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INTRODUCTION

Carol Stevenson*

Despite dramatic changes in the American family,¹ increased participation of women with children in the paid labor force,² and parallel needs for out-of-home child care,³ until now scant attention has been given to the legal issues raised by changes in the way we care for children. Often the difficulties encountered by day care programs stem from a societal belief that a woman's proper place is in the home caring for children without pay while her husband participates in the paid labor force outside the home. This belief is manifested both by lack of consideration of day care as a social institution and by the imposition and inappropriate constraints on the development of day-care services.⁴ Both the successful University of Santa Clara Law School Symposium, *Day Care: Legal and Social Policy Issues*, and this child-care issue of the *University of Santa Clara Law Review* give legitimacy and recognition to what is certain to be one of the pressing domestic issues of this decade.

In the past, child care has been an invisible service carried out largely by female family members. In the United States, the public has supported child care only under isolated circumstances—the jobs

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1. Changes include increases in the number of out-of-work births (quadrupled since 1950) from 4% of all births in 1950 to 18.4% of all births in 1980. The percentage of female headed families has also dramatically increased from 7% of all families in 1960 to 19% of all families in 1982. The proportion of families with three or more children has fallen sharply with a corresponding increase in the proportion with no children or only one child. SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, 98TH CONG., 2D SESS., REPORT ON U.S. CHILDREN AND THEIR FAMILIES: CURRENT CONDITIONS AND RECENT TRENDS 1 (Comm. Print 1983).

2. *Id.* at 13.

3. SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, 98TH CONG., 2D SESS., REPORT ON FAMILIES AND CHILD CARE: IMPROVING THE OPTIONS 1, 12, (Comm. Print 1983) [hereinafter cited as SELECT COMM.].

4. For discussion of the regulatory constraints on child care services, see Grubb, *Day Care Regulation: Legal and Policy Issues*, *infra* pp. 303.

creation program for teachers during the 1930's,⁵ the effort to mobilize women workers during World War II,⁶ and the more recent efforts to reduce welfare costs by requiring public assistance recipients to work.⁷ Because of the lack of a national comprehensive child-care policy and services, mothers who enter or remain in the paid labor force and leave their children in the care of others do not have adequate public support or an organized system of alternative care arrangements.⁸

To remedy this situation, Congress created a Select Committee on Children, Youth and Families in 1983 and held hearings on child care throughout the United States. During the course of these hearings businesses, labor, educators, religious groups, child welfare and women's groups, state and local elected officials, physicians and psychologists, and those who provide child care in both the nonprofit and private sector spoke about the enormous need for child care.⁹ The Committee discovered that although many innovative and successful community programs meet the needs of children and families,¹⁰ many legal and economic impediments to the implementation and expansion of child-care services remain.¹¹ Committee Chair George Miller said "Congress is beginning to show the same concern to the kind of child care received by millions of American children . . . as it has for their health and education."¹² As a result of the congressional scrutiny of child care, the Child Care Opportunities for Family Act of 1985¹³ was introduced in Congress. This bill addresses the availability, affordability, and quality of child care. The bill proposes to increase the amount of federally-subsidized child care, upgrade state child care, provide training for child-care personnel, and target increased child-care services for special groups such

5. U.S. CONG. BUDGET OFFICE, CHILD CARE AND PRESCHOOL: OPTIONS FOR FEDERAL SUPPORT 3 (1978).

6. Lanham Act, 42 U.S.C §§ 1521, 1523, 1531-36, 1541, 1543, 1545, 1561 (these sections omitted pursuant to § 1 (a)(12) of act July 3, 1952, ch. 570. 66 Stat. 322, as amended by Act of March 31, 1953, ch 13, § 1, 67 Stat. (18), §§ 1522, 1524, 1542, 1544, 1546-50, 1551 (repealed Aug. 2, 1954, ch. 649, title VIII § 802(b), 68 Stat. 642) 1552 (1982).

7. See, e.g., Work Incentive Program (Win), 42 U.S.C. § 630-40 (1976) (income disregard provisions.)

8. For a description of current public funding and support of child-care services, see Murray, *Child Care and the Law*, *infra* pp. 261.

9. *Improving Child Care Services: What Can Be Done?: Hearings Before the Select House Comm. on Children, Youth and Families*, 98th Cong., 2d Sess. (1984) [hereinafter cited as *Hearings*.]

10. SELECT COMM., *supra* note 3, at xii, 57-66.

11. *Id.* at 5, 16, 28, 31, 66.

12. *Hearings*, *supra* note 9, at 1.

13. H.R. 2867, 99th Cong., 1st Sess (1985).

as handicapped children and teenage parents. The Select Committee's attention to child care recognized the enormous burden borne by parents, child-care workers, and community members who have created and sustained existing child-care services.

The fact that, until recently, this tremendous social need has not been publicly explored or addressed in a comprehensive manner reflects and perpetuates: 1) the political powerlessness of children, 2) the failure to recognize that families are changing and have changing needs, and 3) the continued denial of equal employment opportunities for women.¹⁴ In order to go forward with successful child-care initiatives, outdated assumptions about who needs child care and what constitutes a family must be abandoned. If child-care services are to flourish, we as a nation must overcome our collective ambivalence about child care. We must do more than recognize the changing demographics of the family. We must devote public resources to the creation of safe and healthy environments in which our children can thrive.

The articles which comprise this issue of the Santa Clara Law Review examine in detail the legal framework of and the barriers to adequate child-care services. Such an in-depth examination of the legal issues in child care can form the basis for the development of more appropriate child-care policies. In the past, child care has often existed despite unfavorable government policies. Because child care has only recently begun to be acknowledged as a necessary community service for all families, the laws that govern it—including state licensing laws, and local zoning, building, fire, and health laws—often do not contemplate its unique nature.¹⁵ Child-care services are rarely regulated with regard to the complexities of providing the service and the players involved.

Proper regulation is the most crucial legal issue in child care today. For example, the Ninth Circuit Court of Appeals recently overturned a District Court decision and upheld warrantless searches of family day-care homes by state licensing officials. This was accomplished by fitting family day care into the pervasively regulated business exception to the warrant requirement.¹⁶ In so holding, the

14. See U.S. COMM'N ON CIVIL RIGHTS, PUB. NO. 67, CHILD CARE AND EQUAL OPPORTUNITY FOR WOMEN (1981).

15. Inman, *Day Care Laws Limit Private-Home Centers that Parents Like Best*, Wall St. J., Oct 26, 1982, at 1, col 1.

16. *Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985). For a more detailed analysis of searches of family day-care homes, see Feldman, *Protecting Children in Licensed Family Day-Care Homes: Can the State Enter a Home Without a Warrant?*, *infra* pp. 411.

court recognized "the states' vital interest in protecting children in family day-care homes." The court held that the legislature may determine if unannounced inspections are necessary to enforce statutes and regulations governing family day care.¹⁷ Without diminishing the need to safeguard children in day-care settings, a child-care regulatory scheme must be designed carefully to accomplish this goal without being so burdensome to day-care providers that they operate outside the regulatory system or cease to operate altogether. This is particularly true because most family day-care homes operate unregulated.¹⁸

Recently, well-publicized cases of child abuse in day-care settings have focused attention on how child care is regulated.¹⁹ Before this new wave of concern, state child care licensing agencies had been struggling with limited budgets due to social service cutbacks.²⁰ For example, in California, where as recently as 1983 a complete deregulation of home-based family day care was proposed,²¹ fifteen bills were introduced in the 1985 legislative session addressing various aspects of child-care regulation. Another example of a legislative response to the child abuse crisis in day care was the enactment of Public Law 98-473.²² In order to obtain their full Title XX appropriation in fiscal years 1986 and 1987, states must provide for employment history and background checks, enact a statute which provides for nationwide criminal record checks of all current and prospective operators and employees of child care facilities and have all procedures in place by September 30, 1985. Unfortunately this law gives little consideration to either the cost or the benefit of imposing such an onerous requirement on the states.²³ And while such

17. *Id.* at 720.

18. See OFFICE OF HUMAN DEV. SERVS. ADMIN. FOR CHILDREN, YOUTH AND FAMILIES DAY CARE DIVISION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., FINAL REPORT ON THE NATIONAL DAY CARE HOME STUDY, FAMILY DAY CARE IN THE UNITED STATES: EXECUTIVE SUMMARY 3 (1981) (stating that 90% of family day care in the United States is unregulated).

19. DEP'T OF HEALTH AND HUMAN SERVS., MODEL CHILD CARE STANDARDS ACT: GUIDANCE TO STATES TO PREVENT CHILD ABUSE IN DAY CARE FACILITIES (Jan. 1985); see also Lindsey, *Increased Demand for Day Care Prompts a Debate on Regulation*, N.Y. Times, Sept 2, 1984, at 1, col 1.

20. CHILDREN'S DEFENSE FUND, A CHILDREN'S DEFENSE BUDGET 163 (1985).

21. CALIFORNIA LEGISLATURE ANALYSIS OF THE BUDGET BILL FOR THE FISCAL YEAR JULY 1, 1983 TO JUNE 30, 1984, REPORT OF THE LEGISLATIVE ANALYST TO THE JOINT LEGISLATIVE BUDGET COMM. (1983).

22. Title IV § 401, Pub. L. No. 98-473 (1985).

23. NATIONAL PROGRAM INSPECTION, OFFICE OF INSPECTOR GENERAL (REGION X), U.S. DEP'T OF HEALTH AND HUMAN SERVS., PREVENTING SEXUAL ABUSE IN DAY CARE PROGRAMS: FINAL REPORT (1985).

a measure appears to make licensed child-care facilities safer, statistics reveal that only a very small percentage of child-care providers have prior felony convictions.²⁴ These examples illustrate how quickly attitudes toward child-care regulation can change, and how public resources can be redirected without consideration of either the consequences or the effectiveness of a particular measure.

The legal aspects of the parents' role in the development, delivery, and regulation of child-care services have also received little attention. The traditional trilateral legal relationship between parents, their children, and the state becomes quadrilateral with the addition of a paid caregiver. Parental guilt, coupled with a shortage of services, has effectively stifled much public parental discontent with the status quo. As child care becomes more accepted however, parents will express their concerns about the quality of the out-of-home care their children receive. Increased family day-care registration in the 1970's resulted in large part from parental enforcement of regulations.²⁵ Parents who visit family homes and child-care centers daily should be educated to monitor whether standards are being enforced. Parents and the state must work together to adequately regulate child care. This partnership can recognize the uniqueness of child-care arrangements and effectively utilize public resources for initial licensing and enforcement. In California, for example, two bills were introduced in 1985 which would give parents the right of access to child-care facilities during operating hours.²⁶

In addition to state licensing schemes, child care is regulated at the local level through municipal and county zoning ordinances, and through building and fire requirements. These requirements, often both overlapping and contradictory, effectively operate to ban licensed child care in some localities.²⁷ Favorable zoning ordinances are a necessary first step in making the child care accessible and available.

Another difficult child-care issue is determining who will pay for the service, and whether public child-care dollars are being spent

24. *Id.* at 17.

25. THE ASSOC. FOR REGULATORY ADMINISTRATION, TEXAS DEP'T OF HUMAN RESOURCES, THE NATIONAL CONFERENCE ON THE REGISTRATION OF FAMILY DAY CARE HOMES 47 (D. Beard & J. Nowak, eds. 1977).

26. California A.B. 466, Reg. Sess. (1985-86); California S.B. 84, Reg. Sess. (1985-86).

27. See CAL. HEALTH & SAFETY CODE § 1597.40, 1597.45-1597.46 (Deering 1985) (preempting local zoning ordinances regarding small family day-care homes and restricting localities from prohibiting large family day care in residential zones). See also AMERICAN SOC'Y OF PLANNING OFFICIALS, ZONING GUIDELINES, FOR DAY CARE FACILITIES 3 (1972); Pegg, *Family Day-Care Homes: Local Barriers Demonstrate Needed Change*, *infra* pp. 477.

in the most useful way. These questions lead one to examine not only how much is spent on state regulatory efforts, but how tax provisions and direct subsidies help parents pay for child care. Many families simply cannot support a paid caregiver. This is most dramatically illustrated in a female-headed household, where the median income for a working mother in 1981 was only \$8,653.²⁸ Current child-care wages can provide only a poverty-level income.²⁹ Even as child-care services move into the paid labor sector, the work is still considered "women's work" and therefore is often paid at less than a living wage.³⁰ Because inadequate public resources are allocated to child-care services, the needs of providers are often pitted against those of children needing care and parents' ability to pay for it. The low pay of child-care workers is a hidden subsidy of child-care services.

The current system of public and private funding for child care must be analyzed. A number of articles in this issue examine various aspects of the child-care funding dilemma.³¹ In addition to more comprehensive public support of child care, family-oriented workplace policies, such as flexible schedules, parenting leave policies,³² child-care benefits, and part-time work options could do much to relieve both the financial and psychological burdens on today's families. Child care is crucial to equalizing a woman's access to and participation in the workplace. Workplace changes are essential to allow all parents to have satisfying family lives.

Adequate and affordable child-care services are crucial to American families. Changing the public perception of day care from "just babysitting" to a respected community service means making it possible for day care to legally exist in every community. Determining who bears responsibility for providing, paying for, and regulating child-care services raises numerous legal questions. The legal

28. SELECT COMM., *supra* note 3, at 15.

29. STATE OF CALIFORNIA, REPORT FROM LT. GOV. LEO MCCARTHY'S TASK FORCE ON THE FEMINIZATION OF POVERTY 3 (1982).

30. Mellor, *Research Summary Weekly, Earnings in 1983: A Look at More Than 200 Occupations*, MONTHLY LAB. REV. 54-59 (Jan. 1985). See also U.S. BUREAU OF THE CENSUS, 1980 CENSUS DATA: EARNINGS BY OCCUPATION AND EDUCATION 139 (1980).

31. For more detailed discussion on the issue of child-care funding, see Geerhold, *Establishing Dependent-Care Programs Through Cafeteria Plans: Fulfilling the Need for a Well-Balanced Benefit Menu*, *infra* pp. 453; Mineta, *Federal Child Care Income Tax Provisions: Legislative Initiatives in the Ninety-ninth Congress*, *infra* pp. 395; Murray, *Child Care and the Law*, *infra* pp. 261; Redleaf, *Illinois Child Care Disregard Litigation: Modest Consolidation for the Working Poor*, *infra* pp. 375.

32. See also Hecht, *The Pregnancy Discrimination Act: Protecting a Man's Right to Infant-Care Leave*, *infra* pp. 433.

framework for comprehensive child-care services depends on the sensitivity and awareness of the legal drafters who construct it.

