

# Disposable Mothers: Paid In-Home Caretaking and the Regulation of Parenthood

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**ABSTRACT:** Recent custody decisions in the United States have treated paid in-home caretakers as substitutes for parents who are either unavailable or unable to care for their children. They have created a legal category of “nanny” that detaches primary caretaking from the caretaker and attributes care provided by in-home caretakers to paying parents. This category fits well with the legal regime of parental exclusivity, which promotes a nuclear family model, and with cultural norms that encourage parents to utilize intensive, development-focused childrearing methods.

This Article argues that this new approach rests on flawed and potentially harmful assumptions about parenting and caretaking. Detaching the care from the caretaker is artificial and contradicts the well-established judicial and legislative view that performing hands-on caretaking tasks over time creates a parent-child bond. Attributing paid caretakers’ labor to hiring parents is unjust: it devalues care work, renders paid caretakers disposable, and places the majority of parents, who cannot afford in-home caretaking, in a disadvantageous position. Furthermore, it endangers the feminist effort to promote policies that allow women to better combine motherhood with workforce participation. This Article urges readers to rethink conventional understandings of parenting and caretaking and to recognize the price that the current legal approach exacts—and who pays it.

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## INTRODUCTION

Sometimes parents have trouble taking care of their children and need other people's help. Maybe work or other obligations require that they spend a considerable amount of time away from their children. Maybe they find it difficult to cope with the challenges that childrearing brings. Although these circumstances are very different, some courts have recently suggested that the solution for both working parents and inadequate parents might be similar—hire an in-home paid caretaker, or “nanny.”<sup>1</sup>

In-home caretaking is the most expensive solution to the problem of child care.<sup>2</sup> Because the Census Bureau's statistics make no distinction between in-home caretakers, neighbors, friends, and casual babysitters,<sup>3</sup> it is hard to know exactly how many parents employ in-home caretakers. However, research indicates that this practice is prevalent in dual-career households.<sup>4</sup> In the winter of 2002, 3.5% of children under the age of one, and 6% of children between one- and two-years-old, were cared for in their homes by non-relatives. In total, 3.7% of children under the age of five fell into this category. Children of employed mothers spent an average of twenty-nine hours weekly with in-home non-relative caretakers.<sup>5</sup>

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1. Courts regularly use the gendered term “nanny,” which potentially romanticizes the reality of paid in-home caretaking by invoking a Mary Poppins-like figure—a skilled unmarried white woman who cheerfully functions as a surrogate mother. Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1, 18-21 (1999). To avoid similar connotations, this Article uses the terms “paid in-home caretaker,” “paid caretaker,” and “in-home caretaker” interchangeably, to refer to the same phenomenon: caretakers who regularly spend a substantial number of hours in the home of their employers performing child care labor. The analysis is not limited to live-in caretakers but refers to all caretakers who work full-time in the homes of the employers. It excludes other types of caretakers, like paid caretakers who provide random or infrequent care (“babysitters”); non-paid caretakers (such as relatives, friends, or neighbors); paid caretakers who provide care in their own home or in a day care center; and paid caretakers who provide care to adults. Following Martha Fineman, this Article uses the term “caretaker” rather than “caregiver,” which implies that nurture work should be given as a gift. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 9 (1995). This Article refers to paid in-home caretakers using female pronouns because the majority of paid in-home caretakers are women. See *infra* note 182.

2. Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women's Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809, 832 (2003).

3. Paid in-home caretakers fall under the Census's category of “non-relative care in the child's home.” Julia Overturf Johnson, *Who's Minding the Kids? Child Care Arrangements: Winter 2002*, in CURRENT POPULATION REPORTS 3 (U.S. Census Bureau, No. P70-101, 2005).

4. See, e.g., ROSANNA HERTZ, *MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL-CAREER MARRIAGES* 159 (1986) (finding that hiring an individual caretaker to take care of children in their home or in the caretaker's home “is the most common form of child-care used by dual-career couples”); JULIA WRIGLEY, *OTHER PEOPLE'S CHILDREN*, at ix n.1 (1995) (quoting research that found that almost a third of parents with advanced degrees hired in-home caretakers in 1991).

5. Johnson, *supra* note 3, at 7. It seems the report editors' assumption is that mothers are responsible for children's care, and the data refers to employed and unemployed *mothers* only.

In some of the instances in which child care arrangements come to judicial attention, as in divorce actions, in-home caretaking has become a factor in the custody decision. This Article explores a set of recent custody and visitation decisions that treat paid in-home caretakers as supplementing parents who are unable or unavailable to care for their children. In a small number of extraordinary cases, courts ordered parents to employ an in-home caretaker, whereas in other cases judges credited parents who had voluntarily done so. Despite their different circumstances, all of these cases offer a glimpse into how courts perceive paid in-home caretaking in relation to parenting. While none of these decisions has consciously addressed the role of paid in-home caretakers in the household, judges reveal their conceptions of in-home caretaking implicitly, both in what is taken for granted and in what is rejected without question. By analyzing these “nanny cases” together with cases in which judges analogize unpaid third parties who are denied a parental prerogative to paid in-home caretakers, this Article unravels the assumptions courts make about caretakers and parents, examines them from a broad legal and cultural perspective, and challenges their validity.

This Article argues that the legal category of “nanny” that emerges from these cases detaches primary caretaking from the caretaker. Courts treat paid caretakers as disposable by attributing their work in its entirety to the hiring parent and by insisting that paid caretakers play no parental role. This conceptualization is potentially detrimental to both parents and caretakers. Furthermore, it has the potential to undermine feminist attempts to promote policies that would allow women to combine motherhood with workforce participation. While recent recognition of parents’—usually mothers’—role as the supervisors of their children’s caretaking is a positive step,<sup>6</sup> the complete denial of the parental role of caretakers may negatively affect women in at least three circumstances: when they work as in-home caretakers; when they cannot afford in-home caretakers; and—under the prevalent “best interest of the child” standard—when their former husbands can afford in-home caretakers.

In order to make sense of the appeal of paid in-home caretaking, I situate the “nanny cases” in the broader context of the legal regime and cultural trends that regulate contemporary parenthood. Two processes intersect in determining how the legal system conceives of paid in-home caretaking. One is the ongoing debate about the parental exclusivity doctrine that, by and large, still governs legal parenthood in the United States. This doctrine ordains that children can only have one set of two parents at any given time, and that parents should

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6. For example, the ALI Principles of Family Dissolution from 2000 define “caretaking functions” as, *inter alia*, “tasks . . . that direct, arrange, and supervise the interaction and care provided by others.” AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(5), at 108 (2000). For the claim that mothers are usually the managers of their children’s rearing, see Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 661 (1992).

prevail over non-parents with regards to rights, privileges, and duties.<sup>7</sup> The other process is a shift in the dominant ideology of parenthood from a focus on the mother-child relationship to an emphasis on child-centered, development-focused childrearing methods.<sup>8</sup> Together these processes construct a particular model of what is good for children when they are not in the direct care of parents: a parent-like figure that focuses closely on children's development without posing a threat to parental authority and autonomy.

The combination of legal and cultural regulations of parenting with the notion that the care provided by in-home caretakers can be attributed to the parents makes paid in-home caretaking seem like a highly desirable child care arrangement. Conceived as primary care detached from a caretaker, in-home caretaking becomes compatible with parental exclusivity because it is the least intrusive to parental autonomy. By hiring in-home caretakers, parents are able to retain control over the upbringing of their children and are less likely to expose themselves to controversies over third party access to their children. This creates a paradox because the conceptualization that makes paid in-home caretaking such an attractive child care solution may also account for a subset of intrusive cases in which courts have ordered divorcing parents to employ an in-home caretaker. Detaching care from the caretaker also turns paid in-home caretaking into an ideal solution under the prevalent middle-class ideology of parenting, which emphasizes children's intellectual development and requires constant attention, highly structured schedules, and strict parental control over content.<sup>9</sup>

This Article challenges the assumptions that courts make about paid in-home caretaking, particularly the distinction between the care and the person providing it, and highlights the costs of these assumptions for parents and caretakers. The Article begins by presenting the "nanny cases": custody and visitation decisions in which courts credited parents for employing paid caretakers or required them to do so. Part II examines these cases in the context of the parental exclusivity doctrine and compares paid in-home caretaking to other child care arrangements, like day care and kin care, in order to further illuminate the unique conceptualization of in-home caretaking and reveal its implications for the many who cannot afford this child care solution. Part III moves from law to its cultural setting and analyzes the legal conceptualization of paid caretakers in light of the cultural regulation of parenting. It draws on the accumulated sociological data about paid in-home caretaking to assess the idea

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7. The term "exclusive parenthood" was coined by Katharine T. Bartlett. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879 (1984). For a detailed discussion of this doctrine, see *infra* Section II.A.

8. See *infra* Section III.A.

9. Joan C. Tronto, *The "Nanny" Question in Feminism*, 17 HYPATIA 34, 43 (2002). For a detailed discussion of this child-rearing ideology, see *infra* Section III.A.

that in-home caretakers may replace unavailable or inadequate parents, so that children receive the intense attention they are now thought to require.

The goal of this Article is not to offer a new set of rules for deciding custody cases. Nor is it to pass moral judgment on the employment of caretakers to care for children in one's home, or to suggest that all parents and courts treat caretakers in the same manner. Rather, this Article invites readers to rethink conventional understandings of parenting and caretaking, and to fully acknowledge the price that the current legal approach exacts—and who pays it.

## I. THE "NANNY CASES"

This Part introduces two types of cases in which in-home caretaking has been instrumental in custody and visitation decisions. First, it explores custody decisions where the employment of in-home caretakers was *credited* to one parent in awarding custody. In particular, it investigates how courts conceptualize in-home caretaking as care by the parents rather than work by third parties. Second, it analyzes custody and visitation decisions that *required* parents to employ in-home caretakers. It examines the circumstances that provoked judges to propose this unusual arrangement and teases out the assumptions that these judges made about in-home paid caretaking.

### A. *Rewarding Parents for Employing In-Home Caretakers*

The following custody cases reward a parent who has voluntarily employed an in-home caretaker. In these cases, a parent who had been otherwise disadvantaged—for showing poor judgment in the past, for doing little to care for the children before the divorce, or for being unavailable due to job requirements—was granted custody. The custody award was influenced, to differing degrees, by the employment of a paid caretaker. A key feature of these cases is the implicit assumption that the care that paid caretakers provide to children can be attributed to the hiring parents.

A New York case, *Forzano v. Scuderi*,<sup>10</sup> involved a typical scenario in which parents relied on in-home care due to their extensive work obligations. Both the attorney father and the radiologist mother worked full-time, and their child was cared for at home by a paid caretaker. The court found that both parents were loving and capable and that during their marriage they shared in child care duties. Yet the court also found that, by hiring, training, and supervising a paid caretaker, the mother performed the primary caretaking and accordingly she was rewarded with sole custody. Moreover, “[a]warding custody to the mother also allowed the child to continue being cared for by the

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10. 637 N.Y.S.2d 767 (App. Div. 1996).

same nanny he had known most of his life," which the judge considered to be in the best interest of the child.<sup>11</sup>

This case is a remarkable example both of the prominent role a paid caretaker may play in a child's life and of the attribution of the paid caretaker's care to the parent.<sup>12</sup> Since the "primary caretaker" standard presupposes that performing the bulk of caretaking tasks creates a bond with the child, and therefore merits awarding custody to the caretaker, identifying who performed the primary caretaking becomes pivotal. The court's decision to consider the mother the "primary caretaker" because of the paid caretaker's work and her resulting bond with the child erased the caretaker and her parental function in this family.

I agree that supervision of a child's caretaker is a parental role. However, since the *Forzano* court found that the parents had shared other aspects of direct care, supervision alone determined custody. In part, this imbalance attests to the disadvantages generated by the all-or-nothing approach of the "primary caretaker" standard.<sup>13</sup> Yet, more is at play here. The court detached the caretaker from the care she provided and credited that care to the mother who supervised her. There is a difference, or rather, there *can* be a difference, between considering supervision a parental role, and treating supervision as absorbing the supervised care to the point where we would say that the supervisor performed the care. The blurring of this distinction, I argue, is unique to this type of child care and is one of the reasons why it is an attractive child care solution to both courts and parents. This ideological preference, however, comes with a cost. I demonstrate below that the attribution of in-home caretakers' labor to parents is likely to harm both paid caretakers and parents who cannot afford in-home caretakers. Moreover, as the following cases demonstrate, under the prevalent "best interest of the child" standard this attribution of care might lead courts to overestimate parental—especially paternal—contributions to child care.

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11. *Id.* at 769. See also *Riaz v. Riaz*, 789 S.W.2d 224 (Mo. Ct. App. 1990) (awarding a neurologist mother primary custody of her two children because the court found, *inter alia*, that the mother was the primary caretaker). The *Riaz* finding was based in part on the fact that the mother hired a resident caretaker who provided the children with the actual care. Anna Maria Maxwell recounts a similar case from South Carolina, where a father was found to be the primary caretaker even though the transcript revealed that the nanny/housekeeper "performed the largest portion of the caretaking responsibilities." Anna Maria Maxwell, *Court Extends Primary Caretaker Doctrine to Cases in Which Neither Parent Takes Clear Responsibility for the Parental Duties*, 48 S.C. L. REV. 113, 115 (1996).

12. In one adoption case, the prospective mother offered the mutual love between the child and the in-home paid caretaker as a factor in favor of granting her petition for adoption. *In re Adoption of M.J.S.*, 44 S.W.3d 41, 56 (Tenn. Ct. App. 2000).

13. The case was decided under the "best interest of the child" standard but the court employed the primary caretaker analysis under the assumption that it is in the best interest of the child to be cared for by the primary caretaker. It is possible that the approximation standard proposed by Elizabeth Scott and adopted by the ALI Principles would have yielded a more nuanced result in this case, although the court was hesitant to adopt a solution that would require the parents' cooperation due to their acrimonious relationship. For the approximation standard, see Scott, *supra* note 6, at 630-43.

*In re Marriage of Austin*,<sup>14</sup> a recent decision from Oregon awarding custody to a father, provides a stark example of the costs to mothers of detaching care from the caretaker and attributing it to the paying parent. After reviewing the parties' relative benefits and disadvantages, the court awarded custody of the children, including the mother's child from a previous relationship, to the father. The court relied heavily on the testimony of neighbors who "were concerned for the safety of the children in [their] mother's care" because of the miserable condition of the children and the shared residence during the couple's marriage.<sup>15</sup> The witnesses testified that the children were not properly clothed, played outside unattended, and that "the parties' home was dirty and food, dirty diapers, and curdled milk were often left on the floor."<sup>16</sup> The court emphasized that, after the parents had separated and the mother moved out, "[the] father, with the help of a nanny, maintained the home in an organized, safe, and clean condition."<sup>17</sup> This case seems to be a clear example of implicit gender bias: The court did not fault the father for the state of the children or the house during the marriage, but instead blamed it entirely on the mother.<sup>18</sup> For the purpose of this Article it is important to note that, although the father did not change his behavior at all, the work of the paid caretaker as homemaker and child care provider made him preferable as a custodian.<sup>19</sup>

Another case further illustrates this point. In *Shofner v. Shofner*,<sup>20</sup> the Tennessee Court of Appeals approved a grant of custody to a father who employed a caretaker even though he physically disciplined his children. The children suffered severe behavioral problems, the most troublesome of which was the eldest son's regular abuse of his sister—hitting her, pushing her down

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14. *In re Marriage of Austin*, 62 P.3d 413 (Or. Ct. App. 2003).

15. *Id.* at 414.

16. *Id.*

17. *Id.*

18. This type of gender bias is not uncommon in custody decisions. See generally Susan Beth Jacobs, *The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845 (1997) (reporting and analyzing an empirical study that found gender bias in the judicial application of the "best interest of the child" standard and its criteria); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982) (arguing that mothers are regularly disadvantaged in custody decisions due to the judicial double standard that penalizes mothers but not fathers for employment and considers favorably paternal but not maternal remarriage).

19. See also *Weickert v. Weickert*, 602 S.E.2d 337, 338 (Ga. Ct. App. 2004) (considering the father's use of "the services of a nanny to cook dinner, bathe the children, clean the home, and help with homework" as an indication of his capacity to be a good single parent); *Maxfield v. Maxfield*, 452 N.W.2d 219, 231-32 (Minn. 1990) (weighing more heavily a father's *plan* to employ a live-in caretaker "to assist him with meal preparation, housekeeping and homemaking" than to the help the father's mother was already routinely providing); *Knopp v. Knopp*, No. 14-02-00285-CV, 2003 WL 21025527, at \*8 (Tex. App. May 8, 2003) (approving appointment of the father as sole managing conservator after he testified that he worked twelve to fourteen hours a day but *promised* to hire an in-home caretaker, while the mother, who had more time available to spend parenting, had only YMCA daycare as assistance).

20. 181 S.W.3d 703 (Tenn. Ct. App. 2004).

the stairs, even breaking her arm.<sup>21</sup> The court traced the roots of this behavior to both parents' conduct. The father, Dr. Shofner, relied on physical punishment and had a gambling addiction.<sup>22</sup> The mother, Dr. Kalisz, was incapable of sustaining basic social relations, and she repeatedly removed the children from schools, activities, and their extended family.<sup>23</sup> The court found that the children were "trained to be dysfunctional."<sup>24</sup> The court speculated that only the parents' wealth and high social status had shielded them from intervention by the Department of Children's Services.<sup>25</sup> In the hearings, "Dr. Shofner conceded that he had previously relied too heavily on physical punishment and that he had been unable to care for the children on his own."<sup>26</sup> Nonetheless, he was awarded custody of his two children because he hired an in-home caretaker and took a parenting class.<sup>27</sup> The court explained that, by "actively seeking outside assistance to improve his parenting skills and to assist him with his parenting responsibilities," Dr. Shofner had "demonstrated a genuine desire to be a better parent."<sup>28</sup> For the court, these were two efforts in the same vein. In effect, the paid caretaking reflected on Dr. Shofner in the same way that learning new parenting skills did. The *Shofner* court did not ask for, nor did it receive, any information about the paid caretaker. While dwelling on the parents' relative disadvantages, the court mentioned neither the name, nor the qualifications, of the caretaker who would care for the children while Dr. Shofner practiced his new parenting skills. Like *Forzano* and *Austin*, the *Shofner* court made the assumption that the care provided by an in-home caretaker reflected positively on the parent. The court perceived parental supervision, and even the mere fact of employment, as consuming the caretaker's labor of care. Understanding care irrespective of the person providing it worked in these cases to the advantage of parents who bought the care. However, as the next subset of cases demonstrates, it sometimes proves a double-edged sword.

### *B. Ordering Parents To Employ In-Home Caretakers*

The judge presiding over the Littlefields' custody dispute was in a difficult predicament. The court-appointed psychologist found "both parents to be immature [and self-centered] and neither was well suited to take on the

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21. *Id.* at 707.

22. *Id.*

23. *Id.*

24. *Id.* at 708.

25. *Id.* at 707.

26. *Id.*

27. *Id.* at 717.

28. *Id.* The court contrasted this effort with Dr. Kalisz's refusal to recognize her shortcomings as a parent. The place that judges give to participation in parenting classes in their evaluations of parental capability is beyond the scope of this Article.

responsibility for raising a youngster . . . .”<sup>29</sup> Trusting neither parent, the judge ordered the parents, as part of the parenting plan, to “mutually select a nanny from a reputable firm, who will be employed for at least two years from the date of entry of [the] parenting plan. The nanny shall travel and remain with [the child in] each parent’s household.”<sup>30</sup> Unlike most custody decisions, the focus of the decision was not on the attainment of cooperation between the parents.<sup>31</sup> Rather, the judge ordered the parents to “cooperate with the nanny in arriving at decisions regarding [the child’s] well-being.”<sup>32</sup>

This order reveals a number of striking assumptions: that the paid caretaker can mitigate parental deficiencies; that, in an erratic residential schedule, constant care by a paid caretaker can be the means to achieve stability in a child’s life;<sup>33</sup> and that, in the course of their work, paid caretakers make, rather than merely execute, decisions. These assumptions are rather puzzling. The future of the Littlefield infant was entrusted to an unknown person, who had never been examined by the court; the only assurance of her competency was that she came from a “reputable firm.”<sup>34</sup> Furthermore, this anonymous caretaker was somehow supposed to provide the child with the care the parents could not give, despite being hired and supervised by those very same inadequate parents. This concern may be the reason for the changes the order introduced to ordinary employment conditions. First, the order did not leave it to the parents to determine when the caretaker was to accompany the child. Second, although paid in-home caretakers are generally employed “at-will”—they can be fired for any reason or no reason at all in the absence of a public policy, contract, or law suggesting otherwise<sup>35</sup>—the judge’s order sets the term of employment at two years.

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29. *In re Marriage of Littlefield*, 940 P.2d 1362, 1365 (Wash. 1997) (en banc).

30. *Id.* at 1365 n.2. Since neither parent was found suitable to take care of the child, the parenting plan “almost evenly split the child’s residential time between the [two] parents each week.” *Id.*

31. For the significance of parental cooperation as a factor in custody decisions in different jurisdictions, see AM. LAW INST., *supra* note 6, § 2.08 cmt. j, at 232.

32. *Littlefield*, 940 P.2d at 1365 n.2. The influential, negative factors in post-divorce child adjustment include lack of cooperation between divorcing parents; diminished parent-child contact; disruptive life changes; and loss of economic and psychological resources. In an attempt to minimize these problems, some states have designed divorce education programs and custody mediations aimed at reducing parental hostility and encouraging continued parental involvement in children’s lives. See generally Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL’Y & L. 129 (2002) (describing and analyzing the impact of numerous interventions developed to reduce the negative effect of divorce on families).

33. Hence the court ordered the parents to employ the *same* paid caretaker for two years. See *Littlefield*, 940 P.2d at 1365 n.2.

34. *Id.* The correlation between a reputable agency and qualified caretakers is not as self-evident as the court assumes. An agency’s reputation relies on its catering to parental preferences. Some parents prefer submissive and cheap caretakers, which is unlikely to be the caretaking the *Littlefield* court had in mind. See *infra* Section III.B.

35. See generally Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994) (discussing the development and adoption of the employment at-will rule in the United States).

The notion of a decision-making, not-to-be-fired, always-with-the-child paid caretaker is a stark departure from the constitutional doctrine that grants fit parents a liberty interest in the nurture, custody, and control of their children.<sup>36</sup> At first impression it looks as if the *Littlefield* court, concerned with parental inadequacy, used the custody litigation to impose a privatized version of a child protection order on the parents, bypassing the legal finding of unfitness. However, the court did not institute any mechanism for the caretaker to raise concerns or report parental misconduct to the court.<sup>37</sup> Rather than treating the in-home caretaker as policing the parents, the court saw the caretaker as a substitute—an assurance that the child would receive sufficient care. The caretaker was seen as supplementing the parents by providing stability and by making decisions with the child's best interest in mind. Despite this huge responsibility, the court showed no interest in the identity of the particular caretaker—the assumption is that the Littlefields can buy their child parental care, detached from a parent.

When courts order parents to avail themselves of paid caretaking, what do they assume these caretakers can do? This question merits further exploration because, in comparison with the conventional legal perception of paid in-home caretaking, these cases offer an extraordinary—perhaps more honest—account of the role caretakers come to play in children's lives. In the next Part, I demonstrate that, when courts and legal scholars consciously explore the role of paid caretakers, they assume that there is an innate difference between a parent and a caretaker.<sup>38</sup> While I suspect no judge ordering the employment of caretakers would oppose this distinction between parents and caretakers in theory, their orders in practice appear to challenge this distinction by treating in-home caretakers as substitute parents.

One example of courts entrusting paid caretakers with parental responsibilities can be seen in court orders that precondition parental visitation with children on the presence of caretakers. Even against the backdrop of increased reliance on supervised visitation providers in custody adjudications,<sup>39</sup> these decisions are unusual. Whereas supervised visitation is defined as “contact between children and their parents or relatives with whom they do not live that occurs in the presence of an observer with the intent of keeping the contact safe,”<sup>40</sup> the decisions ordering parents to employ caretakers actually

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36. Note that the court did not rule the parents unfit. For parents' constitutional interest in the raising and education of their children, see *infra* notes 65-66 and accompanying text.

37. In contrast, see *Taff v. Bettcher*, No. FA 92-0059231, 1994 WL 411119, at \*1 (Conn. Super. Ct. July 29, 1994), discussed *infra* notes 45-54 and within the accompanying text.

38. See *infra* Section II.B.

39. Nat Stern & Karen Oehme, *Defending Neutrality in Supervised Visitation To Preserve a Crucial Family Court Service*, 35 SW. U. L. REV. 37, 37-39 (2005).

40. *Witness to Domestic Violence: Protecting Our Kids: Hearing Before the Subcomm. on Children, Families, Drugs, and Alcoholism of the S. Comm. on Labor and Human Res.*, 103d Cong. 111-17 (1994) (statement of Robert B. Straus, President, Supervised Visitation Network).

required the caretakers to substitute for the parents, not just to supervise them. For example, a court ordered a non-custodial father, who wanted to take his twin boys on a three-day trip, to take the children's paid caretaker as a precondition to approving the trip.<sup>41</sup> The court cited "[t]he medical history of the boys, their need for constant attention and supervision, and some questionable behavior of the [father]"<sup>42</sup> as the grounds for the order. The court was very specific and ordered that the caretaker must be with the children "at all times, including but not limited to staying with them, in the same location, on the overnights."<sup>43</sup> Like the *Littlefield* decision, this ruling used a caretaker not to insure that parents provide proper care, but to provide the care herself.<sup>44</sup>

*Taff v. Bettcher*, a 1994 Connecticut case, went one step further.<sup>45</sup> The *Taff* decision not only forbade the mother from spending time with her child during visitation without the presence of a paid caretaker, but also put the child's attorney in charge of the caretaker, bypassing the parents altogether.<sup>46</sup> In denying the mother's petition for custody over her three-year-old son, the court made it abundantly clear that it considered the mother's parenting skills severely impaired.<sup>47</sup> The mother, Ms. Bettcher, was described as self-centered, suffering from intellectual problems, immature, and unaware of her destructive negativity.<sup>48</sup> The judge went out of his way to enumerate every one of the mother's misdeeds, both grave and minor.<sup>49</sup> In a remarkably stringent comment, the court invited the child to study the records of the proceedings with his future therapist "to discover the probable source of many of his adulthood emotional problems."<sup>50</sup>

Despite this indictment, the court awarded Ms. Bettcher some visitation rights. Her son was to visit her at her residence on Wednesdays from nine to five and on alternate weekends. However, the court conditioned these visits on

41. *Magdalin v. Magdalin*, No. FA99 0172340S, 2000 WL 350309, at \*1-\*2 (Conn. Super. Ct. Mar. 21, 2000).

42. *Id.* at \*1.

43. *Id.* at \*2.

44. See also *Butler v. Butler*, 859 A.2d 26 (Conn. 2004). There, a trial court ordered a custodial father, who was accused by his former wife of sexually abusing the children, to employ an in-home caretaker even though it found the allegations to be baseless. The order read, "A nanny is to be present at all times the children are with [the father]. The nanny shall be responsible for all grooming and hygiene of the minor children." *Id.* at 31 (internal citation omitted). The appellate court interpreted the order as shielding the father from further accusation; however, in practice, the order prohibited the father from performing key parental tasks and entrusted them to a paid caretaker. *Id.* at 37-38.

45. No. FA 92-0059231, 1994 WL 411119, at \*1 (Conn. Super Ct. July 29, 1994).

46. *Id.* at \*3.

47. *Id.* at \*1.

48. *Id.* at \*2-\*3.

49. These misdeeds include "[u]sing foul and profane language"; "[d]isrupting [her son's] toilet training"; "not returning numerous calls from [her son's] father"; "[t]elling [her son] about court proceedings in direct violation of court orders"; exhibiting rage regularly and having a history of drug use; failing to give her son his medications; and leaving the "father's driveway at an excessive rate of speed." *Id.* at \*2.

50. *Id.* at \*3.

the compulsory accompaniment of a paid caretaker and firmly prohibited Ms. Bettcher from spending time with her son without the caretaker present.<sup>51</sup> Furthermore, the judge ordered the father to bypass the mother by providing the child's medication and instructions for their administration directly to the paid caretaker.<sup>52</sup> The child's attorney was charged with hiring the caretaker and apprising the caretaker of the child's "situation and needs."<sup>53</sup> Unlike the previous examples, by linking the caretaker with the child's attorney, the court equipped her relatively well to supervise the mother. However, it is clear that supervision was not enough. While with the mother, the child's needs were the caretaker's responsibility; she was to substitute for the inadequate mother.<sup>54</sup>

The cases ordering parents to employ in-home caretakers assume two things: first, that a paid caretaker may substitute for a dysfunctional parent, and second, that the identity of the caretaker is irrelevant and that any in-home caretaker may provide any parental functions for any period of time. Detaching care from the caretaker—that is, treating in-home caretakers' work as independent of the person providing it and attributable to the hiring parents—led in these extreme cases to the legal subjection of parents' relationships with their children to the discretion and supervision of in-home caretakers. These caretakers were not scrutinized by the court, nor was there any discussion of the resulting caretaker-child relationship and its implications for the children involved. The cases treated in-home caretaking as a band-aid, applicable when needed and then discarded.

### C. Conclusion

Case law dealing specifically with in-home caretakers is rare because courts usually assume rather than analyze the function and benefit of this child care solution. The few available cases are valuable for the rare glimpse they offer into a broader phenomenon. The "nanny cases" demonstrate the pivotal role an in-home caretaker may play in a child's life, as a complementary—and in extreme cases substitute—parent. At the same time they eliminate this quasi-parental figure from the legal depiction of family function by attributing the care caretakers provide to the parent who hired them.

It is tempting to explain these custody and visitation cases from the narrow doctrinal perspective of custody law—that is, to either say that children need adult care and courts are trying to provide it by all means available or that

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51. *Id.*

52. *Id.* at \*4.

53. *Id.* at \*3.

54. Compare *Taff with Wissner v. Wissner*, No. FA 040491308S, 2005 WL 704304, at \*1, \*7 (Conn. Super. Ct. Feb. 10, 2005), a case where the court conditioned a mother's visitation on the presence of a court-appointed family member whose job was to supervise the mother "at all times," not to care for the child.

custody judges' task is to choose between parents and so they should consider caretaking arrangements only as they reflect on the parents themselves. In the following Parts, I argue that there is more at play. The "nanny cases" provide an opportunity to ask what necessitates detaching the care from the caretaker and what underlying assumptions inform the process of allocating custodial responsibility. Conceptualizing in-home caretaking as care without a caretaker rests on a set of assumptions about parents and parental functions, none of which can be sufficiently explained by children's need for stable care. In fact, a closer look at these assumptions reveals flawed logic and unjust consequences.

## II. EXCLUSIVE FAMILY AND CHILD CARE

The legal consequences of performing caretaking tasks are the subject of heated debate. Some courts and legislatures have tried to change legal definitions to better reflect contemporary family life and caretaking arrangements. The American Law Institute's *Principles of the Law of Family Dissolution* [hereinafter ALI Principles] from 2000 is a key contributor to this trend. Among other things, the ALI Principles define "parent" for the purpose of custody and "decisionmaking responsibility" as including "parents by estoppel," thus treating as parents adults who function as parents in specific circumstances.<sup>55</sup> Other legal texts do not challenge the traditional definition of "parent," but instead try to strike a new balance between parents and non-parents, for example by awarding visitation rights to non-parents.<sup>56</sup> These developments have been widely challenged,<sup>57</sup> and even where the definition of "parent" has been expanded to include non-biological or adoptive parents, it is still the law that at any given time a child can have only two legal parents.<sup>58</sup>

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55. AM. LAW INST., *supra* note 6, § 2.03(1). The ALI Principles list four types of individuals who may be parents by estoppel: individuals imposed with child support obligations; a man who lived with a child for at least two years and had a reason to believe that he is the child's biological father; an individual who lived with a child since birth under a co-parenting agreement with the legal parent or parents; and finally an individual who lived with the child for over two years following an agreement with the child's parent. *Id.* § 2.03(1)(b). Note that the ALI Principles uses the term "*de facto* parent" to denote a person who functioned as a child's "primary parent" for not less than two years, but does not meet the heightened requirements of the "parent by estoppel" standard. *Id.* § 2.03(1)(c). Under the Principles, such *de facto* parents should be allocated a share in custodial responsibility but they do not enjoy the presumptions that legal parents and parents by estoppel enjoy. *Id.* at 13.

56. According to the Supreme Court, at the time of its decision in *Troxel v. Granville*, every state provided grandparents (and sometimes great-grandparents) with some form of visitation rights. *Troxel v. Granville*, 530 U.S. 57, 73 n.1 (2000) (holding unconstitutional a Washington statute providing that a court may award visitation to any person at any time when visitation is in the best interest of the children). However, some states have subsequently restricted those rights in reaction to *Troxel*. *See, e.g.*, 2006 Cal. Legis. Serv. 1502 (West) (amending CAL. FAM. CODE. § 3104 (West 1994)); *G.P. v. A.A.K.*, 841 So.2d 1252, 1254 (Ala. Civ. App. 2002) (recognizing ALA. CODE § 30-3-4.1 (1989) as unconstitutional in certain circumstances); *In re Adoption of C.A.*, 137 P.3d 318, 319 (Colo. 2006) (limiting on constitutional grounds COLO. REV. STAT. § 19-1-117 (1999)); *Wickham v. Byrne*, 769 N.E.2d 1 (Ill. 2002) (holding 750 ILL. COMP. STAT. 5/607(b)(1), (3) (2000) unconstitutional).

57. *See infra* Section II.A.

58. *See infra* notes 59-62 and accompanying text.

In this Part, I argue that the conceptualization of paid in-home caretaking as care by parents should be understood in the context of this debate. Detaching care from caretakers helps bridge the growing gap between the two-parent model of family life and the reality of many American families by maintaining the *appearance* that caretaking is performed solely by parents. To develop this argument, I describe the legal debate over access to children and the parental exclusivity doctrine and analyze the conceptualization of in-home caretaking in light of this legal regulation. I then contrast the legal treatment of in-home caretaking with that of other child care arrangements. My aim in making this comparison is to expose the substantial practical implications that result from the assumptions that judges make about different types of caretaking, which, I argue, can cause unjust discrimination against parents who cannot afford in-home caretaking.

### A. Exclusive Family Doctrine

Faced with reproductive technology, changing gender roles, and increasing diversity in the family unit, courts and policy makers in the United States have remained faithful to the dominant doctrine of parental exclusivity. This doctrine “recognizes only one set of parents for a child at any one time”<sup>59</sup> and vests in these parents exclusive rights that non-parents cannot acquire.<sup>60</sup> Regardless of the number of actual caretakers a child may have, for legal purposes the prevalent rule is that only two people—usually one man and one woman—can be designated as the child’s legal parents.<sup>61</sup> The possibility that a child might have more than two parents has been rejected repeatedly by courts, including the Supreme Court.<sup>62</sup>

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59. Bartlett, *supra* note 7, at 879.

60. *Id.* at 883.

61. Thus the California Supreme Court, in finding a woman obligated to pay child support to her former lesbian partner for children born during the partnership, emphasized that its ruling should be construed as to allow only that the two parents of a child can be of the same sex. *Elisa B. v. Super. Ct.*, 117 P.3d 660, 666 (Cal. 2005). The Court repeated its former rejection of a woman’s motherhood claim in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), as a ruling that a child cannot have three parents. *Id.* See also *Sinicropi v. Mazurek*, 729 N.W.2d 256 (Mich. Ct. App. 2006) (ruling that a child cannot have, simultaneously, two legally recognized fathers under the Paternity Act, MICH. COMP. LAWS §§ 722.711-730 (2006), and the Acknowledgement of Parenthood Act, MICH. COMP. LAWS §§ 722.1001-1013 (2006)).

62. In the words of Justice Scalia, “multiple fatherhood has no support in the history and traditions of this country.” *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989). A similar approach was manifested in *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (subordinating non-parental visitation rights to parental discretion). Even in the case of open adoption, the parental rights of biological parents are terminated and any rights they might have are contractual. Amy L. Doherty, *A Look at Open Adoption*, 11 J. CONTEMP. LEGAL ISSUES 591, 592 (2000). For a discussion of the systematic preference of the nuclear family in American constitutional law, see generally Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527 (2001), which surveys landmark cases promoting both family privacy policy and personal autonomy and locates in both a concern for the preservation of the traditional nuclear family.

Parental exclusivity is strongly linked to the notion that caretaking is a matter for the nuclear family.<sup>63</sup> It assumes that childrearing is performed mainly by two heterosexual biological or adoptive parents.<sup>64</sup> Parents are legally obligated to provide their children with care and nurturing and in return they are rewarded with a constitutionally protected liberty interest in control over their children.<sup>65</sup> The Supreme Court described this tradeoff over seventy-five years ago in referring to parents' right to educate their children: "Those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>66</sup>

While the doctrine of parental exclusivity has always been informed by a class- and race-biased conception of family structure,<sup>67</sup> recent social trends have placed this conception of the family at odds with the experience of an ever-growing number of families. Technological advancements in childbearing have brought surrogate mothers and sperm and egg donors to court seeking parental rights. The high rate of divorce, the rise in the number of cohabitating unmarried parents, and the increase in single-parent households has brought petitions for legal parental status from stepparents and unwed fathers.<sup>68</sup> Growing social recognition of the role grandparents and gay partners play in children's lives has come with a demand for access and sometimes also

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63. Martha Fineman has forcefully criticized the allocation of the responsibility for dependents to the nuclear family. She argues instead for collective responsibility for caretaking based on dependency's inevitability and universality because 'all people were dependent as children and many will become dependents again due to sickness or old age. Fineman emphasizes the unjust consequences current policy entails for women, especially poor women. See Martha L.A. Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (1999); Martha L.A. Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89 (1998); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995). In addition, other scholars have argued that the nuclear family's viability as the primary locus of caretaking relied heavily on economic and political support systems that are unavailable today. The prototypical nuclear family, "the 1950s suburban family[,] . . . was far more dependent on government handouts than any so-called 'underclass' in recent U.S. history." STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 76 (2000).

64. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459, 468-69 (1990).

65. Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1078-79 (2003) (arguing that the "legal deference" to parental autonomy in the context of the intact family serves as compensation for parenting and its obligations and that parental autonomy promotes children's welfare by encouraging parental investment in the parent-child relationship).

66. *Pierce v. Soc. of Sisters*, 268 U.S. 510, 535 (1925) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)). For a critical account of the historical roots of this doctrine, see Barbara Bennett Woodhouse, *Who Owns the Child? Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

67. See Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 543 (1984) (highlighting the longstanding tradition among some minority groups in the United States of shared child caretaking within extended kin networks).

68. According to Matthew Kavanagh, "demographers estimate that less than 50 percent of American children will spend their entire childhood in a two-parent, married couple biological family." Matthew Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 114 (2004).

decision-making authority. In short, the doctrine of parental exclusivity has been subject to a constant, and at times successful, challenge to its basic premises about who can be a parent and what parenting consists of. The challengers claim that, by performing the daily tasks of caretaking over a period of time, they have established a relationship with the child that should, at least to a certain extent, be legally protected. These claims have been successful to varying degrees depending on the state, the nature of the past and present relations between the claimant and the parent, and the claimant's relationship with the child.<sup>69</sup>

Custody cases, where judges assess parents' caretaking arrangements and abilities, offer another, more subtle, challenge to the doctrine of parental exclusivity. Many custody decisions reveal family life practices that vary considerably from the ideal nuclear family on which parental exclusivity doctrine is based.<sup>70</sup> Acting within a legal regime that assigns the responsibility of caretaking to the nuclear family, judges struggle with parents' personal deficiencies, available resources, and work obligations when devising caretaking arrangements that are in the best interest of children.

The diversity in family structures and the growing social acceptability of formerly discouraged or prohibited types of family units have changed legal conceptions of who can be recognized as a legal parent. However, despite the extension of parental rights to other adults—as qualified as those rights may be in substance—the rights holders are always limited in number: No more than two parents are recognized.<sup>71</sup>

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69. See, e.g., *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. Ct. App. 2002) (recognizing grandparents' claim of de facto parenthood). *But see* *Jensen v. Bevard*, 168 P.3d 1209 (Or. Ct. App. 2007) (revoking grandmother's sole custody because she did not establish a parent-child relationship with the child). The results of gay partners' claims are similarly mixed. See *Janice M. v. Margaret K.*, 910 A.2d 1145 (Md. Ct. Spec. App. 2006) (finding a woman to be the de facto parent of a child adopted by her former partner and raised by the couple as co-parents and granting her visitation rights but not custody); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (granting a former lesbian partner's petition for visitation); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (finding that a former lesbian partner established standing as a de facto parent and could bring a petition for a co-parentage determination). *But see* *Alison D. v. Virginia M.* 572 N.E.2d 27 (N.Y. 1991) (holding that the former lesbian partner of the biological mother had no standing to seek visitation rights with the child she helped support and raise); *Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997) (denying a woman's petition to be considered a de facto parent of her former partner's adopted child, even though, until the parties' separation, the petitioner cared for the child sixty-five percent of the time).

70. According to *Troxel*, the variation in family and household composition is so wide that it is difficult to speak of "an average American family." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). Historians have convincingly argued that the emphasis on the nuclear family is a relatively recent phenomenon. See COONTZ, *supra* note 63. In *Michaud v. Wawruck*, 551 A.2d 738 (Conn. 1988), in determining that a visitation agreement between the genetic mother and the adoptive parents did not violate public policy, the court acknowledged that "various configurations of parents, stepparents, adoptive parents and grandparents" have replaced the narrow model of the nuclear family. *Id.* at 742.

71. David D. Meyer, *Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 133-34 (2006) (asserting that even courts who permit non-parents to seek custody or visitation based on caretaking fall short of awarding such caretakers the status of legal parents). In contrast, the ALI Principles suggest that in certain

*B. Paid In-Home Caretakers and the Exclusive Family*

In the context of the parental exclusivity doctrine's restriction on the number of people who can acquire legal parental status, paid in-home caretaking is advantageous for more than its supposed benefit to children's development.<sup>72</sup> Paradoxically, reliance on non-relative paid care in situations of family disruption allows courts to reinforce the model of an exclusive nuclear family of mother, father, and children, and to protect it from what is perceived as external intrusion. Courts that continue to adopt the approach taken by the "nanny cases" will, in effect, encourage and applaud parental reliance on paid caretakers, who lose, as we shall see below, any legal claim that might infringe on parental autonomy the minute the first dollar changes hands.

This approach ignores the fact that some paid caretakers are intimately familiar with their charges' needs and have become stable parent-like figures, and that some caretakers develop strong attachments to the children in their care.<sup>73</sup> Moreover, in-home caretakers are, at least partially, paid to develop such attachments.<sup>74</sup> Where non-paid caretakers, like grandparents, might look for legal recourse to sustain such attachments,<sup>75</sup> paid caretakers are excluded from challenging parental authority and control over their children and therefore pose no threat. Paid in-home caretaking therefore allows parents in dual-career households to have their cake and eat it, too—to have one adult parental figure providing child-focused care over time in accordance with the current ideology of childrearing, without the risk of compromising the parents' control over the child.<sup>76</sup> It also allows the legal system to avoid acknowledging the discrepancies in its proclaimed exclusive family doctrine.

The distinction between parents and paid in-home caretakers goes beyond the fact of payment. Courts, parents, and scholars seem to share a belief that paid caretakers are inherently different from parents. On the rare occasions that courts consciously characterize paid caretakers' performance, they are quick to

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circumstances an adult ought to be recognized as a parent by estoppel even when a child has two legal parents. AM. LAW INST., *supra* note 6, § 2.03(1)(b)(iii)-(iv).

72. See *infra* Section III.B.

73. PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE 39, 42-43, 123, 152 (2001); Arlie Russell Hochschild, *Love and Gold*, in GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 15, 24 (Barbara Ehrenreich & Arlie Russel Hochschild eds., 2002); Patricia Baquedano-López, *A Stop at the End of the Bus Line: Nannies, Children, and the Language of Care* 14 (Berkeley Ctr. for Working Families, Working Paper No. 51, 2002).

74. MARY ROMERO, MAID IN THE U.S.A.: 10TH ANNIVERSARY EDITION 137 (2002); Susan Cheever, *The Nanny Dilemma*, in GLOBAL WOMAN, *supra* note 73, at 31, 35; Hochschild, *supra* note 73, at 23; Pierrette Hondagneu-Sotelo, *Blowups and Other Unhappy Endings*, in GLOBAL WOMAN, *supra* note 73, at 55, 68; Romero, *supra* note 2, at 835.

75. See *infra* notes 127-135 and accompanying text.

76. This appearance of parental care where direct care is performed by paid caretakers is facilitated by a childrearing ideology that overvalues intellectually-enhancing childrearing tasks and undervalues menial care. See *infra* Part III. As the following analysis reveals, other types of child care, like kin care and day care, do not enjoy similar treatment.

rule that the functions paid caretakers fulfill do not resemble parental duties. Judges tend to see “a world of difference” between parents and in-home caretakers.<sup>77</sup> Even family law scholars who challenge parental exclusivity share this view. Although they propose a care-based standard for legally sanctioned child-adult relationships, they dismiss the possibility of any acknowledgement of paid caretakers’ parental role.<sup>78</sup> Similarly, under the ALI Principles, in order to qualify as a “de facto parent,” an individual must have performed child care tasks “for reasons primarily other than financial compensation.”<sup>79</sup> The Principles explain their absolute exclusion of paid caretakers by invoking the different assumptions the law makes about parents and paid caretakers:

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 motivation cannot be assumed on the part of adults who have provided caretaking functions primarily for financial reasons.<sup>80</sup>

This is an unsatisfactory explanation. It fails to clarify why the inability to make an a priori assumption about paid caretakers’ motivations should lead to a blanket prohibition of parental rights. Child custody is determined on a case-by-case analysis, and there is no reason to believe that courts that regularly scrutinize parental motivation will be unable to determine whether the actions of a specific paid caretaker were motivated, in part, by love and loyalty. Furthermore, the ALI Principles, in its narrow “best interest of the child” analysis, ignores the possibility that some children might develop strong attachments to their paid caretakers and suffer from complete separation from them.<sup>81</sup> The ALI Principles’ refusal to allow a case-by-case analysis is testimony to the institutional, ideological, and legal power of the distinction between paid caretakers and parents.<sup>82</sup>

In certain respects this view is well-founded. Parents are under obligations to support their children and to provide for their medical, emotional, educational, and physical needs. They are called upon to make tough decisions and sacrifices, and, other than the clear legal path of relinquishing their parental rights, they have no legal way of shedding these responsibilities. Paid

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77. *Youmans v. Ramos*, 711 N.E.2d 165, 171 (Mass. 1999).

78. *E.g.*, Bartlett, *supra* note 7, at 947 (designing the criteria for adult-child relationships that warrant state protection in a way that excludes paid caretakers, based on the assumption that the supervision by parents makes these relationships non-parental in the eyes of the child); Kavanagh, *supra* note 68, at 128 (discussing Bartlett’s criteria and adding a requirement of mutuality so that “paid caretakers and other self-interested parties would not warrant legal recognition”).

79. AM. LAW INST., *supra* note 6, § 2.03(1)(c)(ii).

80. *Id.* § 2.03 cmt. c(ii), at 120.

81. Cheever, *supra* note 74, at 35. Because caretakers know that children’s attachment may arouse parental jealousy and cost them their jobs, they may try to limit demonstrations of affection in the parents’ presence. HONDAGNEU-SOTELO, *supra* note 73, at 151; *see also* WRIGLEY, *supra* note 4, at 79-80.

82. It may also reflect a wish to avoid the vehement opposition that awarding caretakers parental privileges might generate.

caretakers are employed at-will and can leave their workplace (and the child in their charge) whenever they wish to do so. Parents receive much emotional satisfaction as well as a number of financial benefits, such as tax breaks, for having children.<sup>83</sup> Paid caretakers receive a salary that is supposed to remunerate them for all of the childrearing tasks that they perform. Even when a parent is aided by someone else in child care, the ultimate responsibility for the child's well-being rests with the parent.<sup>84</sup> In the words of a Florida judge, "There are certain things that money cannot buy and that a nanny cannot provide, such as the attention of caring parents."<sup>85</sup>

However, closer scrutiny of the actual tasks paid caretakers perform blurs the distinctions between the roles of parent and paid caretaker. While the employer parents retain the overall responsibility for the child, they frequently delegate many of the daily tasks of direct care to paid caretakers, including grooming, feeding, supervising, assisting with homework, and attending to a waking child at night. Consider this in-home caretaker's schedule:

[T]he nanny was required to be at Father's [a doctor] house at 6:00 a.m. During the school year, she helped the children get ready for school and dropped them off at school. After school, she picked the children up, brought them home to Father's house and got them started on their homework. In the summer, the nanny stayed with the children from the time Father left in the morning to the time he returned in the evenings. When Father was on call while the children were staying with him, the nanny would spend the night at Father's house.<sup>86</sup>

This is by no means an exceptional account. The duties of paid caretakers are far broader than those for which courts and scholars give them credit. As this description demonstrates, paid caretakers regularly perform the more intensive and less pleasurable duties of parenting.<sup>87</sup> Often it is up to the paid caretaker to notice what is going on in the child's life, having spent so many hours attuned to the child and her needs. This fact becomes apparent in courts when in-home caretakers are treated as important witnesses to the

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83. The largest government child care program is the child and dependent care tax credit. Barry L. Friedman & Martin Rein, *The Evolution of Family Policy in the United States after World War II*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 101, 107 (Sanford N. Katz et al. eds., 2000).

84. However, consider Joy Zarembka's account of Tigris Bekele, a live-in caretaker who was charged with neglect when the children were found unattended, even though she was off-duty at the time. On the morning that Bekele fled the home of her employers after having suffered severe exploitation, the children were released from school due to a bomb scare. Although the children arrived at the empty house at 10:00 a.m., when Bekele was off-duty as a caretaker, she was arrested for leaving the children unattended. Joy M. Zarembka, *America's Dirty Work: Migrant Maids and Modern-Day Slavery*, in GLOBAL WOMAN, *supra* note 73, at 142, 148.

85. *Young v. Hector*, 740 So.2d 1153, 1178 (Fla. Dist. Ct. App. 1999).

86. *Styka v. Styka*, 972 P.2d 16, 23 (N.M. Ct. App. 1998).

87. Romero, *supra* note 2, at 835.

circumstances of children's everyday life, such as when there is a suspicion of abuse.<sup>88</sup>

A comparison between the tasks that are commonly delegated to paid caretakers and the indicia courts employ to determine which parent is the "primary caretaker" is illuminating. Under the "primary caretaker" standard used in custody determinations in a number of states,<sup>89</sup> the parent who provides daily care is assumed to have developed a stronger relationship with the child that should be protected in a divorce.<sup>90</sup> The West Virginia Supreme Court of Appeals listed the tasks of care that constitute custody-worthy parental behavior:

- (1) preparing and planning 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 with peers after school, i.e. transporting to friends' houses . . . ; (6) arranging alternative care . . . ; (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 toilet training; (9) educating i.e. religious, cultural, social etc.; and (10) teaching the child elementary skills, i.e. reading, writing and arithmetic.<sup>91</sup>

The ALI Principles also describe several tasks as "caretaking functions," which involve "the direct delivery of day-to-day care and supervision to the child."<sup>92</sup> These include "physical supervision, feeding, grooming, discipline, transportation, direction of the child's intellectual and emotional development, and arrangement of the child's peer activities, medical care and education."<sup>93</sup>

88. See, e.g., R.J.M. v. Alaska, 973 P.2d 79 (Alaska 1999); Doe v. Doe, 44 P.3d 1085 (Haw. 1994); Dieterle v. Dieterle, 960 S.W.2d 556 (Mo. Ct. App. 1998); Vernon v. Vernon, 800 N.E.2d 1085 (N.Y. 2003); L.M.W. v. Texas, 891 S.W.2d 754 (Tex. Ct. App. 2002); Fairfax County v. Neidig, No. 1304-97-4, 1998 WL 144375 (Va. Ct. App. Mar. 31, 1998).

89. For recent cases that consider which parent acted as the primary caretaker as a factor in custody determinations, see, for example, *In re Marriage of Heath*, 18 Cal. Rptr. 3d 760, 763 (Ct. App. 2004); *Vangsness v. Vangsness*, 607 N.W.2d 468, 476-78 (Minn. Ct. App. 2000); *Messer v. Messer*, 850 So. 2d 161, 166 (Miss. Ct. App. 2003); *DesLauriers v. DesLauriers*, 642 N.W.2d 892, 896 (N.D. 2002); and *Patel v. Patel*, 599 S.E.2d 114, 120 (S.C. 2004). See also Paul L. Smith, *The Primary Caretaker Presumption: Have We Been Presuming Too Much?*, 75 IND. L.J. 731 (2000) (surveying the implementation of the "primary caretaker" standard and its implications).

90. The standard corresponds to the psychological parent standard proposed by Joseph Goldstein, Anna Freud, and Albert Solnit in *BEFORE THE BEST INTERESTS OF THE CHILD* (1979). See Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making: How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 5-6 (1998).

91. *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). West Virginia is the only state in which there is a presumption in favor of the primary caretaker.

92. AM. LAW INST., *supra* note 6, § 2.03 cmt. g, at 125.

93. *Id.* Section 2.03(5) of the ALI Principles reads:

*Caretaking Functions* are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:

- (a) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing, grooming, and dressing, playing with the

The Principles promote an award of custodial responsibility according to past performance of these caretaking functions, and not based on other “parenting functions,” like financial support, participation in decision-making regarding the child’s welfare, or household chores like laundry, yard work, and car repairs.<sup>94</sup> The Principles explain the importance of caretaking functions to custody determinations:

The allocation of custodial responsibility . . . assumes that the division of past caretaking functions correlates well with other factors associated with the child’s best interests, such as the quality of each parent’s emotional attachment to the child and the parents’ respective parenting abilities.<sup>95</sup>

As mentioned above, the ALI Principles’ perception that the performance of caretaking functions over a substantial period of time creates a relationship between children and adults that merits legal protection has led to their recognition of de facto parents. The Principles restrict this status to adults who have lived with the child and have regularly performed a considerable portion of caretaking functions. A similar belief in the intrinsic quality of caretaking activities was recently expressed by the Massachusetts Supreme Judicial Court:

*[T]he parent-child bond grows from the myriad hands-on activities of an adult in tending to a child’s needs. Unlike other parenting activities . . . which benefit the child but are not performed directly for him or, usually, in his presence—caretaking tasks ‘are likely to have a special bearing on the strength and quality of the adult’s relationship with the child.’<sup>96</sup>*

In families that hire in-home caretakers, many of these parental chores are routinely performed by employees. In fact, studies show that hiring parents—

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- child and arranging for recreation, protecting the child’s physical safety, and providing transportation;
  - (b) directing the child’s various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;
  - (c) providing discipline, giving instructions in manners, assigning and supervising chores, and performing other tasks that attend to the child’s needs for behavioral control and self-restraint;
  - (d) arranging for the child’s education . . . communicating with teachers and counselors, and supervising homework;
  - (e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;
  - (f) arranging for health-care providers, medical follow-up and home health care;
  - (g) providing moral and ethical guidance;
  - (h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

*Id.* § 2.03(5).

<sup>94.</sup> *Id.* § 2.03(6).

<sup>95.</sup> *Id.* ch. 2 cmt. b, at 182. The Principles add that basing custodial responsibility on performance of caretaking functions promotes the “greatest degree of stability in the child’s life . . . especially [in] the child’s relationships with the primary caretaker.” *Id.*

<sup>96.</sup> A.H. v. M.P., 857 N.E.2d 1061, 1071 (Mass. 2006) (emphasis added) (quoting AM. LAW INST., *supra* note 6, § 2.03 cmt. g).

usually mothers<sup>97</sup>—expect their paid caretakers to operate as a “shadow mother,” to perform caretaking tasks with maternal warmth and affection, but then to vanish from sight once the mother is back home.<sup>98</sup> However, if performing hands-on caretaking functions creates the bonds of attachment that the ALI Principles and the courts assume it does, then this vanishing act is just that—an act. It is easy to understand why parents would want to think otherwise, and to some extent, it is likely that judges and the ALI Principles’ authors share the values and worldview of professional parents. But the legal adoption of this approach does more than reassure working parents of their importance in their children’s lives. The legal category “nanny”—that is, someone who performs parental tasks but by definition cannot be considered a parent—fits well in the broad parental exclusivity doctrine. It makes families that do not function as the doctrine presumes appear as if they did.

The work done by this conceptualization of paid caretakers is apparent in *Amy G. v. M.W.*<sup>99</sup> In that case, a trial court compared a woman who raised her husband’s son almost from birth to a paid in-home caretaker when denying her petition to be considered the child’s mother. The husband fathered the child in an extramarital affair and the child’s biological mother, Kim, surrendered him a month after his birth to be raised by the father and his wife, Amy. Both Kim and Amy petitioned the court to be acknowledged as the child’s mother, and, because California abides by the parental exclusivity doctrine and the child’s father was known and present in the action, the trial court had to decide between the two women.<sup>100</sup> Although the child had been in Amy’s care for over two years, “[t]he trial court repeatedly asked ‘how is Amy . . . any different from a live-in nanny?’” and “also commented, ‘[Amy] doesn’t have custody rights. [Father] has custody rights. And she happens to live with [father].’”<sup>101</sup> The appellate court affirmed the trial court’s rejection of Amy’s claim,<sup>102</sup> but admonished the lower court for comparing Amy to a “nanny,” describing the comparison as “unfortunate.”<sup>103</sup>

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97. Mothers provide most of the daily supervision of caretakers. See WRIGLEY, *supra* note 4, at 85.

98. Cameron Lynne Macdonald, *Shadow Mothers: Nannies, Au Pairs, and Invisible Work, in WORKING IN THE SERVICE SOCIETY* 244, 250 (Cameron Lynne Macdonald & Carmen Sirianni eds., 1996); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 58 (1997).

99. *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297 (Ct. App. 2006).

100. In the words of the appellate court, “Here, Nathan’s natural father is known and present in the action. Nathan only can have one additional parent.” *Id.* at 305. See also *Elisa B. v. Super. Ct.*, 117 P.3d 660, 666 (Cal. 2005); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

101. *Amy G.*, 47 Cal. Rptr. 3d at 301 (alteration in original).

102. The trial court granted the mother’s motion to quash Amy’s independent action to establish a parental relationship with the child and rejected the father’s petition to add Amy as a necessary party to the mother’s custody petition.

103. *Amy G.*, 47 Cal. Rptr. 3d at 301 n.4. Interestingly, when commenting on this comparison, the appellate court used the term “domestic employee” and not “live-in nanny,” as to emphasize the employment aspect, which was, apparently, the reason the appellate court found the comparison insulting.

Where the appellate court saw an insult, I see the irreconcilable gap between the dogmatic imperative to limit parenthood to two parents per child and the intricate family reality in which more than two adults may parent a child. The trial court's comparison settles the tension by displacing it: If the stepmother taking care of the child can be redefined as the equivalent of a paid in-home caretaker, her assertion that she has a parental role can then be more easily dismissed. The appellate court was uncomfortable with the trial court's classification of Amy as a paid in-home caretaker. However, both courts participated in the dismissal of parental bonds between paid caretakers and children. We should seize upon the appellate court's discomfort to ask whether the trial court really got the comparison wrong, or whether some in-home caretakers play parental roles in children's lives like the stepmother did in this case.

The trial court protected parental exclusivity by characterizing the stepmother as the type of caretaker who is absolutely excluded from competing with parents over control or access to the child. When the trial court compared the stepmother to a paid caretaker it made the same assumption that the "nanny cases" have made—namely that the care of the "nanny" (in this case the stepmother) can be attributed to the child's parent. Despite the fact that Amy claimed that she raised the child, and although the court-appointed expert referred to Amy's bond with the child in his report, the trial court referred to Amy as someone who "happens to live" with the child's father, thus attributing her caretaking to the custodial father.<sup>104</sup> It is telling that the trial court refused to take judicial notice of the expert's evaluation—it even announced that it had not read the report.<sup>105</sup> This willful ignorance allowed the court both to erase Amy's role in raising the child and to pretend that the father did so on his own in the same way that courts usually ignore paid caretakers' role in childrearing. Amy's classification as "no different from a nanny" was complete.

### *C. In-Home Caretaking as the Foil to Other Types of Child Care Arrangements*

The "nanny cases" expose a substantive class bias in the way courts uphold a specific version of good parenting—intensive child-focused childrearing—which is attainable only by the wealthy few. Other child care arrangements are less likely to be so favorably attributed to parents. In what follows, I offer a glimpse at judicial attitudes toward other child care arrangements, mainly day care and kin care. My aim is not to present an exhaustive account of the

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104. *Id.* at 301.

105. *Id.* The appellate court did review the report, "which discusses, inter alia, the bond between Amy and [the child]," but added that the contents of the report were irrelevant to its analysis. *Id.* at 301 n.3.

divergent treatment that different types of care arrangements receive from the legal system. Rather, my goal is to provide a context for the conceptualization of paid in-home care. I suggest that other types of child care might be treated differently because they do not lend themselves as neatly to the same conceptual assumptions that courts make about paid in-home caretaking: that while the work in-home caretakers do can be attributed to the hiring parent, it is very different from parenting. I argue that day care centers do not invoke the attribution of the care to the parent, and therefore are incompatible with the dominant cultural perception of good parenting as providing close adult attention to and supervision of organized tasks to enhance children's intellectual development.<sup>106</sup> Meanwhile, kin care blurs the distinction between parent and caretaker and as a result is problematic from the point of view of the exclusive family.

### 1. Day Care

American middle-class parents are often prejudiced against day care centers.<sup>107</sup> This is partly due to the fact that relatively little high quality day care is available in the United States.<sup>108</sup> However, the anxiety about child care was fed by a largely exaggerated negative media campaign in the 1980s regarding sex abuse and other dangers.<sup>109</sup> Still, in 2002, 22.7% of working mothers' children under five were cared for by an organized care facility.<sup>110</sup> Children of working mothers attending day care centers spent an average of

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106. For more on this childrearing ideology, see *infra* Section III.A.

107. HONDAGNEU-SOTELO, *supra* note 73, at 4-5; Denise Urias Levy & Sonya Michel, *More Can Be Less: Child Care and Welfare Reform in the United States*, in CHILD CARE POLICY AT THE CROSSROADS: GENDER AND WELFARE STATE RESTRUCTURING 239, 241 (Sonya Michel & Rianne Mahon eds., 2002) (contending that this bias could be detected as early as the 1930s, when nursery schools became "the darlings of the middle class," whereas day care centers and day nurseries "gained a reputation for being 'custodial warehouses' that only the poor would use"). Mary Eberstadt voices much of the prevalent anxiety by calling day care centers germ factories and blaming them for children's aggressiveness. See MARY EBERSTADT, HOME-ALONE AMERICA: THE HIDDEN TOLL OF DAY CARE, BEHAVIORAL DRUGS, AND OTHER PARENT SUBSTITUTES 4-12 (2004).

108. Scholars have declared a child care crisis that manifests itself in problems of affordability, supply, and quality. See SUZANNE W. HELBURN & BARBARA R. BERGMANN, AMERICA'S CHILD CARE PROBLEM: THE WAY OUT 39-44 (2002) (calling for governmental and employer contributions in order to provide affordable quality child care).

109. While day care centers received little coverage during the 1970s and early 1980s, by 1984 the media were flooded with news stories about the dangers of day care centers, especially child abuse. Most of these stories proved false, sometimes after the accused suffered public shame and even spent time in jail. SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED ALL WOMEN 90, 95-103 (2005). Parents continue to recoil from day care even though research continually shows that children are far more likely to be abused at home than at a day care. See SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 42-43 (1991).

110. Johnson, *supra* note 3, at 2 tbl.1.

thirty-four hours per week there, and children at nurseries and preschools spent twenty-two hours per week at these facilities.<sup>111</sup>

In the common setting of two-earner families, day care is generally considered to be an appropriate solution for child care.<sup>112</sup> When a Michigan judge said otherwise in 1994, and refused to award custody to a student mother because she put her daughter in day care, his decision attracted attention on a national scale.<sup>113</sup> The judgment was overturned by the appellate court,<sup>114</sup> and the Supreme Court of Michigan clarified that “day care generally is an entirely appropriate manner of balancing [parental] obligations” with work and schooling.<sup>115</sup> Still, some parents are penalized for using day care, because courts tend to emphasize that the hours spent in day care are hours not spent with the parent.<sup>116</sup>

A comparison highlights the difference in conceptual assumptions regarding day care and in-home paid care. Recall that the judge in *Forzano v. Scuderi* found Ms. Scuderi to be her child’s primary caretaker despite the fact that, during the marriage, both parents shared in child care duties. The reason the court gave for its finding was that Ms. Scuderi “hired, trained, and supervised” the in-home caretaker.<sup>117</sup> Compare the *Forzano* case to *Johnson v. Lewis*, a 2005 case that denied a mother’s appeal of an order directing physical custody of her son to be shared equally by the divorced parents.<sup>118</sup> Both parties in *Johnson* characterized the mother, Ms. Johnson, as the primary caretaker and the initial temporary custody order established her as the child’s primary physical custodian.<sup>119</sup> However, Ms. Johnson was eventually denied the benefits of primary caretaker status because she put the child in a day care center.<sup>120</sup> The court found that “[the child] has spent at least eight hours of each weekday in secondary child care. Therefore, [the] mother’s status as primary

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111. *Id.* at 7 fig.2.

112. Recently the Supreme Judicial Court of Massachusetts noted in a footnote that “[d]ay care is a fact of life in such circumstances and ought not be used as the measure of a parent’s ability or commitment to provide a protective, healthy, and positive environment for the child.” *In re Custody of Kali*, 792 N.E.2d 635, 644 n.12 (Mass. 2003).

113. Jacobs, *supra* note 18, at 845 & n.1. On appeal, the Michigan Supreme Court noted that the decision generated sixty-one amici curiae briefs, all in support of the mother. *Ireland v. Smith*, 547 N.W.2d 686, 691 (Mich. 1996).

114. *Ireland v. Smith*, 542 N.W.2d 344 (Mich. Ct. App. 1995).

115. 547 N.W.2d at 691.

116. *Schaaf v. Schaaf*, No. 224182, 2000 WL 33403306 (Mich. Ct. App. Oct. 31, 2000) (per curiam) (granting father’s petition to modify custody, partly because mother worked two jobs and relied heavily on day care which did not leave the child enough “quality time” with the mother).

117. *Forzano v. Scuderi*, 637 N.Y.S.2d 767, 769 (App. Div. 1996).

118. *Johnson v. Lewis*, 870 A.2d 368, 371 (Pa. Super. Ct. 2005).

119. *Id.* at 370-71.

120. *Id.* at 373 n.7. The court also noted that for a month before utilizing a day care center the parents relied on an out-of-home child care arrangement, in the form of a babysitter in whose home the child spent several hours every day. *Id.* at 370.

caretaker and custodian, while still warranting positive consideration, was entitled to less weight."<sup>121</sup>

The focus of this discussion is not the relative merits of the care provided by a paid in-home caretaker versus that provided by a day care center. Ms. Johnson did not lose her primary caretaker status because the day care was found unsatisfactory, and Ms. Scuderi did not gain primary caretaker status simply because the in-home caretaker she employed provided high quality care. Rather, the courts made different assumptions about the time the child had not been in these mothers' direct care. Ms. Johnson suffered from the fact that the time the child spent in a day care center was counted as time in which she did not care for the child. Ms. Scuderi, in contrast, was fully credited for the time the child spent with the in-home caretaker, whom she hired, trained, and supervised. The absence of Ms. Scuderi, a full-time radiologist, from the work the caretaker was performing within her home was similar to Ms. Johnson's absence from the child care center, and both women paid for someone else to care for their child. Yet only the paid in-home caretaker's work was seen as her employer's.<sup>122</sup>

## 2. Kin Care

Approximately one-third of parents in dual-earner households turn to their own parents for help with child care. According to the Census Bureau, in the winter of 2002, about one-third of employed mothers' children under the age of two were cared for by grandparents.<sup>123</sup> In total, 28.3% of employed mothers' children under the age of five spent an average of twenty-four hours a week in their grandparents' care.<sup>124</sup> Another 11% of these children were cared for by relatives other than grandparents.<sup>125</sup> These data reflect the fact that middle-class working mothers have joined generations of minority families, especially economically disadvantaged ones, for whom the solution to child care problems has long been to turn to their kin for help.<sup>126</sup>

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121. *Id.* at 373 n.7.

122. The sharp difference in judicial treatment of in-home paid care and day care centers also clarifies that it is not the payment that informs judicial regard for paid in-home caretaking. The fact that care is paid for is not considered in itself an indication that it is better than other forms of care.

123. Specifically, 33.7% of children under the age of one and 30% of children between the ages one and two were cared for by grandparents. *See* Johnson, *supra* note 3, at 4 tbl.2.

124. *Id.* at 4 tbl.2, 7 fig.2.

125. *Id.* at 4 tbl.2.

126. *See* GRACE CHANG, DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY 78 (2000) (linking the prevalence of kin care and community care among communities of color to the fact that historically many women of color had to work, even while raising young children, due to the inadequate income of male family members or the absence thereof); Catherine Chase Goodman & Merrill Silverstein, *Latina Grandmothers Raising Grandchildren: Acculturation and Psychological Well-Being*, in CUSTODIAL GRANDPARENTING: INDIVIDUAL, CULTURAL, AND ETHNIC DIVERSITY 237, 237-40 (Bert Hayslip Jr. & Julie Hicks Patrick eds., 2006) (noting that, among Latino groups, caretaking is more likely to be a cooperative effort and often grandparents and their adult

Kin care is often regarded as quality care, and children's relationships with their extended family are sometimes a factor in courts' custody determinations weighing in favor of one parent or the other.<sup>127</sup> However, when a parent's extended family members perform a considerable share of the child care, that care is sometimes treated by courts—and the relatives themselves—as competing care which should result in a reward to the caretaking relative.<sup>128</sup> For example, a 2006 Maryland case granted grandparents visitation with their grandchildren, despite parental objections and the fact that the parents' fitness was not disputed and the family was intact.<sup>129</sup> The court stressed that the grandparents “actively participated in the care and raising” of the first born granddaughter (who, for the first three years of her life, resided with her mother in the grandparents' house) and continued to keep a “close relationship” with her afterwards.<sup>130</sup> The court concluded that “the [c]hildren ‘were part of the [grandparents’] life on a fairly regular basis’” and benefited from having such a relationship with their grandparents, and ordered the parents to renew the relationship.<sup>131</sup> The Court of Appeals of Maryland subsequently reversed this decision and raised the bar for granting grandparental visitation over parental objection by requiring that grandparents show not only that visitation was in the best interest of the child, but also that “the lack of grandparental visitation has a significant deleterious effect upon the children . . . .”<sup>132</sup> Nevertheless, for the purpose of this Article it is important that the court of appeals shared the trial court's view that the care grandparents provided competed with parental care rather than adding to it the way paid caretakers' did. The statute, the court noted, allows grandparents “to play a vital role in the development and

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children co-parent the minors in three-generation households, or grandmothers provide care during the day to their grandchildren who live in two-generation households); Rebecca L. Hegar, *The Cultural Roots of Kinship Care*, in *KINSHIP FOSTER CARE: POLICY, PRACTICE, AND RESEARCH* 17, 22 (Rebecca L. Hegar & Maria Scannapieco eds., 1999) (claiming that the historical pattern of black parents relying on kin caretaking persists today and appears to be on the rise since the 1980s); Rosalyn D. Lee, Margaret E. Ensminger & Thomas A. LaVeist, *African American Grandmothers: The Responsibility Continuum*, in *CUSTODIAL GRANDPARENTING*, *supra*, at 119, 120 (arguing that kinship care has historically been more common in African-American families than in other groups in the United States).

127. *J.P.M. v. T.D.M.*, 932 So. 2d 760, 778 (Miss. 2006) (finding that grandparents' willingness and ability to help a parent may weigh in that parent's favor); *Schmidt v. Schmidt*, 660 N.W.2d 196, 203 (N.D. 2003) (stating that a child's “interactions and interrelationships with relatives” can be considered in the assessment of the child's family environment).

128. *Spaulding v. Williams*, 793 N.E. 2d 252 (Ind. Ct. App. 2003) (granting visitation to grandparents because they had acted like parents in caring daily for their grandson for over three years while their daughter, the child's mother, was at work, and despite the wishes of the child's father, who had broken their relationship with the child after their daughter's death); *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006) (affirming the grandmother's grant of partial custody where the grandmother cared for child daily during her daughter's—the child's mother—terminal illness); *In re Estate of S.T.T.*, 144 P.3d 1083 (Utah 2006) (holding that visitation award to grandparents, who cared regularly for the child and moved in with the child after the mother died, was constitutional).

129. *Koshko v. Haining*, 897 A.2d 866 (Md. Ct. Spec. App. 2006).

130. *Id.* at 868-69.

131. *Id.* at 883 (citation omitted).

132. *Koshko v. Haining*, 921 A.2d 171, 192-93 (Md. 2007). Alternatively, the newly-created threshold allows grandparents to prevail if they show parental unfitness. *Id.*

happiness of a child's life, when circumstances are such that court action is warranted and needed to enforce that role properly. . . . 'Grandparents' contributions do not go unnoticed and their efforts likely accrue to the benefit of the grandchildren."<sup>133</sup>

A recent New York case enumerated the tasks that a grandmother performed that made her a "surrogate, live-in mother" to her recently orphaned grandson:

[For over three years, the] grandmother comforted, supported and cared for the motherless child. She got him ready for school, put him to bed, read with him, helped him with his homework, cooked his meals, laundered his clothes and drove him to school and to doctor's appointments and various activities . . . .<sup>134</sup>

The child's father, who had asked the grandmother to move in and help with his son's care, was enjoined by the court from putting an end to the child's relationship with his grandmother, even though he believed that she was "sabotaging his parental authority and competing with him for control over the household and, more importantly, the child."<sup>135</sup> Note the implications of utilizing one care arrangement and not another. Had the father hired a resident paid caretaker instead of asking the grandmother for help, and had that caretaker performed these exact same tasks for three years, the father would have found himself at liberty to end the relationship as he wished.

Whereas parents might find this trend a sufficient reason for concern, scholars have argued that extensive reliance on kin care might lead courts to see parents as indifferent and neglecting: The caretaking relative is depicted as filling a void, not as lending a hand.<sup>136</sup> Such charges of neglect often lead to placement in state-paid foster care, especially when the parents in question are poor.<sup>137</sup> Since in recent years there has been a trend to place children in formal

133. *Id.* at 191 (emphasis added) (quoting *McDermott v. Dougherty*, 869 A.2d 751, 816 (Md. 2005)). The court of appeals remanded and instructed the lower court to give the grandparents an opportunity to convince the court that such exceptional circumstances existed in their case (or that the parents were unfit). *Id.* at 195.

134. E.S. v. P.D., No. 01336, 2007 WL 470389, at \*1 (N.Y. Feb. 15, 2007).

135. *Id.* at \*2.

136. Dorothy Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1623 (2001).

137. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 27 (2002) ("Poverty—not the type or severity of maltreatment—is the single most important predictor of placement in foster care and the amount of time spent there."); Kathy Barbell & Madelyn Freundlich, *Foster Care Today: Overview of Family Foster Care*, in *CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES AND PROGRAMS* 504, 505-06 (Gerald P. Mallon & Peg McCartt Hess eds., 2005) ("[C]hildren living in poverty are far more likely to be reported to child protective services as victims of child neglect. . . [and] the major determinant of children's removal from their parents' custody [is] not the severity of child maltreatment but the instability of parental income."); see also Francesca M. Cancian, *Defining "Good" Child Care: Hegemonic and Democratic Standards*, in *CHILD CARE AND INEQUALITY: RETHINKING CAREWORK FOR CHILDREN AND YOUTH* 65, 67 (Francesca M. Cancian et al. eds., 2002) (surveying studies that show that "[t]he great majority of children in foster care and in the child welfare system are from poor and minority families" and "[n]eglect, not abuse, is the usual grounds for removing children from their families"); Christina White, *Federally Mandated*

kin foster care,<sup>138</sup> a finding that parents are neglectful when they leave their children for long hours in the care of relatives can yield distorted results. When relatives informally help parents, the state sometimes holds it against parents.<sup>139</sup> Yet, the same relatives can become designated foster parents, which would entitle them to better state assistance than the parents originally had.<sup>140</sup> Social services and courts send parents and their communities the message that a parent relying heavily on extended family for child care is a neglecting parent, even if at the end of the day the children end up being cared for by the same relatives.<sup>141</sup>

Scholars have persuasively argued that the state's perception of extensive kin care as indicative of parental neglect is informed by cultural and class bias.<sup>142</sup> However, the comparison with other types of child care highlights another facet of kin care, namely that it clashes with the basic assumptions of the exclusive family doctrine. Grandparents, uncles, and aunts are not perceived as different from—and therefore complementary to—parents. Instead, their similarity to parents paints them as potential rivals, and as such, their input is not counted favorably to the parents.

For similar reasons, parents who rely on non-paid help of friends or neighbors are more likely to face a problem. A Louisiana custody dispute serves as an instructive example. Upon divorce, Sally Lunsford, a mother of three, had to seek full-time employment. Juggling work and household chores, it was a blessing for her to have her friend Mary around the house. The daughter of a colleague, and Sally's best friend, Mary visited the house daily, doing family and household chores and often spending the night.<sup>143</sup> Yet, two

*Destruction of the Black Family: The Adoption and Safe Family Act*, 1 NW. J. L. & SOC. POL'Y 303, 314 (2006) (“[T]here is a strong correlation between foster care placement and poverty.”).

138. Barbell & Freundlich, *supra* note 137, at 509 (describing the “dramatic” increase in recent years in the formal use of kinship care); Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 FUTURE CHILD. 72, 73 (1998). In some states, kin foster care has even become the popular solution in situations of termination of parental rights. Maria Scannapieco & Rebecca L. Hegar, *Kinship Foster Care in Context*, in KINSHIP FOSTER CARE: POLICY, PRACTICE, AND RESEARCH 1, 3 (Rebecca L. Hegar & Maria Scannapieco eds., 1999).

139. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 585-86 (1997).

140. Berrick, *supra* note 138, at 74-75 (describing the higher state assistance relatives receive when caring for children as foster parents as one of the reasons for the rise in kinship placements in recent years).

141. Roberts, *supra* note 136, at 1623.

142. See, e.g., Appell, *supra* note 139, at 586 (“Because the rich tradition of extended family or kin care is not normative, the child protection system does not recognize it as family and views the mothers who rely on that tradition as having abrogated their maternal roles and duties.”).

143. *Lunsford v. Lunsford*, 545 So. 2d 1279, 1280-81 (La. Ct. App. 1989). The trial court insinuated heavily that it suspected Sally's relationship with Mary to be sexual and conditioned the award of custody to Sally subject to severe restrictions on their relationship. The appellate court completely rejected these insinuations, yet found it material to declare that Sally had complied with the limitations imposed by the trial court. Even though the trial court and the appellate court differed in their interpretation of the nature of the relationship, they were of one mind in regard to the importance of Sally's independence as the head of the household.

courts regarded Mary's help as a sign of Sally's weakness. Sally was instructed to become "self-reliant" by tempering her reliance on her friend "so that the household be dependent upon itself and not on an outside source."<sup>144</sup> In this case, asking a friend for help was not considered providing quality care; rather, it was considered a manifestation of incompetence.

#### *D. Conclusion*

This comparison of the judicial treatment of different types of caretaking arrangements illuminates the conceptual infrastructure underlying courts' understanding of paid caretaking. In-home paid caretakers are the only type of caretakers whose work is treated as an extension of parental care. In-home paid caretakers are not considered persons, as grandparents or day care center providers are. Rather, courts reduce them to the service they provide, one which fills a certain gap in parental conduct. Recall Dr. Shofner's award of custody, which was based on his taking parenting classes and hiring an in-home caretaker. The caretaker was considered an addition to the father, just like the newly taught skills; both were means of making Dr. Shofner a better-functioning parent. By refraining from closer examination of paid caretakers, courts perpetuate the illusion that the care they provide can be disconnected from the person who provides it. The paid caretaker becomes a mere "extra pair of hands."<sup>145</sup> Only in this abstract form can paid caretakers be constructed as a flexible solution tailored to fit any parental deficiency and family situation. In this capacity, the concept of "nanny" has become instrumental for judges in reconciling the contradictions between the ideals of the exclusive family that the law holds onto, and the real life families with whose problems courts are confronted. To achieve this level of abstraction and to produce an ideal solution, courts strip paid in-home caretakers of personality and treat them as interchangeable and disposable. Treating paid in-home caretakers this way allows the legal system to portray the nuclear family as self-reliant.

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144. *Id.* at 1280, 1283. In fact, the appellate court noted with approval that under the threat of change of custody, Sally indeed changed her behavior. Mary's daily assistance diminished in the year preceding the appellate court hearing: She shopped for Sally only five times, and helped with the laundry occasionally. Sally testified that "she personally performed all other household chores." *Id.* at 1283. The appellate court considered this point important enough to list Sally's daily schedule, and to enumerate the chores she performed, "including washing clothes and dishes, ironing, and making lunches for the children." *Id.* at 1281.

145. Caitlin Flanagan recalls the comfort she found in the notion that the in-home caretaker she was about to hire was no more than "two helpful appendages . . . no more of a human presence in the household than the useful refrigerator, the attractive white changing table." CAITLIN FLANAGAN, *TO HELL WITH ALL THAT: LOVING AND LOATHING OUR INNER HOUSEWIFE* 108-09 (2006). She goes on to describe the difficulties she experienced when confronted with the caretaker's humanity as mirrored in the love Flanagan's children came to feel for her: "That I knew my boys would love her is why I hired her. That they did was unnerving me to the core." *Id.* at 123.

## III. IDEAL AND PRACTICE IN IN-HOME CARETAKING

The focus in custody decisions is on children's welfare. When courts contemplate caretaking arrangements, they are informed by widespread conceptions about what children's needs are and what good parenting entails. Therefore, to make sense of the "nanny cases," this Part examines the prevailing cultural conceptions of parenting. After reviewing the shift in childrearing ideology from intensive motherhood to concerted cultivation, I evaluate this shift's consequences, drawing on data accumulated by sociologists. The data show that the combination of contemporary childrearing ideology and the realities of the care market creates incentives for parents to subordinate caretakers, with possible grave costs for the children in their charge. As a result, a custody decision that assumes that in-home caretaking is advantageous to children without examining the caretaker's work conditions is likely to be flawed.

Stepping out of the doctrinal boundaries of custody law, this Part also evaluates the "nanny cases" from a feminist point of view. To the extent that custody cases involving in-home caretaking legitimize maternal reliance on paid caretaking, one might argue that they represent a positive development from a feminist perspective because they allow mothers to pursue meaningful careers without losing their status as good mothers. This Part takes a different stance, insisting that a feminist evaluation of in-home caretaking must take into account the caretakers' perspective and inspect more carefully the source of paid caretaking's new legitimacy. Such scrutiny reveals that this so-called victory benefits only upper-middle-class women and is largely achieved at the expense of female immigrant caretakers (and their families). In fact, in some contemporary wealthy families, the paid caretaker has come to replace "The Wife": unappreciated, lacking authority, poorly rewarded economically, and strictly controlled by the masters of the house.<sup>146</sup>

*A. Childrearing Ideology: From Intensive Mothering to Concerted Cultivation*

Since the 1980s, middle- and upper-middle-class childrearing ideology has been focused on the development of the child's skills and intellectual capacities through constant stimulation and challenge-setting.<sup>147</sup> This childrearing

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146. Hochschild, *supra* note 73, at 20.

147. I only briefly touch upon lower-class parents' childrearing ideology because paid in-home caretaking is an unattainable child care solution for parents of low means. See Romero, *supra* note 2. The childrearing ideologies described below are tailored to the sensibilities, and financial abilities, of the middle- and upper-middle-classes. Indeed, interviews with lower-class and poor mothers show that these mothers see their role not as providing their children with choices and negotiating with them to promote their self-esteem, but as stressing children's obedience to rules and providing formal education. However, Sharon Hays notes that today, mothers of all classes share fundamental assumptions about the

ideology, which sociologist Annette Lareau termed “concerted cultivation,” prompts parents to enroll children in a series of adult-controlled organized activities.<sup>148</sup> It requires “immense emotional involvement, constant self-sacrificing, . . . and a completely child-centered environment.”<sup>149</sup> It also entails extensive direct and indirect expenses, taking a toll on parents’ financial resources, time, and energy.<sup>150</sup>

Adopting such labor-intensive methods is, for many parents, a reaction to the demands of advanced capitalist societies. Their hope is to increase their children’s competitiveness and prospects of success in the years to come by engaging them from an early age in educational activities and dedicating substantial amounts of time and effort to foster their children’s cognitive development.<sup>151</sup> The increasing competition for admission to quality education institutions (college, high school, even urban nursery school) evokes parents’ fear that their children will be deprived as adults of the lifestyle within which they have grown up.<sup>152</sup> By setting a rigid schedule of educational activities, parents hope to cultivate in their offspring “skills and dispositions that [will] help them navigate the institutional world” awaiting them.<sup>153</sup>

The focus on intellectual development and the acquisition of competitive skills marks a paradigm shift in childrearing theory. Before the 1980s, childrearing in middle- and upper-middle-class families took the form of intensive mothering, which emphasized the mother-child relationship, and promoted the fulfillment of children’s desires as a means of achieving their successful development.<sup>154</sup> Child development experts hailed children’s attachment to mothers and maternal bonding as the main sources of children’s

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significance of dedicating themselves to providing for their children’s needs. SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 86 (1996).

148. Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 *AM. SOC. REV.* 747, 752 (2002); see also Teresa Arendell, “Soccer Moms” and the *New Care Work* 8 (Berkeley Ctr. for Working Families, Working Paper No. 16, 2000) (referring to researchers’ finding that American children’s involvement in organized activities outside their homes has risen in the past decades).

149. Romero, *supra* note 2, at 834.

150. Direct expenses include the salary of tutors and cost of lessons and equipment. Indirect expenses include the loss of parental leisure, the time and cost of chauffeuring children, and the cost of time taken off from work. Lareau, *supra* note 148, at 757.

151. See Tronto, *supra* note 9, at 41-42.

152. BARBARA EHRENREICH, *FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS* 83 (1989) (explaining that the “barriers that the middle class erected to protect itself make it painfully difficult to reproduce itself”); JUDITH D. SCHWARTZ, *THE MOTHER PUZZLE: A NEW GENERATION RECKONS WITH MOTHERHOOD* 251 (1993) (“If it comes down to brute survival of the fittest, we want to make our children know how to wind up on top. With uncertainty all around us, we want to provide our children with every certainty we can—and backups, just in case.”); Lareau, *supra* note 148, at 771 (noting that middle-class parents’ worry over their economic future and their children’s economic futures has increased their commitment to inculcating in their children the skills that will enhance their future possibilities).

153. ANNETTE LAREAU, *UNEQUAL CHILDHOOD: CLASS, RACE, AND FAMILY LIFE* 5, 39 (2003).

154. DIANE EYER, *MOTHERGUILT: HOW OUR CULTURE BLAMES MOTHERS FOR WHAT’S WRONG WITH SOCIETY* 83-86 (1996); HAYS, *supra* note 147, at 45.

self-esteem, sense of security, and happiness.<sup>155</sup> Both attachment theory and bonding theory designate mothers as biologically suited to care for children and identify constant maternal attention and affection as the key factors in a child's development.<sup>156</sup> Intensive mothering requires emotionally and financially absorbing methods, and its cornerstone is unconditional maternal love.<sup>157</sup> Specifically, it fosters the expectation that the child's needs and desires be met as they occur, shifts from an obedience-based model of education to a reasoning-based one, and relies on a frustrating and taxing process of setting limits to encourage children to self-discipline.<sup>158</sup>

The requirements of intensive mothering clashed with the major shift in mothers' labor market participation over the last three decades of the twentieth century.<sup>159</sup> The Bureau of Labor reports that in 2001, the predominant family employment pattern in the United States was for both parents to work full-time.<sup>160</sup> This is a clear departure from the dominant pattern in 1980 when, among middle-class married couples, most husbands worked full-time and most wives did not work outside the home.<sup>161</sup> Combined with the rise in the number of single-parent households,<sup>162</sup> historically headed by mothers working full-

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155. HAYS, *supra* note 147, at 55. Attachment is described as a survival instinct causing children to stay close to their caretaker. Bonding is said to be a corresponding "maternal instinct . . . that requires mothers to lovingly hold their babies right after birth and stay close to them in the ensuing months." EYER, *supra* note 154, at 69. Failures in children's lives and characters are attributed to "attachment disorder"—the deficit of proper maternal care—and hence blamed on mothers. *Id.* at 71. Attachment, bonding, and attachment disorder became a primary part of any explanation of child development in the 1970s. Arlene Skolnick, *Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory, and the Best Interests Standard*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 236, 244-45 (Mary Ann Mason et al. eds., 1998). For criticism of these theories, see SUSAN CHIRA, A MOTHER'S PLACE: TAKING THE DEBATE ABOUT WORKING MOTHERS BEYOND GUILT AND BLAME 72 (1998), which notes that attachment theory made no distinctions between long-term and short-term separation and used data regarding war orphans living in orphanages to make general statements about maternal absence, even a temporary absence; and EYER, *supra* note 154, at 83-84, which explains that bonding theory is based on research involving goats.

156. EYER, *supra* note 154, at 84.

157. HAYS, *supra* note 147, at 111. In intensive mothering, maternal love is not just a natural phenomenon, but the child's prerogative and the measure by which both maternal competence and children's futures are determined. For anyone who grew up with intensive motherhood, these notions might seem "natural." It can be sobering to remember that as late as the 1940s, psychiatrists vehemently argued that maternal overprotection—defined as excessive mother-child contact and maternal provision of all the child's needs—was one of the main causes of (mostly male) children's immaturity, lack of confidence, undeveloped personality, impotence, and homosexuality. See DAVID M. LEVY, MATERNAL OVERPROTECTION (1943); EDUARD STRECKER, THEIR MOTHERS' SONS (1946).

158. HAYS, *supra* note 147, at 59-61.

159. Indeed, John Bowlby, an influential psychologist, compared a mother's full-time employment to the death of a parent or a social catastrophe (such as war) in terms of the effect on the child. See Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 415 (1996).

160. Gary Martin & Vladimir Kats, *Families and Work in Transition in 12 Countries 1980-2001*, MONTHLY LAB. REV. 3, 15 (2003); see Macdonald, *supra* note 98, at 245-46 ("Working class and poor women have always engaged in paid labor.").

161. Martin & Kats, *supra* note 160, at 3. The so called "traditional family," in which a father is the sole wage earner, represented only 25% of all families with children in 1988, a decrease from 44% in 1975. COONTZ, *supra* note 63, at 18.

162. Martin & Kats, *supra* note 160, at 13 ("By the year 1995, more than 1 out of 4 U.S. households with children were single-parent households, up from 1 out of 5 in 1980."). Most single-

time,<sup>163</sup> these changes created a rapid increase in the proportion of mothers who work outside the home and have young children. According to the U.S. Census, in 1999, more than sixty percent of all mothers with children under six years old were employed,<sup>164</sup> with white middle-class women playing a leading role in this trend.<sup>165</sup> Although it has been suggested that professional women have recently been leaving the work force because of the strain of combining employment with motherhood,<sup>166</sup> economists have dismissed the idea that women are “opting out,” or even choosing part-time employment, after becoming mothers.<sup>167</sup>

However, this demographic change in household work patterns has not been accompanied by a corresponding change in the traditional allocation of child care responsibilities.<sup>168</sup> Instead, as mentioned above, intensive

parent households are headed by women. Thus in 2000 mother-only households comprised 24% of families with children, whereas father-only households constituted only 4%. JEFFREY SCOTT TURNER, *FAMILIES IN AMERICA* 64 (2002).

163. Linda J. Waite & Mark Nielsen, *The Rise of the Dual-Earner Family, 1963-1997*, in *WORKING FAMILIES: THE TRANSFORMATION OF THE AMERICAN HOME* 23, 28 (Rosanna Hertz & Nancy L. Marshall eds., 2001) (revealing that, in 1997, 58% of single mothers worked full-time, a moderate increase from 50% in 1963). In a 1993 survey of employment patterns of mothers to children under six years old, “51 percent of divorced women and 26 percent of never-married women worked *full-time*.” Stephen D. Sugarman, *Single-Parent Families*, in *ALL OUR FAMILIES*, *supra* note 155, at 13, 17.

164. This is an increase from fifty-four percent in 1989. *See* Martin & Kats, *supra* note 160, at 18 tbl.9. The percentage of employed married mothers was roughly the same. *See* Paula J. Dubeck, *Preface to the Second Edition*, in *WORKPLACE/WOMEN’S PLACE: AN ANTHOLOGY*, at xiv (Paula J. Dubeck & Dana Dunn eds., 2002) (setting the percentage of employed married women with children under the age of three at 61.8%, based on U.S. Census data from 2000).

165. Mark Evan Edwards, *Uncertainty and the Rise of the Work-Family Dilemma*, 63 *J. MARRIAGE & FAM.* 183, 186 (2001) (stating that economic uncertainty and the fear of downward mobility were the key reasons for the rapid increase in two-earner households).

166. This supposed trend was heralded by the *New York Times* and other periodicals in several highly controversial articles. *See* Lisa Belkin, *The Opt-Out Revolution*, *N.Y. TIMES*, Oct. 26, 2003, § 6 (Magazine), at 42 (identifying a trend among educated, high-income women who give up their employment to take care of their children); Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, *N.Y. TIMES*, Sept. 20, 2005, at A1 (claiming that a survey of female Yale students reveals that an increasing number of undergraduates plan to retire at thirty to become stay-at-home moms); Claudia Wallis, *The Case for Staying Home*, *TIME*, Mar. 22, 2004, at 50. For criticism of these publications, see, for example, Katha Pollitt, *Desperate Housewives of the Ivy League?*, *NATION*, Oct. 17, 2005, at 14; and Rebecca Traister, *The Stay-at-Home Mystique*, *SALON*, Dec. 6, 2005, [http://dir.salon.com/story/mwt/feature/2005/12/06/total\\_180/index.html](http://dir.salon.com/story/mwt/feature/2005/12/06/total_180/index.html).

167. Heather Boushey has argued that the decline in the percentage of mothers’ participation in the work force since 2000 is tied to the weakness of the labor market for all workers since the 2001 recession. Mothers have dropped out of the job market at a rate similar to other women, while the economic impact of having children continued to diminish. HEATHER BOUSHEY, *CTR. FOR ECON. & POL’Y RESEARCH, ARE WOMEN OPTING OUT? DEBUNKING THE MYTH* (2005).

168. Women have retained primary responsibility for raising their children. ROMERO, *supra* note 74, at 95; Linda Kelly, *The Fantastic Adventure of Supermom and the Alien: Educating Immigration Policy on the Facts of Life*, 31 *CONN. L. REV.* 1045, 1048 (1999); Lynet Uttal & Mary Tuominen, *Tenuous Relationships: Exploitation, Emotions, and Racial Ethnic Significance in Paid Child Care Work*, 13 *GENDER & SOC’Y* 758, 770 (1999). The *New York Times* reported that researchers from the University of Maryland have recently found that in two-parent families, women still perform twice as many child care tasks as do men. Robert Pear, *Married and Single Parents Spending More Time with Children, Study Finds*, *N.Y. TIMES*, Oct. 17, 2006, at A12 (noting that married mothers spent an average of 12.9 hours a week on child care in 2000, compared with 6.5 hours a week for married fathers).

motherhood has been adjusted. Alongside a discourse of family crisis, which urges mothers to return to the home<sup>169</sup> and still emphasizes the mother-child bond, the focus of good mothering ideology has subtly shifted toward an emphasis on children's intellectual growth. Children's sense of security, happiness, and self-esteem are still considered important goals of childrearing, but they are no longer sufficient.<sup>170</sup>

The "concerted cultivation" childrearing ideology demands even more time-consuming and expensive methods of child care than intensive mothering. It also allows for reliance on external help, help which was demonized as the deprivation of maternal care only two decades earlier. Because intensive mothering emphasized maternal bonding and attachment, the ideology had room for only one primary caretaker<sup>171</sup> and this mother-child bond "eroded mothers' reliance on the assistance of others."<sup>172</sup> But the growing shift toward concerted cultivation has made non-maternal care less problematic. Specifically, concerted cultivation makes in-home paid caretaking more attractive because in-home caretaking provides children with constant adult attention in the children's home, under parental direction and supervision.<sup>173</sup> The legal decisions that were discussed in the first Part embody this thinking in that they assume that children need, or at least benefit from, paid in-home caretaking.

### *B. Paid In-Home Caretaking Meets Concerted Cultivation*

From a feminist perspective, one could argue that the legal acknowledgement of the advantages of in-home paid caretaking signifies a positive development. Working mothers still face mixed responses, even though their legal right to work is no longer in dispute.<sup>174</sup> The change of focus in childrearing ideology, from emphasizing the maternal bond to concentrating on children's skills and intellectual development, may free mothers to pursue meaningful careers without being labeled as—and made to feel like—bad mothers. Seen in this light, the court's decision in *Forzano v. Scuderi* is

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169. See DANIELLE CRITTENDEN, WHAT OUR MOTHERS DIDN'T TELL US: WHY HAPPINESS ELUDES THE MODERN WOMAN 113-43 (1999); EBERSTADT, *supra* note 107, at 172; SUZANNE VENKER, 7 MYTHS OF WORKING MOTHERS: WHY CHILDREN AND (MOST) CAREERS JUST DON'T MIX 152-63 (2004).

170. Arendell, *supra* note 148, at 3 (arguing that parents' responsibilities for their children's development and growth are "an expansion from the middle of the 20th century when parents were accountable primarily for children's general well-being").

171. Macdonald, *supra* note 98, at 246; see also HAYS, *supra* note 147, at 55.

172. Macdonald, *supra* note 98, at 246.

173. Tronto, *supra* note 9, at 43-45.

174. See Edwards, *supra* note 165, at 185 (noting that "[t]he American public . . . remain[s] divided about the wisdom of and reasons for so many young mothers in the labor force") (internal citation omitted); Sanger, *supra* note 159, at 465 (pointing out that while "most of the blanket prohibitions against maternal employment are gone . . . the preference for mother-child togetherness continues").

testimony to a feminist victory. The *Forzano* court allowed the mother radiologist to work full-time in a demanding professional job without losing her status as a good mother or even as a primary caretaker.

Moreover, concerted cultivation seems to incentivize parents to seek experienced, educated caretakers because they want their children's caretakers to be able to actively contribute to each child's competitiveness. Putting high value on enriching environments, parents can be expected to look for educated class peers who are likely to share their values of childrearing.<sup>175</sup> Such a development could further serve women in general by putting a high market value on caretaking, the lack of which has been a cause of feminist lamentation for years.<sup>176</sup> Furthermore, since highly trained, educated workers are more likely to be able to negotiate good work conditions, concerted cultivation would motivate parents not only to choose highly-paid workers but also to utilize non-exploitive employment practices. If we object to the demonization of working mothers, think that care work should entail high status, and want children to benefit from devoted adult attention, then perhaps we should strive to make decisions like *Forzano v. Scuderi* the norm.

However, data accumulated by sociologists regarding in-home caretaking and the legal perception of caretaking as manifested in the "nanny cases" suggest otherwise. Indeed, the combination of the concerted cultivation ideology with the reality of the care market increases the risk of caretakers' subordination and of the devaluation of care work. Most employers cannot afford, and many do not seek, educated, class-peer caretakers. Instead, they hire lower-class or immigrant caretakers that many employers perceive as subordinate. These caretakers report being viewed as possessing little ability to contribute to children's concerted cultivation and are relegated to the most laborious and repetitive tasks of child rearing, with the imperative to be loving and maternal.

Class-peer highly-skilled child care is very expensive and relatively few such caretakers are available.<sup>177</sup> It becomes even more costly when we take into

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175. Parents who seek class peers for caretakers may choose from a pool of American college students, European *au pairs*, Irish and British in-home caretakers, and young women from the American Midwest. WRIGLEY, *supra* note 4, at 51.

176. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 124-27 (2000) (suggesting that in doing the lion's share of housework and caretaking, wives are entitled to an equal share in the fruits of their husbands' labor upon divorce); Naomi R. Cahn, *The Coin of the Realm: Poverty and the Commodification of Gendered Labor*, 5 J. GENDER RACE & JUST. 1, 17-22 (2001) (describing the benefits poor mothers are likely to gain if their caretaking work is commodified); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1899-903 (2000) (arguing that the conversion of unpaid household work into paid work by non-family members is beneficial because it allows better protection for the women who perform it, renders housework more visible and publicly accountable, and frees unpaid family members to pursue gainful work); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 86 (1996) (advocating that housework be regarded as value producing work, even though unpaid, for legal purposes).

177. WRIGLEY, *supra* note 4, at 55. Wrigley reported in 1995 that a British caretaker could earn \$600-\$700 a week and some received extensive perks, *id.* at 72, compared to the \$150-\$180 usually paid

account that, unlike immigrant and lower-class caretakers, peer caretakers are harder to control and unlikely to be hassled into doing housework tasks.<sup>178</sup> The head of a Manhattan domestic employment agency explained that she failed to place a twenty-seven-year-old American woman, whom she described as “the best,” because employers hesitated to hire high status employees: “If someone’s your equal, you can’t say ‘Clean the dishes, do the laundry.’ This is terrible to say, but perhaps they think these other women are beneath them.”<sup>179</sup> That is not to say that hiring a class peer necessarily implies that parents relinquish their desire to control their caretakers. While parents want class-peer caretakers to operate with confidence and authority, they also try to enforce the schedule and contents they desire, to make sure caretakers’ days are child-centered and all activities are educationally enriching.<sup>180</sup> They invest a great deal of money in these caretakers, and it is hardly surprising that they want to make sure that their money is well spent. Even among the wealthy, plenty of parents opt for hiring an employee from a different class and cultural background.<sup>181</sup>

In-home paid caretaking in the United States is typically performed by poor women with few alternatives.<sup>182</sup> Historically, these were African-American women.<sup>183</sup> In the last two decades, domestic work has become the domain of female immigrant workers from developing countries.<sup>184</sup> These women are pushed to migrate by economic strife,<sup>185</sup> and pulled to the United

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to newly arrived immigrant caretakers, *id.* at 23-25. Richardson and Torres found that the median weekly salary for caretakers and domestic workers in South Texas was sixty-five dollars per week. Chad Richardson & Cruz C. Torres, “*Only a Maid*”: *Undocumented Domestic Workers in South Texas*, in CHAD RICHARDSON, BATOS, BOLILLOS, POCHOS & PELADOS: CLASS & CULTURE ON THE SOUTH TEXAS BORDER 69, 83 (1999). See also Romero, *supra* note 2, at 817 (summarizing the findings of several researchers regarding care workers’ wages).

178. WRIGLEY, *supra* note 4, at 49.

179. *Id.* at 5.

180. *Id.* at 54-55.

181. A recent *New York Times* article suggests that, for some professional parents, the choice of class-peer caretakers is practically non-existent. According to the article, many credentialed caretakers refuse to work for black parents, who are then left to choose from a pool of illegal immigrants and non-English speakers. Jodi Kantor, *Nanny Hunt Can Be a ‘Slap in the Face’ for Blacks*, N.Y. TIMES, Dec. 26, 2006, at A1.

182. See ROMERO, *supra* note 74, at 94-95 (referring to minority domestic workers generally).

183. By 1989 only 3.5% of African-American women held service jobs in private households, compared to 37.5% in 1960. Terry A. Repak, *Labor Recruitment and the Lure of the Capital: Central American Migrants in Washington DC*, in GLOBAL DIMENSIONS OF GENDER AND CAREWORK 65, 66 (Mary K. Zimmerman et al. eds., 2006) (quoting research done in 1990 by Marilyn Power for the Institute for Women’s Policy Research). In 1995 fewer than 17% (about 137,000) of domestic workers in general were black women. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 222 (2001).

184. BRIDGET ANDERSON, *DOING THE DIRTY WORK? THE GLOBAL POLITICS OF DOMESTIC LABOUR* 150 (2000) (noting that numbers are extremely difficult to gauge but accumulated evidence shows that in the United States “increasing numbers of immigrant women [are] working in private households”); HONDAGNEU-SOTELO, *supra* note 73, at 17 (stating that Mexican, Caribbean, and Central American women predominate today in metropolitan centers as in-home paid caretakers).

185. See CHANG, *supra* note 126, at 123-24 (explaining that since the 1980s, international financial institutions such as the World Bank and the International Monetary Fund have placed stipulations on

States by employers' preference for immigrant domestic workers.<sup>186</sup> As Rhacel Salazar Parreñas has succinctly put it, "The hierarchy of womanhood—involving race, class, and nation, as well as gender—establishes a work transfer system of reproductive labor among women, the international transfer of caretaking."<sup>187</sup> Visas for domestic workers are strictly limited in number, and thousands of workers enter the United States through illegal channels.<sup>188</sup>

Parents who hire lower-class or immigrant caretakers often perceive these caretakers as subordinates.<sup>189</sup> Still they aim to provide their children with stimulating child care that will enhance their intellectual development. This is where the internal logic of concerted cultivation accounts for the high risk of caretakers' mistreatment. First, concerted cultivation encourages parents to pursue a high level of control over caretakers.<sup>190</sup> Since parents want their children to continuously improve, many of them are very strict about the way caretakers spend their time with the children, the activities in which they engage, and the child-focused environment they are expected to create. Julia Wrigley sums it up this way: "Parents can benefit from their caregivers' labor only if they control it. This requires thought, effort, and a certain ruthlessness."<sup>191</sup> Many parents expect caretakers to work without taking a break, to constantly react to the child, and to fulfill all of his or her needs as they arise. Some employers go so far as to actively seek undocumented non-

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loans to developing countries, requiring them to engage in structural adjustments programs (SAPs) that mainly affect women, who pay for the dismantling of social programs both in their countries of origin and in developed countries); Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1, 57 ("Many Third World countries increasingly depend upon the export of women and women's domestic service. Women in the Third World have become indispensable in providing cheap labor to the 'global capitalist economy.'"). A survey done among undocumented domestic workers from Mexico revealed that most of them were pushed to migrate in search of work that would support their parents or complement their husbands' earning. Richardson & Torres, *supra* note 177, at 72.

186. Maria de la Luz Ibarra, *Creen Que No Tenemos Vidas: Mexicana Household Workers in Santa Barbara, California*, in MORE THAN CLASS: STUDYING POWER IN U.S. WORKPLACES 148, 151 (Ann E. Kingsolver ed., 1998).

187. RHACEL SALAZAR PARREÑAS, *SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION, AND DOMESTIC WORK* 78 (2001).

188. Caretakers have three legal ways to enter the United States for work. The first is with the use of special visas: "A-3 visas to work for ambassadors, diplomats, consular officers, public ministers, and their families; G-5 visas to work for officers and employees of international organizations or of foreign missions to international organizations and their families; and B-1 visas to accompany U.S. citizens who reside abroad but are visiting the United States or assigned to the United States temporarily . . . or [to accompany] foreign nationals with nonimmigrant status in the United States." HUMAN RIGHTS WATCH, *HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES* 4 (2001) (citations omitted). The second is to enter as part of the *au pair* program with the "visiting scholar" visa (J-1), usually used to bring young middle-class European students to care for children for a limited time. Young, *supra* note 185, at 48. The third is with a temporary employment visa (H2-B). *Id.*

189. WRIGLEY, *supra* note 4, at 4-5. Women who migrate to work in developed countries do not usually come from the poorest classes of their society and are typically better educated and more affluent than male migrants. Barbara Ehrenreich & Arlie Russell Hochschild, *Introduction*, in *GLOBAL WOMAN*, *supra* note 73, at 1, 10.

190. Tronto, *supra* note 9, at 44.

191. WRIGLEY, *supra* note 4, at 99.

citizen caretakers because they are more likely to be compliant.<sup>192</sup> Caretakers are supposed to provide care without having “much authority over the children or in planning activities.”<sup>193</sup> Instead of bringing up children, some caretakers find themselves waiting on and serving them.<sup>194</sup>

The second manner in which concerted cultivation motivates subordination is related to the expectations and preferences that parents form based on the caretaker’s race, ethnicity, religion, and class.<sup>195</sup> Many parent employers judge prospective employees according to racialized conceptions of “warmth, love for children, and naturalness in mothering.”<sup>196</sup> Sociologists found that “employers often use socioeconomic status, immigrant status, and racial group membership to define the subordinate social status of workers.”<sup>197</sup> Parents who perceive caretakers as culturally subordinate often do not trust the caretakers to give their children the stimulation that concerted cultivation requires.<sup>198</sup> These parents retain for themselves intellectual tasks like reading and helping with homework and cultural tasks like shopping, and leave to caretakers the less creative and more physical and repetitive tasks of child care.<sup>199</sup> These parents classify the domestic chores performed by unprivileged women as unimportant to children’s development, a perception that reinforces the notion that

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192. Mary Romero, *Immigration, the Servant Problem and the Legacy of the Domestic Labor Debate: “Where Can You Find Good Help These Days!,”* 53 U. MIAMI L. REV. 1045, 1060-61 (1998).

193. Romero, *supra* note 2, at 819.

194. *Id.* Julia Wrigley reports that some of the parents she interviewed expressed the belief that their children were intellectually superior to the caretakers they employed. *See* WRIGLEY, *supra* note 4, at 41.

195. Abigail B. Bakan & Daiva K. Stasiulis, *Making the Match: Domestic Placement Agencies and the Racialization of Women’s Household Work*, 20 SIGNS 303, 310 (1995) (finding that in Canada as well as the United States, racialized stereotypes inform employers’ expectations of potential employees, and as a result play into domestic placement agencies’ decisions); Romero, *supra* note 2, at 835; Mary Romero, *Unraveling Privilege: Workers’ Children and the Hidden Costs of Paid Childcare*, 76 CHI-KENT L. REV. 1651, 1663 (2001).

196. Romero, *supra* note 2, at 835 (internal quotation omitted); *see also* PARREÑAS, *supra* note 187, at 177-79 (finding that both in Rome and in Los Angeles migrant Filipina domestic workers are usually paid higher salaries than blacks and Latinas and that the different treatment owes partly to the stereotype attached to Filipinas, such as “nice” and “hardworking,” as well as to their better command of the English language).

197. Shellee Colen, *“With Respect and Feelings”: Voices of West Indian Child Care and Domestic Workers in New York City*, in ALL AMERICAN WOMEN: LINES THAT DIVIDE, TIES THAT BIND 46, 55 (Johnnetta B. Cole ed., 1986) (“The assignment of [child care and domestic labor] to those with low status, by virtue of gender, and racial and ethnic hierarchies, reinforces these hierarchies.”); Uttal & Tuominen, *supra* note 168, at 772.

198. Parental distrust of caretakers’ abilities also accounts for caretakers’ diminishing utility to middle-class parents as the children in their charge grow older. *See* WRIGLEY, *supra* note 4, at 40-41 (finding that no matter how attentive the caretaker and how satisfactory parents had found her to begin with, parents tend to move their children “into their own cultural orbit” as they get older and immigrant caretakers generally lose their hold on their jobs after children become verbal).

199. Romero, *supra* note 2, at 819-20; *see also* WRIGLEY, *supra* note 4, at 111-12 (stating that parents retain control over four main categories: discipline, safety, health, and nutrition).

caretakers are interchangeable and the presumption that caretakers do not perform a parental role in their children's lives.<sup>200</sup>

The risk of exploitation is further aggravated by the work conditions most in-home caretakers face. With a few exceptions,<sup>201</sup> domestic workers have been discriminated against by Congress, which has excluded them from many of the protections of labor laws.<sup>202</sup> State laws generally fail to fill in the gaps left by federal legislation.<sup>203</sup> Furthermore, paid caretakers' employment takes place in the employers' "private sphere" and therefore is not perceived as "a real job."<sup>204</sup> Unlike most employees, who work in a place of business conducted for profit, and usually with other people, in-home caretakers are often expected to blend in to their work environment, and are consequently isolated from peers and support networks.<sup>205</sup> Many parents also take advantage of the fact that in-

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200. This division of labor can be understood in terms of the prevalent ideological distinction between menial and spiritual housework, as identified by Dorothy Roberts. This division allows parents to find someone who will perform the menial components of childrearing—bathing, feeding, dressing, chauffeuring, monitoring—so that parents can then devote whatever scarce time they have with their children to their intellectual cultivation, without giving up (indeed intensifying!) their child-centered childrearing ideology. Roberts adds that working mothers might not be able to devote quality time to their children at all if they came home to face the chores that the caretaker performed during the day. Roberts, *supra* note 98, at 51, 58.

201. The Fair Labor Standards Act (FLSA) requirements regarding minimum wage and record-keeping apply to domestic workers. *See* 29 U.S.C. § 206(f) (2000); 29 C.F.R. § 516.2 (2007). However, employers are allowed to deduct from the minimum wage "reasonable costs of room and board," thus legalizing paying resident caretakers less than the minimum wage. HUMAN RIGHTS WATCH, *supra* note 188, at 30 & n.185 (internal quotation omitted). Moreover, 29 U.S.C. § 207(a)(1) (2000), which provides workers with additional compensation for every hour worked over forty hours a week, applies only to employees who are "engaged in commerce" or employed in an enterprise which is. However, some states (such as New York and Maryland) provide domestic workers overtime protection. HUMAN RIGHTS WATCH, *supra* note 188, at 30 n.182.

202. The National Labor Relations Act (NLRA) explicitly excludes domestic workers from its protection. 29 U.S.C. § 152(3) (2000). This disadvantage is at least partly responsible for domestic workers' depressing wages. Silbaugh, *supra* note 176, at 74; Young, *supra* note 185, at 27. Domestic workers are also excluded from the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-658 (2000). *See* 29 C.F.R. § 1975.6 (2007). This exclusion is especially severe because OSHA covers other single-employee workplaces and other workers entering private homes. Silbaugh, *supra* note 176, at 77. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, does not apply to most domestic workers because of its fifteen employee minimum. *See* 42 U.S.C. § 2000e(b) (2007); HUMAN RIGHTS WATCH, *supra* note 188, at 30.

203. Young, *supra* note 185, at 30-33 (reviewing state legislation and finding that States exempt workers employed in private homes from minimum wage laws and from maximum hours provisions and restrict their eligibility to unemployment benefits); *see supra* note 201.

204. HONDAGNEU-SOTELO, *supra* note 73, at 9; *see also* ROMERO, *supra* note 74, at 51-52 (adding that housework has become fused with the roles of mother and wife and is therefore not considered labor); Cheever, *supra* note 74, at 36 (quoting a participant in a "nanny-awareness class" in Brooklyn as saying, "The main thing they told us was to be businesslike . . . but it's hard to be businesslike when you're going into someone's house and taking care of their children.").

205. PARREÑAS, *supra* note 187, at 161-62 (noting that the problem is especially acute for live-in caretakers, who "[o]ften feeling trapped[,] . . . cannot help but see the enclosed space of the employer's home as a prison"); Baquedano-López, *supra* note 73, at 8 (documenting very little sharing of personal information between paid caretakers, even though they spend substantial amounts of time together in the same park in Los Angeles); Uttal & Tuominen, *supra* note 168, at 767 ("[T]he private location of [in-home caretaking] contributes to the potential for exploitation."). Isolation also facilitates employers' abuse of workers. HUMAN RIGHTS WATCH, *supra* note 188, at 6. Combined with the diversity of

home caretakers' job requirements are ambiguous.<sup>206</sup> Caretakers are frequently "asked to do work—dog walking, ironing, serving at dinner parties—that was not part of the job description and was not included in the original salary,"<sup>207</sup> and some employers expect them to be available for extremely long workdays.<sup>208</sup> Consequently, caretakers report that "they feel like 'objects' or 'things' within a labor process where they have little control, where they have few interactions with other workers, and where at any moment their job can be taken away from them."<sup>209</sup> This feeling is further aggravated by the fact that employers often resent developing personalized relationships with in-home caretakers, and many want their employees to demand little in terms of parental time, space, and attention.<sup>210</sup> Whatever restraints parents might normally have are often removed by their sincere concern for their children's future well-being.<sup>211</sup> As one New York mother put it rather extremely, "I want someone who cannot leave the country, who doesn't know anyone in New York, who basically does not have a life. I want someone who is completely dependent on me and loyal to me and my family."<sup>212</sup>

Poor job conditions and the high risk of mistreatment have led some scholars to doubt that paid in-home caretaking is as beneficial to children as parents and courts seem to think. They argue that paid in-home caretaking, as it is practiced today, may nourish selfishness, racism, and entitlement in children.<sup>213</sup> Some children come to view relationships as potential employment relationships and experience the power of money to buy affection.<sup>214</sup> They

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employers and workers, isolation also leaves little opportunity for workers to organize and bargain collectively to improve their conditions.

206. Hochschild, *supra* note 73, at 35; see Colen, *supra* note 197, at 63; Richardson & Torres, *supra* note 177, at 88-89.

207. Hochschild, *supra* note 73, at 35; see HONDAGNEU-SOTELO, *supra* note 73, at 138; ROMERO, *supra* note 74, at 131; WRIGLEY, *supra* note 4, at 17; Richardson & Torres, *supra* note 177, at 83 (quoting an employee who in addition to taking care of a newborn baby and a three-year-old was expected to "clean the house, do the laundry and run errands" with no addition to her salary of thirty-five dollars per week).

208. See HONDAGNEU-SOTELO, *supra* note 73, at 141-42 (reporting that employers required caretakers to sleep in the children's room, even when allocated a private room for their usage, and expected paid caretakers to remain on duty even when the employers were present).

209. Ibarra, *supra* note 186, at 166.

210. WRIGLEY, *supra* note 4, at 26; see also HONDAGNEU-SOTELO, *supra* note 73, at 172-75 (arguing that mothers who engage in full-time employment wish to avoid or minimize personal relationships with their in-home caretaker, and are less likely than homemakers to view the employee as their extension); Colen, *supra* note 197, at 54-56 (finding that many of the women she interviewed had difficulties with the asymmetrical social relations of care and domestic work); Hondagneu-Sotelo, *supra* note 74, at 68 ("Many employers go out of their way to minimize interactions with their domestic employees, but Latina immigrant women, especially those who look after children, crave personal contact."); Richardson & Torres, *supra* note 177, at 78 (finding that few employers choose to become friends with their employees, and that even the friendly employers are careful not to tread on the boundaries of the employment relationship).

211. Tronto, *supra* note 9, at 43.

212. CHANG, *supra* note 126, at 109-10.

213. Tronto, *supra* note 9, at 40.

214. WRIGLEY, *supra* note 4, at 127-28; Baquedano-López, *supra* note 73, at 18.

learn to treat people as merely a means to an end and may come to expect that others always be available to them.<sup>215</sup> It is problematic, therefore, for custody judges to assume, without checking the specific work conditions, that paid care in the child's home is quality care. Furthermore, the doctrinal limitations of custody law obscure the harm inflicted on other children, who are not part of the custody litigation before the court. Constrained by the goal of finding the best care for the children whose custody they adjudicate, judges have no reason—or legal ground—to take into account the price that the children of in-home caretakers pay.<sup>216</sup> The problem is most acute for immigrant caretakers, especially undocumented ones, who often find it impossible to bring their own children with them to the United States.<sup>217</sup> Not surprisingly, these children report feelings of loss and sadness over this acute disruption in their relationships with their mothers.<sup>218</sup> My aim in emphasizing the price caretakers' children pay is not to cast blame on immigrant caretakers, who usually find the separation from their families to be a constant cause of pain.<sup>219</sup> Rather, it is to note that discussing paid in-home caretaking as a care arrangement within custody decisions hides the hardship experienced by caretakers' children. The fact that this problem cannot be addressed within custody law is not, in itself, a good enough reason to ignore the externalities of this childrearing practice altogether.

### C. Conclusion

The reasoning that judges apply in the “nanny cases” manifests and reinforces the internal logic of concerted cultivation. First, automatically considering in-home caretaking to be quality care is compatible with the belief that good childrearing means providing the child with the constant attention of an adult working to enhance the child's development and attuned to the child's needs. Second, the attribution of the caretakers' work to the parents who hired them mitigates the gap between parents' actual involvement in childrearing and their perception—and society's—of what good parenting entails. Any legal attempt to acknowledge the importance of caretakers' specific qualities would

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215. Tronto, *supra* note 9, at 40.

216. Some of these children, who are in the United States, learn their place in the race and class stratification through encounters with their mothers' employers and employers' children. Romero, *supra* note 195, at 1669-70. Their mothers' attention, energy, and time are invested in their charges and thus diverted from them. Sau-ling C. Wong, *Diverted Mothering: Representations of Caregivers of Color in the Age of "Multiculturalism,"* in *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY* 67, 71-73 (Evelyn Nakano Glenn et al. eds., 1994). Many have to care for siblings in their mothers' absence. Romero, *supra* note 195, at 1664.

217. Hochschild, *supra* note 73, at 21.

218. *Id.* at 22; Rhacel Salazar Parreñas, *The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy*, in *GLOBAL WOMAN*, *supra* note 73, at 39, 42, 48, 50; Romero, *supra* note 195, at 1665-66.

219. Hochschild, *supra* note 73, at 21; Parreñas, *supra* note 218, at 41.

shatter the parents' and the courts' illusion that parental care is the only care that is irreplaceable. Thinking of paid caretakers as disposable is important to satisfy the demands of concerted cultivation. Parents can hire paid caretakers to spend a significant amount of time with their children, demanding that they act with love and maternal warmth, and at the same time, devalue the caretaker-child relationship and the caretaker's contributions to the child's development.

As it now stands, the practice of in-home caretaking is also likely to reaffirm racial hierarchies and traditional gender roles. Rather than a feminist victory, this practice represents an upper-middle-class feminist concession.<sup>220</sup> Instead of motivating men to take upon themselves an equal amount of child care responsibilities,<sup>221</sup> insisting on subsidized quality day care,<sup>222</sup> or pushing workplaces to accommodate women's caretaking responsibilities,<sup>223</sup> in-home caretaking facilitates a bogus achievement, buying the liberation of the wealthy few without undermining the foundations of women's domesticity.<sup>224</sup> As Audrey Macklin has noted, "The grim truth is that some women's access to the high-paying, high-status professions is being facilitated through the revival of semi-indentured servitude. Put another way, one woman is exercising class and citizenship privilege to buy her way out of sex oppression."<sup>225</sup> Before courts

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220. See, e.g., Hochschild, *supra* note 73, at 20 ("Two women working for pay is not a bad idea. But two working mothers giving their all to work is a good idea gone haywire.").

221. ROMERO, *supra* note 74, at 128.

222. Jean H. Baker, *Child Care: Will Uncle Sam Provide a Comprehensive Solution for American Families?*, 6 J. CONTEMP. HEALTH L. & POL'Y 239 (1990); Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561 (2005).

223. Most American workplaces do not consider employees' child care responsibilities as a factor in defining their demands and expectations for employee performance. Kelly, *supra* note 168, at 1051-52; see also EYER, *supra* note 154, at 65 (arguing that the workplace presents women with "the maternal wall, which prevent[s] them from both working and caring for their families"). Scholars have challenged the contemporary organization of the workplace and advocated changes that would accommodate employees' caretaking responsibilities. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 285 (2004) (demanding that the state "oversee and facilitate the restructuring of the workplace so that market institutions accommodate caretaking"); NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* 227 (2001) (offering a different structure for paid parental leaves that would ensure parental attention for infants and promote gender equality); Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 70 (2002) (arguing that jobs can and should be restructured to accommodate mothering). For opposition to proposed subsidies for parents, see Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001).

224. Grace Chang, *Undocumented Latinas: The New "Employable Mothers,"* in *MOTHERING*, *supra* note 216, at 259, 277 (noting how necessity has driven minority communities to construct alternatives to female domesticity). Moreover, most in-home caretakers are hired and supervised by women, so that even as employers, middle-class women retain substantial responsibility for child care. ROMERO, *supra* note 74, at 128.

225. Audrey Macklin, *On the Inside Looking In: Foreign Domestic Workers in Canada*, in *MAID IN THE MARKET: WOMEN'S PAID DOMESTIC LABOUR* 13, 34 (Wenona Giles & Sedef Arat-Koç eds., 1994). The willingness of women in developing countries to migrate to developed countries and perform low wage jobs is enhanced, among other things, by the collapse of welfare in their countries of origin, stemming from the economic policy of developed countries. CHANG, *supra* note 126, at 123-24.

can turn to in-home caretaking as a solution to parental inadequacy or unavailability, we need to rethink caretakers' status in society.

#### CONCLUSION

Contemporary custody law is concerned with children's well-being. When the family is disrupted, courts try to provide children with optimal child care. At first glance, it seems that the "nanny cases" can be explained within the principles of child custody doctrine: Courts credit parents for providing quality substitute care and order inadequate parents to employ caretakers because *somebody* has to take care of these children.

This Article argues that this doctrinal explanation does not sufficiently account for the way courts perceive in-home caretaking. Why do courts see caretakers' care as care done by parents, when they do not do so with other types of child care? Why do courts and scholars insist that there is "a world of difference" between paid caretakers and parents, while they are willing to accept, in other contexts, that day-to-day child care over long periods of time creates special attachments between children and caretakers that should be legally protected?

By analyzing in-home caretaking in the context of the current legal and cultural regulation of parenthood, this Article provides an alternative explanation for the appeal of in-home caretaking and its peculiar conceptualization as care without a caretaker. It argues that the characteristics of in-home paid caretaking—intense one-on-one care in the child's home—help to conceal the discrepancy between a legal regime in which parenting is still regarded as an exclusive status and the reality of contemporary family life in which many tasks associated with parenting are regularly performed by people who are not legally considered parents. The "nanny cases" bridge this gap by valorizing one-on-one child care while erasing the caretaker herself. Her care is instead credited to the parents, creating an ideal (but fictional) legal family. This conceptualization obscures the important role paid in-home caretakers can come to play in children's lives and causes dual-earner families to appear as if they abide the two-parent model when in practice they do not.

This Article demonstrates that courts do not take such a favorable view of other caretaking arrangements because they do not lend themselves to this conceptualization. Day care is incompatible with concerted cultivation, and as a result it is not seen as parental enough. It takes place outside the child's home, it does not provide children the full attention of one adult focused solely on the children's needs and development, and it is hard to use the notion of parental supervision as a conceptual tool for attributing the caretaker's work to the parent. Kin care, in contrast, is considered too much like parental care. We see relatives, their motivations, and their relationships with children as independent

of the parents—therefore the care that they provide cannot be attributed to the parents in the same way that paid caretakers' care can. Given that paid in-home caretaking is the most expensive child care option, the courts' ideological preference for this care has the potential to reinforce existing inequalities. Parents who cannot buy a substitute parent for their children do not enjoy the same advantages; whether they leave their child in a day care or with relatives, courts do not see parents as performing the actual care. Only parents who employ in-home caretakers have this privilege.

What alternatives does the legal system have? The less promising route is to acknowledge the parental role of paid caretakers by changing their status vis-à-vis the individual child that they care for. Some in-home caretakers develop an emotional attachment to their charges and experience a feeling of loss when the relationship is severed by the parents.<sup>226</sup> If acting "motherly" is an important job requirement, the emotional investment of paid caretakers could be rewarded by some legal protection to the caretaker-child bond.

This approach is extremely impractical. To begin with, it requires too stark a departure from the current legal doctrine and cultural norms. If part of paid caretakers' appeal in the eyes of judges and parents is that they are perceived as posing no threat to the exclusive family, a complete reversal of their status is highly unlikely anytime soon. It is also impractical because it would be relatively easy for parents to avoid any conditions set to trigger the awarding of such status. For example, if parents knew that by employing the same caretaker over a certain period of time they would expose themselves to a legal claim for visitation, they would simply replace caretakers more often, thus reinforcing the perception of caretakers as disposable. Parents' desire to avoid the risk of caretakers' parental rights would result in impossible strains on the employment relation. However impractical, the suggestion to afford in-home caretakers parental privileges and the strong, almost instinctive, objection it provokes are very revealing, because they highlight the fact that employing in-home caretakers is an activity with externalities currently not paid for by the beneficiaries of this activity. If it is unthinkable that any employer would hire an in-home caretaker should the terms of employment recognize the caretaker-child relationship, it means that a segment of the population's way of life is currently made possible only because it does not pay the full price for its choices.

Instead of seeking a solution on the individual household level, I argue that reattaching care to caretakers can—and should—provoke us to question the nuclear family model and the parental exclusivity doctrine that builds upon it. Fully acknowledging the parental role of caretakers can be a positive step toward rethinking parental exclusivity and replacing it with a doctrine that

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226. See *supra* notes 73-74 and accompanying text.

better reflects the fact that childrearing in many contemporary American families is a collaborative rather than an exclusive project.

Moreover, realizing that paid in-home caretakers raise American children can bring about a change in their status in society. Caretakers frequently face unclear job requirements, isolation, separation from their families, little control over the substance or schedule of their work, and sometimes disrespect and even racism. These problems cannot be solved at the individual household level: They require a systemic solution. As I noted earlier, some scholars have already argued for changes in employment law to extend protections awarded to workers in general to domestic workers, including in-home caretakers. In addition, a substantial change in immigration rules is necessary. Currently paid caretakers are treated as disposable, unskilled laborers who can be disconnected from their families, imported, and later discarded. Acknowledging the fundamental role of paid in-home caretakers requires the accommodation of their basic needs not only as workers, but as parents as well. The fact that it might be considered preposterous that in-home caretakers be recognized as “American mothers” and receive especially favorable treatment by immigration authorities only shows that society is not currently paying the full cost of one of its growing child care solutions.

Feminists have long struggled to change policies that hinder women’s attempts to combine motherhood with gainful employment. A policy that allows the wealthy few to integrate professional work with maternal obligations by pretending that they perform these obligations themselves is potentially detrimental to other mothers who cannot afford this charade. Furthermore, in valuing “nanny care” as the best care while discarding the caretaker as irrelevant, courts devalue care work generally, and subordinate in-home paid caretakers. A feminist victory that creates such obvious injustice is no victory at all.

For many there is a clash between what they think of as good parenting and what they do as parents. This clash is mirrored by the legal system, which pretends we do one thing (provide children with intensive care by two parents) even when we do another (provide children with intensive care by third parties). I suggest we see in-home caretaking for what it really is, even if this realization requires us to rethink the legal definitions and cultural perceptions of parenthood.

