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CARING FOR CHILDREN AND CARETAKERS

MARY BECKER*

INTRODUCTION

In recent years, feminists in many disciplines have written about care. Feminists have made moral and economic arguments for an ethic of care. They have also explored various links between care and equality.

In her 1997 book, *Caring for Justice*, Robin West argues that justice and care are both required for moral decision making.¹ She suggests that empathy grounded in an ethic of care could be the basis for “a commitment to egalitarianism, albeit grounded in shared fellow feeling rather than in principle.”² West concludes that “[o]f the two commitments,” “one from principle” (an abstract commitment to equality for those similarly situated) and “one from fellow feeling” (an empathy-based commitment to help those in need), the commitment based on empathy may “prove to be the more enduring.”³

There is another way in which care and equality are linked. One of the points West makes in her book, and a point made by an increasing number of feminists writing about equality today, is that until we place greater value on caretaking and provide better supports for caretakers of dependents, women will continue to be unequal.⁴ In her 1999 book, *Love's Labor: Essays on Women, Equality, and Dependency*, philosopher Eva Kittay explores the link between acknowledging dependency and valuing caregiving, on the one hand, and equality for women on the other. She believes that

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1. ROBIN WEST, *CARING FOR JUSTICE* 72 (1997).

2. *Id.*

3. *Id.*

4. See, e.g., EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 186-88 (1999).

equality will be possible only when there is a “social and political commitment to ourselves as dependents and as dependency workers.”⁵ I make a similar point in an article published in 1999, arguing that only a feminism with values incompatible with patriarchal values (i.e., relational feminism with its commitment to care) has the potential to bring about real change in the status of women.⁶

In the 1999 book *Care and Equality: Inventing A New Family Politics*, Mona Harrington, a lawyer and political scientist, argues that care should be “a national political value”:⁷

The key idea for a new politics of family care . . . is to add care to the pantheon of national social values. That is, to assure good care to all members of the society should become a primary principle of our common life, along with the assurance of liberty, equality and justice.

We need to elevate care to this level of importance for the basic reason that it is essential to human health and balanced development. It is also crucial to developing human moral potential, to instilling and reinforcing in an individual a sense of positive connection to others. And it is this sense of connection that makes possible the whole range of mutual responsibilities that allow the people of a society to respect and work toward common goals. As political theorist Joan Tronto puts it, thinking about care seriously, recognizing that everyone at different times is both a giver and a receiver of care, underscores for people the *fact* of their personal and social interdependence. And, she says, this insight can enhance a commitment to the responsibilities of democratic citizenship.⁸

In a March 2000 article in *Nation*, political scientist Deborah Stone makes a similar argument, calling for a “care movement” because we all need the right to care for others and to be cared for.⁹

During the 1990s, feminist economists developed parallel arguments, identifying the raising of capable citizens as a public good, i.e., a benefit to society in general (not only or exclusively a benefit to those who invest in children). Nancy Folbre, for example, made this

5. *Id.* at 188.

6. See Mary E. Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21.

7. MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS 44 (1999).

8. *Id.* at 48-49 (citing JOAN TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE (1993)).

9. See Deborah Stone, *Why We Need a Care Movement*, NATION, Mar. 13, 2000, at 13.

argument in a 1994 article and book.¹⁰ In a 1999 article, Paula England joined Nancy Folbre in arguing that:

Because the production of children's capabilities creates a public good that cannot be priced in the market, individuals can free ride on the efforts of parents in general and mothers in particular. We need to redesign the social contract in ways that encourage more sustainable forms of intergenerational altruism and reciprocity.¹¹

Martha Fineman and Joan Williams have both played important parts in this care movement. In her recent article *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, Fineman argues that caretaking produces a public good and therefore warrants support from government and other institutions, including accommodation of caretakers' needs by employers.¹² In her recent book, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, Joan Williams analyzes our notions of caretaker and ideal worker, finding their roots in the nineteenth-century ideology of domesticity, from which we inherited the notion that the ideal worker is someone who can devote his or her energy and time to wage work without caretaking responsibilities.¹³ Williams argues that Title VII should reach much discrimination against workers with significant caretaking responsibilities and that property divided at divorce should include post-divorce income.¹⁴

In their articles for this Symposium, Fineman and Williams make additional contributions to the care movement. Fineman builds an argument for adjusting the implicit social contract to support and accommodate the needs of caretakers.¹⁵ Williams makes a number of points about the ideology of domesticity, the intensive mothering norms of the late twentieth century, the recent wars between maternalists and equal parenting advocates, and gender as tradition.¹⁶

10. See Nancy Folbre, *Children As Public Goods*, 84 AM. ECON. REV. 86 (1994); NANCY FOLBRE, WHO PAYS FOR THE KIDS? GENDER AND THE STRUCTURES OF CONSTRAINT (1994).

11. Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 194 (1999).

12. See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (1999) [hereinafter, Fineman, *Cracking the Foundational Myths*]; see also MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228-33 (1995) (arguing that the mother-child dyad should be regarded as the core family unit and should be supported by the state).

13. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 31 (2000).

14. *Id.* at 121-22.

15. See Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1407-08 (2001).

16. See Joan Williams, *From Difference to Dominance to Domesticity: Care As Work*,

Section I of this Commentary addresses Fineman's contributions to the care movement, and Section II comments on Williams's contributions. Section III discusses some of the emerging feminist arguments against the care movement.

I. FINEMAN

In her article for this Symposium, Martha Fineman builds a powerful argument for public support of dependency. As Fineman points out, those who care for dependents do productive labor essential for the public good: caretaking labor reproduces society.¹⁷ Society therefore owes caretakers a debt and should provide better supports. And Fineman (like Williams)¹⁸ calls for changes in market institutions to make wage work compatible with caretaking.¹⁹

Fineman's argument is in the form of a challenge to the social contract "that guides and gauges the relationship among individuals, societal institutions, and the state."²⁰ This is not the "social contract" of political theorists, but the real-world, unwritten but implicit and widely-shared understanding of the respective roles of individuals, families, parents, schools, churches, the state, employers, and other institutions in the United States today; an understanding that makes the current distribution of rights, obligations, and resources seem fair and even natural. Despite sea changes in family organization—particularly divorce rates near fifty percent and the entry of most mothers into the wage labor market—Americans continue to expect the family to care for dependents.²¹ But even middle class families lack the ability to care for dependents without increased support and accommodation from government and employers.²² And high rates of child poverty after years of prosperity are stark evidence of the seriousness of the problem for families at lower income levels. Although Fineman's assertion that children are a public good is an economic argument, she also challenges the present value system, criticizing our focus on the Dow Jones Industrial Average as a

Gender As Tradition, 76 CHI.-KENT L. REV. 1441, 1444-45, 1449-50, 1452 (2001).

17. See Fineman, *supra* note 15, at 1406.

18. See *infra* Part II.

19. See Fineman, *supra* note 15, at 1411-12.

20. *Id.* at 1405.

21. See *id.* at 1422-23.

22. See *id.* at 1430.

barometer of national well-being while oblivious to shocking levels of child poverty and increasing income inequality.²³

In this Commentary on Fineman's contribution to this Symposium, I make two points. First, I ask her to clarify whether she believes caretakers should receive enough in subsidies to make wage work optional. I suggest that we push for something like the French system of supports, a system that requires parents to work for wages if their families are to rise above poverty, but under which working parents can pull their families out of poverty. Second, I add to her challenge of the dominance of economic values in the United States today by describing how the literature on human happiness supports her position, as does the important work of Amartya Sen and Martha Nussbaum on freedom as the opportunity to develop one's capabilities as a human being.

A. *Wage Work and Caretakers*

Fineman is not explicit about the kinds of supports she would provide for caretakers. Does she believe that caretakers should receive enough in income supports, food stamps, health care, subsidized housing, etc., so that they need not work for wages as well as caretake? This is an important issue for several reasons. On a pragmatic level, it is very difficult—nearly impossible—to imagine that in the next twenty years we could create supports high enough to keep families out of poverty without any working adult. Most mothers, even mothers of infants, are in the wage-labor market today.²⁴ Voters are therefore unlikely to support policies that would transfer enough resources to poor caretakers to bring their families above the poverty line without wage work.

More importantly, wage work is of value to caretakers. If mothers²⁵ do not work while their children are small (or until the youngest child is eighteen?), they spend years with no connection to the wage labor market, and the wages of these women will be depressed throughout their working lives. Further, wage work has beneficial effects.²⁶ Wage workers tend to be happier and to have

23. *See id.* at 1436.

24. *See* U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, FERTILITY OF AMERICAN WOMEN, Fig. 4 (June 1998) (fifty-nine percent of mothers with a child under a year are working for wages or looking for work, though many work part-time).

25. I assume that any policies along the lines described in text would be available to caretakers regardless of their sex, but use "mothers" because caretakers are usually mothers.

26. *See* Peter B. Edelman, *Promoting Family by Promoting Work: The Hole in Martha*

better self-esteem as well as the opportunity to develop their own capabilities.²⁷ The poor tend to be more socially isolated than other people, and work gives people the opportunity to connect with others as well as to learn skills that are likely to make caretakers more effective in all areas of life, including caretaking. In her recent book telling the story of one woman's escape from domestic violence and welfare (and analyzing various policy alternatives), Jody Raphael describes the importance of work for such women:

In addition to providing the capacity for much-needed economic independence, however, work provides other necessary ingredients that help women escape from and stay free of violence. These critical attributes of employment include instilling a sense of personal worth and value, a sense of purpose and achievement, a capacity to contribute to the wider society, experience with and control over social arrangements outside the household, and independence from the control of others.²⁸

For any poor, single parent, work offers these advantages, though these attributes of work are particularly important for poor women in violent relationships. Nearly one-third of women on welfare are or have recently been in a violent relationship.²⁹ It is true that racism explains our insistence that married mothers *should* be full-time homemakers and that poor, single mothers should work for wages. But it is nevertheless true that poor families need the advantages that come from a wage-earning adult in the household.

I believe that we should push for a system of supports similar to those in France, where strong supports for caretakers create no disincentive to work because by working, but only if they work, parents earning low wages can pull their families out of poverty. In France, families with children receive many supports from the state. As a result, although child poverty rates are about equal in France and the United States prior to governmental supports (based on parental income alone, about 24.7% of French children were poor in 1984–87 as compared to 23.3% of American children), after governmental supports, only 5.7% of French children remained poor whereas 21% of American children remained poor.³⁰ Similarly,

Fineman's Doughnut, 8 AM. U. J. GENDER SOC. POL'Y & L. 85 (2000).

27. *See id.* at 88-89.

28. *See* JODY RAPHAEL, SAVING BERNICE 114 (2000) (citing Abigail J. Stewart, *Discovering the Meaning of Work*, in *THE EXPERIENCE AND MEANING OF WORK IN WOMENS' LIVES* 262 (Lawrence Erlbaum Assoc. ed., 1990)).

29. *See id.* at 25.

30. *See* BARBARA R. BERGMANN, SAVING OUR CHILDREN FROM POVERTY: WHAT THE UNITED STATES CAN LEARN FROM FRANCE 6 (1996).

although 24% of French adults and 20% of American adults were poor based on wage income alone, only 8% of French adults were poor after governmental supports whereas 16% of American adults remained poor after considering such supports.³¹ Further, in the United States, proportionally more poor adults are women than in France. In the United States, 38% more women than men are poor, whereas in France only 11% more women than men are poor.³²

1. Supports for All Families

In France, many supports are available to all parents and children regardless of income. Free nursery schools are available for children (regardless of whether the mother works) from the time they are toilet trained (about 2½ years) until they enter first grade. Parents who use private centers receive cash benefits and tax breaks. When mothers of younger children work, government heavily subsidizes placements in daycare centers.³³

Daycare workers in France are well-trained and well-paid relative to the United States. Indeed, because of the higher level of teacher training, nursery quality surpasses that of American preschools with lower teacher-child ratios.³⁴ In 1991, salaries for French daycare workers started at \$14,153 per year, and these workers also received free housing or a tax-free housing allowance.³⁵ The average yearly earnings for childcare workers in the United

31. Colin Hughes & Kerry McCuaig, *When Mom Must Work: Family Day Care As a Welfare-to-Work Option*, Section 2, Table 1 (2000), at http://www.childcarecanada.org/CPAG_CCEF/moms_welfare/two.html.

32. Karen Christopher et al., *Gender Inequality in Poverty in Affluent Nations: The Role of Single Motherhood and the State*, paper 108 (2000), at <http://www.jcpr.org/wp>.

33. See BERGMANN, *supra* note 30, at 27-41. Subsidies for care of infants and toddlers vary with income level. In 1991, a family with a monthly income under \$681.00 and one child would pay the equivalent of \$4.15 per day for care of an infant or young toddler; such a family would pay the equivalent of \$3.38 per day per child for two children in such care. A family with a monthly income of \$1,286.00 would pay \$7.68 and \$6.45, respectively. A family with a monthly income of \$2,496.00 would pay \$15.21 and \$12.60. *Id.* at 40.

34. See *id.* at 31. In France, the ratio tends to be about 16 children to one adult. This would be regarded as inadequate in the United States, where:

an adult-child ratio of 1:9 [is thought] to be crucial to providing high-quality care; U.S. preschools abide by this finding. However, a group of American experts on day care who observed French child-care facilities in 1989 concluded that, despite the larger number of children per adult, the quality . . . was as high as or higher than the best and highest-cost American day-care centers. More systematic studies of teacher-child interactions confirm this impression. One study concluded that teacher training in France, which encourages teachers to carefully plan daily activities and constantly monitor the children, explained the good results.

Id. (citations omitted).

35. *Id.*

States in 1998 was under \$12,000.³⁶ Thus, women working for wages as caretakers are paid significantly more in France than in the United States.

Perhaps as a result of the better pay for caretakers in the wage-labor market, the gap between men's and women's pay is smaller in France than in the United States. In the United States, full-time, year-round wage-earning women earn an average of \$0.75 for every dollar earned by similar men, but full-time, year-round wage-earning women in France earn about \$0.81 for every \$1.00 earned by such men.³⁷

All education is free in France, from nursery school through university. And "supervised recreational programs for school-age children for the after-school hours, and during summers and school vacations, subsidized by the government, are common."³⁸

Family allowances are available to all families with more than one child under sixteen (or eighteen, depending on the child's earnings from age sixteen to eighteen) and are not income tested. The benefit varies only with the number of children, and in 1990 was \$91 per month for a family with two children and \$207 a month for a family with three children. In addition, every pregnant woman is entitled to a new baby allowance each month from the third month of pregnancy until the baby is three months old. In 1991, the new baby allowance was \$134 per month. For low- and medium-income families, this allowance continues until the youngest child is three years.³⁹

If parents do not live together, the government pays a minimum child support payment each month and is responsible for collecting child support from the noncustodial parent. In 1991, the Child Support Assurance benefit was \$66 per month per child; this benefit is not means tested.⁴⁰ Handicapped children receive an additional allowance independent of family income.⁴¹ In 1991, it was \$304 a

36. Robin Urevitch, *All Things Considered: Child-care Workers Look to Unions to Help Them Raise Pay and the Status of Their Profession* (NPR All Things Considered radio broadcast, Jan. 2, 2001), available at LEXIS, News Library, National Public Radio File.

37. See JONI SEAGER, *THE STATE OF WOMEN IN THE WORLD ATLAS* 68 (Penguin Reference 2d ed. 1997).

38. See BERGMANN, *supra* note 30, at 28.

39. See *id.* at 58-61. All members of the European Community, even England, provide family allowances. In England, the allowance is \$46 per month for one child, \$92 for two children, and \$138 for three children. See *id.* at 59.

40. See *id.* at 61-62.

41. See *id.* at 62.

month for a child requiring constant help in daily activities and \$164 a month for a child needing less help.⁴² Income tax deductions for children are also available and are about the same size as those in the United States on a per child basis.⁴³

Mothers receive sixteen weeks of paid maternity leave at the birth of a first or second child and twenty-six weeks on the birth of a third child.⁴⁴ The stipend is paid by the social security agency, and in 1991 “was 84% of the mother’s base salary up to a maximum of [\$1,742 dollars] per month.”⁴⁵ In France, all families are covered by national health insurance.⁴⁶

2. Supports for Poor Families

Poor families with three or more children (and no new baby allowance) in France are entitled to an additional family allowance. In 1991 this benefit was \$122 per month.⁴⁷ For families of modest means (\$17,669 yearly income for family with one child), an allowance of \$57 is available for each child between the ages of six and ten at the start of the school year.⁴⁸ The single-parent subsistence allowance ensures that total family income from wages, government benefits, child support, etc., reaches at least a set minimum level if there is a child under three in the family (\$582 per month in 1991 for a parent with one child, with an additional \$146 per month for each additional child).⁴⁹ Substantial housing subsidies are also available to families at very low income levels, though they decline sharply as income rises.⁵⁰

These state-provided subsidies for child raising have two important effects: First, by working, even at a minimum-wage job,

42. *See id.*

43. *See id.* at 68.

44. *See id.* at 46.

45. *See id.* (she is entitled to \$192 a month if she had a job immediately before the pregnancy or during it even though she no longer has the job).

46. *See id.* at 70. Although France has national health care, it spends a smaller portion (9.9% in 1995) of its Gross Domestic Product on health care than does the United States (13.6% of Gross Domestic Product spent on health care in 1995). In the United States, 15% of whites lacked health insurance in 1997, 22% of African Americans, 34% of Hispanic Americans, and 21% of Asian Americans. *See* JAMES HEINTZ & NANCY FOLBRE, *THE ULTIMATE FIELD GUIDE TO THE U.S. ECONOMY* 122, 132 (2000).

47. *See* BERGMANN, *supra* note 30, at 64.

48. *See id.* at 64-65.

49. *See id.* at 65-66. When she no longer has a child under three, the single parent may qualify for additional assistance under the Minimum Income to Assist Job Entry Program. *See id.* at 66-67.

50. *See id.* at 63.

parents who work can pull their families out of poverty. Good supports provide no disincentive to work in France, because families remain poor unless parents work, but can rise above the poverty level if parents work. Second, many of the supports needed by poor families are either available to all families or to all but wealthy families. Because these supports are available to all or most families, they enjoy broad support.

3. Hours of Work

Finally, caretaking is made easier by the fact that the French, like other Europeans, work significantly fewer hours per year than Americans. American workers receive an average of only ten paid vacation days a year.⁵¹ In Europe, including France, the norm is twenty to twenty-seven days of paid vacation.⁵² In the United States, full-time workers average 43.2 hours a week⁵³ under unenforced laws setting the maximum work week at forty hours.⁵⁴ In France, a recent law mandates a maximum work week of thirty-five hours (down from thirty-nine hours with no reduction in pay).⁵⁵ In 1997, American workers worked an average of 1966 hours, compared to the French who worked only 1656 hours.⁵⁶ Thus, the French worker works an average of 5.98 fewer hours per week.

In her article for this Symposium, Joan Williams argues for approaches to child poverty that do not focus *only* on the poor.⁵⁷ An

51. Barbara Clements, *Different Slant on Enjoying a European Vacation*, NEWS TRIB., July 9, 2001, at C14.

52. *Id.*

53. Larry Williams & Mary Otto, *Mild Unrest Marks Modern Labor Day: U.S. Workers See Best, Worst of Times*, DENV. POST, Sept. 6, 1999, at E-05.

54. Liz Pulliam, *A Century of Stunning Progress for the American Worker*, L.A. TIMES, Nov. 21, 1999, at C2.

55. See Anders Hayden, *France's 35-Hour Work Week*, 34 CANADIAN DIMENSION 8 (2000). The law was designed as a way to cut the unemployment rate, which has been very high (though it is now steadily falling). Prior to the new law, unemployment was 12.5%. Although there was some controversy about the legislation even among workers, some of who worried that employers would merely require employees to do the same amount of work in a shorter amount of time, "84 per cent of workers who had their hours reduced said that there were more advantages than disadvantages, and 75 per cent said their quality of life had improved." *Id.* Workers reported that they were likely to use the time to "spend more time with family and children." *Id.* Employers have implemented the change in "diverse ways, such as: seven-hour days, alternating four and five-day weeks, additional days off on an annual basis—usually 22 or 23, and 'time savings accounts' for accumulation of long periods of leaves." *Id.* Many workplace agreements "have gone beyond 35 to 32 hours or given individual workers the choice of reducing their hours further." *Id.*

56. Elizabeth Olson, *Americans Lead the World in Hours Worked*, N.Y. TIMES, Sept. 7, 1999, at C9.

57. See Williams, *supra* note 16, at 1454-55.

approach patterned after the French model would fill this need and encourage caretakers to work. Some adjustments would, of course, be appropriate for the American context. For example, as Bergmann points out in her book, vouchers would seem to be a better approach to childcare in the United States than government-run daycare centers.⁵⁸ But vouchers must be generous enough to allow all parents, regardless of income, to purchase quality care and to ensure that daycare workers earn a living wage.

B. *Human Happiness and Well-Being*

One of the most evocative passages in Fineman's article is her criticism of our obsession with the Dow Jones average and blindness to the needs of poor children and other vulnerable human beings:

A focus on market well-being has supplanted more inclusive and nuanced public assessments about national direction. The transformation in the focus of the public sphere is best captured by the way in which the well-being of the nation is currently measured. The Dow Jones Industrial Average is reported daily (even hourly on public radio) as though this reflected our country's health and wealth, an economic indicator substituting for other forms of evaluation of national standing such as the equitableness of the distribution of the wealth the society is producing or the well-being of the most vulnerable of our citizens. We seem blinded in a reverie of self-satisfaction even as the position of our children and the historically disadvantaged subgroups in society deteriorates both from where they were a few decades ago and relative to the positions of these groups in other industrialized democracies.⁵⁹

From viewing both national conventions during the 2000 election, one would assume that the key to human happiness is ever-increasing GNP and that an ever-increasing GNP is the undisputed primary concern of government. As Fineman notes, this fixation on economic indicators to the exclusion of other measures of well-being is obviously troubling for the poor.⁶⁰

It is not, however, only the needs of the poor that this fixation ignores. It is the needs of all of us. Empirical work on wealth and human happiness indicates that in any given society at any given time, individuals who are wealthier tend to be happier.⁶¹ But these studies

58. See BERGMANN, *supra* note 30, at 130.

59. Fineman *supra* note 15, at 1436.

60. *See id.*

61. *See, e.g.,* Richard A. Easterlin, *Will Raising the Incomes of All Increase the Happiness of All?*, 27 J. ECON. BEHAV. & ORG. 35, 35 (1995). The effect of income on happiness is, however, limited after other factors have been taken into account. *See id.*

also reveal that an increase in a society's wealth does not increase reported happiness.⁶² An analysis of happiness surveys in the United States from 1946 to 1977 found no trend toward increased happiness with rising prosperity.⁶³ Indeed, data through 1994 reveals "no improvement in happiness in the United States in over almost half a century in which real GDP per capita more than doubled."⁶⁴

The experiences of Europe and Japan have been similar, and that of Japan is particularly dramatic because income levels in Japan in the aftermath of World War II were much lower than in Europe or the United States. Japan experienced a five-fold increase in real per capita income between 1958 and 1987, bringing Japan to a "living level equal to about two-thirds that of the United States."⁶⁵ Whereas at the start of this period, few homes contained washing machines, refrigerators, televisions, and other durables, by the end of the period, almost every household contained such items and sixty percent owned cars.⁶⁶ Yet "there was no improvement in mean subjective well-being."⁶⁷

Higher incomes do not produce increased happiness "because material aspirations increase with a society's income."⁶⁸ Indeed, researchers find that "material norms and income increase, not only in the same direction, but at the same rate."⁶⁹

Another set of happiness studies indicates that an individual's pursuit of affluence and power are actually inconsistent with the pursuit of happiness.⁷⁰ Individuals who value extrinsic goals (e.g., power, wealth, fame, image) relative to intrinsic goals (e.g., personal growth, competence, relatedness, community service, community) experience lower levels of well-being.⁷¹ Intrinsic goals "can directly satisfy basic psychological needs for autonomy, relatedness, and competence."⁷² Extrinsic goals "provide only indirect satisfaction of

62. *See id.* at 35-37.

63. *See id.* at 37.

64. *Id.* at 38 (citations omitted).

65. *Id.* at 39 (citations omitted).

66. *See id.* at 39-40.

67. *Id.* at 40 (citations omitted).

68. *Id.* at 41.

69. *Id.*

70. *See* Richard M. Ryan et al., *The American Dream in Russia: Extrinsic Applications and Well-Being in Two Cultures*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1509, 1509 (1999).

71. *See id.*

72. *Id.* at 1510.

these basic needs and may actually distract from or interfere with their fulfillment.”⁷³

Psychologists have reached conclusions much like those of Amartya Sen and Martha Nussbaum. Psychologists see three factors as crucially important for human happiness: competence, autonomy, and connection.⁷⁴ Competence refers to an individual’s ability to develop her or his capabilities, whether building sand castles, climbing mountains, learning to read and write, or learning to do a job well. Autonomy refers to the ability to make decisions about one’s life, and connection refers to relationships with other people. Wealth is not irrelevant to human happiness, but of limited importance after basic needs are met. Income disparities are, however, a problem in terms of human happiness, a point also explored *infra*.

Sen defines substantive freedom as the individual’s ability “to lead the kind of life he or she has reason to value.”⁷⁵ From this perspective, “poverty must be seen as the deprivation of basic capabilities rather than merely as lowness of incomes.”⁷⁶ Here is a more detailed description from Nussbaum:

Central Human Functional Capabilities

(1) *Life*. Being able to live to the end of a human life of normal length

(2) *Bodily health and integrity*. Being able to have good health, including reproductive health; being adequately nourished; being able to have adequate shelter.

(3) *Bodily integrity*. Being able to move freely from place to place; being able to be secure against violent assault, including sexual assault, marital rape, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

(4) *Senses, imagination, thought*. Being able to use the senses; being able to imagine, to think, and to reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, . . . being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom of religious exercise; being able to have pleasurable experiences and to avoid pain.

73. *Id.* France has substantially higher levels of national happiness than the United States. See R. Ross Eshleman & Steven Stack, *Marital Status and Happiness: A 17-Nation Study*, 60 J. MARRIAGE & FAM. 527, 532 (1998).

74. See Ryan et al., *supra* note 70, at 1510.

75. AMARTYA SEN, DEVELOPMENT AS FREEDOM 87 (1999).

76. *Id.*

(5) *Emotions*. Being able to have attachments to things and persons outside ourselves; being able to love those who love and care for us

(6) *Practical reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's own life

(7) *Affiliation*. Being able to live for and in relation to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; being able to imagine the situation of another and to have compassion for that situation; having the capability for both justice and friendship . . . (b) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others

(8) *Other species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.

(9) *Play*. Being able to laugh, to play, to enjoy recreational activities.

(10) *Control over one's environment*. (a) *Political*: being able to participate effectively in political choices that govern one's life . . . (b) *Material*: being able to hold property . . . ; having the right to seek employment on an equal basis for others, having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.⁷⁷

Thus, for Sen and Nussbaum, human capabilities encompass competence, connection, and autonomy, which are the three factors psychologists consider important for human happiness. It follows that "the central goal of public planning should be the *capabilities* of citizens to perform various important functions."⁷⁸ And the political organization of a country should be judged by the extent to which the people of the country are able to develop their capabilities.⁷⁹

Wealth is not wholly irrelevant to human well-being, of course. But, as indicated earlier, it is of only limited importance. Indeed, increased GNP that brings with it increased income inequality can actually cause unhappiness. The American dream teaches that anyone can achieve status, power, wealth, etc., through personal effort. Failure is not, therefore, just bad luck or the result of social

77. MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 41 (1999); see also Amartya Sen, *Capability and Well Being*, in *THE QUALITY OF LIFE* 30 (Martha C. Nussbaum & Amartya Sen eds., 1993) (describing and discussing meaning of capabilities).

78. NUSSBAUM, *supra* note 77, at 42.

79. See *id.*

class, but evidence of a defective moral character; those who fail are morally culpable and “vulnerable to shame and guilt.”⁸⁰ (The reality is, of course, that one’s success in life correlates most strongly, not with individual attributes, but with the socioeconomic class into which one is born.)⁸¹ Being poor in a poor village full of people who are similarly poor is not damaging to the psyche. Being poor in a country like ours with great disparities in income and a definition of virtue synonymous with wealth is far more damaging, even if the poor American is objectively better off than the poor villager.⁸²

In addition, Sen emphasizes, “relative deprivation in terms of *incomes* can yield *absolute* deprivation in terms of *capabilities*.”⁸³ Part of Sen’s definition of capability is the ability to participate in the life of the community (what the psychologists would refer to as the ability to form connections with others).⁸⁴ But a poor person in a rich community may be unable to participate in the life of community because she or he lacks Internet access or does not own a car.⁸⁵ Even though the poor person in the rich community might be objectively better off in terms of assets and income than a poor person in a poor community, the poor person in the rich community will suffer a capability deprivation not necessarily suffered by the poor person in the poor community, who may be fully capable of participating in the life of the community.⁸⁶

Seeing GNP growth as the undisputed *primary* concern of government should be troubling to all of us. Without a doubt, this goal is ideal from the perspective of business. But it is not, in and of itself, a goal that fosters human well-being. Indeed, it can be inconsistent with the attainment of the real human needs of connection and competence. As noted above, people who pursue affluence and power are *less* happy than those who pursue goals that directly lead to competence and connections with others.

Further, increasing wealth for some leads to increased income disparities, as has been the case in the United States in recent decades,⁸⁷ and brings with it problems in all three areas (connection,

80. JEROME KAGAN, *THREE SEDUCTIVE IDEAS* 141 (1998).

81. *See id.* at 147-49.

82. *See id.* at 175-76.

83. SEN, *supra* note 75, at 89.

84. *See id.*

85. *See id.*

86. *See id.* at 89-90.

87. *See* U.S. CENSUS BUREAU, *MONEY INCOME IN THE UNITED STATES, CURRENT POPULATION REPORTS: CONSUMER INCOME 1999* (P60-269), at xii tbl.C (2000).

autonomy, and capability) for the poor. Poverty places great, often unbearable, stress on human relationships. Those who live in poor neighborhoods tend to have fewer connections to formal and informal social supports, including churches, schools, and civic and political organizations.⁸⁸ The poor have less autonomy because they have less control than others over where they live, how they get from one place to another, what schools they or their children attend, etc. The poor also have less ability to develop their competence, since they tend to go to inadequate schools and, as adults, face jobs that are likely to be tedious and numbing rather than challenging.

In addition, income inequalities are associated with poor health for all members of a society, not just the poor. Social scientists and medical researchers studying the health of populations report that it is not the richest countries that have the best health, but those with the smallest inequalities between the rich and the poor.⁸⁹ Even within a country such as the United States, people living in states with lower levels of income inequality are healthier than those in states with higher levels of income inequality.⁹⁰ And it is not simply the poor who have poorer health when income disparities are pronounced. In less equal societies the middle class is less healthy than the middle class in more equal societies (even at equal income levels).⁹¹ In a society with high levels of disparities, we all suffer considerable strain. Fineman is right in questioning the Dow Jones average as a barometer of our well-being.

My comments on Fineman ask her to clarify her argument with respect to whether she would transfer sufficient supports to caretakers to enable them to support their children above the poverty line without engaging in wage work. For both pragmatic political reasons and for the well-being of caretakers themselves (and hence their children), we should follow the French pattern and provide

88. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 296-318 (2000).

89. See, e.g., Norman Daniels et al., *Justice Is Good for Our Health, in IS INEQUALITY BAD FOR OUR HEALTH* 3, 9-11 (Norman Daniels et al. eds., 2000) (once per capita gross domestic product reaches a minimum level of \$8,000 to \$10,000). On the interrelationship of equality and health, see generally RICHARD G. WILKINSON, *UNHEALTHY SOCIETIES: THE AFFLICTIONS OF INEQUALITY* (1996); 1 *THE SOCIETY AND POPULATION HEALTH READER: INCOME INEQUALITY AND HEALTH* (Ichiro Kawachi et al. eds., 1999); 2 *THE SOCIETY AND POPULATION HEALTH READER: A STATE PERSPECTIVE* (Alvin R. Tarlov & F. St. Peter eds., 2000).

90. See WILKINSON, *supra* note 89, at 78-79; Richard G. Wilkinson, *Putting the Picture Together: Prosperity, Redistribution, Health, and Welfare, in SOCIAL DETERMINANTS OF HEALTH* 256, 258-59 (Michael Marmot & Richard G. Wilkinson eds., 1999).

91. See Daniels et al., *supra* note 89, at 3.

supports such that, when combined with wage work, working parents can pull their families out of poverty.

II. WILLIAMS

Williams focuses on the ideological framework of domesticity and its links to gender norms requiring that women be selfless nurturers and that men be breadwinners. This is an important contribution. Feminists have focused too much on the social pressures on women and too little on the social pressures on men. Williams is right in saying: “[G]ender is not just a power differential between men and women.”⁹² In my comments on Williams’s article, I break my discussion into four major topics: (1) the battle between maternalists and equal parenting feminists; (2) Williams’s criticisms of relational and dominance feminism; (3) gender as tradition; and (4) using Title VII to require employers to accommodate caretakers.

A. *Maternalists v. Equal Parenting Feminists*

Much of Williams’s first section is an insightful social commentary on norms of domesticity in twentieth-century America. Women’s reproductive labor has been so spiritualized that it is difficult to see it as either reproductive or labor.⁹³ The home has become increasingly child centered, with ever-increasing demands for intensive mothering as more and more mothers work for wages outside the home.⁹⁴ Under intensive mothering norms, mothers are caught in double binds with respect to their performance as mothers and workers, and women who are not mothers understandably resent the notion that this construct is true womanhood.⁹⁵

In this same section, Williams discusses the wars between maternalist and equal parenting feminists. She begins her discussion of the wars with a “first important point, constantly forgotten”: whether one is a maternalist or an equal parenting advocate depends on personal experience. According to Williams,

[i]f a woman truly loves the mothering role and feels no desire to give up part of it, or has no partner and wants none, she will be a maternalist. In sharp contrast, a woman who has successfully shared family work with a partner in a way she feels has enriched

92. Williams, *supra* note 16, at 1470.

93. *See id.* at 1446.

94. *See id.* at 1447-52.

95. *See id.* at 1450-51.

both her family and her work life will feel equally [committed] to ideals of equal parenting.⁹⁶

This may often be true. Maybe it is true for every other woman on earth, but it is not true for me. And I suspect that it is not actually true for many equal parenting advocates either. In Williams's taxonomy, I am a maternalist. I have been skeptical of the likelihood of men actually engaging in equal parenting (i.e., being as likely to actually carry the child in their minds as mothers)⁹⁷ and have advocated a presumption that the mother, if fit, should decide what custody arrangement would be best for the child.⁹⁸

My maternalism cannot, however, be traced to a love of my mothering role and an absence of any desire to give it up. I am not a mother. I am the oldest of six children and did an enormous amount of childcare while growing up. I was always ambivalent about having children. In the end, I never had them, for many reasons. But I do love children. When I wrote the article arguing a maternal presumption for custody, I had been living with a sister and her children for some years, the youngest of whom is like a daughter to me. But I have been more like a father than a mother to her. I appreciate the vast difference between the care I have given and the care her mother has given. I believe that my experiences *are* relevant to my position in this battle, but that it is my experience in a father-like role that has made me appreciate the work mothers do. I also believe that most fathers, being men, tend not to see the full extent of the difference between what they do and what their children's mothers do on many different levels, particularly the emotional.

I suspect that many equal parenting feminists know that in most families, including their own, fathers and mothers do not play comparable roles in their children's lives. But they believe that the only way to achieve equality between women and men is for men to be equally responsible for caretaking. They are, therefore, strongly committed to increasing equality between mothers and fathers over time, and *do* see some progress: their partners *are* more involved than their fathers were. I suspect that many use the rhetoric of equality as the best way to support their commitment to equal parenting in the long term, though most have experienced its impossibility in the short term of their own lives. Others may consciously believe that what

96. *Id.* at 1453.

97. See generally Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 15 CAL. REV. L. & WOMEN'S STUD. 133, 202-03 (1992).

98. See *id.* at 203-17.

they have achieved is equality (no matter how unequal) because they, like many of the couples in Arlie Hochschild's study, believe in equality and therefore regard their parenting roles as equal regardless of reality.⁹⁹

I am also somewhat skeptical of Williams's solution to the war between equal parenting advocates and maternalists: craft all proposals to appeal to both maternalists and equal parenting feminists. Often it is possible to do so, at least theoretically. Both maternalist feminists and equal parenting feminists might agree, for example, to seek paid parental leave incorporated into unemployment insurance. But what if it might be possible to enact paid maternity leave but impossible—at least in the near future—to enact paid parental leave? In fact, the country that was first to mandate paid parental leave by law (Sweden) started with paid maternity leave.¹⁰⁰ It may well be that the quickest way to get the paid parental leave that both maternalists and equal parenting advocates could support would be to start with a maternalist policy: paid maternity leave.

Similarly, both maternalists and advocates of equal parenting can, in the abstract, support custody standards at divorce that favor the primary caretaker. But reality is that (1) a primary caretaker standard is biased against mothers in application because judges tend to be too impressed by any caretaking by fathers; (2) even when fathers get custody of children after the divorce, the primary caretaker often continues to be, not the father, but another woman (typically the father's new wife or girlfriend); and (3) women are not fungible (i.e., most stepmothers have weaker ties to children than the children's mothers).¹⁰¹ In the real world, it does not seem possible to fashion a standard that is neither biased against mothers nor maternalist.

99. See ARLIE HOCHSCHILD, *SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME?* 33-58 (1989).

100. See Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 *COMP. LAB. L.J.* 373, 396-97 (1996); Scott A. Caplan-Cotenoff, *Parental Leave: The Need for a National Policy to Foster Sexual Equality*, 13 *AM. J.L. & MED.* 71, 93-94 (1987).

101. See Becker, *supra* note 97, at 175-83. On stepmothers, see also ANNE CASE ET AL., *HOW HUNGRY IS THE SELFISH GENE* (2000), available at <http://www.wws.princeton.edu/~rpd/s/macarthur/gene2000.PDF> (reporting on an empirical study that shows more money is spent on food in families with mothers rather than stepmothers).

B. *Williams's Criticisms of Relational Feminism and Dominance Feminism*

Williams criticizes relational feminism as essentialist (i.e., as assuming that all women are identical to each other and that all men are different). Williams directs this criticism at Robin West:

A decade of antiessentialist critique has not dislodged different-voice feminism. Indeed, the critique has accomplished remarkably little. Early different-voice articles noted that Carol Gilligan's descriptions were "controversial," and proceeded to use them anyway; more recent scholarly work acknowledges antiessentialist critiques but then proceeds to use precisely the same picture of women as selfless, all-giving, and focused on care. Thus Robin West acknowledges the antiessentialist critique but then goes right on to talk about "women." This only serves to fuel objections that she overlooks many women who do not feel described by relational feminists' description of women.¹⁰²

Two questions jump to my mind when reading this passage. First, Williams uses the word "women" repeatedly throughout her contribution to this Symposium. If she can use it without being essentialist, why cannot Robin West? Indeed, how can Robin West work at all as a feminist if she cannot use the word "women"?

Second, in *Caring for Justice*, West responds to the anti-essentialist critique thoughtfully and in great detail, explaining why it is important to acknowledge the "genesis of the ethic [of care] in women's lives" even as we argue for applying it (as West does in her book) broadly to social problems.¹⁰³ Williams agrees that women have traditionally been assigned nurturing and caretaking roles (this is, after all, part of her core claim about the ideology of domesticity).¹⁰⁴ Williams would not, therefore, seem to disagree that the ethic of care can be traced to women's lives via women's traditional roles. In the *Caring for Justice* passage Williams cites, West clearly states that she believes neither that all men are essentially different from all women nor that all women are identical: "there are caring men and uncaring women."¹⁰⁵ Why does Williams not discuss West's response of the essentialist critique and explain why she considers West's response inadequate?

102. Williams, *supra* note 16, at 1468 (citations omitted).

103. WEST, *supra* note 1, at 19-20.

104. See Williams, *supra* note 16, at 1444-45.

105. WEST, *supra* note 1, at 18.

I also had difficulty with Williams's discussion of dominance feminism in her contribution to this Symposium. She criticizes dominance feminism for its reliance on "false consciousness":

[T]he only rhetoric dominance feminism offers for understanding "choice" . . . is "false consciousness." "False consciousness" presents several problems. First, it is infuriatingly condescending; can you imagine a trade book that actually inspired women to think of themselves as responding to social mandates rather than making authentic choices by telling them they suffered from "false consciousness"? As feminist jurisprudence seeks a broader audience than academic lawyers, the false consciousness language becomes less useful.

False consciousness is analytically flawed as well, for it implies that the analyst has a bird's-eye view from outside the gender system she is describing, and is delivering the Truth to the poor, trapped inhabitants. Not only is this condescending, it will cause feminists to miss the extent to which we all are operating within the gender system we seek to contest, which is a crucial insight if we are to avoid a new round of sameness/difference debates.¹⁰⁶

Catharine MacKinnon *never* uses the term "false consciousness"; she consciously avoids it. Williams does not cite any examples of dominance feminists who actually do. It is, of course, likely that some of the hundreds, if not thousands, of feminists who have engaged in dominance analysis (following MacKinnon) use the term "false consciousness." But given MacKinnon's avoidance of it, there is no reason to identify its use as a unique problem for dominance feminism.

All feminists have some vision of potential change in women's status and consciousness. Williams herself has such a vision: a weakened gender system in which there is more equality between women and men than there is today and in which women would face fewer constraints and be able to make different decisions.¹⁰⁷ In Williams's ideal world, the consciousness of men as well as that of women would change with respect to internalized norms of gender identity.¹⁰⁸

C. *Men under Pressure, Gender As Tradition*

Throughout her article, Williams stresses that gender is more than men's power over women; it is tradition—a set of social norms

106. Williams, *supra* note 16, at 1470.

107. See *id.* at 1493.

108. See *id.* at 1478-79.

and expectations pressuring men as well as women to conform to gender stereotypes.¹⁰⁹ While women are harmed by becoming giving selves, men are harmed by losing the ability to know what they feel. Women as mothers and workers face impossible double binds. But men are under great pressure both internally (norms of masculinity requiring that men be breadwinners) and externally (employer resistance to time off for parenting for men) to make wage work a higher priority than caretaking in their lives. This is an important point. Feminists have focused too much attention on pressures under which women operate and too little on the pressures under which men operate. We need to see masculinity as well as femininity as problematic.

But it is also important to recognize the very real conflicts of interest between women and men. Even after taking into account the fact that fathers work more hours in the wage labor market, in families in which mothers also work for wages, mothers work more hours altogether—when wage and care work are combined—than do men. Recall Arlie Hochschild's families in *Second Shift* in which the women put in an extra month of work a year when hours of wage and care work are combined.¹¹⁰ This difference is not attributable to pressures on men to put breadwinning first, but to men's preference for personal leisure over caretaking, fairness, justice, and equality.

Indeed, it is generally true that the social system that pressures men to be masculine and women to be feminine does not operate in parallel ways for women and men, as the "gender as tradition" approach seems to suggest. More helpful than Pierre Bourdieu and Judith Butler, I suggest, are contemporary American scholars writing in the new field of masculinities, which closely examines both the pressures on men to conform to social norms and what men get as a pay off: more power than women, including a month of extra leisure a year in families with two wage earners. Men conform in part to enjoy the advantages of being male.¹¹¹

109. See generally *id.*

110. See HOCHSCHILD, *supra* note 99, at 254.

111. See, e.g., ALLAN G. JOHNSON, *THE GENDER KNOT: UNRAVELLING OUR PATRIARCHAL LEGACY* (1997); MICHAEL KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* (1997); MICHAEL KAUFMAN, *CRACKING THE ARMOUR: POWER, PAIN AND THE LIVES OF MEN* (1993); *RETHINKING MASCULINITY: PHILOSOPHICAL EXPLORATIONS IN LIGHT OF FEMINISM* (Larry May et al. eds., 2d ed. 1996); *MEN AND INTIMACY: PERSONAL ACCOUNTS EXPLORING THE DILEMMAS OF MODERN MALE SEXUALITY* (Franklin Abbott ed., 1990); *BEYOND PATRIARCHY: ESSAYS BY MEN ON PLEASURE, POWER, AND CHANGE* (Michael Kaufman ed., 1987).

D. *Using Title VII to Force Employers to Accommodate Working Parents*

In her contribution to this Symposium, Williams does not describe the details of how she would move toward a world in which employers provided greater accommodation of caretaker workers. In her book, however, she suggests a litigation drive to expand the meaning of sex discrimination under Title VII to include policies premised on ideal workers without caretaker responsibilities.¹¹²

We need to face the fact that Title VII is an empty remedy apart from the most extreme cases. We need another way to resolve discrimination complaints; the federal courts are simply unwilling to do so. Today, Title VII plaintiffs routinely lose on motions for summary judgment, with the result that the law of discrimination is becoming more and more hostile to plaintiffs. The fate of pregnancy discrimination claims is but one illustration of this broad phenomena.

In 1976, the Supreme Court held that Title VII's prohibition on sex discrimination did not include distinctions based on pregnancy.¹¹³ Women were shocked and outraged. Congress responded with the Pregnancy Discrimination Act of 1978 ("PDA"), which amended Title VII to provide that sex discrimination includes discrimination:

on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability to work or inability to work.¹¹⁴

Although the PDA remains formal law,¹¹⁵ it is increasingly difficult for a plaintiff to win a pregnancy discrimination case. Consider, for example, *Troupe v. May Department Stores Co.*¹¹⁶ Kimberly Troupe had worked as a sales person at Lord & Taylor for several years without any problem before she became pregnant.¹¹⁷ She had terrible morning sickness during her pregnancy and was often late or early to leave, even after cutting her hours from full-time to half-time (1:00 P.M. to 5:00 P.M.).¹¹⁸ After a warning, she was

112. See WILLIAMS, *supra* note 13, at 104-10.

113. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134 (1976).

114. 42 U.S.C. § 2000e(k) (1994).

115. See *id.*; § 2000e-2(a)(1)-(2) (1994).

116. 20 F.3d 734 (1994).

117. See *id.* at 735.

118. See *id.*

placed on probation, but the problem continued.¹¹⁹ On the day before she was to start her maternity leave, her supervisor (as they made their way to the meeting at which Troupe was fired) told Troupe that she was being fired because she (the supervisor) did not believe that Troupe would return to work following her leave.¹²⁰ When Troupe sued, arguing that the employer had discriminated on the basis of sex in violation of the PDA, the employer argued that she was fired for arriving late and leaving early.¹²¹

The district court granted the employer's motion for summary judgment, and the Court of Appeals for the Seventh Circuit affirmed, holding that Troupe had not demonstrated that a man about to go on a medical leave would not have been fired.¹²² *Troupe* is by no means unique, and has been followed by the Court of Appeals for the Third Circuit in a case finding no discrimination when an employer, forced to lay off one secretary, laid off the unmarried African American woman on maternity leave rather than the secretary with the least seniority or the lowest job evaluations.¹²³ In that case, there was a trial, but increasing numbers of dismissals of complaints on summary judgment result in substantive law that is ever more hostile to plaintiffs.¹²⁴

Thus, despite the PDA, pregnant women can be fired for being the one on leave when a reduction in force is necessary or being late for work because of morning sickness.¹²⁵ It is also difficult for women to win on claims that they were discriminated against for being new mothers.¹²⁶ Indeed, it is becoming difficult for plaintiffs to win in discrimination cases of any kind, except on the most extreme facts.¹²⁷

119. *See id.*

120. *See id.* at 736.

121. *See id.*

122. *Id.* at 737-38.

123. *See In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 297 (3d Cir. 1997).

124. *See id.*

125. *See* Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61, 78-82 (1997); Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193 (1994); MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* (2d ed. 2001).

126. *See* Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337 (1999).

127. *See, e.g.*, Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998) (describing cases holding that de minimis discrimination is not actionable under Title VII, with a high standard for de minimis); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (discussing difficulties for plaintiffs under the ADA); Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505 (2000).

Over the last thirty years, trials of any kind have become increasingly rare in federal court civil suits as increasing numbers of cases are dismissed on motions for summary judgment. This trend was already visible at the district court level by the mid-1980s, but was strengthened by three cases decided by the Supreme Court in 1985.¹²⁸ Although none of these cases involved a civil rights or employment discrimination issue, they have been interpreted by the lower federal courts as changing the standard for summary judgment in all kinds of cases, including those arising under Title VII.¹²⁹

Paul Mollica conducted a study examining ten volumes of the *Federal Reporter* from 1973 and ten volumes from 1997–98. He found a dramatic difference in the standard for summary judgment between these dates. In 1973, most appeals were from trials. In the cases in which the trial court had granted summary judgment, the reversal rate on appeal was 45.5%.¹³⁰ In 1973, federal appellate courts showed:

[E]xtreme vigilance against treading on contested fact issues or mixed questions of law and fact—even arguable ones—reversing them for evidentiary hearings. Only a modest proffer by the non-movant was enough to demonstrate the necessity of a trial. This was especially true in cases applying indeterminate legal standards, such as reasonableness. . . .

With only one exception [a defamation case], state-of-mind issues (such as intent and malice) did not terminate in summary judgment in the sample cases.¹³¹

In the 1997–98 sample, in contrast, most appeals were from grants of summary judgment, not trials.

It has become common to evaluate such legal standards as intent and reasonableness on summary judgment—to evaluate, on occasion, even issues of credibility—and to default non-movants under Rule 56. . . .

The reach of summary judgment . . . is especially pernicious in the field of employment discrimination law, where the ultimate issue in most cases is whether the employer (or, more pointedly, its agent) intended to discriminate on the basis of a protected classification. . . .

128. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (antitrust action); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (libel action); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (wrongful death action).

129. See Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 141-70 (2000).

130. See *id.* at 147 (citing William P. McLaughlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEGAL STUD. 427 (1977)).

131. *Id.* at 147-49.

In a fair number of the employment cases, the summary judgment went to the heart of the employer's alleged discriminatory intent. A few cases found that plaintiffs failed to prove even a prima facie case of discrimination. A larger number of decisions affirmed summary judgment by holding that the plaintiff could not establish discriminatory intent, either directly or indirectly.¹³²

The pressure on lower federal courts to use summary judgment to eliminate Title VII cases from their dockets has increased dramatically in the 1990s as the number of employment discrimination cases filed has gone through the roof. In the year ending December 13, 1990, 8290 employment discrimination cases were filed.¹³³ Less than a decade later, in the year ending March 31, 1997, the number filed was 23,547.¹³⁴ These numbers are high enough to overwhelm the federal courts and create great pressure on district courts to dispose of employment discrimination claims on motions for summary judgment.

As increasing numbers of Title VII cases are decided on summary judgment, it is likely to become ever harder for plaintiffs to prevail. *Troupe*, for example, held that as a matter of law, a plaintiff cannot survive summary judgment on a pregnancy discrimination claim when the employer alleges that she was fired for absenteeism even if she can show that her supervisor said she was being fired because she was not expected to return from maternity leave.¹³⁵ Over time, as more and more cases are decided by summary judgment in order to control dockets and avoid trials, it will become more and more difficult for plaintiffs to prevail.

With the scope of Title VII and other discrimination statutes shrinking for these reasons, it is not even remotely possible that the federal courts would consider expanding Title VII's scope to reach claims that employers discriminate when they structure jobs for ideal workers without caretaking responsibilities. Rather than arguing to judges for expanding the reach of Title VII, we need to think about an alternative forum for enforcing antidiscrimination laws in general; federal judges are simply not interested. We should also consider a set of clear rules protecting pregnant workers and caretakers, rules that would not require convincing judges that discrimination against

132. *Id.* at 167-69.

133. *See White, supra* note 127, at 1124 n.14.

134. *See id.* Paul Mollica reports that in 1973, 8.5% of pending federal civil cases resulted in a trial, for a total of 8,297 civil trials. In 1999, 2.3% of pending federal civil cases resulted in a trial, for a total of 6,228 civil trials in a year. *See Mollica, supra* note 129, at 141.

135. *See Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (1994).

them is sex discrimination. European Union law is far ahead of us on these points and could serve as a model with respect to specific rules.¹³⁶

In my comments on Williams, I have suggested that her view of maternalists and equal parenting advocates may be insufficiently nuanced both with respect to the background leading a feminist to be one or the other and with respect to the ability to avoid the conflict by advocating policies that appeal to both camps. I have also noted weaknesses in her criticisms of relational and dominance feminists (West and MacKinnon) as well as in her suggestion that we should regard gender norms as tradition pressuring both women and men to conform. Finally, I have suggested that rather than expanding Title VII to reach discrimination against workers who caretake, we need to start thinking about an alternative (to the federal courts) forum for resolution of such disputes as well as develop a set of bright-line rules protecting workers who caretake.

III. A RADICAL ATTACK ON CARETAKING

In her opening paragraphs, Fineman describes an emerging “radical attack on any existing notion that there is some collective responsibility for children and other dependent persons.”¹³⁷ She also notes with surprise that “some of today’s extreme rhetoric extolling private rather than public responsibility for dependency has come from self-identified feminist legal scholars and scholars otherwise aligning themselves with progressive positions.”¹³⁸ In addition, Fineman reports that “[s]ome are led to a privatizing position through the logic of economic analysis with its emphasis on efficiency and utility.”¹³⁹ Fineman does not, however, respond in detail to such radical attacks; when she submitted her contribution to this

136. In Europe, for example, it is illegal for an employer to fire an employee during pregnancy or maternity leave for any pregnancy-related reasons, including inability to work or being on maternity leave; thus, both *Troupe* and *Carnegie Associates* would have been decided differently in Europe. There is no need to find a similarly situated man. See *Brown v. Rentokil, Ltd.*, E.C.R. I-4185, 4222-23 (1998) (holding that under European Union law, an employer cannot fire an employee during pregnancy or maternity leave for any reason connected to pregnancy, such as inability to do the job because of pregnancy-related disability). European law also requires that part-time workers receive equal pay and benefits on a pro rata basis (i.e., in proportion to the hours worked). See EVELYN ELLIS, *EC SEX EQUALITY LAW 112-19* (2d ed. 1998) (discussing cases).

137. Fineman, *supra* note 15, at 1403.

138. *Id.* at 1403-04.

139. *Id.* at 1404.

Symposium, there was as yet no such attack in print.¹⁴⁰ One has, however, just been published by Katherine Franke in the *Columbia Law Review*.¹⁴¹ In the remainder of this Commentary, I describe and then comment on Franke's arguments.

A. *The Call*

In her article, Franke criticizes feminism for seeing "sexuality as [only] dependency and danger."¹⁴² According to Franke,

[L]egal feminism has, by and large, reduced questions of sexuality to two principal concerns for women: *dependency*, and the responsibilities that motherhood entails, and *danger*, such as sexual harassment, rape, incest, and domestic violence. This concentration on the elimination of sexual danger and dependency for women risks making "women's actual experience with pleasure invisible, overstat[ing] danger until it monopolizes the entire frame, positions women solely as victims, and fails to empower our movement with women's curiosity, desire, adventure, and success."¹⁴³

The heart of Franke's article is a call for feminists to focus on women's sexual pleasure, a focus she sees as incompatible with, or at least threatened by, feminist arguments for support and accommodation of caretakers. She begins her section on "The Repronormativity of Motherhood" with this paragraph:

Motherhood and its implications figure centrally in virtually all feminist agendas. However, for much of the first and second wave legal feminism, issues of gender collapse quite quickly into the normative significance of our roles as mothers. Grounding feminist legal theory in object relations theory and demanding that women's participation in the wage labor market be compatible with our responsibilities as mothers are only two salient examples of how the legal feminist frame tends to collapse women's identity into motherhood. The centrality, presumption, and inevitability of our responsibility for children remain a starting point for many, if not most, legal feminists.¹⁴⁴

140. *Id.* at 1404 n.3 (noting that such opinions were expressed "by several participants at the 'Uncomfortable Conversation' panel discussions on 'Children: Public Good or Personal Responsibility?'" sponsored by the Feminism and Legal Theory Project and held on November 19 and 20, 1999, at Cornell Law School).

141. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *COL. L. REV.* 181 (2001).

142. *Id.* at 208.

143. *Id.* at 182 (quoting Carol S. Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, 38 *N.Y.L. SCH. L. REV.* 289, 290 (1993)).

144. *Id.* at 183.

Franke makes a number of points in discussing the repronormativity of motherhood:

- Feminists have not paid enough “theoretical attention” to the “complex ways in which reproduction is incentivized and subsidized in ways that may bear on the life choices women face.”¹⁴⁵
- Feminists need to “reconceptualize procreation as a cultural preference rather than a biological imperative, and then explore ways in which to lessen or at least modify the demand to conform to that preference.”¹⁴⁶
- We “must go beyond the mere revaluation of women’s reproductive labor such that the maternalization of female identity remains intact.”¹⁴⁷
- Commodification of dependency work is dangerous: “our best strategy cannot lie in creative efforts to commodify the domain of sexuality that is the surplus above mere procreation, for it may be that its greatest value lies precisely in its excess.”¹⁴⁸
- To Fineman’s argument that raising children is society-preserving work creating a social debt to mothers, Franke responds:
 - Consumption also reproduces society and cannot be distinguished from production. Indeed, SKYY Vodka’s marketing campaign targeted at the gay community was an occasion of celebration by the community, evidence that it had “achieved a level of social visibility, acceptance, and presence.”¹⁴⁹ And community identity can be strengthened through consumptive acts, as illustrated by MasterCard’s use of Martina Navratilova to market rainbow credit cards to the gay and lesbian community, promoting “the idea that personal consumption is an effective mode of political participation.”¹⁵⁰
 - Mothers often have children for selfish rather than altruistic reasons, such as “‘because they love them or the idea of them, to keep a marriage together, to meet social, spousal, or parental expectations, to experience pregnancy, or to pass on the family name, genes or silver.”¹⁵¹

145. *Id.* at 184.

146. *Id.* at 185.

147. *Id.* at 187.

148. *Id.*

149. *Id.* at 189.

150. *Id.* at 188-90 (quoting ALEXANDER CHASIN, *SELLING OUT: THE GAY AND LESBIAN MOVEMENT GOES TO MARKET* 198-99 (2000)).

151. *Id.* at 190 (quoting Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN’S STUD. 15, 48 (1992)). It should be noted that having children because one loves them is altruistic in economic terms. From an economic perspective, “parents are being ‘altruistic if all they obtain [by] doing something for others is the pleasure of making those others happy.’”

- Parents are given a degree of control over child rearing—such as being able to decide to home school their children to avoid dominant public values such as “tolerance, equality, and humanity”¹⁵²—inconsistent with viewing children as a public good.
- Parenting “has become, in many regards, as much or more about consumption than production,” witness parents’ need to buy “Pokemon accessories, My Little Pony dolls, Barbies, fancy sneakers,”¹⁵³ etc. It is unfair to require taxpayers to pay for consumer goods in a consumerist culture just because parents want to give things to their children.¹⁵⁴
- The need for a new generation of workers can be met by immigration. Our preference for “natalist solutions” (raising our own children) over immigration “have often taken the form of loosely-veiled racism, xenophobia, or decolonization.”¹⁵⁵ Indeed, our immigration policy has consistently rested on racist underpinnings.¹⁵⁶ Some of the French supports for working parents were enacted at the time immigration laws were tightened and supported by nationalist rhetoric.¹⁵⁷
- Reproduction by women of color has been “structurally discouraged, if not prohibited.”¹⁵⁸ Despite the “structural disincentives to reproduce, women of color are more likely than white women to have children.”¹⁵⁹ Franke asks: “Might there be any grounds upon which virtually universal motherhood by Latinas would garner critical attention from critical race feminists? According to what theory of well-being, community, and flourishing would a cultural justification or explanation for women of color’s overwhelming reproduction be legitimate?”¹⁶⁰

Franke closes her section on the “repronormativity of motherhood” by carefully stating that “feminists should not abandon a concern for the role of reproduction and mothering in women’s lives.”¹⁶¹ She repeats her call to feminists to question mothering:

Andrew Hacker, *The Case Against Kids*, N.Y. REV. BOOKS, Nov. 30, 2000, at 14 (quoting economists Alessandro Cigno and Furio Rosati in *THE ECONOMICS OF RECIPROCITY, GIVING, AND ALTRUISM* (Louis-André Gérard-Varet et al. eds., 2000)).

152. Franke, *supra* note 141, at 191-92.

153. *Id.* at 192.

154. *See id.*

155. *Id.* at 194.

156. *See id.* at 195.

157. *See id.* at 194.

158. *Id.* at 195-96.

159. *Id.* at 196.

160. *Id.*

161. *Id.* at 197.

[W]e could stand to pay closer attention to the taken-for-grantedness of motherhood in feminist legal theory. What is our stake in treating motherhood as a social position and a set of both expectations and entitlements not worthy of the level of interrogation we have visited on other fundamental aspects of women's lives?¹⁶²

B. Responses

1. Linking Reproduction As Dependency and Sex As Danger

The linkage Franke sees between reproduction as dependency and sex as danger strikes me as nonexistent. I am all for more emphasis on women's right to sexual pleasure, and have written and raised questions about this issue.¹⁶³ But I would not look to lawyers for a theory of female sexual pleasure. Law solves problems, redresses harms, redistributes income.¹⁶⁴ Given the purpose of law, the focus of legal feminism on sex has appropriately involved sexual harms.

More fundamentally, reproduction as dependency is not a phenomenon in anyway parallel to sex as danger. Sex is dangerous because heterosexual male sexuality is so often predatory. Sex is dangerous because so often women are forced to have sex or are so situated (as in a marriage with children) that they feel they cannot say no to unwanted sex.

Reproduction involves dependency for mothers because we live in a capitalist society in which income is required to live and in which children are not allowed to engage in significant amounts of wage labor. Raising children requires resources and limits the mother's ability to earn wages.

True, a mother with children is likely routinely to have undesired sex with her husband because of her children's dependency on his wages. But public supports for working parents, like those in France (and as under Williams' proposed sharing of income after divorce),¹⁶⁵ would *increase* the mother's ability to say no and still be able to care for her children. Until women can say "no" when they do *not* want

162. *Id.*

163. See Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 189-202 (1998); Becker, *supra* note 6, at 50-51 (identifying the value of female sexual agency as one of four key values of relational feminism); MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 181 (1st ed. 1994); MARY BECKER ET AL., *supra* note 125, at 249-50.

164. See WEST, *supra* note 1, at 94-95, 174-78.

165. See WILLIAMS, *supra* note 13, at 124-31.

sex, women will have difficulty being free sexual subjects seeking their own pleasure. Unwanted sex teaches one to be somewhere else (other than in one's body during sex) and that distancing, if repeated often enough, makes it difficult to be present when one wants sexual pleasure or thinks about wanting sexual pleasure.¹⁶⁶ Increasing supports for and accommodation of mothering should *increase* women's sexual agency.

Franke argues that women are under too much pressure, ignored by feminists, to be mothers. (She sees structural disincentives to mothering only for women of color.) I agree entirely with the limited point that women face social pressures to be mothers and that anything that would ease such social pressure would improve women's well-being, provided that it does not increase the disincentives to mothering. Although Franke totally misses this reality, all women are under tremendous pressure *not* to be mothers as well as *to be* mothers.

As Marilyn Frye pointed out in a classic essay published nearly twenty years ago, to say that women (or any group) is oppressed is to say that women are "caught between or among forces and barriers which are so related to each other that jointly they restrain, restrict or prevent the thing's motion or movability."¹⁶⁷ According to Frye, "[o]ne of the most characteristic and ubiquitous features of the world as experienced by oppressed people is the double bind—situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation."¹⁶⁸

Whether to be a mother is one such double bind. If you decide not to be a mother, some people will regard you as not a "real" woman. But if you do become a mother, you are likely to be seen as essentially a mother. This is particularly damaging in the workforce, where being a mother is incompatible with being an ideal worker, as Joan Williams so aptly terms it.¹⁶⁹ But this is only the tip of the iceberg with respect to disincentives to mother. Mothers earn less money than other workers, even after considering the fact that mothers work fewer hours because of the demands placed on them by caretaking. And the depression in mothers' wages is life long; it does not end when childhood ends.¹⁷⁰

166. On the harms of unwanted sex, see *id.* at 133-35; Becker, *supra* note 163, at 193-97.

167. Marilyn Frye, *Oppression*, in *THE POLITICS OF WAR* 1, 2 (1983).

168. *Id.* at 2.

169. See WILLIAMS, *supra* note 13, at 70.

170. See, e.g., ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST*

Mothers who work for wages work more hours than other workers when caretaking is included. Mothers have less power in marriages than women who are not mothers.¹⁷¹ Working mothers of young children are often sleep-deprived as well as leisure-deprived. Mothers who work for wages are subject to work-place rules designed for ideal workers without caretaking responsibilities. Mothers lose jobs because of pregnancy or absences associated with pregnancy or caretaking (such as the need to stay home with a sick child). Mothers who work for wages are bombarded with messages that they are inadequate as mothers, despite mounting evidence that children in quality daycare do as well or better than children raised by stay-at-home mothers on every imaginable indicator of well-being.¹⁷² At divorce, mothers are at risk of losing custody of the children for whom they have cared and are likely to become poor because of the inequitable distribution of assets at divorce. In general, mothers are disproportionately poor, because being a mother depresses one's ability to work for wages and increases one's needs, given their need to provide for dependent children. Quality daycare for the children of working mothers is expensive and beyond the reach of mothers who are not at least solidly middle class. Our intensive mothering norms, which Williams describes,¹⁷³ place impossible pressures on working mothers, with the result that many working mothers feel that they are doing an inadequate job as mothers and an inadequate job as workers.

Mothers who do not work for wages are at even greater risk of poverty in the event of divorce. They are also more likely to be depressed. The work they do is not valued much in their culture; they are often seen (by themselves and others) as "only" moms.

Working women, like Franke and myself, who are not mothers enjoy many privileges at work and at home relative to women who are mothers. One could describe what we enjoy as "non-mothering-

IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 87-109 (2001); NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUE* 34-35 (2001).

171. See CRITTENDEN, *supra* note 170, at 110-30; JANICE M. STEIL, *MARITAL EQUALITY: ITS RELATIONSHIP TO THE WELL-BEING OF HUSBANDS AND WIVES* 24-42 (1997).

172. See, e.g., FOLBRE, *supra* note 170, at 63. In the Spring of 2001, the media paid considerable attention to early reports on a study showing higher levels of aggression by children in "childcare" rather than children cared for by their mothers, but the as yet unpublished study used a broad "childcare" category, ignoring the quality of childcare and including paternal care and care by other relatives as nonmaternal care. See, e.g., Katha Pollitt, *Happy Mother's Day*, *NATION*, May 28, 2001, at 272; Valerie Strauss, *Child Care Worries Adding Up: New Study Finds Staffing Problems*, *WASH. POST*, Apr. 30, 2001, at A01.

173. See Williams, *supra* note 16, at 1448-52.

working-woman privilege,” similar to the white privilege enjoyed by whites in a racist society. In Franke’s writing, she fails to notice her privilege, but that is not surprising. Part of the point of having a privilege is that it feels natural and is typically invisible to the privilege holder. We—non-mothering-working women—enjoy the following privileges, just to name a few: being taken more seriously as workers because we are not mothers; getting more sleep than working mothers of young children; not having to worry during the day about whether one’s child is doing alright at daycare or whether she really is getting sick and one should have stayed home with her; being able to focus single-mindedly on our work—as most fathers do—without having to do significant amounts of caretaking. In seeing mothering as only too “incentivized,” Franke resembles critics of affirmative action who can only see reverse discrimination against whites and cannot see the immense barriers (conscious and unconscious discrimination, poor schools, etc.) faced by many people of color. The barriers working mothers face have been institutionalized so that they seem natural and inevitable to those not facing them. But there is no reason why jobs cannot be structured to accommodate mothering or why the costs of dependency should be born so disproportionately by women. We all begin life as dependents, whether or not as adults we care for children.

Given the disincentives to being a mother, it is amazing that eighty percent of women nevertheless *are* mothers.¹⁷⁴ Yet Franke only notices the disincentives for women of color. To be sure, women of color face additional and severe disincentives to mothering. It is difficult to raise children of color in a racist culture, particularly in poor communities devastated by the war on drugs and gun violence, where one must worry about children getting to and from school and through the school day safely. Poor women of color often lack the resources to provide adequately for their children and to send them to good schools and quality daycare, and these problems cause immense pain to mothers. Yet, as Franke notes, “women of color are more likely than white women to have children in their lifetime.”¹⁷⁵

Women are either totally brainwashed by the pressures to be mothers, crazed, or find something of value in mothering given their decisions to mother in the face of overwhelming disincentives. Again, this is not to argue against easing pressures on women to have

174. See Franke, *supra* note 141, at 196.

175. *Id.*

children when it is possible to do so without harming women who do have children. My point is that there are already so many disincentives to having children today that most mothers must experience something of value in mothering.

Although not all women report that they are happy with their decisions to be mothers, I believe most are. And most find mothering and their relationships with their children valuable and sources of great pleasure and joy (as well as frustration and difficulty). Mothers speak of the importance of their relationships with their children, the unconditional love their children give them, and the pleasure they experience in much of mothering.¹⁷⁶ As described earlier in discussing the empirical work on human happiness and well-being, we all need a measure of autonomy over our lives, connections to others, and the opportunity to develop our abilities. For most mothers, relationships with their children are among the most important, if not *the* most important, connections to others in their lives. Further, recall that the happiness studies indicate that acquisition of material goods in order to impress others not only *does not* increase human happiness, it can depress human well-being by interfering with the ability to achieve the competence, autonomy, and connections with others.¹⁷⁷ In terms of human well-being, buying a Porsche is not equivalent to having a child.

2. Maternalization of Women's Identity

According to Franke, "demanding that women's participation in the wage labor market be compatible with our responsibilities as mothers . . . collapse[s] women's identity into motherhood."¹⁷⁸ This is simply nonsense. Imagine applying this standard generally. Pushing for workers rights would be forbidden because it collapses wage earners' identity into their identity as workers. Tort remedies collapse the identity of injured people into victims. Any use of law to redress any specific problem would be inappropriate because it would collapse the identity of those helped into one aspect of their being.

176. See generally LUIS GENEVIE & EVA MARGOLIES, *THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS* 100-09 (1987); SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 109-10 (1996); ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 21-24, 31-33, 36-38 (1986); Becker, *supra* note 97, at 142-53.

177. See *supra* Part I.B.

178. Franke, *supra* note 141, at 183.

3. Commodification Anxiety

For Franke, commodification anxiety is a serious concern:

The push to commodify dependency work has been an important means by which the separate spheres doctrine has been repudiated, but what has it done for women's sexuality generally? Surely our best strategy cannot lie in creative efforts to commodify the domain of sexuality that is the surplus above mere procreation, for it may be that its greatest value lies precisely in its excess.¹⁷⁹

What does Franke mean by the first sentence here? I am unaware of any effect the "push to commodify dependency work" (what push? articles and books by feminists?) has had to date on women's sexuality. Moreover, were working mothers given the kinds of supports and accommodation available in France, women would be in a better position to say no to unwanted sex since they would be in a better position to support their children above the poverty line without a breadwinning husband. They would also be in a better position to escape unsatisfying marriages and seek sexual pleasure elsewhere.

More fundamentally, how precisely would supports for caretakers commodify anything, let alone sexuality? Franke seems to be confusing shared responsibility for the costs of child raising—such as the subsidized daycare and family allowances enjoyed by French working families—with a market transaction involving an exchange. Government already does provide some support, such as free public education from kindergarten through high school in the United States. (One estimate puts the government share of child-raising costs in the United States at thirty-eight percent of total costs.¹⁸⁰) Neither current levels of support nor higher levels would mean that women or women's sexuality would be more "commodified" than they are today. Women would simply have more money.

Is Franke suggesting that women are more likely to use birth control today than they would be if they received better public support for children? Is contracepted sex ("the surplus above mere procreation"?) purer and finer than uncontracepted sex? Although this is a delightful flip of the official Catholic attitude toward sex,¹⁸¹ it makes no more sense than the official Catholic insistence that

179. *Id.* at 187.

180. See England & Folbre, *supra* note 11, at 200.

181. For the official Catholic view, see generally John M. Finnis, *Law, Morality & Sexual Orientation*, 69 NOTRE DAME L. REV. 1014 (1994); Robert P. George & Gerald V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995).

uncontracepted heterosexual intercourse is inherently superior to other sexual acts.¹⁸²

4. Child Raising As the Creation of a Public Good

Fineman argues that “[c]aretaking labor preserves and perpetuates society and, therefore, collective response and responsibility is warranted. Because of its public value, . . . caretaking labor creates a societal or social debt.”¹⁸³ Fineman does not see children as simply a consumption choice by parents equivalent to the decision to purchase a Porsche: “the society-preserving nature of children helps to distinguish that preference from the whim of the auto fan.”¹⁸⁴

Franke makes a number of related points in rebuttal. First, she argues that production and consumption cannot be distinguished in economic terms: “if there is anything we have learned as members of modern political economies, it is that consumption is society-preserving work.”¹⁸⁵ But it is possible to distinguish between public goods and other productive behavior, which is Fineman’s point. As economists Paula England and Nancy Folbre explain:

[T]he time, money, and care that parents devote to the development of children’s capabilities create an important public good whose economic benefits are enjoyed by individuals and institutions who pay, at best, a small share of the costs. Economists define a public good as one that is difficult to put a price on because it is nonexcludable (someone can enjoy it without paying for it) and nonrival (one person can enjoy it without diminishing someone else’s enjoyment of it). Individuals who do not contribute to the production of public goods are likely to ride free on other people’s efforts unless their responsibilities are enforced through explicit laws and rules, including taxes.¹⁸⁶

Children who grow into responsible adults do not benefit *only* their parents (let alone only their mothers, who in most instances make the greatest investment in them). Children become taxpayers (thus benefiting all who live in the country) when they are adults. We all

182. For a criticism of the Roman Catholic Church’s official position from the perspective of women, see Becker, *supra* note 163, at 188-91. For a discussion of the historical background of the Catholic position, see Mary Becker, *Family Law in the Secular State and Restriction on Same-Sex Marriage: Two Are Better Than One*, 2001 U. ILL. L. REV. 1, 17-27 (2001).

183. Fineman, *supra* note 15, at 1410-11; see also Fineman, *Cracking the Foundational Myths*, *supra* note 12, at 19.

184. Fineman, *Cracking the Foundational Myths*, *supra* note 12, at 21 n.15.

185. Franke, *supra* note 141, at 190.

186. England & Folbre, *supra* note 11, at 195.

benefit by a new generation of workers as we age, people able to collect the garbage, empty our bedpans, and keep the wheels turning. We all benefit from friends, coworkers, spouses, though we did not raise them.¹⁸⁷ These benefits enjoyed by those who have not invested in the child are “externalities.” Unless nonmarket mechanisms are used to spread the costs of raising children, people will be allowed to ride free on the investments of others.

To give a concrete and dramatic example: social security is structured to support the elderly by transfers from the working-age population. Therefore, our ability to receive social security benefits depends on a younger generation of workers generating revenue for the system. Yet those who benefit most are not necessarily those who have contributed most to the next generation:

[C]onsider two individuals who have the same marriage and employment history—they will receive exactly the same retirement benefits from Social Security, even if one of them raised three children who grew up to become productive members of society and to pay taxes on the income they earned, while the other raised none and simply enjoyed higher levels of personal consumption. Current policies in the United States socialize many of the economic benefits of children while requiring parents, mothers in particular, to pay most of those costs.¹⁸⁸

Thus, Franke misses Fineman’s point entirely. Whether production and consumption are distinct categories is irrelevant. What is relevant is the distinction between production of public goods and other production or consumption activities.

Next, Franke argues that parents’ reasons for having children are often selfish rather than altruistic. Again, this wholly misses the mark. Parents may have children and raise them to be productive and responsible citizens *entirely for purely* selfish reasons (though I believe that most do not). It is nevertheless true that others enjoy the benefits of the parents’ (particularly the mothers’) labor, when the children become productive adults. These others receive a free ride at the parents’ (particularly mothers’) expense unless they bear some of the costs. In addition, some parents (particularly the poor) will under invest in developing their children’s capabilities relative to the value of their children as productive and responsible members of society unless they receive public supports.

187. *Id.* at 195-96.

188. *Id.* at 196.

In a related point, Franke argues that we give parents property rights over children, allowing parents to decide to home school their children to ensure that they will not share the public values of their culture, such as “tolerance, equality, and humanity.”¹⁸⁹ Such treatment is, she maintains, inconsistent with regarding children as a public good.¹⁹⁰ But again, she confuses two distinct issues. Whether children are a public good in an economic sense is one question. What degree of autonomy parents should have over child raising and educational decisions is another. It may well be that children will be more likely to become productive and responsible members of society if their parents, rather than the state, make many decisions, though parents will not always make decisions entirely in the public interest.

Finally, Franke suggests immigration as a cheaper way of acquiring younger generations of taxpayers and workers, noting that our immigration policies are natalist, racist, and xenophobic.¹⁹¹ I have no quarrel with Franke’s criticisms of our immigration policies. But the idea that, instead of supporting caretakers because they produce a public good, we should rely on immigration for social reproduction is bizarre. It is not going to happen. Most women are going to continue to have children as they have throughout human history. The question Fineman and Williams are raising is whether mothers (a disproportionately poor group) should disproportionately bear the costs of child raising given that raising children creates a public good, a benefit to us all.

What would Franke do with poor children (who will continue to be born)? Without supports, they will not be able to develop their capabilities to become the productive citizens they could be. There are moral, not just economic, reasons for supporting care of dependents. The moral needs of poor children in our rich nation are shocking, yet Franke never mentions the effect her approach would have on poor children.

Moreover, the public-goods argument is in part an argument grounded in fairness and justice. If we were to stop having children and instead import our next generations, we would simply be shifting the cost from American women to women in other (poorer) countries while continuing to reap where we have not sown. And we will be separating those women (unless they are willing to immigrate at

189. Franke, *supra* note 141, at 191-92.

190. *See id.* at 191.

191. *See id.* at 194.

middle age or later to the United States) from the children in whom they have invested. This is hardly a humane solution.

In an article in *Nation*, Deborah Stone argues for a right to care and to care for others: "Care is as essential as the air we breathe."¹⁹² Human beings need care as children. The seriously ill and the elderly need care as well. Surely the citizens of the richest country on earth can afford care and to care for others.

5. Unfairness to Taxpayers Who Are Not Parents

Franke argues that taxpayers who are not parents should not be forced to support parents just because parents wish to fulfill their children's desires for consumer goods.¹⁹³ There are two important points to be made here. First, if children are a public good, as argued in detail above, then there is a reason for public support of them: there will be a public payoff when the children become adults who are productive members of their society and taxpayers (a benefit particularly for those who are elderly). But this requires that children be given the resources to develop their capabilities, which means that they must be integrated into their communities and able to interact with their peers. These ends require, not that every child have every new gizmo, but that they have more than the bare minimum necessary to keep body and soul together. In any event, no child support program, even one as generous as the French system, is actually going to give parents enough to buy toys rather than just help in providing for food, shelter, clothing, and educational needs.

Second, each of us began as dependent children. And those of us, like Franke and myself, who grew up in the baby boom generation, enjoyed exceptionally high levels of subsidies to our families as we were growing up. In the fifties, close to seventy percent of the adult population had school-age children.¹⁹⁴ Today the number is below thirty percent.¹⁹⁵ Not surprisingly, when we were growing up, there was strong public support for a good education system and many subsidies to suburban families.¹⁹⁶ Perhaps Franke never went to public school and did not benefit from any of the subsidies for

192. Stone, *supra* note 9, at 13.

193. See Franke, *supra* note 141, at 192.

194. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 278 (1992).

195. *Id.*

196. See *id.* at 76-79.

suburban housing, transportation, etc.¹⁹⁷ But most people growing up in the fifties and sixties did. We (or most of us) were supported by government as well as our parents when we were growing up. Now it is payback time. We have obligations both to support the elderly (as our parents and other workers did when we were children) and to support today's children (as our parents and other workers did when we were children).

6. Natalism, Racism, and Decolonialization

Franke objects to “natalist solutions” (i.e., raising our own children) on the ground that preferences for such solutions over immigration “have often taken the form of loosely-veiled racism, xenophobia, or decolonization.”¹⁹⁸ This is no doubt true. But it is emphatically *not* true that people have children only for racist or xenophobic reasons.

More to the point, imagine eliminating any human endeavor which has “often taken the form of loosely-veiled racism” or xenophobia. (I am not quite sure what “decolonization” means in this setting and hope racism includes “decolonization.”) Religion has often taken the form of loosely-veiled racism and xenophobia (as well as sexism), as has science, literature, the arts, academic studies in general, education, and politics. I do not see how we could apply this standard and continue any human endeavor. It is, then, inappropriate to apply it only to parenting, although we must fight for policies that are not racist or xenophobic and oppose those that are.

7. Real Women and Real Children

I believe that the point of feminism is to improve the quality of women's lives in the real world in conjunction with improving the lives of other vulnerable people, particularly children. As the tables below illustrate, the well-being of women and children are closely linked. In the real world, most women are mothers. Without a doubt, women are under considerable pressure to be—and *not* to be—mothers. But if most women are mothers, feminists *should* be pushing for changes to improve the lives of women who are mothers. Franke is careful to avoid actually stating that she opposes feminist

197. If she did not, it was because she was extremely lucky—born to parents who did not rely on government subsidies in any way. And that luck would not be something earned or deserved.

198. Franke, *supra* note 141, at 194.

efforts to improve the situation of mothers.¹⁹⁹ But the thrust of her arguments certainly cuts against any efforts to improve mothers' lives.

In the real world, too many women and children are poor. Table 1 shows poverty rates by family type after cash transfers and illustrates the precariousness of many women's lives, particularly if they are mothers in households without men.

TABLE 1
POVERTY RATES BY FAMILY TYPE AFTER CASH TRANSFERS
1999²⁰⁰

ALL FAMILIES	9.3%	HISPANIC FAMILIES WITH CHILDREN < 18	25.0%
Married couple	4.8%	Married couple	16.8%
Male head only	11.7%	Male head only	26.0%
Female head only	27.8%	Female head only	46.6%
FAMILIES WITH CHILDREN < 18	13.8%	ANGLO* FAMILIES WITH CHILDREN < 18	8.0%
Married couple	6.3%	Married couple	3.9%
Male head only	16.2%	Male head only	11.9%
Female head only	35.7%	Female head only	25.4%
BLACK FAMILIES WITH CHILDREN < 18	28.9%		
Married couple	8.6%		
Male head only	21.4%		
Female head only	46.1%		

*This entry is for non-Hispanic white families.

Women heading households with children under eighteen, whether African American, Hispanic, or non-Hispanic white, are much more likely to be poor than married women and are also much more likely to be poor than single African American, Hispanic, or non-Hispanic white men heading households with children under eighteen.

199. See *id.* at 197 (“[F]eminists should not abandon a concern for the role of reproduction and mothering in women’s lives. Instead we could stand to pay closer attention to the taken-for-grantedness of motherhood in feminist legal theory.”).

200. JOSEPH DALAKER & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES, CURRENT POPULATION REPORTS: CONSUMER INCOME 1999 (P60-210), at B-11-19 tbl.B-3 (2000).

Children are poor in the United States at shockingly high rates. Close to one-fourth of children in the richest nation on earth live in poverty, as illustrated by Table 2.

TABLE 2

CHILDREN IN POVERTY IN THE UNITED STATES 1999²⁰¹

	Prior to taxes but including cash benefits	After taxes and non-cash benefits
ALL RACES		
All children < 18	16.9%	12.0%
Children < 6	18.0%	12.8%
Living with single mother	30.4%	22.1%
BLACK		
All children < 18	33.1%	22.8%
Children < 6	36.6%	26.0%
Living with single mother	41.0%	28.2%
HISPANIC		
All children < 18	30.3%	21.9%
Children < 6	30.6%	21.7%
Living with single mother	40.7%	31.0%
NON-HISPANIC WHITE		
All children < 18	9.4%	6.8%
Children < 6	10.0%	7.1%
Living with single mother	19.8%	15.2%

201. *Id.* at 28-32 tbl.5.

As Tables 3 and 4 illustrate, children are more likely to be poor in the United States than in other countries with similar economies, and the poverty rate of women relative to that of men is higher in the United States than in other similar countries.

TABLE 3
CHILD POVERTY SELECTED INDUSTRIAL NATIONS CIRCA
1990²⁰²

Country	Pre-taxes and transfers	Post-taxes and transfers
Canada	23%	15%
United States	29%	25%
Australia	21%	15%
United Kingdom	29%	19%
Belgium	17%	4%
Germany	12%	9%
France	27%	7%
Netherlands	15%	8%
Sweden	18%	3%

Table 4 reports the results of a recent study comparing poverty rates for women and men in eight industrialized nations. The United States has the highest disparity between male and female poverty rates of any nation studied. In the United States, thirty-eight percent more women than men are poor, yielding a poverty ratio of 1.38 (women to men). As Table 4 illustrates, women are *less* likely than men to be poor in Sweden (where only seventy-three women are poor for every 100 men). Of the industrialized nations in this study, with the exception of Australia, all have considerably better poverty ratios for women. The Australia ratio is lower than that of the United States, but not nearly as low as in the other countries studied.

202. Colin Hughes & Kerry McCuaig, *When Mom Must Work: Family Day Care As a Welfare-to-Work Option*, Section 2, Table 1 (2000), at http://www.childcarecanada.org/CPAG_CCEF/moms_welfare/two.html. Poverty rates vary with the definition of poverty being used.

TABLE 4

POVERTY RATIOS (WOMEN TO MEN) IN SELECTED
INDUSTRIALIZED COUNTRIES AFTER CASH TRANSFERS²⁰³

Country	Poverty ratio (women to men)
Australia	1.30
Canada	1.13
France	1.11
Germany	1.18
Netherlands	1.14
Sweden	0.73
United Kingdom	1.20
United States	1.38

Because people sharing a household are assumed to share income, a poverty ratio other than one (one poor woman for every poor man) reflects the extent to which women are not living with men. Women living in households without men are likely to be poor for three reasons. First, women earn less than men in the wage-labor market. Second, women living without a male partner are more likely (than men living without a female partner) to be living with and supporting children. And third, being a parent depresses women's wages, though not men's. Indeed, motherhood depresses women's earnings even after taking into account time off for childcare.²⁰⁴ Men tend to earn more when they become fathers.²⁰⁵

Franke never mentions the implications of her argument for poor women and children. If, as feminists, we want to improve the situation of real women living in the real world, often in poverty with real children, we must support the care movement. And, as Williams notes, if we are to provide better long-term supports for the poor, we must provide broad supports to all or most working families.²⁰⁶

203. Karen Christopher et al., *Women's Poverty Relative to Men's in Affluent Nations: Single Motherhood and the State*, tbl.2 (2000), at <http://www.jcpr.org/wp/wpprofile.cfm?ID=126>.

204. See FOLBRE, *supra* note 170, at 34.

205. See *id.* at 35.

206. See Williams, *supra* note 16, at 1454-57.

CONCLUSION

In this Commentary, I have tried to strengthen the arguments for better supports for and accommodation of caretakers that Fineman and Williams have made in this Symposium and in their earlier work. This feminist goal becomes urgent as globalization and corporate strength increase and the well-being of business becomes increasingly the measure of human well-being. It becomes urgent not just for the good of women or of women and children, but for all. Following Sen and Nussbaum, we need to see the primary goal of government as care: creating an environment in which everyone is able to develop their basic capabilities as a human being in light of basic human needs for strong connections with others, the ability to exercise autonomy, and opportunities develop their abilities.