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Parents as Hubs

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RESPONSE

PARENTS AS HUBS

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IN her provocative article *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, Professor Melissa Murray offers a much-needed corrective to the view that families are "autonomous islands" and argues that the law should recognize the networks of care provided by nonparental caregivers.[1] I wholeheartedly agree with Professor Murray that the law should support families in providing care. I am also deeply sympathetic to the claim that family law is overly reliant on binary opposites—here, the mutually exclusive categories of parent and legal stranger—that do not capture the complex reality of family life. And I applaud Professor Murray's initiation of a conversation about these concerns.

To advance that conversation, I want to engage with a central aspect of Professor Murray's argument: the nature of the recognition she argues that the law should provide for nonparental caregivers. Two basic paradigms seem likely. First, we might understand recognition to be simply cognizance of and greater attention to the care provided by nonparents. Once we recognize the network of caregivers, it may be possible for the law to support

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[1] See Melissa Murray, The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers, 94 Va. L. Rev. 385, 409–10 (2008).

that network in a variety of ways. By contrast, we might understand recognition to mean direct legal protection of the relationship between a nonparental caregiver and a family.

There is an important difference between these two understandings, as a little probing of the network metaphor demonstrates. Although the concept of the networked family is a useful tool for moving beyond unrealistic dichotomies, not all network architecture is equal. Some networks are distributed and spontaneous, but others are designed and centered around a core. In puzzling through the nature of recognition, then, it is important to understand that while families do draw upon a variety of caregivers, parents typically remain the central hub.[2]

Within the centralized network, parents make important decisions about who will care for their children and in what manner. If a parent is raising a child in a religious tradition with dietary restrictions, the parent likely will require the caregiver to follow these restrictions. Similarly, parents often instruct caregivers about appropriate levels of risk for childhood activities as well as general household rules. To be sure, in many instances a parent may not have many child care options and therefore may have to settle for a caregiver who is less than responsive to the parent's preferences, but this does not mean that a parent is indifferent to the manner in which a caregiver provides care.

Granting legal recognition to nonparental caregivers risks delegating to those caregivers the authority to make decisions for a child, leading to numerous problems that Professor Murray identifies. If a nonparental caregiver could decide that a child should not follow a religiously dictated diet preferred by the parent, for example, the parent likely would object. Similarly, the parent probably would object if a nonparental caregiver decided a parent was overly protective and that a child should be able to, say, ride a bicycle without a helmet.

As anyone who has tried to co-parent a child with another adult knows, differences of opinion about what is best for a child are inevitable. Giving legal weight to yet more individuals in that

[2] I recognize the potential cultural myopia of this statement. My observations have deeper salience for families where parents are the central decisionmakers. This is not a universal reality, but it is the understanding of the law in its current allocation of authority between parents and the state.

conversation would not only complicate the discussion but might well undermine the current allocation of authority between parents and the state. As it stands, the state generally defers to parental decisionmaking absent egregious circumstances. Should the law give greater recognition to nonparental caregivers, however, conflicts between parents and caregivers would inevitably implicate the state as arbiter. To the extent that the state did not intervene to vindicate the rights of the nonparental caregiver, the legal recognition would have no bite.

A networked family with parents as hubs moves beyond the unrealistic isolationism that currently marks conceptions of family, but at the same time recognizes that parents must be empowered to choose whom to invite into their network. If there are options (and sometimes there are not), parents must be free to choose to rely upon some individuals but not others and, importantly, to set the terms of that reliance without interference from the state. Networks are partially a product of happenstance but are also conscious. A parent both creates and directs the network. Family law should recognize this hierarchy of care.

This hierarchical network, of course, is not always centered on biological and adoptive parents. Due to parental absence or in alternative families, other individuals may be at the hub of the network, and these adults deserve legal recognition. Indeed, where adults step into a parental role, the law already provides at least some means for recognizing these individuals, as Professor Murray identifies with her discussion of de facto parents, psychological parents, private contracts, and the identification, at least by some courts, of multiple parents. When a caregiver does not play even a quasi-parental role in a child's life, however, it is not clear that the expressive and tangible benefits of granting legal recognition to that individual outweigh the very significant costs of interfering with parental rights.

Once we see parents as hubs, it is far easier to assess the desirability of the three alternatives Professor Murray analyzes: expanding the definition of parenthood, creating alternative statuses, and dismantling the legal understanding of parenthood. Only the proposal to keep decisionmaking authority in parents but expand the benefits (such as the Family and Medical Leave Act) available to nonparental caregivers honors the important role

parents play. The remaining options undermine the centrality of parents (and those who act as parents) in their children's lives.

The harms that Professor Murray identifies from not recognizing the continuum of care—the expressive harm of literal nonrecognition, the practical harm of a caregiver not being able to assign benefits to a non-child, and the descriptive harm of insisting on falsely dichotomous categories—are significant, to be sure. The question is whether the cure for these harms is worse than the disease. If recognition entails legal protection for the relationship between a caregiver and family, there is too great a risk of the law pitting caregivers against parents.

However, to return to the other way of understanding recognition, Professor Murray's laudable concern for supporting those who provide care ultimately underscores the need for greater public support for all caregivers, parental and otherwise. Rather than using the backdoor route of legal recognition for nonparental caregivers, which risks diminishing parental rights, a more straightforward route to supporting families in the provision of care would be to acknowledge the role caregiving plays in our society and support it more robustly. Professor Murray describes this "care debate" well in the article and indeed is sympathetic to its calls. Her concern is that appeals for public support miss the need to recognize and support "the existing *private* infrastructure of care."[3]

I believe public support can undergird this private infrastructure. At least some of the harms identified by Professor Murray would recede if we had greater public support for families and caregiving in general, regardless of the identity of the caregiver. Assigning private health insurance benefits is an issue because universal health care for children does not exist. Coverage under the Family and Medical Leave Act is an issue because the workplace is not structured to accommodate caregiving, regardless of who performs it. If the state and private employers provided greater support for caregiving in general, we might well be less concerned with reallocating the distribution of those few family-oriented benefits that exist today.

[3] Murray, supra note 1, at 412.

To the extent that recognizing (in the sense of acknowledging) nonparental caregivers as important spokes in the network leads to more support for caregiving—more state-supported child care, more workplace flexibility for workers to have families and jobs—I strongly favor this recognition. Thinking more broadly about who should be accommodated in the workplace—not just parents but also grandmothers, uncles, friends, etc.—is an important step forward. But we should not allow the lack of commitment to public and private support for caregiving to lead us to undermine important parental rights. We do not need competing forces in the network. Instead, parents (and those acting as parents) should remain the hub in a robust, well-supported network of care.