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# HOW HIGH THE APPLE PIE? A FEW TROUBLING QUESTIONS ABOUT WHERE, WHY, AND HOW THE BURDEN OF CARE FOR CHILDREN SHOULD BE SHIFTED

MARY ANNE CASE\*

There is fairly widespread agreement among feminists that, as Linda McClain puts it in *Care As a Public Value*, “women (both as paid and unpaid caregivers) continue to bear the disproportionate burden for caregiving.”<sup>1</sup> Where to look in order to shift some of the burden of care for children is a subject for greater debate. Joan Williams has suggested that

in most situations the most desirable policy will be determined by the political culture in which feminists work. That culture will determine which of three potential axes it is most practical to change in a given political culture at a particular moment: the allocation of responsibilities or entitlements between fathers and mothers, the relationship of employers and employees, or the contours of the public and private spheres.<sup>2</sup>

Unfortunately, a fact of our current American political culture often left unstated is that, fathers as a class having proven strongly resistant to accepting much more of the burden,<sup>3</sup> paths of lesser

\* Professor of Law, University of Chicago Law School. A version of this Commentary was presented at Martha Fineman’s November 1999 Uncomfortable Conversation on Children: Public Good or Individual Responsibility at Cornell Law School. I am grateful to participants in that conversation as well as to Kathy Abrams, Mary Becker, Lisa Bernstein, Jacob Corre, Janet Currie, Martha Fineman, Katherine Franke, Beth Garrett, Janet Halley, Jill Hasday, John Hedges, Janice Honigberg, Kathie Kepchar, Rob Kushen, Bernie Meltzer, Julia Mahoney, Paul Mahoney, Linda McClain, Tracey Meares, Randy Picker, Dinah PoKempner, Eric Posner, Todd Preuss, Lorrie Ragland, Julie Roin, Jane Rutherford, Gina Sanders, Bill Schwesig, Kate Silbaugh, Cass Sunstein, Paula Vaeth, Adrian Vermeule, Glenn Wallach, David Weisbach, Joan Williams, Lui Wiest, and participants in a Berlin discussion, for their willingness to engage, assist, and encourage me in pursuing this topic despite what is for many of them profound disagreement with, indeed aversion to, my approach; and to Eric Moran for scheduling accommodation. Because care responsibilities of my own precluded my circulating a draft of this Commentary widely in advance of publication, responsibility for any errors is even more than usually exclusively my own. Support for this project came from the Arnold and Frieda Shure Research Fund of the University of Chicago Law School.

1. Linda C. McClain, *Care As a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1680 (2001).

2. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 207-08 (2000).

3. See, e.g., SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 98-108 (1996) (noting that, in the study’s sample, “[t]here is not a single household in which

resistance in this political culture at this particular moment seem to lie with employers or in the public sphere.<sup>4</sup> In this Commentary, I want to put up some resistance, or at least begin to ask some preliminary, tough, critical questions about what it might mean, who might be benefited and who burdened, and how, if we looked in various alternative ways to employers or to the state to ease the burden of caring for children. This is by far the most difficult essay I have yet written as a legal academic.<sup>5</sup> It is difficult not to sound

fathers . . . take responsibility for all child-rearing tasks, . . . men rarely take primary responsibility for any single child-rearing duty," and "mothers . . . , on average, spend *four times* the hours men do as the primary caregivers"; and going on to describe mothers' "implicit resentment of" and their "[s]trategies for downplaying gender inequities in child rearing").

4. Elinor Burkett, who has become one of the most prominent critics of calls for increased so-called "family-friendly" government and employer policies, characterizes one version of these assumptions bluntly:

The new strategy for that social remodeling is simple: If men won't do half the work, or if women still suffer too much stress when they do, push more responsibility off on society or corporations. Nancy Folbre, an economist, proclaimed that women's wage work would be less constrained if the costs of caring for children were transferred to their employers or to other taxpayers (an observation that does not require a doctorate in economics, since whose wages would not be "less constrained" if someone else paid a chunk of their bills?).

ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* 161 (2000). While a discussion of where I disagree and where I agree with Burkett is well beyond the scope of this Commentary, I want to make clear at the outset that my line of analysis was developed independently of and before the publication of Burkett's book.

5. It is no accident that the first formal event at which I presented any of the thoughts in this Commentary was at one of Martha Fineman's aptly titled *Uncomfortable Conversations*. I was dragged reluctantly into that Conversation, as I was into this Symposium, by people who had heard me express some of these thoughts in conversation; but even some of those people acknowledged that my role would be that of "the turd in the punchbowl." Remarks of Kathy Abrams, presenting my position in a panel discussion beginning the *Uncomfortable Conversation on Children: Public Good or Individual Responsibility* at Cornell Law School, Nov. 20, 1999.

Let me disclose near the outset of this Commentary that, while I have no children, I do have significant care responsibilities as the legal guardian of my mentally incapacitated mother. I disclose this, not because I claim it to be particularly relevant to my argument or to elicit sympathy, but because I have already had the painful experience of hearing a few who vehemently oppose the views I express in this Commentary, who do not know this fact about me, accuse me of speaking from the privileged position of one without care responsibilities; and, worse, having a few others who do know this fact about me accuse me of being hypocritical for expressing these views given the accommodations I have required for my own care obligations, which, because they involve the unproductive elderly, do not, in their view, generate nearly the same societal benefit as care for children. The overwhelming majority of people have been much more generous and sympathetic, and I am deeply grateful for their accommodation. But even some of their sympathy can be painful. Consider the legal academic who said she knew just how I felt because she, too, had to turn down a symposium invitation due to a conflict with a family obligation. I could not quite manage to explain that turning down a symposium invitation because you do not want to miss your child's birthday party is not quite comparable to doing so because you need to attend your mother's contested guardianship hearing; cleaning the ankle-deep cat excrement under the heaving mass of roaches on the floor of your mother's apartment as you strive to place her more than 200 cats is not quite comparable to cleaning up spilled punch and birthday cake as you send tired cranky toddlers on their way home. Whatever other compensation they may lack, parents are at least rewarded by their children with "hugs

churlish when raising these questions,<sup>6</sup> particularly when one has chosen to have no children of one's own.<sup>7</sup> After all, who but the selfish and heartless could oppose more benefits from employers or the state for mothers and their children?<sup>8</sup> Not for nothing is motherhood with apple pie on the short list of things no one can be against. But it is not necessarily opposition to apple pie to ask, for example, "Were the apples in it contaminated with alar? Is the pie forming part of a balanced diet? And what will we serve to those who prefer plain ice cream even to apple pie à la mode?"

Moreover, while some pies can be made larger, and others can be better divided so that everyone gets an appropriate size piece (with his or her preferred proportion of apples and crust), the zero-sum aspect of other divisions should not be overlooked, especially not by resort to fuzzy metaphors like George W. Bush's proposal to "make the pie higher." As McClain acknowledges, endorsing care as a public value is the beginning, not the end, of policymaking. As we

and kisses," see Sylvia Ann Hewlett, *Have a Child, and Experience the Wage Gap*, N.Y. TIMES, May 16, 2000, at A23; my mother repays me instead with abuse. In short, though having a child can be dismissively analogized to buying a Porsche (see Martha Fineman's contribution to this Symposium, Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1403 n.2 (2001)), being appointed legal guardian of your mentally incapacitated mother feels much more like being run over by a Porsche.

6. I do mean only to raise questions and do not presume to provide answers in this complicated area about which I acknowledge having insufficient information. It should go without saying that both the appropriate questions and the answers vary by circumstance, including, for example, by the economic class of children and their parents. Questions about how and why to provide subsidies for the care of the children of very poor parents often necessarily run along somewhat different tracks as similar questions about subsidies for wealthier parents. To take one relatively uncontroversial example, proposals to shift some of the burden from mothers to employers in the form of greater benefits for employees with children are of no help if neither the mother nor her spouse has an employer in a position to provide benefits.

7. I freely admit that self-interest as well as concern for sex equity is at least part of the source of this resistance—if men are to get the benefit of not being imposed on simply by adamant resistance, it would be unwise of those to whom the burden shifts not to offer some resistance of our own. And what I am resisting in part (but only in part) is the imposition of too much more of the burden of other people's children on me as an employer, employee, or taxpayer, and particularly as a woman. In so doing, I am taking seriously another one of Joan Williams's observations with respect to care for children; to wit, that "[w]omen know that if *they* do not sacrifice *no one* will, whereas men assume that if *they* do not, *women* will." Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 831 (1989). I want other women, but particularly men, to realize that this cannot and should not be assumed to be true of all women. If we continue to be the political path of least resistance, we will continue and even increase our subsidy of male reproduction.

8. Those of us disadvantaged by what now goes under the heading of "family-friendly" policies are in a double bind. If we remain silent, we risk being told that these policies are justified, even if for no other reason, because everyone supports them; if we speak out about our concerns or our exclusion, we risk being accused of selfishness, pettiness, indifference to the plight of hardworking parents and innocent children, or worse.

move, following her suggestion, beyond statements of principle to “policymaking . . . result[ing] from deliberative processes and experimentation, and . . . involve[ment of] the different constituencies affected by the issues,” we need to make sure any resulting “blueprint for institutional design” is more than just a call for “higher pie.”<sup>9</sup>

To date, plans to look to the state for increased support for mothers and children seem to me to be undertheorized: as I shall try to explain, we need to articulate more precisely what we are seeking to accomplish with our policies before we can determine whether any particular form of state aid for parents will appropriately accomplish these goals. Nor should we endorse increased employer responsibility for children without a critical examination of the possible distributional consequences as between women and men and as between particular employees in a given workplace; my particular fear is that some possible ways of structuring employer responsibility risk further increasing the advantages of men with wives and children at the expense of relatively untraditional women (the childless and those in jobs disproportionately occupied by men with dependent spouses). Finally, we should not stop looking at the possibility of redistribution of responsibility toward fathers simply because fathers offer resistance; resistance from men is a large part of the reason women got stuck with a disproportionate burden of care in the first place.

If the question I begin with is, “Whose responsibility should care for children be?,” the answer I begin with is, “Not simply women’s responsibility.”<sup>10</sup> Precisely because I do not think that children should be simply women’s responsibility, I worry about localizing more of the responsibility for children, at least as a matter of law, at the level of the individual employer. As Arlie Hochschild famously demonstrated, women are losing the battle of the second shift with men.<sup>11</sup> Working mothers unable or unwilling to shift more of the

9. McClain, *supra* note 1, at 1714.

10. I find it worthy of note, indeed of concern, that the overwhelming majority of those involved in serious discussions of legal approaches to care are women—women of all sorts, with young children or grown children or potential children they hope to have some day or adopted children or no children at all and no desire for them; women who are married, in heterosexual or lesbian couples, who do not define themselves as members of a couple at all, who are single mothers, or members of extended families; women who embrace care for children or who worry about it—but almost no men. For example, this Symposium has just one male participant, and 100% of the panelists and more than 90% of those in attendance at the November 1999 Cornell Uncomfortable Conversation were women. These figures are representative, not extraordinary.

11. See generally ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

burden onto men have frequently been criticized for shifting some of it instead from one group of women to another—to nannies or underpaid daycare workers, to stay-at-home moms,<sup>12</sup> to their own daughters<sup>13</sup> or mothers. Adding their own and their husbands' childless female colleagues to the list is not a good solution. And this is part of what I fear might happen if more of the burden of care for children were localized at the level of the individual employer.

Joan Williams acknowledges one aspect of this risk in her contribution to this Symposium:

The recent well-publicized backlash against family-responsive workplaces provides a good example. The backlash is fueled, in significant part, by employer exploitation: employers allow some mothers to go part-time, then pocket the part-time dividend that results when employers dump the excess work on existing employees but pay them no additional compensation for doing it. This is good, old-fashioned worker exploitation. Feminists need to work with reporters to point out this phenomenon, to defuse the growing backlash against mothers.<sup>14</sup>

One thing Williams fails to make explicit in this passage is that in female-dominated jobs, like those so many women occupy, “the existing employees” on whom the “excess work” resulting from schedules favoring mothers on the job is “dump[ed]” are other women, most likely women without children. And, for a variety of reasons, employers in some pink-collar ghettos may be the most constrained of all in looking elsewhere than to their existing

12. See, e.g., Kathleen Ferguson, *Parents Having to Deal with Year-End Parties Their Children Attend* (NPR Morning Edition radio broadcast, June 5, 2000), available at LEXIS, News Library, National Public Radio File. Ferguson reported that:

The truth is if you're a working mom, you can't volunteer in the classroom as often as at-home moms, and you have to rely on the kindness of fellow parents to drive your kids to soccer. So you no doubt suffer from terminal guilt.

Nine months a year you walk around feeling that you aren't doing your share. By winter you begin to avoid eye contact with other mothers lest their resentment take some physical form. You know, like swinging their purses dangerously near your head.

*Id.*

13. See McClain, *supra* note 1, at 1712 (“Some recent studies of the experiences of girls in low-income families indicate that mothers with few economic resources may rely heavily upon their daughters as ‘family workers,’ enlisted to provide housework, childcare, and other efforts to help keep families together.”). McClain cites Lisa Dodson for the proposition that “such conscription of daughters has considerable costs, in terms of girls’ identity, loss of sense of ‘childhood,’ school performance, their tendency to view gaining a boyfriend as the way of passage to a different role, and their readiness to become mothers at an early age.” *Id.* at 1713 (citing LISA DODSON, DON’T CALL US OUT OF NAME: THE UNTOLD LIVES OF WOMEN AND GIRLS IN POOR AMERICA 14-49 (2d prtg. 1999)).

14. Joan Williams, *From Difference to Dominance to Domesticity: Care As Work, Gender As Tradition*, 76 CHI.-KENT L. REV. 1441, 1450 (2001).

overburdened workforce to make up the work deficit caused by accommodation of parents.

Consider the situation for employers of nurses. For all kinds of reasons, elaboration of which is well beyond the scope of this Commentary, the current state of the nursing profession may present the strongest challenge yet to those who dismissed comparable worth from a law-and-economics-based faith in market solutions. There is, unsurprisingly, a serious shortage of nurses—women now have many more alternative opportunities, some who once settled for nursing because it alone was open to them now go to medical school. But even among women drawn to nursing, the disincentives in the form of continuing low pay and worsening labor conditions are considerable. Why does market demand not cause wages to rise or conditions to improve? Well, it is not just a lingering attachment to old values; hospitals are also constrained by managed care and other forms of cost consciousness on the part of payors from raising their prices.<sup>15</sup> In a job category already rife with double shifts, short staffing, and budget constraints, where is the give to accommodate any increase in employer responsibility for the care needs of employees' children likely to come from, other than from more "good, old-fashioned . . . exploitation" of employees without children?

The fears I have are different, but no less serious, with respect to job categories and workplaces that are more sex-balanced or male-dominated. Here I fear the practical effect of localizing benefits for children and their parents at the level of the employer may be to effect something like a taking,<sup>16</sup> not so much from the employer, as principally from one group of female employees (childless women who will remain childless), for the benefit predominantly of another group of male employees (those with wives and children). The former are in a lose/lose scenario, the latter can win big, while childless men may lose little and employee-mothers win some. I envision the following likely redistribution within the employment

15. See, e.g., Gail Collins, Public Interests Editorial, *Nursing a Shortage*, N.Y. TIMES, Apr. 13, 2001, at A19; Milt Freudenheim & Linda Villarosa, *Nursing Shortage Is Raising Worries on Patients' Care*, N.Y. TIMES, Apr. 8, 2001, at A1.

16. Cf. *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 555, 558 (1923) (holding unconstitutional a federal statute setting minimum wages for female employees based on committee determination of an amount "sufficient to supply the necessary cost of living for a woman worker," because "[t]he standard furnished by the statute . . . is [too] vague" since "it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business").

setting, absent a radical shift in the existing structures, incentives, and mindsets of most such workplaces.

All women may be at increased risk for employment discrimination in a world in which women do all the childbearing and most of the childrearing if benefits, especially benefits required by law, for childbearing and childrearing come from the employer.<sup>17</sup> Permanently childless women like me<sup>18</sup> will be in a lose/lose situation—so long as we are potentially mothers, we are at risk for discrimination; so long as we are not actually mothers, we get no offsetting compensation from the increased childcare benefits. Men without children get no increased benefits either, but they are not at risk for increased discrimination. The big winners in the workplace are men with wives and children and their winnings are both direct and indirect—from their own employer, these men get increased benefits, the benefit of the subsidy without the harm of the discrimination. If their wives are also in a workplace with benefits, they win even bigger, because there is a decreased likelihood that they will themselves have to do more care work and, as a result, a decreased likelihood that any of the potential discrimination against caregivers will spill over onto them.

We have seen it happen before that benefits intended to improve the situation of women in the workplace who had children ended up in unanticipated ways benefiting male employees in that same workplace with dependent spouses. Remember *Newport News*

17. According to a Sylvia Ann Hewlett editorial, single women make 90% and married women with children 73% of men's wages. Sylvia Ann Hewlett, Editorial, *Have a Child, and Experience the Wage Gap*, N.Y. TIMES, May 16, 2000, at A23. My question is how do you account for the other 10%—spillover discrimination is one plausible contributor. Consider the evidence that "wages for women of child-bearing age fell when several states mandated that firms provide maternity leave in the late 1970s and early 1980s." Janet Currie, *Gender Gaps in Benefits Coverage*, in 3 THE HUMAN RESOURCE MANAGEMENT HANDBOOK 175, 189 (David Lewin et al. eds., 1997) (citing Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622 (1994)).

18. I will readily admit that some of my concern is personal. But even more than I am fighting for myself, or retrospectively expressing grievance, I am fighting for the continued viability of people like me. Like Katherine Franke, I am fighting what she has called "repronormativity." See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2000). I am also fighting for what I will call the virago, by which I do not simply mean the woman with conventional male biography who is the focal point for first generation sameness feminism and its critics. Rather, I mean a woman, not necessarily childless or without care obligations, in a predominantly male field whose competitors for the job are disproportionately male. I myself will shortly be past reproductive age and am comfortably tenured—except in the unlikely event an employer suspects I will have a menopausal change of heart and implant a donor egg or adopt a Chinese girl, I do not have to worry any more that my job opportunities will be compromised by concern about my reproductive potential.



*Shipbuilding v. EEOC*,<sup>19</sup> in which the Pregnancy Discrimination Act was applied to force an employer who offered hospitalization benefits for pregnancy to its female employees but not to any of its employees' dependents to extend pregnancy hospitalization coverage to the wives of its male employees?

A real pessimist or a conspiracy theorist of male privilege might make an argument here similar to the argument that Catharine MacKinnon made with respect to abortion rights. According to MacKinnon, whatever benefits abortion rights may have offered women were dwarfed by the ways in which they subsidized the male privilege to have sex with women.<sup>20</sup> Men can have more sex at less cost because the age of sexual liberation increased abortion rights more than condom responsibilities or a woman's right to say no to intercourse. Similarly, one might fear that among the first fruits of the care movement might be increased subsidy for male reproduction—rather than internalize the costs in time or money, men will shift even more of them to employers, the state, and women.

If such fears are particularly worrisome for legally mandated benefits, does the same hold true for voluntarily provided benefits? Well, I think that is to a large extent the situation we have now. Freely confessing anecdotalism, I recall a major law firm with reasonably generous maternity benefits in which, during a massive economically driven layoff, the group of those fired included nearly half a dozen female associates who had recently taken maternity leave. They contemplated suing, but their former employer was a big tough law firm, they had young children and alternative employment opportunities, and in the end they quietly moved on. Potential discrimination problems arise *a fortiori* when the employer makes accommodations for parents and care not voluntarily, but as a result of government mandate.

I will readily admit that some of this is anecdotal. But now that most employers realize that openly admitting a prejudice against hiring potentially fertile women can lead to Title VII liability, where, other than through the anecdotal confessions of trusting friends, can one hear (as I do from a significant number of friends in positions to make hiring decisions) that employers looking for committed

19. 462 U.S. 669 (1982). By drawing this analogy, I do not mean to cast doubt on the desirability of the Pregnancy Discrimination Act.

20. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 97-99 (1987).

employees still view women of childbearing age with suspicion?<sup>21</sup> In this as in so many areas of Title VII antidiscrimination law, employers may have learned what not to say;<sup>22</sup> unfortunately, this does not guarantee that they have learned what not to do. Institutionalized hypocrisy is not quite the same as equal employment opportunity.

Even the evidence cited by proponents of increased employer-based benefits for parents indicates that wariness about potentially childbearing women, however unfortunate or legally problematic, may not be totally irrational. Ann Crittenden, for example, cites the following statistics: "During an average week in 1989, full-time working mothers who were married and had a child under age six had more than double the average rate of absenteeism. Married fathers with preschoolers were well below the average."<sup>23</sup> If absenteeism such as Crittenden describes becomes a governmentally mandated right instead of potential grounds for employee termination, adverse effects on women's initial employment prospects will be hard to avoid as a practical matter,<sup>24</sup> particularly if fathers have little increased incentive to change their behavior.

And the evidence indicates that merely giving fathers the same rights as mothers will not be sufficient incentive. Even where they can, fathers often do not seek childcare leave. Why don't they? For at least two reasons: because they think it will make them less attractive in the workplace and because, in more cases than I care to see, they can get women to do it for them.<sup>25</sup> Moreover, I suspect that

21. Before the passage of the 1964 Civil Rights Act, its interpretation by the courts, and the subsequent passage of the Pregnancy Discrimination Act, many employers were prepared to say explicitly, "We don't hire married women, we don't hire women of childbearing age, we don't hire women with children." They cannot legally say that anymore, but it still can and does happen that women who are seen as potentially reproductive, let alone actually reproductive, will have difficulty getting some kinds of jobs.

22. Or at least most of them have most of the time. See Glenn Collins, *Wooing Workers in the 90's: New Role for Family Benefits*, N.Y. TIMES, July 20, 1988, at A1 (reporting that when researcher Dana Friedman told a group of chief executive officers that "80 percent of the women in the work force will be of childbearing age, and that 90 percent of them will get pregnant . . . , [o]ne C.E.O. jumped up and said, 'Well I just won't hire them!'").

23. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 25 (2001).

24. This notwithstanding that one of the earliest Supreme Court Title VII cases, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), held that employers could not simply refuse to hire the mothers, but place no restriction on hiring the fathers, of young children.

25. See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, *Support for Men's Child-Care Responsibilities in Western Europe*, in HUMAN DEVELOPMENT REPORT 1999, at 82 (1999).

Although several countries in Western Europe have encouraged gender-neutral family-oriented work policies, in 1995 only 5% of the male workforce in the European Union (EU) worked part time, and only 5% of fathers took paternity leave. Men often cite their work environment as a constraint when explaining their reluctance to

a disproportionate amount of the time they do take leave, they spend it more on what, following Dorothy Roberts, I will call “spiritual” rather than “menial” childcare,<sup>26</sup> cooing over the child and bonding with it, but still letting the mother do most of the hard work of caring for it. From the perspective of sex equity in the home, in the workplace, or in general,<sup>27</sup> is this what we want from paternity leave? If it were to happen, does it promote a more equal distribution of parental responsibilities, or does it further exacerbate the leisure gap favoring men as a group over women as a group?

The potential problems, direct and indirect, formal and informal, more or less serious, of shifting more of the burden of care for children to the workplace are numerous and varied. In a workplace where the baby shower notices come thick and fast from the support staff, I wonder, for example, how big an imposition it is on an unmarried, childless older secretary to fork over a substantial chunk of her meager wages without hope of return—unlike retirement or illness (which can happen to anyone) or birthdays (which inevitably do) or weddings (which often are structured as a somewhat reciprocal exchange of a big splashy party for presents), baby showers rarely offer the childless the opportunity for anything beyond one-sided generosity. Godparents and other friends of the family may get some reciprocal care, attention, and affection from a child, but rarely do co-workers who contribute to baby showers. Genuinely voluntary giving is not a problem, but I am not sure that what goes on in some workplaces can fairly be characterized that way. Worse still it is sex-based—men, no matter how close to the mother, rarely are asked to participate.<sup>28</sup>

make full use of parental and paternal leave rights or to work part-time to care for a child. . . . EU Commissioner for Employment and Social Affairs Pdraig Flynn has stated that “even where there are policy instruments aimed at breaking down the gender imbalance in caring . . . the assumption that caring is the responsibility of women persists.”

*Id.*

26. See Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *YALE J.L. & FEMINISM* (1997).

27. Concededly, there are other perspectives. It may more generally be good for children, for example, to spend extra time with fathers cooing over them, even if this does not affect the division of labor between parents.

28. Do not get me wrong. I have enjoyed the friends’ baby showers I personally have attended and I do not begrudge the presents I have bought, but I note with some sadness (and a wee sense of injustice) that even the most liberated of mothers-to-be with the most sex-integrated set of close friends and colleagues usually invited only women to their baby showers—the male co-workers got off scot free.

In 1945, in testimony in support of the Equal Pay Act, then Secretary of Labor Lewis Schwellenbach insisted, "The principle of a 'family wage' has never become established in this country as a basis for compensation. A single man is paid as much as a married man for doing the same job. Pay is for work done, rather than for the number of dependents of the worker."<sup>29</sup> This seems to be a somewhat inaccurate characterization of present employment compensation practices. In particular, while pay narrowly defined as salary may rarely be set in accordance with "the number of dependents," a host of valuable employment related benefits are often available to employees on account of their dependents, with nothing comparable made available to employees without dependents.

Take the most ubiquitous example, health care benefits for an employee's dependents. While fine-grained statistics are hard to come by, I predict discrepancy, with more of such dependent benefits likely to go to male employees.

At the risk of alienating everyone for whom I have ever worked in legal academia, I will admit that much of my sensitivity to these discrepancies comes from personal experience. I never had anything like the experience another unmarried childless female legal academic recounted to me, of being told in so many words by her dean that of course she would be paid less in salary than a male peer, since she had no family to support. But, at the University of Virginia, where my tenure cohort consisted of four men with wives not then in the labor force and me, I was initially delighted to learn that the dean proposed to subsidize lunches for junior faculty but shocked by the follow-up memo noting that this benefit was not intended for and should not be used by those without family responsibilities.<sup>30</sup> When I

29. *Equal Pay Hearings*, 79th Cong. 5-6 (1945) (testimony of Lewis Schwellenbach, Secretary of Labor), *quoted in* ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 105 (1990).

30. The motivating force behind the offer was the recent arrival of yet another male professor with a wife not in the labor force, this one with three children. Asked why he declined lunch invitations from colleagues (invitations rarely extended to me), he apparently had explained that the home cooked meals his wife prepared were cheaper than anything he would eat in a restaurant or dining hall with colleagues. My lack of a wife to cook my meals, prepare my contribution to student bake sales, wait at home for repairs and deliveries, etc., was never seen as either a financial burden on me or an impediment to my doing my job.

My lack of a wife could negatively affect far more than my decision not to have children, however. Cf. LOTTE BAILYN, *BREAKING THE MOLD: WOMEN, MEN, AND TIME IN THE NEW CORPORATE WORLD* 53 (1993). Bailyn notes

that women faculty . . . were much less likely to have children, or to expect ever to have children, than was the case for their male colleagues. But close analysis reveals that it is not sex but dual-career status that mainly accounts for this difference. The major distinction proves to be . . . between men whose wives provide family support

promptly and indignantly replied that it was wrong to assume that those without a spouse or children had no family responsibilities, my point was taken and my lunches paid for. At New York University, where I was a visitor contemplating a permanent offer, I was told that exceptionally cheap and desirable university-owned housing in the extremely tight and expensive Manhattan real estate market was allocated, *inter alia*, on the basis of numbers of dependents, with apartments larger than one bedroom given only to those with children, but retainable by them regardless of whether the children resided there. And, although the law school itself had much more flexible and generous housing policies for new arrivals, the dean still noted that houses are for families. Administrators of my current employer, the University of Chicago, initially balked at paying my moving expenses, demanding to know why the estimate from their chosen movers came in higher than a bill presented for a family of four. I had to explain at some length numerous mundane details, such as that basic household furnishings and equipment typically do not vary in size or number or weight proportionally to household size (for example, most families of four have neither four dining room tables nor four vacuum cleaners) and that, while short on toys and baby clothes, I had many heavy books, books directly related to the work the university was hiring me to do.<sup>31</sup>

Finally, while many universities also subsidize private primary and secondary education for and offer tuition breaks to faculty dependents, few make as generous an offer as the University of Chicago, which will in addition pay for its faculty to “send their children, tuition-free, to any university in the nation, for the full range of undergraduate and graduate work. Nonparents, of course, have no equivalent benefit.”<sup>32</sup> With annual tuition approaching \$20,000 per

for them and those professors (both male and female) whose partners are equally involved in demanding careers.

*Id.* It could also affect my ability to dedicate myself to my job. Ken Herman, an Austin journalist facing a stint away from his family while covering the Bush transition, puts this problem well: “This thought of independent living kind of scares me—simple things, like I’m not really sure how toothpaste shows up. Do you have to get a prescription? Is this an over-the-counter product? It just shows up in my drawer. I don’t know anything about this.” Renee Montagne, *Three Texans Who Find Themselves in Washington After the George W. Bush Victory in the Presidential Election* (NPR Morning Edition radio broadcast, Jan. 19, 2001), available at LEXIS, News Library, National Public Radio File. Perhaps in gradual realization that all employees would be more productive if things like toothpaste just showed up, some companies are beginning to offer concierge and other services to their employees.

31. Additionally, I had to explain, for example, that I was moving, not from a small town, but between two urban locations with the nation’s highest rates.

32. BURKETT, *supra* note 4, at 40. I am ashamed to admit that I learned of this substantial

student, this means that, of two hypothetical professors performing equal work for equal salary, the one with several children could receive a compensation package worth hundreds of thousands of dollars more over his career than his childless peer's.<sup>33</sup>

The point is not that I begrudge my colleagues, their spouses, and children any particular benefit, or that, in the end, I have not gotten most of my own needs met, but rather that the policy of each of my academic employers, at least in the first instance, was not "to each according to his needs,"<sup>34</sup> but, Secretary Schwellenbach to the contrary notwithstanding, something more like to each according to "the number of dependents of the worker."<sup>35</sup>

Although not quite the old distinction between a male worker's "family wage" and a female worker's "pin money," this presents particular problems of sex equity when a disproportionate number of women in high-paying, high-prestige, high-power jobs are childless and a disproportionate number of men in those same jobs not only have children, but have dependent spouses.<sup>36</sup> I fear that localizing even more of the costs of caring for an employee's dependents at the level of the employer (whether through direct monetary subsidy, in-kind benefits, or paid leave or other adjustments in work rate or schedule), when geared simply and exclusively to those with children on account simply of their parental status, will have even more pernicious consequences from the perspective of job equity for women.

These sorts of concerns incline me to believe that, whether at the level of the employer or the state, having a child should on no account be simply a ticket to a benefit. This means at least two things. First, many benefits should also be available to those without children. Having a child should rarely, if ever, be the only way to get a benefit. Second, those few benefits that are limited to persons with children

benefit from reading Burkett's book. No one bothered mentioning it in my negotiations over joining the law school.

33. I use male pronouns for those with several children advisedly. Among the law school faculty are several men with three or more children. No woman ever on the faculty has, to my knowledge, yet had more than two children. See Lotte Bailyn quote *supra* note 30.

34. Let alone the more conventionally capitalistic "to each according to his abilities."

35. *But cf.* *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 203-04 (1991) (holding that manufacturer of batteries was foreclosed by Title VII from treating the "deep social concern" for the "future children" of female employees as "an essential aspect of battery making").

36. See, e.g., CRITTENDEN, *supra* note 23, at 17-18 ("A survey of chief financial officers in American corporations found that 80 percent were men with stay-at-home wives. Another survey of managerial employees revealed that 64 percent of the male executives with children under age thirteen had nonworking spouses.").

should have monitoring designed to ensure that the benefit actually goes to the child.<sup>37</sup> I will have more to say on the subject of monitoring for what McClain calls “quality control” when I go on to raise questions about what it might mean to shift more of the burden of care for children to the state. First, let me explore what it might mean to make benefits such as flexible work schedules and leave time available, if at all, on a basis broader than merely an employee’s parental status.

Let me again begin by acknowledging personal experience. First, part of what needs to be questioned on the part of both employers and the state may be the traditional and limited way care obligations and family relationships have been defined. As I had to remind my dean at Virginia when seeking lunch money, the parents of young children are not the only ones with family responsibilities.<sup>38</sup> I am the legal guardian of a mentally incapacitated mother, but no part of the out-of-pocket expenses of caring for my mother—not the legal fees, not the transportation expenses, nor the contributions in time and money I have made toward her maintenance—is covered in anything comparable to the way that, as noted above, my current employer covers certain out-of-pocket expenses associated with childrearing.<sup>39</sup>

37. A World Bank study indicates that mothers in the third world tend to spend money on children, fathers on tobacco and entertainment. Kathleen Schalch, *Profile: Newest Research from the World Bank on How Improving Women’s Lives Fosters Economic Growth* (NPR Morning Edition radio broadcast, June 6, 2001), available at LEXIS, News Library, National Public Radio File.

38. This issue also came up when UVA was designing its maternity leave policy at the instigation of a female faculty member who was expecting her third child. Also on the faculty at the time was a woman whose husband was dying of cancer and a man whose adult son had been seriously injured, each of whom had received the necessary accommodation ad hoc. When asked for my views as a faculty member and an academic specialist in feminist issues, I insisted at the time that any policy formulated to accommodate only the first of these three cases would be badly designed.

The Family and Medical Leave Act (“FMLA”), 29 U.S.C. §§ 2601-2654 (2001), is a step in the right direction, not only, as I have previously discussed, because it is sex neutral from a feminine model, see, e.g., Mary Anne Case, *Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women in Leadership*, 1999 U. CHI. LEGAL F. 347, 361 n.76, but also because it expands caretaking beyond childcare. I applaud the decision of the drafters of the FMLA not to limit it to childcare leave for mothers or even to the rare other primary caretaker of young children, but to allow for the care of others besides children, including the workers themselves. I do not regard it as necessarily a failure of the act that it has (surprisingly to some of its sponsors) been used most frequently by employees with health problems of their own.

39. I certainly do not mean to suggest that the University of Chicago Law School has been anything other than most generous and accommodating to my situation, for example granting me a quarter’s leave with pay to deal with the worst crisis in my mother’s affairs and allowing me to arrange my teaching schedule to manage frequent and extended trips out of town to deal with the rest. I do want to suggest that there is an important difference between individually granted accommodation as a matter of particular need and across the board availability of a

And I have spent the last decade in a commuting relationship, with an average of nearly a thousand miles between me and my often physically ill significant other, but the costs of maintaining that relationship are not subsidized directly or indirectly by my employer or my government—they are by and large not even tax deductible, and it would not help if we were married. I am not so much here arguing that I should be entitled to a subsidy as trying to point out (in a way familiar to advocates of benefits for the partners of gay men and lesbians) that providing benefits on the basis of certain “family” relationships and not others privileges certain relationships in ways we ought not be blind to.

The difficulty I have experienced goes beyond privileging certain kinds of family over others, and more broadly extends to a privileging of family matters over an employee’s other life concerns. While a law student, for example, I went to a panel on “The Varieties of Legal Practice.”<sup>40</sup> When I asked the panelists if there was any variety of legal practice that would leave the practitioner time to pursue other interests than the job, the one female in-house lawyer responded, in essence, “Yes, you can have your baby if you want to.” As it happens, I wanted more time off from work to indulge my study of the history of feminism, little dreaming that I could actually get paid by a prestigious law school for doing what I then saw as a valuable and sustaining hobby. When I tried to make this clear, sympathy for my position and predictions of my ability to accommodate it within law practice quickly dissipated.

Joan Williams has optimistically noted that

[t]he existing management literature . . . suggests that the most effective and practical way to offer flexibility is for managers to ask not “Why do you need it?” but “Will it work?” Once managers begin asking only whether a proposal for flexibility works, nonparents will be offered flexibility for any of a wide range of life goals other than caregiving.<sup>41</sup>

There is at least some evidence that such flexible accommodation of “a wide range of life goals” was not unheard of in the old days:

As one former clerk at Aetna Life Insurance recalled, work time was fluid and varied rather than sharply delineated, and an informal work culture encouraged interdependence: “If . . .

benefit as a matter of right.

40. As conceptualized by the organizers at the Harvard Law School in the 1980s, the varieties turned out to be limited to large firm, small firm, government, and corporation practice.

41. WILLIAMS, *supra* note 2, at 60-61.



somebody wanted to go to a ballgame, he would hustle and get all his work done as far as he could go and then ask his desk companion if he would take over if anything unexpected came in. . . . Next week it would be another fellow who wanted to go fishing—or something. The work was always kept up, and no complaints were heard.”<sup>42</sup>

And there is also evidence that modern-day employers may be moving in this direction:

Many employers are erasing the “mommy track” stigma from work-family programs by redefining “family” as “a life outside of work.” Motorola has recast its benefits plan to include a series of lifelong supports for reducing stress—from home-buying and legal help to long-term care insurance. Bank of Montreal makes flexible work arrangements a mainstream affair by urging men and women at all levels to use them to manage “multiple commitments.” About 18% of its employees do so; Glen McLeod, a senior manager, cash-management, works a compressed week so he can run Boy Scout nature-study courses and build sets for a dance company. The breadth of the campaign discourages mommy tracking anyone.<sup>43</sup>

In addition to being, in my view, more equitable and more normatively desirable, arguing that benefits such as an increase in flexible scheduling of job responsibilities should be available to employees regardless of their parental status would broaden the coalition for such change and potentially reduce the possibility for zero-sum games among employees.

But many strong advocates of legally mandated employer support for parents are pursuing a different and to some extent contradictory policy tack. Sylvia Ann Hewlett, for example, has argued that “parents have become one of the most disadvantaged groups in our nation”<sup>44</sup> and that the remedy begins with a national decision to “[g]ive top billing to families with children.”<sup>45</sup> One of the policy proposals that follows from this approach is legislation barring discrimination against parents, of the sort that the Clinton administration was persuaded to embody in an executive order and that congressional bills have sought to extend to private employers. If there must be legislation on parental status discrimination, I agree

42. ANGEL KWOLEK-FOLLAND, *ENGENDERING BUSINESS: MEN AND WOMEN IN THE CORPORATE OFFICE, 1870-1930*, at 106 (1994).

43. Sue Schellenbarger, *Work & Family: Shedding Light on Women's Records Dispels Stereotypes*, WALL ST. J., Dec. 20, 1995, at B1.

44. SYLVIA ANN HEWLETT & CORNEL WEST, *THE WAR AGAINST PARENTS: WHAT WE CAN DO FOR AMERICA'S BELEAGUERED MOMS AND DADS*, at xv (1998).

45. SYLVIA ANN HEWLETT, *WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN* 234 (1991).

with Elinor Burkett about its scope. Burkett told the *New York Times*,

Last time I checked, discrimination law generally cut both ways. We don't bar discrimination against women; we bar discrimination on the basis of gender, and so on. So why single out parents? Why not bar discrimination on the basis of family status? Why not make it illegal to presuppose that a nonparent is free to work the night shift or presuppose that nonparents are more able to work on Christmas than parents?<sup>46</sup>

I also agree with Joan Williams, who opposed the Clinton administration executive order and the proposed legislation barring discrimination against parents on the grounds that employers do not by and large discriminate against all parents—they tend to discriminate in favor of male parents and against female parents.<sup>47</sup> Moreover, I note that much that is complained of is not as a technical matter discrimination against parents, but rather a failure to discriminate in their favor. Consider the oft-cited case of the mother fired for her inability to do required overtime because of childcare responsibilities. There is no evidence that a worker with a different reason for being unavailable would have kept her job. What is being sought on behalf of such parents really is something more like “special rights” (a loaded term in the sexual orientation context, where it generally does not apply in the way those who use it believe). Parents seem to want something like the special accommodation given religious workers, but even legally mandated religious accommodation is generally limited when the consequence would be to overburden other workers by, for example, forcing those without religious objection to do all the weekend work regardless of seniority.<sup>48</sup> Perhaps the best precedent for parental status discrimination is marital status discrimination—both married and single people do suffer discrimination, and the purpose behind the legislation barring such discrimination, while largely trying to reduce the social cost to women of marrying, was by no means so limited.

Prohibitions on discrimination against parents in employment are not the only policy arena where some prefer to privilege the claims of parents rather than pursue more broadly available benefits.

46. Lisa Belkin, *Your Kids Are Their Problem*, N.Y. TIMES, July 23, 2000, § 6 (Magazine), at 30.

47. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

48. The Supreme Court has granted certiorari on a case raising a similar issue in the Americans with Disabilities Act context. See *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000).

Compare two different ways of arguing that greater access to public space be afforded to parents and their children: Joan Tronto laments on behalf of parents “the absence of viable forms of social support that range from adequate public transportation to ‘safe’ public spaces such as neighborhood streets on which children play.”<sup>49</sup> Hewlett and West, by contrast, propose that “[s]uburban communities could offer priority parking in shopping malls for pregnant women and parents with small children (a few do already), and the federal government could offer free or discounted admission to national parks, monuments, and museums so that moms and dads could always afford to accompany their children.”<sup>50</sup> Not only does the former proposal sound like an equal right and the latter like a special right, the former is coalition building, the latter has real zero-sum potential.

Some advocates for parents have taken the movement for increased public recognition and access for people with disabilities as a model.<sup>51</sup> I, too, find much that is useful in such an analogy. Consider, for example, several different ways to increase access to public spaces for people whose mobility is impaired. Ramps and sidewalk cutaways are useful to parents and nannies with strollers, travelers with baggage, shoppers with grocery carts, elderly people who can’t quite manage stairs, cyclists and rollerbladers, and many others besides the wheelchair-bound for whom they were originally and principally designed. They are generally seen as a boon and (other than people forced to pay for renovations),<sup>52</sup> no one seems to object strongly to them. Contrast the handicapped parking space, which is clearly read as a zero-sum game—for every space reserved for “them,” there is one less for the rest of us. The handicapped parking space has become the object of griping out of proportion to its actual effect because of the common error of assuming that any particular motorist personally, and not one of the dozens or hundreds of other able-bodied motorists competing for it, would have gotten that tantalizingly empty space. Strong proponents simply of equality of result might still object to the cutaway or ramp as insufficient, because, strictly speaking, it doesn’t equalize the position of the

49. Joan C. Tronto, *Who Cares? Public and Private Caring and the Rethinking of Citizenship*, Social Science Research Computing, University of Chicago (n.d.), at <http://www.src.uchicago.edu/politicaltheory/Tronto01.htm> (last visited Apr. 25, 2001).

50. Sylvia Ann Hewlett & Cornel West, *Caring for Crib Lizards*, AM. PROSPECT, Jan. 1, 2001, at 17.

51. See, e.g., *id.*

52. I do not mean to minimize the cost to such people, just as I do not want to dismiss the potential cost to employers of providing increased benefits.

wheelchair-bound, though it improves it. This is because people not beginning with mobility impairment will probably still be able to move more easily through the newly reconfigured space; the differential will have narrowed, but not vanished, in part because the improvements also facilitate mobility by those not impaired.

Similarly, if the premise of some parents' advocates really is one of strong equality of result (i.e., that parents should, in effect, be held harmless in time and money from their decision to have children; that their decision to have children should be made as close as possible to costless), then we really are talking, if not quite about a zero-sum game, then at least about a massive redistribution from nonparents to parents, one which, on grounds, *inter alia*, of inequity to people like myself, I would strongly oppose.<sup>53</sup> For, let's face it, children do take time and cost money, directly and indirectly. Is the goal really to hold constant the amount of nonchild-centered leisure and of disposable income net of child-related expenses as between otherwise similarly situated parents and nonparents? While there are, for example, good feminist arguments for reducing or eliminating the leisure gap between fathers and mothers, I can think of none comparably strong for similar opposition to a gap between parents and nonparents. I am honestly unsure how most proponents of parental benefits, particularly for middle- and upper-income parents, conceptualize this.

53. Most often, there is only an implicit suggestion of equality of result. Consider, for example, Sylvia Ann Hewlett's *When the Bough Breaks*, which characterizes, as revelatory of "an urgent level of need" for employer assistance with childcare, statistics indicating that at New England high-tech companies, "the average working mother logs a total of eighty-four hours a week between her home and her job, compared with seventy-two hours for male parents and fifty hours for married men and women with no children." *Id.* at 212. Apart from the discrepancy between fathers and mothers, what is the problem here? To the extent hours "log[ged]" at home include all time spent directly on childcare, do parents not want to spend this time with their children? Won't Hewlett's proposed solution of employer assistance with childcare just reduce the parents' time with the child and allow an increase in their leisure or availability for more work? Is this meant to benefit children or parents? How exactly? Is the problem Hewlett perceives simply the discrepancy between the time allotments of parents and the childless? For another ambiguous complaint, see CRITTENDEN, *supra* note 23, at 4 (denying that having children leads a woman's human capital stock to atrophy and complaining that "the only things that atrophy when a woman has children are her income and her leisure").

Occasionally, but rarely, the premise of equality of result is made explicit. While attending a gathering in Berlin, for example, I listened to one eastern German guest's impassioned complaint that taking her children to the zoo was too much of a strain on her budget and the solution was heavy redistributive taxation away from DINK (Double Income No Kids) couples toward her and other mothers. Why shouldn't they fork over the money they spend on ski vacations to me and my kids, she asked? My assumption that she must be a struggling impoverished single working mother of young children was rapidly corrected by other guests who told me that, instead, when she divorced her husband, she had obtained a settlement so generous that she had been enabled to leave the work force permanently at a time when her children were all preteens.

How much time is enough time? How much money is enough money? And are time and money to be measured absolutely, or by comparison to what may be available to the childless? What sacrifices/compromises/trade-offs, if any, do strong advocates of parental benefits see as appropriate for those with children to make? There is a vast spectrum between concluding that having children should not leave parents utterly bereft of time, money, energy, or career opportunity and concluding that parents should suffer no cost whatsoever along any of these dimensions as a result of their decision to have children. Where on that spectrum should we as a society be aiming?

As I shall attempt to show, not being able to judge what is good policy unless we are clearer about exactly what our aims are may be the most serious problem with shifting more of the burden of care for children from mothers to the state. On the one hand, moving the source of parental benefits to the level of the state (for example, not having health insurance or paid leave provided at the level of the employer or on the strength of one's affiliation to a wage earner but rather universally) removes some of the potential distributive inequities in favor of men with dependents and some of the incentives to discriminate against potentially reproductive women that I described earlier. But it opens much wider the question of policy goals, the setting of which is a useful precondition to evaluating whether any particular policy is a useful step in the right direction. What exactly are we seeking to maximize<sup>54</sup> when we turn to the state for support of care? Having greater clarity on this undertheorized question might, *inter alia*, help us determine what models of state subsidy are most useful in this context, with a nonexhaustive list including in-kind subsidy, veterans benefits, and social security as well as some less obvious candidates like Agricultural Price Supports, NEA grants, funding for scientific research or higher education, and hazardous waste cleanup, which I will discuss further below.

In addition to opening up the question of goals, moreover, moving to the level of the state only shifts and broadens but does not answer the problem of what Linda McClain has called "quality control." What can we as taxpayers expect to get for our financial investment? And what level of monitoring is appropriate to make sure that we are getting it? For example, consider again parental

54. Though this is the way my law and economics colleagues might phrase the question, I urge readers not to be distracted by the genetic fallacy in evaluating the question's usefulness.

leave, whether state provided or state mandated and employer provided. Are we going to do quality control, and, if so, should we check up to see how people are using their leave time? Should we make them put in a daily log, the way we do when they get paid for many other kinds of activities? Lawyers break down their hours into six-minute segments for billing records. Is that what we want from people who get a paid leave for childcare, so that we can see how they are spending it? What if they use their leave as a paid vacation, spending very little time with their child? What if they spend the full financial subsidy to pay domestic help, but spend their own time writing more law review articles?<sup>55</sup> If they were to do either of these things,<sup>56</sup> is that something we should see as inappropriate,<sup>57</sup> a violation of the conditions of parental leave? Is that something someone who funds the leave should want to know and should we engage in the sort of investigations necessary to see if that is what is happening? I have already expressed my own view that, for example, paid paternity leave should not be just a paid vacation or, valuable though parent-child bonding may be, simply involve a father cooing over an infant while leaving all the dirty work of caring for it in the hands of the mother.<sup>58</sup> But other people may have other views. My point here is that we need to get beyond the point of seeking more for parents from employers or the state and start asking, not only, "How much more?" but "To what end?"

Some of the ends identified by other countries with more generous state subsidies are, in my view, out of bounds for the United States. We have no acceptable reason for setting, as some of them have, a goal akin to maximizing the number of births to native born women.<sup>59</sup> In no sense of the word does the United States have a

55. See, e.g., Robert Drago & Joan Williams, *A Half-Time Tenure Track Proposal*, CHANGE, Nov./Dec. 2000, at 46, 50 ("Anecdotal evidence suggests some fathers take parental leaves but do not use their time to care for young children; instead they use it to 'get ahead of the game' by doing additional research and writing.")

56. And, let me be clear, I am not claiming that any of them do; I am asking hypothetically what we ought to do or think if they do, because it seems to me this may help with the design of our policies.

57. Joan Williams and Robert Drago call it an "abuse[]." Drago & Williams, *supra* note 55, at 50.

58. At the risk of sounding like one of those fussy mothers Sharon Hays and others document, who do not trust the father alone with the child lest he behave irresponsibly and ignore it to focus on his own pleasures, see, e.g., HAYS, *supra* note 3, at 101-08, I am more inclined to demand monitoring when benefits are given directly to fathers or, to put it sex neutrally, to someone other than the child's primary caregiver. A World Bank study backs me up, showing that when given a subsidy, mothers in the third world tend to spend the money on their children, fathers on tobacco and entertainment. Schalch, *supra* note 37.

59. For further discussion of racialist underpinnings of many subsidies for reproduction,

problem of underpopulation. We are not an ethnically homogeneous or culturally isolated population at risk of extinction. We are not, as a nation, committed to reproduction for religious reasons, to hasten the second coming, or prevent the chosen people from dying out. We have more potential immigrants than we can handle willing to commit to our national ideals and contribute to our economy and society as entrants into the labor market and as the parents of citizens.<sup>60</sup>

There are two quite distinct aspects to my argument that, in contrast to some other nations at some other times in history, we Americans as a nation today should not be committed to policies designed specifically to maximize the birth rate of our citizens, the first ideological and the second economic. On an ideological level, I believe that reproducing Americans is and should be more about education in citizenship and less about hospital births to American citizen mothers. On an economic level, if all we are looking for is a new generation of workers to pay my generation's social security,<sup>61</sup> it may be cheaper to import them as adults than to raise them at home. With respect to each of the proposed refinements of the end of maximizing births discussed below, a similar combination of

see, for example, Franke, *supra* note 18, at 194-95.

60. Indeed, we could begin by being more welcoming to some of the offspring of our own citizens. We could have let Lorelyn Penero Miller and the other illegitimate foreign-born children of U.S. servicemen in, for starters. Miller's bid for citizenship was denied in a welter of Supreme Court opinions. See *Miller v. Albright*, 523 U.S. 420 (1998). The sex discriminatory set of citizenship rules that kept her out was most recently upheld on the merits in *Nguyen v. INS*, 121 S. Ct. 2053 (2001). But, as I have already argued, Congress could have solved the legal tangle in the rules governing the citizenship of children born abroad with only one U.S.-citizen parent by requiring of all offspring of only one citizen parent of either sex or marital status merely proof of parental relationship, coupled with some uniform and minimal period of parental residence in the United States. This would be a generous, straightforward, and perhaps even just result. Rather than responding with aversion to the specter of invasion by the scattered seed of American servicemen, which seemed to haunt at least Justice Stevens, see *Miller*, 523 U.S. at 438-39, perhaps we as a nation should welcome and take responsibility for them. See Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law As a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1480 (2000). In an intriguing article on the implications of *Miller*, Alex Aleinikoff and Cornelia Pillard point out the "ugly class and race implications [of allowing] U.S. fathers not to convey citizenship" on children they may conceive abroad. Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 24 n.92.

61. See Bjorn Borg Urges Europe to Have More Sex, Reuters, Mar. 9, 2001, available at <http://www.iol.co.za>. Reuters reports that the tennis star took out ads with a picture of midwives and the slogan "Fuck for the future" warning that "We have a bit of a delicate problem here in the Western world: there aren't enough babies being born. If nothing drastic happens soon there won't be anyone who can work and put up for our pensions." *Id.* Borg's proposed "simple solution" is "[a]n intimate form of socialising that, if done properly, will keep midwives labouring all over Europe." *Id.*

ideological and economic questions apply and I will begin to raise them.

I realize that looking at childbearing and childrearing in cold-bloodedly economic terms may be disturbing, but it is some proponents of an increased shift of the burden of children to the state, not I, who introduce arguments sounding in economic rationality into the debate, for example, by insisting that children are a public good or that parents are entitled to compensation from the childless. All I am here urging we explore is what it might mean to take such arguments seriously. My sense is that such arguments are not only difficult to sustain, but they have nasty implications their proponents rarely face up to. Most notably, starting down the road of claims for compensation grounded in economic rationality invites case-by-case examination and analysis of precisely to what extent which children will produce positive externalities worthy of compensation. Consider, for example, the claim that children are a public good. First, to the extent they are a public good, the public is already paying a substantial percentage, by many estimates thirty-eight percent, of the cost of raising them.<sup>62</sup> Some children may not produce positive externalities in excess of this; indeed, some will produce net negative externalities. To what extent should state subsidies take this into account and how?

Consider first the repeated invocation of the need for children to “become the future workers . . . needed to fund our social security accounts” as the justification for treating children as “a public good” and the source of “positive externalities.”<sup>63</sup> The first difficulty with this argument is that its proponents tend to underestimate the extent to which childless workers, particularly single men and women, already subsidize social security payments to those raising children—at present the social security system offers payments to the dependent spouses of workers; these payments are funded, in part, by contributions from those without dependent spouses. While some of those dependent spouses have never raised a child, the bulk of them are the classic homemaker/secondary earner spouse. The system may

62. Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 200 (1999).

63. Katharine B. Silbaugh, *Accounting for Family Change*, 89 GEO. L.J. 923, 968-69 (2001) (book review) (reviewing JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (2000)); see also Williams, *supra* note 14, at 1492 (“We should [share the costs associated with] childrearing: after all, who will pay the social security of the childfree? Whose children will be their doctors when they are old?”); Nancy Folbre, *Children As Public Goods*, 84 AM. ECON. REV. 86 (1994).



have many flaws,<sup>64</sup> but free riding by the childless on parents is the least of them.

A second set of difficulties arises when we examine what it might mean to take seriously parents' claim to be compensated for producing the next generation of workers. As my articulation of concerns about localizing care responsibility at the level of the workplace should show, in approaching the working out of care as a public value, I am not focused on the world after the revolution; I am in an all-other-things-being-equal world much closer to the world as we know it. But I do not see why so many of those involved in developing more imaginative and revolutionary approaches take all else as up for major restructuring but take the contours of the current social security system as a given. One exception is Shirley Burggraf.<sup>65</sup> Burggraf suggests that in the future, the only legal source of social security payments be a tax on the income of children to be paid into the account of their parents. Even some of the staunchest defenders of the concept of children as a public good view her scheme as both pernicious and impractical. Nancy Folbre, for example, expresses the sensible concern that schemes like Burggraf's "might encourage parents to treat their children in instrumental terms. In the United States, as well as in other countries, parental control over adult children's income has been associated with child abuse, forced marriages, and a preference for male children (who tend to earn more)."<sup>66</sup> Moreover, it is difficult to see how Burggraf's plan can extend to a second generation—the first generation of parents will have every financial incentive to raise children with maximum realized earning power, not a generation that itself will sacrifice that earning power to engage in childrearing.<sup>67</sup> We might, of course, make less radical changes in social security, like facilitating to an increased extent each worker's more direct contributions to his or her own retirement. Without actually forcing their children to support them directly in their old age, we could put a certain percentage of the

64. For example, it tends to distribute far too much of the benefits to the wage earner and away from the dependent spouse in the event of divorce, once again tending to advantage men over women far more than it does the childless over parents. See generally Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein and Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989).

65. See generally SHIRLEY P. BURGGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN: REVIVING THE ROLE OF FAMILY IN THE POST-INDUSTRIAL AGE* (1997).

66. Folbre, *supra* note 63, at 89.

67. For a cogent exploration of this and many other problems with Burggraf's proposals, see generally Amy L. Wax, *Is There a Caring Crisis?*, 16 YALE J. ON REG. 327 (1999) (book review) (reviewing BURGGRAF, *supra* note 65).

social security taxes paid by children in their parents' account (or in their mother's account? or in their primary caretaker's account?). This might be a good way to put those parents arguing that their entitlement comes from having supplied a worker to pay social security for the childless to the proof. Even more radically, we might have something like the old knight's service, where people who did not want to fight in their feudal overlord's army themselves paid identifiable individuals to do it. I, as a childless adult, could pay subsidies for the raising of a particular child, betting on his or her social security tax payments to cushion my old age, losing if I bet on someone who turned out unproductive. (Note, I do not endorse any of these changes, I just introduce them as possibilities to show that we need not hold the current parameters of social security constant.)

Consider next the analogy of agricultural price supports. At one level, support for farmers, like support for parents, can be viewed as interest group politics—there is the risk that the subgroup that mobilizes best, rather than the neediest or the one most worthy of support, absorbs the bulk of state money.<sup>68</sup> As with many block grants, there is a risk of transfer, not from the rich to the poor or from those who do not to those who do have the skill to spend the money wisely, but, too often, simply from the politically less powerful to the more powerful.<sup>69</sup> But implicit in most carefully designed programs of agricultural price support is that while some are paid to farm, others are paid not to. There are some who take a similar approach to the production of children. For example, the privately funded group CRACK (Children Requiring a Caring Kommunity), founded by a woman who had herself adopted four of eight children born to one crack-addicted mother, offers drug addicts up to \$200 if they undergo long-term birth control or sterilization.<sup>70</sup> Representatives of Planned Parenthood have objected that “any program that offers cash as an incentive to take birth control or become sterilized is inherently

68. In suggesting various ways in which governmental subsidies to mothers and their children can go wrong, I do not mean to suggest that such subsidies are peculiarly susceptible to such problems, only that they are not peculiarly exempt from them. And the fact that many other government subsidy programs may be badly designed is not, in my view, a good reason to add another badly designed program to the mix, but rather, a reason to work on better design for each of them.

69. See, e.g., Elizabeth Becker, *Far from Dead, Subsidies Fuel Big Farms*, N.Y. TIMES, May 14, 2001, at A1 (describing increasing government subsidies “tilting the playing field in favor of the largest farms”).

70. Avram Goldstein, *Group to Pay Addicts to Take Birth Control*, WASH. POST, June 26, 2000, at B1.

coercive.”<sup>71</sup> And there are obvious classist and racist risks and history in such programs. On the other hand, it should be uncontroversial that some people (not identifiable categorically on the basis of race or class or income level or age or marital status or sexual orientation, but including individuals from all groups) make better parents than others. Should state subsidization take this into account?

A world in which government needs to give you a license to reproduce would be frighteningly un-American. So would a world in which the government determines who may study what. But (consistent with a perhaps troubling constitutional heritage of drawing fairly sharp distinctions between carrots and sticks, between conditioned funding and regulation), we have fewer problems with government subsidizing at an increased level higher education for the extremely talented or those in undersupplied fields.<sup>72</sup> If, for example, the National Science Foundation can demand a show of aptitude for training grants and demonstrated performance and skill for renewal grants or senior scientists, what about similar aptitude and performance criteria for those whose childrearing the government will subsidize at an extremely high level? As a commentator at Martha Fineman’s Uncomfortable Conversation on Children facetiously suggested, “We’ll support you in having a second child once we see how the first one works out.” In proposing the thought experiment of imagining such a regime, I am far from endorsing it. But I do think, once again, that those whose argument for substantially increased subsidy for childrearing seeks to rest on traditional economic justifications like the production of public goods need to face up to these sorts of hypotheticals if they mean their arguments to be taken seriously.

Some have suggested that our policy should be, not maximizing the number of children, but subsidizing our citizens so that each can have the number of children (s)he wants,<sup>73</sup> free of financial constraints.<sup>74</sup> One does not have to go so far as to say that children

71. *Id.*

72. Recall, for example, the Sputnik-inspired drive to fund math and science education.

73. Of course, some have claimed that it is not the individual at all, but only the married couple whose desire to reproduce we should subsidize.

74. I have risked being misunderstood as arguing that welfare mothers have babies for the welfare check (something I am not at all suggesting), when I have in the past articulated concern that, whatever the effect or lack thereof of a small subsidy, a really large one (of the sort that would make even Martha Fineman happy) might lead to the production of many more children, and that we should consider the likelihood and desirability of this possible consequence in evaluating this policy goal. As a questioner at the Cornell Uncomfortable Conversation helped by articulating on my behalf,

are “like any other item of consumption”<sup>75</sup> to say that they perhaps ought not to be subsidized quite at the level of demand. There is virtually nothing we as a nation subsidize at the level of demand. Even the much criticized mortgage interest deduction has been capped.

Rather than viewing children as a Porsche, why not a poem? The voluntary production of both poetry and children can be at once a source of pleasure and a site of intense effort to those who do it and, if it is well done, a source of positive externalities for others. Rolf George, among others, has sought to analogize parents’ production of children to an author’s production of books: “In both cases, great effort goes into the production, and substantial externalities are generated that escape the control of the producer.”<sup>76</sup> It may well be that comparing children to works of art is a fruitful analogy, but I am not sure it leads where George thinks it does. According to him, “it appears to be absurd to argue against copyright . . . on the grounds that really dedicated writers would write anyway,” but “it is demanded that parents should provide a gratis service to the rest of society as a matter of duty. . . . We should begin to think of a parental right to an abstract property in analogy to the property that is protected by copyright.”<sup>77</sup>

The first of many problems with George’s claim is that it is far from clear that the “substantial externalities” of either children or art are necessarily positive externalities. Some children, like some books or other works of art, produce net positive externalities, others net negative.<sup>78</sup> Often the question of the valence of an externality is quite

[t]he fact that a small subsidy does not have a pro-natalist effect does not mean that, if you increased the subsidy, if you have a really large subsidy, it would not have such an effect. If you think about the demand for children in the same way as you think about the demand for any other good or service, it is highly likely that the lower the price of the child, the more people will want to have children. On the other hand, there are a million other things that affect whether or not you want to have children—your income, your education, your taste for children, if you will. So suppose you kept all those things the same, income, education, proclivity for children, etc., and now you put in a big subsidy if you have a child. It is likely that for some people that is going to mean that they have more children. What the size of that effect is we do not know.

75. Fineman, *supra* note 5, at 1403.

76. Rolf George, *On the External Benefits of Children*, in *KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY* 209, 214 (Diana Tietjens Meyers et al. eds., 1983).

77. *Id.* at 214-15.

78. With apologies for descending to the Nazi hypothetical, let me invite consideration of the production of Adolf Hitler by his parents and of *Mein Kampf* by its author. In both cases the “externalities . . . that escaped the control of the producer” are not, by and large, ones for which the producer is generally seen as entitled to reward.

debatable. For example, it frequently happens that what some see as a work of art that improves the landscape, others see as an eyesore or obstruction.<sup>79</sup> Whether a street musician is producing a positive or negative externality by playing depends not only on his or her skill, but on the listeners' tastes in music<sup>80</sup> and the extent to which they prefer music of any kind to silence.

Moreover, we already do have something like a copyright in children—for a period of approximately eighteen years we allow parents, like authors, a great deal of control (although not absolute control—compare fair use and minimum education requirements) over their offspring, literal or literary. George acknowledges that “of course, the analogy must not be pressed. For example, to recognize such a right need not lead to the introduction of a royalty scheme, which would be absurdly difficult.”<sup>81</sup> Yet he is convinced that “if such a right were recognized, it would justify a higher level of support through redistributive taxation, free schooling, day care, and the rest.”<sup>82</sup> This conclusion by no means follows from the premise of the analogy. Most of those who actually do produce poetry, even very good poetry, do not in the modern United States benefit from a particularly “high[] level of support through redistributive taxation . . . and the rest.”<sup>83</sup> And far more people, with more or less talent, would produce more poetry were it not for material constraints. Like reproductive freedom, freedom of speech is an American value of constitutional significance. But even strong proponents of greater equality of opportunity for speech do not generally argue for subsidy at the level of demand for the production of speech. They do not seek to maximize the production of books, not even the production by each individual of as many books as (s)he wishes to produce. Are reproduction and childcare, of all life's valuable activities, peculiarly suitable for subsidy at the level of demand?

79. Recall, for example, the controversy that resulted in the removal of Richard Serra's monumental sculpture *Tilted Arc* from a public plaza in New York City for which it had been designed. See, e.g., Joseph Berger, “*Tilted Arc*” to Be Moved from Plaza at Foley Sq., N.Y. TIMES, June 1, 1985, § 1, at 25.

80. Consider the use by malls of piped in classical music to drive away youths whose taste runs to something funkier. See, e.g., Jeffrey Miller, *Mozart As Specific, General Deterrence*, LAW. WKLY., Apr. 10, 1998, LEXIS, News Library, The Lawyers Weekly News File.

81. George, *supra* note 76, at 215.

82. *Id.*

83. *Id.*

A further problem with arguments for subsidizing only reproduction at the level of demand is the distorting effect it might have: we may inflate the demand for reproduction relative to other activities. Let me explain why I believe this to be a potential problem from a feminist, as well as an economic, perspective: Part of the reason women in high-status, high-power, high-income jobs tend to have fewer children is the pressure of the job and the lack of corresponding subsidy of their reproduction. But only a hard-core descriptive sociobiologist and repronormativist with a view of women I and my brand of feminism resist would want to deny the possibility that part of the reason may be that a world of comparatively attractive alternative things to do with their time and energy<sup>84</sup> is available to such women in a way that it is not to poor, less educated women in this society (or to women in societies past and present that categorically deny entry into such jobs on the basis of sex). That the opportunity cost of childrearing is rising for women<sup>85</sup> cannot be seen as unmitigated bad news from a feminist perspective—it means, in part, that women are being offered a wider range of options for productive work. The realization that giving women options tends to curb their fertility is behind United Nations and NGOs (nongovernmental organizations) efforts to curb population, not by direct suppressive measures, but by educating women, improving their economic status, and improving their options.

While subsidies are a great improvement on coercion into childrearing as a means of lowering the opportunity cost of childrearing to women, it is worth asking whether it makes sense to target childrearing specifically for greatly increased subsidy: what if a poor woman wants to write a book or start a business or get an advanced degree instead of raising a(nother) child? If money (whether in the form of a guaranteed income or a one-time grant) were provided without strings attached, it might have less of a distorting effect on preferences. This is what I understand to be the idea behind Bruce Ackerman and Anne Alstott's proposal to stake every young American high school graduate to \$80,000.<sup>86</sup> Alstott and

84. Cf. Arlie Russell Hochschild, *There's No Place Like Work*, N.Y. TIMES, Apr. 20, 1997, § 6 (Magazine), at 51 ("Increasing numbers of women are discovering a great male secret—that work can be an escape from the pressures of home . . .").

85. See, e.g., Shirley P. Burggraf, *How Should the Costs of Child Rearing Be Distributed?*, CHALLENGE, Sept./Oct. 1993, at 48, 50 (noting that "[r]ising opportunity costs of women's time in the labor market . . . have made parental time spent at home increasingly expensive").

86. See generally BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999). Compare Ronald Dworkin's thought experiment for achieving equality of resources of a

Ackerman specifically acknowledge that women may “use their stake to take extra maternity leave or cut back their work hours while their children are young,” and that this may leave them “[i]n the end . . . even more dependent on a husband or boyfriend for support.”<sup>87</sup> But they argue that, “[n]o less than men, [women] deserve nothing less than the real freedom that stakeholding offers.”<sup>88</sup> While a world in which women, but not men, are moved to spend their stake on children is far from ideal, so is a world in which a stake is given only to those women who have a child.

In looking critically at incentive effects, we should not only consider the extent of available subsidy for childbearing and rearing in comparison to subsidies for other activities, but also the comparative costs imposed on those who do or do not have children. Joan Williams, for example, concedes that no one who does not want to engage in childrearing “should have to do it,” but she nevertheless goes on to insist that “everyone should contribute financially.”<sup>89</sup> Unless limits to this demand for contribution are recognized, the consequences could, it seems to me, be unfair and counterproductive. Consider the following complication of Williams’s somewhat more dichotomous picture: Some fraction of those who choose to have no children personally do so because they recognize that they simply have no taste or aptitude for childrearing. But many others see the choice not to have children as a tradeoff: realizing that raising children takes a lot of time, money, and energy, they may, with some regret at an opportunity foregone, choose to spend their time, money, and energy in other ways. They may choose service to humanity or pursuit of fame or spiritual life or artistic excellence or scientific knowledge or career or romantic love or pleasure or leisure—in short, any human endeavor from the sublime to the ridiculous, some quite socially valuable, others less so. If their time, money, or energy is taxed at a high level for the benefit of those with children (whether directly through government taxation and redistributive schemes or indirectly through, for example, workplace scheduling of the childless for all overtime, weekend, and out-of-town work), they may understandably feel that they have lost the benefit of their tradeoff, and may either rethink their decision whether to have children or

clamshell-based auction among shipwreck survivors on a desert island. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 66 (2000).

87. ACKERMAN & ALSTOTT, *supra* note 86, at 61.

88. *Id.*

89. Williams, *supra* note 14, at 148.

become increasingly frustrated and resentful.<sup>90</sup> They may say, “I don’t want to be a queen bee (in either the biological or sociological sense of the word), but I don’t want to be a worker bee<sup>91</sup> either, putting all my energies and resources to work in support of another’s reproductive choices. If I’m going to have my time, energy, and money, in effect, taxed to the level they would have reached if I had had children so that the surplus can be given to a parent, I would rather be that parent.” Researchers describe something similar in the reaction of some teenage girls with caretaking responsibilities for their siblings to the prospect of their own early pregnancy—if I am going to have to do this work anyway, the girls conclude, I might as well do it for my own child in my own household.<sup>92</sup> Similar motivations may also have induced working class girls and boys to marry earlier so as to escape continuing caretaking duties and financial contributions to the parental home, in which they were expected to remain until marriage.<sup>93</sup>

I have already expressed my own view that neither employers nor the state should be giving parents anything—from money to tax breaks to time off to parking spaces to Jane Rutherford’s proposed extra votes<sup>94</sup> to housing to flexible schedules—merely because of the fact that they are parents. I am similarly opposed to something frequently analogized to special benefits on the basis of parental status, special privileges merely because someone is serving in the armed forces.<sup>95</sup> Of the many voters who for reasons good and bad did not get their absentee ballots in on time or correctly filled out during

90. As the quote from *CK v. Shalala*, 883 F. Supp. 991, 1015 (D.N.J. 1995), with which McClain begins her contribution to this Symposium indicates, see McClain, *supra* note 1, at 1673-74, this sort of resentment may already be an issue for working and middle class parents who limit family size out of financial and time constraints, not preference, and then perceive money for which they have worked overtime or money they would like to spend on another child is taxed away to support growing families on welfare.

91. See, e.g., 3 ENCYCLOPEDIA BRITANNICA *Bee* 304 (1962) (describing a queen bee whose “sole function is egg laying” and worker bees who “normally lay no eggs” but “feed the brood, clean the hive, guard against intruders, construct combs, collect pollen”).

92. See, e.g., DODSON, *supra* note 13, at 14-50.

93. See, e.g., LILLIAN B. RUBIN, *WORLDS OF PAIN: LIFE IN THE WORKING-CLASS FAMILY* 56 (1976).

94. See Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1464 (1998).

95. If you think the scenario described in the preceding paragraph is an implausible exaggeration, that redistribution from nonparents to parents at the high level necessary to provoke the bad consequences I imagine could never occur, consider another spin on the oft-pressed analogy between childrearing and military service—there certainly are nations that have choked off resources to all other activities of citizens or the society so that their army could live well and their military be strong.



the most recent presidential election, I see no reason to give extraordinary waivers only to armed service personnel. Unless there would otherwise be a shortage of qualified volunteers, a volunteer army in times of peace should be entitled to fewer veterans preferences<sup>96</sup> from either employers or government than a drafted army in time of war. If the honor of serving their country, the training, the thrills, the camaraderie, the pay, and the benefits are not enough for a given soldier, he or she should find another job. I say the same to prospective parents—if you insist that you are having children as a service to me for which I owe you big, do not do me any favors just yet.

On the other hand, I would be inclined to look more favorably on the state spending money in monitorable and controlled ways on the child and socially useful things for the child. This spending would not be formulated as payback to the parents but as direct benefit to the children. Many of the forms of state subsidy I would be inclined to support would involve a fairly high degree of what McClain calls “quality control.”<sup>97</sup> I agree with Katherine Franke that, “especially when the public is called upon to finance” the project, we cannot afford to “delegate[] to private parties the task of producing and raising the next generation...in the absence of any public accountability for what kinds of people this public service produces.”<sup>98</sup> Franke seems principally concerned with the potential failure of parents to instill in “‘our’ future citizens public norms of tolerance, equality, and humanity.”<sup>99</sup> I share these concerns, but I will

96. Compare the effects of Massachusetts’s veterans preference in *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979), with the potential effects of, for example, legally mandated preference for parents in job scheduling and structure. Just as the nearly absolute preference for veterans and the large number of male veterans meant that Feeney and other women were well nigh shut out of the upper echelons of the Massachusetts civil service and into pink-collar clerical jobs, see *id.* at 260-61, so a strong parental preference might shut the childless into weekend and holiday work, overtime, and grueling business travel and out of flex time well nigh categorically.

97. In this connection, it is worth noting that many of the countries with greater financial support for childrearing combine this with home visits to parents. How many proponents of increased state subsidy in the United States would be willing to accept such monitoring? My sense is that while a small number would see home visits as desirable even independent of a link with subsidy, a far greater number would see such visits as an unwarranted intrusion on parents. It is also worth noting that the history of support in the United States for poor parents and their children shows an oscillation between favoring in-kind benefits, targeted payments, and unrestricted cash grants. For a survey of the changing approaches to controlling spending on and by poor families, see VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 119-98 (1994).

98. Franke, *supra* note 18, at 192.

99. *Id.* at 191-92.

add that those whose argument for subsidies for parents sounds in economic benefit to the rest of us should also be prepared to expect “public accountability” for their offspring’s ability and diligence in fact making such economic contributions.<sup>100</sup>

I hope I have shown that there are serious analytic problems with any detailed attempt to ground public support for care of children on the theory, justified on the basis of conventional economic rationality, of required compensation to parents for the positive externality children produce. There is a world of difference between care as a public value and children as a public good.<sup>101</sup> Framing public responsibility for children and their care as a stop-loss possibility, as a need to reduce negative externalities from (some) reproductive activities rather than to compensate parents for positive externalities has, in my view, a great deal more purchase. Particularly convincing are, for example, statistics on the comparative costs of maintaining young people in school or in prison, and of good pre-natal care versus medical intervention to fix damage to children after birth.

Once we acknowledge that there should be “some collective responsibility”<sup>102</sup> for childcare, we might still conclude that forced extractions from the collective in aid of this responsibility should kick in only after those with an individual responsibility, notably fathers, are forced to kick in their fair share, financially and otherwise. This is not quite the same as saying that children are a purely private responsibility. Similarly, we may have a collective interest in cleaning up hazardous waste dumps, but that does not mean it is inappropriate to begin with a “polluter pays” principle. (Note, I am certainly not suggesting that children are hazardous waste and parents polluters.) Whether you measure the public good or just within the family makes little difference to fathers’ responsibility—either way they should not be free riding. If any one group gets disproportionate positive

100. Again, I fear that such arguments lead in dangerous directions which their proponents would not embrace. For example, there is much to be said for the old premise of social security that the emergency needs of otherwise responsible people are worthy of support—the birth of a wanted child has less claim to extraordinary support than the sudden illness of that same child—but, of course, if proponents insist on arguing for children on account of their positive economic externalities, does it not follow that we should strongly resist support for the reproductive choice of a parent with an expensive or debilitating heritable disease? Like the Roman *paterfamilias*, can we as a society decide which child to take up and which to abandon as unprofitable?

101. As noted above, to the extent that they are a public good, the public is already paying a substantial percentage—by many estimates thirty-eight percent of the cost of raising them. See England & Folbre, *supra* note 62, at 200.

102. Fineman, *supra* note 5, at 1403.

externality from children, it is currently less clearly the childless as it is fathers, who often get genes, status, love, and care without a correspondingly high investment.<sup>103</sup> Which leaves me where I started, wondering why men's mere resistance to accepting more of the burden is a sufficient basis for turning so readily away from them toward employers and the state in seeking to relieve women from the disproportionate burden of care they now bear.<sup>104</sup>

As I prepare to submit this Commentary for publication, the Jewish feast of Passover has just ended. Just as for the ancient Israelites the promised land flowed with milk and honey, so for modern feminists it would offer all inhabitants, regardless of sex or of their need to give or receive care, the time and resources and liberty to pursue their freely chosen life projects unconstrained. Care would be a public value in such a land. My purpose in this Commentary has not been to question the goal of reaching that promised land. It has been to remind us that we are a long way from it in *Mitzrayim* ("the narrow place").<sup>105</sup> Our Passover night has not yet ended. Our unappetizing Passover meal of unleavened bread and bitter herbs is still on the table. We have yet to figure out how to leave the land of slavery (and, as feminists committed to the value of care, preferably to do so without killing the firstborn and charioteers even of those who stand in our way as we go), which of our master's goods to take with us, and how to reject the worship of golden calves and survive the desert in the years before we can reach the promised land.

103. See, e.g., CRITTENDEN, *supra* note 23, at 23.

104. It is well beyond the scope of this Commentary to raise similar questions about various possible combinations of carrots and sticks for fathers.

105. The Hebrew name for Egypt.