to work for financial reasons. Her previous job in Chicago has already been filled, but she receives an excellent offer from a hospital in Cleveland. She is eager to relocate and begin in her new position. However, Mary cannot cross state lines with Sam because Sam is a ward of the state. The Illinois child welfare agency has

413. Id.
414. See supra notes 338-46 and accompanying text.

https://scholarship.law.missouri.edu/mlr/vol74/iss1/3
another placement for the child in a foster home with multiple children and high turnover rates. Mary is devastated. She has become very attached to Sam. She is eager to adopt Sam, but he is not yet free for adoption because his birth mother has progressed fairly well in the rehabilitation center and is due to be released shortly. Sam’s birth mother has visited with him on a number of occasions, but she is unsure whether she can accept the responsibility of the child and may voluntarily terminate her rights. She is very fond of Mary and would like Mary to adopt him if she determines that she cannot keep him.

Under my proposal, Mary could petition the court for legal custody of Sam under a best interests standard and would likely be awarded custody which would allow her to cross state lines with the child. She could then petition for adoption if and when Sam becomes available. The qualifying crisis event would be her need to relocate to another state and the termination of Sam’s foster placement. Foster payments would likely end as she is crossing state lines and Sam would no longer be in the legal custody of the state, but Mary feels she could now support Sam with her new job without state stipends. Under the ALI Principles, Mary would be disqualified from seeking such custody because she is a foster parent and because she did not live with him for a full two years.

2. Tom

A second example might arise with an older child, “Tom,” who has been in foster care from the age of eight to sixteen. His parents are deceased and he is eligible for adoption. His foster parents, “Jim” and “Jody,” live in a rural area in Pennsylvania and have had many foster children come live with them over the years, but none as long as Tom. Tom has a mild disability which makes him somewhat harder to place for adoption and foster care, but he has adjusted very well to life on the farm. Jim and Jody have six children of their own, and Tom is one of four foster children that live with them. All the children attend school and work on the farm. Jim and Jody have been notified that the state has decided that Tom would be placed in a group home because of his disability and age, and that they would no longer receive a stipend on his behalf. The state has a policy of putting older children in group homes to prepare them for independent living; such group homes may also be less expensive for the state. Jim and Jody are devastated and are sure that this is the wrong decision for Tom, who loves his life on the farm. However, they cannot afford to adopt him because of the legal expense of doing so and because they are dependent on the stipends.

Under my proposal Jim and Jody would be able to petition for either just physical or both physical and legal custody of Tom under a best interests standard. Jim and Jody could receive custody or at least visitation rights in which Tom would be allowed to visit with them on a regular basis, which would help Tom with the transition to group home living. If the court does grant Jim and Jody custody, they could retain foster payments until Tom is
eighteen if the court so directs while legal custody remains with the State, or alternately, receive guardianship subsidies or TANF subsidies, depending on state law.

3. Sue

Finally, imagine the case of "Sue," who was born to "Mark" and "Wendy" when they were both twenty and in college. Mark’s out-of-town step-sister from a previous marriage of his father’s (i.e., no blood relation), "Vanessa," who was at the time eighteen and a high school drop-out, was hired to care for Sue and live in their home while they finished college and then began working, both as teachers. Vanessa was paid well and loved her job and her step-niece. When Sue is three, Mark and Wendy undergo a nasty divorce. By the end of the divorce, Mark is suffering from a gambling addiction and Wendy is clinically depressed. Wendy is given full custody of Sue at the time of divorce, but she will no longer let Vanessa care for or visit with Sue because she trusts nobody, and has lost her job and can’t afford to pay her. Vanessa says she is opening a small day care and will watch Sue for free, allowing Wendy to look for a new job. Wendy refuses and will not allow any visitation. Wendy is living on unemployment and child support.

Under my proposal Vanessa could likely obtain court ordered visitation with Sue under a best interests standard. The crisis event would be the divorce. If Vanessa could prove that the psychological bond between her and Sue is strong given their long-term relationship, her status as a paid child care provider would not disqualify from maintaining her bond with Sue as it would under the ALI Principles.

VI. CONCLUSION

The model for considering money and caretaking and the kin-like status I am proposing for paid caretakers is idealistic and transformative. It envisions a more open understanding of parenting and psychological kin-like attachments with children. It seeks to respect both biological and functional connections to children. It also views raising children as a more communal process, albeit respecting family privacy where it is maintained. Once the family opens its doors to third parties to help in raising their children, or when children are removed from the private family to be raised by others, those third parties become very much part of the "family" in a non-traditional sense; they become like kin in their connection and attachment to the children, and legal significance may attach to this kin-like status if the state becomes involved in assigning custodial responsibilities. The art of parenting is far more than just biological connection. Parenting should be respected when it is done well even if compensated. In fact, as many feminists have argued, all parenting should be compensated in one form or another. Caring for children is work and should be valued as such. The fact of compensation
does not vitiate the value provided nor should it be used to undermine the bond created between the caretaker and the cared for.