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PARENTS AS FIDUCIARIES

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TRADITIONALLY, the law has deferred to the rights of biological parents in regulating the parent-child relationship. More recently, as the emphasis of legal regulation has shifted to protecting children's interests, critics have targeted the traditional focus on parents' rights as impeding the goal of promoting children's welfare. Some contemporary scholars argue instead for a "child-centered perspective,"¹ in contrast to the current regime under which biological parents continue to have important legal interests in their relationship with their children. The underlying assumption of this claim is that the rights of parents and the interests of children often are conflicting, and that greater recognition of one interest means diminished importance to the other.

One way of thinking about a legal regime that seeks to harmonize this conflict is to imagine that the parent's legal relationship to the child is shaped by fiduciary responsibilities toward the child rather than by inherent rights derived from status.² Fiduciaries in law are agents who occupy a position of special confidence, superi-

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¹ See, e.g., Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *Cardozo L. Rev.* 1747 (1993). Woodhouse argues that gestational and social parenting should receive legal protection, while the fact of biological parenthood should have little relevance.

² Woodhouse describes parenthood using the model of stewardship. See *id.* at 1755. Although commentators have suggested rhetorically that the parental role be defined as that of a fiduciary, no one has rigorously examined the implications of defining the legal role in this way. See, e.g., Francis J. Catania, Jr., *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 *Neb. L. Rev.* 1228, 1231-32 (1992); Ira C. Lupa, *The Separation of Powers and the Protection of Children*, 61 *U. Chi. L. Rev.* 1317, 1318-19 (1994).

ority, or influence, and thus are subject to strict and non-negotiable duties of loyalty and reasonable diligence in acting on behalf of their principals.³ Characterizing parents as fiduciaries suggests that the parent-child relationship shares important features with other legal relationships that have been similarly defined, such as trustees and trust beneficiaries, corporate directors and shareholders, executors and legatees, and guardians and wards. Basic structural similarities are apparent. There are information asymmetries in this family relationship that are analogous to those of other fiduciary relationships. Moreover, satisfactory performance by parents, like that of other fiduciaries, requires considerable discretion, and children, like other principals, are not in a position to direct or control that performance. Here, as in other contexts, the challenge for legal regulation is to encourage the parent to act so as to serve the interests of the child rather than her own conflicting interests, and yet to do so in a context in which monitoring parental behavior is difficult.

Particular features of the parent-child relationship distinguish it from most traditional fiduciary relationships, however, and thus present some unique challenges. This relationship is broader in scope than are many other fiduciary relationships. Beyond this, the parental relationship, once established, has intrinsic value for the child that extends beyond successful performance of caretaking tasks.⁴ Obviously, the unique characteristics of family relationships

³ "The fiduciary relation may exist wherever special confidence is reposed, whether the relationship be that of blood, business, friendship, or association, by one person in another who are in a position to have and exercise or do have and exercise influence over each other." *Dawson v. National Life Ins. Co.*, 157 N.W. 929, 933 (Iowa 1916); see also Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1126-30 (1981) (summarizing the strict obligations imposed upon fiduciaries for the benefit of principals).

⁴ The loss of the relationship with a parent can inflict serious costs on the child. Research on divorce indicates that reduced contact with fathers is a source of significant harm to many children. See E. Mavis Hetherington, Martha Cox & Roger Cox, *The Aftermath of Divorce, in Relationships: Mother/Child, Father/Child* (Joseph H. Stevens, Jr. & Marilyn Matthews eds., 1978) [hereinafter Hetherington et al., *Aftermath of Divorce*]; E. Mavis Hetherington, Martha Cox & Roger Cox, *Divorced Fathers*, 25 *Fam. Coordinator* 417, 424-26 (1976); E. Mavis Hetherington, Martha Cox & Roger Cox, *Effects of Divorce on Parents and Children, in Non-Traditional Families: Parenting and Child Development* 233 (M. Lamb ed., 1982); see also Judith S. Wallerstein & Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope With Divorce* (1980); Judith S. Wallerstein and Sandra Blakeslee, *Second Chances: Men, Women, and Children a Decade*

necessarily shape legal regulation in idiosyncratic ways. Nonetheless, thinking systematically about parents as agents and fiduciaries is a useful project.⁵ By employing this framework, we can draw on lessons learned from the legal regulation of fiduciaries in other contexts, and on the insights of legal and agency theory that have shaped our understanding of how the law can function to optimize these relationships. Such an exercise may illuminate the deep structure of the regime of legal and extralegal norms that shape parental behavior.

Agency theory identifies two means of reducing conflicts of interest between agents and principals. Bonding encourages agents to align their interests with those of their principals, while monitoring facilitates the oversight of agents' performance to detect selfish behavior.⁶ Fiduciary law utilizes varying combinations of these mechanisms in different settings to reduce or avoid conflicts of interest. Viewed through this lens, much contemporary regulation of the parent-child relationship can be understood as serving either bonding or monitoring functions. There are, however, some aspects of family law that seem sharply dissonant with this perspective, reflecting in part the lingering influence of traditional legal structures regulating family-state relations.

Part I of this Article begins with a brief account of the growing criticism that legal policy regulating the parent-child relationship is driven excessively by the objective of protecting parents' rights. Critics argue that children's welfare rather than parents' rights

After Divorce 143-44 (1989); Judith S. Wallerstein & Joan B. Kelly, Effects of Divorce on the Visiting Father-Child Relationship, 137 *Am. J. Psychiatry* 1534 (1980) [hereinafter Wallerstein & Kelly, Visiting Father-Child Relationship]; Judith S. Wallerstein & Joan B. Kelly, The Effects of Parental Divorce: Experience of the Child in Later Latency, 46 *Am. J. Orthopsychiatry* 256 (1976) [hereinafter Wallerstein & Kelly, Parental Divorce: Experience of the Child in Later Latency]. Goldstein, Freud and Solnit argue against state interference with even suboptimal parent-child relationships because of the importance of this bond to children. See Joseph Goldstein, Anna Freud & Albert J. Solnit, Before the Best Interests of the Child 3-25, 75-86 (1979).

⁵ The utility of this perspective depends in part on whether the normative premise of the focus on children's welfare is attractive, a point which might be debated. We do not propose to enter this debate. Rather, our purpose is to examine the implications of thinking about family relationships from a fiduciary perspective, *assuming* that the normative goal is to advance the interests of children.

⁶ See Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 *J. Fin. Econ.* 305, 308 (1976).

should define the legal relationship between parent and child. We suggest that the critics' challenge argues for a focus on the instrumental effects of legal regulation on this relationship. This approach asks to what extent the law influences parents to act in ways that promote their children's interests, and to what extent the focus on parents' rights is incompatible with that objective. The answer to those questions is complicated by the dynamics of the parent-child relationship, and especially by the feedback effects between parental performance and parental rights.

In Part II, we develop an informal model of the parent as fiduciary. We use the tools of agency theory to identify the optimal combinations of extralegal and legal arrangements that seem to best reduce conflicts of interest within the parent-child relationship. Owing to the peculiar characteristics of this relationship, the utility of specific mechanisms varies depending on whether or not the parent lives in a family unit with the child. In the intact family, the dominating effects of informal norms reduce the demand for extensive legal regulation. When the family is fractured, the power of extralegal constraints is diminished and more elaborate legal rules are required to ameliorate potential conflicts.

In Part III, we apply this relational model of parents as fiduciaries to contemporary family law. We conclude that, in many respects, current law fits comfortably within the fiduciary paradigm. Indeed, legal rules that are justified (and criticized) in terms of parental rights can be better rationalized as necessary complements to fiduciary obligations. To be sure, some aspects of current law appear to intensify conflicts of interest between parent and child. Many of the rules governing divorce, for example, seem to undermine children's welfare by encouraging parents to exercise their rights selfishly. But the central insight of the relational approach is to focus attention on the feedback effects between parental rights and children's interests. The contract metaphor makes explicit what is implicit in contemporary family law: parental "rights" are granted as *ex ante* compensation for the satisfactory performance of voluntarily assumed responsibilities to provide for the child's interests.

We conclude, therefore, that the criticism of contemporary family law as being unduly "rights-centered" is misplaced. The paradox of modern family law is the uneasy coexistence of legal

outcomes that largely can be explained and justified within a framework of reciprocal rights and responsibilities, together with legal rhetoric that fails to make explicit the nexus between this framework and the normative goal of promoting the welfare of children.

I. RECONCEPTUALIZING THE PARENT-CHILD RELATIONSHIP

A. *The Critique of Parents' Rights*

Legal deference to the claims of biological parents recently has come under attack in the courts, in the academic literature, and in the popular media.⁷ Cases such as the highly publicized dispute between the DeBoers and Daniel Schmidt over the custody of "Baby Jessica"⁸ contribute to a view that the law, frozen in ancient

⁷ See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 259-60 (1983) (observing that a "mere biological relationship" cannot alone establish parental rights); see also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Scalia, J., plurality opinion) (denying challenge of biological father to California statute establishing conclusive presumption that mother's husband at child's birth is legal father of child); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 *Yale L.J.* 293, 295 (1988) (advocating an emphasis on parental responsibilities rather than parental rights); Woodhouse, *supra* note 1 (placing the child's interests at the center of family law); Nancy Gibbs, *In Whose Best Interest?*, *Time*, July 19, 1993, at 44 (relating the pain of couples forced to relinquish an adopted child to its biological parents); Geoffrey Cowley, *Who's Looking After the Interests of Children?*, *Newsweek*, August 16, 1993, at 54 (emphasizing the vulnerability of adopted children under current custody laws).

⁸ See *DeBoer v. Schmidt (In re Baby Girl Clausen)*, 502 N.W.2d 649 (Mich. 1993); *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992). "Baby Jessica" was given up for adoption by her mother only hours after birth, without the knowledge of her biological father, Daniel Schmidt, and placed in temporary custody with the DeBoers. A few weeks later, upon learning that he was the father of the child, Schmidt initiated legal efforts to gain custody, on the grounds that he had not consented to the termination of his parental rights. During the pendency of the legal battle, Jessica remained in the home of the DeBoers, who resisted Schmidt's efforts to reclaim his daughter. Despite testimony from experts who warned that return to her father's custody would be emotionally traumatic for Jessica, the Iowa Supreme Court ruled that Schmidt was legally entitled to custody of his daughter. Although a subsequent determination by a Michigan court concluded that transferring custody was not in Jessica's best interests, the Michigan Supreme Court deferred to the jurisdiction of the Iowa courts, enforcing the order to return Jessica to her biological parents. For popular accounts of the case, see Bill Hewitt, *The Battle for Baby Jessica*, *People*, May 31, 1993, at 32; Jon D. Hull, *The Ties That Traumatize*, *Time*, April 12, 1993, at 48. A more recent example involves "Baby Richard," whose father's parental rights were reinstated almost four years after his placement in an adoptive home. See *In re Petition of Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994).

The "Baby Jessica" case has proved an attractive target for scholarly criticism of contemporary family law. See Suellyn Scarnecchia, *A Child's Right to Protection from*

doctrine, accords unwarranted legal protection to biological parents in ways that are both directly harmful and symbolically corrosive to the interests of their children.⁹ For example, recognition of the rights of non-custodial biological parents can undermine a relationship between the child and a more suitable social parent.¹⁰ Further, the latitude given to parents in rearing their children is seen as excessive, allowing some parents to inflict unmonitored and unsanctioned harm on their children.¹¹ More indirectly, to the extent that the law emphasizes parental rights, it encourages parents' inclination to put their own interests before those of their children, both in the intact family and on divorce or dissolution.

However controversial this issue may be today, the tradition of legal protection of parental rights has deep historical roots.¹² Before the twentieth century, the combined status of biological

Transfer Trauma in a Contested Adoption Case, 2 Duke J. Gender L. & Pol'y 41 (1995); Suellyn Scarnecchia, Who Is Jessica's Mother? Defining Motherhood Through Reality, 3 Am. U. J. Gender & L. 1 (1994). Scarnecchia, a professor at the University of Michigan School of Law, physically delivered Jessica from the DeBoers to the Schmidts. See also Wendy A. Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11, 72-84 (1994) (arguing that the mechanistic legal doctrine governing the "Baby Jessica" case failed to honor Jessica's individual interests as a child).

⁹ For general critiques of the emphasis on parental rights in modern family law, see Goldstein et. al, supra note 4, at 54; Bartlett, supra note 7, at 295; Woodhouse, supra note 1, at 1756, 1809-12. Similarly, James Dwyer argues for abandoning parental rights altogether and according parents merely child-rearing privileges, the contours of which are subject to the rights of the children. James G. Dwyer, Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 Cal. L. Rev. 1371, 1374 (1994).

¹⁰ Critics charge that policies grounded in parental rights empower unmarried fathers (like Daniel Schmidt) to derail an adoption that is in the child's interest. See supra note 8; see also Bartlett, supra note 7, at 322, 324 n.137 (arguing that the emphasis on parental rights permits fathers to exploit the legal system to the detriment of the child). These policies also devalue the custodial claims of stepparents and other third parties who have functioned as parents, and inhibit the termination of the parental rights of unfit parents to allow permanent placement of children in foster care. See Woodhouse, supra note 1, at 1784-95.

¹¹ The case of Joshua DeShaney is often cited as demonstrating the law's excessive deference toward abusive parents. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). Joshua was severely beaten by his father following many episodes of abuse. Although his case was being monitored by a social worker during the period of the abusive treatment, the county failed to intervene and prevent the abuse. See also infra note 111 (comparing *DeShaney* to other cases of parental abuse).

¹² See Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv. L. Rev. 727, 737-39 (1988); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the Child as Property, 33 Wm. & Mary L. Rev. 995, 1041-50 (1992).

parenthood and marriage signified a legal authority of almost limitless scope. Until the social reform movement at the beginning of this century,¹³ the state took little interest in family governance.¹⁴ Parents, particularly fathers as heads of household, had extensive legal authority over the lives of their children.¹⁵ Parental rights were understood to be grounded in natural law and were not dependent on behavior that promoted the child's interest.¹⁶ Parents' interest under traditional law was property-like in many respects.¹⁷ A parent's right to the custody of his children so approximated property ownership that it could be transferred by contract,¹⁸ and lost only by abandonment or unfitness.¹⁹ In the 1920s, the United States Supreme Court elevated parental rights to constitutional stature, restricting the extent to which the state can

¹³ This movement included the creation of the social work profession, with its mission of promoting the welfare of children, the founding of the juvenile court (characterized by early reformers as an institution that could perform a parental function, when parents failed), and the development of widespread public education. See Murray Levine & Adeline Levine, *A Social History of Helping Services: Clinic, Court, School, and Community* (1970); Anthony M. Platt, *The Child Savers: The Invention of Delinquency* (2d ed. 1977).

¹⁴ Indeed, Anthony Platt argues that the reform efforts of the Progressive Era were driven by a desire to create a legal means for state supervision of working class parents. See Platt, *supra* note 13, at xxii-xxix.

¹⁵ See sources cited *supra* note 12. Even today, parental rights operate against the state, third parties, and the child herself. These rights include discretion over custody, discipline, education, medical treatment, religious upbringing, and earnings and services. 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, 884 (1984).

¹⁶ Bartlett discusses the natural law origins of parental rights. See Bartlett, *supra* note 15, at 887-90; see also *Risting v. Sparboe*, 162 N.W. 592, 593-94 (Iowa 1917) (holding that "utter selfishness alone cannot be allowed to cut off the natural claim of parents to the custody of their own offspring").

¹⁷ See sources cited *supra* note 12. Indeed, before the Industrial Revolution, children were economic assets of their parents in agrarian society, contributing to the characterization of the parents' interest as a property right. See John J. Dempsey, *The Family and Public Policy* 3 (1981).

¹⁸ This transaction could occur, under ancient English common law, when parents placed children in indentured service or apprenticeship. Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 *Emory L.J.* 209, 210 & n.5 (1978).

¹⁹ See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). The loss of parental rights through abandonment is firmly based on property concepts. Unfitness is, of course, a different matter.

override parental authority.²⁰ Although modern courts vigorously reject the characterization of children as the property of their parents, many argue that this legacy continues to cast a shadow.²¹

In fact, the situation is even more complex than the critics recognize. Although many assume that outcomes such as that reached in the DeBoers-Schmidt dispute result from the failure to reform archaic legal doctrine, the extension of parental rights to unmarried biological fathers is actually a relatively recent development.²² Historically, unmarried fathers were invisible parents, presumed by courts and legislatures to have no legal interest in their children.²³ This presents an apparent puzzle, given the patriarchal character of traditional family law (although the legal response may reflect, as Mary Shanley has argued, a desire to shield fathers from financial responsibility for children that they produced outside of marriage).²⁴ In any event, legal policy rested on the very plausible empirical assumption that most unmarried fathers had little interest in having a relationship with their children.²⁵ Today, the rhetoric of parental rights extends to this group of parents, and consent of the unmarried father to the adoption of his child (either by

²⁰ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the fundamental right to control education of one's child is constitutionally protected); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that an Oregon law requiring children to attend public schools was an unconstitutional violation of the fundamental right to control education of one's child); see also Woodhouse, *supra* note 12, at 997 (arguing that these cases gave a constitutional underpinning to the concept that children are property of their parents).

²¹ See, e.g., Woodhouse, *supra* note 12, at 997, 1113-15; Bartlett, *supra* note 15, at 882.

²² Traditionally, unmarried mothers had more robust rights than fathers. For example, before *Stanley v. Illinois*, 405 U.S. 645 (1972), the mother's, but not the father's, consent to adoption was required under most adoption statutes. The parental rights of unmarried mothers, however, were (and are) more fragile than those of married parents, at least in practical effect. Unmarried mothers are much more likely to be subject to state supervision and intervention as a part of receipt of public assistance.

²³ See John R. Hamilton, Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 Ky. L.J. 949, 949 (1987-88) ("Until a few years ago, unwed fathers were ignored by or received virtually no protection from either the United States Constitution or the statutes of most states."); Elizabeth R. Stanton, Note, *The Rights of the Biological Father: From Adoption & Custody to Surrogate Motherhood*, 12 Vt. L. Rev. 87, 92 (1987).

²⁴ See Mary L. Shanley, *Unwed Father's Rights, Adoption and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 Colum. L. Rev. 60, 66-70 (1995). Shanley contrasts the lot of unmarried fathers ("shielded from financial responsibility for his 'spurious' offspring") with that of mothers ("[A] woman who bore children outside of marriage was 'ruined' . . ."). See *id.* at 69.

²⁵ The exigencies of administrative efficiency in the placement of children supported a policy of presnming that unmarried fathers lacked a legal interest in their children.

strangers or by a stepparent) has become a factor of much greater importance.²⁶ The outcome in the DeBoers case, vindicating the paternal rights of Daniel Schmidt, fits into this legal framework.

Outside of the adoption context, non-custodial biological parents often win custody contests with stepparents and other third parties who have functioned in a parental role.²⁷ To the consternation of critics, traditional law gives little legal protection to the relationship between the faithful stepparent and the child if the biological parent is fit.²⁸ Similarly poignant are cases in which a grandparent or other relative has assumed the care of a child who is neglected or informally abandoned by his parent. Months or even years later, the wayward parent who mends her ways may assert her parental rights and often successfully reclaim custody.²⁹

Critics of parental rights also decry the legal response to seriously deficient parental conduct. State agents are constrained from directly monitoring the quality of parental care by policies that support parental authority and family privacy.³⁰ Many critics view these policies as leaving children vulnerable and without adequate

²⁶ Modern doctrine has evolved from the 1972 Supreme Court opinion in *Stanley*, 405 U.S. at 648, which signalled that the claims of at least some unmarried fathers warrant constitutional protection. In the years since *Stanley*, the Court has explored the constitutional scope of parental rights in several cases involving unmarried fathers.

²⁷ Woodhouse, *supra* note 12, at 1048 nn.245-47, describes several such cases. See, e.g., *Harper v. Tipple*, 184 P. 1005 (Ariz. 1919) (holding that a child who lived over three years with her grandparents following her mother's death must be returned to the father, absent clear showing of incompetency); *In re Salter*, 76 P. 51, 52 (Cal. 1904) (directing lower court to award guardianship of a child to his father rather than the child's grandmother if father found competent); *Lee v. Lee*, 65 So. 585, 588 (Fla. 1914) (ruling that a father had the right to custody of his seven-year-old child despite fact that child had been raised by cousins from the age of nine days); *Hernandez v. Thomas*, 39 So. 641, 645 (Fla. 1905) (finding a competent father is generally preferred as custodian of his child over other parties, here a grandmother); *In re J.P.*, 648 P.2d 1364, 1374-75 (Utah 1982) (holding that absent a showing of parental unfitness, state may not terminate parental rights, even if such termination would be in the best interest of the child).

²⁸ Traditional law is slowly changing in this area, but courts still generally favor biological parents in these contests. For a discussion of the legal protection of stepparents' rights, see David R. Fine & Mark A. Fine, *Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 *Dick. L. Rev.* 49, 56-57 (1992). For a survey of statutes covering the rights of third parties, see American Bar Association, "Rights of Third Party," 25 *Fam. L.Q.* 26 app. (1991).

²⁹ See *supra* note 27.

³⁰ See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 *Mich. L. Rev.* 1803, 1835-39 (1985) (discussing the legal tradition of noninterference in the family).

protection from their parents' neglectful or abusive behavior.³¹ Even when children are in state custody, the spectre of parental rights casts a shadow. Foster care placement tends to extend indefinitely for a large percentage of these children,³² who are neither returned to their parents' custody nor available for adoption because parental rights are not terminated. Children get older (and less adoptable) while parents are given expansive opportunities to remedy the conditions that resulted in the removal.³³ Mean-

³¹ See, e.g., Fitzgerald, *supra* note 8, at 63-64. A particularly grim and poignant illustration of this point is the case of Lisa Steinberg, who was illegally adopted by New York lawyer Joel Steinberg and his live-in companion, Hedda Nussbaum. In 1987, after years of abuse, Lisa was beaten to death at age six by Joel Steinberg. Steinberg repeatedly beat Nussbaum as well, and police had been to their apartment several times prior to the fatal beating to answer neighbors' complaints. Nussbaum's coworkers had tried unsuccessfully to block the adoption, and Steinberg never formally registered the adoption to avoid investigation. Two complaints of possible child abuse were investigated in 1983 and 1984, but were rejected as unsubstantiated by investigators from the city's Human Resources Administration. See Ken Gross, *A Wicked Rage Claims a Child*, People, Nov. 23, 1987, at 44.

³² See Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 *Harv. Educ. Rev.* 599, 610-13 (1973) (a classic early account of the problems with the foster care system). Despite efforts to improve the situation of children in foster care, the average stay in foster care in many jurisdictions still exceeds two years. David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 *Loy. U. Chi. L.J.* 183 (1995), cites several studies in support of this assertion:

A New York adoption study revealed that in 1989, a child, on average, spent 4.6 years in foster care before being eligible for adoption. Debra Ratterman, *Termination Barriers: Speeding Adoption in New York State Through Reducing Delays in Termination of Parental Rights Cases* at iii (1991); see also Permanency Planning Task Force Court Appointed Special Advocates Subcommittee, *Demographics of Permanency in Allegheny County, Pennsylvania* (1992) (reporting that of the children living in foster care in Allegheny County, Pittsburgh, Pennsylvania, 44% had been in foster care for more than two years); Voluntary Cooperative Information System & American Public Welfare Association, *Characteristics of Children in Substitute and Adoptive Care: A Statistical Summary of the VCIS National Child Welfare Database 116-17* (1993) . . . (summarizing statistics showing that by the end of fiscal year 1989, 39.5% of children living in substitute care had been there for more than two years, 15.5% had been in care between two and three years, 13.4% had been in care between three to five years, and 10.6% had been in care five years or more).

Id. at 190 n.50.

³³ Robert Mnookin reported twenty years ago that social workers are often reluctant to terminate parental rights because to do so necessitates a separate legal proceeding, often with more stringent standards than those required for initial removal, and because termination of parental rights is seen as a drastic measure. See Mnookin, *supra* note 32, at 612-13. The problem has not been resolved. The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 471(a)(15), 94 Stat. 500, 503 (codified in scattered

while, children's relationships with foster parents receive little legal protection (and children are moved from one foster family to another) on the ground that a strong attachment might undermine family ties with the biological parents.³⁴

Considerable reform efforts, including comprehensive federal legislation, have focused on the problem of foster care "drift," but with few positive results.³⁵ Policies promoting family reunification have had mixed success, because a large portion of parents are unable to resume care, or fail to do so adequately. Moreover, systemic efforts directed at facilitating termination of parental rights and adoption in appropriate cases have been largely unsuccessful. Terminating parental rights continues to be a costly and cumbersome process, owing to procedural and substantive requirements

sections of 42 U.S.C.), imposed a requirement that state welfare agencies make reasonable efforts to avoid removing children from their homes or to return them to their homes after staying in foster care. According to David Herring, social workers generally fear having to prove "reasonable efforts" in court and thus decline to seek termination of parental rights. See David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. Pitt. L. Rev. 139, 180 (1992). The Department of Health and Human Services confirms this observation: "Over 75% of the respondents in the State survey indicate that the inability of the child welfare agencies to meet the 'reasonable efforts' standard to the satisfaction of State courts in a timely manner is the *primary barrier* to implementing permanent plans of adoption." Office of Inspector General, Dep't of Health and Human Servs., *Barriers to Freeing Children for Adoption* 11 (1991), *cited in* Herring, *supra*, at 180 n.117.

In *Santosky v. Kramer*, 455 U.S. 745, 768-70 (1982), the Supreme Court held that due process requires proof by clear and convincing evidence of parental unfitness to terminate parents' rights. Some observers argue that after *Santosky*, state agencies increasingly tend to maintain children in foster homes for long periods of time while they accumulate "clear and convincing evidence." See, e.g., Fitzgerald, *supra* note 8, at 63.

³⁴ Mnookin, *supra* note 32, at 612-13, 624-25. The phenomenon of foster care "drift" has been well documented. See Barbara L. Atwell, "A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. Cin. L. Rev. 593, 595 (1992); Herring, *supra* note 33, at 140-41.

³⁵ The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.), created a two-prong policy initiative to redress foster care "drift." The first prong emphasizes maintaining the family unit, by discouraging removal of the child and encouraging states to promote reunification of the family through services that would facilitate that end. See 42 U.S.C. §§ 625-27 (1988); see also S. Rep. No. 336, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1450 (describing the purpose of the act). The second prong focuses on efficient monitoring and review procedures, so that if parents cannot resume custody, parental rights can be terminated and adoption facilitated. See 42 U.S.C. §§ 670-73 (1988). There is little evidence that the Act has led to substantial improvements.

directed toward protecting parental interests.³⁶ For the population of children in foster care, a large gap separates the cases in which parents can resume care of their child from the cases in which parenting is so clearly deficient that state agents pursue termination of parental rights.³⁷ The interests of the children in this middle category, the critics argue, are poorly served by policies that protect parents' rights.³⁸

Advocates invoke child development theory in attacking legal deference toward biological parents' rights. Attachment theory emphasizes the critical importance of the relationship between the child and her primary caretaker for healthy psychological development. Although this caretaker most commonly is the child's biological mother, the biological relationship in itself is unimportant under the theory. Three psychoanalysts, Joseph Goldstein, Anna Freud, and Albert Solnit, have been particularly influential in popularizing this perspective.³⁹ They argue that the welfare of the child would be promoted if biology were deemphasized, and the law focused on protecting the relationship between the child and her *psychological* parent, the adult who cares for her needs on a day-to-day basis. In the view of Goldstein, Freud and Solnit, the biological parent who does not fill the role of psychological parent becomes a stranger to the child, and should not have a privileged legal status.⁴⁰

The critics of parental rights often focus on cases of horrendous parental conduct,⁴¹ or on contexts in which parents use a legal entitlement to claim (or reclaim) a relationship with their child which

³⁶ See *supra* note 33; Fitzgerald, *supra* note 8, at 60-61. Moreover, although the Supreme Court has declined to hold that a parent has a right to an attorney in any termination proceeding, see *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981), almost all states provide counsel for parents.

³⁷ In 1984, only eleven percent of children in foster care were adopted. Edith Fein & Anthony N. Meluccio, *Permanency Planning: Another Remedy in Jeopardy?*, *Soc. Sci. Rev.* 335, 340-41 (1992). This statistic is largely attributable to the procedural barriers precluding termination of parental rights. See Mnookin, *supra* note 32, at 612-13 (identifying the strict legal requirements for termination of parental rights as a deterrent to the initiation of termination proceedings).

³⁸ See, e.g., Fitzgerald, *supra* note 8, at 63-64.

³⁹ See Goldstein et al., *supra* note 4.

⁴⁰ See *id.* at 16-28, 47-48.

⁴¹ For examples of such cases, see *infra* note 111 (reviewing the child abuse cases of Joshua DeShaney, Susan Smith, and Elizabeth Steinberg).

in some sense they have not earned.⁴² A more subtle critique focuses on the intangible but perhaps more pervasive effects of contemporary “rights talk”⁴³ on family relationships. A rights framework is grounded in autonomy and protection of individual interests. Thus, it reinforces the parents’ tendency to elevate self-interest over the interests of their child.⁴⁴ As Carl Schneider suggests, thinking in terms of rights “encourages us to think about what constrains us from doing what we want, not what obligates us to do what we ought.”⁴⁵ Arguably, the legal emphasis on parental rights (and the cultural rhetoric that it generates) influences parents’ behavior in a number of ways. It might affect the allocation of financial resources and parental efforts between family and personal pursuits, as well as the inclination to consider the child’s welfare in making family decisions.⁴⁶ An incentive to act selfishly can, of course, lead to abuse and neglect in extreme cases. A more subtle but destructive impact on the stability of family relationships

⁴² See, e.g., Fitzgerald, *supra* note 8, at 72-84 (recounting the custody dispute underlying the “Baby Jessica” case).

⁴³ See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 121-30 (1991) (criticizing excessive emphasis on rights in American society).

⁴⁴ Many family law scholars have criticized the law’s emphasis on rights in this context as undermining family relationships and failing to express the importance of moral responsibility. See, e.g., Bartlett, *supra* note 7; Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463 (1983). Carl Schneider describes the decline of moral discourse in family law. See Schneider, *supra* note 30. See also Mary Ann Glendon, *Abortion and Divorce in Western Law* (1987) (comparing the individual rights-based approach to abortion and divorce in the United States with a more responsibility-based approach under Western European laws); Mary Ann Glendon, *The Transformation of Family Law: State, Law and Family in the United States and Western Europe* 311-12 (1989) (describing the impact of law in shaping how people think and feel about personal commitments and the possibility that law may contribute unintentionally to “dis-integrating” trends in families); Martha Minow, “Forming Underneath Everything That Grows:” *Toward a History of Family Law*, 1985 Wis. L. Rev. 819 (1985) (arguing that while family law tends to be explained in terms of individual rights, it more properly should be seen as an implementation of relational values).

⁴⁵ Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 Cal. L. Rev. 151, 162-63 (1988).

⁴⁶ A well-publicized and somewhat bizarre example of parental selfishness involved a couple who spent several days vacationing in Mexico, leaving their elementary-school-age children at home to fend for themselves. For details, see Jennifer Lenhart & Flynn McRoberts, *Abandoned Kids’ Parents Land in Jail*, Chi. Trib., Dec. 30, 1992, at 1; Lindsey Tanner, *A Year After Vacationing Couple Left Kids Alone, People Still Ask ‘Why?’*, Chi. Trib. Evening Update, Dec. 20, 1993, at 2.

results if parents are less motivated to preserve the family in the face of marital stress, or, if the family dissolves, to maintain a relationship with the child and provide financial support.⁴⁷ The regime of no-fault divorce may exemplify the effects of a rights-based conception of the parent-child relationship.⁴⁸ By making divorce easy, the law signals that, in making the decision to divorce, parents are not required to weigh the interests of their children.⁴⁹

B. *A Relational Approach*

Although the critics whose concerns we have articulated concur that beneficial family law reforms would deemphasize parental entitlement, there is no consensus about how best to promote children's welfare. One alternative is to enhance the state's role as *parens patriae* within the traditional paradigm, which purports to balance parental rights against the interest of the state in promoting the welfare of children.⁵⁰ This approach would demand a larger state presence in the family, with increased supervision of parental care and greater readiness to terminate parental rights. While this perspective does not focus directly on the parent-child relationship, its effect is to discount the interests of parents and to reduce parental authority and rights. This is because the interest-balancing approach pits the welfare of children against the interest of parents and presumes that the latter will be diminished if the former is enhanced.

Simply shifting the focus of legal regulation toward greater protection of the needs of children is unhelpful, in our view. This is so

⁴⁷ Carl Schneider argues that one of the factors behind the recent rise in tolerance of divorce and non-marital relations is the American tradition of liberal individualism. See Schneider, *supra* note 30, at 1839-42. Barbara Woodhouse refers to the emphasis on parental rights as "[t]his destructive emphasis." Woodhouse, *supra* note 1, at 1812. Mary Ann Glendon states that "[i]t is still more regrettable when the legal system inadvertently fosters irresponsible behavior, as has been the case with certain aspects of American family law." Glendon, *supra* note 43, at 105.

⁴⁸ See Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 Va. L. Rev. 9, 25-37 (1990).

⁴⁹ This is not to say, of course, that parents necessarily or even generally ignore their children's interest in deciding to divorce.

⁵⁰ This interest-balancing approach has characterized legal policy and constitutional doctrine toward families since the turn of the century. For a discussion of these countervailing interests, see Fitzgerald, *supra* note 8, at 37-46.

not because such a perspective misunderstands the social goals that drive the regulation of parent-child relationships, but rather because a child-centered approach, standing alone, will not lead reliably to legal rules that effect those objectives. Presumably, the social goal at stake in the regulation of the parent-child relationship is to ensure children the care necessary for their development into healthy, productive adults. This goal is more likely to be achieved if the law focuses principally on the relationship between parent and child, rather than on the child's needs per se. Parents are not fungible child rearers. The link between parent and child has substantial and intrinsic value to the child; the substitution of another parent and/or termination of the relationship is accomplished only at considerable cost to the child.⁵¹ Moreover, as a general matter, the state is not well suited to substitute for parents in the job of rearing children. If the calculus used to determine the optimal state role focuses on the child's interest discounted by the (now less weighty) parental interest, the presumption that these interests are inherently in tension persists and the central importance of the relationship is likely to be obscured. Moreover, assuming that we are correct that parents presumptively are the "first best" child-rearers, an interest-balancing approach offers no grounding for a regulatory regime that promotes optimal parental performance.

Other critics of rights-based family law argue that the law should emphasize parental responsibility, rather than rights.⁵² Katharine Bartlett, for example, emphasizing the law's expressive function, argues that the law should express a "better view of parenthood,"⁵³ one that is grounded in the morality of benevolence and responsibility. In her view, responsibility *is* inherent in relationship, and

⁵¹ See Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 *Fam. L.Q.* 233, 237-40 (1986); Marsha Garrison, *Why Terminate Parental Rights?*, 35 *Stan. L. Rev.* 423, 469-72 (1983); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *Stan. L. Rev.* 623, 672-74 (1976).

⁵² See, e.g., Bartlett, *supra* note 7, at 294-95; see also Milton C. Regan, Jr., *Family Law and the Pursuit of Intimacy* (1993) (arguing for a communitarian framework that emphasizes responsibility and relationship).

⁵³ Bartlett, *supra* note 7, at 294.

describes a connection based on identification.⁵⁴ Although parental responsibility is a component of a rights-based conception of family relationships, it serves primarily as a justification for rights. As such, the importance of responsibility and other relationship values is obscured and diminished.⁵⁵

In our view, Bartlett correctly identifies parental responsibility as a core component of a regulatory scheme that will better promote the interests of children. Although in many regards our analysis is compatible with communitarian principles, we propose to explore the issues of parental responsibility through a lens that is quite different from the more philosophically-based critiques developed by Bartlett and others. Our relational approach is more explicitly positive and instrumental in character.⁵⁶ We seek to discover the means through which a scheme of legal regulation can best motivate parents to invest the effort necessary to fulfill the obligations of child-rearing. This inquiry leads to another: to what extent and through what means does the current regime function to encourage desired parental behavior?

Even cursory consideration of a relational approach to the protection of children's interests suggests features that pose challenges for legal regulation. The scope of the relationship between parents and children and the range of parenting tasks are very broad. Parenting places substantial demands on the time, energy and resources of those who undertake the job, and good parenting requires giving the role a high priority relative to others in parents' lives. Inevitably, parents experience conflicts between the claims

⁵⁴ *Id.* at 299 (citing Thomas Nagel, *The Possibility of Altruism* 83 (1970)).

⁵⁵ As Bartlett puts it: "Having rights" means to be entitled to, to be owed, to have earned, or to deserve something in exchange for who one is or what one has done." *Id.* at 298.

⁵⁶ In applying relational theory to family law, we start with analyses that have heretofore been focused principally on more explicitly contractual relationships. See, e.g., Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 *Va. L. Rev.* 967 (1983); Goetz & Scott, *supra* note 3; Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 *Cal. L. Rev.* 2005 (1987) [hereinafter Scott, *Conflict and Cooperation*]; Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 *J. Legal Stud.* 597 (1990); Robert E. Scott, *A Relational Theory of Secured Financing*, 86 *Colum. L. Rev.* 901 (1986). Some efforts have been made, however, to apply the principles of relational theory to other, more diverse contexts. See, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909 (1992).

of parental obligation and other interests that may interfere with the fulfillment of parental duty.⁵⁷ It is in the child's interests that these conflicts be resolved without sacrificing parental obligation. Thus, the law's overarching goal is to encourage and reinforce parents' reasonable efforts to fulfill child-rearing duties and to reduce the conflicts of interest that might lead to shirking of their responsibilities.

Regulation directed toward this end must be constrained and shaped by the complexity of the parents' task and by certain qualities of the parent-child relationship. The "performance" of parental obligation in rearing children to adulthood is extraordinarily complex and subject to many uncertainties. Numerous contingencies confront parents in making appropriate choices about health care, safety, nutrition, discipline and education. Narrowly prescribed performance criteria are incompatible with the latitude and discretion that parenting requires. Moreover, the parent-child relationship is uniquely intimate, and presumably requires considerable privacy in order to flourish.⁵⁸ Intrusion by state agents may impose peculiar costs for this reason. Any legal supervision of parents that seeks to reduce conflicts of interest between parental and non-parental tasks must be fashioned in a way that does not substitute one set of costs for another.

The task of legal regulation is further complicated by the fact that parents receive no financial compensation for the care of their children; indeed, in financial terms, children are a significant drain.

⁵⁷ These "other interests" can include a broad range of parental preferences and behaviors that conflict with the child's interest, either because they result directly in harm to the child (physical abuse, abandonment) or because they contribute to inadequate fulfillment of parental responsibility. Parents may pursue career advancement instead of spending time with their children and attending to their needs. They may relieve frustration by hitting their child, rather than exercising self-restraint. They may spend money on alcohol or drugs (or cars, clothes, trips or jewelry) instead of on their children's educational needs. They may satisfy their own personal needs by pursuing extramarital relationships that threaten family stability and ultimately harm their children. They may fail to maintain contact with the child when the family dissolves, because new relationships provide more gratification.

⁵⁸ This is the thrust of the argument against state intervention in the family made by psychoanalysts Goldstein et al., *supra* note 4. The authors argue that undisturbed development of the parent-child bond is essential to healthy child development, insisting that state intrusion is "invariably detrimental." See *id.* at 9. The child has a liberty interest in privacy and parental autonomy, they argue, which is a part of "family integrity." *Id.*

The coin in which parents are paid for their work is the nonpecuniary compensation they derive from the role and the relationship. Thus, legal regulation needs to minimize the impact of intervention on parental role satisfaction by avoiding unnecessary burdens and by supporting parents' inherent desires to have and rear children.

In sum, the challenge for family law is to construct a legal apparatus that regulates parental behavior in a complex relational context. The welfare of children and their successful development hinges to a large extent on adequate performance by parents of their child-rearing obligations. At least in theory, the law can encourage parents to act in ways that better serve their children's interests whenever they otherwise might be inclined to pursue self-interested goals. The context, however, also suggests that there will be significant constraints on the types of legal mechanisms that can safely be deployed to reduce conflicts of interest.

II. REGULATING CONFLICTS OF INTEREST BETWEEN PARENT AND CHILD

The analysis in Part I describes a current of dissatisfaction with legal regulation of the parent-child relationship and an emerging sense that the primary objective of state regulation of this relationship should be to advance the interests of children whenever they conflict with those of their parents. This premise in turn suggests that family law could usefully employ analogies drawn from the legal treatment of other relationships similarly subject to substantial conflicts of interest. Because of the asymmetries in information and control between parent and child, fiduciary relationships seem particularly relevant, and on inspection the relationship between parent and child shares many features in common with this category of relationships. Indeed, the fiduciary heuristic seems to capture the essence of the argument for a legal regime that is grounded in parental obligation to serve the child's interests.

Fiduciaries in law, such as trustees, corporate directors and managers, guardians, and executors, carry a heightened moral and legal obligation to serve the interests of a principal/beneficiary, and, within the scope of the fiduciary relationship, to subordinate their

own personal interests.⁵⁹ This duty is underscored by a requirement of due diligence and unqualified fidelity.⁶⁰ In the same vein, a family law regime premised on a fiduciary framework would entrust parents with the duty to raise their children to adulthood, to provide for their physical and psychological needs, and to perform the services of parenthood with reasonable diligence and “undivided loyalty” toward their children’s interests.

In many respects, optimal fiduciary behavior as it is described in other contexts seems quite analogous to the ideal of parenting advocated by critics of the parental rights approach.⁶¹ This analogy is typically only casually drawn, without any systematic attention to the implications of treating parents as fiduciaries. Our purpose is to push the analogy beyond rhetoric.

A. The Structure and Control of Fiduciary Relationships

Fiduciary relationships are a subset of agency relationships, a broad category of legal relationships in which one party undertakes to perform a service for another. A key goal in the regulation of agency relationships is to encourage the agent to serve her principal’s interests as well as her own. Several characteristics of agency relationships contribute to the risk of self-interested actions. In contrast to performance under a simple contingent contract, the agent’s performance is complex and cannot be reduced readily to specific obligations.⁶² Satisfactory performance demands consider-

⁵⁹ In such relationships, where the principal “occupies a position of special confidence, superiority, or influence, a ‘special duty’ exists to protect the interest of the other.” Goetz & Scott, *supra* note 3, at 1127 (citations omitted). As Goetz and Scott note, “Fiduciaries are required, *inter alia*, to act ‘primarily for the benefit of another, in matters connected with the undertaking.’” *Id.* (citing *Nagel v. Todd*, 45 A.2d 326, 327 (1946) (quoting Restatement of Agency § 13, cmt. a (1933)); accord *Weisbecker v. Hosiery Patents, Inc.*, 51 A.2d 811, 813 (Pa. 1947)). For a general discussion of the duties of corporate directors and managers, see Robert Charles Clark, *Corporate Law*, chs. 3-8 (1986). For a discussion of the trustee’s duty of loyalty, see George T. Bogert, *Trusts* § 95 (6th ed. 1987).

⁶⁰ Although the obligation of loyalty and “unqualified fidelity” is mandatory, the parties are free to define by contract the specific duties required of the fiduciary. See Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 *UCLA L. Rev.* 738, 760 (1978).

⁶¹ The metaphor of fiduciary responsibility, in different forms, has been used by commentators to emphasize the importance of parental obligation. See *supra* note 2.

⁶² For this reason, Charles Goetz and Robert Scott designate the agent-principal relationship as a relational contract. See Goetz & Scott, *supra* note 3.

able decisionmaking discretion, and monitoring the quality of the agent's performance may be difficult.

These factors are exaggerated in a fiduciary relationship because the principal will typically be even less able to control or monitor the fiduciary's performance than is the case in an ordinary agency relationship.⁶³ The problem may be particularly acute if the principal/beneficiary is a minor or is mentally disabled. More typically, beneficiaries—whether shareholders, trust beneficiaries or legatees—are presumed to lack the requisite information or expertise to understand and evaluate the fiduciary's performance, and acquiring such information is very costly.⁶⁴ As a result, not only is it difficult to monitor the agent's diligence and effort in performing her assigned responsibilities, but the context carries a heightened risk of self-dealing as well. In general, the law characterizes as fiduciary those agency relationships in which the principal is particularly vulnerable and unable fully to protect and assert his own interests, thus providing the agent a peculiar opportunity and incentive either to shirk or cheat.⁶⁵

Fiduciary law seeks to change these incentives through mechanisms designed to encourage actors to pursue collective rather than personal goals. Legal duties of fiduciaries fall roughly into two categories: a duty of care—the agent must perform her responsibilities with reasonable diligence—and a duty of loyalty—the fiduciary must not place her personal interests above those of her principal.⁶⁶ The objective, in either case, is first to encourage the

⁶³ Robert Clark argues that fiduciaries are different from typical agents, because principals control agents and are ready to countermand their agents' decisions. See Robert C. Clark, *Agency Costs versus Fiduciary Duties*, in *Principals and Agents: The Structure of Business* 55, 56-59 (John W. Pratt & Richard J. Zeckhauser eds., 1985). In our view, fiduciary relationships should be treated as a subset of agency relationships which have many agency characteristics in exaggerated form.

⁶⁴ This is often true of trust beneficiaries and shareholders. Alison Anderson discusses the costs to shareholders of acquiring information, each of whom has a small stake in the corporation, and thus may not be motivated to invest enough to acquire adequate information. See Anderson, *supra* note 60, at 778-80; accord Clark, *supra* note 63, at 77.

⁶⁵ See *supra* note 3.

⁶⁶ In *Bayer v. Beran*, 49 N.Y.S.2d 2 (Sup. Ct. 1944), the court made this distinction very clear:

The fiduciary has two paramount obligations: responsibility and loyalty. . . . The responsibility—that is, the care and the diligence—required of an agent or of a fiduciary, is proportioned to the occasion. It is a concept that has, and necessarily so, a wide penumbra of meaning

fiduciary to take the beneficiary's interests properly into account in making decisions, and second to facilitate detection of her failure to do so.

The means used to achieve the desired goals include both extra-legal mechanisms (primarily informal social norms) and legal devices, and are usefully grouped into two broad categories. Monitoring arrangements allow the principal to supervise the agent's actions so as to detect and sanction agent conduct in pursuit of selfish ends.⁶⁷ Bonding arrangements align the interest of the agent with that of the principal through self-limiting constraints that serve a precommitment function.⁶⁸ Bonding mechanisms, although they constrain agent behavior, will be as desired by agents as by principals to the extent that they substitute for even more costly monitoring efforts.⁶⁹ In contractual agency relationships, for example, agents voluntarily accept the imposition of sanctions upon default, thus providing assurance to principals that they will not act contrary to the principals' ends.⁷⁰ In fiduciary relationships, legal and extralegal limits on fiduciary conduct serve an analogous bonding function, defining the role in a way that constrains the fiduciary's future conduct through threat of sanction in the event of default.

From an efficiency perspective, the goal of legal regulation of fiduciaries (and other agents) is to reduce conflicts of interest (situations that compromise either the agent's diligent performance or loyalty, or both) at the least cost. In service of this goal, extralegal

The concept of loyalty, of constant, unqualified fidelity, has a definite and precise meaning. The fiduciary must subordinate his individual and private interests to his duty . . . whenever the two conflict.

Id. at 5, *cited in* Goetz & Scott, *supra* note 3, at 1127 n.86.

⁶⁷ Jensen & Meckling, *supra* note 6, at 308.

⁶⁸ *Id.*

⁶⁹ Jensen & Meckling established the reciprocal relationship between bonding and monitoring functions. Through bonding, the agent guarantees that she will not take certain actions which would harm the principal or ensures that the principal will be compensated if she does take such actions. *Ex ante*, these precommitments benefit the agent as well as the principal to the extent that they increase the value of the performance being provided. The enhanced performance is reflected in a higher price paid to the agent for her services. Thus, self-limiting constraints will be voluntarily assumed whenever these precommitments can substitute for more costly monitoring alternatives. See *id.* at 323-26.

⁷⁰ It is useful to think of bonding mechanisms as precommitments that will encourage the agent to pursue the collective long-term interest at times when her short-term interest diverges from the cooperative goal. *Id.*

and legal mechanisms are substitutes for one another, as are bonding and monitoring devices. Thus, where informal social norms exert a powerful influence on agents' behavior, less extensive legal mechanisms are required.⁷¹ Similarly, insofar as the fiduciary is adequately "bonded" (i.e., she sees her interests as allied with that of the beneficiary), the principal's need to monitor the fiduciary's performance is reduced. Consequently, the optimal scheme of regulation (specifically, the best combination of extralegal and legal incentives and of bonding and monitoring mechanisms) will vary depending on the circumstances and the particular context.

The prohibition against self-dealing, a feature common to the regulation of fiduciaries, is a particularly appropriate illustration of the variable nature of legal regulation. This proscription functions to define a boundary of fiduciary discretion, and it varies in its strictness in different settings. In trust law, the prohibition is absolute; trustees cannot engage in self-dealing, however reasonable the transaction.⁷² The beneficiaries can rescind any transaction between the trustee and the trust, and require the trustee to disgorge profits.⁷³ The duty of corporate managers and directors, however, is less stringent. A corporate director who enters into a contract with the corporation must demonstrate that the deal is fair to the corporation, in the sense that the transaction is as advantageous to the corporation as a comparable transaction in a competitive market.⁷⁴

⁷¹ Stewart Macaulay relates the comment of one businessman:

"[I]f something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you ever want to do business again." As an example of how well established this attitude is, Macaulay tells of the large manufacturer of packaging materials who inspected its records and found that it had failed to create legally binding contracts in two-thirds of the orders randomly selected for review.

Scott, *Conflict and Cooperation*, *supra* note 56, at 2047-48 (citations omitted) (quoting and citing Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55, 60-61 (1963)).

⁷² Self-dealing is implicated any time the trustee, as trustee, bargains with himself in an individual capacity. It occurs any time the trustee sells his own property to the trust or buys trust property. See Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts, and Estates* 851-52 (4th ed. 1990).

⁷³ *Id.* at 852.

⁷⁴ Clark, *supra* note 63, at 73-74; see also American Law Institute, *Principles of Corporate Governance and Structure: Restatement and Recommendations* § 5.02 (Tent. Draft No. 5, 1986) (covering transactions by directors and officers for a corporation), *cited*

The self-limiting constraint is more stringent as applied to trustees than to corporate fiduciaries in part because, as a class, trust beneficiaries have less control⁷⁵ and are more vulnerable⁷⁶ than are shareholders. For these reasons, trustees may face a greater opportunity and temptation to cheat than corporate fiduciaries, and thus require greater levels of deterrence and constraint. But perhaps more importantly, the more stringent rules that apply to trustees generally reflect the more limited purpose and scope of the trust relationship. In contrast to trustees, corporate directors are engaged in a broad range of activities on behalf of the corporation. Broader discretion and a presumption of good faith and diligence are justified in the corporate context by the broad scope of the agency relationship as well as the importance of encouraging directors willingly to invest effort in service of the shareholders.

In corporate law, the presumption of due diligence is embodied in the business judgment rule, "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the

in William L. Cary & Melvin A. Eisenberg, *Corporations* 591 (6th ed. 1988); Clark, *supra* note 59, § 5.2 (describing three conditions for the validity of self-dealing transactions involving directors or officers of a corporation). For example, if the corporate president happens to own a gravel pit and sells gravel to the corporation at above market price, the shareholders can rescind the deal or collect damages. As Clark explains, this response is part of a general scheme of rules prohibiting the corporate director/manager from using her positional advantage to the detriment of the corporation. These include prohibitions against corporate directors and managers developing corporate opportunities unless the corporation is unable to do so. See Clark, *supra* note 63, at 74-75. The prohibition against insider-trading was originally imposed under the Securities Act of 1933 and the Securities Exchange Act of 1934 on the ground that insider trading was wrong. See Henry G. Manne, *Insider Trading and the Stock Market* 8-10 (1966). Some argue that the insider-trading ban is valuable because it reinforces confidence in the stock market among third parties and avoids the appearance of conflict of interest. If the majority of potential investors fear the market is unfair, they will refrain from investing, leaving the market undercapitalized. See Roy A. Schotland, *Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53 *Va. L. Rev.* 1425, 1440-42 (1967).

⁷⁵ Trust beneficiaries cannot terminate the relationship with the trustee, unlike shareholders, who can vote to terminate directors. See William L. Cary & Melvin A. Eisenberg, *Corporations* 205-07 (6th ed. 1988); Clark, *supra* note 59, § 3.1.1.

⁷⁶ Among multiple shareholders in a corporation, some are likely to be inclined to monitor managerial behavior even if most are not. A given trust will usually have one or a small number of beneficiaries, who may be minors or otherwise incapable of monitoring. Thus, the potential for abuse of power by fiduciaries may be greater in the latter situation.

action taken was in the best interests of the company."⁷⁷ The actions and judgments of corporate directors are not protected by the business judgment rule, however, when the judgment in question was tainted by a conflict of interest⁷⁸ or by gross negligence.⁷⁹ In sum, the business judgment rule assumes that the decision in question reflects reasonable diligence and care, but evidence of a violation of the duty of care (negligence) or of the duty of loyalty (self-dealing) will trigger sanctions. The business judgment rule represents an implicit recognition that the more complex and broad ranging is the fiduciary relationship, the more discretion is needed and the more legal norms must be selectively deployed in concert with other informal arrangements that also align the interests of the parties.

1. Bonding Arrangements

The legal rules that support the duties of care and loyalty serve both bonding and monitoring functions. Given the costs of enforcement, however, the bonding function dominates. Bonding restrictions function principally as precommitments; they are undertaken by the fiduciary with the purpose of limiting her future actions in a way that reduces the incidence of conflicts of interest.⁸⁰

⁷⁷ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); see also *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981) (holding that the business judgment rule is a presumption of good faith and due diligence that requires deference to the expertise of corporate directors); American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 4.01(c) (Proposed Final Draft 1992) ("A director or officer who makes a business judgment in good faith fulfills the duty under this Section [titled *Duty of Care of Directors and Officers; the Business Judgment Rule*] if the director or officer: (1) is not interested . . . (2) is informed . . . (3) rationally believes that the business judgment is in the best interests of the corporation."); Clark, *supra* note 59, § 3.4 (summarizing the business judgment rule).

⁷⁸ See *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968).

⁷⁹ See *Bucyrus-Erie Co. v. Gen. Prod. Corp.*, 643 F.2d 413, 420 (6th Cir. 1981).

⁸⁰ A decisionmaker, wanting to follow a chosen course of action, and fearing that in the future she may be tempted to make choices that are inconsistent with that course, may precommit by taking present actions that make it more difficult in the future to depart from the chosen course. For a discussion of precommitment theory in various legal contexts, see Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. Cal. L. Rev. 329, 342-47 (1986); Scott, *supra* note 48, at 40-42. For discussions of precommitment theory generally, see R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 Rev. Econ. Stud. 165 (1955-56) (the pilot work in the field); George Ainslie, *Behavioral Economics II: Motivated, Involuntary Behavior*, 23 Soc. Sci.

On the margin, the fiduciary will internalize the prohibition and avoid conduct that increases the risk of self-interested actions. Toward this end, fiduciary law explicitly uses informal social norms to influence fiduciary behavior in ways that reduce conflicts of interest. By establishing a standard of performance that emphasizes heightened obligations of loyalty and integrity, and by the use of hortatory moral rhetoric, the law invokes a personal sense of moral obligation in the performance of fiduciary duty.⁸¹ As Robert Clark observes, courts talk about fiduciary duty in a tone that contrasts sharply with that which is used to describe obligation in commercial contractual relationships.⁸² The stance of moral neutrality that courts adopt toward efficient breach in other contexts is absent here; fiduciary default is treated as a moral violation with attendant reputational costs.⁸³ This invocation of morality may compensate partially for the ineffectiveness of market controls in this context, since beneficiaries are presumed less able to protect their interests than are parties in ordinary commercial relationships.⁸⁴ In any

Info. 47, 54-56 (1984); George Ainslie, Specious Reward: A Behavioral Theory of Impulsiveness and Impulse Control, 82 Psychol. Bull. 463, 476-89 (1975); Thomas C. Schelling, Economics, or the Art of Self-Management, 68 Am. Econ. Rev. (Papers & Proc.) 290 (1978); Thomas C. Schelling, Ethics, Law, and the Exercise of Self-Command, in *Choice and Consequence* 83 (1984); Thomas C. Schelling, Self-Command in Practice, in *Policy*, and in a Theory of Rational Choice, 74 Am. Econ. Rev. (Papers & Proc.) 1 (1984).

⁸¹ Justice Cardozo described fiduciary duty in the following terms:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

⁸² Clark, *supra* note 63, at 75-76.

⁸³ *Id.* The importance of reputational costs and benefits in shaping behavior according to moral prescriptions has been examined in the context of marital and family behavior in Amy L. Wax, Review Essay: Against Nature—On Robert Wright's *The Moral Animal*, 63 U. Chi. L. Rev. (forthcoming 1996) (manuscript at Part II.1, on file with the Virginia Law Review Association).

⁸⁴ As Clark points out, a breach of contract is likely to be sanctioned, because the obligee will know of the breach and may seek a remedy. In contrast, moral disapproval is needed in the fiduciary context because ordinary market and legal controls are less effective, either because beneficiaries lack information or because they are incompetent. See Clark, *supra* note 63, at 78-79.

event, the rhetoric of fiduciary duty is a strong signal that this relationship does not involve "business as usual." The fiduciary who is tempted to defect faces the informal social costs of guilt and moral opprobrium as well as others that the law might impose.

The tradition, often endorsed by law, of appointing family members as fiduciaries is another example of a bonding mechanism that reinforces extralegal norms.⁸⁵ Family members are often chosen as trustees, executors, or guardians and as managers in close corporations, because it is assumed that they will be more likely to identify their interests with the interests of their principals, and will be less likely to abuse their discretion. The informal cultural norms of family loyalty reinforce legal standards, thereby encouraging self-limiting behavior by the fiduciary. The family fiduciary anticipates costs of humiliation and social disapproval upon default that exceed those experienced by non-family fiduciaries. These costs may discourage self-interested behavior.

The rhetoric of obligation that characterizes the fiduciary relationship is directed principally toward reducing the heightened risk of disloyalty. Thus, as Robert Scott and Charles Goetz have shown, the extraordinary obligations of fiduciary performance are obligations of loyalty and integrity, rather than requirements of extraordinary effort in pursuit of collective purposes.⁸⁶ Fiduciaries are not obliged to attend to their fiduciary duties to the exclusion of other personal obligations and activities. Scott and Goetz argue that the degree of care and effort required of a fiduciary in advancing the principal's interests is analogous to that required in other agency relationships—an amount of diligence and effort that maximizes the joint utility of beneficiary and fiduciary.⁸⁷

⁸⁵ See Uniform Guardianship and Protective Proceedings Act §§ 2-205, 2-309, 8A U.L.A. 439, 489-90, 509-10 (1982) (establishing priority for appointment of family members as guardian and conservator, respectively). This mechanism is not suitable, of course, for the setting of the public corporation, where there are multiple "beneficiaries."

⁸⁶ See Goetz & Scott, *supra* note 3, at 1126-30. In corporate law, however, sometimes the line is ambiguous between duty of loyalty on the one hand and duty of care on the other.

⁸⁷ *Id.* at 1128-29. The joint maximization hypothesis follows from the reciprocal nature of contractual relationships. Parties enter into contractual relationships in order to pursue individual ends through collective action. The greater the benefits that can be gained from their contractual venture, the greater the individual benefits for each contracting partner, *ceteris paribus*. An assumption that the degree of effort required of a fiduciary or other agent is that necessary to maximize the joint interests of the parties thus provides the most

2. *Monitoring Mechanisms*

The beneficiary in a fiduciary relationship is generally less well-positioned to monitor the agent's behavior than is the principal in a typical contractual agency relationship.⁸⁸ As a consequence, legally prescribed and supervised oversight plays a larger role in monitoring fiduciary conduct. Trustees, guardians and executors are subject to elaborate, judicially supervised reporting requirements obliging them to disclose their activities as fiduciaries, and some fiduciary decisions are subject to court approval.⁸⁹ Corporate fiduciaries are legally obliged to report to shareholders;⁹⁰ they are

rational default rule for specifying standards of performance in the absence of specifically agreed upon alternatives. *Id.* at 1126-30. Moreover, the joint maximization criterion subsumes other plausible alternatives such as a standard of reasonable diligence and care, since any effort that maximizes the joint product will, by definition, be the effort required of a reasonably prudent agent.

The joint maximization criterion also fits comfortably within the rhetorical tradition of fiduciary law. Such a standard requires the fiduciary to treat the principal's interests fairly, taking both parties' interests into account when determining the appropriate amount of effort to devote to collective as opposed to individual tasks.

Although the joint maximization criterion functions primarily as a default rule in contractual agency relationships, the logic that underlies the criterion would be equally compelling in determining mandatory standards of performance for other fiduciary relationships, including those where the contractual relationship runs from the settlor or the state to the fiduciary insofar as the state or settlor undertook to establish the relationship to advance the interests of the beneficiary.

⁸⁸ The creator of the fiduciary relationship (the settlor of a trust, for example) can sometimes monitor the fiduciary's performance. This may be difficult for a trustee, however, and impossible for a testator. Of course, in a guardianship, the state as creator of the guardianship monitors through judicial supervision.

⁸⁹ See, e.g., Uniform Guardianship and Protective Proceedings Act, §§ 2-109, 2-209, 2-317-18. Guardians, under some statutes, must seek court approval for extraordinary medical treatment such as psychiatric hospitalization, or sterilization of minors or the mentally impaired. See, e.g., Ark. Code Ann. § 20-49-202 (Michie 1991); Conn. Gen. Stat. Ann. § 45a-698 (West 1993); Kan. Stat. Ann. § 59-3018(g)(8) (1994); N.C. Gen. Stat. §§ 35-36, 35-37 (1990). Some states require court approval for guardians to sell stock or real estate of their minor wards. See, e.g., Ga. Code Ann. §§ 29-2-5, 29-2-6 (Michie 1993).

⁹⁰ For example, under the authority of the Securities Exchange Act of 1934, the Securities Exchange Commission requires registered corporations to send an annual report to shareholders along with proxies. The report must include audited balance sheets for the last two fiscal years, information concerning disagreements with accountants or changes in accountants, management's analysis of the corporation's financial condition and the result of corporate operations, the identity of all directors and executive officers, as well as other information. See 17 C.F.R. § 240.14a-3(b) (1995). Many states have similar provisions. California, for example, requires that an annual report containing a balance sheet and income statement for the past fiscal year be sent to shareholders 15 days prior to annual meetings. See Cal. Corp. Code Ann. § 1501(a) (West 1990). Other states merely give

also subject to oversight by the Securities and Exchange Commission.⁹¹

An important means of controlling misbehavior in most agency relationships is the principal's right to terminate the relationship or to replace the agent.⁹² In many fiduciary relationships, however, this right is either not available to or is not easily exercised by beneficiaries.⁹³ The choice of fiduciary is controlled by the party who creates the relationship, who in many contexts is not the beneficiary.⁹⁴ Corporate shareholders have the power to remove directors and (indirectly) managers, but in many other fiduciary relationships this power can only be exercised by a court unless otherwise provided by the party creating the relationship.⁹⁵ Courts

shareholders a right to inspect corporate records upon written request. See, e.g., N.Y. Bus. Corp. Law Ann. § 624 (McKinney 1986).

⁹¹ Publicly-held corporations are subject to periodic reporting requirements imposed under the authority of the Securities Exchange Act of 1934. They must file annual 10-K forms, quarterly 10-Q forms, and 8-K forms when certain events occur. 10-K forms must be filed within 90 days of the end of the fiscal year and must include, inter alia, information on the corporation's financial condition and general business development, disclosures on legal proceedings against the corporation, executive compensation, and conflict of interest transactions. See 17 C.F.R. §§ 240.13a-1, 240.15d-1, 249.310 (1995). For a copy of form 10-K, see Research Institute of America, 4 Securities Regulation ¶ 13,139 (1993). Form 10-Q reports must be filed within 45 days of the end of the quarter, except for the fourth quarter. See 17 C.F.R. §§ 240.13a-13, 240.15d-13, 249.308a (1995). They must include a quarterly financial report, a management report, and disclosures on legal proceedings and defaults on senior securities, as well as other requirements. For a copy of form 10-Q, see Research Institute of America, 4 Securities Regulation ¶ 13,141 (1993). A form 8-K must be filed within 15 days of a change in corporate control, if the corporation experiences a major change in assets (beyond the ordinary course of business), or if there is a change of accountants. See 17 C.F.R. §§ 240.13a-11, 240.15d-11 (1995); For a copy of Form 8-K, see Research Institute of America, 4 Securities Regulation ¶ 13,133 (1993). See generally J. Robert Brown, Jr., Corporate Communications and the Federal Securities Laws, 53 Geo. Wash. L. Rev. 741 (1985) (analyzing corporate disclosure duties). States also have their own reporting requirements. See Cary & Eisenberg, *supra* note 75, at 269-70.

⁹² See Goetz & Scott, *supra* note 3, at 1130-49.

⁹³ Termination of the fiduciary relationship (such as the dissolution of a trust) and replacement of one fiduciary with another are, of course, different acts.

⁹⁴ Moreover, in trusts and wills, the settlor and testator are often not available.

⁹⁵ Compare Clark, *supra* note 59, § 3.1.1 (noting conditions under which corporate shareholders may remove directors), with Bogert, *supra* note 59, § 160, at 573-74 (noting conditions under which courts may remove trustees, including, inter alia, insanity, habitual drunkenness, extreme improvidence, conviction of a crime, insolvency, bankruptcy, failure or refusal to act, mingling of trust property with the trustee's individual property, failure to account, conflict of interest, and failure to cooperate with co-trustees). The court has considerable power with respect to trustees:

generally have broad discretion to remove and replace fiduciaries who misbehave.⁹⁶ Courts exercising this power typically assume that substituting a new fiduciary imposes only minimal costs on the beneficiary and that fiduciaries themselves have little direct interest (other than loss of income) at stake in the relationship.⁹⁷

3. *Rewards of the Fiduciary Role*

If the relationship between fiduciary and beneficiary is structured primarily to serve the interests of the beneficiary, why would the role of fiduciary have any appeal? To be sure, some fiduciaries may be altruistic, or motivated by a preexisting sense of duty toward a particular beneficiary, perhaps because of a family relationship. Fiduciaries also receive financial compensation for their work, and in some professions involving fiduciary obligation the compensation is generous. Another important component of role satisfaction for many fiduciaries is reputational reward and correlative self-esteem. The role of trustee, for example, invokes respect in the community, signaling that the individual has assumed an important responsibility, and is trustworthy and morally upright. Community recognition of these attributes carries its own reward, enhancing the nonpecuniary value of the fiduciary role.

In sum, through a scheme of formal and informal bonding and monitoring mechanisms, the fiduciary is encouraged to subordinate self-interest in carrying out her responsibilities and to devote appropriate efforts toward furthering the beneficiary's interests.

If a beneficiary can prove that his financial interests will be seriously endangered by a continued operation of the trust by the trustee, he may be able to secure the trustee's removal by a court of equity.

....

The court has power to remove a trustee and to appoint a successor trustee.

Id. at 571.

⁹⁶ See, e.g., *Hines v. Brown's Comm.*, 88 S.W.2d 314, 316 (Ky. Ct. App. 1935); Uniform Guardianship and Protective Proceedings Act, §§ 2-112, 2-211; George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 527, at 49 & n.3, 52 & n.7 (Rev. 2d ed. 1993) (citing statutes).

⁹⁷ Some courts do acknowledge that the fiduciary has a reputational interest at stake in a removal proceeding. See, e.g., *IFS Indus., Inc. v. Stephens*, 205 Cal. Rptr. 915, 925-26 (Cal. Ct. App. 1984); *Heizer Corp. v. Hackbarth*, Civ. A. No. 7949, 1988 WL 58272, at *2 (Del. Ch. 1988); *In re Estate of Georgiana*, 458 A.2d 989, 991 (Pa. Super. Ct. 1983); *Dahl v. Akin*, 645 S.W.2d 506, 520 (Tex. Ct. App. 1982); see also Bogert, *supra* note 59, § 160, at 571 (noting that reputational costs deter courts from removal of trustees).

These responsibilities are induced by a *quid pro quo*: compensation that includes, in addition to financial rewards, broad grants of authority and discretion that enhance reputation and self-esteem.

B. A Relational Model of Parents as Fiduciaries

1. In General

The relationship between parent and child invites comparison to legal fiduciary relationships and poses similar challenges for legal regulation. It is apparent at the outset, however, that applying a fiduciary framework to the parent-child relationship requires accommodation of some peculiar features that distinguish this relationship from many others in the fiduciary category. Given the extensive scope of the relationship, a prescription that parents must systematically subordinate their personal interest to that of the child when the two are in conflict seems unduly burdensome, and ultimately likely to deter prospective parents from taking on the role. Furthermore, enforcement of such an obligation, although theoretically feasible, would require costly and intrusive state supervision of intact families. This effect seems particularly troublesome given the intimacy of the relationship and the presumed importance of privacy to optimal family functioning. Moreover, the substantial costs to children of replacing parents and of severing the filial bond inhibits the imposition of a sanction that is used to discipline fiduciaries in other contexts.⁹⁸

Thus, a model scheme for regulating the parent-child relationship must attend to the unique features of this familial bond, and some adaptation of the conventional regulatory mechanisms is required. The usefulness of this approach is not diminished by these constraints, however, so long as policymakers appreciate the goals of regulation and evaluate legal rules as means to the prescribed ends. Optimal rules that seek to motivate parents to act so as to promote their children's welfare and to encourage parental commitment to the relationship will necessarily weigh the burdens that are placed on parents and the costs of disrupting the relationship. To ignore these costs is counterproductive, and, by definition, suboptimal. Because parents are not fungible actors in their chil-

⁹⁸ See *supra* note 4.

dren's lives, and because parents' enthusiasm for their role can be assumed to affect their children's welfare, protecting the child's interest requires particular attention to the effects of regulation on parental satisfaction and commitment. As in all other relationships that are similarly regulated, rules that reduce conflicts of interest and self-dealing are shaped by the character of the relationship being regulated.

Although the parent-child relationship is formally derived from status, its salient characteristics suggest that the relationship is most closely analogous to contract-based agency relationships that carry fiduciary obligations, such as the duties of corporate directors to their shareholders. The role of parents, like that of corporate directors, involves a performance that includes an extensive range of decisions and tasks. Like corporate directors, parents are granted broad discretion in making decisions that affect the interests of their principals. Moreover, as is true in the family context, the ultimate goal of maximizing shareholder value is served by encouraging directors to invest substantial efforts in performing their duties. Many of the rules governing corporate directors—such as the business judgment rule—implicitly recognize the feedback effects between role satisfaction and performance.

2. *A Relational Model of the Intact Family*

At the outset, we make several fundamental assumptions about state regulation of the parent-child relationship. First, we assume that the overarching purpose of the state is to protect the interests of children in receiving from their parents the care and nurture necessary to enable them to develop into healthy adults. Second, we assume that parents function as "first best" caretakers and are preferred to state agents, *ceteris paribus*. Finally, we assume that a substantial motivation leading parents to procreate is the anticipation of rearing their children in a family unit. Taken together, these assumptions imply that the state, in specifying an optimal scheme of regulation, must attend to the interests of parents in having and rearing children.

One method of analyzing the interplay among these basic assumptions is to imagine a hypothetical negotiation between the state and parents over the appropriate standards of parental responsibility. The state's interest is to achieve its stated goals.

The parents' interest is to maximize the returns from parenthood. We then ask what combination of regulatory provisions would be agreed to by the state and the broadest number of parents engaged in such a bargaining process.⁹⁹ In the context of the intact family, both extralegal forces and legal bonding arrangements emerge as attractive candidates.

a. Extralegal Influences: Biological and Affective Bonds and Social Norms

In analyzing the appropriate role that extralegal forces play in encouraging parents to act in their children's interest, we assume that having children represents a voluntary choice on the part of parents,¹⁰⁰ but that in rearing children parents must fulfill the fundamental objective of the state: to provide the care and nurture necessary for children to develop into healthy, functioning adults. Given this assumption, it follows that social norms and other influences that bond parents to their parental obligations serve the interests of both parents and the state. The state's interest is to achieve its objective at least cost, and thus it would always agree to substitute a less costly extralegal arrangement for more costly state supervision.¹⁰¹ Similarly, parents would accept self-limiting con-

⁹⁹ Some readers have objected to the use of a contractual model that characterizes parents as agents of the state in the rearing of their children. Stephen Sugarman challenges this characterization, arguing that the agency model does not capture the understanding of the parental role shared by most people. Parents, unlike other fiduciaries, are free to do as they want with their children (above some minimum level of care). Letter from Stephen Sugarman to authors (Mar. 6, 1995) (on file with the Virginia Law Review Association). We are sympathetic to the discomfort that the relational model may cause. However, a model is not tested by how accurately it captures real world experience—which no model purports to do. Rather, the validity of a model turns on how well it predicts results. We believe that the agency model explains much of the peculiar design of the legal regulation of the state-parent relationship. If anything, the relational model exaggerates parental autonomy and deemphasizes the authority of the state to dictate standards of parental performance. As our analysis shows, the freedom of parents to make decisions about child-rearing free of state intrusion (which, as Sugarman observes, distinguishes the parental role from other fiduciary relationships) is entirely consistent with the relational model.

¹⁰⁰ This assumption may be counterfactual in some instances, of course. It is generally sound, however, given that it is relatively easy to avoid having unwanted children.

¹⁰¹ It is important to remember that the cost of any regulatory mechanism is the sum of two types of costs: the direct costs of enforcement and the "error" costs of a failure to control perfectly the behavior subject to regulation. Thus, a given arrangement is cost-

straints that deter selfish behavior whenever these constraints can substitute for more onerous state controls on child-rearing.

The biological and affective bonds between parents and children together with informal social norms encourage parents to identify their interests with those of their children and to approach their performance as parents with a sense of moral obligation. In such an environment, parents would expect to experience the rewards of social approval and self-fulfillment for good parenting, and would expect both guilt and social opprobrium to follow default. Indeed, in contrast to other fiduciary contexts where the invocation of morality as a means of influencing fiduciary behavior is largely a legal construction, in the family setting these extralegal factors function independently of the law to influence parental behavior. Research and other evidence suggests that most parents are influenced to a greater or lesser degree by biological, psychological and social forces which, in combination, generate a norm of parental obligation.¹⁰²

The most controversial strand of this complex bond is biological. Scholars representing very diverse perspectives and ideologies have emphasized the importance of the biological bond between parents and children as an influence on parental behavior.¹⁰³ Evolutionary psychologists argue that biological parenthood inclines

effective when the sum of enforcement and error costs is less than the total cost of any available alternative.

¹⁰² See *infra* text accompanying notes 103-13 for discussion of the relevant research.

¹⁰³ As discussed in the text and notes below, evolutionary psychologists and sociobiologists most prominently argue for the importance of biology. See *infra* notes 104-06 and accompanying text. Legal scholars, such as Richard Epstein, have advocated the importance of sociobiology. See Richard A. Epstein, *Gender is for Nouns*, 41 *DePaul L. Rev.* 981 (1992); Richard A. Epstein, *The Authoritarian Impulse in Sex Discrimination Law: A Reply to Professors Abrams and Strauss*, 41 *DePaul L. Rev.* 1041 (1992); Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 *Harv. J.L. & Pub. Pol.* 331 (1995). Moreover, feminist legal scholars such as Robin West, Mary Anne Case, and Martha Fineman also have focused on the importance of the biological bond between parent and child. West argues that women's identities are importantly shaped by the experience of connection in pregnancy and birth. See Robin West, *Jurisprudence and Gender*, 55 *U. Chi. L. Rev.* 1 (1988). Case, in an entertaining and provocative response to the enthusiastic endorsement of sociobiology by Richard Epstein, suggests that if law sought to embrace the lessons of sociobiology, it would protect the mother-child dyad rather than the tenuous marital bond. See Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 *Harv. J.L. & Pub. Pol'y* 369 (1995). Case bases this argument on Martha Fineman's thesis that the mother-child dyad should be legally protected as the core family relationship. See Martha Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century*

parents to protect and care for their children.¹⁰⁴ By this account, parents nurture their young (and have little inclination to nurture the children of others) in order to protect their genetic heritage and maximize its survival.¹⁰⁵ Researchers point to the much lower rates of violence directed toward biological children than toward stepchildren and non-biological family members as evidence of this biological inclination.¹⁰⁶

Less debatable is the powerful affective bond between parent and child. At the birth of their child, parents undertake a long-term relationship which usually builds incrementally and involves a deep emotional attachment. This relationship is distinctive among others characterized by emotional attachment, constituting what social psychologists describe as a "crescive bond," which links irreplaceable individuals into a continuing relationship.¹⁰⁷ For these bonds to form, the relationship must be an important component of the parents' personal and social identity and must provide rewards, particularly self-esteem. Research suggests that the role of parent is among the most important in defining personal identity for both men and women.¹⁰⁸

The affective bond provides powerful grounding for a parental precommitment to care for the welfare of one's children. The force of that commitment does not, however, derive solely from the

Tragedies (1995). Fineman does not argue for rights based on biology per se, but on nurturing (a function usually fulfilled by mothers).

¹⁰⁴ See Margo Wilson, *Impact of the Uncertainty of Paternity on Family Law*, 45 U. Toronto Faculty L. Rev. 216, 222-24 (1987); see also Martin Daly & Margo Wilson, *Child Abuse and Other Risks of Not Living with Both Parents*, 6 *Ethology & Sociobiology* 197 (1985) (concluding that children living with one natural parent and one stepparent are dramatically more likely to suffer child abuse than those living with both natural parents); Joy L. Lightcap, Jeffrey A. Kurland & Robert L. Burgess, *Child Abuse: A Test of Some Predictions from Evolutionary Theory*, 3 *Ethology & Sociobiology* 61 (1982) (concluding that lack of genetic relationship makes "parent" more likely to neglect or abuse child).

¹⁰⁵ See Daly & Wilson, *supra* note 104, at 197; Lightcap et al., *supra* note 104, at 62; Wilson, *supra* note 104, at 222-24.

¹⁰⁶ See Daly & Wilson, *supra* note 104, at 205; Lightcap et al., *supra* note 104, at 64-66.

¹⁰⁷ See Ralph H. Turner, *Family Interaction* 80 (1970). For a discussion of the parent-child relationship as a crescive bond, see Lynn White, *Step Families Over the Life Course: Social Support 4-5* (paper presented at National Symposium on Stepfamilies, Pennsylvania State University, Oct. 14-15, 1993) (on file with the Virginia Law Review Association).

¹⁰⁸ See White, *supra* note 107, at 4-5. White notes that the role of stepparent is much less salient. Recent research has found the role of parent to be the most salient role. *Id.* (citing Peggy A. Thoits, *Identity Structures and Psychological Well-Being: Gender and Marital Status Comparisons*, 55 *Soc. Psych. Q.* 236 (1992)).

existence of a strong affective bond.¹⁰⁹ Informal social norms play an important part in shaping parents' recognition that their role is defined by serious obligation and subordinated self-interest. Certainly, much of the rhetoric about parenthood in contemporary culture reinforces this sense of obligation, and anecdotal evidence suggests that the message is getting stronger.¹¹⁰ Several examples make the point. First, public concern about child abuse and neglect has increased in the past generation. Predictable reactions of outrage follow egregious examples of parental misconduct¹¹¹ and self-interested behavior.¹¹² Second, popular media attention has focused on the harmful psychological and economic impact of divorce on children, and negative publicity about "deadbeat dads" has been translated into tough child support enforcement legislation.¹¹³ Examples of fathers going to jail or losing professional

¹⁰⁹ The fact that the parent-child relationship is of identity-defining importance to the parent does not mean, necessarily, that parents will understand their role as shaped principally by obligation. The role could also include a sense of entitlement.

¹¹⁰ A theme of popular psychology in the 1970s and 1980s was that "parents are people, too" and should not feel guilty about pursuing their own interest. Carl Schneider discusses the "rise of psychologic man" as a modern cultural phenomenon in which personal fulfillment and self realization are emphasized. See Schneider, *supra* note 30, at 1852-60. The enthusiasm for this attitude seems to have waned in recent years, however, perhaps because of concern about the impact of widespread divorce on children and the growing focus on child abuse. See *infra* text accompanying notes 202-07.

¹¹¹ The cases of Susan Smith, Joshua DeShaney, and Joel and Lisa Steinberg are good examples. Susan Smith drowned her two sons in South Carolina in 1994. Bill Hewitt, *Tears of Hate, Tears of Pity, People*, Mar. 13, 1995, at 76. A national poll revealed that 50% of the public supported her execution for the crime. *Id.* at 78. Joshua DeShaney was beaten so badly by his father that he will spend the rest of his life in a home for the severely retarded. Most public outrage was focused on the U.S. Supreme Court for not allowing Joshua's mother to sue the social services department that failed to remove Joshua from the custody of his father, her former husband. "Poor Joshua!," *Time*, Mar. 6, 1989, at 56; *Cold Comfort and a Beaten Child*, *N.Y. Times*, Feb. 26, 1989, at E22. Joel Steinberg beat his illegally adopted six-year-old daughter to death. See *supra* note 31. Even fellow inmates wanted to kill Steinberg. Steinberg, *Citing Fear*, *Misses Court Hearing*, *N.Y. Times*, Dec. 17, 1987, at B5.

¹¹² A good example is the public outrage that followed an episode in which two parents left two small children home alone for several days over Christmas while they went to Acapulco. See *supra* note 46.

¹¹³ For examples of popular media articles on the effect of divorce on children, see Barbara Kantrowitz, *Breaking the Divorce Cycle*, *Newsweek*, Jan. 13, 1992, at 48; Jennet Conant, *You'd Better Sit Down, Kids*, *Newsweek*, Aug. 24, 1987, at 58; Aric Press, *Divorce American Style*, *Newsweek*, Jan. 10, 1983, at 42.

For examples of popular media articles on deadbeat dads, see David van Biema, *Dunning Deadbeats*, *Time*, Apr. 3, 1995, at 49; Joe Klein, *'Make the Daddies Pay'*,

licenses for failure to pay child support underscore the lesson that parental default is a moral, as well as a legal, violation.¹¹⁴ Thus, as is true with other fiduciary relationships, these informal norms can be invoked to reinforce the commitment by parents to limit their future behavior in ways that will serve their children's interest.

The pervasive force of these extralegal influences in shaping parental attitudes distinguishes the parent-child relationship from other fiduciary bonds.¹¹⁵ The utility of parents' affective bonds and informal social norms in promoting desirable behavior reduces substantially the role for formal legal incentives in mitigating conflicts of interest. Moreover, extralegal norms impose much lower costs on both the state's and parents' interests in procreation and

Newsweek, June 21, 1993, at 33; Steven Waldman, *Deadbeat Dads*, Newsweek, May 4, 1992, at 46.

In recent years, Congress has sought to promote enforcement of child support through tougher legislation, including the Child Support Enforcement Amendments of 1984, Pub. L. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. § 1305 (1988)); the Family Support Act of 1988, Pub. L. 100-485, 102 Stat. 2343 (codified at 42 U.S.C. § 1305) (mandating automatic withholding by employers of legally due child support payments); and the Child Support Recovery Act of 1992, Pub. L. 102-521, 106 Stat. 3403 (codified at 18 U.S.C. § 228 (1994)) (authorizing interstate imposition of fines and imprisonment for non-payment). In March of 1995, the House passed H.R. 4, the Personal Responsibility Act of 1995. Title VII, Child Support, requires state child support agencies to maintain automated child support registries, requires employers to provide information on all newly-hired employees to a central registry and provides for civil penalties for employers that fail to comply, authorizes and encourages states to suspend driver's and professional licenses of parents in default, provides for withholding of wages to satisfy delinquent child support obligations, and expands the authority of the Federal Parent Locator Service. H.R. 4, 104th Cong., 1st Sess. (1995).

State legislatures have also been active. In January 1994, Massachusetts Governor William Weld signed legislation giving the state the power to jail defaulting parents or to revoke their driver's or professional licenses. See Mass. Gen. Laws Ann. ch. 119A, § 16 (West Supp. 1995).

The direction of legal reform regarding parental obligation runs counter to the dominant ethos of moral neutrality in contemporary family law. See Schneider, *supra* note 30, at 1812.

¹¹⁴ See Peter J. Howe, *New 'Deadbeat Dad' Law*, Boston Globe, Jan. 21, 1994, at 18 (summarizing provisions of the Massachusetts law). Several fathers have been jailed or have lost their professional licenses for failure to pay child support under this new law. See Andrea Estes, *DOR Nabs 3 Deadbeat Dads Owing \$200G Out of State*, Boston Herald, June 2, 1994, at 11; Doris Sue Wong, *State Pulls Job Licenses of 'Deadbeat' Fathers*, Boston Globe, May 19, 1995, at 51.

¹¹⁵ As we noted, in other settings the informal norms themselves are largely legal constructions, generated from judicial and other legal descriptions of the fiduciary bond. See *supra* notes 81-84 and accompanying text. Moreover, other fiduciary relationships often do not involve the biological and affective components of the parental bond.

child-rearing. These norms are low-cost/high-benefit instruments for reducing the incidence of self-interested behavior by parents and thus function as substitutes for more intrusive and costly legal constraints.¹¹⁶

b. Legal Bonding Arrangements: Conflict of Interest Rules

As we suggested above, the dominant function of conflict of interest rules in fiduciary law is to induce self-limiting behavior by the fiduciary. In the family context, however, blanket rules against self-dealing analogous to those applied to trustees and executors would impose much greater demoralization costs on parents and would undermine the interests of both the state and parents in promoting procreation and child-rearing activity.¹¹⁷ Parents' and children's interests are extensively intertwined, and many decisions that parents make affect their own lives as well as those of their children. Thus, even the relaxed standard for avoiding conflicts of interest between corporate directors and shareholders would be costly if applied to parents. It is hard to imagine effective self-enforcement of a precommitment under which, for example, a parent would be required to ensure that a proposed move across the country for professional advancement is in the child's interest. Such a restriction would be unsatisfactory both because of the demoralization costs that it imposed and because of the fundamental uncertainty about how and to what extent particular parental choices affect children's interests. These costs, together with the pervasive character of the informal norms that reinforce commitments of diligence and loyalty, imply that the parties to an *ex ante* bargain would instead contract for a legal presumption of good faith and reasonable diligence in assessing parental performance,

¹¹⁶ The distinctive character of family relationships suggests a cautionary note, however. Because of the vulnerable status of children and the emotional quality of public responses to that vulnerability, the use of moral rhetoric and an exalted standard of fiduciary duty as a mechanism to reduce conflicts of interest, see *supra* notes 81-84 and accompanying text, may carry an offsetting risk of intrusive and oppressive policies driven by a societal zeal to protect children.

¹¹⁷ Of course, the extent of the state's interest in promoting procreation depends on a number of other factors, including rates of population growth and available resources, such as land. The state has an unambiguous interest in adequate parenting of the children who *are* produced.

analogous to the presumption applied to corporate directors.¹¹⁸ We call this presumption a "parental judgment rule."

Some parental actions and judgments, however, would not be protected by a parental judgment rule. As powerful as are extralegal influences on parental behavior, these normative forces, by themselves, cannot be relied upon to align parents' and children's interests in all instances. Thus, some specific conflict of interest rules would predictably be agreed upon as supplements to a parental judgment rule. Predicting the precise domain of these rules *ex ante* is a problematic exercise. The significant costs entailed in enforcing legal rules that trump informal norms implies that preemptive conflict of interest rules would be specified only when a societal consensus about the impact of the regulated conduct on children dictates a particular choice. These same concerns argue for retaining parental discretion whenever "reasonable" parents are likely to differ about what choice promotes the interest of children.¹¹⁹

By aligning legal rules with prevailing social norms, several of the potential costs of conflict of interest regulation can be reduced. First, the saliency of a clear societal consensus significantly reduces the uncertainties about optimal parental behavior that otherwise would impose costs on both parents and the state.¹²⁰ Preemptive rules grounded in consensus are clear signals of the limits of acceptable behavior and are readily enforced by the state. Second, tracking broadly shared societal norms of parental behavior enhances the self-enforcing benefits of the legal rules (and concurrently reduces demoralization costs).

Optimal parental conflict of interest rules, then, announce a social consensus that mandates the legislatively designated approach. Parents who would choose a different course are acting in a way that conflicts with children's interest. Child labor laws and

¹¹⁸ See *supra* text accompanying notes 77-79 (summarizing the business judgment rule).

¹¹⁹ For example, it is probable that a societal consensus supports requiring parents to assure that their children are educated. In contrast, no consensus supports the requirement that education need conform to a prescribed curriculum or take place in public school.

¹²⁰ In a sense, the existence of a social consensus solves a coordination problem for the parties by offering a default solution to the bargaining game on some issues. The state's initial bargaining stance may generally incline toward regulation and the parents' toward maintaining discretion.

compulsory school attendance requirements, for example, serve as legally-supported announcements that children's welfare is furthered by remaining in school until a designated age, and that any other choice is contrary to their interest.¹²¹ Consensus-driven rules could also establish minimum age restrictions for drinking, driving and marriage.

These sorts of legal preemptions are a close analogue to conflict of interest rules in other fiduciary contexts. In many other settings, of course, the fiduciary obligation primarily involves financial management, and thus conflict of interest rules focus on financial decisions.¹²² Because the scope of parental authority is broader and includes decisions affecting every aspect of the child's life, legal rules regulating parents would predictably cover a wider range of issues, from health to education to discipline. By limiting legally-imposed restrictions to only those that reflect a normative consensus about the welfare of children, parents are left with broad discretion to rear their children according to their own values. Thus, a limited domain for legal regulation promotes the shared objective of encouraging investment in the parental role. At the same time, the law reinforces broadly shared social norms in ways that induce parents to internalize an obligation to attend to their children's welfare.

c. The Function of Parental Rights

In an ideal regulatory scheme, extralegal and legal norms function both as complements and substitutes. For example, a parental judgment rule together with narrowly drawn conflict of interest rules will specify only the broad parameters for the exercise of parental discretion. Thus, extralegal norms are a necessary complement to establish the further constraint that discretion does not imply license to pursue selfish interests. In the same vein, the rela-

¹²¹ The prohibition of corporal punishment by parents under Swedish law is another example. See Greg McIvor, *Human Rights: Swedish Parents Demand Right to Smack Children*, Inter Press Service, Feb. 5, 1993, cited in Robert H. Mnookin & D. Kelly Weisberg, *Child, Family & State* 333-35 (3d ed. 1995) (describing the policy and suggesting that consensus supporting it may be in question). That corporal punishment by parents is not prohibited in this country suggests the lack of a consensus.

¹²² Some restrictions on guardians deal with other kinds of decisions, because the scope of guardians' authority encompasses a broader range of decisions.

tional model predicts that the parties would agree to amplify and reinforce informal social norms with pervasive and powerful legal rhetoric of parental fidelity and responsibility.

On first analysis, the conferral of parental rights and the characterization of parents' status in terms of entitlement seems inconsistent with this requirement of complementarity.¹²³ Legal attention to parents' rights appears to weaken informal normative signals about parental responsibility and to dilute social sanctions. Thus, the functioning of extralegal norms that do much of the work to incline parents toward an attitude of obligation may be undermined by a robust concept of parents' rights. Furthermore, a focus on rights encourages parents to consider their own interests, rather than their child's, in asserting relationship claims. Through this lens, the standard assumption that parental rights count *against* children's interests makes sense.

Despite its apparently corrosive influence, however, the legal recognition of parental rights plays a central role in a fiduciary regime, and its banishment from the family context would entail substantial costs. The absence of pecuniary compensation to parents for capably performing parental tasks necessarily increases the value of nonpecuniary substitutes such as reputation and role satisfaction.¹²⁴ On this dimension, parental authority over the relationship with children is offered as the *quid pro quo* for satisfactory performance. It is unlikely that, in a hypothetical bargain over the terms of their performance, parents would agree to undertake the responsibilities desired by the state without assurance that their investment would receive legal protection. Recognition of these parental claims in some form is an important inducement to encourage investment in children's welfare.

In sum, a regime of parental rights has offsetting effects. To the extent that rights are closely linked to performance, they serve as the *ex ante* compensation for the satisfactory future performance

¹²³ "Rights" of fiduciaries in other contexts are limited to pre-agreed compensation. Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 801 (1983) ("[A]n entrustor [beneficiary] does not owe the fiduciary anything by virtue of the relation except in accordance with the agreed-upon terms or legally fixed status duties.").

¹²⁴ We have noted that even in contexts in which fiduciaries are compensated, non-pecuniary reputational attributes of the role increase its attractiveness. See *supra* Part II.A.3.

of critically important social functions. But the rhetoric of parental rights (especially when it is divorced from the *quid pro quo* of parental obligation) can also intensify parental inclinations to view the relationship in terms of self-interest. One method of correcting for these negative effects is to clarify the link between rights and responsibilities and to impose substantial sanctions, such as restriction or withdrawal of parental authority, for serious default on parental obligations.

d. Monitoring Mechanisms

The relational model suggests that, within the intact family, bonding arrangements will dominate, and that extralegal influences on parents' behavior will do much of this work. The effectiveness of these norms reduces the relative benefits of monitoring alternatives. Moreover, direct state monitoring of parental performance in the intact family is awkward and very costly.¹²⁵ Monitoring rules used in other fiduciary contexts, such as judicial supervision of important decisions and regular reporting requirements, would impose demoralization and uncertainty costs on parents who are presumptively the superior caretakers for their children. Moreover, systematic monitoring by governmental agencies represents an intrusion into family privacy which carries a further relational cost. These arguments together provide strong support for a parental judgment rule which establishes a presumption of reasonable diligence and good faith in the exercise of parental duties.

Nonetheless, some specific devices to detect and discourage deficient parental behavior are cost-justified. For example, mandatory school physical examinations are a low-cost means of evaluating children's health and development. Psychological evaluations would serve a similar function. In addition, teachers, doctors, and baby-sitters can serve as informal, but effective, monitors. More

¹²⁵ For this reason among others, systematic state monitoring is simply not cost-effective in the absence of parental default. The experience with in-home supervision in abuse-neglect cases supports the proposition that such direct state monitoring is awkward and inefficient. If a court opts to leave children in their parents' home, it can order the parents to allow a public health nurse to visit the child, to participate in therapy or alcohol or drug addiction programs, or to bring the child to public daycare. See Wald, *supra* note 51, at 630. Making sure parents comply requires constant monitoring by public caseworkers who are generally overburdened and underfunded. See Garrison, *supra* note 51, at 432 n.44 (summarizing the caseload burdens on social workers).

formally, child abuse reporting statutes impose a duty on all professionals dealing with children—as well as an opportunity for neighbors and acquaintances—to bring seriously deficient parental conduct to the attention of child protective service agencies.¹²⁶ Parents who receive public welfare support are subject to an additional level of monitoring by social service professionals.¹²⁷

As in any contractual relationship, both parties' interests are served by stipulating sanctions for breach. In the case of the intact family, the principal sanction for deficient parental performance is reduction or withdrawal of parental rights. Upon default by the parent, the presumption of good faith and due diligence gives way to more precise monitoring rules that confine parental discretion. Parents whose children are found to be abused or neglected will be subject to formal judicial and agency supervision. In this way, parents whose precommitments prove unreliable are more carefully monitored until the deficient behavior is cured. If the parents' default is judged to be irremediable, further sanctions can be imposed, including termination of parental rights (after an appropriate judicial proceeding), followed by placement with substitute adoptive parents.

In short, as this somewhat stylized description suggests, state monitoring of parental conduct has limited utility (and higher costs) in the context of the intact family. However, monitoring plays an important role in a scheme of sanctions once evidence of parental deficiencies overcomes the presumption of good faith and diligence.

3. *Reducing Conflicts of Interest in Broken Families*

The preceding discussion suggests that there will be some significant differences between the optimal means of aligning the interests of parents and children in intact families and those that are best for reducing conflicts of interest between children and non-

¹²⁶ See, e.g., Cal. Pen. Code § 11,166 (West Supp. 1995). This statute requires not only professionals such as doctors or teachers to report abuse, but also film developers who discover possible sexual abuse of children captured on film.

¹²⁷ This form of parental monitoring is controversial, of course, because it focuses on poor families. Some observers believe that the disproportionate number of poor parents who are the subject of abuse/neglect investigations is attributable to the fact that they are subject to greater governmental scrutiny. See Wald, *supra* note 51, at 629 n.21.

custodial parents. A hypothetical *ex ante* bargain between non-custodial parents and the state would most likely rely upon a significantly different combination of extralegal norms and legal rules, and of bonding and monitoring arrangements.

Several distinct situations present contexts for regulation of the relationship of children and non-custodial parents. One category of cases involves biological parents (usually fathers) who have never lived in a family unit with the child. In others, the dissolution of the family unit may result from divorce or separation, or from state intervention and removal of the child because of inadequate parental performance. In some sense, it seems curious to conceive of these parents as fiduciaries, and surely a threshold question is whether the law should encourage any involvement with their children. In general, parents not living with their children perform a greatly diminished parental role, and those whose children have been placed in state custody have been specifically found to be deficient as caretakers. In these contexts, if no parent-child bond has developed, the benefit to the child of promoting further parental commitment may be offset by counterbalancing costs. Nonetheless, so long as the state pursues the objective of promoting the interests of children, the model of parents as fiduciaries applies equally to the relationship between the non-custodial parent and the child. Differences in the regulatory regime turn in part on variations in the content of the desired parental performance and in the anticipated conflicts of interest that occur when the child and parents no longer form a family unit.

a. The Importance of the Non-Custodial Parent-Child Relationship

The first question, then, is what are the goals of legal regulation of non-custodial parents, and what kind of parenting performance should be encouraged. The relational model dictates different responses depending on whether or not established family relationships exist.

The case for encouraging involvement by a non-custodial parent rests first on the non-trivial value attached to biological parenthood. First, biological parenthood may be an important influence on behavior. If we accept the lessons of sociobiology, biology inclines parents to care for and protect their children to a

greater extent than stepparents or other non-genetically related substitute parents.¹²⁸ The genetic link can reinforce and strengthen the creative bond that defines the relationship as central to personal identity.¹²⁹ Second, the bond to the biological parent has value to the child. Children find meaning in their genetic ties as a source of personal identity, a tendency that is evident in the efforts of adopted children to establish a link to their biological parents. The response of children whose biological parents have severed ties reveals the psychological importance to children of this relationship.¹³⁰ Thus, the relational model supports encouraging non-custodial biological parents to invest in a relationship with their children absent offsetting costs to relationships with parents filling more substantial functions.

The importance of the biological link justifies providing the non-custodial parent with the opportunity to establish a relationship with his infant child. If a parent fails to act expeditiously, and the child establishes such bonds with other adults, the risk of offsetting costs argues against further parental involvement.¹³¹ The parent who is dilatory in assuming responsibilities may be supplanted by another; at this point further involvement is more disruptive than beneficial.

¹²⁸ See *supra* notes 104-06 and accompanying text.

¹²⁹ See White, *supra* note 107, at 4-5.

¹³⁰ Judith Wallerstein and Joan Kelly have found that children visited infrequently by their fathers suffered severely diminished self-esteem during the first five years after the separation of their parents. See Wallerstein & Kelly, *Parental Divorce: Experiences of the Child in Later Latency*, *supra* note 4. Robert Hess and Kathleen Camara have found that children who maintained positive relationships with both parents demonstrated less aggression and stress and functioned more effectively in work and social relations with their peers. Robert D. Hess & Kathleen A. Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, 35 *J. Soc. Issues* 79, 92-95 (1979). Children who have lost or never had fathers yearn for them and feel disappointed by their absence. See Woodhouse, *supra* note 1, at 1765. Studies show that there is an increase in delinquency and antisocial behavior when the father is absent. This delinquency is much more pronounced when the father is absent because of separation or divorce rather than death. See J.W.B. Douglas, J.M. Ross, W.A. Hammond & D.G. Mulligan, *Delinquency and Social Class*, 6 *Brit. J. Criminology* 294, 300 (1966); H.B. Gibson, *Early Delinquency in Relation to Broken Homes*, 10 *J. Child Psychol. & Psychiatry* 195, 203 (1969); Michael Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 12 *J. Child Psychol. & Psychiatry* 233, 241-42 (1971).

¹³¹ This point will be developed further in the analysis of the rights of unmarried fathers. See *infra* Part III.A.2.

When the parent and child have an established relationship, usually built through life together in a family, the situation is quite different. Except where parental conduct is so harmful that it warrants severing the relationship or where the parent has had minimal involvement, the continuing importance of this relationship for the child persists even when parent and child are no longer part of a family unit. Parents are not fungible players in their children's lives, and disruption of the parent-child bond is costly to children's psychological health.¹³² For these reasons, both child-development experts and policy analysts argue for protecting established parent-child relationships outside of the intact family.¹³³ Thus, the basic

¹³² Most child-development experts emphasize the harm to the child of any disruption of the parent-child bond. Joseph Goldstein, Anna Freud and Albert J. Solnit, for example, argue against removal of the child from parental custody except under the most threatening of circumstances, positing that disruption of the bond is almost always extremely destructive. See Goldstein et al., *supra* note 4, at 4-14. Policies of state intervention and removal are premised on a view that weighs more heavily the harm to children of inadequate parenting and less heavily the harm of disruption.

Researchers have found that adoption is associated with psychological adjustment problems. See Garrison, *supra* note 51, at 470 & n.218 (citing studies finding that adopted children are disproportionately vulnerable to psychological and emotional problems). Adoptees' emotional problems are generally worse the older they are at adoption. See *id.* at 471 & n.223 (citing studies finding that the later the age of adoption, the greater the frequency and severity of emotional problems).

¹³³ See, e.g., studies cited *supra* note 132; Andre P. Derdeyn, Andrew R. Rogoff & Scott W. Williams, *Alternatives to Absolute Termination of Parental Rights After Long Term Foster Care*, 31 *Vand. L. Rev.* 1165 (1978); Garrison, *supra* note 51; see also *infra* note 143 and accompanying text (clarifying that the reform movement that favors shared parenting after divorce is predicated in part on the importance for the child's welfare of continued involvement by both parents).

Legal rules governing state intervention in families have been reformulated both to discourage removal of the child from parental custody, and, if the child is removed, to encourage remediation of parental deficiencies so that the child can be returned to parental custody. A primary example of such legislation is the federal Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.). The Act was designed to change the emphasis of child protection services from centering on foster care to centering on either maintaining the child in her original family or creating a new family through adoption. Thus, the Act, while beginning with the presumption that parents are the first best caretakers, does not seek to maintain the parent-child relationship if parents continue to be deficient. The goal then becomes to provide the child with a new permanent family through adoption. See *supra* note 35 (summarizing the provisions of the Act). The Act has not been very successful at achieving its goals. For analyses of the success of the Act, see Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 *Cal. W. L. Rev.* 223 (1990); MaryLee Allen, *Crafting a Federal Legislative Framework for Child Welfare Reform*, 61 *Am. J. Orthopsychiatry* 610 (1991).

legal objectives that shape regulation of intact families—encouragement of parental responsibility and commitment to the relationship—are unchanged in this context, even though the parental role is more limited.

b. Replacing Informal Norms with Legal Regulation

Within the intact family, extralegal bonds of biology, affection, and creative attachment, together with internalized informal norms about parenting, are assumed to function effectively, mitigating potential conflicts of interest without extensive legal regulation. When the family is fractured, however, either voluntarily¹³⁴ or because the parents' performance has been found to be inadequate, there is greater reason to question the power of extralegal constraints on parents' inclination to act selfishly. A presumption of good faith and reasonable diligence, as reflected in a parental judgment rule, is not warranted. This necessarily increases the demand for more elaborate legal rules to ameliorate potential conflicts.

Parents who lack custody of their children because of divorce or dissolution and those whose children are in state custody are more likely than parents in intact families to choose self-interest over parental responsibility. Selfish behavior by non-custodial parents is more prevalent, even when those parents were unselfish custodians when the family was intact. In a typical example, the divorced father who previously seemed to care about his children's education refuses to contribute to college expenses. Divorced parents defect on obligations that they would have fulfilled before divorce in part because the postulated identity of interests between parent and child erodes over time. For some non-custodial parents, the creative bond of parenthood grows more attenuated, such that being the child's parent becomes less central to personal identity.¹³⁵

¹³⁴ Voluntary dissolution occurs most commonly when the parents divorce. Of course, the issues created by divorce would arise whenever the child's parents dissolved their relationship, whether or not they are married.

¹³⁵ Several researchers have found that many fathers withdraw from the relationship with their children after divorce. See, e.g., Robert E. Emery, E. Mavis Hetherington & Lisabeth F. Dilalla, *Divorce, Children, and Social Policy*, in 1 *Child Development Research and Social Policy* 189, 213 (Harold W. Stevenson & Alberta E. Siegel eds., 1984) (citing Furstenburg, Spanier & Rothchild, *Patterns of Parenting in the Transition from Divorce to Remarriage in Women: A Developmental Perspective* 325 (Phyllis W. Berman & Estelle

As the unity of parents' and children's interests dissolves, the risk of conflicts intensifies. Moreover, for many non-custodial parents, the rewards of parenthood diminish after divorce,¹³⁶ reducing further the incentive to invest in the relationship with their children. Parent-child interaction is less frequent and is often accompanied by conflicts with the former spouse. Other attachments, perhaps to a new family and different children, substitute for those in the dissolved family, and the fulfillment of previously established parental responsibilities becomes more burdensome.

Parents whose children have been placed in state custody present a somewhat different case for more pervasive legal oversight. Assuming that the state has correctly judged their parenting to be deficient,¹³⁷ these parents have revealed themselves to be insufficiently influenced by the informal norms that shape parental behavior. Since informal mechanisms have failed, more formal legal constraints and sanctions are required to reduce the risk of misbehavior.

Encouraging non-custodial parents to act in their children's interest requires translating informal norms into more explicit legal directives. Two examples under current law make the point. Parents whose children have been removed by the state and placed in foster care are subject to explicit directives (usually in a foster care

R. Ramey eds., 1982)). See also Hetherington et al., *Aftermath of Divorce*, supra note 4, at 93; Wallerstein & Kelly, *Visiting Father-Child Relationship*, supra note 4, at 1534.

¹³⁶ Many fathers tend to find this non-custodial relationship artificial and unsatisfactory. See Furstenburg et al., supra note 135, at 331; Mel Roman & William Haddad, *The Disposable Parent: The Case for Joint Custody* (1978); Judith B. Greif, *Fathers, Children, and Joint Custody*, 49 *Am. J. Orthopsychiatry* 311 (1979). Hetherington, Cox & Cox found that some fathers reported that they could not tolerate the artificial relationship permitted by visitation. See Hetherington et al., *Divorced Fathers*, supra note 4, at 427. See also C. William Briscoe & James B. Smith, *Depression in Bereavement and Divorce*, 32 *Archives Gen. Psychiatry* 439 (1975); Briscoe & Smith, *Depression and Marital Turmoil*, 29 *Arch. Gen. Psych.* 811 (1973). Hetherington, Cox & Cox describe the stereotypical "Disneyland Daddy" relationships in which fathers see their children occasionally and shower them with gifts but do not develop real relationships. See Hetherington et al., *Divorced Fathers*, supra note 4, at 425-26; see also Grief, supra, at 315 ("Fathers experiencing greater child absence are more prone . . . to entertain their children with constant activity, despite a repeated disdain for being seen as a 'Sugar Daddy.'").

¹³⁷ We acknowledge that state intervention in families may sometimes be driven by class biases that affect social workers' assessment of adequate parenting, rather than parents' conduct that actually conflicts with the child's interest. For the purpose of this analysis, we set this issue aside.

plan) that define their obligation to their children. Parents may be required to abstain from drinking alcohol, to clean up the house, to participate in therapy, or to terminate a relationship with another adult who abuses the child.¹³⁸ In the divorce context, non-custodial parents are subject to court orders directing them to provide financial support to their children, while custodial parents and parents in intact families are not. Parents in family units share their children's standard of living and, through informal influences, can usually be trusted collectively to take their children's needs into account in allocating family resources. Moreover, for reasons discussed earlier, oversight of parents' financial decisions in intact families imposes demoralization costs, and is unlikely to yield significant net benefits for the child. Parents not living with their children, on the other hand, are less likely to give priority to their child's financial needs and may require a formal legal incentive in the form of a child support order.

The status of parents as "joint fiduciaries" further complicates the process of designing optimal rules for non-custodial divorced parents. In the intact family, the issue of disagreement between parents over appropriate caretaking actions is resolved by a pre-

¹³⁸ The Virginia Code, for example, states that a "foster care plan shall describe . . . the participation and conduct which will be sought from the child's parents and other prior custodians . . ." Va. Code Ann. § 16.1-281(B)(ii) (Michie Supp. 1995). At periodic reviews, a petition must be filed for each child that "set[s] forth in detail the manner in which the foster care plan previously filed with the court was or was not complied with and the extent to which the goals thereof have been met." Va. Code Ann. § 16.1-282(B)(6) (Michie Supp. 1995). The court may terminate parental rights if parents fail to remedy the conditions which led to foster care placement in the first place. Va. Code Ann. § 16.1-283(C)(2) (Michie 1988). Foster care plans can include a variety of conditions on parents, depending on the conditions which led to foster care placement. See, e.g., *Comer v. Virginia Beach Dep't of Social Servs.*, No. 2103-94-1, 1995 WL 91399 (Va. Ct. App. 1995) (requiring mother to complete an alcohol abuse treatment program, attend weekly Alcoholics Anonymous meetings, and avoid voluntary contact with her abusive husband); *Durham v. Alexandria Dep't of Social Servs.*, No. 2176-93-4, 1994 WL 242442 (Va. Ct. App. 1994) (requiring "home based services" and mental health counseling); *Hileman v. Winchester Dep't of Social Servs.*, No. 0320-93-4, 1994 WL 161390 (Va. Ct. App. 1994) (requiring counseling sessions for paranoid schizophrenic); *Hunter v. Commonwealth*, No. 2592-92-3, 1993 WL 364736 (Va. Ct. App. 1993) (requiring substance abuse therapy and psychological testing); *Edwards v. Fairfax County Dep't of Human Dev.*, No. 2607-92-4, 1993 WL 302380 (Va. Ct. App. 1993) (requiring mother to receive substance abuse treatment and mental health counseling, stop associating with drug dealers and users, find stable and appropriate housing, obtain employment, maintain weekly visitation with her daughters, and acknowledge the abuse and neglect suffered by them).

sumption that the family unit will generate consensus on the best course of action. But in the case of divorce or dissolution, there is a significant risk of conflict between parents over how best to promote children's interests. This requires more elaborate and formal rules to resolve potential disputes between the fiduciaries. Thus, explicit directives may be required to signal which parent has authority to make particular decisions (such as those regarding religious practice or education) and how the child's time is to be allocated between the parents.¹³⁹ Arrangements that would be reached informally and by consensus in the intact family may be prescribed by court order,¹⁴⁰ and in cases of irreconcilable conflict, legal rules must determine which parent is to exercise sole authority as decisionmaker.¹⁴¹ Predictably, under a relational model, the parent with primary responsibility (physical custody) retains greater decisionmaking authority (legal custody) when parents cannot cooperate. This authority serves as *ex ante* compensation for the fulfillment of more expansive parental obligations.

In sum, in both the divorce and abuse/neglect contexts, legal rules articulate and reinforce informal social norms regarding parental responsibility, norms which in intact families are presumed adequate by themselves to constrain behavior. The state substitutes formal, legal rules for the informal arrangements that govern the intact family because in this context the informal mechanisms are inadequate. Moreover, re-articulating informal norms

¹³⁹ Separation agreements and court orders often incorporate a schedule describing when the child will be with each parent, including a schedule for holidays, vacations and birthdays. Experts suggest that the more arrangements for the child can be reduced to precise written terms, the less the potential for future conflict. See Robert Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* 162-67 (1994).

¹⁴⁰ Courts have authority to order parents to cooperate with each other and prohibit each from undermining the child's relationship with the other parent. See Va. Code Ann. §§ 20-124.2, 20-124.3 (Michie Supp. 1995). Courts may threaten withdrawal of custody if a parent fails to cooperate. See *Beck v. Beck*, 432 A.2d 63, 72 (N.J. 1981).

¹⁴¹ When parents have joint legal custody, they share legal authority to make decisions regarding education, religious practice, etc. Courts sometimes set aside joint custody orders and give one parent sole legal custody when parents are not able to cooperate about these issues. See, e.g., *Schultz v. Elremmash*, 615 So. 2d 396 (La. Ct. App. 1993) (awarding sole custody to mother after joint custody arrangement broke down over father's desire to take child for visits to Libya and his desire that daughter be isolated from Catholicism and American political culture).

in legal prescriptions serves to reinforce the independent weight of the informal precommitments.¹⁴²

c. Rewards of the Parental Role

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

From this perspective, joint legal custody after divorce constitutes a symbolic acknowledgment of parental status and authority; it promotes fatherly involvement that may translate into more faithful fulfillment of financial responsibility.¹⁴³ Common sense

¹⁴² Thus, legal regulation requiring noncustodial parents to provide financial support to their children signals the law's endorsement of one form of parental obligation. Moreover, the extent to which enforcement of this duty is lax or rigorous indicates whether or not this responsibility is an important societal value.

¹⁴³ Proponents of joint custody argue that it will promote sharing of parental responsibility and will reduce the tendency of fathers to withdraw from their relationship with their children after divorce. This issue is discussed in Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 Ohio St. L.J. 455, 458-62 (1984). Some state codes state this objective explicitly as a legislative purpose. The California Code, for example, was amended in 1979 to facilitate joint custody. It states:

The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child . . .

Cal. Fam. Code § 3020 (West 1994).

Eleanor E. Maccoby and Robert H. Mnookin have found that fathers who see their children regularly after divorce are more compliant in paying child support, although they found no correlation between joint custody arrangements *per se* (as opposed to sole custody with visitation rights) and child support compliance. See Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 250-57 (1992).

The premise that it is important to recognize the status of non-custodial parents can also be seen in reform measures that affect non-custodial parents in sole custody arrangements.

supports the notion that non-custodial parents are more likely to embrace their responsibilities if the relationship continues to offer emotional rewards. Thus, an optimal regulatory scheme will encourage frequent contact between the non-custodial parent and child after divorce, whatever the formal custody arrangement, unless this contact generates offsetting costs to the child.¹⁴⁴ Moreover, custodial parents are properly encouraged to promote the child's relationship with the other parent.¹⁴⁵ The same point holds for parents whose children are removed by the state. Encouraging meaningful contact between parent and child during the period of state custody and seeking to reestablish the family within a reasonable time serves to increase parental efforts and commitment.

Imagining an *ex ante* bargain between non-custodial parents and the state focuses attention finally on legal termination of the parent-child relationship. Here, distinguishing features of the parent-child bond complicate the issue. In other settings, beneficiaries and other agents are presumed to be as well served by one fiduciary as another, and fiduciaries who perform poorly are replaced. In contrast, once the parent-child relationship is established, even suboptimal parents have idiosyncratic value to their child. The relational model thus argues against severing this relationship unless it results in greater harm than benefit to the child.¹⁴⁶ This is true even when many of the tasks of parenthood have been assumed by others.

For example, modern law gives non-custodial parents access to their children's school and medical records, a recognition of their parental status. See, e.g., Colo. Rev. Stat. § 14-10-123.5(7) (1987); Fla. Stat. Ann. § 61.13(2)(b)(3) (West Supp. 1995); Idaho Code § 32-717A (1983); Mont. Code Ann. § 40-4-225 (1993). Under traditional law, no such right of access was available, a small but perhaps particularly grating signal that these parents held a diminished legal status as parents.

¹⁴⁴ For example, if the parents have a very conflictual relationship, the costs to the child of being subject to the conflict may offset the benefit of continued contact with both parents. See Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 *Psych. Bull.* 310, 313 (1982); Scott & Derdeyn, *supra* note 143, at 490-92.

¹⁴⁵ See *supra* note 140. Custody statutes also make the inclination of each parent to support the child's relationship with the other parent a factor in deciding custody.

¹⁴⁶ See Goldstein et al., *supra* note 4, at 4-14 (advocating a policy of "minimum state intervention" in the family). When the state intervenes in the family to promote the welfare of children, the minimum that can be asked is that it not do more harm than good. See Franklin E. Zimring, *The Changing Legal World of Adolescence* 62 (1982).

4. *Summary*

The relational model of parents as fiduciaries suggests the contours of an optimal regime for regulating the parent-child relationship. Informational and control asymmetries generate a significant risk of conflicts of interest in parent-child relationships. The costs of these deviations from the norm of parental responsibility toward children can be efficiently reduced by a legal regime that is constructed around a pre-existing network of informal social norms. By selecting the appropriate mix of extralegal and legal norms and of bonding and monitoring arrangements, a fully integrated regulatory regime can function harmoniously both to encourage parents to approach the tasks of child-rearing with an elevated sense of duty and to detect when parents fail to perform those tasks adequately.

The character of legal regulation will differ depending on whether or not the family is intact. In the intact family, extralegal norms do much of the work to promote desired parental behavior. This is a function of the relatively high cost of monitoring and the correspondingly lower costs of effective bonding alternatives. In this setting, bonding through psychological attachment and informal social norms is an efficient substitute for invasive restraints on discretion and family privacy. Legal directives that function as supplemental precommitments are appropriately limited to issues where a strong societal consensus dictates mandatory behavior. Viewed only from the perspective of legal regulation, such a regime may seem imbalanced: a broad recognition of parental rights and authority, together with a narrowly drawn set of legal responsibilities. This apparent inequality dissipates, however, once the powerful effects of extralegal norms are recognized.

The optimal regulatory patterns change when the subject of legal regulation is the non-custodial parent. Here, legal regulatory prescriptions are necessary substitutes for the informal norms that are relied upon in the intact family. The substitution of more exacting legal standards is justified by the weakening of informal norms, the breach of the obligation to provide satisfactory care, and by the potential for conflict between parents as joint fiduciaries.

III. THE RELATIONAL MODEL AND MODERN FAMILY LAW

In this Part, we apply the relational model of parents as fiduciaries to contemporary family law. We will argue that, to a considerable extent, the model explains the deep structure of the legal regulation of the parent-child relationship. Although generally not described in these terms, the parent-child relationship is regulated by a variety of interactive mechanisms that function to encourage parents to serve their children's interests better. Analyzing family law from a fiduciary perspective also reveals particular areas in which legal norms depart from these principles. Certain aspects of contemporary law regulating divorce and termination of parental rights, for example, appear to exacerbate conflicts of interest between parent and child. More generally, the rhetoric of parental rights, unconstrained by any explicit conceptual framework, may undermine informal norms and distort the feedback function of rights in a fiduciary scheme.

A. Contemporary Family Law as a Fiduciary Regime

1. Some General Similarities

The peculiar shape and character of contemporary family law conforms, in large measure, to the predictions of the relational model of parents as fiduciaries. Parental performance in the intact family is shaped largely by extensive extralegal norms and by a correlative presumption of parental authority and discretion. Explicit legal commands are limited largely to a series of preemptive rules that define the boundaries of parental discretion. The array of preemptive rules, including compulsory school attendance requirements, child labor restrictions, curfew laws and vaccination requirements, appears to function principally as a means of reinforcing powerful extralegal influences.

As the model predicts, the set of regulatory mechanisms changes when the family dissolves; informal social norms are replaced by formal prescriptive rules. For example, parents whose children are in foster care are subject to state agency directives regarding their obligations under foster care plans.¹⁴⁷ These parents, having devi-

¹⁴⁷ As discussed previously, court orders sometimes direct one parent not to undermine the child's relationship with the other parent, not to involve the child in a particular religious practice, etc. See *supra* notes 140-41 and accompanying text.

ated from informal normative standards, are provided with explicit performance objectives (at least in theory¹⁴⁸) that must be met before they can resume custody. The foster care plan functions as a more formal bonding arrangement, creating incentives for parents to avoid parenting practices that conflict with their child's welfare and clarifying the sanctions for breach of the commitment.

The recent trend promoting shared parenting after divorce, either through joint custody or through sanctions against uncooperative parents,¹⁴⁹ is further evidence of the descriptive power of the relational model.¹⁵⁰ As with foster care plans, these require-

¹⁴⁸ See Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in *Foster Children in the Courts* 128 (Mark Hardin ed., 1983). Hardin cites the Colorado statute defining "residual parental rights and responsibilities" as:

those rights and responsibilities remaining with the parent . . . including, but not necessarily limited to, the responsibility for support, the right to consent to adoption, the right to reasonable visitation unless restricted by the court, and the right to determine the child's religious affiliation.

Id. at 181 n.49 (quoting Colo. Rev. Stat. § 19-1-103(24) (1978)). Hardin also cites: Idaho Code § 16-1602(p) (1979); Mass. Gen. Laws Ann. ch. 119 § 26 (West 1975 & Supp. 1981); Utah Code Ann. § 78-3a-49 (1977); Vt. Stat. Ann. tit. 33 § 632(a)(16) (1981); Va. Code Ann. § 16.1-228(S) (Michie 1982); Wash. Rev. Code Ann. § 13.34.160 (Supp. 1981). Id. at 181 nn. 49, 52.

¹⁴⁹ There has been much criticism of the implementation of foster care plans by social service agencies. The criticisms are either that state agencies are dilatory or unclear in setting objectives, or that they don't provide services necessary for parents to comply with requirements.

¹⁵⁰ For a discussion of joint custody, see *supra* notes 143-45 and accompanying text. Under what have been described as "friendly parent" provisions, judges are encouraged in custody hearings to consider which parent is more likely to support the other parent's relationship with the child. The goal is to foster the relationships of both parents with the child. For examples of friendly parent provisions, see Alaska Stat. §§ 25.20.060, 25.24.150(c)(6) (1991); Ariz. Rev. Stat. Ann. § 25-332(A)(6) (Supp. 1994); Cal. Fam. Code Ann. § 3040(a)(1) (West 1994); Colo. Rev. Stat. § 14-10-124(1.5)(f) (1987); Fla. Stat. Ann. § 61.13(3)(a) (West Supp. 1995); La. Civ. Code Ann. art. 134(10) (West Supp. 1995); Mich. Comp. Laws Ann. § 722.23(3)(j) (West Supp. 1995); Minn. Stat. Ann. § 518.17(13) (West Supp. 1995); Mont. Code Ann. § 40-4-223 (1993); Nev. Rev. Stat. Ann. § 125.480(3)(a) (Michie 1993); 23 Pa. Cons. Stat. Ann. § 5303(a) (1991). Such provisions discourage parents from presenting evidence that joint custody would be against the best interest of the child, because presenting such evidence can make a judge feel that the adversarial parent is unlikely to foster the child's relationship with the other parent. See Scott & Derdeyn, *supra* note 143, at 476 nn.101-02 (1984) (summarizing the policy imperatives underlying friendly parent provisions); see also Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 *Golden Gate U.L. Rev.* 539, 554-56 (1982) (noting that friendly parent provisions promote the use of custody as a bargaining chip by parents seeking to minimize child support obligations or to maintain access to a victim of abuse).

ments function to formalize norms of parental cooperation that are implicitly presumed when parents live together. Upon divorce, conflict between the parents may undermine the cooperative norm and promote conduct that conflicts with the child's interest. Viewed in this way, the controversy surrounding joint custody may reflect a dispute about whether the formal requirement of post-divorce cooperation distorts pre-divorce norms and conduct, and whether the law is realistic in assuming that divorced parents can cooperate as joint fiduciaries to the extent that joint custody requires.¹⁵¹

As the model predicts, monitoring arrangements are used far more extensively upon family breakdown. In general, parents who are divorced, and to a far greater extent, those whose children are in state custody, are subject to a degree of judicial and state agency supervision that would be deemed violative of family privacy if applied to intact families. Increasingly tough child support enforcement procedures assure that non-custodial parents fulfill their financial duty.¹⁵² Courts may authorize formal agency supervision of abusive or neglectful parents.¹⁵³ Moreover, regular judicial supervision is used to determine whether these parents are progressing in remediating performance deficiencies.¹⁵⁴

Divorce lawyers utilize evidence of what has been designated "parental alienation syndrome" to establish the claim that the opponent has sought to turn the child against the other parent. See Richard A. Gardener, *The Parental Alienation Syndrome* (1992). For a critical analysis, see Cheri L. Wood, Note & Comment, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 *Loy. L.A. L. Rev.* 1367 (1994).

¹⁵¹ For example, a joint custody order can coerce cooperation between a primary caretaker and a formerly uninvolved parent.

¹⁵² See *supra* notes 113-14.

¹⁵³ Such supervision involves mandatory family cooperation with the agency's treatment plan and regular agency monitoring of the family. See *supra* note 125; see also Bonnie Kamen & Betty Gewirtz, *Child Maltreatment and the Court*, in *Clinical Social Work with Maltreated Children and their Families: An Introduction to Practice* 178, 183-84 (Shirley M. Ehrenkranz et al. eds., 1989).

¹⁵⁴ The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.), requires the development of a case plan for every child in foster care, a review of the plan every six months, and a "dispositional hearing" no later than eighteen months after a child enters foster care. See 42 U.S.C. §§ 627(a)(2)(B), 671(a)(16), 675(1), 675(5) (1988). For a discussion of these provisions, see MaryLee Allen, Carol Golubock & Lynn Olson, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in *Foster Children in the Courts* 575, 582-84 (Mark Hardin ed., 1983). Periodic review has been established in a majority of states. For examples of

Even features of contemporary family law that are conventionally understood as serving the interests of parents can better be understood and rationalized as promoting the goal of optimizing the parent-child relationship. Thus, for example, legal restrictions on state supervision of families are commonly thought to reflect deference toward parental authority, and are justified in the rhetoric of parental rights.¹⁵⁵ Some critics assume that this deference to parental authority would be greatly diminished were the law to focus instead on children's welfare.¹⁵⁶ To the contrary, however, our analysis indicates that a fiduciary regime will rely substantially on informal norms to shape responsible parental behavior and that explicit legal directives will not serve the desired ends of enhancing parental performance.¹⁵⁷ Moreover, the relational model suggests that parental authority and discretion are the necessary *quid pro quos* for parents undertaking the responsibilities of parenthood. Thus, setting aside the *rhetoric* of parental rights, deference to family privacy fits comfortably into a fiduciary framework.

2. *Relationship Claims of Unmarried Fathers*

a. *Parents' Rights in the Supreme Court*

In a series of opinions dealing with the claims of unmarried biological fathers, the Supreme Court has struggled to define the

current laws, see Cal. Welf. & Inst. Code § 366, 366.22 (West Supp. 1995); N.Y. Soc. Servs. Law Ann. § 392 (McKinney Supp. 1995).

¹⁵⁵ See Dwyer, *supra* note 9; Schneider, *supra* note 30, at 1835-42; Fitzgerald, *supra* note 8, at 37-45; Woodhouse, *supra* note 12, at 1112-22; see also Bartlett, *supra* note 7, at 297-98 (characterizing the rhetoric of parental rights as intrinsic to the modern liberal state); Woodhouse, *supra* note 1, at 1811 (arguing that the "possessive individualism" underlying parental rights objectifies children).

¹⁵⁶ See, e.g., Bartlett, *supra* note 7; Dwyer, *supra* note 9; Fitzgerald, *supra* note 8; Woodhouse, *supra* note 1. Some experts have proposed policies of extensive state oversight to protect children. In the 1970s, Henry Kempe proposed a Home Visitor Program to undertake health monitoring of all infants at home. See Richard J. Light, *Abused and Neglected Children in America: A Study of Alternative Policies*, 43 Harv. Ed. Rev. 556, 567-71 (1973).

¹⁵⁷ Joseph Goldstein, Anna Freud and Albert J. Solnit emphasize the importance for the child's welfare of an undisturbed parent-child bond. See Goldstein et al., *supra* note 4, at 4-14. Zealous efforts to protect children's welfare in the intact family also run the risk of inefficient use and exhaustion of scarce resources, which are dissipated and not targeted toward situations in which intervention is needed. For a discussion of the difficulties in actually measuring levels of child abuse, see Light, *supra* note 156, at 560-67; R. Gellas, *Demythologizing Child Abuse*, Family Coordinator, Apr. 1976, at 135-38.

rights of unmarried fathers, a group of parents who historically were presumed to lack any legally protected interest in their relationship with their children.¹⁵⁸ Under current constitutional doctrine, biology is an important but not sufficient condition for establishing a cognizable parental claim.¹⁵⁹ Under the Court's analysis, legal protection of the biological father's parental relationship is strongly correlated to his investment in and fulfillment of his parental role. Thus, the constitutional analysis conforms to the predictions of the relational model, although it has not been couched in these terms.

In *Stanley v. Illinois*,¹⁶⁰ the Supreme Court extended parental rights to an unmarried biological father who had lived with his children and their mother until her death.¹⁶¹ *Stanley* invalidated an Illinois statute that established a presumption of unfitness for unmarried fathers and automatically transferred custody to the state upon the death of the mother.¹⁶² The Court recognized Stanley's legitimate interest in a continuing relationship with his children and held that the state could not terminate that interest without giving him an opportunity to demonstrate his fitness as a parent.¹⁶³

Stanley can be understood on one level as simply announcing that formal marriage is not a predicate for legal protection of a father's relationship with his child. The case was described by the Court as presenting an unremarkable father-child relationship in an intact family, except that Stanley and the mother of the children were unmarried.¹⁶⁴ In extending parental rights to Stanley, the Court implicitly recognized that the parent-child relationship is the core value that underlies the legal recognition of parental rights.

¹⁵⁸ See *supra* notes 23-25 and accompanying text.

¹⁵⁹ As the Supreme Court stated in *Lehr v. Robertson*, 463 U.S. 248, 262 (1983), "the biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."

¹⁶⁰ 405 U.S. 645 (1972).

¹⁶¹ The majority assumed that Stanley performed his parental role adequately. The dissent, and some critics of the opinion, were not so charitable, suggesting that Stanley played an episodic role in his children's lives and was far from the exemplary parent. See *id.* at 667 (Burger, C.J., dissenting).

¹⁶² See *id.* at 646-49.

¹⁶³ *Id.* at 649, 658. At the same time, the Court found the state's interest in separating children from fit parents to be *de minimis*. *Id.* at 657-58.

¹⁶⁴ See *id.* at 651-52.

Since *Stanley*, the Court has considered the claims of several unmarried fathers, each seeking to block adoption of their child by a stepparent. The articulated basis for separating successful and unsuccessful parental rights claims in these cases has been evidence that the father established a relationship with his child and filled a parental role.¹⁶⁵ The Court has endorsed protection of the rela-

¹⁶⁵ Fathers who do not live with their children are more likely to have their relationship claims recognized if they were once part of a family unit with their children. This factor distinguishes the fathers in two Supreme Court opinions after *Stanley*: *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Caban v. Mohammed*, 441 U.S. 380 (1979). Both *Quilloin* and *Caban* sought to block the adoption of their children by the husbands of the children's mothers, under similar Georgia and New York statutes which allowed adoption over the objection of the biological father. See Ga. Code Ann. §§ 74-203, 74-403(3) (1975) (*Quilloin*); N.Y. Dom. Rel. Law § 111 (McKinney 1977) (*Caban*). *Caban* had lived with the children from their birth until the couple's separation, when the oldest child was four years old, while *Quilloin* had never shared a home with his son. The Supreme Court rejected *Quilloin's* due process claim, but upheld *Caban's* equal protection claim.

Janet Dolgin argues that recognition of fathers' claims under Supreme Court doctrine depends on whether the parent-child relationship was grounded in a shared life with the child's mother in an acceptable family unit. See Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. Rev. 637, 649-50 (1993). We think that this is important mostly because it serves as a handy proxy for the kind of involvement that is relevant to the judicial determination of parental rights.

The family unit will often be the context in which the kind of bond that receives protection is formed. This factor is not sufficient in itself, however, as evidenced by statutes permitting adoption by stepparents after a period of default by non-custodial parents, regardless of whether the father once lived with the child. See, e.g., Alaska Stat. § 25.23.050 (1991); Cal. Fam. Code § 8604(b) (West 1994); N.Y. Dom. Rel. Law § 111(1)(d) (McKinney 1988).

Moreover, nothing in parental rights doctrine as articulated by the Supreme Court, or in the legal treatment of this matter under state law, supports the claim that the father who fulfills his parental obligations but never lives with the child and her mother will find that this parent-child relationship is unprotected when a stepfather seeks adoption. The biological father who develops a parent-child relationship in which he fulfills the responsibilities of his role by spending time with the child and by providing financial support on an ongoing basis has parental rights that are unlikely to be set aside.

Some courts have recognized the claims of fathers to rights vis-a-vis children with whom they have not lived. Usually there is some uncertainty in these cases as to whether the father sought a relationship with the child but was prevented by the mother from establishing such a relationship. See, e.g., *Michael M. v. Giovanna F.*, 7 Cal. Rptr. 2d 460 (Ct. App. 1992) (awarding to biological father of child conceived out of wedlock, prior to mother's marriage to another man, the right to establish paternity of his child); *Sider v. Sider*, 639 A.2d 1076 (Md. 1994) (holding that biological father originally unaware of his paternity was entitled to establish paternity and join mother in seeking transfer of custody to mother from mother's husband in pending divorce dispute).

The Supreme Court has yet to deal with the case of a father who has a parent-child relationship and fulfills his fatherly responsibilities by providing financial support to the child, but who has never lived with the child's mother and the child in a family unit.

tionship between the child and the father who "demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'"¹⁶⁶ In *Caban v. Mohammed*,¹⁶⁷ for example, the father had not only lived with his children, but had provided financial support and had spent time with the children after his relationship with their mother had ended.¹⁶⁸ In contrast, the father's efforts in *Quilloin v. Walcott*¹⁶⁹ were sporadic,¹⁷⁰ and in *Lehr v. Robertson*,¹⁷¹ no parent-child relationship was ever established.¹⁷² In rejecting Lehr's claim that his unsuccessful efforts should be recognized, the Court emphasized that only an actual relationship of parental responsibility is entitled to legal protection.¹⁷³ This relationship is important to the parties and to society because of "the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children."¹⁷⁴

¹⁶⁶ *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (quoting *Caban*, 441 U.S. at 392).

¹⁶⁷ 441 U.S. 380 (1979).

¹⁶⁸ *Id.* at 382.

¹⁶⁹ 434 U.S. 246 (1978).

¹⁷⁰ *Quilloin* saw his son now and then and gave occasional gifts and financial support. Moreover, he only came forward to legitimate his son when the child was eleven years old and the stepfather had petitioned for adoption. See *id.* at 247-51.

¹⁷¹ 463 U.S. 248 (1983).

¹⁷² *Id.* at 262.

¹⁷³ *Id.* *Lehr*, however, remains something of a puzzle under this analysis. Why was Lehr, frustrated in his efforts to establish a relationship with his daughter by her mother's resistance, not rewarded for his efforts (albeit unsuccessful), when finally after more than two years he asserted his legal claim? The temporal element may be the key to the puzzle. Genetic fatherhood creates the opportunity, as the Court said, to assert parental rights. The claim, however, must be made in a timely manner, or the right atrophies. *Id.* at 262. Despite the dissent's account, see *id.* at 268-69 (White, J., dissenting), Lehr seems at a minimum to have been inept and dilatory in seeking to establish a legal relationship with his daughter. He failed to come forward to establish his claim until very late in the game. See *id.* at 250-53. (In this regard, he was unlike Daniel Schmidt, who challenged the DeBoers' adoption petition shortly after the birth of Baby Jessica. See *supra* note 8.) The metaphor of the father's rights as a seed seems particularly apt. If tended, the rights grow into a substantial claim based on a flourishing relationship. If not, they wither away and eventually die.

In *Lehr*, the child was well-situated in a family unit with her mother and stepfather, and with only a hypothetical interest in her relationship with her biological father. The costs of developing the bonds that would generate a legally protected parental relationship might well have disserved the child's interests.

¹⁷⁴ *Id.* at 261 (quoting *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972))).

The Supreme Court's treatment of biological fathers fits comfortably into a fiduciary framework. Fathers like Caban who have invested in the relationship with their child are granted legal protection for the relationship. The child benefits when her non-custodial parent works to maintain a relationship previously established within the family unit. In contrast, no protection is extended to fathers such as Quilloin who are sporadic in their attention and who announce a serious commitment only after an established substitute father threatens their paternal status. This dilatory behavior conflicts with the child's interest. Even the outcome in *Lehr* is consistent with the relational model. The failure to initiate a relationship until after a stepfather functionally becomes father to the child justifies treating the biological father's relationship claim as forfeited. Tolerating the father's ineffectual efforts to establish a relationship would encourage strategic behavior and undermine informal incentives to assume the role of parent. In essence, the Court has recognized paternal rights of fathers who act like fiduciaries. Establishing the desired patterns of behavior reduces the risk of conflicts of interest between the father and child and justifies "compensation" in the form of recognized parental rights.

b. Unmarried Fathers Under State Law.

The constitutional framework developed by the Supreme Court to define the rights of unmarried fathers has influenced state regulation, which conforms as well to the relational model of parents as fiduciaries. Statutes provide the unmarried father with the opportunity, when his child is born, to acknowledge paternity and accept parental responsibility.¹⁷⁵ Fathers who are ready to assume full

¹⁷⁵ In California, for example, an unmarried man is presumed to be a child's father if he receives the child into his home and openly holds out the child as his natural child. See Cal. Fam. Code § 7611(d) (West Supp. 1995). He can also claim paternity by voluntary declaration at the time of the child's birth, Cal. Fam. Code §§ 7571, 7574 (West 1994 & Supp. 1995), or by suit, Cal. Fam. Code §§ 7630-7631 (West 1994). A putative father who is not the presumed father must come forward within 30 days of the birth of the child or within 30 days of receiving notification that he might be the child's father if the mother is seeking to put the child up for adoption. See Cal. Fam. Code §§ 7631, 7664, 7666 (West 1994).

In New York, under the statute upheld in *Lehr*, a father may voluntarily establish paternity at birth by filling out a notarized acknowledgement of paternity form. N.Y. Pub. Health Law § 4135-b(1)(a) (McKinney Supp. 1995). He may also bring suit to establish

parental responsibility can acquire custody of the child, blocking adoption by third parties even when the mother consents to the adoption. The law assumes that the biological parent who steps forward to act as parent will fill this role better than other candidates. On the other hand, biological fatherhood alone is not sufficient to establish a substantial parental claim. Adoption placement in most jurisdictions will not be defeated by the father who is dilatory in assuming responsibilities or who is not ready to accept full responsibility as a custodial parent.¹⁷⁶

State law responses to the efforts of stepparents to adopt and to sever paternal rights is similarly explained by a model that links parental rights with responsibility. The father who fails to maintain contact with his child or who is seriously delinquent in providing financial support may lose his parental status when a stepfather seeks to adopt the child.¹⁷⁷ Statutes of limitation in some states

paternity anytime before the child reaches age 21. N.Y. Fam. Ct. Act § 517 (McKinney Supp. 1995).

¹⁷⁶ See, e.g., *Adoption of Christopher S.*, 242 Cal. Rptr. 866, 870 (Ct. App. 1987) (denying biological father the right to veto adoption because he had not supported children while he was in prison and prior to imprisonment); *In re Raquel Marie X.*, 559 N.E.2d 418, 424 (N.Y.) (observing that "the biological father not only must assert his interest promptly . . . but also must manifest his ability and willingness to assume custody of the child") (citations omitted), cert. denied, 498 U.S. 984 (1990); *In re Stephen C.*, 566 N.Y.S.2d 178, 179 (App. Div. 1991) (holding that readiness to assume full custody is threshold criterion for right to veto adoption and thus denying father's attempt to block adoption because he wanted child's mother or paternal grandmother to care for child rather than himself); *In re Adoption of Kyle*, 592 N.Y.S.2d 557, 560-61 (Surrog. Ct. 1992), aff'd 601 N.Y.S.2d 902 (App. Div. 1993) (holding that father who had acknowledged paternity and provided financial support in past could not veto adoption because of present, lengthy incarceration).

¹⁷⁷ In California, the consent of a presumed father is required for adoption unless he has failed to communicate with and pay support for his child for one year. Cal. Fam. Code § 8604 (West 1994). If the child has no presumed father, only the consent of the mother is required. Cal. Fam. Code § 8605 (West 1994).

In New York, a father of a child over six months old must maintain "substantial and continuous or repeated contact" with his child, by paying support and either visiting the child at least monthly or communicating with the child regularly, in order to veto adoptions. N.Y. Dom. Rel. Law § 111(1)(d) (McKinney 1988). The father loses his rights if he fails to communicate with the child for six months. *Id.* § 111(2)(a). See also *In re J.J.J.*, 718 P.2d 948, 954 (Alaska 1986) (holding that biological father who failed to provide support for at least 12-month period could not block stepfather adoption); *Adoption of Christopher S.*, 242 Cal. Rptr. at 870; *Hergenreder v. Madden*, 899 P.2d 1155, 1160-61 (Okla. 1995) (upholding Oklahoma statute allowing adoption without consent of father who fails to pay court-ordered child support for one year).

specify forfeiture of parental rights following extended parental absence and default.¹⁷⁸ On the other hand, the stepfather's efforts to adopt will be unsuccessful if the father has maintained a relationship based on sustained commitment, contact, and financial support. By promising legal protection of the relationship, the law encourages unmarried non-custodial fathers to undertake a limited, but nonetheless important, parental role.¹⁷⁹

3. *Explaining the Contours of Legal Regulation*

Existing legal regulation of the parent-child relationship is broadly consistent with the model of parents as fiduciaries. This is not surprising, despite critics' claim of excessive deference to parents' rights because promoting the welfare of children is an explicit goal of modern family law. Indeed, legal regulation of the parent-child relationship is the one area of contemporary family law where the modern trend toward pursuit of self-interest is categorically modified.¹⁸⁰ Principles of parental obligation increasingly shape regulation and constitute strong themes in political and scholarly commentary.¹⁸¹ It follows that the law would discourage

¹⁷⁸ See *supra* note 177 (discussing the California and New York statutes); see also Alaska Stat. § 25.23.050(a) (1991) (providing that consent is not required from a parent who has abandoned the child for at least six months or from a non-custodial parent who has failed to communicate meaningfully with the child or failed to provide support for at least one year); Okla. Stat. Ann. tit. 10, § 60.6 (West Supp. 1995) (providing that consent is unnecessary from a parent who has failed to pay child support for one year) (upheld in *Hergenreder*, 899 P.2d at 1160-61). These statutes seem to be applied only in cases in which a stepparent seeks to adopt and to provide a substitute for the defaulting biological parent. We found no cases in which the custodial parent alone successfully effected termination of the rights of the defaulting parent.

¹⁷⁹ Only because the child's basic needs are met by her custodial parent is a limited fatherly role in her interest. In this regard, this context differs significantly from that of adoption placement.

¹⁸⁰ Modern family law is increasingly based on principles of liberal individualism, a trend which has been criticized as promoting selfish behavior. In the mid-1980s, Carl Schneider observed that moral discourse in family law has declined in the past generation. See Schneider, *supra* note 30, at 1805-08; see also Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 Utah L. Rev. 687, 708-17 (discussing the trend toward liberal family law and the communitarian critique of the trend). In the regulation of the parent-child relationship, however, reforms in family law have placed increasingly forceful emphasis on parental obligation. This has been particularly true in the enforcement of non-custodial parents' financial obligations. See *supra* notes 113-14.

¹⁸¹ Certainly, the political climate today is one in which more stringent enforcement of parental obligation is favored. The polemical tone of Republican critiques of welfare

selfish behavior in parents and encourage them to align their child's interests with their own.

The law's purpose in promoting the alignment of parent-child interests, for unmarried fathers and for other parents, is a central insight of the relational model. As our earlier analysis indicates, role satisfaction is a key component of successful performance by parents. Thus, any regime directed toward discouraging selfish parental conduct requires a means of rewarding good parenting and encouraging commitment. Legal protection of parental rights and authority serves as an important form of compensation for fulfillment of parental obligations and thus functions to serve the child's interest in receiving good care from her parents. The conventional analytic model that balances parental rights *against* the child's interest misperceives this function. The problem with parental rights is not the grant of authority to parents but rather the failure to recognize the instrumental function of rights and authority as an inducement to satisfactory parental performance. The claim that parental rights are a license to engage in selfish behavior ignores the function of rights as a mechanism for aligning conflicting interests.

B. Rules that Exacerbate Conflicts of Interest

Although much of contemporary family law conforms to the relational model of parents as fiduciaries, the correspondence is not complete. Some aspects of the legal regulation of parents appear to exacerbate inherent conflicts between the self-interest of parents and the interests of their children. To the extent that this observation is accurate, the descriptive power of the model is incomplete. This argues for a continuing search by family law scholars for a more complete explanatory theory. It also provides the basis for a normative critique of those provisions that appear to reinforce selfish behavior by parents.

policy in the 1994 congressional elections had a flavor of moral outrage at parents who produce children for whom they cannot care. Newt Gingrich has argued for removal of welfare children from their homes and placement in orphanages. See Mary McGrory, *Orphanage Idea Has Many Parents*, Wash. Post, Dec. 13, 1994, at A2; Excerpts from Speaker Newt Gingrich's Opening Remarks, Wash. Post, Jan. 5, 1995, at A12. In a more thoughtful voice, Katharine Bartlett and others have argued that the parent-child relationship be recast as one of parental obligation. See Bartlett, *supra* note 7, at 295-306.

1. *Conflicts of Interest in Divorce Law*

Parents negotiating with the state over the terms of their future performance and seeking to maximize their own interests would predictably bargain for the right to dissolve a truly unhappy marriage which renders cooperative parenting within a family unit untenable. The state would likely agree to such a term because the informal norms that are relied upon to shape parental behavior are vulnerable to breakdown if the parents are in serious conflict. Thus, the law governing availability of divorce (without the necessity of proving fault against the spouse) is fully compatible with the model of the parent as fiduciary.

Some dimensions of contemporary no-fault divorce law, however, appear to intensify the conflicts of interest between parent and child. Modern marriage is often characterized as an "at will" relationship between the spouses. Thus, either spouse can terminate the relationship at any time for any reason (or no reason) upon notice to the other.¹⁸² The goal of modern divorce law is to facilitate a "clean break," so that the parties will be free to pursue their personal ends, including new intimate relationships, unencumbered by an unhappy marriage.¹⁸³

This approach, grounded in norms of short-term, rational self-interest, ostensibly does not affect parents' obligation toward their children. In at least two ways, however, the recent understanding of marriage and divorce as a means of self-actualization discounts the importance of parental obligation and encourages self-interested behavior by parents. First, divorcing parents receive no encouragement to consider the impact of family dissolution on their children. The law presumes that if either spouse is dissatisfied with the marriage, then termination is appropriate. Further, the dominant "clean break" norms of modern divorce law may obscure

¹⁸² Indeed, the freedom of spouses to terminate marriage with no sanction for breach goes beyond any bases for termination under contract law. See Scott, *supra* note 180, at 720-25.

¹⁸³ Modern divorce law at one level reflects the application of principles of liberal individualism to the regulation of family relationships, a broad trend in family law in this century. In some regards, however, modern no-fault divorce law distorts liberal principles in discounting the possibility of binding, enforceable, voluntary commitments between spouses. See *id.* at 725 (arguing that legal recognition of binding contractual commitments between spouses are consistent with liberal principles); see also Scott, *supra* note 48, at 21.

the incompatible norm that obligation to children continues even though the marriage is dissolved.

a. The Right to Divorce and Children's Welfare

Divorce is a major disruption of children's lives. The negative effects on psychological adjustment and financial security for many children have been well documented.¹⁸⁴ Although parents (and policymakers) may find comfort in the assumption that divorce is better for children than is being raised in an unhappy family, the empirical evidence offers little support for this view. As a general matter, except in families in which children experience serious conflict between their parents,¹⁸⁵ divorce has more costs than benefits for children.

Nevertheless, parents contemplating divorce face few legal incentives to subordinate their individual interest to that of their children or even to take children's interests into account. This is evidenced most strikingly by the fact that children, whose interests are profoundly affected by divorce, have no standing to object to the dissolution of the family and no right to be represented in the proceeding in which their future is determined. Nor can a spouse object to the divorce on the ground that the children of the marriage will be harmed. Current law sanctions "quickie" divorces, permitting spouses to exit the marriage without requiring any period of reflection on the impact of divorce on their children.¹⁸⁶

The relational model of parents as fiduciaries would suggest, to the contrary, that legal oversight of parental choice is warranted under these circumstances. In the context of spousal conflict and dissatisfaction, extralegal factors that otherwise align the interests of parent and child in the intact family may no longer function to constrain parental choices. The model would predict provisions in divorce law that reduced the risk that the child's interest would be

¹⁸⁴ For a detailed description of the psychological and economic research examining the impact of divorce on children, see Scott, *supra* note 48, at 25-37.

¹⁸⁵ It is well-established that the most destructive aspect of divorce for children is exposure to serious interparental conflict. See Scott & Derdeyn, *supra* note 143, at 490-92 (citing studies).

¹⁸⁶ See Scott, *supra* note 48, at 26.

subordinated.¹⁸⁷ To be sure, legal impediments to divorce impose costs on parents by constraining parental authority and autonomy.¹⁸⁸ Nevertheless, the relational model suggests that such costs are more than off-set by reductions in the ex ante risk of potential conflicts of interest. A legal rule that constrained parental choices about divorce would function as a substitute for extralegal norms rendered less effective by the prospect of family dissolution.

b. Clean Breaks and Child Support

Once parents divorce, their future actions are influenced by a "clean break" policy that dominates modern divorce law. This norm, which, for example, supports a preference for short term rehabilitative alimony and lump sum property settlements, promotes efficient disentanglement of divorced couples.¹⁸⁹ It signals that former spouses should be free of financial and other ties so

¹⁸⁷ Several plausible reforms would be consistent with the model. For example, a mandatory waiting period before divorce is granted increases the likelihood that long-term rather than short-term goals will be pursued. Such a "cooling-off" period is premised on the assumption that most parents are inclined to consider their children's interest over the longer term, but that short-term preoccupation with marital conflict or alternative relationships may distort decisionmaking. A period of mandatory delay before divorce also encourages parents, in a general way, to make careful, thoughtful (and thus more accurate) decisions. See Scott, *supra* note 48, at 76-78. Distortion caused by deviation between long-term and short-term preferences could also be mitigated by increasing parents' access to information concerning the child's interests through counseling, mediation, and the like. Further, mandatory mediation of custody disputes encourages parents to shift their attention from their selfish separate interests to their mutual interest in planning for post-divorce arrangements that serve their children's interest. Finally (and most radically), a court-appointed guardian ad litem could be charged with representing the child's interests in the divorce proceedings and advising the court regarding the costs to the child of awarding divorce.

¹⁸⁸ The costs of reducing the conflict of interest when parents consider divorce are modest by comparison with the costs of more intrusive monitoring of parental behavior after divorce, when the assumption that extralegal factors constrain the conflict of interest becomes far weaker. See *infra* text accompanying notes 134-42.

¹⁸⁹ Short-term rehabilitative alimony allows the dependent partner to obtain education or skills so that she can support herself. Permanent spousal support is virtually a thing of the past in many states. See, e.g., Del. Code Ann. tit. 13, § 1512(d) (1993) (providing that alimony shall generally be limited to a period not to exceed 50% of the duration of marriage). The trend toward rehabilitative alimony is based in part on the assumption that men will remarry and have new family responsibilities. See *Turner v. Turner*, 385 A.2d 1280, 1281-82 (N.J. Super. Ct. Ch. Div. 1978).

that they can enter new relationships and form new families.¹⁹⁰ This message contributes to an attenuated sense of financial responsibility toward the children of the prior marriage.

The clean break policy supports reductions in child support payments—on the ground of “changed circumstances”—when an obligor parent has a new spouse and/or child to support.¹⁹¹ This “changed circumstance” criterion is complicated because the rule is driven in part by parental obligation to children in the new family. Nonetheless, the rule exacerbates conflicts of interest by encouraging parents to pursue their interest in creating a new family, thereby marginally undermining their pre-existing parental obligation. By weakening the informal norms that serve to align the interests of parents and children, the clean break policy pits the financial security of children against the personal fulfillment of parents.¹⁹² Harmonizing the “clean break” norm with the notion of

¹⁹⁰ See *Turner*, 385 A.2d at 1282 (“The law should provide both parties with the opportunity to make a new life Neither should be shackled by the unnecessary burdens of an unhappy marriage.”).

¹⁹¹ See *Berg v. Berg*, 359 A.2d 354, 356 (R.I. 1976) (“It is recognized in . . . [many] jurisdictions that the expenses incurred by a divorced father’s remarriage may be considered in determining whether child support payments should be reduced, terminated, or, increased.”); accord *Cagwin v. Cagwin*, 245 P.2d 379, 380 (Cal. Dist. Ct. App. 1952); *LaBove v. LaBove*, 503 So.2d 670, 674 (La. Ct. App. 1987); *Belke v. Belke*, No. 0749-93-2, 1994 WL 369718, at *2 (Va. Ct. App. 1994); see also *Ira M. Ellman, Paul M. Kurtz & Katharine T. Bartlett, Family Law 482-85* (2d ed. 1991) (considering the rule that remarriage may justify reduction in child support); C.P. Jhong, Annotation, *Remarriage of Parent as Basis for Modification of Amount of Child Support Provisions of Divorce Decree*, 89 A.L.R.2d 106, 115-18 (1963) (citing cases). But see *Dorgan v. Dorgan*, 571 N.E.2d 325, 326-27 (Ind. Ct. App. 1991) (holding that father’s remarriage and adoption of new wife’s children did not warrant reduction in child support); *Young v. Young*, 762 S.W.2d 535, 536 (Mo. Ct. App. 1988) (holding that birth of father’s child of second marriage did not require reduction of child support); *State v. Reed*, 658 So.2d 774, (La. Ct. App. 1995) (same); *McCarthy v. McCarthy*, 610 N.Y.S.2d 619, 620 (App. Div. 1994) (same).

Statutes are often written to give courts broad discretion. See, e.g., N.Y. Dom. Rel. Law § 240(1-b)(g) (McKinney Supp. 1995) (“Where the court finds that the non-custodial parent’s pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate”); N.Y. Dom. Rel. Law § 240(1-b)(f) (McKinney Supp. 1995) (providing that court may adjust child support if non-custodial parent must provide for other children not involved in the case at hand); Cal. Fam. Code. § 3651(a) (West 1994) (providing that, with certain exceptions, “a support order may be modified or terminated at any time as the court determines to be necessary”).

¹⁹² It should give one pause to consider how improbable such a rule would seem in a commercial context. Consider the response to a debtor who, outside of the context of

fiduciary responsibility requires giving priority to the claims of children of the dissolved marriage over later-in-time obligations. As with any precommitment, parents understand that future opportunities for self-fulfillment are limited by their responsibility to existing children.

2. *Termination of the Parent-Child Relationship*

We have argued that the Supreme Court's recognition of the rights of unmarried fathers adheres to fiduciary principles in its encouragement and protection of fathers' efforts to fulfill parental responsibilities. In other contexts, however, legal deference toward parental rights can undermine the interests of children. In the case of parents whose children are removed due to abuse or neglect, legal regulation of the termination of the parent-child relationship has lacked conceptual coherence. In practice, if not in design, the legal process for terminating the rights of deficient parents reflects an unresolved tension between what are understood to be the conflicting goals of protecting parental rights and promoting the child's welfare. Courts also show curious tolerance of absentee non-custodial parents if no substitute parent has formally adopted the child. Viewed from the perspective of the relational model of parents as fiduciaries, the results are often inconsistent and counterproductive.

a. *The Inadequate But Involved Parent*

Current policy requires that an abused or neglected child removed from the custody of a parent should either be returned quickly upon remediation by parents or placed permanently in an adoptive home following termination of parental rights.¹⁹³ In prac-

bankruptcy, has incurred additional financial obligations and, on that basis, seeks to reduce her outstanding debt to her original creditor.

¹⁹³ This is the fundamental goal of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.). The Senate Finance Committee Report stated this objective at the outset:

In particular, the incentive structure of present law is modified to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes.

S. Rep. No. 336, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1450. For detailed analysis of the provisions of the Act, see Allen et al., *supra* note 154.

tice, however, courts are reluctant to terminate the rights of parents despite their inability competently to assume full responsibility for their children. This leaves children in limbo, as parents' probationary period is extended indefinitely and permanent placement is postponed.¹⁹⁴ The standard criticism is that this judicial distortion of stated policy is driven by excessive deference toward the rights of biological parents.

We think the issue is more complex. The current regime, through the threatened sanction of termination of parental rights and the reward of regained custody, creates powerful incentives for those parents who both desire custody of their children and are able to remediate. It does not, however, seek to motivate less able parents to maintain a relationship with their children, although the bond may have substantial value to the child. Many parents whose performance is suboptimal have a substantial relationship with their children and make efforts (albeit unsuccessful) to remediate the conditions that led to their children's removal. A continued relationship may in fact serve the child's interest.¹⁹⁵ This intuition contributes to a reluctance by some courts to sever the parent-child relationship, a response which, in the current legal framework, leaves the child's status uncertain. Further, the signals to parents are confusing and blurred; the threat of termination always hovers, but is rarely carried out.

Under this scheme, the law's instrumental function of encouraging parental commitment is surely diluted. Straightforward legal reinforcement of the efforts of suboptimal parents, together with permanent custodial placement of the child with adequate substitute parents, might better serve the child's interest than the current ambivalence. To be sure, in some cases continuing a relationship is harmful to the child. In general, however, the older the child and the greater the duration of the parent-child relationship, the more

¹⁹⁴ See *supra* notes 32-38 and accompanying text.

¹⁹⁵ Psychological research supports the claim that severing the biological parent-child bond can be costly to children, even if the child has a tenuous relationship with the parent and the alternative placement is independently desirable. See Garrison, *supra* note 51, at 461-67 (citing studies).

costly is the decision to terminate parental rights.¹⁹⁶ A sensible legal rule would capture this insight.¹⁹⁷

b. *The "Enoch Arden"*¹⁹⁸ Parent

Courts routinely terminate the parental rights of the biological parent who has not maintained any relationship with the child, so as to allow adoption by stepparents. When substitute social parents have not formally established parental status, however, non-

¹⁹⁶ Common sense argues that termination is less costly if the child is young or if the parent has failed over an extended period to maintain meaningful contact. Moreover, for older children with a substantial filial bond, the probability that a substitute parent can or will fill the parental role is not great. Older children are less likely to be adopted at all and more likely to face a series of foster placements.

Marslia Garrison extensively analyzes the clinical literature on the need of older adopted children and children in foster care for continued contact with their parents. See Garrison, *supra* note 51, at 461-72. Garrison concludes that the earlier a child is adopted, the less likely the adoptee is to have emotional problems, citing the following studies:

Humphrey & Ounsted, *Adoptive Families Referred for Psychiatric Advice, I: The Children*, 109 *Brit. J. Psychiatry* 599, 604-05 (1963) (children adopted after six months of age are more likely to exhibit symptoms of disturbed social behavior, stealing, cruelty, destructiveness, and lying); Jameson, *Psychiatric Disorder in Adopted Children in Texas*, 63 *Tex. Med.* 83 (1967) (greater incidence of severe psychiatric illness in children adopted after infancy); Offord, Aponte & Cross, *Presenting Symptomatology of Adopted Children*, 20 *Archives Gen. Psychiatry* 110, 116 (1969) ("[t]he later the age of adoption, the greater the frequency and severity of the antisocial behavior."); See also S. Wolff, *Children Under Stress* 107-08 (2d ed. 1981) (a child's age is a main factor associated with the adoption outcome). But cf. Schwam & Tuskan, [*The Adopted Child*, in 1 *Basic Handbook of Child Psychiatry* 342, 345-46 (Joseph D. Noshpitz ed., 1979)] (it is unclear whether these studies can be generalized throughout adopted population).

Id. at 471 n.223.

¹⁹⁷ A more tailored two-tiered scheme that might better reduce conflicts of interest could be rationalized within a fiduciary framework. Under such an approach, termination of parental rights would be ordered in cases of serious harmful impact or abandonment of the relationship—the failure to maintain meaningful contact. In other cases, parents' failure to remediate deficiencies adequately would lead to denial of the child's return to parental custody, substituting instead permanent state (or third party) custody with parental visitation rights. The parent who cares about continuing her relationship would understand that preserving the bond with her child requires effort, and that efforts will be rewarded. Moreover, under a regime that offers permanence to the child without termination of parental rights, courts would likely be prepared to make the decision regarding permanent placement more expeditiously than under the current regime.

¹⁹⁸ This term describes a person who suddenly returns after a long absence from which he was not expected to return at all. It comes from Tennyson's poem, "Enoch Arden." See Alfred Lord Tennyson, *Enoch Arden* (1864), *reprinted in* *The Poetic and Dramatic Works of Alfred Lord Tennyson* 227 (Cambridge ed., Houghton, Mifflin & Co. 1898).

the absent parent a subsequent opportunity to develop the relationship. The benefits of such an approach are obvious when the stepparent has established a parental relationship and the contesting biological parent is a remote figure. When the single custodial parent protests, the prospect of increased financial support might seem to argue against a sanction for material breach (indeed, the child may benefit from a relationship with the absent parent). Relational theory suggests, however, that the judgment to forego financial support as well as other possible benefits is properly left to the custodial parent, whose interests are presumptively better aligned with the child's. The underlying theme of this analysis is that parents should be encouraged to create and maintain a parent-child relationship which represents their "best efforts," given their circumstances and capacities. This goal requires sanctions for parents' default and rewards for efforts to invest in the relationship with the child.

3. *Informal Norms of Responsibility and Parental Rights*

The relational model points to the centrality of extralegal social norms that function to align parents' and children's interests in the intact family. Indeed, in contrast to other fiduciary contexts, these norms are imbedded in the culture and are not primarily legal constructions. A variety of cultural influences reinforce the common belief that the role of parent is intrinsically desirable, socially important and imbued with responsibility.²⁰² For many people, personal fulfillment is linked to having children and rearing them successfully. Parents who default on their responsibility meet intense social disapproval, as is evidenced by public outrage over child abuse and neglect.²⁰³

²⁰² A 1986 Roper phone poll of 1654 American adults found that 95% of the respondents felt "being a good parent" was "very important" to their "idea of success." Roper Center for Public Opinion Research, Feb. 1987, available in Westlaw, Poll database.

²⁰³ Examples include the angry public response to crack-addicted mothers exposing their infants to the dangers of addiction, Anastasia Toufexis, *Innocent Victims*, *Time*, May 13, 1991, at 56; Tom Morgenthau, *The Orphanage*, *Newsweek*, Dec. 12, 1994, at 28; fathers who fail to pay child support, *supra* note 113; and evidence of the harmful psychological impact of divorce, Pamela Lansden, *Going Home Alone, Too*, *Newsweek*, Dec. 28, 1992, at 7; all seem particularly intense because of a sense that there has been a breach of a fiduciary obligation.

custodial biological parents are far more likely to succeed in asserting parental rights. Thus, stepparents, grandparents and others who have functioned as parents can have their claim trumped when the absent biological parent returns and claims custody.¹⁹⁹ In other cases, the custodial parent dies, and the non-custodial biological parent seeks custody, often prevailing over the faithful grandparent or stepparent who has not adopted the child, but who has functioned in a parental role.²⁰⁰ Finally, cases in which the custodial, single parent objects in vain when the defaulting parent petitions for visitation rights. In a typical case, the custodial mother is raising the child alone (or with a female partner) when the non-custodial parent appears to claim visitation rights.²⁰¹ In all of these cases, a haphazard interest-balancing approach vindicates parental rights without promoting responsibility and commitment—often at the cost of the child's relationship with a functional parent.

To the extent that the law affords parents an indefinite opportunity to develop a relationship with their child, it fails to motivate them to accommodate other interests to the responsibilities of parenthood. The relational model argues instead for sanctioning fundamental failures to assume parental responsibilities by denying

¹⁹⁹ See, e.g., *Scarpetta v. Spence-Chapin Adoption Serv.*, 269 N.E.2d 787 (N.Y. 1971); *In re Ronald FF v. Cindy GG*, 511 N.E.2d 75 (N.Y. 1987).

²⁰⁰ See, e.g., *Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. Ct. App. 1980) (awarding custody to the biological father, rather than stepfather, after mother's suicide); *In re S.B.L.*, 553 A.2d 1078 (Vt. 1988) (awarding custody to the biological father, rather than maternal grandfather, after the mother was killed in a car accident); see also Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 *Cornell L. Rev.* 38, 74-78 (1984) (discussing the "natural parent preference" in custody disputes between biological parents and stepparents).

Today, the law has evolved to the extent that stepparents have a reasonable chance of winning custody against seriously defaulting biological parents. See *In re Osborne*, 21 *Fam. L. Rep. (BNA)* 1478 (Kan. Ct. App. August 22, 1995) (holding that wife of deceased custodial father may intervene in divorce action versus former wife to seek custody of stepchildren); Mahoney, *supra*. For proposed reforms, see Fine & Fine, *supra* note 28, at 78; Janet L. Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 *Nova L. Rev.* 733, 765-66 (1992).

²⁰¹ See *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994) (granting an order of filiation to the father to confer standing upon him to seek visitation rights); see also *Jordan C. v. Mary K.*, 224 *Cal. Rptr.* 530 (1986) (granting sperm donor visitation rights, rejecting claim to right of family autonomy by mother and female partner). In a case with which we are familiar, the unmarried father left after the child's birth and the mother alone cared for the child until she was six years old. At this point, the father returned and was granted visitation rights over the mother's objections.

Some evidence suggests that interwoven with this conception of the parental role is a distaste for legal norms of parental entitlement. There is a persistent public perception that the law grants to biological parents a property-like interest in their children, and that this often results in legal outcomes that are harmful to the child's interest.²⁰⁴ The sense that social norms and legal rules are divergent is reinforced in the popular culture by cases such as "Baby Jessica" and "Baby Richard," in which courts have ordered the removal of young children from their adoptive families and returned them to their biological parents.²⁰⁵ While public response in both cases is based perhaps on a distorted view of the legal situation,²⁰⁶ the reaction indicates a powerful disquiet with a legal regime that speaks in the language of parental rights.

The paradox of contemporary family law, as the preceding analysis reveals, is the uneasy coexistence of legal outcomes that largely fit within a fiduciary framework together with legal rhetoric that continues to emphasize parental rights without responsibility. The divergence of legal outcomes and legal language is commonplace in the common law tradition, but even divorced from results, rhetoric grounded in parental rights can undermine the effects of social norms in subtle but pervasive ways. Conflicting signals are sent by a legal regime that emphasizes parental rights as well as the welfare of the child, but links the two by balancing the one against the other. It is not surprising that this is understood to mean that when parental rights are vindicated, children's welfare is sacrificed.

²⁰⁴ See *supra* note 9. Many family law scholars have criticized the rhetoric of rights in family law. See, e.g., Glendon, *supra* note 43; Glendon, *supra* note 44; Minow, *supra* note 44; Bartlett, *supra* note 7.

²⁰⁵ See *supra* note 8.

²⁰⁶ Few critics focused on the fact that Daniel Schmidt asserted his interest soon after the birth of Baby Jessica, and that much of the delay was due to the DeBoers' pursuit of appeals. See *DeBoer v. Schmidt (In Re Baby Girl Clausen)*, 502 N.W.2d 649, 652-54 (Mich. 1993) (recounting the procedural history of the case). Similarly, Otakar Kirchner made efforts to find his child despite the mother's claim that the baby had died, and when he was finally successful 57 days after the birth, he immediately petitioned for custody. See *In re Petition of Doe*, 638 N.E.2d 181, 182 (Ill. 1994) ("When the father entered his appearance in the adoption proceedings 57 days after the baby's birth and demanded his rights as a father, the petitioners should have relinquished the baby at that time. It was their decision to prolong this litigation through a lengthy, and ultimately fruitless, appeal."), cert. denied, 115 S. Ct. 891 (1995). Moreover, in the latter case, the adoptive parents' attorney knew that the mother was withholding the father's name, but made no effort to identify him. *Id.*

The central insight of the fiduciary heuristic is to focus attention on the reciprocal relationship between parental rights and children's interests. The contract metaphor makes explicit what is implicit in social norms: parental "rights" are granted as compensation for the satisfactory performance of voluntarily assumed responsibilities to provide for the child's interests. It follows that substantial default on those responsibilities leads to the loss, in whole or in part, of the instruments of parental authority. We have argued that the outcomes (as distinct from the rhetoric) of modern family law are substantially consistent with this relational model of parents as fiduciaries. The dissonance lies in the use of an inapt doctrinal framework to regulate a dynamic relationship. Unlike the "law of rights," a fiduciary framework consistently underscores and reinforces norms of parental responsibility and obligation as conditions to the reciprocal obligation of the state to provide compensation for satisfactory performance.

The changing legal response to non-custodial divorced parents suggests that the evolution of family law doctrine may be underway. Pre-reform child support enforcement was lax, encouraging parents to assume that pursuit of their own interests to the detriment of their children's welfare was acceptable behavior. Over the last decade, tough enforcement measures have been enacted which function to require parents to consider their child's interest together with their own.²⁰⁷ These measures send strong signals that the law requires parents to fulfill their obligations. At the same time, legal reforms have expanded the relationship claims and the role of non-custodial parents.²⁰⁸ Laws that encourage shared cus-

²⁰⁷ See *supra* notes 113-14 (summarizing contemporary child support enforcement measures).

²⁰⁸ See David J. Miller, *Joint Custody*, 13 *Fam. L.Q.* 345, 364-65 (1979); Scott & Derdeyn, *supra* note 143. In addition to joint custody, some states require custodial parents to give non-custodial parents access to medical and school records. See, e.g., *La. Rev. Stat. Ann.* § 9:351 (West Supp. 1995); *Utah Code Ann.* §§ 30-3-33(11) (1995); *McDougal v. McDougal*, 422 S.E.2d 636 (W. Va. 1992) (denying father joint custody but granting access to medical and school records). Custody law encourages parents to cooperate and to support the child's relationship with the other parent. See *supra* note 150 (discussing friendly parent provision and parental alienation syndrome).

Courts also may require custodial parents to give non-custodial parents some latitude in sharing their religious beliefs with their children. Courts have enforced prenuptial agreements providing for the religious upbringing of the child when the custodial parent seeks to change the child's religious training. See *Spring v. Glawon*, 454 N.Y.S.2d 140, 142

today and offer increased participation and authority to non-custodial parents are often justified on the ground that parents who have a strong relationship are more likely to fulfill their financial responsibilities.²⁰⁹

Modern child custody and support doctrine thus links responsibility and rights much more explicitly than previously and underscores the instrumental function of rights.²¹⁰ This approach presumes that parental role satisfaction is tied to successful performance, and that the noncustodial parent's commitment to act in ways that reduce potential conflicts of interest are, to a degree, contingent on relationship rewards.

CONCLUSION

The relational model of parents as fiduciaries provides a purchase from which to evaluate the evolution of contemporary family law on issues relating to the state's role in the family. This perspective differs from the traditional interest-balancing approach that pits the state's interest in protecting children against parents'

(App. Div. 1982); *Gluckstern v. Gluckstern*, 220 N.Y.S.2d 623, 624 (Sup. Ct. 1961); see also *Gruber v. Gruber*, 451 N.Y.S.2d 117, 122 (App. Div. 1982) (holding that father must fulfill promise to enroll children in yeshiva as per separation agreement). But see *Lynch v. Uhlenhopp*, 78 N.W.2d 491, 496 (Iowa 1956) (holding antenuptial agreement on child's religious upbringing void for vagueness). Courts will also sometimes uphold a non-custodial parent's right to have the child participate in religious activities different from those of the custodial parent when with the non-custodial parent. See, e.g., *Murga v. Murga*, 163 Cal. Rptr. 79, 82 (Ct. App. 1980); *Felton v. Felton*, 418 N.E.2d 606, 607 (Mass. 1981). But see *Andros v. Andros*, 396 N.W.2d 917 (Minn. Ct. App. 1986) (granting exclusive control over religious education of children to custodial parent); *Morris v. Morris*, 412 A.2d 139, 147 (Pa. Super. Ct. 1979) (holding that Jehovah's Witness non-custodial father could not take daughter along on door-to-door solicitations).

²⁰⁹ See *supra* note 143 and accompanying text.

²¹⁰ An emerging issue that is being reexamined in this light is the relationship between visitation rights of the non-custodial parent and the obligation to pay child support. Traditionally, these were not interdependent—at least not in doctrine. Failure to pay child support did not result in loss of visitation rights, and the custodial parent's (or child's) undermining of the ability to exercise visitation rights did not absolve the obligor parent of the duty to pay child support. The trend is to link visitation rights and child support obligations. For an overview of the doctrine and the split amongst the different states, see Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 Rutgers L.J. 619 (1989); Carolyn E. Taylor, Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 Colum. L. Rev. 1059 (1984); Greg M. Geismann, Comment, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*, 38 S.D. L. Rev. 568 (1993).

rights. A relational perspective clarifies the core objective of legal regulation: to function in concert with extralegal influences so as to encourage optimal parental behavior. In turn, this objective focuses attention on the reciprocal relationship between parental obligation and parental role satisfaction. The filial bond is central to the lives of both parents and children, is intense and intimate, and requires privacy to flourish.²¹¹ This, rather than any notion of entitlement, is the justification for the initial deference to parental judgments about children's interests. Maintaining the filial bond, however, requires arrangements to guard against conflicts of interest as well as means of compensating parents for avoiding such conflicts. In a very real sense these arrangements confer on parents the status of fiduciaries with the corresponding rights and obligations that such a relationship necessarily implies.

²¹¹ Privacy may be important in some other fiduciary relationships, such as that of attorneys and clients and possibly guardians and wards. Given the important role of judicial supervision as a monitoring mechanism in most fiduciary relationships, however, the value of privacy does not seem to be given a great deal of weight.