FAMILY MATTERS: THE FAMILY-STATE RELATIONSHIP AND OUR LIBERAL DEMOCRATIC IDEALS

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ABSTRACT

MAXINE EICHNER: Family Matters: The Family-State Relationship And Our Liberal Democratic Ideals
(Under the direction of Michael Lienesch and Pamela Conover)

In this dissertation, I consider the stance that a liberal democratic state should take with respect to intimate relationships among citizens. My basic argument is that an adequate vision of the family-state relationship must pay significant respect to the standard liberal goods of freedom and equality, and yet it must also recognize that a liberal society's respect for human dignity requires it to foster caretaking and human development. The best way to harmonize these goods, I argue, is for the state to allow individuals a significant degree of freedom to pursue their own visions of the good life while requiring the state to support the institutional conditions that facilitate families' capacity for caretaking and human development. I offer my "supportive state" model to illustrate how a liberal democratic polity should organize its family-state relations and reconcile the tensions among these important goods.

In the first two chapters of the book, I consider the absence of families in contemporary liberal theory and engage a broad spectrum of liberalism’s critics—from communitarians, to civic liberal revisionists, feminists, and queer theorists—to consider alternative visions of the family-state relationship. In the following three chapters, I argue for a “supportive state” model of the family-state relationship, in which families bear responsibility for caring for and organizing the care of family members, but the state bears a simultaneous responsibility to ensure that societal institutions support caretaking and human development. I develop the
contours of this model in the context of discussing caretaker-dependent relationships, relationships among generally able adults, and relationships of political socialization and the transmission of civic norms and values. In the final two chapters, I critique current law and public policy and the vision of the family-state relationship on which it rests. I argue that both current child welfare law and work-and-family law and policy are built on unrealistic and unproductive assumptions that assign the state a peripheral role in supporting caretaking. These areas of law, I contend, would be better grounded on a supportive state model.
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CHAPTER 1

INTRODUCTION

Most of us spend the majority of our lives in long-term (albeit not always permanent) relationships with others whom we consider “family.” These relationships have a fundamental influence on our lives from our day of birth, and generally stand at the core of our emotional and moral commitments. They profoundly affect the way we live our lives on a daily basis. It is through these relationships that much of our identities are structured (I am “X’s parent,” “Y’s spouse or partner,” “Z’s child.”), that central emotional and physical needs are met, that the rearing of children is largely accomplished, and that other issues of dependency, including financial dependency, are generally managed.

What role should the state play with respect to these critical ties among citizens? Until recently, there had been little explicit consideration of this issue in political theory in the United States. Instead, the liberal theory that dominated the academy tended to be focused on individual justice and framed in terms of individuals and their rights viewed apart from their relationships with others. Families, when they were considered at all, tended to be seen as natural, pre-political, and largely benign associations that properly remained aloof from the scope of legal and political theory. To the extent that families were considered, these theories largely posited that the basic posture of the state should be neutrality.

In contrast to this academic theorizing, public discourse on families in the United States has taken a very different tack. That discourse has prominently emphasized the importance of families, often conceiving them as the foundational unit of society. To the
extent that the definitional issue of what constitutes a family has been raised, public
discussion has sought to distinguish “real,” “natural,” and “good” families, which can
properly serve their foundational functions (generally conceived as the raising of healthy,
moral children), from deviant families, which cannot. In this discussion, the heterosexual
marital family has not only been construed as more natural and moral than alternative family
forms, it has also been deemed better because it is believed to be more self-sufficient in
performing the functions families are supposed to perform (again, generally associated with
the raising of children).¹ This discourse comports with a legal system that has granted
hundreds, if not thousands, of privileges to the marital family as against other relationships
(Fineman 2004, 104-05; Dougherty 2004). Yet because of the view that families should
properly be self-sufficient (Fineman 2004), state support for caretaking – even for caretaking
that occurs within the marital family – has been quite limited in comparison to that offered
by other nations, and particularly limited compared with Western European democracies
(Gornick and Meyers 2004, 58-83).²

Developments in the last few decades, however, have called into question the
adequacy of both academic and public discourse regarding the family-state relationship.
Some large part of this challenge has come from political and social developments,
including, most prominently, the boom in diversity of family forms. The rise of divorce
rates,³ the increasing visibility of same-sex relationships,⁴ the mushrooming rates of single-

¹The state’s policy in this regard is ironic, Fineman points out, since it is precisely the view that the marital
family is autonomous that causes it to receive this massive subsidization by the state (Fineman 2004, 57).

²For example, according to a report released by a United Nations agency, of 152 industrialized countries, the
United States ranks dead last in benefits and protections it offered to working parents (Grimsley 1998).

³For graphs illustrating the increase in divorce rates since the 1860s, as well as an explanation of the difficulties
in adequately assessing the changes in those rates, see Carbone 2000, 86-87; Cherlin 1995, 306.
parent families,\(^5\) and the growing number of couples who choose to remain childless,\(^6\) challenge conventional understandings of what it means to be a family. Fewer than one in four U.S. families is composed of a husband, wife and children today, compared with 45% in 1960 (Sado and Bayer 2001). That number drops to under 10% for families in which both parents live with their biological children and the wife does not work outside the home (Sado and Bayer 2001). These vast changes in family form have called into question preconceived notions of what families look like, what functions they should perform, and have challenged the supposed naturalness and immutability of the traditional family structure.

This transformation in family structure has contributed to political pressures that challenge the dominant academic and popular views. For example, the rise in visibility of same-sex relationships along with an invigorated gay rights movement has helped to bring the issue of same-sex marriage to the fore. In turn, this has shed a strong light on the state’s role in legally approving some family relationships and refusing to recognize others. This attention to the state’s position with respect to creating families undercuts the view that families are somehow natural and pre-political, and that the state has and should remain neutral with respect to them.

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\(^4\)The 2000 U.S. Census counted 601,209 same-sex unmarried partner households. This means that roughly 1% of all couples sharing a household are same-sex. That is a 314% increase from the 1990 Census, although changes in the manner of coding these responses likely led to significant undercounting in the earlier census. It is likely that actual numbers are higher than even the 2000 Census reveals due to underreporting of these relationships (Smith and Gates 2001).

\(^5\)In 1960, nine percent of children lived in single-parent homes. By 1999, that figure rose to 27% (Sado and Bayer 2001). The rise in single-parent families is attributable not only to increased divorce rates, but to an increase in the number of families in which the parents were never married. The percentage of children born out of wedlock increased at an accelerated pace beginning in the middle 1960s. In 1970 there were about 400,000 births (out of 3.7 million total births) to mothers who were unmarried; in 1990, that figure rose to 1.2 million (Akerlof, Yellen and Katz 1996, 285). During the same period, married women’s fertility rate declined (Akerlof, Yellen and Katz 1996, 285). Overall, almost one in every three families with children is headed by a woman who has never been married. (Luker 1996, 103).

\(^6\)See Regan 1993, 47.
At the same time, these changes contest the prevailing idea that the state’s proper role with respect to families should be one of benign detachment. The combination of women’s increased labor force participation and the growing number of single-parent families means that 70% of families are now headed either by two working parents or an unmarried working parent (Bureau of Labor Statistics 1998). As a consequence of this and the rising number of hours that Americans work, American parents now have fewer hours per week to spend with their children than they did in past decades (Kornbluh 2003; Crittenden 2001, 27 nn.25-26). The conflict between work demands and childrearing in a culture that gives little public support to the latter has caused both the public and commentators to cite the “family time famine” as a major concern (Powell 2004; Galston 1997; Cummins 1996). This time crunch is exacerbated by the need of many adults to care for their aging parents. In all, these trends have caused most Americans to believe that the government should be doing more to aid families (Powell 2004; Megan 1996; Healy 1996; 1997).

In addition, the feminist movement has contributed to the unsettling of the dominant
academic and popular views on the role of families. Feminist campaigns against domestic violence and support for no-fault divorce laws have increased awareness that not all families are benign for their participants (Schneider 2000; Ellman 1989, 81 n.15), as academic and popular conceptions often assume. The feminist movement has also called attention to the continuing gender inequality associated with the heterosexual marital family, still the dominant family form (for example, Stacey 2003; Fineman 2004). In addition, second-wave feminism encouraged many women, including those with young children, to work in the labor market, thereby putting under stress the idea that families could autonomously deal with caretaking issues. The resulting feminist campaigns for day care and family leave have more directly contested the view that families are and should be autonomous from the state.

Recent politics demonstrate the unsettled and complex nature of the American public’s view of the proper role of the state with respect to family. While many conservatives continue to call for the state to recognize and support the heterosexual marital family exclusively (Gallagher 2004; Limbaugh 2004; Thomas 2003), a minority of conservatives favor state recognition of same-sex marriage (Safire 2003; Buckley 2003; Sullivan 2001). Furthermore, recent legal attempts to strengthen the institution of marriage stand in uneasy counterpoint with the view of conservative libertarians that marriage is a pre-political (to some, a religious) institution that should not require state recognition and support.¹²

There is no greater consensus on the state’s proper relationship to families at the other end of the political spectrum. Many on the left argue that the state should recognize some forms of families, albeit a broader category than conservatives. Proponents of this position

¹²See, for example, Young 2003 (citing the Cato Institute's David Boaz argument for privatizing all marriages).
favor, for example, broadening marriage to include same-sex couples. Yet others, including some gay rights advocates, believe the state has no business at all in adult relationships, and assert that the state should remove itself completely from sanctioning marriage (for example, Warner 2000). And although those on the left generally believe that the state should have a larger role in the ongoing support of families than do conservatives, this is still accompanied by considerable dissension over how much support the state should give, the rationale for this support, and how much to expect that families will do for themselves.13

These political and social developments, and the controversy that surrounds them, point to the need for a careful reconsideration of the state’s posture toward family relationships. In this dissertation, I seek to engage in such a rethinking. The account that I develop is unabashedly liberal, in the sense that it assumes the equal worth of all human beings, the importance of limits on government, and respect for individual rights.14 It takes seriously, however, the recent insights of political theorists who argue that liberalism cannot and should not be completely neutral with respect to different versions of the good life, and that a liberal polity must strive to further a broader range of goods than the individualistic versions of liberty and justice that have often been associated with it (Nussbaum 1999; Galston 1991; Guttman 1989; Macedo 1995; Spragens 1999). And it seeks to combine those insights with those of feminist theorists who have pointed out that the inevitability of dependency, and the consequent need for caretaking, must be accounted for in structuring our

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14I use the term “liberal” throughout this article to refer to the Anglo-American line of political thought stretching from John Locke through John Stuart Mill and on to such contemporary thinkers as John Rawls, whose work focuses on the importance of liberty, self-government, and equal rights for citizens. This use of the term is therefore broader than the use of the term “liberal” in common parlance to refer to those who hold political beliefs at the opposite end of the political spectrum from conservatives. Under my use of the term, both thinkers such as John Rawls, who might qualify as a liberal under common usage, and Robert Nozick, who might be considered a political conservative, are “liberals.”

Put another way, although a liberal democracy should give significant pride of place to individual liberty and justice, it must also pay attention to an array of other goods and principles relating to human dependency and human development that are necessary to a vigorous democracy, and which have been too often read out of standard liberal accounts.15 In my view, it is only by considering this broader range of goods and principles that the appropriate relationship between families and the state can be brought into focus.

It is conceivable, of course that society could be structured in a way in which issues of dependency and human development issues were not primarily dealt with within families. That, however, is the work of some other project. In this work, I assume, following the model of John Rawls,16 that at least some significant part of the work of caretaking for dependency needs and fostering human development will continue to occur within intimate caretaking relationships with those whom we consider “family.” My aim is therefore to construct a theory of the relationship between families and the state that, while paying healthy respect to the values of individual freedom and justice, also supports the caretaking and human development functions, goods, and values that family relationships can provide. At the same time, I seek to do this without idealizing these relationships. As advocates for domestic violence survivors would quickly point out (for example, Pleck 1987, 7-9), families are not always conducive to the welfare of their members. Further, women’s familial

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15 As Charles Taylor says about modern thought generally, “[w]e have read so many goods out of our official story, we have buried their power so deep beneath layers of philosophical rationale, that they are in danger of stifling. Or rather, since they are our goods, human goods, we are stifling” (Taylor 1989, 520).

16 See Rawls 1971, 462-63 (“I shall assume that the basic structure of a well-ordered society includes the family in some form, and therefore that children are at first subject to the legitimate authority of their parents. Of course, in a broader inquiry the institution of the family might be questioned, and other arrangements might indeed prove to be preferable. . . . ”).
relationships, at least within the institution of heterosexual marriage, have been a primary locus of sex inequality in our society (Fineman 2004; Stacey 2003).

My basic thesis is that it is possible to construct a normatively attractive vision of the family-state relationship that pays significant respect to the standard liberal goods of liberty, equality, and justice, and yet also combines them with the recognition that a good society must also foster caretaking and human development. Implementing such a vision, I contend, requires that the state pay specific attention to promoting conditions in which families will flourish, rather than just taking such conditions for granted. In this regard, I contend, the state must be conceived to have a continual responsibility to support families’ capacity for caretaking and human development in the ordinary course of events, rather than simply when families are deemed to fail. Healthy families, in this view, are an achievement to be pursued rather than an inevitability. Yet these conditions can be achieved, I contend, without emptying the public fisc, ignoring principles of fairness to those who are not members of families, or undermining the responsibility and autonomy of the adults who head families. Doing so, however, requires more nuanced policies that are capable of harmonizing the tension among the more diverse array of goods for which a liberal state should strive.

To consider these issues, my plan is fairly simple. Chapter 1 discusses the way that the family-state relationship has been constructed in mainstream liberal political theory. As is somewhat obligatory in a work of liberal revisionism, I begin with the work of John Rawls to discuss the elements of the liberal tradition that have caused it to pay so little attention to families. My basic argument is that specific features of the Rawlsian mode of theorizing make it very difficult to bring families into sharp focus. However, these features, I contend, are not intrinsic to liberalism, itself. While certain defining features of liberalism make it
somewhat less amenable to attending to families than was the political theory that preceded it, liberalism hardly precludes a sensitive treatment of families. Indeed, early versions of liberalism better allowed consideration of the place of families, even if earlier liberals seldom took up the invitation. And, as John Stuart Mill’s robust discussions of families demonstrate, once that invitation is taken up, rich theorizations of the family-state relationship are indeed possible.

Chapter 2 considers recent critiques of liberal theory that bear on the family-state relationship. In it, I review the work of communitarians, recent liberal revisionists (sometimes called “civic liberals”), and feminists. Particular aspects of these critiques, I contend, lay the groundwork for a more nuanced account of the family-state relationship that better takes into account both the goods to be realized and the dangers that might arise from the state’s relationship with families. Thus far, however, there has been a dearth of work that seeks to reconstruct the project of the liberal state in this manner.

The remaining five chapters take up this project of liberal reconstruction by examining different facets of the family-state relationship. Chapter 3 considers the issue of how to conceptualize the state’s responsibility vis-à-vis families for caretaking for those who are substantially dependent on others, including children, the aged, and those with significant disabilities. In it, I consider three possible models of the division of this responsibility between families and the state. The first is Martha Fineman’s model, in which the state’s responsibility is characterized as a debt owed to parents and other caretakers of dependents. The second is the model of subsidiarity propounded by William Galston, which posits that the state’s responsibility to assist families in caring for dependency is triggered only after families have tried and exhausted their own resources. In contrast to these two models, I
advocate a third, which I call the “supportive state” model, in which the state’s responsibility
to dependents in society is conceived as requiring the state to construct institutions that
support families in their caretaking efforts. In doing so, I contend that the state should
develop systems that enable all citizens to integrate both caregiving and breadwinning into
their lives.

Chapter 4 then moves on from the issue of the state’s responsibility to dependents to
consider what stance the state should take to relationships between able adults. Again, I use
Martha Fineman and William Galston as interlocutors. Fineman argues that the state should
have no role in formalizing relationships between adults and has no business according
particular privileges to such relationships. Galston, by contrast, argues that the state should
privilege marital relationships over other forms of families. I argue that the caretaking that
even adults need gives the state an important role vis-à-vis adult-adult relationships. I
contend, however, that the state’s position with respect to these relationships is complicated
by the fact that important principles that underlie liberalism stand in considerable tension
when it comes the state’s position regarding such relationships. I then develop an approach
that seeks to ameliorate the tension among these principles, and to give each of them the
respect that it is due them. This gives the state a role, albeit a limited one, in formalizing and
supporting relationships among adults.

In chapter 5, I turn to the issue of civic education. As both theorists and cultural
commentators have recognized, preparing children for the task of citizenship in a liberal
democracy is an important and demanding responsibility. How should this responsibility be
allocated between parents and the state? And, in the event of disagreement between them
about what this task entails, whose views should trump – parents’ or the state’s? In this
chapter, I contend that a vibrant liberal democracy must seek a delicate balance of three types of interests in educating children for citizenship: liberal, democratic, and civic. As with the issue of relationships between adults, I argue that each of these interests should receive significant weight, but that none of the relevant interests should be allowed to dominate. I then develop an approach that achieves such a balance.

Finally, the last two chapters, 6 and 7, move away from straight political theorizing to a more applied analysis by performing close critiques and suggesting reconstructions of two areas of law involving the intersection of the family and the state. Chapter 6 considers the way in which the intersection between parenting responsibilities and work is treated in United States law. Chapter 7 considers the way in which the law treats foster care and child welfare issues. Both chapters argue that current law provides inadequate support for families that a sound polity requires. I therefore suggest the reformulation of the law in these areas to conform with the “supportive state” model in order to better foster the caretaking and related goods that a strong liberal democracy requires.

**On Terminology and Methodology**

Before I begin my discussion, let me clarify the key terms associated with this project, specifically my use of the terms “family” and “state” – neither of which is self-explanatory. With regard to the former, the issue of which intimate relationships are and should be considered “families” is deeply contested in our society. Far from there being any clear, nonpolitical answer to the question, my project takes as a starting point that what counts as a “family” is inherently intertwined with politics and power. My use of the term “family” here is not meant to elide this definitional issue, but rather to explore it. Part of the function of my dissertation is to consider which relationships are now embedded in our legal
understanding of the term “family” and which are excluded, to consider how these inclusions and exclusions affect the construction of the family-state relationship, and to think through which forms of associations should be recognized as families in a liberal democratic polity.

On a related issue, in writing this work, I considered adopting the plural form of “families,” and thus “families-state relationship” to denominate the relationship between intimate associations and the state. Using this somewhat more cumbersome plural terminology would avoid the mistaken impression that there is any unitary entity that can be identified as a family. However, I have chosen to rely on the singular form, “family,” for the sake of simplicity and clarity. In doing so, I ask the reader to keep in mind that, far from any singular entity, the critical caretaking relationships that sustain us, and on which a viable liberal democracy depends, come in a number of shapes and sizes.

My use of the term “state” also requires some elaboration. As a number of theorists have pointed out, the term is often used, yet rarely pinned down. Moreover, it runs the risk of oversimplifying a complex array of relations, structures, and institutions. That said, I use the term in the sense that it has generally been used in the liberal tradition, to invoke the array of institutions that have a monopoly on legal authority (in this project, specifically legislative and juridical authority), and which are presumed legitimately to have only a limited role in the lives of citizens. This use of the term refers not only to the formal legal rules and procedures that comprise these institutions, but also the cultural meanings attached to and embedded within them. My use of the term “polity” is broader, intended to cover not simply the state itself, but also encompass the political community and the citizens who comprise it, as well as civil society.

17See, for example, Peter Steinberger’s recent book (2004,12), in which he argues “that an on-going and recurrent failure on the part of political theorists to be clear about what they mean when they use the word ‘state’ has led to an entire range of important theoretical confusions.”
Turning briefly to an issue of methodology, this project seeks to consider how families relate to the complex of ideals and purposes that should motivate the liberal democratic project and to consider how these ideals and purposes might best be realized in the relationship between families and the state. It probably goes without saying, but since my method is not to deduce conclusions from claimed fundamental moral principles as, for example, John Rawls sought to do in his earlier work, my arguments will succeed or fail to the extent I convince the reader of the normative attractiveness of my proposal. As Thomas Spragens says of a similar project: “It should be obvious, then, that no one can reasonably pretend to have any knock-down arguments in this particular universe of discourse (Spragens 1999, xiii).” My hope, of course, is still to convince the reader that the vision of the family-state relationship that I propose is a better alternative than the existing academic and public visions or their current contenders. At the very least, I hope to demonstrate that the issue is a far more complex one that warrants far more discussion than it has received thus far.
Despite the importance of families to a well-ordered polity, Anglo-American political theory took little notice of them from its renaissance in the 1970s through almost the turn of the twenty-first century. Why is this? The omission likely did not represent a deliberate attempt on the part of theorists to leave out women or concerns traditionally attributed to them: these theories were written during the second wave of feminism in the United States, and most of them gave at least a passing nod to sex equality. Perhaps it could be argued that the omission was an oversight: the political theory of this era was still largely the province of men who tended to have less responsibility for domestic concerns than women, and who therefore might have been less likely to focus on these issues. While there may be some truth to this explanation, in my view there is more to it than that: particular features

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18 For example, although John Rawls did not explicitly state in *A Theory of Justice* (1971) [“ATOJ”] that sex is one of the characteristics that is morally irrelevant in the original position, in subsequent work, Rawls confirmed that he considers sex to be such a factor (Rawls 1975, 537).

19 In fact, John Rawls validated this explanation in an unpublished manuscript, saying:

Except for the great John Stuart Mill, one serious fault of writers in the liberal line is that until recently none have discussed in any detail the urgent questions of the justice of the family, the equal justice of women and how these things are to be achieved. Susan Okin’s contentions about this in *Justice, Gender and the Family* cannot be denied. Liberal writers who are men should, with whatever grace they can muster, plead nolo contendere to her complaints. (Unpublished manuscript, quoted in Nussbaum 2003, 488).
of the way in which theories of this era were conceived made it difficult to properly conceptualize families and their role in a liberal democracy.

In this chapter, I use the work of John Rawls to explore the features of late-twentieth century liberal theory that obscured attention to families. I focus on Rawls’ work because of the immensely powerful influence it has had on liberal theory and because, as a result of this influence, it typifies much contemporary liberal theory. I contend that particular features of *A Theory of Justice* that set the stage for later liberal theory – the limited focus on the good of justice, to the exclusion of other goods such as human development, human virtue, and affection; the failure to conceptualize the dependency inevitable in the human condition, and therefore the need for caretaking; and the attempt to keep the state neutral with respect to citizens’ conceptions of the good – prevent an adequate theorization of the role of families in a liberal state. Yet these features, I argue, are adventitious to Rawls’ work rather than necessary features of liberal theory. To demonstrate this, I show that earlier versions of liberalism better accommodated a more nuanced discussion of the role of families, even if earlier liberals seldom engaged in such discussions. I then use the work of John Stuart Mill to demonstrate the rich discussions of families possible in liberal theory.

**Families and the State in the Work of John Rawls**

*A Theory of Justice*

Normative political theory was widely considered to be a dead subject during the middle of the twentieth century as a result of the firm grip that positivism had on the academy at that time (Nussbaum 2001). John Rawls’ *A Theory of Justice*, with its broad theorizing of what justice demanded in a liberal state, is widely credited with reinvigorating political theory. As feminist theorists have pointed out, however, little attention was paid to
families in this work and in the considerable foment of liberal theory that followed in its wake. In this section, I describe Rawls’ work and consider why *A Theory of Justice* focused so little on the family-state relationship.

In his most famous work, Rawls made it clear that his theory was limited to describing principles of social justice, rather than alternative principles that might guide a polity, such as, for example, achieving happiness or virtue. Rawls justified this limited focus on the rationale that “[j]ustice is the first virtue of social institutions, as truth is of systems of thought” (3). Social justice is so fundamental, Rawls counseled, because “[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override” (3). With that said, according to Rawls, “even though justice has a certain priority, being the most important virtue of institutions, it is still true that, other things being equal, one conception of justice is preferable to another when its broader consequences are more desirable” (6).

In laying out his theory, Rawls explained that his principles of justice do not apply to every interaction between citizens. Instead, they govern only “the basic structure of society, or more exactly the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation” (7). Among the institutions that compose the basic structure, Rawls lists competitive markets, private property in the means of production, and, most importantly for the subject at hand, families (7, 462-63).

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20. This standard, however, is not to be confused with the principles defining the other virtues, for the basic structure, and social arrangements generally, may be efficient or inefficient, liberal or illiberal, and many other things, as well as just or unjust. A complete conception defining principles for all the virtues of the basic structure, together with their respective weights when they conflict, is more than a conception of justice; it is a social ideal” (*ATJ*, 9).
The majority of *A Theory of Justice* is then spent developing these principles of justice and applying them to the institutions that make up the basic structure of society. Yet despite Rawls’ categorizing the family as part of the basic structure at the beginning of the book, throughout the rest of the book, as Susan Okin pointed out, he never scrutinized the internal justice of families (Okin 1989a, 97). In fact, throughout the rest of *A Theory of Justice*, Rawls largely ignored families altogether, mentioning them only in a few contexts, and then generally only in passing. For example, Rawls suggests that persons in the original position might be thought of as heads of household, and he states that he will generally follow this interpretation (128). He made explicit that his goal in doing so, however, is simply to ensure that the decisional rules chosen in the original position will be fair to future generations (128-29); there is no indication that the “head of household” assumption alters any of the decisions that those in the original position would make aside from saving resources for future generations.

Rawls also briefly touched on the problematic implications that families have for equality when he argued against the distribution of primary goods based on both individual capacities and efforts. Both of these, he contended, are affected by the families in which children are raised. In Rawls’ words:

> [T]he principle of equality of opportunity can be only imperfectly carried out, at least as long as the institution of the family exists. The extent to which natural capacities develop and reach fruition is affected by all sorts of social conditions and class attitudes. Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is itself dependent upon family and social circumstances (*ATOJ*, 74).

Later in *A Theory of Justice*, Rawls extended this argument to character, as well.\(^{21}\) While these observations might invite an examination of the institution of families and even,

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\(^{21}\) He stated that “[t]he assertion that a man deserves the superior character that enables him to make the effort to
perhaps, consideration of how the state might support families to encourage the development of these capacities, Rawls never took up these subjects. Instead he simply asserted that the differences caused by different family circumstances should be deemed politically irrelevant, and left it at that (104).

The only time that Rawls discussed families at any length, in the less widely-read Part III of *A Theory of Justice*, is also the only time that Rawls recognizes any positive role that families play with respect to any virtue he deemed politically relevant – here, a sense of justice. At this point, Rawls linked children’s development of a sense of justice to the existence of a particular kind of relationship between children and their parents that includes love and guidance. Yet although Rawls treats families as crucial to children’s developing a sense of justice, and recognizes that the success of a liberal democracy depends on instilling this quality in each generation, he treated this development as if it were a black box – as if families either will or will not develop this sense in their young regardless of their relationships with the state.

Susan Okin has already insightfully argued that Rawls' account of the development of children’s sense of justice depends on the internal justice of the family but that, inexplicably, Rawls fails to consider whether the monogamous family is, in fact, just with respect to gender (Okin 1989a). I want to consider Rawls' failure in *A Theory of Justice* to discuss families more generally. Given that Rawls discusses other institutions crucial to an ongoing liberal democracy in some detail, why is such a central institution only barely mentioned in his theory? In my view, the explanation lies not with a simple oversight on Rawls' part. Instead, I contend that three specific features of Rawls' mode of theorizing prevented him to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit” (104).
from bringing families into focus. First, Rawls limited his theory to focus on justice, therefore obscuring other goods and virtues essential to a liberal polity with which families are fundamentally linked. Second, he conceptualized the human condition without recognizing the centrality of dependency, and therefore the centrality of the need for caretaking in any system of organizing how humans live together. And third, his goal of state neutral with respect to citizens’ conceptions of the good prevented him from focusing on the goods that families might foster. I discuss each feature in turn.

**Focus on justice**

First and foremost, by confining *A Theory of Justice* to the good of justice, without attending to other virtues relevant to a liberal democracy, Rawls obscures much of the relevance of families to the health of liberal democracies. In this framing, families are relevant only insofar as they intersect with Rawls’ version of distributive justice, which Rawls defines with an emphasis on the good of equality. This narrow framing, however, misses many of the goods that families bring to a liberal polity. Under Rawls’ lens, the important role that families play in raising young citizens, in providing care for older and disabled citizens, and in developing the capacities of all citizens is irrelevant insofar as it cannot be related to justice. By the same token, the role of families in developing particular virtues that a liberal polity has an interest in furthering, such as tolerance, intelligence, and public spiritedness, is not considered in his account.

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22 Rawls defines justice in a distributive sense -- in terms of how the fruits of social cooperation, which he defines in terms of fundamental rights, duties, and goods, are distributed within society (4, 7). He then argues that a just society would give all equal political rights, while distributing resources equally unless an unequal distribution would reasonably be expected to advantage the least favored in society (303).
This framing not only misses the goods associated with families, it emphasizes their disadvantages. While families are important to a healthy polity in many ways, they tend to be a problem for the value of equality since they often create unequal distributions of wealth, as well as of capacities, effort, and character (Fishkin 1983). It is for this reason that Rawls considers the negative aspects of families, to the extent that he considers families at all: considering only families’ relationships to justice makes it easy to ignore families’ most important functions. Susan Okin is therefore correct that a scrutiny of the internal justice of families should have been included within Rawls' framework as it is currently constructed (Okin 1989a). Families’ critical relationship to other important goods, however, cannot be comprehended within that framework.

Rawls’ narrow focus on justice also obscures attention to families by neglecting principles other than justice by which goods and resources might be distributed in society. For example, Rawls does not take account of how the application of principles based on care, birth, or blood might distribute goods and resources, or how such distributions should intersect with these principles of justice. Raising these issues, though, would bring the issues associated with families into better focus. Do we want family members to be able to distribute their wealth and their caretaking to family members, both because we value their expression of love and want to promote this type of relationship? And, if so, how should we balance this against the principle that society should tax such a distribution to ensure some degree of economic equality in our society and the citizens’ responsibilities to society? Along similar lines, given that the polity has an interest in developing the capabilities of all of its citizens, how should principles of distribution to increase citizens’ capabilities be squared with distribution based on principles of justice?
Rawls recognizes that his focus on justice is limited. He states at one point that this limitation may mean that a theory of justice must be combined with theories relating to other virtues in order to produce a comprehensive vision of a good state.\textsuperscript{23} Yet the manner in which he applies his principles precludes any meaningful compromise between justice and other principles. As Thomas Spragens points out, Rawls does not define justice in terms of a basic institutional threshold that a well-ordered, free society should meet, for example, by ensuring that all citizens have voting rights, that the rule of law applies to all, and that all have fair access to courts. Conceiving of justice in this way would allow the remaining societal resources to be used to pursue other goods and virtues once these prerequisites of justice had been satisfied (Spragens 1999, 59). In contrast, Rawls’ scheme dictates the way in which all rights, responsibilities, and goods that are part of the basic structure are distributed. It is therefore only in the situation in which alternative schemes are equal with respect to distributive justice, but produce different consequences for other goods, that such goods can be considered (Spragens 1999, 59-60).\textsuperscript{24}

Rawls' focus on distributive justice therefore not only prevents adequately conceptualizing and valuing important virtues associated with families, it could actively undercut these same virtues. In Thomas Spragens' words:

\begin{quote}
[A] well-ordered society must . . . recognize that attempts to eliminate all sources of unfairness – all undeserved inequalities – will unfortunately impinge destructively upon other social practices and relationships that not only have great value to society but also have strong moral standing in their own right. Paramount among these
\end{quote}

\textsuperscript{23}A complete conception defining principles for all the virtues of the basic structure, together with their respective weights when they conflict, is more than a conception of justice; it is a social ideal. The principles of justice are but a part, although perhaps the most important part, of such a conception” (ATOJ, 9).

\textsuperscript{24}“Even though justice has a certain priority, being the most important virtue of institutions, it is still true that, other things being equal, one conception of justice is preferable to another when its broader consequences are more desirable” (ATOJ, 9).
practices and relationships are affiliations of blood and affection, including family ties (Spragens 1999, 60; see also Fishkin 1983).

In other words, a society that distributes goods based solely on Rawls’ criteria of distributive justice will harm those institutions, including families, that rely on distributive principles other than justice. For example, Rawls’ focus solely on justice prevents the state from seeking to foster what Rawls refers to elsewhere as “supererogatory actions,” those “acts of benevolence and mercy, of heroism and self-sacrifice” which stem from “higher-order moral sentiments that serve to bind a community of persons together” (ATOJ, 117, 192). However, as Thomas Spragens points out, "a society bereft of the enormous contributions to nurturance, socialization, and economic support made in the context of and as a consequence of these affiliations would be in deep trouble" (Spragens 1999, 60).

Thus, while Rawls’ theory of justice may at first blush seem appealing because it provides a clear hierarchy of values that should govern the distribution of most of the basic resources in society, on closer scrutiny, it does so only by ignoring other, sometimes competing, goods besides justice that any healthy liberal democracy must also take account. In sum, Rawls' sole focus on justice, and his attempts to create a complete, determinative distribution scheme based solely on this value, diverts consideration from other social goods that families create that have an important role to play in a liberal democratic polity. His narrow focus also precludes legitimate discussion about the hard choices that need to be made between competing ends. Finally, by excluding principles of distribution aside from justice, application of his theory could be destructive of family groupings.
Failing to conceptualize human dependency

And it is not simply Rawls' focus on justice that renders families invisible; his conception of the human condition does so as well. Certainly there is no problem with Rawls’ modeling his theory on the moral ideal of free and equal citizens who cooperate with one another on the basis of reciprocity and mutual respect (\textit{ATOJ}, 546), yet Rawls seems to mistake this moral ideal for an account of human nature.\textsuperscript{25} In doing so, he frames a theory that largely ignores the dependency that is a part of the human condition, and ignoring dependency means that Rawls ignores the institution in which dependency is largely dealt with – families. The inevitable dependency that characterizes children, many older adults, and others at varying points of their lives because of physical or mental illness receive startlingly little discussion, and is never considered by Rawls in any detail. Indeed, Rawls’ framing of the central project of government as how to divide basic social goods among citizens (4), rather than how to bring citizens into existence and deal with the dependency that all humans face at various times in their lives, bespeaks a view of humanity in which dependency is a relatively minor concern (62). Further, as Eva Feder Kittay points out, in setting out the list of those primary social goods that “a rational man wants whatever else he wants,” although Rawls includes only “rights and liberties, opportunities and powers, income and wealth,” he notably neglects to include the good of care (92).

Rawls’ framing of his theory on the model of able adults means that it cannot account for the importance of caretaking or nurture that families can offer, and provides no way to

\textsuperscript{25}I am not making the claim that Rawls’ description of persons in the original position supports this view. It is certainly true, as Rawls’ defenders have argued, that those who criticize Rawls’ original position on the ground that it conceives humans as autonomous and detached from others misunderstand Rawls’ construct: the original position is intended as a moral rather than an ontological construct that, indeed, models benevolence (see, for example, Nussbaum 1999, 55-80). With that said, other elements of his theory are vulnerable to that charge.
grapple with the issue of dependency with which all decent and humane societies must deal. Rawls’ failure to grasp the inevitability of dependency is evident in his response to the charge that he should have discussed the situations of dependent persons with severe mental and physical handicaps: according to Rawls, such difficult cases are better left to the later legislative stage (Rawls 2001, 171-76, 303, 332). Yet it is only by seeing humans as generally able and independent, rather than as a combination of independent and dependent that varies over a lifetime, which could lead Rawls to see such dependent persons as special cases rather than one end of a continuum that represents the human condition.26 As Eva Feder Kittay states:

Because dependency strongly affects our status as equal citizens (that is, as persons who, as equals, share the benefits and burdens of social cooperation), and because it affects all of us at one time or another, it is not an issue that can be set aside, much less avoided. Its consequences for social organization cannot be deferred until other traditional questions about the structure of society have been settled without distorting the character of a just social order. Dependency must be faced from the beginning of any project in egalitarian theory that hopes to include all persons within its scope (Kittay 1999, 77).

And as relevant as dependency issues are with respect to goods aside from justice, dependency issues also have important implications for social justice that Rawls neglects. Without considering dependency’s relationship to justice, Eva Feder Kittay rightly points out, the dependency work necessary in any society can be accomplished only through the “exploitation of those who do dependency work or by the neglect of the concerns of the dependents” (Kittay 1999, 77; see also Okin 1989a). It is only by recognizing the ways in

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26In Martha Nussbaum’s words, this framing “makes us think of ourselves as atemporal. We forget that the usual human life cycle brings with it periods of extreme dependency, in which our functioning is very similar to that enjoyed by the mentally or physically handicapped throughout their lives” (2002, 188). See also Kittay 1999, 88.
which humans are both dependent and independent that a state committed to justice as well as to other important goods can properly order its affairs (Kittay 1999, 101).

*State neutrality*

At the same time, Rawls’ view that the liberal state should remain neutral on citizens’ views of the good life sharply curtails recognition of the value of families in a sound liberal polity. In Rawls’ view, “the liberal state rests on a conception of equality between human beings as moral persons, as creatures having a conception of the good and capable of a sense of justice . . . . Systems of ends are not ranked in value” (*ATOJ*, 19). On this basis, Rawls generally treats the development of citizens’ preferences, traits, and qualities as exogenous to his theory and as irrelevant to the concerns of the liberal state. What is more, his reluctance to identify virtues aside from those necessary to conceive his conception of justice (pt. III) means that the family’s role in nurturing many qualities necessary to a thriving liberal democracy never makes it into the picture.

To summarize, three features of the way in which Rawls constructs *ATOJ* eclipse the importance of the role of families in a liberal state. First, Rawls’ narrow focus on distributive justice, framed with a heavy emphasis on equality, makes it easy to see the family only in terms of their disadvantages to equality, insofar as it calls attention to families at all. Second, Rawls’ conceptualizing of the citizens who inhabit his theory as able adults also obscures the role of families. Third and finally, Rawls’ goal of state neutrality excludes attention to the state’s need for the virtues that families foster.
Rawls’ Later Work

Rawls’ later work has not had the tremendous level of influence that *ATOJ* has had. Nevertheless, I want to briefly discuss one later article, “The Idea of Public Reason Revisited” (1997), because in it, Rawls specifically addresses families’ relationship to his theory in some detail. In doing so, Rawls sheds light on another feature of contemporary liberal theory that makes it hard to grapple with the family-state relationship – the view that families are properly pre-political in the sense that they have some “natural” way of functioning to which they should be left by the state.

In his 1997 article, Rawls at last specifically addresses how principles of justice should apply to the family. According to Rawls, although the family is part of the basic structure to which principles of justice might apply, these principles “do not apply directly to its internal life,” but instead guarantee the basic political “rights and liberties and the freedom and opportunity of all its members” (Rawls 1997, 789-90). He likens the family to other voluntary associations such as private universities and churches which, he contends, need not be constrained by principles of political justice internally, so long as they do not hinder these principles from operating outside these associations. For example, “[c]hurches cannot practice effective intolerance, since, as the principles of justice require, public law does not recognize heresy and apostasy as crimes, and members of churches are always at liberty to leave their faith. Thus, although the principles of justice do not apply directly to the internal life of churches, they do protect the rights and liberties of their members by the constraints to which all churches and associations are subject” (789).

Applying this approach to families, Rawls tells us:

These principles [of justice] do not inform us how to raise our children, and we are not required to treat our children in accordance with political
principles. Here those principles are out of place. Surely parents must follow
some conception of justice (or fairness) and due respect with regard to their
children, but, within certain limits, this is not for political principles to
prescribe. Clearly the prohibition of abuse and neglect of children, and much
else, will, as constraints, be a vital part of family law. But at some point
society has to rely on the natural affection and goodwill of the mature family
members (790).

Based on this internal-external dichotomy, Rawls counsels that principles of social
justice should be applied at the end of a marriage to ensure that women are justly
compensated for childrearing. Intervention in the internal workings of an extant
family to eliminate unequal sex roles, however, would be inappropriate if the
childcare arrangements were “fully voluntary” between the spouses and did not stem
from or lead to injustice (792). This means that

the government would appear to have no interest in the particular form of
family life, or of relations among the sexes, except insofar as that form or
those relations in some way affect the orderly reproduction of society over
time . . . for example, if monogamy were necessary for the equality of
women, or same-sex marriages destructive to the raising and educating of
children (799).

Put another way, “[s]ince wives are equally citizens with their husbands, they have
all the same basic rights, liberties, and opportunities as their husbands; and this,
together with the correct application of other principles of justice, suffices to secure
their equality and independence” (789-90).

Susan Okin has already powerfully challenged Rawls’ claim that principles
of justice should not regulate the internal lives of families, as well as demonstrated

27“Some want a society in which division of labor by gender is reduced to a minimum. But for political
liberalism, this cannot mean that such division is forbidden. One cannot propose that equal division of labor in
the family be simply mandated, or its absence in some way penalized at law for those who do not adopt it. This
is ruled out because the division of labor in question is connected with basic liberties, including the freedom of
religion. Thus, to try to minimize gendered division of labor means, in political liberalism, to try to reach a
social condition in which the remaining division of labor is voluntary. This allows in principle that considerable
gendered division of labor may persist. It is only involuntary division of labor that is to be reduced to zero”
(792).
the way in which the division of labor in the family creates inequalities for women in society (Okin 1989a). Less noticed are the specific features of his theory that led Rawls, otherwise such a strong advocate of justice, to reject applying these principles to the internal lives of families. One particular feature responsible for this is Rawls’ view of the family as functioning in some natural, prepolitical way that would be adulterated if the state were to intercede.

To be fair, Rawls at times explicitly demonstrates his recognition that the family is a political rather than a natural entity. For example, Rawls’ inclusion of the family as part of the basic structure of society indicates his awareness of the political nature of the family (ATOJ 7); likewise, his statement at the end of A Theory of Justice that he is simply assuming the existence of the family for purposes of considering the development children’s sense of justice and that “in a broader inquiry the institution of the family might be questioned, and other arrangements might indeed prove to be preferable” (463), also demonstrates a recognition that the nuclear family is not an inevitable or immutable feature of life, and is potentially subject to political control. In addition, Rawls specifically disclaims the view that the private sphere is immune from the requirements of justice (1997, 789).

Nevertheless, the distinction that Rawls seeks to draw between the internal and external workings of families still suggests his basic belief that some “internal” realm of the family exists that is and should be left immune from the operations of the state. As Rawls depicts them, families are entities that exist apart from the state, and for whom state action should be limited to their point of intersection with the state. This might be graphically depicted by drawing a circle on a sheet of paper: it
is only at the circumference of the circle – the interface between families and the state – that the state may regulate. Everything within the circle, on this view (short of extreme cases, such as abuse), is the family's realm, that should be left to the families’ own “natural” functioning, and in which the state should play no part. Recall Rawls’ statement that “at some point society has to rely on the natural affection and goodwill of the mature family members” (Rawls 1997, 790).

In theorizing the relationship in this manner, Rawls both misstates and oversimplifies the relationship between families and the state. As a growing number of theorists point out, the contemporary family is not a natural, prepolitical structure, but an entity whose shape and function are shot through with political choices and state action (for example, Minow 1997; Nussbaum 2002, 199). The link between politics and family is demonstrated most obviously by the fact that what constitutes a family is itself defined by law, rather than some structure that preexists it.\footnote{In Martha Nussbaum’s words:}

People associate in many ways, live together, love each other, have children. Which of these will get the name “family” is a legal and political matter, never one to be decided simply by the parties themselves. The state constitutes the family structure through its laws, defining which groups of people can count as families, defining the privileges and rights of family members, defining what marriage and divorce are, what legitimacy and parental responsibility are, and so forth. This difference makes a difference: The state is present in the family from the start, in a way that is less clearly the case with the religious body or the university; it is the state that says what this thing is and controls how one becomes a member of it (1997, 199).

In addition, the ways in which families function are also deeply and inextricably intertwined with government policy. For example, laws regulating child labor and education shape the lives of children and affected parents’ control over them (Nussbaum 1999, 262). Equal employment legislation for women affected women’s movement into the labor market, which, in turn, influenced the availability
of childcare within families. Equal employment laws also probably contributed to the increase in divorces, as greater numbers of women in unhappy marriages began to have the financial wherewithal to divorce their husbands (Mergenhagen 1992, 53). By the same token, the relaxation of divorce laws affected whether and which families stay together (see, for example, Brinig & F. H. Buckley 1998). Laws governing the availability of health insurance for employees’ family members influence not only which family members work, but what kind of health care children and other family members receive. And United States welfare policy was, as Alice Kessler-Harris has demonstrated, constructed deliberately on a model that pitted work and family in mortal conflict (Kessler-Harris 2001). In these circumstances, the family has no “natural” baseline of functioning that it can be left to “apart from” the state. Yet Rawls’ views that families somehow retain a “natural” core that should remain untainted by the influence of the state leads him to adopt a hands-off attitude with respect to the functioning of families and provides no guidance to the state when its policies inevitably affect how families function.

Rawls’ view that families are properly removed from the workings of political power is also related to his view that what happens within families is generally “voluntary,” in some relatively uncomplicated sense. Rawls sees only two distinct possibilities with respect to the adoption of traditional gender roles: either they are voluntary, in which case he tells us that we should assume that the arrangement yields fair opportunities for the sexes, or they are involuntary. In only

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29 See Gunderson 1989 (concluding that antidiscrimination laws had a positive, albeit modest, effect on women’s entry into the labor force); Ellman, Kurtz, and Scott 1991, 46-51 (discussing how women’s influx into the workplace created childcare issues at home.)
the latter case may the state act. In formulating this dichotomy, Rawls overlooks the complicated ways in which sex role preferences often come to reflect the conditions of inequality in which they were formed by adapting women’s (and men’s) sense of what is possible, normal, and desirable (Abrams 1999; Higgins 1997). An appreciation of these dynamics makes it far more difficult to accept gender patterns as unproblematic because they are “voluntary”, and therefore properly immune from state action.

Finally, and also related to these earlier points, is Rawls’ apparent assumption that families, so long as they remain unimpeded by the state, will flourish. In this conception, families need no economic, social, or political preconditions other than those that pertain to individuals to function well and to spit out happy, healthy future citizens into the larger society. For Rawls, principles of justice may occasionally be necessary to constrain families and the inequalities they produce. However, as evidenced by the complete lack of discussion about the issues, no resources are required for families to flourish, apart from those properly distributed to individual members of the family by the state based on principles of justice.

In conclusion, Rawls’ later work shows the vestiges of the belief that the family is somehow a natural, pre-political entity that should remain aloof from the state. This view, in combination with those apparent in ATOJ – the limitation on political theorizing to the good of justice, the conceptualizing of the subjects of theory as able adults, and the position of the state to neutrality – act to keep families from the center of political theorizing. But while these features are reproduced in much contemporary liberal theory, they are not intrinsic to liberal theory itself.
Early Liberal Treatment of the Family-State Relationship – John Stuart Mill

Early liberals

John Rawls’ work is, of course, only a small part of the line of liberal political theory that extends back for more than three centuries, and an even smaller part of Western political thought generally. But Rawls’ work is certainly not atypical of the line of Western political thought in paying little attention to the issue of families. To some extent, this might not be surprising given that most writers on political thought were white men who were less closely tied to family responsibilities and household work than their female and non-white counterparts. Further, for the vast majority of the history of this thought, the women who were charged with family responsibilities were not only denied citizenship, they were often not even deemed fully human. Yet at the time liberal political theory emerged, discussion of families became even more submerged than in previous political thought.

Some of the explanation for the absence of families from liberal theory is intrinsic to liberalism, itself. One of the demarcations between earlier classical and medieval political thought, on the one hand, and the liberal tradition, on the other, is liberalism's adoption of methodological individualism, which embodied the view that individuals rather than communities or families are the relevant unit of political theory. Further, what was relevant about individuals for purposes of liberal theory was no longer their position in the social network, including their familial position, but each individual's basic equality in some shape or form.\(^3\) Liberalism’s emphasis on the individual as an individual didn't require ignoring individuals' social and familial ties, but it at least kept attention elsewhere. Moreover, the

\(^3\)As the English Leveller, John Wildman said at the time of the Putney Debates on October 29, 1647: "Every person in England hath as clear a right to elect his representative as the greatest person in England" (Woodhouse 1992, 66).
efforts of liberals to carve out a sphere of individual liberty for citizens also drew attention away from families, since families were perceived as quintessentially part of the private realm from which the state should be removed.

This transformation at liberalism’s inception made early liberal theorists pay even less attention to families than the relatively scant attention families had received in earlier classical and medieval political theory. Even if Greeks seldom considered families, their ideal of politics as a well-ordered common life led far more easily to consideration of the role of families because of families’ role in molding citizens, than did the liberal conception of politics as largely based on the preservation of individual rights. It was achieving this goal of harmony that led Plato in *The Republic* to make the suggestion that some children should be separated from their biological families and reared by the class of people who most matched their basic natures. Doing so, Plato argued, was necessary for citizens to become the kind of people who could inhabit a state in which each person assumes his or her proper role in a harmonious polity (Plato, Bk. III, ll. 412-17). Plato’s proposal sounds bizarre to the contemporary liberal ear because he conceives of no limits to the state’s power in citizens’ private lives, no issue of parents' right to raise their children as they see fit, and gives no weight to children's interest in choosing who they want to be. It is these characteristic concerns of liberalism that steered early liberals away from considering families to be a proper province of political theory.

Because of these features of liberalism, although early liberal theorists like Locke sometimes referred to families, they did so precisely to distinguish political power from the familial power with which it had previously been associated. Arguing against the view that kings had a natural right of sovereignty over their subjects that had been passed down from
Adam's paternal authority over his children, Locke contended that "the power of a magistrate over a subject may be distinguished from that of a father over his children, a master over his servant, [and] a husband over his wife" (Locke, 7). The intended (and achieved) result was to place political power on the table for debate in a manner it had not been previously by distinguishing it from the still-uncontested right of fathers and husbands. Families, and the state’s relationship with them, were thereby even further removed from political debate. The result was that early liberal accounts often overlooked both these facts in much the same way that Rawls did three centuries later. As the conservative critic of Hobbes, William Lucy, wrote more than three hundred years ago: “Methinks that he discourses of men as they were terrigene, born out of the earth, come up like Sees, without any relation one to the other. . . [By nature a human is] made a poor helpless Child who confides and trusts in his Parents, and submits to them” (Salkever 1990, 211 n.13).31

With that said, however, although these features intrinsic to liberalism tended to turn the attention away from families, they did not, in contrast to Rawls’ work centuries later, require completely eclipsing them. Early liberalism’s conception of individuals as autonomous for the purposes of protecting their rights did not require ignoring how these individuals achieved autonomy. Moreover, liberalism’s rejection of the view that individuals should take their status from their family did not require ignoring that presumptively equal individuals were reared by families. Indeed, early-liberal political theory contained several features that allowed fuller consideration of families than later Rawlsian-era versions. First, in contrast to Rawls’ work, early liberalism recognized the importance of a broader range of

31See also Filmer, at 241 (accusing Hobbes of “imagining a company of men at the very first to have been all created together without any dependency one of another, or as mushrooms . . . they all on a sudden were sprung out of the earth without any obligation one to another”); Okin 1989b (stating that liberalism pays “remarkably little attention to how we become the adults who form the subject matter of political theories.”).
goods than the value of liberty, equality, and justice that currently receive pride of place. In this way, they invited attention to the importance of families. Although the protection of rights and liberty was the primary focus of early liberalism, individual virtues still played a crucial role in them. Thus, although the *Federalist Papers* is most often recognized for the authors' reliance on institutional checks to protect against tyranny and injustice, its authors recognized that these checks could never completely substitute for virtue, which they considered an integral element of the new republic's success. In Madison's words:

> As there is a degree of depravity in making which requires a certain degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another (Federalist 55, 284; see also Spragens 1999, 217).

Early liberals’ understanding of human institutions as tools that could be used to foster virtue in citizens also warranted focusing on the role that families might play in this process. While it is certainly true that early liberals saw human nature as less malleable than the line of continental European theorists stretching from Rousseau to Marx, they were still considerably more likely to view institutions in this way than contemporary liberals. For example, Locke saw the law not simply as a tool to arbitrate among individual rights: "for law, in its true notion, is not so much limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no farther than is for the general good of those under that law" (Locke, 32). Law here does more than carve out zones of individual liberties – it actively attempts to move citizens toward a virtuous community.
Further, although early liberal theorists, as with Rawls, didn’t adequately take into account the inevitable dependency of the human condition, in contrast to him, they at least still tended to see individuals as fundamentally social beings with ties to one another. As Locke describes it, "God having made man such a creature, that in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into society, as well as fitted him with understanding and language to continue and enjoy it" (42). Men keep company, in Locke’s view, not only to increase personal goods but because they have an innate "desire . . . to be loved of my equals in nature" (Locke, 9 (quoting Hooker)). This desire to be loved creates toward other men "a natural duty of bearing to them-ward fully the like affection" (Locke, 9). This description stands in contrast to Rawls’ picture of essentially able adults who have no necessary connection to one another.

*John Stuart Mill*

Although most early liberal authors did not accord families the scrutiny that I argue early versions of liberalism allowed, John Stuart Mill's work demonstrates that liberalism can engender rich theorizations of families and the family-state relationship. Mill, despite penning what has remained the most avid defense of liberty in the liberal tradition, still recognized the important link between virtue and good polities. "[I]f we ask ourselves on what causes and conditions good government in all its senses depends, we find that the principal of them, the one which transcends all others, is the qualities of the human beings composing the society over which government is exercised" (Mill *CRG*, 225). In fact, Mill’s *Considerations on Representative Government* is essentially a long discourse regarding how political institutions could be used to contribute to the human development of citizens.
This focus on virtue led to Mill’s recognition of the role of society in ensuring that children develop the necessary qualities to become citizens. For example, Mill argues that the existing generation is master both of the training and the entire circumstances of the generation to come; it cannot indeed make them perfectly wise and good, because it is itself so lamentably deficient in goodness and wisdom; and its best efforts are not always, in individual cases, its most successful ones; but it is perfectly well able to make the rising generation, as a whole, as good as, and a little better than, itself. If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences (Mill OL, 91).

Here, Mill's recognition of the inevitable fact of interdependence of citizens, combined with his recognition that good citizens do not simply spring up like mushrooms, led him to posit a societal responsibility for childraising. In doing so, Mill argued for a broader responsibility on society's part than simply insuring basic human survival; the interdependence of citizens is so great, he says, that society must instead aim instead to foster “goodness and wisdom.” Mill’s version here has much in common with what is commonly identified with republican theorists: an emphasis on virtue, and a focus on the way that institutions can instill it. Yet he recognized the limits to virtue, as well: he relies not on citizens’ virtue to ground their responsibility to the next generation, but rather, as Tocqueville would put it, on their “self interest, properly understood,” that is, the problems created for society if the next generation is not adequately raised. At the same time, Mill’s recognition of societal interdependence does not diminish his emphasis on individual liberty and responsibility: he expected that parents will assume primary responsibility for the task of childrearing, but recognized that society and the state also have some role to play.32

32 “[T]o bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; and that if the parent does not fulfill this obligation, the State ought to see it fulfilled, at the charge, as far as possible, of the parent” (Mill OL, 117; see also 120-21).
To this mix, Mill also introduces the important liberal value of equality. By applying it to the sexes, however, and then using it to scrutinize families, Mill uses the tools and concepts of liberal theory to attain critical purchase on families as an institution that other liberal theorists, both then and now, have largely avoided. Specifically, because families are a training ground for democratic citizenship, Mill argued that they must reflect the principles of equality and justice on which a democracy is founded. He therefore condemns the inequality of women in the current family structure as inhibiting the development of children’s democratic character. In Mill’s words:

The family is a school of despotism, in which the virtues of despotism, but also its vices, are largely nourished. Citizenship, in free countries, is partly a school of society in equality; but citizenship fills only a small place in modern life, and does not come near the daily habits or inmost sentiment. The family, justly constituted, would be the real school of the virtues of freedom. It is sure to be a sufficient one of everything else. . . . What is needed is that it should be a school of sympathy in equality, of living together in love, without power on one side or obedience on the other . . . . The moral training of mankind will never be adapted to the conditions of the life for which all other human progress is a preparation, until they practice in the family the same moral rule which is adapted to the normal constitution of human society (Mill, SW, 519).

Mill, in this passage, links the private and the public, recognizing that crucial goods for the polity are linked to goods inside the family. In this respect, he pushes Jean Jacques Rousseau’s insights further than Rousseau did himself. Rousseau recognized the strong link between the families and democracy in the context of reacting to Plato’s proposal to weaken the family structure. According to Rousseau, “Plato acts as though there were no need for a natural base on which to form conventional ties; as though the love of one’s nearest were not the principle of the love one owes the state; as though it were not by means of the small fatherland which is the family that the heart attaches itself to the large one” (Rousseau, 363). Rousseau therefore recognized that to be good citizens capable of participating effectively in self-government, the family must provide future citizens with certain tools in childhood. Mill
takes this one step further, by recognizing how injustice within the family can hinder the
development of a larger sense of justice. In doing so, Mill takes into account a complex
range of goods and values tied to family. He argues that the issue of justice is implicated in
the internal makeup of families, recognizes the important role of nurturing children both for
themselves and for a good polity, and yet also gives strong (but not unlimited) respect to
parents' and children's liberty to choose their own course in life.

In sum, with the key exception of John Stuart Mill, early liberal political theorists
paid little attention to the family, even compared to earlier Western political theory. Some of
the reasons for this were probably integral to characteristics of liberalism itself – most
obviously, its focus on individuals rather than society. Some were the products of its time:
the belief that women and their purview were irrelevant to politics. With that said, however,
other features of early liberalism provided tools on which theorists might have grounded a
rich picture of the family-state relationship. These include the recognition of the
interdependence among individuals, and between individuals and society, including the belief
that the individual is part of a larger moral whole, to which he or she is bound by a network
of duties and responsibilities. They also include earlier liberalism’s focus on a broader range
of goods than most contemporary versions’, including human dignity and individual
development. Finally, early liberalism’s recognition that good government requires
particular virtues opens the door wide for consideration of the role that families play in
fostering these qualities.

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33 This insight is one that Rousseau denies. He argues that the governance of the family, unlike the political
society, need not be accountable to its members or regulated by principles of justice by appealing to the notion
that the family, unlike the wider society, is founded upon love. Thus unlike a government, he says, the father of
a family, “in order to act right . . . has only to consult his heart” (Rousseau, *DPE* 3, 241-42). For criticisms of
this view see Mill *SW*; Olsen 1983; Okin 1989a.
Conclusion

Rawls’ failure to focus on families is continuous with a longer trend of neglecting families in liberal political theory. Part of this neglect was directly related to the liberal mission: the founders of liberalism rejected the idea that people’s place in the polity was dependent on their families or position in the social network, and instead sought to focus on the essential equality, in some shape or form, of all individuals, regardless of which families they came from. Although this shift in perspective didn’t require ignoring that it was families who raised and sustained these individuals, this emerged as an unfortunate byproduct of liberalism. Nothing intrinsic to liberalism, however, precludes a sensitive discussion of the family-state relationship. To do so, however, requires departing from many of the features of liberal theory that Rawls introduced.
CHAPTER 3

ALTERNATIVE APPROACHES TO THE FAMILY-STATE RELATIONSHIP: COMMUNITARIANS, CIVIC LIBERALS, AND FEMINISTS

In the last few decades, specific features of Rawlsian liberal democratic theory that made it difficult to focus on the family-state relationship have been soundly criticized in several conversations. To break down these rich and fluid conversations into particular categories of positions inevitably does damage to the complexity of the views expressed by their participants. Nevertheless, with apologies to these authors, in this chapter, I do just this in order to describe the ways that they assist to more adequately theorize families. Specifically, I argue that three overlapping groups of critics\(^\text{34}\) contribute important pieces to the puzzle of theorizing families – a loose-knit group of critics of liberalism, sometimes identified as “communitarians;” liberal theorists who have sought to revise liberalism in response to communitarian critiques, who sometimes call themselves “civic liberals;” and feminist theorists. These conversations set the stage for a more complex consideration of the relationship between the family and polity.

In this chapter, I discuss these critiques and their consequences for theorizing the relationship between families and the state. I argue that several features of the communitarian critique, including its focus on the social constitution of individuals and its

\(^{34}\text{Because I am seeking to impose my conceptual framework on a conversation that is, in reality, far more complex, some of the authors that I discuss take positions that put them into more than one category in my schematization. For example, Martha Nussbaum’s work has both strong feminist and civic liberal elements. Likewise, Thomas Spragens identifies himself as a civic liberal, but has also been referred to as a communitarian.}\)
criticism of liberalism’s emphasis on freedom to the exclusion of other goods and values, open the door to a more complex account of the family-state relationship than Rawlsian-era liberal theory allowed. Communitarians, however, have generally not sought to develop such accounts and have had difficulty presenting a credible alternative to liberalism.

Recent civic liberal attempts to develop reworked versions of liberalism provide a more promising approach for rethinking the family-state relationship. However, few such accounts have focused on families. Moreover, those accounts that have done so have focused on too narrow a version of family, namely, the heterosexual marital family, without adequately considering its disadvantages or alternative forms of families.

Finally, many features of recent feminist critiques of liberalism, including the criticism of liberalism’s narrow focus on autonomy and neutrality, dovetail with communitarian critics and civic liberal accounts. Feminists, however, have been more attentive than communitarians to theorizing the family and the power dynamics within it. They have also devoted more attention to the condition of dependency in human lives, as well as the resulting need for caregiving. As a result, they have produced the richest characterizations of the family-state relationship in contemporary political theory. Yet more work needs to be done in thinking through the precise contours of the state’s responsibility vis-à-vis families to deal with dependency.

In sum, each of these three positions – communitarian, civic liberal, and feminist – provide elements that help to conceptualize the family-state relationship more fully. In the remainder of the chapter, I discuss each in turn.
The Communitarian Critique


Communitarians also contested liberal theorists’ assertions that liberalism was distinctive from other political traditions in that it did not embody a theory of the good life. As Ronald Dworkin expressed this view of the liberal state: it “must be neutral on . . . the question of the good life [and] political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life” (Dworkin 1978, 127). According to the dominant view, as William Galston aptly summarizes it, the liberal state is supposed to “preside[] benignly over [different ways of life], intervening only to adjudicate conflict, to prevent any particular way of life from tyrannizing over others, and to ensure that all adhere to the principles that constitute society’s basic structure” (Galston 1991, 80). Communitarians demonstrated that what was taken by liberal theorists to be neutral actually embodies a particular conception of the good premised on autonomy and

Further, some communitarians argued that the liberal emphasis on neutrality and free choice failed as a normative matter because it does not promote the culture necessary to sustain a liberal democracy. As Michael Sandel states it, “despite its appeal, the liberal vision of freedom lacks the civic resources to sustain self-government. . . . The public philosophy by which we live cannot secure the liberty it promises, because it cannot inspire the sense of community and civic engagement that liberty requires” (1996, 6). Because of this, Sandel calls for a state which is, at least over some part of the terrain of sovereignty, deliberately non-neutral, in that it “accord[s] the political community a stake in the character of its citizens” (1996, 321). Similar calls were made by others, who argued that the liberal state must consciously foster the conditions that will allow citizens to participate in a vigorous liberal polity (for example, Glendon 1995).

In a related vein, communitarians criticized the emphasis on rights in liberal theory and public philosophy. To them, the focus on rights, generally conceived as protecting an individual from the state’s incursions on their liberty or property, portrays individuals as fundamentally independent and autonomous. This focus on rights misses the ways in which people are interdependent and need more than simply to be left alone. Further, communitarians argued that this focus was destructive as a normative matter. In Mary Ann Glendon’s words, the conception of rights as merely delineating zones of autonomy results in a “near aphasia” regarding the way that the law might aid individuals in meeting their responsibilities to other individuals and in leading full, dignified lives (Glendon 1991, 109).
This set of critiques opens the door to a more complex understanding of the role of human relationships and the social constitution of individuals than Rawlsian-era theories permit. They also invite thinking about the ways in which the state can better support relationships that contribute to sound children who will someday be citizens of the polity. Both points would seem to lead ineluctably to consideration of the relationship between families and a thriving liberal democratic polity. Yet despite the obvious role that families play in embedding individuals in their culture and in inculcating in them particular virtues and visions of the good life, early communitarian critics generally ignored them. For example, Alisdair MacIntyre paid little attention to families in his defense of tradition-based thinking regarding conceptions of the good life (MacIntyre 1981). As a consequence, he failed to consider who will rear the children in the society he envisions, in which public participation is the highest form of life for both men and women. In doing so, as Susan Okin pointed out, he missed the fact that “if it were not for the childbearing, nurturance, and socialization that have taken place within the family, there would be no people to live the good life” (Okin 1989, 56).

Similarly, other communitarians and like-minded scholars tended to focus on institutions in civic society conceived apart from families, such as bowling leagues, local city governments, and churches (for example, Putnam 1993, 2000; Elkin 1987). The relatively few communitarians who considered families often adopted an overly-idealized view of them, seeing them as a place in which altruism prevails, a realm devoid of power relations and conflict (Okin 1989, 31, McClain and Fleming 2000, 327-30). For example, Bellah et al.’s (1985) nostalgic depiction of the altruistic family of the nineteenth century

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35Some civic theorists use the term “civil society” to include families (for example, Hollenbach 1995, 147; McClain 2001, 1684); others use it to refer to mediating institutions between individuals and families, on the one hand, and government on the other (for example, Rosenblum 2000, 813-14; Gutmann 1989).
overlooked the extent to which the husband’s/father’s will both legally and morally
determined the fate of other family members, as well as the extent to which the altruistic
ethic the authors praise was specifically seen as the province of women (Bellah 1985).

Michael Sandel’s treatment of issues relating to the family-state relationship in
Democracy’s Discontent (1996) demonstrates both the strengths and weaknesses of
communitarian accounts. Sandel is certainly on the mark when he criticizes the effects of the
shift in family law to “no-fault” divorce and to alimony and property divisions that do not
reflect fault as a basis for determining distribution. Sandel argues that these changes penalize
those whose identities have been constituted by their family roles, particularly women who
have devoted their lives to childrearing (114). He also correctly points out that this law is not
neutral with respect to its effects on the lives citizens lead. “For . . . the ideals of
independence and self-sufficiency embodied in the law do not simply enlarge the range of
possible lives; they also make some ways of life more difficult, especially those like
traditional marriage that involve a high degree of mutual dependency and obligation” (114).
In doing so, Sandel’s account illuminates the way in which law has come to place great
weight on the value of personal choice, and to screen out other relevant values. He also
demonstrates that a focus on choice without a correlative focus on responsibility can produce
a system that treats human relationships, even close family relationships, as essentially
disposable, and can therefore deter these relationships.

Yet Sandel’s critique falls wide of the mark when he criticizes the law’s placing any
weight at all on autonomy as a good. While he sometimes claims to object only to the
excessive weighting of choice and personal freedom as against other values, more often
Sandel conceives liberalism’s valuing of personal choice itself as a problematic embodiment
of the liberal view of persons as “unencumbered selves,” by which he means a conception of
individuals who have ties with others only as matters of choice. Thus, he criticizes the
Supreme Court’s rationale for supporting abortion as a fundamental right in Planned
Parenthood v. Casey (1992). In that case, the Court defended women’s right to abortion on
the ground that “[f]ew decisions are . . . more properly private, or more basic to individual
dignity and autonomy than a woman’s decision whether to end her pregnancy. A woman’s
right to make that choice freely is surely fundamental.” Sandel argues that this rationale
demonstrates the Supreme Court’s problematic view that what makes people human is their
capacity to live autonomously, as defined through choosing their lives and relationships for
themselves (92, 103). In doing so, however, Sandel mistakenly conflates legitimate
normative claims regarding individuals’ right to self-determination with the ontological claim
that selves are radically unencumbered: although the two claims are intertwined in much
liberal thought, they are by no means the same, and the former claim certainly does not
require the latter (Spragens 1999, 134).

Ironically, Sandel’s rejection of individual choice presents the mirror-image of the
flaw that he criticizes in liberal accounts. Whereas many liberal accounts too narrowly focus
on autonomy, construed as the right to make all kinds of choices without interference,
Sandel’s account unduly demonizes the value of choice, even with respect to those choices
most basic for human dignity and self-determination. To think that women should be able to
make their own decisions about whether they should have abortions does not require the
belief that persons are radically encumbered, so that the essence of their individuality is
denied if they are deprived of the opportunity to choose. All it requires is a normative belief
that there is some value in persons being able to make certain important decisions for
themselves, and that this value outweighs others that may also be implicated. By rejecting considerations of free choice and self-determination, Sandel threatens the position of women, who have traditionally been subordinated by an emphasis on the community over the individual (McClain and Fleming 2000, 327-28). His devaluation of autonomy also threatens to eclipse one of liberalism’s most appealing tenets -- that each person’s views about how to live their own life should be taken seriously, even if other values ultimately trump them.

**Civic Liberalism**

In recent years, many theorists sympathetic to the communitarian critique, rather than arguing against liberalism, have begun to adapt liberal theories to incorporate these critiques. This new generation of liberal theories redresses problems with Rawlsian-era liberalism in that it recognizes the impossibility of justifying any particular vision of the liberal state based solely on abstract principles that would apply to any society – Rawls’ later discarded hope of “moral geometry.” Instead, these recent theories recognize that liberalism involves a non-neutral conception of the good that places a high premium on individual liberty. As Stephen Macedo sums up this shift, the “[p]olitical order should not be understood, at base, as the product of an invisible hand, but rather as a construction for discernible collective ends and purposes, including the preservation of a broad swath of liberty” (Macedo 2000, 5).37

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36 This belief, in turn, requires the ontological presupposition that people have some capacity to make decisions for themselves, but does not require a notion of complete agency.

37 Although civic liberals agree that the state must assume a more active role in promoting a well-functioning liberal democracy, they disagree about the exact role that the liberal state should assume. A hallmark of liberalism is that the goals of politics at least to some extent are subordinated to the goals of private individuals. Further, liberalism is generally marked by a deep distrust of the power of the state (for example, Shklar 1989). The extent to which the government may act to further a vigorous polity is therefore a troubling issue for civic liberals. Compare, for example, Macedo 2000; Galston 1991; and Gutmann 1989.
In their reformulations of liberalism, these theorists, sometimes called “civic liberals” (Macedo 2000, Spragens 1999), contend that liberalism must do more than simply safeguard individuals’ right to noninterference by others. They argue that liberal democracy should seek a broader range of goods than the individualistic versions of liberty that have become associated with it (for example, Nussbaum 1999; Galston 1991; Gutmann 1989; Macedo 1995; Spragens 1999). As Thomas Spragens explains his project: “[l]iberal democratic practice . . . should be guided by a complex idealism – differentiated from liberal realism by its higher reach and from the other liberalisms by its greater breadth of aspiration” (Spragens 1999, xv). While recognizing the value of individual liberty, these revisions of liberalism also recognize liberty’s limits. They take account of the facts that individuals are never completely autonomous; that even autonomous individuals in this partial sense are made, not born; that for a liberal democratic society to flourish, its citizens must possess particular capabilities and virtues; and that a vigorous liberal democratic polity needs to foster these goods and virtues.

At the same time, civic theorists have argued that it is both consistent with and incumbent on the liberal state to ensure the political and social conditions needed for the health of the polity by being decidedly non-neutral about developing certain civic goods and virtues in the polity (for example, Galston 1991; Gutmann 1989; Macedo 2000; Spragens 1999). In William Galston’s words, the liberal state must become “far more aware of, and far more actively involved in reproducing, the conditions necessary to its own health and perpetuation” (Galston 1991, 6).

These accounts redress some of the difficulties of the communitarian critiques they incorporate. While communitarian accounts center largely on critiques of liberalism without
developing a new positive program, civic liberals develop a positive account of the role of
the state. They reemphasize the importance of justice, liberty, and individual rights without
believing that these goods should monopolize the field of political discourse, thereby at least
responding to feminist concerns that women might again be subjugated based on
communitarian notions of some shared good. And they recognize the value of individual
choice without believing that that choice could ever be completely unencumbered or
unconstrained.

Yet, as with communitarians, despite the fertile ground that this new terrain contains
for rethinking the family-state relationship, few civic liberals have taken on the job. Neither
have they adequately considered how conceiving of individuals as socially constituted
through a process requiring considerable time, effort, and care should change liberal agendas
on issues that affect families. For example, Thomas Spragens, in contrast to many liberal
theorists, attends to the limits of autonomy in his theoretical account by recognizing that
citizens are not completely autonomous, and that the autonomy they do achieve must be
nurtured through social institutions. Spragens also distinguishes himself from Rawlsian-era
liberal accounts through recognizing the importance of bonds between people in a
functioning liberal polity. Yet while this would seem to lead to a discussion of the role
families in the liberal polity, Spragens never follows this road to its conclusion; instead, his
agenda for civic liberalism largely overlooks the way that specific policies impact families
and the goods realized through them. For example, Spragens argues that the goal of welfare
reform should be to include poor adults “within the institutions of economic production” so
that the state can help them stand on their own two feet (250, 262). The loss to children of
having their parents away for long hours, the loss to parents’ sense of personal responsibility
for caring for their children, and the loss to the community of ensuring that children are cared for by loved ones is answered only by Spragens’ suggestion that the government should also provide child care subsidies (250).

The relatively minor numbers of civic liberal proposals that have considered families have tended to valorize a single model of the family – the two-parent heterosexual family – without also factoring in the costs of this model or giving careful consideration to other models. For example, William Galston argues for the importance of marriage based on data demonstrating the considerable poverty rates of children raised by single mothers, and the harm to boys caused by the absence of fathers as role models (1995, 56; 1996; 1997, 300-02). In doing so, however, Galston fails to give adequate consideration to the costs associated with the heterosexual marital family form, including the profound gender inequality associated with it (Fineman 2004). Likewise, he fails to consider whether other family forms could serve the same societal objectives if they had the same support that married families have long received from the state.

In sum, civic liberals have set the stage for the long-overdue consideration of families’ role in liberal-democratic polities. By drawing attention to the relationship between the qualities of citizens in a democracy and the quality of that democracy, by recognizing that liberal states must actively develop the culture needed for a flourishing liberal democracy, by proclaiming the importance of a diverse range of goods, and by insisting on individuals’ connections to the community, they invite more nuanced conceptualizations of the family-

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38Ann Crittenden demonstrates that most of the difference in earnings between men and women comes from women’s assumption of childrearing responsibilities. Because many more women than men take parenting leaves, work part-time, or assume less demanding full-time work, the average earnings of all female workers in 1999 were 59% of men’s earnings. In contrast, women who have never had children earn 98 cents to a man’s dollar (Crittenden 2001, 87).

39I address these issues in further detail in Chapter 4.
state relationship. They have seldom, however, taken up the project of thinking through how a revitalized conception of liberalism would approach the family-state relationship. And on the rare occasions that they have considered families at all, they have tended to focus on the heterosexual nuclear family as the preferred form, without adequately considering its alternatives or its downsides to important public goods such as sex equality.

**Feminist Theory**

The other group of theorists whose critiques of liberal theory have set the stage to rethink the family-state relationship are feminist theorists. There is considerable overlap between the feminist and communitarian critiques. Like communitarians, feminist theorists have criticized the conception of the autonomous individual that appears in law and political theory. Feminists, for their part, have pointed out the gendered nature of this depiction of the individual (McClain 1992; Held 1990; Okin 1989b; Williams 1991). They have also pointed out that the assumption of autonomy rests “on the often unstated assumption of women's unpaid reproductive and domestic work, their dependence and subordination within the family, and their exclusion from most spheres of life” (Okin 1989b, 41).

Like communitarians, feminists have also criticized liberal theory's emphasis on free choice. In feminist critiques, this emphasis, as well as liberal theory’s conceiving of ties between individuals as the product of voluntary choice, rests on a gendered view of the world. Communities have survived and flourished only because women attended to relationships and family responsibilities at a far more fundamental level than is accounted for by liberal conceptions of choice and the free pursuit of ends. Within almost all sexual divisions of labor in history, women have been encumbered by the bonds of necessity and have been bound to relationships they are assigned to tend (Brown, 154). In Nancy
Hirschmann's words, "[t]he exaggerated emphasis on consent as the only legitimate way to establish relationships of obligation, and the assumption of innate human separateness on which it is based, reveal a masculinist conceptualization of the self, of 'individuals,' that runs contrary to women's historical experience and epistemology" (Hirschmann 1996, 162). 40

Feminists also share with communitarians and civic liberals the conviction that the supposed neutrality of the liberal state isn’t neutral at all, but instead is premised on a particular world view that idealizes freedom, choice, and a particular detached, rational view of the self. In many feminists’ view, all of this better describe men than women in their assigned cultural roles (MacKinnon 1989; West 1988; Tronto 1993; Held 1990). In Catharine MacKinnon’s words, “[t]he foundation for the [liberal state’s] neutrality is the pervasive assumption that conditions that pertain among men on the basis of gender apply to women as well” (1989, 163).

Yet while some feminists approve of communitarians’ emphasis on altruism, care, and the social dimension of human existences, not least because they are characteristics associated with women that have long been devalued, 41 many have expressed concern that this emphasis will ultimately redound to women’s detriment. These theorists have criticized communitarian theorists for being too quick to dismiss the value of justice, liberty, equality,

40 As Virginia Held frames the issue: "To see contractual relations between self-interested or mutually interested individuals as constituting a paradigm of human relations is to take a certain historically specific conception of 'economic man' as representative of humanity. And it is, many feminists are beginning to agree, to overlook or to discount in very fundamental ways the experience of women." (Held 1990, 288). Joan Williams makes a similar point in noting that men could only conceive of themselves as having the capacity for free choice because they assigned caretaking responsibilities to women (Williams 1991, 1608).

41 As Eva Feder Kittay (2001) notes in the context of voicing caution about communitarian positions, the Responsive Communitarian Platform reads like a feminist tract: “A communitarian perspective . . . mandates attention to what is often ignored in contemporary politics: the social side of human nature; the responsibilities that must be borne by citizens, individually and collectively, in a regime of rights; the fragile ecology of families and their supporting communities; the ripple effects and long-term consequences of present decisions.” (The Responsive Communitarian Platform: Rights and Responsibilities, “preamble,” in Etzioni, ed., p. xxv.)

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and individual rights in favor of some more community-oriented conceptions of the good, in some accounts derived from “shared understandings.” They point out that women were long subjugated based on the ideology that they should be self-sacrificing for the benefit of others (Lacy 1993; Okin 1989, 29).

In contrast to communitarians and civic liberals, feminists have paid close attention to families as an institution, and done so without the rose-colored lenses. Theorists across the feminist spectrum, including Susan Moller Okin (1989a, 1989b), Catharine MacKinnon (1989), Martha Fineman (1995, 2004), and Martha Minow (1997), have concentrated on families. Their accounts not only call attention to the important role of families, the necessity of the caretaking functions that women have largely performed, and the way in which the liberal state has failed to support families, but also to the power dynamics within families. For example, Robin West argues that the state fails both “to protect and nurture the connections that sustain and enlarge us” and “to intervene in those private and intimate ‘connections’ that damage and injure us” (West 1997, 14). She also conceives marriage as an institution that neither benefits nor satisfies women (West 1997). In this respect, feminist accounts of families have often been far less idealized than communitarian accounts.

Among the most prominent and insightful of feminist critiques of the theoretical treatment of families is Susan Moller Okin’s. Okin argued that the major theories of justice produced during the last generation have made a critical error in seeking to theorize a just society without considering the institution of the family. She demonstrated how communitarians, libertarians, and liberal egalitarians all assume the existence of the “gendered family,” but treat it as outside the scope of a theory of justice. In Okin’s words, these theorists “take mature, independent human beings as the subjects of their theories.
without any mention of how they got to be that way” (9). She argued that this omission ignores the way in which the conventionally-structured contemporary family involves women in a cycle of socially-caused vulnerability. In her words, marriage and the family “constitute the pivot of a social system of gender that renders women vulnerable to dependency, exploitation, and abuse” (Okin 1989a, 136). Justice, Okin contended, requires that the state intervene in this cycle of inequality rather than treat it as a private matter (173).

Feminist theorists have also shown how the demarcation between the public and private realms as the boundary for state action has served to perpetuate women’s inequality in families and in society (Olsen 1983, MacKinnon 1989). These theorists contend that liberal theory, in walling off families from the reach of the state, fails to recognize the way in which families can be a locus of oppression, rather than an expression of individual autonomy. As Martha Nussbaum counsels, the relatively recent liberal emphasis on the public/private split probably grew from an admirable concern for the protection of individual choice, yet it asks too few questions about whose choices are protected (Nussbaum 1999).

The power of feminist critiques of the relationship between families and the state is undeniable. At the same time, many of these critiques have been limited: most feminist theory dealing this relationship has, perhaps understandably, limited the issue to achieving equality between women and men (for example, Okin 1989a). Other goods and interests relevant to a liberal democracy, including the needs of children for care to develop soundly, the interests in women (and men) fulfilling their moral responsibilities, the polity’s interest in ensuring that children are raised to be good and productive citizens, and the need of all adults for care have been, if not completely neglected, at least peripheral in these discussions. Slightly less explicity, this literature has often equated the achievement of gender equality
with ensuring that women achieve economic equality in the workplace. In Nancy Fraser’s words, “the vision implicit in the current political practice of most U.S. feminists” is that of “the Universal Breadwinner.” She defines the point of this position as “enabl[ing] women to support themselves and their families through their own wage-earning. The breadwinner role is to be universalized, in sum, so that women, too, can be citizen-workers” (Fraser 1997, 51). Based on this focus, some proposed feminist solutions have involved restructuring women’s family responsibilities to allow them to hold full-time jobs without considering the broader interests at stake. In these accounts, the interests of men, children, and communities, and women’s own concern for their families and desire to participate in childrearing, generally have been taken into account in constructing these solutions only to the extent that they are relevant to achieving women’s economic equality.

A recent article by Linda Hirshman in *The American Prospect* (2005) demonstrates such an analysis. In it, Hirshman argues that those women who choose to stay at home with their children rather than work in the market economy are undercutting the feminist goal of equality. The solution? Women should treat work seriously by finding jobs that pay good money. They should also avoid marrying men who are their peers: “If you both are going through the elite-job hazing rituals simultaneously while having children, someone is going to have to give. Even the most devoted lawyers with the hardest-working nannies are going to have weeks when no one can get home other than to sleep. The odds are that when this happens, the woman is going to give up her ambitions and professional potential” (25). Hirshman argues that women’s attaining an equal share of the powerful and high paying jobs in society is better for both society and for women individually:

A good life for humans includes the classical standard of using one’s capacities for speech and reason in a prudent way, the liberal requirement of having enough
autonomy to direct one’s own life, and the utilitarian test of doing more good than harm in the world. Measured against these time-tested standards, the expensive expensively educated upper-class moms will be leading lesser lives. At feminism’s dawning, two theorists compared gender ideology to a caste system. To borrow their insight, these daughters of the upper-classes will be bearing most of the burden of the work always associated with the lowest caste: sweeping and cleaning bodily waste” (26).

While there can be no doubt that women’s interest in economic equality would be furthered by their choosing to attain high-paying jobs, Hirshman not only misses the import and potential dignity of carework (despite its societal devaluation), she also fails to consider the costs to children, society, and to women themselves of women (like many men) assuming jobs that provide no time to raise their families.

A significant answer to the feminist theory that has focused on caretaking only instrumentally to ensure women’s equality in the workplace is the feminist work that has sought to promote care as an ethic. Beginning in the 1980s, care theorists have focused on the necessary task of caretaking in our society, as well as its virtues. For example, Robin West, in an essay that argues that jurisprudence should be transformed to accommodate virtues associated with women, states that:

[w]e need to show . . . that a legal and economic system which values, protects and rewards nurturant labor in private life will make for a better community. We need to show that community, nurturance, responsibility, and the ethic of care are values at least as worthy of protection as autonomy, self-reliance, and individualism. We must do that, in part, by showing how those values have affected and enriched our own lives (West 1988, 65-66).

Early work on care, however, presented its own difficulties that limited its usefulness in theorizing the family-state relationship. First, many of these theorists presented caretaking as an activity that women are better suited to perform than men because of either biological or cultural factors. This group of care theorists, sometimes called “cultural” or “relational” feminists, often use Carol Gilligan’s important work in moral psychology as a springboard
for theory. In privileging women’s position with respect to these qualities, however, they tended to overlook differences between individual women and between different social groups of women.\(^{42}\) In addition, this type of theorizing tended to valorize care and those who perform it without considering how women’s socially-assigned role as caretaker can be oppressive to women.

More useful treatments come from those feminist theorists who have begun to theorize issues surrounding care without intrinsically privileging women’s relationship to it. Joan Tronto is one of the scholars who took the lead in this work. In her important book, *Moral Boundaries* (1993), Tronto recognized that the conception of care, the low value accorded it, and its association with women are all culturally constructed, and seeks to challenge all three (124).\(^{43}\) Tronto asks “What would it mean in the late twentieth century American society to take seriously, as part of our definition of a good society, values of caring – attentiveness, responsibility, nurturance, compassion, meeting others’ needs – traditionally associated with women and traditionally excluded from public consideration?” (2-3). Doing so, she argues, would require a radical rethinking of the nature and boundaries of morality and the structures of power and privilege within society (3). It would contest the view that care is a moral rather than a political value, and move caretaking from a private to a political issue (6-10). Moreover, although it would not require abandoning moral commitments, for example, to universalizability, it would require “that we recognize that

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\(^{42}\) See, for example, West (1988, 3) (“Indeed, perhaps the central insight of feminist theory of the last decade has been that woman are "essentially connected," not "essentially separate," from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life”).

\(^{43}\) “[I]f we look at questions of race, class, and gender, we notice that those who are least well off in society are disproportionately those who do the work of caring, and that the best off members of society often use their positions of superiority to pass caring work off to others” (113)
humans are not only autonomous and equal, but that they are also beings who require care” (152). In this work, Tronto’s purpose is to show that a political ethic that incorporates care is, indeed, possible, and consistent with basic principles of liberal theory (albeit still requiring a radical revisionism of current liberal thought). Accordingly, she does not articulate the specifics of such a political ethic or describe the institutions or public policies that incorporating such an ethic might require.

Feminists since Tronto’s *Moral Boundaries* have sought to consider how incorporating care as a political ethic can be both reconciled with other liberal goods and principles. Unsurprisingly, given the primacy of justice in liberal discussions, many of these treatments have sought to flesh out the relationship between principles of care and justice. As Tronto recognizes, care and justice are not mutually exclusive (166-67). Martha Nussbaum (1999) points out, in fact, that an exclusive focus on the value of care of others that is not balanced by a focus on individual independence and caring for the self runs the risk of perpetuating women’s roles as the helper of others without independent claims to be subjects in their own right. By the same token, a focus on care without an accompanying focus on justice may leave women’s subordination intact (Card 1990; Okin 1990; Tronto 1993; Bubeck 1995; Kittay 2000). With that said, recent care theorists have been somewhat vague in delineating the specifics of how the state’s responsibility with respect to care should be reconciled with other purposes of the liberal state. This has led critics to argue that care theorists value care disproportionately to other contributions that individuals can make to society, call for virtually unlimited resources to support care as against other goods, and assign the state responsibility for supporting children that should be left to the parents who
decided to have the children in the first place (for example, Case, 2001; Franke, 2001; Wax 2004).

In summary, recent feminist theory considerably deepens the critique of dominant versions of liberalism. The light this theory has cast on families has been especially illuminating, revealing not only the importance of families, but also its hazards. Feminism has also contributed a richer theorization of individuals’ ties to others and the importance of care. Much work remains, though, to think through the way in which human dependency creates an obligation on the part of the state, the contours and limits of this obligation, and how the state should fulfill its obligation given other goals, including sex equality. Furthermore, while feminist theory has properly restored to political theory the recognition of human neediness, it is still struggling to integrate this insight with the ways in which humans are and can be decisionmakers and the creators of their destinies in at least some shape or form.

Conclusion

The conversation regarding liberal political theory has come a long way from the account presented in Rawls’ A Theory of Justice. In the succeeding years, many of the features of liberal political theory that have made it so hard to bring families into focus have been soundly criticized by communitarians, civic liberals, and feminists. These critiques open a space to reconceive liberal theory in a manner that can better address both the possibilities and pitfalls of families. My project in the remainder of this dissertation is to think through a conceptualization of the family-state relationship that, while still coherent, is more true to the complexity of the goods at stake. Is it possible to construct a theory that, while paying healthy respect
to the value of individual autonomy, also recognizes the importance of caretaking? And can this be done while recognizing and seeking to redress the fact that families are sometimes, perhaps often, the sites of oppression and a primary source of gender inequality? And if such a theory is possible, what would it look like? It is to these questions that I turn in the next chapter.
CHAPTER 4
FAMILIES, THE STATE, AND CARETAKER-DEPENDENT RELATIONSHIPS

The standard Rawlsian model, in its single-minded concentration on distributive justice with respect to individuals, overlooks the goods and functions that families serve. It is also based on the image of citizens as able adults, without considering the dependency that is inevitably a part of the human condition. If we loosen the assumptions of the Rawlsian model and pay attention to the fact that humans don’t spring up like mushrooms, and are, instead, needy in varying amounts over the course of their lives, and also recognize that the goods that a liberal polity must pursue are broader than simply the (important) goods of individual justice and autonomy, how does this change the picture of what the state’s role should be with respect to families?

In this chapter and the next, I consider this question by discussing the state’s role with respect to the function that families serve in dealing with dependency in our society. I begin the discussion in this chapter with the type of dependency that Martha Fineman (2004) calls “inevitable dependency” – the biological dependency that occurs always in children, often in old age, and at other points in many citizens’ lives as a result of illness. Inevitable dependency, by definition, involves what might be considered a “vertical” dependency, in which one person is the caregiver and the other the dependent. This type of dependency stands in contrast with what might be called “horizontal” dependency between adults, in
which both are interdependent with one another and perform caretaking tasks for one another. I address the issue of horizontal relationships in chapter 4.

My discussion in this chapter is framed in two parts. In Part I, I sketch out a normative vision of the state’s responsibility vis-à-vis families for inevitable dependency. To develop this vision, I contrast my views with those of Martha Fineman, one of the foremost feminist theorists on issues of dependency. Fineman contends that the inevitability of dependence, and the fact that caring for the inevitability dependent is required to reproduce society, means that the state owes families a debt to compensate them for resources expended in childrearing. I argue, in contrast, that conceiving of the state’s responsibility in terms of its duty to protect society’s vulnerable members, which in turn derives from the liberal state’s respect for human dignity, better conforms with both the ideals of liberalism and our considered intuitions. I then discuss the contours of this responsibility, a model that I call the “supportive state.” In contrast with the civic liberal William Galston’s view that the state’s responsibility for dependents is triggered only after families fail to meet this responsibility, I contend that the inevitably intertwined relationship between families and the state means that the two should be seen as having concurrent, although not coextensive, responsibilities. Conceiving of the state’s responsibility in this way, I argue, has the added advantages of both helping to define the outer limits of the state’s responsibility, and of clarifying the role that parents’ decision to have children (or to engage in sex) should play in discerning the state’s responsibility for caretaking.

I move on, in Part II, to consider how the state’s responsibility for dependency intersects with the important good of sex equality. To think through this issue, I contrast models like my own, which seek public support for caretaking, with two other feminist
approaches for dealing with the relationship between sex equality and caretaking. The first of these seeks to have men assume an equal burden of caretaking; the second seeks to persuade women to choose other life courses besides having children. Ultimately, I conclude that a public support model must be the centerpiece of state efforts to deal with dependency, but that elements of the other feminist approaches should play important roles.

**Conceptualizing the State’s Responsibility for Dependency**

*Grounding the Responsibility—Martha Fineman*

In her recent book, *The Autonomy Myth* (2004), Martha Fineman takes on what she calls “core myths” of American society, which center on “the desirability and attainability of autonomy for individuals and families” (xiii). In Fineman’s view, the autonomy myth has produced institutional arrangements that fail to take account of the dependency inherent in the human condition. As a biological matter, Fineman points out, all humans are dependent at some points in their lives. The need for care that this inevitable dependency creates, Fineman counsels, gives rise to a secondary form of dependency experienced by caretakers. To the extent that caregiving precludes caretakers from engaging in activities such as wage labor, these caregivers develop a “derivative dependency” caused by their own need for goods and resources. The dominant ideology of autonomy treats both types of dependency as private matters with which the state has no legitimate concern (36). As a result, those who bear the caretaking burden – primarily women in our society – assume the costs of carework without compensation for their work or accommodation through access to societal goods (36-37). The result is a nation rife with economic and sex inequality that has no public philosophy that can redress these issues.⁴⁴

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⁴⁴Fineman wryly observes that the state selectively applies its ideology of autonomy: “a society that imposed
Fineman contends that the inevitability of dependency creates an obligation on the part of the state to support caretaking. She charges that

[i]ndividual dependency needs must be met if we, as individuals, are to survive, and our aggregate or collective dependency needs must be met if our society is to survive and perpetuate itself. The mandate that the state (collective society) respond to dependency, therefore, is not a matter of altruism or empathy (which are individual responses often resulting in charity), but is a matter that is primary and essential because such a response is fundamentally society preserving” (48).

The fact that caretaking is currently performed by families with little recompense from society therefore creates for Fineman a problem of justice. The family, she asserts, should be seen as a dynamic public institution that has been assigned the task of caretaking for the benefit of society as a whole.⁴⁵ Although families assume the vast bulk of the burdens of caretaking without compensation, “[c]aretaking labor provides the citizens, the workers, the voters, the consumers, the students, and others who populate society and its institutions” (xvii).⁴⁶ Thus, the state and the market currently “free ride” on families’ labor by delegating the work of rearing future citizens and workers to families without compensating them for their efforts. This fact creates a collective debt on the part of society to caretakers which, in

the ideals of self-sufficiency and independence on all its citizens would certainly institute close to a 100 percent inheritance tax on all large estates. . . . People should not be deprived of the opportunity to rise above the mediocre masses, demonstrating their own inherent merit and worth, simply because they are burdened by the wealth of their fathers” (3-4). By the same token, those whom the state dubs “autonomous” ironically receive the greatest government largesse (witness the tax benefits awarded to married couples), whereas those dubbed “dependent,” such as welfare mothers, are denied state aid so as not to promote dysfunctional dependency (22, 31-33).

⁴⁵ “[T]he family in [the traditional ‘separate spheres’ understanding of society] is positioned as a unique and private arena. I argue that this is an incorrect and unsustainable conception. The family is contained within the larger society, and its contours are defined as an institution by law. Far from being separate and private, the family interacts with and is acted upon by other societal institutions. I suggest the very relationship is not one of separation, but of symbiosis. It is very important to understand the roles assigned to the family in society – roles that otherwise might have to be played by other institutions, such as the market or the state.” (xviii).

⁴⁶ “[W]hile the state provides what we think of as subsidies, such as those supplied by the tax code, caretakers provide a subsidy to the larger society and its institutions. Far from being independent, the state and the market institutions that it protects and fosters are dependent on the caretaking labor that reproduces society and populates its institutions” (xvii).
Fineman’s words, “must be recognized, and payment accomplished, through policies and laws that provide both some economic compensation and structural accommodation to caretakers” (263).47

Fineman’s account adds a considerable amount to the picture of the family-state relationship that had been missing from liberal accounts. In contrast to these accounts, she recognizes the ways in which humans are inherently needy beings, and that this need varies over the human life cycle, and she carefully works through how this recognition should change the state’s role with respect to citizens. In doing so, she seeks to give care its rightful place in a good society in ways that comport with justice and sex equality.

Yet Fineman’s account of how the state should respond to the fact of dependency is ultimately unsatisfactory. Most prominently, her claim that the inevitability of dependency gives rise to collective responsibility raises conceptual difficulties. The claim regarding the inevitability of dependency is a statement of ontological fact; the claim of state obligation is a normative conclusion. So while the first claim certainly has a bearing on the latter, without more, it cannot prove it.48 If scientists discovered that all adult women had an undeniable need to pair off for life, this discovery alone would not tag the state with the responsibility for helping women find partners; some normative argument about why the state should help meet this need would still be required. Likewise, Fineman’s assertion of the inevitability of dependency fails to answer the question of “why the state?” rather than, for example, parents or other family members.

Fineman’s contention that the state gets some benefit from parents’ caretaking efforts does not quite fill this bill. There are some numbers of instances in which the actions of private citizens produce benefits for society without accruing any legal or moral right to

47See also xvii (“Caretaking . . . creates a social debt . . . according to principles . . . that demand that those receiving social benefits also share the costs when they are able”).

48See also Taylor 1989b, 159, 160 (presenting similar critique of communitarian arguments).
compensation. For example, if a violinist were moved to play a beautiful solo in a town square, few of us would believe that the town had an obligation to repay her for the value of the pleasure she created for the townspeople. Instead, we would conceive the benefit to be gratuitously conferred. We would likely believe the same even if the music were to draw people into the surrounding cafes, and give the area an economic boon. Some people might be moved to drop a tip into the violinist’s hat, but that does not create a debt by the café owners or the town at large. In the absence of an agreement between the violinist and others, more is required to support compensation on both a legal and an ethical level than the simple fact that one party received a benefit from the actions of another.\footnote{For example, a court may find a contract “implied-in-fact” if the recipient of valuable services had an opportunity to reject the services but chose not to do so with knowledge or reason to know that the other party expected to be paid. The failure to reject services in this circumstance operates as an acceptance. When acceptance cannot be inferred from the conduct of the parties, a court may still find a contract “implied-in-law” where one party has been unjustly enriched by the actions of another. Generally for the doctrine to apply, however, it must have been reasonable to perform such services with an expectation of payment in the absence of an agreement, such as the case of a surgeon performing emergency services on an unconscious patient. Neither doctrine is analogous to the case at hand, however. See generally Murray 2001, § 51(B).}

A similar analogy comes from the officious intermeddler cases in contract law. For example, a tenant cannot take it upon himself to paint his apartment without asking the landlord and later charge the landlord for the service.\footnote{See, for example, Tomko, 1.}

Similarly, the simple fact that society would fall into disrepair without caretaking is not sufficient to hold the state responsible for compensating the caretaking performed by families. As empirical political scientists have demonstrated, societies fall into disrepair and democracies become unmanageable when civil society lacks institutions that generate “social capital,” or goodwill among individuals.\footnote{See, for example, Putnam 2001.} This makes it good policy for the state to encourage such institutions. It might even be said, somewhat loosely, that the state has the
responsibility to encourage such institutions. Yet this certainly doesn’t give those who participate in such institutions, including the now paradigmatic bowling leagues, a claim to compensation by the state, despite the fact that they are generating the social capital necessary for a flourishing liberal democracy.

Fineman’s use of the economic imagery of “debt” somewhat muddies the waters in characterizing the nature of the state’s responsibility. Fineman suggests that the state and employers “owe” parents support for caretaking because caretakers provide a subsidy to the larger society and its institutions. Far from being independent, the state and the market institutions that it protects and fosters are dependent on the caretaking labor that reproduces society and populates its institutions. . . . Caretaking thus creates a ‘social debt,’ a debt that must be paid according to principles of equality that demand that those receiving social benefits also share the costs when they are able. Far from exemplifying equal responsibility for dependency, however, our market institutions are ‘free-riders,’ appropriating the labor of the caretaker for their own purposes (xvii).

Fineman’s framing of the state’s responsibility in terms of debt raises several issues. First, it suggests that caretakers deserve subsidies because of the net benefits that children will bring to society at a future point. Yet, even if we accept Fineman’s contention that children’s contributions to society should be credited to their parents, the conclusion that children are a net benefit to society does not necessarily follow. Determining whether children should indeed be considered a net benefit requires assessing whether children’s future contributions exceed their costs to society. For example, opponents of state support might argue that the ecological, social, and psychic costs from overcrowding outweigh the benefits of children. In addition, if debts are going to be paid off by the state, should there be a corresponding offset for the unique benefits to parents of having children — benefits so
substantial that a large proportion of children are deliberately conceived even without subsidies?

Further, grounding public support on the assertion that children are a net future asset to society produces some unpalatable results. For example, this line of reasoning opens the door for critics of public support, such as Mary Anne Case, to argue (somewhat disturbingly, as she herself acknowledges) that we could get the same benefits for less money if we imported immigrants rather than supported children. Fineman’s argument also leads to other counterintuitive results. To the extent that we are comfortable giving public support to parents of healthy children who will likely grow up to be productive citizens, would we therefore not support parents whose children had disorders like cystic fibrosis, because they would likely not reach adulthood and repay taxpayers’ investment? The reason that most of us would be horrified by this suggestion is that we intuitively conceive public responsibility for caretaking to spring from something other than the likelihood of society receiving a future economic return.

In my view, Fineman’s insights about the inevitability of dependency and the need for caretaking support a stronger rationale for public support than the one she presents. Few would disagree that the state has some responsibility to protect and defend the basic well-being of its most vulnerable citizens – children, the elderly, and other dependents – when

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52 Case 2001, 1774 (“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.”); see also Franke 2001, 192-95.

53 See also Kittay 2001, 540 (criticizing attempts to support care based on future productivity of children “because it betrays an essentially instrumental attitude toward children and the ‘temporarily’ dependent, suggesting that the only reason to care for dependents is the usefulness they will provide once they are no longer dependent”).
they cannot do so for themselves. For example, most of us would agree that the state had some obligation to protect a child who was orphaned and starving in the streets. By the same token, most would agree that the state has the responsibility to remove a child from his or her home if it learns of serious abuse inflicted by the child’s parents. What is controversial, then, is not the fact of the state’s responsibility to children and others who are inevitably dependent, which stems from its obligation to respect human dignity. Just as respect for human dignity requires respecting the autonomy of able adults, it requires support the well-being of its vulnerable citizens. Instead, what is controversial is the issue of when this responsibility for ensuring the welfare of dependents is triggered vis-à-vis the responsibility of families to ensure the same. (The reason that the two examples given are uncontroversial is because, in the first, no family exists and, in the second, the family is clearly shown to have already failed.) For this reason, opponents of state support for dependency do not argue that the state has no duty to support dependents, but rather that the state should act as a second-line of defense that comes into play only after families fail to meet their responsibilities. William Galston makes this view explicit when he likens the state’s responsibility for children to “[t]he Catholic theory of subsidiarity, which holds that responsibility begins at the smallest units of society and expands to public institutions only when these units cannot solve their own problems” (Galston 1996).

The view espoused by Galston – that the state should step in only after parents have tried

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54 See also Goodin 1985 (discussing societal duty to protect the vulnerable). Even Case, who opposes aid to parents for the purposes of facilitating caretaking, exhibits a grudging support for the state aiding children directly (Case 2001, 1785).

55 See also Case 2001, 1785. (“Once we acknowledge that there should be some ‘collective responsibility’ for child care, 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 or otherwise.”).
and failed – dominates public debate about state policy. Yet it rests on too simplistic a view of the state’s relationship to families. Feminists, including Fineman, have pointed out that this view of the family as a distinct entity that is removed from the state fails to recognize the complex interconnections that exist between the two.\footnote{See, for example, Fineman 1999, 1207-09.} At the most basic level, the very determination of whether a group of citizens constitutes a family is determined by state action. In Martha Nussbaum’s words:

> People associate in many ways, live together, love each other, have children. Which of these will get the name “family” is a legal and political matter, never one to be decided simply by the parties themselves. The state constitutes the family structure through its laws, defining which groups of people can count as families, defining the privileges and rights of family members, defining what marriage and divorce are, what legitimacy and parental responsibility are, and so forth. This difference makes a difference: The state is present in the family from the start, in a way that is less clearly the case with the religious body or the university; it is the state that says what this thing is and controls how one becomes a member of it (Nussbaum 2002, 199).

Further, as I argued in chapter 1, the ways in which families function in contemporary society are also deeply and inextricably intertwined with government policy.\footnote{See, for example, Minow 1997; Woodhouse 1993, 500-02.} The modern administrative state built on this foundation has no neutral, isolated position into which it can retreat to wait while families exhaust their responsibility to care for dependents “before” the state acts.

It would make far more sense to abandon the fallacy that the state both can and should wait for the family to act and to recognize that, insofar as the state has a responsibility to foster the well-being of its dependent citizens, that responsibility must be deemed to exist \textit{simultaneously} with families’ responsibility to foster their well-being. And fostering the well-being of dependents, as Fineman clearly shows, along with Joan Tronto (1993) before her,
requires that they receive care. This need not mean that the state’s responsibilities in this regard are identical to families’. Rather, consistent with the view that the state should expect citizens to perform those responsibilities that they can reasonably perform for themselves, the state should expect families to bear responsibility for the day-to-day caring for (or arranging the care for) children and other dependents. Meanwhile, the state should bear the responsibility for structuring institutions in ways that help families meet their caretaking responsibilities. In other words, the state should assume the responsibility for ensuring that the “rules of the game” facilitate caretaking. This division of responsibility recognizes the malleability and contingency of institutional structures. It does not artificially separate state action from the realm of families or presume that clear boundaries can even be drawn between them, but it does assume certain spheres of authority as between the two

The state’s responsibility to protect the well-being of those who are inevitably dependent has a special corollary when it comes to children: an intrinsic part of ensuring their well-being involves insuring them adequate conditions in which to develop their capabilities. Indeed, ensuring such conditions is not only a fundamental responsibility of the state, but is also central to the polity’s own self-interest. Recall John Stuart Mills’ words, “If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences” (OL 5, 91). As Linda McClain points out, in the absence of ensuring that the children who

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58 The division of responsibility I suggest here comports with Fineman’s view that when individuals assume the burdens of caretaking, the state should provide them with “the necessary tools to perform their assigned tasks and to guarantees that they will be protected by rules and policies that facilitate their performance” (Fineman 2004, 49).

59 I am grateful to both Linda McClain and Mary Shanley for pointing this out to me in private conversations. See also Nussbaum 2000 (arguing that respect for human dignity requires that states provide conditions that enable citizens to develop a threshold level of central human capabilities).
will one day be citizens have an adequate capacity for self-government, which for children requires ensuring them adequate care, the future of a well-ordered society is dubious.\textsuperscript{60}

The division of responsibility that I pose posits what might be called both “strong families” and a “supportive state.” It expects that people should seek to meet the dependency needs of their family members, and therefore requires families that are up to the difficult task of caring for children and other dependents. Yet the “supportive state” model maintains that such caretaking should be done within institutional structures that facilitate caretaking, and that it is the state’s responsibility to secure such institutional structures. This approach, in contrast to the reigning autonomy myth, recognizes that the ability of families to nurture their members does not simply exist as a matter of fact, or spring up as a matter of spontaneous generation; instead, it is an achievement to be pursued jointly by both citizens and the state.\textsuperscript{61}

\textit{Parameters of the “Supportive State” Model}

In the preceding section, I contended that the state’s responsibility to protect the vulnerable gives it a duty to structure societal institutions in ways that support caretaking. In this section, I want to explore the limits of this duty. How far does the polity’s obligation to support caretaking extend? And how should the state weigh this goal against other goods and principles? Clearly the answer to these questions cannot be determined through a kind of

\textsuperscript{60}See McClain, 2005 (forthcoming); see also McClain 2001, 1682-95.

\textsuperscript{61}As Eva Feder Kittay writes

\begin{quote}
Even though the well-being of an individual may be the immediate duty of those who are closest, it is the obligation of the larger society to assure that care can be and is provided. The parallel to that other vulnerability to which the creation of the state is often attributed—protection from the malfeasance of others—is fairly direct. For although the responsibility not to harm another falls on each of us individually, it is the role of the larger society to protect us against and to punish those who do violence. While a crime against an individual victim is the responsibility of the criminal, it is up to the wider society to protect against criminals and to punish crimes (Kittay 1999, 535).
\end{quote}
“moral geometry,”\textsuperscript{62} in which a single, correct answer can be absolutely and firmly calculated once and for all. Nevertheless, some guideposts can at least mark out the parameters of this duty.

At a minimum, the state should arrange institutions in such a way that family members may, through exercising diligent but not Herculean efforts, adequately meet the basic physical and emotional needs of dependents while avoiding impoverishment or immiseration themselves. The state’s responsibility to meet this threshold level of support stems directly from its own obligation to vulnerable dependents. Translated into concrete government policies, this means that the welfare system would be structured in a way that those at the bottom of the economic ladder who have children, insofar as they are required by the state to work outside the home, have realistic access to good quality day care. Further, government policies should also allow these parents enough time with their children to ensure that they are well-parented and supervised. The same holds true in terms of direct financial support: those with dependents at the bottom of the income pyramid should receive enough financial subsidization so that they can provide the dependents with decent environments that promote basic capabilities. In this view, the state shirks its responsibility when it forces parents to choose between working to put food in their children’s mouths and ensuring that their children receive adequate care. By the same token, the state must ensure institutional structures – such as family leave allowances, \textsuperscript{63} flex-time provisions, and a living wage that does not require that parents work two or three jobs – that keep parents and other

\textsuperscript{62}The term is Thomas Spragens’ (1999, 64).

\textsuperscript{63}See Gornick and Meyers 2003, 117 (“[O]ne of the most important weakness of the family leave system in the United States is the lack of any paid leave for a substantial share of the workforce.”).
caretakers from becoming so pressed for time or frazzled by time pressures that it interferes with adequate caretaking.

That is the minimum level necessary for the state to satisfy its obligations to protect the vulnerable. Above this threshold level, the state’s support of caretaking is no longer an absolute obligation, but rather needs to be balanced against the other goods that the state might use its resources to support. In this regard, while caretaking is not a good we normally think of as distributive, to the extent that the state must expend resources to support caretaking, it is in fact a distributive good that requires trade-offs against other goods. In weighing this trade-off, the importance of citizens fulfilling moral responsibilities to the health of a liberal democracy, and the importance of the soundness of the future citizens to the polity’s future, are weighty reasons for the state to support carework as against other uses of the state’s resources. With that said, under this rationale, supporting carework beyond the baseline level is good policy, but not, as in Fineman’s rationale, a debt that must be paid.

Under this principle, the state could legitimately support caretaking both below and above the threshold level over other pursuits of citizens that did not implicate the state’s responsibility to vulnerable citizens. On this ground, for example, the state could subsidize caretaking without similarly subsidizing those who choose to drive expensive cars rather than to have children.64 Society has no basic obligation to support the purchase of a Porsche, in contrast to its obligation to protect dependents. This is not to say that a polity might not decide that all or some other endeavors should also be accommodated, just that there are particularly compelling reasons to accommodate caretaking responsibilities.

64Fineman refers to the argument that the state has no more duty to support a citizens’ decision to have a child than it does to subsidize any other preference of individual citizen, including the preference to own an expensive car, as the “Porsche preference” argument (Fineman 2004, 42-43).
In assessing whether to subsidize over and above this threshold level, a liberal polity can find a common-sense median between, on the one hand, the most begrudging proponents of state support for dependency, such as Mary Anne Case, who argues that the state should only invest enough resources to keep the next generation out of prison (Case 2001, 1785), and, on the other hand, an approach in which the state should devote virtually unlimited funding to its children and other dependents. One such sensible midpoint can be found in the words that I referred to in chapter 1 of John Stuart Mill, who argued that the “existing generation,” is responsible for

> the training and the entire circumstances of the generation to come; it cannot indeed make them perfectly wise and good, because it is itself so lamentably deficient in goodness and wisdom; and its best efforts are not always, in individual cases, its most successful ones; but it is perfectly well able to make the rising generation, as a whole, as good as, and a little better than, itself (Mill OL, 91).

Seeking to do a little better for the next generation of dependents is a realistic but still ambitious goal that recognizes the importance of caring for dependents yet also recognizes that there are other goods that a liberal democracy must and should pursue.

Finally, at some point towards the end of the spectrum marked by greater state support, and depending on competing priorities and available resources, it makes less sense for the state to subsidize higher marginal levels of caretaking as against other goods. At this upper end of the spectrum, subsidizing more caretaking may actually be counterproductive for both the recipients of care, who may not develop the level of autonomy needed to function in society (Baker 1997; Riylin 2004), and for the caregiver, who may never get to pursue other courses in life. Although family members may still to decide to give this higher level of care to their dependents, they should do so without state subsidization.
The Choice To Have Children And The Limits Of State Responsibility

I have until this point been addressing inevitable dependency in all its forms—i.e., the dependency of children, and dependency that occurs because of old age, illness, or disability. There is one issue limited to the dependency of children that deserves special attention, however: that is how parents’ decision to have children in the first place should factor into the state’s responsibility to support them. Some critics of state support for families argue that the state should not lighten parents’ load because it is parents, after all, who have chosen to have children (who will, inevitably, be dependent) in the first place. As Mary Anne Case phrases the objection, those who choose to forego children have decided to invest their time, energy, and money in other projects: why then should they be required to subsidize and accommodate parents in their decision to have kids, when their non-childrearing projects are not similarly subsidized? (Case 2001: 1782-83) Amy Wax (2004) puts the point somewhat differently. She argues that:

[providing public financial support for caretakers is in tension with the belief that parenthood is a choice for which people should be held responsible. The widespread availability of birth control and abortion reinforces the idea that childbearing should be regarded as a deliberate decision that is within a person's control. Many use contraception to limit the size of their families, and many delay or forgo childbearing because of a lack of resources, a reluctance to make tradeoffs, or concerns about giving their children the right start in life. Those who show restraint and prudence, often at great personal cost, understandably resent subsidizing those who show less.

Fineman thoughtfully responds to these contentions with the argument that even if individuals “choose” to have children, this should “not be the end of the matter if what we are seeking is social justice or fairness” (Fineman 2004, 42). Some conditions, she contends,
may be “just too oppressive or unfair to be imposed by society even if and when an individual openly agrees to or chooses them” (42). Fineman’s argument therefore underscores the point that the state’s failure to support childrearing on the ground of parental choice would consign women to inequality, since they disproportionately care for them. Fineman also forces us to recognize the limits of consent in this context, pointing out that those who choose to have children do not necessarily consent to the way in which societal structures penalize parents, even if they know what these penalties are ahead of time (42-3).  

However, Fineman moves to somewhat murkier territory when she argues that the concept of “choice” needs to be qualified when discussing women’s decision to bear children because they make this decision under considerable social pressure (Fineman 2004, 41). As Mary Anne Case points out, in liberal polities that envision citizens as rational decision-makers, we hold people accountable for many decisions they make under equally constrained circumstances. For example, courts enforce individuals’ promises to repay bank loans and mortgages even when they are executed under dire financial circumstances. Moreover, despite considerable social pressure on couples to marry, courts still enforce marital obligations during marriage. To refrain from holding those who decide to have children (or even those who unintentionally get pregnant as a result of consensual sex) responsible as a result of social pressures varies too far from the notion that liberal citizens should be treated as responsible agents (Wax 2004).

A better way for the state to respond to the social pressure to bear children would combine two types of policies. The first would seek to lessen this social pressure by, for

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66See also Williams 2001: “[T]he decision to have a child does not mean that [parents] willingly gave up paid employment because it was structured in a manner inconsistent with caretaking.”

67Mary Anne Case (personal conversation 2003); see also Higgins 1997; Wax 2004.
example, ensuring that citizens had access to alternative life paths.⁶⁸ The second would not relieve parents of their responsibility as a result of this pressure, but it would limit the consequences of this decision. Parents do and should accept the responsibility for children whom they bear. Yet the consequences that follow from this should, as Fineman argues, result from caretaking within institutions supportive of that activity, rather than institutions that refuse to accommodate caretaking and that impose heavy limitations on caretakers’ life prospects. Viewing the situation in this light provides a rationale for state support of childrearing that still sees citizens as strong, responsible decisionmakers, although it also recognizes the limits on their autonomy. This view does not deny that most of those who have children have made a choice—albeit a constrained choice—to which they must live up to the extent of their ability. Yet it asserts that the consequences of this choice should be limited by the state’s own obligations to dependents.

**Feminist Alternatives to Public Support**

I have argued that society’s responsibility to protect the vulnerable mandates public support for caretaking. The issue of caretaking, however, also powerfully implicates the value of sex equality (Crittenden 2001). As feminists have long pointed out, through a complex combination of societal processes and expectations, most women in our society continue to assume caretaking roles in families that leave them socially and financially unequal to men, while most men continue to assume the role of primary breadwinner and the status and economic power that this role provides (Okin 1989a; MacKinnon 1989; McClain

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⁶⁸Ensuring that school-aged children were exposed to role models, both in literature and in real life, who had happy and productive lives without having children would be a promising start. See also infra at pp. 102-03.
Consequently, no solution to the carework issue can be attempted without thinking through its implications for sex equality.

How should the liberal state respond to the issues of gender inequality associated with inevitable dependency? Feminists have discussed this issue many times in a conversation that dates back to the 1970s. In the course of this conversation, they have proposed three very different types of solutions. The first of is an approach in which the state, itself, facilitates caretaking, such as the “supportive state” approach that I advocated earlier in the chapter.69 The second—which I will call the “parental parity” model – advocates policies that would shift carework within families so that women no longer assume a disproportionate share relative to men. The third of these models – which I will call the “anti-repronormativity” model70—calls for policies that would encourage women to consider other life options beside bearing and rearing children, since these tasks are so closely linked with sex inequality. These three positions suggest very different routes for dealing with the inequality caused by women’s performing a disproportionate share of carework. In this part, I assess the promise of each of these approaches, individually and collectively, to further the goods with which a liberal polity should be concerned. I conclude that the public support model is central to solving the carework issue, but that it must be supplemented by components of both other approaches.

69 The schema that I set out here is composed of ideal-types for the purpose of conceptual clarification. It is not meant to, and does not, capture the complexity and depth of thought in individual feminists’ proposals on this issue.

70 The term “repronormativity” was coined by Katherine Franke to refer to the system of social incentives and pressures that lead women to bear children and to mother, and which treat these activities as natural and inevitable for women (2001, 183).
Parental parity model

The first of the positions to emerge in feminist theory, the parental parity model, sought to solve the carework issue by adopting policies that would equalize the caretaking performed by men and women within families.\textsuperscript{71} Susan Okin espoused this approach in \textit{Justice, Gender and The Family} (1989), when she argued that “any just and fair solution to the urgent problem of women’s and children’s vulnerability must encourage and facilitate the equal sharing by men and women of paid and unpaid work, of productive and reproductive labor” (171). Okin’s work seeks a world in which “it would be a cause for surprise, and no little concern, if men and women were not equally responsible for domestic life or if children were to spend much more time with one parent than the other” (171).\textsuperscript{72}

The parental parity position has a number of advantages. Achieving true equal distribution of carework between men and women would, of course, go a long way toward achieving sex equality. It would eliminate a large portion of the wage gap between the sexes, since the overwhelming portion of that gap comes from women’s greater caretaking responsibilities.\textsuperscript{73} In addition, it would largely eliminate the existing gap in leisure time

\textsuperscript{71}A recent variant of this approach would require that husbands compensate wives for performing housework rather than seek to redistribute housework within the family. See, for example, Ertman 1998 (proposing that premarital security agreements be used to value women’s greater carework), and Silbaugh 1996 (arguing that law should treat housework the same as paid work). This “spousal compensation” strategy, like the parental parity strategy, seeks to solve the carework issue within the family itself. It also bears a resemblance to the public subsidy model, discussed \textit{infra}, in that it would subsidize women for performing the carework that women have traditionally performed, rather than redistributing that burden. In the case of the public subsidy model, however, the state rather than the partner pays.

\textsuperscript{72}As mentioned in note 69, my typology consists of ideal types for analytical purposes. An individual theorist’s work may fit into more than one of these categories. For example, I am here excerpting the portion of Okin’s proposal that fits the parental parity model. Other parts of her work comport with the public support model. See, for example, Okin 2004, 176 (“The facilitation and encouragement of equally shared parenting would require substantial changes. It would mean major changes in the workplace, all of which could be provided on an entirely (and not falsely) gender neutral basis.”).

\textsuperscript{73}See, for example, Alstott 2004; Crittenden 2001; Folbre 2001; Williams 2001; Case 2001.
between women and men. Further, because this approach seeks to shift responsibilities within the family, it at least theoretically would not require changes to institutions outside of the family. To some who advocate parental parity, including Mary Anne Case, this is the primary virtue of the position. To Case, shifting the burdens of childcare to the state or the labor market unfairly relieves fathers from the responsibilities they assumed at the child’s birth. In her words, “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” (Case 2004, 1756).

Yet while such a limited version of parental parity, which demands no accommodation of institutions other than the family, is possible on a theoretical level, it fails on a practical level. Measures to persuade men to take on more caretaking will have little success without removing the significant disincentives that exist for men to perform this activity: among the most potent of these is the substantial financial penalty that caregivers currently suffer in the labor market. Put another way, an approach that seeks to persuade

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74 See generally Hochschild 1989 (discussing the leisure gap between men and women in the United States).

75 As discussed infra, Case is probably best viewed as an anti-repronormativity theorist, even though she also espouses some parental parity views.

76 Fineman criticizes parental parity proposals as fundamentally misguided, at least partly for this reason. In her words, “[w]e must reject the notion that the problem of work/family conflict should be cast as the problem of a lack of equal sharing between women and men of domestic burdens within the family. We have gone down that road and it is a dead end. Our arguments for reform must now acknowledge that the societally constructed role of mother continues to exact unique costs for women” (2004, 171). Because of this, she contends, “[u]ntil the structures that make it so difficult and costly to combine caretaking responsibilities with paid work are changed, the status quo of family dynamics and workplace demands will continue to place women in a relatively disadvantageous position” (165).

77 As Ann Crittenden shows, even if the state were able to get men to assume considerably more responsibility for carework than they do now, but still less than women, women would likely still be penalized significantly. See Crittenden 2001, 94-103 (citing studies showing that women who had only briefly left the workplace for maternity leaves and who worked only slightly fewer hours than men working full-time still had significantly lower salaries than men).
men to assume more carework within families will ultimately founder if performing carework continues to be tied to significant penalties outside of families. Thus, the success of the parental parity model, in practice, requires adopting some measures of the public support approach. As Fineman notes in advocating the public support model, “[b]y making nurturing and caretaking a central responsibility of the nonfamily arenas of life, we structure an equal opportunity to engage in nurturing and caretaking. Under these circumstances, men may actually be more likely to take time and energy from their market careers to invest in nurturing their families” (Fineman 2004, 201-02).

Leaving aside the practical need to adjust other institutions in order to implement the model, how does the limited goal of parental parity fare in terms of achieving goods besides sex equality with which a liberal democracy should concern itself? Measured in terms of the welfare of children and others with significant dependency needs, its success is questionable. Even if men could be persuaded to assume half of the caretaking burden, they and their female counterparts would still work in a labor market whose standards are constructed without reference to the needs of dependents. As a result, the value and prestige of caregiving and the extent to which it is pursued in society would continue to suffer. This model also leaves workers who have significant caregiving responsibilities to rely on the quality of whatever substitute caregivers their finances permit them to employ; these caregivers may or may not be adequate to meet their dependents’ needs.\(^78\) Parental parity, moreover, would not lighten the load for the considerable numbers of single-mother families in which there is no man available to share the workload.

\(^78\) In a discussion of paid daycare for children, Clare Huntington reports, “Only one in seven centers provides care that promotes child development, while seven in ten provide care that could compromise a child’s future learning abilities, and one in eight provides care that threatens a child’s health and safety.” She notes that this ratio is even worse for care provided to infants and toddlers (Huntington 1996, 102).
Further, this system would continue to penalize workers with caregiving responsibilities to the extent that they cannot meet existing job structures. Those who have significant caretaking responsibilities will continue to be assigned to marginal positions in the workplace, putting them and their dependents in economic peril, or worse, consigning them to receiving means-tested welfare benefits which (in our work-oriented society) subject them to stigmatization and exclusion. Given the inevitability and unpredictability of dependency, the failure to adapt the labor market to accommodate this condition means that all workers are subjected to a system in which having a close family member become dependent means the sudden loss of many rights and privileges.

Supplementing the parental parity approach with the public support model, however, ameliorates these stark disadvantages. Not only would the public support model restructure institutions like the workplace to ensure that children and other dependents get the care they need, but it would also reduce the disincentives for men to perform carework since it would help eliminate the penalties parents currently suffer in the labor market.

Anti-repronormativity model

In the last few years, a new position has been sounded in the carework conversation, most prominently by Mary Anne Case of the University of Chicago, and Katherine Franke of Columbia Law School (Case 2001; Franke 2001). Both argue that past discussion on this issue has assumed a special relationship among women, caretaking, and motherhood without questioning the inevitability of this relationship. Instead of ensuring that women are not penalized for their carework, Case and Franke argue that feminists should seek to disrupt the perceived naturalness of the link between women, caretaking, and motherhood, and to promote other life paths for women.
As Katherine Franke explains this view, recent feminist calls for public support of carework have collapsed women’s identity into their roles as mothers, thereby reinforcing the “repronormativity” of motherhood (Franke 2001). Rather than “incentivizing” (in Franke’s words) women’s relationships with children by rewarding them for having and caring for children, she argues that feminists should challenge the forces that conceive of these activities as women’s highest calling. Until now, she contends, feminists have been unwilling to take on this project: “To suggest that we reconceptualize procreation as a cultural preference rather than a biological imperative, and then explore ways in which to lessen or at least modify the demand to conform to that preference, is to initiate a conversation within feminism that has been explicitly and curtly rejected by some legal feminists” (184-85).79 In a similar vein, Mary Anne Case argues that women must be given “a wider range of options for productive work” so that they will have alternative life paths aside from raising children (Case 2001, 1781).

These theorists’ calls to disrupt the persistent association of women with mothering add an important, heretofore missing piece to the carework conversation. Case and Franke are particularly on-target when they challenge the assumption underlying much feminist theory that the decision to bear children is a virtuous, community-enhancing one that the government therefore should privilege and support. Both authors point out that a woman’s decision to have children often has little to do with altruistic impulses.80 They also persuasively argue that there are many other activities that contribute at least as much to the

79See also Franke 2001, 184 (“Is there any principled reason why legal feminists might not want to devote some attention to exposing the complex ways in which reproduction is incentivized and subsidized in ways that may bear upon the life choices women face? To ask such a question is to risk being labeled unfeminist.”).

80See, for example, Franke 2001, 190 (“I suspect that if polled, mothers would rank a species-regarding reason well behind more private and personal motivations for their decisions to reproduce”).
public good as the decision to bear children. In addition, their concern with challenging the vast array of cultural messages that suggest to women that the only way to have satisfying and productive lives is through parenthood is vital to women’s struggle to attain both freedom and equality. As Franke and Case both recognize, significant cultural forces in women’s lives normalize the prospect of children, and suggest that women’s lives are incomplete without them. Given the strong link between rearing children and women’s inequality, questioning the necessity of the link is an important feminist project.

However, insofar as the two authors argue against state subsidization of childcare on these grounds, they translate this valuable insight into flawed public policy. Both Franke and Case raise concerns about subsidizing and accommodating carework on the ground that to do so might encourage women to have children. From the perspective of furthering women’s equality, this policy is deeply troubling. Roughly eighty percent of women become mothers at some time during their lives (Franke 2001, 196) and confront the profound economic and social disadvantages that attend caretaking responsibilities (see Crittenden 2001). Insofar as the anti-repronormativity position seeks to dissuade these women from having children by decreasing assistance for caretaking, the likely result would be a dismal failure. If having women bear large costs in terms of economic and social inequality would deter them from having children, humanity would already have been threatened with extinction. Women’s

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81 See Franke 2001, 184; Case 2001, 1780, 1751 (warning that family-friendly workplace initiatives and government support for parents may “inflate the demand for reproduction relative to other activities,” and could therefore distort the choices of women who might prefer “to write a book or start a business or get an advanced degree instead of raising a(nother) child.”).

82 These claims bear a strong similarity to those made by opponents of welfare, who contend that increasing subsidies for children will encourage welfare mothers to bear more children. As an empirical matter, there is not much support for this proposition. Researchers have found, at most, only a small positive correlation between welfare and childbearing, and only for particular groups of women without high-school degrees (for example, Robins & Fronstin 1996). The existence of even this correlation, however, is hotly contested because of the difficulty of separating out confounding factors (for example, Fairlie & London 1997).
desires to have children – whether social, biological, or some mix of the two – have proved incredibly tenacious (Becker 2002). Given that, while it makes sense to adopt measures to increase women’s understanding of and ability to withstand these pressures, failing to adopt public policy measures that accommodate women’s childrearing responsibilities would far more likely hurt than help the cause of women’s equality.

Moreover, the anti-repronormativity position that the state and private employers should not support caregiving ignores a central reality to which feminists have long demanded attention be paid: dependency is an unavoidable condition in human lives, rather than simply a product of women’s choices. In Joan Tronto’s words, “Care is not a parochial concern of women, a type of secondary moral question, or the work of the least well off in society. Care is a central concern of human life. It is time that we began to change our political and social institutions to reflect this truth” (1993:80). Even if women could be convinced that they don’t want to become pregnant, sometimes dependency just happens. Parents or partners fall ill. Unplanned pregnancies occur. Public policy and the labor market could ignore the inevitability of dependency only because they were developed on the assumption that men have wives at home to deal with caretaking (see, for example, Frug 1979; Fraser 1997; Williams 2001; Eichner 1988). As Tronto points out, it is through the exclusion of care as a core political and social value that “those who are powerful are able to demand that others care for them, and they have been able to maintain their positions of power and privilege” (1993: 179). While this model is now described in gender-neutral terms, the job structures premised on this exclusion remain unchanged. And it is these structures that anti-repronormativity advocates would allow to remain intact.

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83In addition to Fineman, see, for example, Tronto 1993; Held 1990; Kittay 1999.
As problematic as its implications for sex equality are, the anti-repronormativity argument against accommodation of childrearing would also hurt dependents. Although Mary Anne Case distinguishes between the state providing benefits directly to children, which she would support to further children’s welfare, and the state providing benefits to the parents of children, which she would oppose on the ground that it sets up incentives for women to have children, the effect on children’s welfare cannot be so neatly delineated. Children and other dependents need far more than direct subsidies; they need care. Care theorists have amply demonstrated the primacy of the dependency relation to the well-being of the dependent (see, for example, Kittay 2001, 542). The labor-market accommodation opposed by Case, to the extent that it deprives children and other dependents of care, would redound to their detriment.

Indeed, in arguing against accommodation for caretaking, Case presents a straitened view of the principles that should guide a liberal polity. While she pays lip service to the notion that care could serve as a legitimate public value (Case 2001, 1786), her essay over and over again presumes that a narrow version of a principle requiring equal treatment for all should trump all other decision-making principles. She therefore rejects the notion that a

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84 See Case 2001, 1783-84 (“I have already expressed my own view that neither employers nor the state should be giving parents anything – from tax breaks to time off to parking spaces . . . to housing to flexible schedules – merely because of the fact that they are parents. . . . 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.”).

85 See Case 2001, 1767 (“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.”); 1768-69 (“If there must be legislation on parental status discrimination, I agree with Elinor Burkett about its scope. [According to] Burkett . . . [l]ast 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?”); 1769 (“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
good polity might prioritize care for the vulnerable, accommodate citizens’ moral responsibilities, 86 or seek to develop the capacities of its future citizens, without equally accommodating other activities in which citizens choose to engage. Case’s description of the reasons that society should extend certain subsidies to children exemplifies the paucity of her view. She would frame the reasons for support to children as “a stop-loss possibility, as a need to reduce negative externalities from (some) reproductive activities . . . . 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” (Case 2001, 1785). Absent from her account is any description of the more positive reasons for extending such subsidies or any thicker sense of collective purpose that would justify state support. 87

**Public support model**

In contrast, the public support model is premised on the view that society has a responsibility to address dependency, and should therefore structure its institutions in ways that make caretaking possible. As Martha Fineman argues, there is little hope for achieving sex equality without public support for carework: so long as women continue to bear an 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” . . . .). See also Becker 2002, 96 (noting that Case “seems uncomfortable with values” and wants the state “to act in a value-neutral manner.”).

86 A sizeable contingent of political theorists have begun to make the case for the importance of fulfilling such responsibilities to a well-functioning democracy. See, for example, Galston 1991; Taylor 1985; Spragens 2001; see also Berlin 1969.

87 In this regard, Case’s rationale for collective responsibility sounds much like Hobbes’ description of the reasons that men should join together in a commonwealth in the first place, “for their own preservation, and [for] a more contented life thereby; that is to say, [for] getting themselves out from that miserable condition of war, which is necessarily consequent . . . to the natural passions of men, when there is no visible power to keep them in awe” (Hobbes, 106).
unequal share of caretaking responsibilities, they cannot attain equal status with men if societal prerogatives continue to be denied based on these responsibilities. And, as discussed supra, getting men to assume more responsibility for caretaking is unlikely in the absence of public support to eliminate the significant penalties now incurred by caregivers.

Further, insofar as feminism seeks to transform society to truly accommodate both men and women, Fineman is right that it must transform those public institutions that remain premised on traditionally male life patterns and that award prerogatives to those who most closely enact these life patterns. This system, in Nancy Fraser’s words, “delivers the best outcomes to women whose lives most closely resemble the male half of the old family wage ideal couple. It is especially good to childless women and to women without other major domestic responsibilities” (Fraser 1997, 53). Because most women do not fall into this group, as a class they fare poorly. This standard, moreover, subjects people to a “dependency lottery” in which those who manage to go through life without having to take on caretaking responsibilities win big and are awarded social prerogatives. Correspondingly, those who lose – mostly women – lose big. Not only are those who find themselves in caretaking roles deprived of the salary and accompanying benefits of a job, they are also marginalized in a system that esteems the breadwinner role while it accords far less social value to the caretaker’s.89

The public support model not only contributes to sex equality, it also supports the needs of dependents. In situations in which existing work standards do not accommodate family responsibilities, public support can mean the difference between adequate support and

88 See supra at p. 2.

89 “An employment-centered model, even a feminist one, has a hard time constructing an honorable status for those it defines as ‘nonworkers’” (Fraser 1997, 54).
no support at all. By the same token, it is only this model that would help the rising number of single parent families in which there is no other parent to provide support or to whom carework can be redistributed.

**Methods of public support: direct subsidies versus public integration**

With that said, all public support is not similarly situated with respect to furthering sex equality. In this regard, it is important to distinguish between two different kinds of support that the welfare state can provide. In the first of these, which I will call the “direct subsidy” approach, the state directly subsidizes caretakers for performing carework in family settings. In the second, which I will call the “public integration” approach, the state accommodates societal institutions, like the labor market, to the demands of caretaking. Although both approaches posit the need for public support, they envision very different roles for caretaking and for the role of the state with respect to carework. Of these two approaches, I hope to persuade the reader that the public integration approach better furthers the normative purposes of a liberal polity.

As Nancy Fraser (1997, 41) points out, welfare systems are inevitably constructed on a particular normative vision of social organization. The New Deal era introduced a model of the welfare state that dominated for more than three generations, and that was built on the presumption that citizens lived in families comprised of a breadwinner married to a caretaker and their biological or adopted children. Events in recent years have at least partially forced the demise of this breadwinner-married-to-caretaker model, as policymakers were confronted with the recognition that it did not conform to the far more varied groupings in which people lived their lives. Yet rather than moving toward a model that better accommodates...

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90In fact, Stephanie Coontz (2000) argues that the assumptions that this mode of family organization ever
citizens’ lived reality, recent revisions of welfare policy have turned to a model that presumes that everybody should be a breadwinner. As Martha Fineman has demonstrated, in adopting this new “universal breadwinner” model, current welfare policy fails to give caretaking the support it both requires and merits.

Yet if both the traditional breadwinner-married-to-caretaker model and its successor, the universal breadwinner model, are predicated on problematic normative conceptions, on what alternative conception should the welfare state be premised? The two variants of the public support model that I laid out above – the direct support and public integration approaches – although both versions of the public support model, answer this question very differently. The direct subsidy approach is constructed on the view that caregivers should continue to provide care in much the same way that caregivers in the traditional breadwinner-married-to-caretaker model did. This approach assumes that citizens who have significant caretaking responsibilities, like the housewives of yore, will either drop out of the paid labor market completely or at least become marginal figures in that market. In this approach, the labor market is not required to change, and caregiving is still to be performed largely by family members in private homes. The big difference between the traditional model and this approach is that now caregivers will receive money for their work from the state rather than from their husbands. This approach might therefore be envisioned as taking the old family picture of the breadwinner-married-to-caregiver, and replacing the breadwinner’s picture with that of the state.

represented the norm in the United States is largely a myth: the form was applicable only to a small class of people for a brief period of time.

91This terminology is Nancy Fraser’s (1997, 41, 51).
In contrast, the public integration approach, while it also envisions the state as an integral partner, calls for the state to structure societal institutions in ways that enable citizens to integrate both the roles of caregiver and breadwinner into their lives. This approach therefore requires significant changes to institutions beyond the family, including, most importantly, the labor market, in order to accommodate caretaking responsibilities. Put another way, it replaces the old picture of the breadwinner married to the caretaker with one in which citizens are each, individually, both breadwinners and caretakers.

Unlike the old breadwinner-married-to-caretaker model and the prevailing universal breadwinner model, both the direct subsidy and public integration models have the virtue of public support for caretaking. Both also have the advantage of providing this support to single-parent and other non-traditional families, an important feature given that most contemporary families do not comport with the traditional family model. Of these two models, however, the public integration model is a significantly better choice for several reasons.

First, the public integration model has particular features that give it an edge in achieving sex equality. Since the public integration model does not require caregivers to completely drop their work identities, it makes men more likely to engage in carework than does the public subsidy model. Further, women are more likely to achieve financial equality under the public integration model. Even the most generous direct public subsidy proposals

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92 See supra, Introduction, at pp. 2-3.

93 Other scholars have also reached the conclusion that a welfare system that allows individuals to combine caretaking and breadwinning offers the best prospect for fostering both caretaking and equality. See, for example, McClain 2005 (forthcoming) ("A better resolution is to support and recognize care as a public value in a way that facilitates both women and men integrating family and employment."); Gornick & Meyers, 84-111 (seeking a "dual-earner-dual-career society").
generally seek replacement only of wages and benefits for the period of caretaking.\textsuperscript{94} Under these proposals, the caretaker is not compensated for the considerable loss of opportunity to increase her skills and broaden her experiences during this time. As economists have shown, however, even small amounts of time taken out of the job market generally results in large financial losses for the mothers who take them, and considerably diminished financial prospects for the rest of their lifetimes. Most of these losses would remain unredressed under direct support proposals (Crittenden 2001). In addition, as Vicki Schultz (2000, 1883) eloquently discusses, structuring societal institutions in a manner that allows those with significant caretaking responsibilities to hold paid work would allow women opportunities for self-fulfillment, self-definition and to realize aspirations in the larger world that have largely been foreclosed to them until now.\textsuperscript{95}

Second, the public integration approach better combats the destructive complex of myths about care that pervade United States culture. As Martha Fineman persuasively argues, our society loudly trumpets the myth of autonomy. But her analysis focuses on only one – albeit the loudest – of the cultural messages that circulate regarding care. The counterpoint to this message, sounded less loudly than the autonomy myth but still quite audibly, does more than proclaim the importance of caretaking – it announces it to be women’s highest calling.\textsuperscript{96} It is this strand of the cultural conversation that gives Case’s and Franke’s critique of heterorrepronormativity such traction (Case 2001; Franke 2001). In this narrative, children (in contrast to their complete disappearance in the narrative sounding in autonomy) are

\textsuperscript{94}See infra note 2.

\textsuperscript{95}See also Becker 2002, 1505-11.

\textsuperscript{96}It is this strand that both Mary Anne Case and Katharine Franke tap into when they talk about the pressures of repronormativity, and which gives their critique such traction. See also Hays 1996.
presented as society’s greatest treasure, deserving and requiring the complete attention of their caretakers to fulfill their potential. According to this view, women must sacrifice their careers as well as years of their lives to fulfill their role as mothers adequately. Those mothers who fail to give their children virtually unlimited care and attention are seen as selfish, and their children doomed to a life of failure.97

Any adequate prescription for dealing with the carework issue needs to grapple with the complexity and contradictions of these cultural messages, recognizing the dominance of the autonomy myth, but also the fetishization of care in other strands. The public integration approach, in my view, accomplishes this better than its direct subsidy counterpart. The former recognizes the importance of carework without presuming that women must withdraw from the rest of the world to be good mothers or caretakers. At the same time, in contrast to the direct subsidy model, it contests the ideology that work and family occupy separate and exclusive spheres. Instead, the public integration model posits that paid work and caretaking are not fundamentally incompatible pursuits, given sufficient adjustments to the way in which both the labor market and families operate.98

97See, for example, Suzanne Venker, Seven Myths of Working Mothers: Why Children and (Most) Careers Just Don’t Mix (2004) (arguing that motherhood is a full-time job that women should choose over a career; linking the problems of today’s children and the absence of mothers); Mary Eberstadt, Home- Alone America: The Hidden Toll of Day Care, Behavioral Drugs, and Other Parent Substitutes (2004) (arguing against day-care and working motherhood); Laura Schlessinger, Parenthood By Proxy: Don’t Have Them If You Won’t Raise Them (2000) (couples who both work should not have children; those who do are self-centered and contribute to the moral decline of society); Robert Shaw, The Epidemic: The Rot of American Culture, Absentee and Permissive Parenting, and the Resultant Plague of Joyless, Selfish Children (2003) (title speaks for itself). Judith Warner’s recent book, Perfect Madness: Motherhood in the Age of Anxiety (2005), critiques the costs to women of an intensive mothering model and interprets it as women’s individualized responses to the lack of public support for childrearing.

98Baker 1997, 1521-22 (“Supporting the idea of gendered caretaking, without striving to integrate the needs to caretake into the world of public work will do nothing to tear down the divide between caretakers and the noncaretakers. The caretakers, despite the support they may receive from the state, will not be able to compete with those that do not caretake . . . When the dependency has run its course or when the caretaker wants to choose a less caretaking-intensive lifestyle, her options are going to be severely limited. She opted out of the noncaretaking world, and by doing so she seriously compromised her ability to integrate herself back into a more public life.”).
caretaking are mutually exclusive has largely been restricted by race and class: minority and working-class women have historically not had the luxury of believing that they could not combine raising children and paid work.\textsuperscript{99} The public integration model dispels this view by asserting that mothering and breadwinning roles can coexist, thereby allowing women to assume places in the public realm.

Third, the public integration approach ensures that children’s needs are met, but not fetishized. The approach supports the ability of parents to spend significant amounts of time with their children, but not every hour of the day, and not to the exclusion of all else. In this model, children would likely spend some time in group care arrangements, but significantly less time than if they had parents working full-time under the current system. This approach therefore has the virtue of recognizing the importance of parents’ relationships with their children and supporting that relationship, while also recognizing the value of children spending time with other adults and children.\textsuperscript{100} Children who regularly spend time in group care arrangements are more likely to form bonds with others and less likely to fall victim to the “over-appreciated child” syndrome in which they have difficulty functioning without the constant attention on which they come to rely.\textsuperscript{101}

\textsuperscript{99}For example, in the years between 1961 and 1965, 65.7\% of white women quit their jobs on the birth of a child, compared to 39\% of black women (Taeuber 1996, 110).

\textsuperscript{100}Hooks 1984, 144 (advocating childrearing as a community activity, in contrast to the “idea that parents, especially mothers, should be the only childrearers”); see also Card 1990 (noting that community childrearing may take place more commonly than acknowledged, and has yet to receive fair consideration as an alternative).

\textsuperscript{101}Baker 1997, 1518 (noting studies that show that children reared in community caretaking institutions are less demanding of parents, have strong moral development, and are able to navigate new environments); Riylin 2004.
Toward A Unified Approach to the Carework Issue

The public support approach, taken alone, however, creates some problems for the liberal state. Even assuming that a public support model were completely implemented, the parental parity model’s goal of an equal division of caretaking between the sexes would still be important to achieving sex equality for several reasons. First, repeated experience shows that tasks performed by women tend to retain low status until men assume them (Baker 1997; Eichner 1988, 1401-02). Until more men take on caretaking, it is therefore likely to continue to be seen as low status “women’s work.” Second, as a practical matter, it is difficult to imagine that even a state that adopts a public support model will subsidize caretaking to such an extent that caretakers will experience no societal penalties whatsoever. Because of this, even feminists who favor a public support approach should push for parental parity so that both sexes share this remaining burden equally. Third, equal sharing of carework is also important to allow women the same amount of leisure time that men have to enjoy themselves, to sustain themselves, and to develop their capabilities. The goal of parental parity therefore not only does not stand in tension with the public support model, it should be pursued as a complementary strategy.

The liberal state should adopt a more cautious stance toward the measures advocated by anti-repronormativity theorists – accepting some and rejecting others. The project of deconstructing the reflexive association of women with motherhood by making alternative life courses visible and viable is crucial to pursue in concert with the public support

102 Even more ambitious proposals to subsidize family leave, for example, do not suggest compensation for caregivers’ opportunity loss in the market. Anne Alstott’s work (2004) is a notable exception. Alstott argues for a “caretaker resource account” to compensate parents for opportunities they lose as a consequence of caretaking. Alstott proposes that the caretakers of children under age 13 be given annual grants of $5,000, which they may use for child care, education, or retirement savings. Even she, however, proposes a level of compensation for caregivers’ opportunity costs that is well below most caregivers’ actual opportunity cost for caregiving. See Crittenden (2001) for a discussion of those costs.
approach. Without it, a public support approach runs the risk of further solidifying this association. No doubt some tension exists between public initiatives that support caregiving, which emphasize the importance of caregiving, and anti-repronormativity proposals, which emphasize the value of other life paths. But this tension, in my view, is both healthy and necessary, and can be mitigated by a more nuanced account than is usually offered. Such an account would make clear that neither childbearing nor childrearing is a woman’s necessary or highest calling. Yet once children exist, caring for them, and caring for other dependents, is a critical responsibility that must be taken seriously by parents, other family members, and society. This analysis does not fetishize children, motherhood, or childrearing, yet it still recognizes the importance and dignity of carework.

Conclusion

Acknowledging the fact of dependency in human lives requires recognizing that a sound liberal polity must do more than simply safeguard individual rights in order to respect the human dignity of its citizens. This brings the state’s role with respect to families into focus. Insofar as it is families who assume the day-to-day responsibility for caretaking (or arranging the caretaking) for dependents in our society, the state’s responsibility to these dependent citizens requires that it support families and facilitate this caretaking. And as I discuss in the next chapter, it is not only dependents that need care: even able adults need care to some greater or lesser degree over the course of their lives. How the liberal state should respond to relationships between adults as a result of these dependency needs is the subject of chapter 4.
CHAPTER 5

FAMILIES, THE STATE, AND RELATIONSHIPS BETWEEN ADULTS

In the last chapter, I discussed the state’s position with respect to those relationships that might be called “vertical relationships,” in which one member is a caretaker and the other a dependent, such as the relationship between a parent and a young child, or an adult child and an aging parent. In this chapter, I turn to intimate relationships between generally able adults, or what might be called “horizontal relationships.” In these relationships, what role, if any, should the liberal state play? Should the state distance itself from them on the rationale that adults should be left to order their own relationships? Or, as with vertical relationships, should the state positively support such relationships? And, assuming that the state should seek to support relationships between adults, should it treat all types of such relationships in the same way, or may it and should it favor some over others?

Theoretical Positions

To help think through these questions, I again use Martha Fineman and William Galston as interlocutors. The two theorists have almost diametrically opposed perspectives on these issues. Fineman argues that the state has no business with respect to relationships between able adults, and should instead invest its efforts in supporting caretaker-dependent relationships. In arguing that the state should eliminate marriage as a legal status, she receives support from queer theorists, including Michael Warner. Galston, meanwhile, argues that the liberal state should privilege marriage and two-parent families because they
provide the best environment in which to raise children and contribute to a stable, well-ordered polity. In doing so, his work bears some similarity to the work of social conservatives, including the Council on Family Law, an organization chaired by Mary Ann Glendon, a Harvard Law professor who has been associated with both communitarian and conservative perspectives.

*Fineman and Warner—The Case Against Marriage*

No feminist theorist has taken a stronger stance against civil marriage than Martha Fineman. Fineman takes her insights regarding the inevitability of dependency to new and original places when she uses it to critique the privileges given to the marital family in the United States. Current public policy privileges and subsidizes married couples, she argues, based on the autonomy myth—here applied to how families, rather than individuals, should function (Fineman 2004, 57). According to this myth, the marital family is seen as a strong and independent unit that does not need state support. Because of this presumption of autonomy, Fineman points out with irony, married couples receive hundreds, if not thousands, of subsidies and privileges from the state that are unavailable to others (104-05).

Fineman contends that this policy of supporting the marital family is misguided on several grounds. First, she contends that all humans are inevitably needy. As a result, complete autonomy is possible for no one, including married couples. In contemporary

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103 The Council on Family Law is jointly sponsored by the Institute for American Values, the Institute for Marriage and Public Policy, and the Institute for the Study of Marriage, Law, and Culture.

104 Fineman’s views on this issue have received significant critical debate. See, for example, Scott 2004; Shanley 2004.

105 See also Dougherty 2004 (listing marital benefits under federal and Massachusetts law).
society, everyone exists within a web of institutions that provide for at least some of his or her needs. For this reason, she argues, the pursuit of autonomy should be abandoned in favor of insuring that human needs are humanely and justly met for all citizens, not just those in families (199, 285).

Fineman also criticizes other justifications for the multitude of benefits currently awarded to married couples. Insofar as the state focuses on the marital family to support childrearing, Fineman contends, it is sorely out-of-touch: large portions of the population raise children out of wedlock, while, at the same time, many married couples choose to remain childless (67, 110-112). A state that truly seeks to support the welfare of children should therefore support childrearing in all the contexts in which it occurs, not just for children whose parents are married (xvii). And insofar as the state subsidizes the marital family because it represents the majority’s views of how people should order their lives, Fineman contends, its actions are illegitimate: In a diverse and secular society, the state should not privilege one form of affiliation over others simply because that affiliation better comports with the private morality of the majority of citizens (105). On top of that, Fineman points out, the state’s current support for the institution of marriage overlooks significant problems with that institution, most obviously that it is an institution to which (at least until recently, and in most places still) only heterosexual couples are admitted, and that it is rife with sex inequality. On this latter point, she argues that public policy that encourages marriage for the sake of children demonstrates the state’s willingness to sacrifice women’s interests for children’s (88).

Fineman argues that instead of subsidizing a particular type of family, i.e., the marital family, the liberal state should subsidize the particular functions that it has a legitimate
interest in supporting, in whatever relationships these functions take place.\textsuperscript{106} This means, for Fineman, that the state should not seek to further its interest in childrearing through privileging the marital family grouping, as it currently does; instead, it should subsidize the caretaker-dependent relationship directly in whatever type of configuration in which it occurs (67).\textsuperscript{107} In contrast, Fineman argues that the state has no legitimate stake in furthering relationships between capable adults. In her words, “Why create policies based on a seriously weakened family affiliation – the marital couple – when it is really caretaking that we as a society should want to ensure? Society has a responsibility to adjust to these changing patterns of behavior by guaranteeing that the emerging family forms are supported in performing the tasks we would have them assume”(67). As a result, Fineman asserts, the state should eliminate civil marriage as a legal institution (122).\textsuperscript{108} In the new regime she proposes, legal relationships between adults would be governed by private contracts negotiated between them. This would leave marriage as a purely religious institution for those couples who choose to have religious ceremonies.

Fineman’s view that the state should eliminate civil marriage bears a strong affinity to arguments made by queer theorists, including Michael Warner. In arguing for the abolition of state-sponsored marriage, Warner contends that the purpose of marriage is to privilege and promote a particular, monogamous model of heterosexual sexuality, and to stigmatize all other models as morally tainted (1999). According to Warner, this represents the blatant

\textsuperscript{106}“It is time to build our family policy around these emerging norms, to focus not on form but on the function we want families to perform” (67). See also 68, 105, 107.

\textsuperscript{107}See also xix, 108, 138

\textsuperscript{108}“I argue that for all relevant and appropriate societal purposes, we do not need marriage and we should abolish it as a legal category. I argue that we should transfer the social and economic subsidies and privilege that marriage now receives to a new family core connection – that of the caretaker-dependent” (122).
imposition of the majority’s view of what is morally proper on the minority. Warner resists the notion that the state should serve as an instrument of moral judgment, granting “legitimacy to some kinds of consensual sex but not others or to confer respectability on some people’s sexuality but not others” (123). He argues that instead of calling for same-sex marriage, gays and others who perceive themselves as queer should be striving for “[t]he ability to imagine and cultivate forms of the good life that do not conform to the dominant pattern” (123).

Galston and the Council on Family Law – The Case for Marriage

Fineman’s and Warner’s arguments against marriage stand in stark contrast to arguments favoring marriage from civic liberal William Galston, as well as from the Council of Family Law. In the context of condemning out-of-wedlock births for their negative consequences on children, Galston argues against the view that marriage is a failed social institution that the state should abandon as a means to redress societal problems. In his words, marriage:

is not a panacea, but it is a vital part of the solution. In at least a majority of cases, marriage can make a positive contribution, not only to the well-being of children, but also to the well-being of their parents.

Does this represent nostalgia? Does it imply the reaffirmation of patriarchy? On the contrary: it means the simple recognition that for economic, emotional and developmental reasons, marriage is the most promising institution yet devised for raising children and forming caring, competent, responsible adults. . . . I am deeply skeptical that the abolition of marriage, with all of its imperfections, can possibly yield better lives, or a better society for our children (1996, 323).

Despite Galston’s having served as domestic policy advisor for the Clinton administration, his view that the state should promote the marital relationship bears a significant resemblance to the policies advocated by the socially conservative Council of
Family Law, although some of its rationales vary from Galston’s. In its recent report, “The Future of Family Law” (2005), the Council argues that marriage should continue to be the state’s privileged institution for relationships between adults. That report argues that “at its core marriage has always had something to do with societies’ recognition of the fundamental importance of the sexual ecology of human life: humanity is male and female, men and women often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care” (13). This understanding of marriage—the promotion of a stable framework for biological parents procreating and raising children—the report argues, should continue to be promoted by the state.

The report therefore decries proposals like Fineman’s that argue for state disengagement from marriage. To do so, the Council asserts, sounding a chord of Galston’s, “denies the state’s legitimate and serious interest in marriage as our most important child-protecting social institution and as an institution that helps protect and sustain liberal democracy” (6). The Council also argues against proposals that seek to expand the relationships eligible for state support beyond married couples. According to the Council, expanding the category of relationships entitled to state recognition would unwisely “celebrate relationship diversity” to the exclusion of fostering the important goals that have traditionally been supported in marriage (40). To treat relationships that have not been formalized as the equivalent of marriage, the Council argues, would not only undercut couples’ own intent regarding the effects of their relationships, it would also fail to encourage couples to enter into formal commitments, and would therefore miss an important opportunity for the state to encourage the stability of their relationships and the welfare of any children who result from them (24–25).
The Council also argues against expanding marriage to same-sex couples. To do so, the report contends, would “strip[] all remaining remnants of sex, gender, and procreativity from the public, shared meaning of marriage” (26). It would therefore, according to the report, fail to recognize “the specificity of marriage as a form of life struggling with the unique challenges of bonding sexual difference and caring for children who are the products of unions” (21).

Assessing the State’s Interest in Horizontal Relationships

What should we make of these diametrically opposed arguments regarding the position that the state should take with respect to relationships between adults? How should we evaluate, on the one hand, Fineman and Warner’s claim that the state’s recognizing and privileging certain family forms over others constitutes an illegitimate attempt to impose the majority’s own morality on the minority, and, on the other hand, Galston’s and the Council of Family Law’s claim that the state’s privileging the marital family serves the important public end of promoting children’s welfare? And how should we deal with the fact that marriage is still, as

109 In doing so, they depart from Galston’s position. In a recent article, Galston suggests that he supports states’ freedom to expand marriage beyond its current boundaries:

It remains to be seen whether the evolving constitutional jurisprudence will ultimately strike down prohibitions on same-sex marriage. The push for a federal constitutional amendment defining marriage as the union of one man and one woman reflects social conservatives’ fears about just such an outcome. By contrast, many advocates of gay marriage would be satisfied with a state-by-state approach, which would inevitably yield long-term differences among the states on this matter. The debate over the right of public authorities to enforce uniformity on the institutions of civil society is far less settled. I agree with [Peter] Schuck when he insists that “the distinction between public and private morality, between the values laws should mandate and those it should leave to the disparate choices of a diverse civil society, lies at the core of a liberal society,” and that “the diversity that flows from the[ ] exercise of individual freedom is presumptively valid." I also agree with Schuck's application of this principle to the freedom of association: “[I]f valuing diversity in a liberal society means anything, it means assuring people's freedom to form exclusive groups that embrace unpopular beliefs in ways permitted by the Constitution and without undue interference by the law” (2005, 19).
Fineman reminds us, both an exclusionary institution and one that is riddled with sex inequality?

My view is that there are particular elements of each of these positions that a vigorous liberal democratic polity should seek to draw upon – although many that should be rejected, as well. Fineman is certainly right that autonomy is possible for no one, adults as well as children, and that the state should abandon the quest for the pursuit of autonomy in favor of insuring that human needs are met with justice and dignity. Yet, precisely contrary to Fineman, this gives the state an important stake in relationships between adults.110 As care theorists have made abundantly clear,111 it is not just children and others who are inevitably dependent who need care:112 All humans need care, even generally-healthy adults. And as our society is organized, some large portion of that care comes, if it comes at all, from other adults with whom we share close relationships. In such “horizontal” relationships, neither person is always the caretaker or the dependent, as they are in vertical relationships. Instead, adult-adult relationships are, at their best, marked by what might be called “reciprocal dependency,” in which each partner sometimes performs caretaking activities for the other and meets the other’s dependency needs; in turn, their partner does the same for them at other times. These relationships, when they function well, involve countless small acts in which each adult takes care of the other: one partner

110McClain 2003 (“To do [otherwise] seems to undervalue adult-adult interdependency and to miss the important facilitative role government may play in supporting such forms of adult affiliation”); see also Becker 2002, 62.

111See, for example, Kittay 1999; Tronto 1993.

112As discussed supra in chapter 3, Fineman uses the term “inevitable dependency” to refer to the biological dependency that occurs always in children, often in old age, and at other points in many citizens’ lives as a result of illness (Fineman 2004, xvii, 35-36).
makes the other a cup of coffee when they get up; the other drops off dry-cleaning on
the way to work; one runs to the store for cold medicine when the other is sick; and
so on.\textsuperscript{113}

This sort of caretaking, at its best, produces a society in which adults are knit
into webs of care that help them to support one another. In these webs, one partner’s
cold doesn’t develop into something worse because the other partner insists on taking
them to see a doctor. Moreover, such caretaking helps keep families stable so that
partners are there for one another at times when one of them has greater needs, such as
periods of disability. The state has an interest in these relationships because of its
interest in the dignity of its citizens, not to mention their health and well-being of its
citizens. Because of this, although the state does not have the same threshold duty to
ensure the welfare of able adults that it has to those who are dependent, it is still wise
policy for the state to foster these relationships.

By the same token, Warner, it seems to me, gets it only partly right: He is on
firm ground in arguing that the state should not be used as a vehicle to promote the
majority’s own comprehensive views with respect to citizens’ private lives. Yet while
the liberal state should therefore seek to accord broad freedom to all types of consensual
relationships, it can still recognize that stable caretaking relationships are important to
the welfare of the polity. On this ground, the state may legitimately seek to offer
privileges to such relationships.

\textsuperscript{113}This is not to say that in all, or even most, horizontal relationships between women and men the carework is
evenly divided. Studies have repeatedly shown that women spend significantly more time caretaking than men,
even when women work outside the home. See, for example, Hochschild 1989, 271-78; see also Baker 1997,
1512 n.63. There is some suggestion, however, that the deficit between men and women has been decreasing
slightly. See, for example, Schultz 2000, 1906-07.
Turning to the other side of this debate, there is some validity to Galston and the Council on Family Law’s positions, in my view, although Galston comes significantly closer to the target than does the Council. The liberal democratic state, as both Galston and the Council argue, should be able to privilege some relationships over others for public ends. And certainly creating a stable environment for children is such an end: all other things being equal, stable family relationships are better for children than unstable or nonexistent relationships. Further, while many of the greater difficulties associated with single-parent families are attributable to lack of adequate legal and social supports,¹¹⁴ having the emotional and financial resources of two loving adults available to a child, again, all other things being equal,¹¹⁵ is better than having the resources of just one. In my view, as well, both Galston and the Council make valuable points about the important role that the state can have through formalizing and privileging relationships such as marriage in creating an environment that fosters the caretaking of citizens generally, as well as children specifically.

Yet, in focusing on the state’s promoting marriage (and, in the Council’s case, solely heterosexual marriage), they too narrowly define the relationships that should be accorded such privileges by the state.¹¹⁶ The Council argues that advocates who support the state’s awarding privileges to a broader category of relationships than marriage miss “the specificity

¹¹⁴See, for example, Dowd (1995).

¹¹⁵The caveat of “all other things being equal” is a significant one. I am not arguing that having two parents who are unhappy stay together is better for children than having them separate. I am making the more modest claim that, for a child, having two happy parents living together is generally better than having one happy parent because of the extra emotional, caretaking, and financial resources they can contribute. Moreover, having two parents who live together happily is, all other things being equal, generally better for a child than having two parents who live happily apart. See, for example, studies cited in Galston 1997.

¹¹⁶To be fair, while Galston argues in favor of shoring up marriage and discouraging divorce, he would extend other policy measures that he advocates such as making work and family more compatible, and offering tax breaks to anyone with children, to many types of families, not simply families headed by a married couple (Kamarck and Galston 1992, 153). See also Galston 1996.
of marriage as a form of life struggling with the unique challenges of bonding sexual difference and caring for children who are the products of unions” (21). Yet the Council gives no convincing reason why the disparate issues of “bonding sexual difference” and caring for children must be tied together into the package of marriage, and, indeed, why the state shouldn’t make available, as well, other packages that promote other legitimate public ends.\footnote{Indeed, while both heterosexuality and procreation were certainly conceived as central to traditional marriage (see, for example, Reynolds v. Reynolds (Mass. 1862), in which the court stated that “[t]he great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring”), at least the procreative purpose of marriage has been, if not quite eclipsed, then at least demoted from its spot of sole star billing to costar alongside the companionate and caretaking aspects of marriage. For example, older American cases restricted annulment for fraud in entering marriage to misrepresentations going to the “essentials” of marriage, conceived in terms of duties connected with consortium and fertility. See, for example, Reynolds v. Reynolds (Mass. 1862). However, more recently, courts have broadened the fraud for which annulment will be granted. As stated in Kober v. Kober (N.Y. 1965):

[The fraud [required for annulment] need no longer “necessarily concern what is commonly called the essential of the marriage relation – the rights and duties connected with cohabitation and consortium attached by law to the marital status. Any fraud is adequate which is “material to that degree that, had it not been practiced, the party deceived would not have consented to the marriage” and is “of such nature as to deceive an ordinarily prudent person.” Although it is not enough to show merely that one partner married for money and the other was disappointed . . ., and the decisions upon the subject of annulment have not always been uniform, there have been circumstances where misrepresentations of love and affection, with intention to make a home, were held sufficient . . . .

See also Wolfe v. Wolfe (1979).}

Indeed, the Council’s arguments against same-sex marriage miss the mark on several counts. While the Council is certainly right that it is generally heterosexual relationships in which children will arrive unplanned, and the state therefore has a particular incentive to encourage heterosexual couples to enter into formalized commitments to promote the stability of the relationship in the event of unplanned children, this is not a reason to exclude same-sex couples from receiving state privileges. Many same-sex couples, like many heterosexual couples, plan to have children. And the children of these same-sex parents, like the children of opposite-sex parents, are benefited by the stability of their parents’
relationships. Given this, it makes sense for the state to seek to stabilize these relationships with the same supports that the Council argues will work so well with opposite-sex couples.

More than that, the state’s interest in ensuring that adults receive care also militates in favor of extending relationship privileges to same-sex couples. Currently, many heterosexual couples who choose to remain childless benefit, as does the state, from the state’s privileging their relationship. Doing so supports the state’s interest in caretaking for adults. While the Council criticizes those who seek to extend the state’s support beyond heterosexual marriage on the ground that these policy advocates too narrowly focus on “such values as commitment, mutual support and the rest” in the absence of childrearing (21), the importance of mutual support and related goods offer powerful incentives for the state to privilege relationships that promote these goods, whether or not they further all the other values that the Council believes are crucial to the state’s protecting marriage.

Finally, although the Council is right that women have, for a variety of biological and social reasons, been more vulnerable than men historically with respect to both unplanned pregnancies and childrearing, limiting marriage to heterosexual couples for this reason would be unwise. To the contrary, to the extent that homosexual relationships do not replicate these same patterns of vulnerability, the state has grounds to encourage same-sex relationships rather than deny them recognition and rights.\textsuperscript{118} Further, the Council’s insistence that marriage is an institution designed to protect vulnerable women flouts the Supreme Court’s counsel in cases such as \textit{Frontiero v. Richardson} (U.S. 1973), that the state should not rely on overbroad or outmoded sex stereotypes.

\textsuperscript{118}See McClain 1999, 510 (citing studies showing that generally lesbian couples do not organize their relationship on a provider-homemaker model).
Further, in advocating state support for marriage as against other relationships, both Galston and the Council too quickly dismiss other principles important to liberal democracy that militate against the state privileging such relationships. The most important of these alternative principles of distribution is based on need. Because of economies of scale, adults in live-in relationships generally have an easier time financially than those who live alone.\textsuperscript{119} Distributing resources to adults in relationships therefore is a regressive measure, on the whole, based on need. Further, insofar as two-parent families have particular advantages that make them more conducive to rearing healthy, stable children than single-parent families, distributing privileges to dual-parent families may also be regressive based on need.\textsuperscript{120} As Judith Stacey argues, “The more eggs and raiments our society chooses to place in the family baskets of the married, the hungrier and shabbier will be the lives of the vast numbers of adults and dependents who, whether by fate, misfortune or volition will remain outside the gates (Stacey 2003, 344).\textsuperscript{121}

Further, a clear recognition of the limits of both the state’s and individuals’ capacity to encourage marital relationships also cuts against privileging marital status, or should at least limit the extent to which the state seeks to put eggs into this basket. Taking first limitations on the state’s capacity, it must be recognized that the state has only limited ability to help citizens acquire and sustain healthy caretaking relationships. While it can establish

\textsuperscript{119}\textsuperscript{119}See, for example, Crittenden (2001).

\textsuperscript{120}\textsuperscript{120}The simple fact of distributing goods to families with children, however, is not regressive based on need. As Elizabeth Warren and Amelia Warren Tyagi demonstrate, having a child is now the best indicator of whether someone will end up in financial collapse. In their words, “Married couples with children are twice as likely as childless couples to file for bankruptcy. They’re seventy-five percent more likely to be late paying their bills. And they’re also far more likely to face foreclosure on their homes” (Warren and Tyagi 2003).

\textsuperscript{121}\textsuperscript{121}Stacey adds: “In my view, this is an unacceptably steep and undemocratic social price for whatever marginal increases in marital stability might be achieved for those admitted to the charmed circle. . . .” (344).
certain institutional preconditions and incentives for couples to make relationships work.\textsuperscript{122} Ultimately whether or not healthy relationships will develop and be sustained has a great deal to do with characteristics of the individuals involved that are beyond the state’s reach to affect, and dumb luck – for example, who individuals happen to meet. The state could, of course, still provide such sufficient financial incentives that people would enter into and remain in relationships in which they were miserable and in which little healthy caretaking occurred. Doing so, however, would not further the goods that the state should seek to further. With respect to the issue of individuals’ own capacity to enter into and maintain relationships, it must be recognized that personal attributes and behavior have some part to play in the success of an individual’s relationships, but many factors are simply beyond the individual’s control. Accordingly, considerations of fairness militate against distributing privileges based on the success of a person’s relationships, when this success has little relation to merit and an inverse relation to need.

In sum, the issue of how the state should treat relationships between adults is significantly more complex than either the Fineman-Warner positions or the Galston-Council positions recognize. Some large part of this complexity comes from the fact that the goods and principles that a liberal democracy should seek take into account are manifold, and, in the case of adult-adult relationships, stand in tension with one another. My hope in the

\textsuperscript{122}It should be noted, however, that poverty is significantly correlated with divorce, as are problems associated with poverty, such as homelessness and drug addiction. Social scientists who study the phenomenon believe that some of the correlation between poverty and divorce is actually a causal relationship – in other words, poverty leads to divorce. See generally Marsha Garrison, presentation at International Society of Family Law Conference, July 2005, Salt Lake City, Utah. Given this, an effective way for the state to increase the stability of intimate relationships may be through antipoverty measures and other institutional supports for the poor rather than through direct measures to promote institutions such as marriage. Such indirect measures would also harmonize rather than conflict with the principle of distributing resources based on need.
remainder of the chapter is to develop an approach that harmonizes important but competing principles implicated in the state’s position with respect to relationships between adults.

A Liberal Democratic Approach to Horizontal Relationships

To begin sorting out these matters, let me point out that there are actually two separate but related issues that must be considered with respect to the state’s approach to relationships. The first issue is whether the state should recognize relationships between adults for the purpose of assigning rights and responsibilities within the relationship. The second is whether the state should privilege relationships between adults, in the sense that those who participate in these relationships receive either benefits from or rights against the state or third parties that they would not otherwise receive. Both of these issues should be answered in the affirmative, in my view, although the first issue is an easier one than the second.

State Recognition Of Adult-Adult Relationships

When it comes to whether the state should recognize relationships between adults for the purpose of assigning rights and responsibilities as between the two parties, the answer seems to me to be clearly “yes.” The interdependent nature of intimate relationships between adults, particularly when they are long-term, creates a series of issues regarding rights and responsibilities that are best addressed through laws that, at a minimum, establish a fair default position in the absence of an express agreement between parties to the relationship. Without such default rules, this interdependence can create large inequities and injustices both during and, particularly, at the end of these relationships. For the state to do otherwise, as Mary Shanley recognizes, would abandon the state’s interest in securing justice and equality in these relationships (Shanley 2004).
Martha Fineman completely disagrees. According to Fineman:

If people want their relationships to have consequences, they should bargain for them, and this is as true with sexual affiliates as with others who interact in complex, ongoing interrelationships, such as employers and employees. This would mean that sexual affiliates (formerly labeled husband and wife) would be regulated by the terms of their individualized agreements, with no special rules governing fairness and no unique review or monitoring of the negotiation process. (Fineman 2004, 134).

She asserts that the state’s withdrawal from regulating adult-adult relationships “would mean that we are taking gender equality seriously” (134). In suggesting that a contractual regime will result in fair and equal agreements between parties involved in intimate relationships, however, Fineman glosses over serious difficulties. First she fails to take into account the ways in which those entering into a relationship based on affective ties may not be looking out after their own interests rather than the other person’s (and that the state may not want to encourage them to be solely self-regarding). As a result, “sexual affiliates” may agree to an unfair contract. Furthermore, the course of lives and relationships are often so difficult to predict that contracts entered into ex ante may not fairly and justly resolve what occurs ex post. In addition, in a regime of contract, those in a weaker bargaining position – traditionally women – will likely negotiate less favorable terms for themselves that will lead to inequality both in the course of the relationship and also when and if it ends.

And in this regime, even those who negotiate unfavorable contracts may be the lucky ones compared to those who negotiate no contracts. For some, this will be because they cannot afford a lawyer; for others, this will be because the motivation to express one’s love publicly, which many would say is their motivation to enter marriage, would not similarly
impel them to enter into a contract with their partner. If and when these relationships end, the partners would have no contract claims against one another. Existing, albeit imperfect, status-based protections that are currently available to those divorcing, such as the right to equitable distribution of property and alimony, would be nonexistent in such a regime. This would particularly hurt those who devote more energy and care to the relationship than to financial pursuits – again, likely women – since they would have no automatic claim to income earned by their partners through the joint efforts of the family.

A regime in which the state recognized relationships among adults for the purpose of apportioning rights and obligations among them is therefore necessary for fairness and justice. Of course, such rights and obligations could be assigned to couples based on the functional status of their relationship, without the state having to provide civil avenues to formalize these relationships ex ante. For example, the rights and responsibilities that the American Law Institute’s Principles of Family Dissolution now seek to apply to unmarried cohabitants could, in an era in which civil marriage and other formalized commitments between adults were eliminated, be applied to all couples. Under such an approach, what would matter in assigning such rights would be the couple’s functional characteristics – how

123 See Goodridge v. Department of Public Health (Ma. 2003) (quoting Griswold v. Connecticut (U.S. 1965) (“Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. ‘It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects?’”)

124 It might be argued, however, that although some individuals who enter into conjugal relationships may fare worse in the event of a break-up if status based marriages were eliminated, many other individuals would fare better because, in the absence of such recognition from the state, they would cease to enter into conjugal relationships. And certainly Fineman and other commentators have suggested that most women would fare better if they avoided entering into marriage or marriage-like relationships with men altogether. Whether or not this is the case, my strong hunch is that ending civil recognition will have little effect on the numbers of people who enter into conjugal relationships – they will simply do so without the imprimatur of the state, or its protections.
long they lived together, whether they had children together, etc. – rather than whether they had formalized their relationship. Thus, more property sharing might be required of couples who lived together for longer periods of time than couples who lived together for shorter periods, regardless of whether the couple had made some formal commitment to stay together.

In my view, eliminating a civil route for formalizing relationships would be a mistake for two reasons. First, this formalization helps to identify the intent of its members and their own understandings with respect to the intended primacy and permanency of the relationship. And surely such understandings should be relevant to determining the default rules that apply to the particular relationship. Thus, a commitment to a permanent relationship, such as the entry into marriage serves today, should be pertinent to the state’s determination of how long income should be redistributed between parties who have separated. Second, as the Council of Families recognizes, and as I discuss later in this chapter, the state’s making available a route through which citizens can formally commit to the permanency and depth of their relationship serves the state’s goal of increasing the stability of adult caretaking relationships. Such commitments increase the likelihood that those participants who face tough times will make more efforts to stay together with their partners.

*State Privileging Of (Some) Adult-Adult Relationships*

I have argued that the state should *recognize* relationships between adults and impose, at the least, default rights and responsibilities among participants in such relationships for the purpose of seeking to ensure equality and fairness. The issue of whether the state may and should seek to *privilege* such relationships over others is a much tougher issue for liberal theory. As I suggested earlier in this chapter, I think the answer should be “yes,” but with
significant reservations, since such privileges raise tensions among important liberal goods and values. Part of the challenge of a more robust liberalism that recognizes a richer diversity of goods must be to seek a course of action that ameliorates the tensions among these varied goods. In what follows, I set out four principles that, together, seek to accomplish this purpose.

1. **Freedom to enter into consensual relationships**
   
   First, liberalism’s great respect for individuals’ forming and carrying out their own life plans requires that the liberal state allow individuals the freedom to engage – or not engage – in consensual relationships with others. The right to determine one’s own personal relationships is central to liberalism’s respect for individual self-determination. The fact that liberalism was born out of fear of tyranny, as Judith Shklar points out (1989), strongly militates against the state decreeing that some consensual relationships are permissible and others are not. John Stuart Mill’s counsel that society benefits from allowing different "experiments of living” to flourish also supports the state’s ensuring that such freedom exists (OL, 54). Under this principle, for example, a citizen whose vision of the good life is to have sexual relationships with as many other citizens as possible should be able to fulfill that vision without interference by the state (barring issues such as public health concerns), regardless of whether the majority’s own private views of morality condemn such action.

2. **Encouragement of (a broad range of) long-term caretaking relationships**
   
   Second, although the liberal state must tolerate all consensual relationships, it need not give all such relationships a level playing field. It is true, as Fineman and Warner argue, that the liberal democratic state should not favor some relationships over others based on citizens’ private notions of morality. It can and should, however, seek to support
relationships that further important public goods in which the liberal state has a legitimate interest. Among the most important of these is caretaking. Without minimizing the harm that can occur in relationships between adults, or ignoring the sex inequality that tends to mark heterosexual relationships, the crux of the matter is that dependency is an inevitable fact of life for adults as well as children, and a liberal state must contend with that fact. Because of its interest in the health, well-being, and dignity of its citizens, the liberal state has an interest in the success of long-term relationships, and should provide these relationships with the institutional support that will help them flourish.

Given that the state’s interest is in caretaking, the category of relationships that the state has an interest in supporting is considerably broader than the set of couples who are now formally married. The state has an interest in supporting all long-term horizontal relationships in which caretaking occurs, including relationships between couples who are not necessarily monogamous, or, at the opposite end of the spectrum, those whose relationships are not sexual. By the same token, the state has an interest in supporting caretaking in family groupings that involve more than two adults.125 Thus, the state has valid reasons to support all of the following horizontal relationships involving caretaking: a couple of elderly sisters who live together and take care of one another, a non-monogamous homosexual couple, a commune of five adults who live together with their children, and a heterosexual married couple.

125There may be administrative rather than theoretical reasons to limit the number of persons that the state will recognize. There is, however, no reason that two persons should necessarily be the limit.
3. Limits on the privileges available to long-term caretaking relationships

Third, with all that said, promoting the health and stability of horizontal relationships is only one goal that a flourishing liberal democracy should pursue, and only one of many principles that should affect the state’s decision-making. State distribution of privileges these relationships therefore has to be weighed against alternative principles of distribution, including distribution based on need, as well as the recognition of the limits on the state’s and individuals’ abilities to ensure the existence and stability of relationships.

This recognition should cause the state to limit the privileges that support these relationships in two specific ways. First, the state’s seeking to aid caretaking relationships between adults cannot undercut the state’s responsibility to ensure that all its citizens have the means and opportunity to pursue dignified lives. This means, at a minimum, as Martha Fineman argues, that a just society should seek to deliver basic social goods such as health care to everyone in society, rather than based on family membership. Insofar as the state distributes these goods based on marital status, it neglects its most basic responsibilities.

Second, the state should limit privileges for relationships to the specific area in which the state has a legitimate interest – for example, caretaking, or sex equality. Singling out families for more generalized favorable treatment – while it might still further the goal of supporting families – stands in tension with principles of fairness among all citizens, both those within and those not in such families, particularly insofar as it redistributes economic resources to those who are, on average, better off. Under this third principle, the state could allow caretaking leaves from work or special immigration privileges for the partners of citizens, but not general tax breaks for those in caretaking relationships.

See also Law Commission of Canada (2004).
that are unrelated to the extra expenses incurred in caretaking. Thus the state would have little justification for funnelling general economic support to those in adult-adult relationships, given that these adults, on average, do better financially due to the economies of scale of living together. In contrast, economic redistribution to caretaker-dependent relationships could be better justified by the consideration of the cost to caretakers of caring for dependents.

One important way in which the state can legitimately foster such relationships is to provide a civil route through which adults can formalize their commitment to others. As Bruce Hafen notes, formal commitments increase the likelihood that a relationship will last (Hafen 475-76). They also serve as an expressive vehicle for the state to announce its support for stable caretaking relationships without redistributing tangible privileges in favor of such relationships and, hence, away from those who might need them more. The state’s endorsing such civil commitments is still not, of course, without cost to those who do not enter them: to the extent that the state endorses such commitments, those who do not enter into them may feel societal disapprobation. In my view, however, the benefits that such formalization yields in terms of the stability of these relationships, given the importance of such relationships, still outweighs the costs of this potential stigmatization.

4. Guarding against injury to other important goods

Fourth, in privileging caretaking relationships among adults, the state must also seek to remedy the negative consequences to public goods associated with these relationships. Three of these possible consequences bear particular attention: 1) increased gender inequality, 2) increased economic inequality, and 3) the possibility that close caretaking
relationships will cause their participants to turn away from civic life, instead of serving as a springboard to healthy civic engagement. I discuss each in turn.

**Sex inequality**

Any proposals that the state should promote intimate caretaking relationships must deal with the fact that heterosexual relationships are deeply intertwined with women’s continued gender inequality. Leaving current political realities aside, the state might, of course, deal with this troubling association by privileging only those long-term caretaking relationships that do not involve heterosexual conjugal relationships. Alternatively, and far more palatable politically, the state could privilege heterosexual relationships along with other relationships at the same time that it seeks to increase the equality within such relationships.

One way to pursue this latter goal would be for the state to mandate that employers introduce rules that allow employees genuinely to combine work and family, since much gender inequality is associated with women’s assuming the greater portion of childrearing responsibilities (see Bartlett 1998). To accomplish this goal, the state could, as discussed in Chapter 3, adopt models of public support for caretaking that encourage men to take an equal role. For example, requiring that employers adopt family leave policies that can be taken by parents sharing childcare between them, rather than policies that are limited to full-time caregivers, would encourage shared caretaking, as would flex-time, and allowing both parents of very young children to work somewhat fewer hours without sacrificing their jobs. Schools, too, should play a role in this endeavor, teaching children that both fathers and mothers can have equal roles in nurturing their children, and helping them to understand the importance of these caretaking tasks. In Anita Shreve’s words, “the old home-economics
courses that used to teach girls how to cook and sew might give way to the new home economics: teaching girls and boys how to combine work and parenting” (Shreve 1987, 237 (quoted in Okin 1989a, 177)).

Economic inequality

Second, with respect to economic equality, the state’s encouraging tighter family ties runs an increased risk that wealth will be more tightly held within particular families’ hands, and, relatedly, that there will be more disparities of opportunity across families. What this threat to equality calls for, however, is not the state’s attempt to loosen family ties, but rather its attempt to lessen the disparities of wealth and opportunity that result. In other words, rather than the state’s seeking to weaken families, the state should seek to ensure that all citizens have the financial means and education to ensure (at the very least) some basic threshold of opportunity, even when their families cannot provide this without aid. It also means, at the other end of the income spectrum, that the state should seek to reduce, although probably not eliminate, disparities in wealth continuing between generations. As Michael Walzer argues, there are significant reasons to allow family members to express their love through bequests to family members, as well as significant reasons to tax these bequests for the state’s other purposes. The state should moderate between these goals by giving some weight to both when determining the extent of taxation of such gifts.

Families as a respite, not an island

The state should also seek to encourage familial relationships to serve as a source of support, but not be islands unto themselves. Michelle Barrett and Mary McIntosh

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127 “But surely the gift is one of the finer expressions of ownership as we know it. And so long as they act within their sphere, we have every reason to respect those men and women who give their money away to persons they love or to causes to which they are committed, even if they make distributive outcomes unpredictable and uneven” (Walzer 1990, 128).
point out that the nuclear family, with its ideal of self-sufficiency, can cause family members to turn inward to an extent not consistent with the vigorous public life that a healthy liberal democracy requires (Barrett & McIntosh 1982). This inward turn may be due to the fact that nuclear families in our society are conceived and structured as private, self-sufficient entities. This means that tasks that could be shared, including cooking and childrearing, are generally accomplished within families, with a tremendous duplication of effort.

To counter the tendency for family members to treat their families as an island, the state should simultaneously seek to support the caretaking relationships associated with the nuclear family at the same time that it seeks to de-privatize this form to some extent. The pattern of childrearing in which parents have sole responsibility for childcare inside a private home isolates children and caretaking parents from the larger community. In privileging caretaking relationships, the state should seek to construct institutional arrangements that incorporate parents and dependents into the life of the community and share caretaking responsibilities within the community. Tax subsidies for co-housing developments, in which some cooking and childcare are performed cooperatively, and supports for childcare cooperatives, are two measures by which the state can pursue this end.

**Civil Partnership or Proliferation of Families?**

The most difficult issue with respect to how the state should treat adult’s long-term caretaking relationships is not, in my view, whether or not the state should accord some civil status to these relationships, or even the issue of whether the state should provide subsidies to caretaking relationships. As I have said, in my view the answer to all these questions is “yes,” in large part because of the importance of caretaking to society. In my view, the most difficult issue is whether all such horizontal relationships should be categorized together for
purposes of public support under a banner such as “domestic partnership,” or whether they should be categorized separately according to the general type of relationship at issue. In the latter case, the state would presumably retain a civil status for conjugal relationships such as marriage (which, out of justice and fairness, as well as for the goods associated with them, would need to be expanded to same-sex couples), but also recognize other forms of adult-adult relationships, such as domestic partnerships between friends who cohabitate.

Grouping all adult-adult relationships into a single legal status has the advantage of guarding against the possibility that any particular subcategory of relationship (specifically, marriage) would be unfairly privileged as against other horizontal relationships. In addition, clustering different types of horizontal relationships together would send a strong message that marriage occupies no paramount place in the hierarchy.

There are several downsides to this strategy, however. First, treating these relationships as a single category would keep the state from tailoring the particular obligations and benefits assigned to that status to the type of caretaking relationship at issue. For example, when a child is born to or adopted by one of the parties within a conjugal relationship, it makes sense to accord a presumption of parenthood or right to adopt to the other partner. There is far less reason to accord such a presumption in a non-conjugal caretaking relationship, however. The same is true for inheritance rights: as a default matter, it makes sense to assign a presumption that conjugal partners intend their partner to inherit (in the absence of agreements to the contrary), since most individuals in such relationships leave their estates to their partners. It may make less sense to apply this presumption to other types of long-term caretaking relationships. With that said, the state could choose to divide
relationships into categories for the purpose of delineating rights between the partners, but to use a single category for purposes of assigning state support.

Second, although moving away from the category of marriage has the benefit of eliminating marriage as the privileged category, it has the related disadvantage that much of the positive cultural resonance associated with marriage – the notion that the institution is a serious, long-term bond of commitment based on love between two people who come together and take one another permanently as family – will also be lost. To the extent that laws have an expressive force, eliminating marriage may weaken the resolve of those in relationships to work through rough periods. It could also dissuade those who would otherwise have married from entering into domestic partnerships, since such partnerships do not have the same cultural resonance that swearing one’s love through marriage does. This could leave many of those made vulnerable by relationships to remain legally unprotected.

At the level of theory, in my view, there is no clear winner between these two alternatives – each has its own set of benefits and costs. At the level of political reality, though, the popular ideology (not to mention the $50 billion wedding industry) is so invested in the value of marriage that eliminating civil marriage is well nigh impossible. As a result, those who seek to topple marriage from its pedestal as the preferred form of family and to increase the equity among different forms of relationships would likely do better to

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Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

129As a result of the difficulty of this issue, Mary Shanley recently shifted positions, first arguing that the state should continue to support civil marriage, see Shanley 2004, and more recently arguing that the state should discard civil marriage and treat all horizontal relationships as domestic partnerships. See ibid.

130El Boghdady (2003, F1).
focus their attention on decentering marriage by proliferating other categories of status relationships among adults, rather than seeking to eliminate marriage as a civil status (see Stacey 1994, 344; McClain 2003, 391, 401-02). This strategy of broadening the category of relationships that receive legal protections and support, and distributing a subset of the bundle of rights now received by marriage among these different relationships (see also Young 1996; DiFonzo 2003), is not only the most pragmatic course to take, given existing political realities, but a course that offers significant promise in furthering the goods that a liberal democracy needs to flourish. Disaggregating the privileges awarded with respect to the good at issue also helps deconstruct the monolithic notion of “The Family,” and the orthodoxy surrounding it. This approach makes it clear that there are many kinds of relationships that contribute to many different public goods, and that no one-size-fits-all family is the ideal.

**Difficult Cases: Supporting the Two-Parent Family and Supporting Marriage**

I have argued that the state has a legitimate interest in preferring two-parent (or more) families over single-parent families where children are involved. However, the thorny issue of how the state should seek to promote two-parent families merits additional discussion. I asserted in chapter 3 that the state has a duty to ensure that children have the caretaking and other resources necessary to support their well-being and develop their capabilities. These duties pertain whether or not the state believes that parents made a wise choice about family form, and even if the state fears that it will send the wrong signals and therefore hurt future children if it meets its duties. Accordingly, it is illegitimate for the state to deprive welfare benefits to low-income families based on the mother’s having additional children out of wedlock, if doing so would deprive the children in these families of necessary resources.
Above this required threshold of support, the state has legitimate reasons to adopt measures that foster two parent families. In doing so, however, the state should seek to harmonize the important liberal goods at stake. In other words, the state’s goal should be to construct policies that avoid zero-sum situations in which furthering some goods operates to the detriment of others. Developing such policies will, however, require careful attention to the ways in which relevant goods may conflict. By this criterion, the state’s seeking to further two-parent families by awarding them privileges not awarded to single-parent families is a peculiarly bad tool to harmonize these goods. Not only would doing so deprive of resources the very families who need them most, it also risks stigmatizing the very children who are most vulnerable. Far better would be measures that do not pose such a stark tradeoff among goods. Thus the legislature would do better, for example, to adopt job training programs and educational subsidies for youths who are at risk of becoming parents, since studies show that increasing the prospects for young adults’ future makes it significantly less likely that they will bear children while they are young and single (Edelman 1988). Such programs do not pit the important interests of current children against the important interests of future children.

The state should deal in a similar manner with proposals to shore up the institution of marriage (or whatever categories of adult-adult relationships that the state retains). Proponents of marriage in the past years have proposed a number of policies to strengthen marriage, including making divorce more difficult through returning to fault divorce laws, adopting covenant marriage provisions, premarital counseling, and even awarding bonuses for marriages where no pre-marital abortions occurred. In choosing policies to strengthen

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the health and permanency of horizontal relationships, the state should here too seek to avoid policies that require large tradeoffs between important goods. In this light, tightening up divorce laws through a return to fault divorce, despite furthering the state’s interest in promoting marriage, severely infringes on citizens’ autonomy interests. The state would therefore do better to adopt proposals such as pre-marital counseling requirements, which would avoid this tradeoff of goods. Further, given that women more often seek divorces than men, as Katharine Bartlett points out, the state could usefully support such relationships by encouraging men to be better partners through assuming an equal share of housework and carework. Such measures would infringe less on individual’s autonomy than stricter divorce laws and, at the same time, increase sex equality.

It is important to keep in mind the limits of the state’s institutional competence to deal with the complexities of human relationships. The state can make it more difficult for individuals to get out of marriage. Just as it cannot arrange relationships for its citizens, however (at least, in a liberal polity), neither can it keep affection and caretaking alive within

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132Covenant marriage laws, in which individuals getting married can choose whether or not heightened standards will apply at divorce, pose less of a conflict among important goods (See Ariz. Rev. Stat. §§25-901 to 25-906 (2000 & Supp. 2004), Ark. Code Ann. §§ 9-11-801 to 9-11-811 (2002 & Supp. 2003), La. Rev. Stat. Ann. §§ 9:272 to 9:276 (2000 & Supp. 2005)). Given the small number of couples who choose to enter into covenant marriage where it is available, though, as well as the problems with requiring parties to remain in a marriage that one party wants to exit, the state would be wise to seek alternative policies. (In Louisiana, 2%; in Arizona, 0.25%; and in Arkansas, only 71 out of approximately 38,000 marrying couples elected the covenant marriage (Drewianka 2003)).

133Bartlett cites figures from a 1986 study which indicate that women initiate divorce in 62 to 67% of cases (Bartlett 1998: n.135). A more recent study gives approximately the same result, placing the figure at 70% (Brinig & Allen 2000).

134See Bartlett 1998: 842. More recent data indicates that women still do an average of 17.5 hours of housework per week, while men do an average of 10 (Sweet & Bumpass 1996).
such relationships. As I argued before, this recognition of the state’s inherent lack of institutional capacity, as well as limits on citizens’ own capacities in this area, should cause the state to limit benefits awarded to families out of concern for individual fairness. It should also cause the state to investigate means to encourage alternative caretaking networks for those who are not, either through chance or choice, members of intimate relationships, such as “mothers houses” where single parents can raise their children more communally, or the types of informal networks among friends that helped provide caretaking for men in the gay community stricken with AIDS in San Francisco at the height of the AIDS epidemic.

**Conclusion**

The appropriate stance of the state to relationships among adults is such a difficult issue because it implicates important goals and purposes of a liberal democracy that stand in considerable tension with one another. In the next chapter, I argue that similar tensions exist with respect to civic education in public schools. Here, too, a liberal democracy that seeks to attend to a more complex array of goods than did Rawlsian-era liberalism must seek solutions that harmonize, to the extent possible, this diverse array of goods.

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135 The difficulties associated with the state’s promotion of this marriage, for example, was made eminently clear in President G.W. Bush’s recent plan to promote marriage for women on welfare. Despite the administrations 1.5 billion initiative, the administration had no clear plan for how states might successfully promote marriage once Wade Horn, the top official at Health and Human Services, withdrew his earlier proposal to award those who married with cash bonuses (see Ehrenreich 2004).
CHAPTER 6
THE PLACE OF CIVIC EDUCATION IN A LIBERAL DEMOCRATIC POLITY

“A free society is free only to the degree that its citizens are informed and that communication among them is open and informed.”

Until this point I have been discussing the state’s relationship to families with respect to the complex of goods surrounding caretaking. In this chapter, I turn to consider another critical function relevant to the family-state relationship: that of preparing children to become citizens. As both theorists and cultural commentators have recognized, preparing children for the task of citizenship in a liberal democracy is an important and demanding responsibility. How should this responsibility be allocated between parents and the state? And, in the event of disagreement between parents and the state about what this task entails, whose views should trump?

The issue of children’s civic education is a thorny one for liberal democratic theory. A vigorous liberal democracy requires certain qualities of its citizens, including commitments to political equality among citizens, to the rule of law, to tolerance of different life plans, to resolving political differences through lawful procedures, and to protection of basic individual rights. These qualities do not simply arise spontaneously, but require nurture. Yet the deliberate promotion of these qualities stands in tension with the great weight that liberalism places on respecting citizens’ own views of the good life.

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Furthermore, insofar as the state uses public education to promote these virtues, it raises liberalism’s suspicion of state despotism. As John Stuart Mill wrote in opposing public education,

That the whole or any large part of the education of the people should be in State hands, I go as far as any one in deprecating. All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general State education is a mere contrivance for moulding people to be exactly like one another . . . it establishes a despotism over the mind.\textsuperscript{137}

A century and a half after Mill wrote, there is little debate about the existence of public education, itself, but a vigorous dispute remains regarding the appropriate scope the education that public schools and the state can require of its young citizens, particularly over the objection of their parents.

In this chapter, I consider this controversy. My discussion consists of three parts. In Part I, I set up the basic framework of the problem by discussing the cases in which disputes over civic education have been raised in recent years. I argue that these cases are so difficult for liberal democratic theory because of the conflicting claims to authority and the different goods implicated in civic education. In Part II, I argue that several leading theories of civic education founder because they fail to attend to the complex of claims of authority and goods at stake. Finally, in Part III, I contend that a more nuanced analysis of the goods at stake ameliorates some of the tension among them. I then offer an alternative theory that, I hope, better balances the relevant goods.

The Scope of the Civic Education Controversy

The battleground regarding civic education has been fought in recent years over the issue of whether parents who possess beliefs outside of the mainstream must expose their children to education in public schools with which they disagree. This issue is a particular problem for parents who are members of religious sects that possess illiberal beliefs. In these parents’ eyes, the state’s attempts to inculcate their children with liberal democratic values violate deeply-held religious precepts that breach the parents’ duty to raise their child properly, as well as risk eternal damnation for their children. Two difficult cases raising these issues that have come before the courts have served as touchstones for this debate. In addition, several more recent cases demonstrate the complexity of the issues raised. I describe them not for their legal analysis, but rather because the challenged educational programs provide factual scenarios that help to explore the normative complexity of civic education for liberal democratic theory.

In the first of the cases that have served as the flashpoint for this debate, Yoder, Amish parents challenged a state law requiring that children attend high school until age 16 on the ground that it violated their right to free exercise of religion. The parents contended that requiring their children to attend school with non-Amish students past the age of primary education exposed their children to worldly attitudes that contradicted Amish religious beliefs. Essentially, the Amish argued that exposure to education beyond that needed to run a simple farm, as well as exposure to other ways of life, undermined the children’s entry into the Amish community and threatened the continued existence of the community, as well as the parents’ and children’s salvation. In response, the state of Wisconsin argued both that the

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education requirement was necessary to prepare the children to participate effectively in our liberal democratic system, and that this education was necessary to prepare the children to be self-sufficient participants in society. Ultimately, the United States Supreme Court held that the state’s interest in preparing children to participate in our open political system did not rise to the compelling level necessary to justify interference with the parents’ religious beliefs. The Court held that because the children were being prepared for life in a separate agrarian community rather than in modern society, they did not need the more complex understandings of society and government that other children might need.

In the second case, Mozert, plaintiffs, born-again Christian parents of children attending Hawkins County, Tennessee public schools, filed a free exercise challenge to the school system’s use of a particular series of basic reading texts, the Holt, Rinehart & Winston readers. The parents objected to the readers on the ground that they exposed their children to cultures, values, and ways of life that were prohibited by their fundamentalist faith. For example, the parents found objectionable a story depicting a young boy enjoying cooking and a story about the religious and social practices of an Indian settlement in New Mexico. They contended that these and other portions of the readers prompted their children to think that ways of life and values other than those their parents supported could be acceptable, a view incompatible with their fundamentalist beliefs. The District Court for the Eastern District of Tennessee held that the compulsory use of the textbooks violated the plaintiffs' free exercise of religion, and ordered the school to permit the students to "opt-out" of the school's reading program. On appeal the Sixth Circuit reversed the district court's ruling and held that the school system's compulsory use of the textbooks did not unconstitutionally burden the

139 Id. at 647 F. Supp. 1194, 1203.
plaintiffs' free exercise of religion. According to the court, so long as students were not compelled to affirm or disaffirm any particular religious belief or practice, mere exposure to religiously objectionable material did not burden free exercise rights.

In addition to *Yoder* and *Mozert*, three more recent examples of clashes between parents and schools have moved through the courts that help to illustrate the issue. In the first of these cases, *Brown v. Hot, Sexy and Safer Productions*, the parents of fifteen-year-old children in Chelmsford High School in Massachusetts objected to their children’s being required to attend a school-wide assembly without parental approval that consisted of a ninety-minute presentation intended to serve as an AIDS awareness program for students. The presentation was staged by the owner of a private company, Suzi Landolphi. In the course of the presentation, Landolphi, the parents charged, presented sexually explicit monologues and participated in sexually suggestive skits with several students chosen from the audience. The parents asserted that Landolphi not only joked with students about premarital sexual activity (including encouraging one male student to display his “orgasm face” to the crowd), she also discussed approvingly oral sex, masturbation, homosexual sexual activity, and condom use.

The First Circuit, in denying the parents claim, held that while the state did not have the power to foreclose parents from choosing a different path of education, this freedom does not encompass “a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.”

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140 68 F.3d 525 (1st Cir. 1995)

141 In that case, the students, themselves, also filed claims contending that their compelled attendance deprived them of their privacy rights and their rights to an education free from sexual harassment.

142 *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d at 534 (1st Cir. 1995).
In the Court’s words,

[i]f all parents had a fundamentally constitutional right to dictate individually what the schools teach their children, the school would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school’s choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents . . . do not encompass a broad-based right to restrict the flow of information in the public schools. ¹⁴³

In the second of the recent cases,¹⁴⁴ the parents of a high school student in the Rye Neck School District contested the district’s mandatory community service program. Under the program, students had to complete 40 hours of community service work to earn their diplomas. The plaintiffs objected to the school requiring their child to participate on the ground that it infringed on their right to direct his upbringing and education. In reviewing the case, the Second Circuit applied only a rational basis level of scrutiny because the parents’ objection to the program was not based on religion. It then found that the school district easily passed that test. In the Court’s words,

The state’s interest in education extends to teaching students the values and habits of good citizenship, and introducing them to their social responsibilities as citizens. . . . The mandatory community service program rationally furthers this state objective. The District reasonably concluded that the mandatory community service program would expose students to the needs of their communities and to the various ways in which a democratic system of volunteerism can respond to those needs. In doing so, the program helps students recognize their place in their communities, and, ideally, inspires them to introspection regarding their larger role in our political system. ¹⁴⁵

Finally, in the last of these newer cases,¹⁴⁶ the father of a seventh-grader attending a Fairfield, Connecticut public school challenged a state regulation requiring his son to attend

¹⁴³Id. at 535.
¹⁴⁵Id. at 461-62.
¹⁴⁶Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003).
health education classes at a public school that included information on health, character, citizenship, family planning, human sexuality, AIDS awareness, and social aspects of family life. The school permitted parents to excuse their children from the six classes involving family-life instruction and AIDS education, but not the other sessions of the health program. The father argued that it was his Fourteenth Amendment right for his son “to be home schooled regarding health, morals, ethical and personal behavior.”

On appeal, the *Leebaert* plaintiff conceded that the challenged curriculum would pass rational basis review since the program would be a rational way of furthering the health and welfare of children. He contended, however, that strict scrutiny was appropriate, both because the case concerned a parent’s fundamental right to control their child’s upbringing, and because the curriculum implicated his free exercise rights. The Court rejected the father’s claim that parents had a fundamental right to dictate public school curricula on the ground that recognizing such a right “would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children”.

**Liberal Democratic Goods and Justifications**

My purpose here is not to consider the constitutional appropriateness of the school programs contested in these cases, but their appropriateness in a liberal democracy as a normative and prudential matter. These cases are such difficult cases because, as with the interests at stake in state support of relationships between adults, they implicate fault lines among important interests that go clear to the core of a liberal democracy. One way to map

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147 Id. at 136.

148 Id. at 141.
out these tensions is to think of the relevant values as occupying the space of a triangle in which each corner represents a different source of goods, and hence a different source of justification, important to a liberal democracy: liberal, democratic, and civic. In this schematization, the liberal corner includes those goods relating to individual rights and self-determination that have been given pride of place in the liberal tradition. The democratic corner, by contrast, focuses on the moral legitimacy of majoritarian self-rule. Finally, the civic corner focuses on those virtues that must be inculcated in citizens if the polity is to flourish.

I do not want to make great claims for the congruence of these three categories: obviously their status varies greatly – both the liberal and civic corners contain particular goods and virtues, while the democratic corner contains no definitive content, but instead gives justification to whatever the citizens decide. With that said, each corner marks a legitimate source of justification in a liberal democracy to which attention should be paid. It is the tensions among the interests associated within and among each of these corners that make the issue of civic education such a difficult one. I discuss these interests in turn.

Liberal goods

Considering the liberal corner first, given the primacy of liberalism in the American world-view (Hartz 1955), it is unsurprising that liberal goods are most often discussed with

149There are a number of shortcomings to mapping the debate on civic education in this way. Some qualities, such as children being able to make informed decisions about different ways of life, potentially fall into both the liberal (based on furthering the autonomy of children) and civic (based on the polity’s functioning better when citizens are able to deliberate) corners of the triangle. In addition, it could be argued that liberalism itself both should and historically did incorporate the values associated with a strong civic realm (see, e.g., Stephen Macedo, Democracy and Distrust 2000; Thomas Spragens, Civic Liberalism: Reflections on Our Democratic Ideals 1999; William Galston, Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State 1991). With that said, it seems to me that thinking of the issue of civic education in terms of these three areas helps to highlight the tension among and within these different areas – tensions that are too often glossed over in discussions of civic education.
reference to civic education. In particular, it is the good of autonomy, traditionally accorded pride of place in liberal theory, on which theoretical analyses generally focus. It is, moreover, the interest focused on by the parents in each of the cases described above, generally framed in terms of parents’ liberty interest to raise their children in accordance with their own religious beliefs and views of the good life. Yet, as Thomas Spragens\textsuperscript{150} points out, analyzing civic education in terms of autonomy does not produce a clear direction for civic education. The problem is that both parents and children have autonomy interests implicated in civic education that potentially point in different directions: The parents’ interest involves raising children in accordance with parents’ views of the good life. Focusing on this interest suggests narrowly circumscribing the state’s authority to control the education of children. Yet parents’ views of the good life may include teaching their children to reject a norm of autonomy for their own lives, or preventing children from developing the capacity to think and make decisions for themselves.\textsuperscript{151} In this case, the states’ deferring to parents’ autonomy interests can conflict with children’s own autonomy interests. Thus, while the parents’ autonomy interests would favor a confined role for the state, the children’s autonomy interests can therefore favor state involvement to insure that children develop the capacity to choose their own course in life.

The \textit{Yoder} and \textit{Mozert} cases both raise these issues clearly. In both, the parents’ objection to the schools’ programs was that they would expose their children to other ways of life besides that of their parents. The parents’ concern was that this exposure might lead the children to believe that they had capacity to choose other ways of life, a belief that their

\textsuperscript{150}Spragens, supra note 149, 31.

parents found abhorrent. By the same token, the health education curriculum challenged in Leebaert assumed that students should and would make their own decisions about whether to engage in sexual activity before marriage, and counseled them about their options if they chose to engage in sexual activity. Turk Leebaert, in contrast, asserted that he had the right to foreclose this choice on the part of his son, and to teach him simply that premarital sexual activity was wrong and that the child was not permitted to engage in it.

*Democratic goods*

But we are not only a liberal polity, we are also a democracy. The claim to legitimacy of collective self-rule therefore provides an alternative source of justification through which the issue of civic education must be analyzed. Insofar as democracy is seen as a minimally objectionable form of government because each citizen has a say in the conduct of the collective affairs of the group, the determinations of the polity have a source of moral justification apart from whether they further the individual interests accorded value in the liberal tradition. And the fact that children are not only members of their families but also citizens of the polity means that the polity, like their families, has a legitimate claim to direct the education of children. Whereas the liberal goods at stake do not yield a clear direction regarding the scope of civic education, focusing on the moral authority of democracy argues for the state to have broad authority with respect to children’s education, although it does not determine the content of that education.

This democratic justification is not explicitly mentioned in the opinions resolving the legitimacy of contested school programs. It serves, nevertheless, as an ideological underpinning of the constitutional framework that courts use to assess the legitimacy of

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152See Amy Gutmann, Democratic Education (1999).
contested school programs. Under this framework, enactments issued according to
democratic mandates will generally be declared legitimate unless challengers can establish
that they interfere with some fundamental interest of the challenger’s.

**Civic virtues**

Finally, in the last corner of the triangle, are civic virtues – those virtues that citizens
must possess if the polity is to function well. In the civic republican tradition, in which
participation in politics was seen as an end in itself, these virtues received considerable
attention. Likewise, in democratic theory, theorists gave significant attention to these virtues.
Even Joseph Schumpeter, who presented a fairly unambitious account of democracy, argued
that its success depends on “the human material of politics—the people who man the party
machines, are elected to serve in parliament, rise to cabinet office -- . . . be[ing] of
sufficiently high quality.” He added that politically relevant players in society must be
willing and able to exercise “democratic self-control,” under which politicians abide by
applicable laws, avoid miscarriages of justice, and support the integrity of the legislature and
voters allow leaders to rule; all concerned, moreover, must have “a large measure of
tolerance for different opinions” and must have the patience to allow others to sound their
view.

In the cases in which parents have challenged school programs, civic interests have
received some, albeit limited, attention when courts examine the schools’ justification for
these programs. Thus, in *Yoder*, the Court considered the importance of the state’s interests
in preparing children to participate effectively in our liberal democratic system, as well as to

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154Galston, *supra* note 149, 295.
be self-sufficient participants in society. Similarly, in *Immediato*, the Second Circuit, in upholding the challenged community service program, focused on the value of the civics education that the program would given the students, thus teaching them “the values and habits of good citizenship, and introducing them to their social responsibilities as citizens.”

In contrast, Rawlsian-era theorists, as I discussed in Chapter 1, paid less attention than either civic republican or democratic theory to the virtues needed for a liberal democracy to thrive. In recent years, however, the renewed focus on civic republicanism has acted as an important corrective on liberal theory, as liberal theorists have increasingly recognized the need for civic virtues in the citizenry for a well functioning liberal democracy. As a consequence, preeminent proponents of liberalism have begun to argue that the state should foster the civic virtues necessary to the polity’s. They have differed with one another, however, regarding both the content of civic virtues and the extent to which the state may promote them when they interfere with citizens’ autonomy.

**Existing Theories of Civic Education**

There are strong claims to be made for each of the three types of interests implicated in civic education – liberal, democratic, and civic. Many discussions of civic education, however, have tended to focus on only one of the three types of interests, or a subpart of one of these interests. As a result, these theories have limited usefulness for helping to sort out the proper path for a polity committed to both liberal principles and democratic rule, and which recognizes that children are both members of their families and future citizens of the

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polity. In this section, I consider discussions on civic education by four prominent theorists of civic education: Bruce Ackerman, Stephen Gilles, Amy Gutmann, and William Galston. Each of their analyses, I argue, fails to give adequate consideration to the important interests at stake and therefore fails to achieve an appropriate balance among these different interests.

**Bruce Ackerman: Emphasis on Children’s Autonomy**

Ackerman’s theory -- The renaissance of liberal political theory in the United States that began in the 1970s with the publication of John Rawls’ *A Theory of Justice* assumed that a distinctive feature of the liberal state is its neutrality among individuals’ conceptions of the good life.¹⁵⁷ The liberal state, in this view, is a limited state whose purpose is to preserve as much autonomy of citizens as possible so that they can live out their own vision of the good life. In *Social Justice in the Liberal State* (1980), Bruce Ackerman argued that this precept of state neutrality means that a liberal theory of education precludes both parents and the state from inculcating in children “an uncritical acceptance of any conception of the good life.”¹⁵⁸ According to Ackerman, “We have no right to look upon future citizens as if we were master gardeners who can tell the difference between a pernicious weed and a beautiful flower.”¹⁵⁹ Instead, it is the role of liberal education to “provide children with a sense of the very different lives that could be theirs – so that, as they approach maturity, they have the cultural materials available to build lives equal to their evolving conceptions of the good.”¹⁶⁰

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¹⁵⁸Ackerman, supra note 157, 163.

¹⁵⁹Id. at 139.

¹⁶⁰Id.
In his theory, Ackerman accorded parents broad rights to control the cultural diversity to which younger children are exposed during primary education on the ground that these children need significant cultural coherence in order to locate their own place in the world.\footnote{See id. at 141.} Parents’ authority to control diversity, however, receded as a child grows older and can tolerate greater challenges to parental ideas. As children progress through secondary school, both society and their parents should therefore expose them to more diverse cultural materials to ensure that, as they approach adulthood, they have the raw materials to define who they want to be.\footnote{See id. at 159.}

*Analysis* -- Ackerman’s broad affirmation of children’s autonomy is appealing in many respects. Liberalism’s respect for each individual’s autonomy certainly means that children need to be given the resources and education that allow them the capacity for self-determination. Yet Ackerman’s view that this should be the extent of a child’s character education ultimately gives far too much weight to this value as against other values. Importantly, Ackerman gives no weight to the polity’s interest in insuring that citizens develop other civic virtues besides autonomy that are necessary to function in a liberal democracy. Yet, as William Galston notes, many of the virtues essential to a flourishing democracy, such as a belief in the political equality of all citizens, are virtues specific to democracies, rather than the obvious choices that children would arrive at if left to their own devices.\footnote{Galston, supra note 149, 244-46.} Because of this, Ackerman’s view that the state should merely present options of different ways of life to children makes his version of liberalism unlikely to produce the committed, responsible citizens needed for a liberal democracy to function well. Instead, the array of choices presented to children is far more likely to produce a culture that would justify Stephen Macedo’s likening of liberal cultures to Californian culture – in which people
constantly try on new lifestyles and principles without buying wholeheartedly into any of them (besides that of personal freedom).

Further, in giving paramount weight to children’s autonomy, Ackerman ignores parents’ deeply-held interests in teaching children their own vision of the good life. As Stephen Gilles argues, raising children is central to the life plan of many adults. And part and parcel of raising children is imparting one’s own vision of the good life to them. While this interest would seem to merit at least some weight, Ackerman’s view discounts it as illegitimate. Similarly, he discounts the interests of the democracy in ensuring that the majority can pass on its way of life and its view of the good life to the next generation.

In summary, Ackerman certainly gets it right when he focuses on the importance of developing children’s capacity for autonomy. A liberal democracy that respects citizens’ choices because it believes that these choices reflect a capacity for (self and collective-self) determination, must indeed seek to assure that young citizens do, indeed, develop this capacity. Yet Ackerman is wrong that children’s autonomy is the only good that has a legitimate role in civic education.

*Stephen Gilles: A Parentalist Manifesto*

*Gilles’ theory* -- If Ackerman’s vision veers too heavily in the direction of children’s autonomy, however, Stephen Gilles’ veers too heavily in the direction of their parents’ autonomy. In a 1996 Chicago Law Review article, Gilles vigorously defends parents’ rights to pass on their way of life to their children, and opposes civic education over parents’ objections. Gilles rests his contention that parents should control children’s civic

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education on two basic arguments. First, given the lack of liberal consensus on what constitutes the good life and, consequently, the good education, and the absence of any standards to decide these issues authoritatively, Gilles contends that decision-making authority is properly vested in parents, who are “more likely to pursue the child’s best interest as they define it.”

Second, Gilles disputes the notion that the state has a paramount interest in controlling the education of children. As against the state’s interest, he contends, individuals have an even more fundamental interest in nurturing their children and in being nurtured by their parents. Contemporary liberal theory tends to assume not only that citizenship comes first, and individuality second, but also that – even within the realm of individuality – marriage, family, and child rearing are merely one prominent set of pursuits. These assumptions invert the priorities by which most reasonable people live. For the overwhelming majority, the loving relationships we share with our spouses, our children, our siblings, and the parents who educated us are at the heart of our individual conceptions of the good life.

According to Gilles, the human flourishing of both parents and children depends on parental nurturing and education, and parental control over the values children are taught is essential to that enterprise. On the basis of these two rationales, Gilles argues that parents’ views regarding their children’s schooling must be respected so long as they are reasonable, in the sense that they “acknowledge the importance of normal human development, embrace civic toleration and respect for law, and acquiesce in our basic constitutional arrangements.”

Under this standard, “[b]ecause few parents in our society will choose to educate their children in ways that fail to satisfy these standards, states will only rarely be able to justify

166 Id. at 940.
167 Id. at 940-41.
168 Id. at 939.
overriding parents’ educational authority.”

Based on this framework of analysis, Gilles argues that the parents in both *Yoder* and *Mozert* properly had the right to decide their children’s educational fate. In *Yoder*, Gilles argues, requiring children to go to public school beyond the eighth grade exceeds the societal consensus of the civic education required to support the polity. After this point, he contends, parents properly had the right to choose the education for their children that was appropriate to their lives in the Amish community. In *Mozert*, Gilles argues that the state’s effort to teach respect for other ways of life also exceeds the liberal consensus on this issue and hence should not have been imposed over their parents’ objection.

*Analysis* - Gilles’ account, in contrast to Ackerman’s written a generation before, recognizes the validity of a number of different interests, including the state’s interest in instilling civic virtues as well as children’s interest in autonomy. Based on an oddly-constructed, formalistic argument, however, grounded on the fact that no consensus can ever be achieved on what constitutes the good life, Gilles winds up giving parental interests almost complete weight, with little weight given to the other interests.

That there are no definitive standards for sorting out what constitutes good civic character, however, does not mean that the polity’s interest in such character should be ignored, or that there are not better and worse arguments to be made with respect to civic character, any more than the recognition that there are no definitive standards for art should lead art museums to empty out their galleries. Insofar as citizens’ need for civic virtues is taken seriously, the question Gilles should be asking is not “who has the best incentives to further the child’s best

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169 Id. at 939-40.

170 See id. at 940.
interests?” but instead “who has the best incentives to further the polity’s interest in developing civic virtue in children?” In answering this question, parents are disadvantaged compared to the state precisely because they are likely to be focused on their child’s individual interests rather than the polity’s long-term interests.

This is not to argue, of course, that the child’s best interests should not be considered, but rather to recognize that the difficult enterprise of maintaining a vigorous liberal democracy requires that more than only the interests of children as individuals be considered. And this means that sometimes an expansive reading of individual interests – both parents’ and children’s – needs to be constrained to take into account the needs of the polity. Gilles’ argument – that contemporary liberalism should take parents’ private interests in rearing their children more seriously than citizenship interests – therefore misses a critical point. The point is that citizens must give up some portion of their freedom to secure the very freedom to raise their children that Gilles lauds.

And while Gilles is certainly correct that complete consensus regarding the civic virtues required for a healthy liberal democracy will never be possible, and that the finer points of these virtues will always be debatable, one could also overstate the extent of this debate. In contrast to the difficulty of knowing what a good life should be, the inquiry regarding what skills and traits are needed to support a liberal democracy is considerably more directed. As William Galston counsels, “If sufficiently rigorous criteria are employed, we are of course forced to conclude that we ‘know’ nothing. If, however, we adopt criteria appropriate to the subject matter, it turns out that we know a fair amount about what promotes our . . . collective wellbeing.”¹⁷¹ In this regard, it is clear that a vigorous liberal

¹⁷¹Galston, supra note 149, 11.
democracy requires that children understand that deep differences in beliefs exist among citizens of the polity, come to learn to respect others’ rights, and to listen carefully to others’ opinions. Children must learn to adopt a position of liberal humility in which they recognize that, even if they believe they are right about particular comprehensive views, they cannot prove this and should not seek to foist these views on others, and that politics should be more than a free-for-all in which the majority attempts to wield the coercive power of the state to defend its own contested vision of morality on others. Finally, children must learn to support fundamental liberal institutions such as the separation of church and state. While there is room for reasonable debate over the precise boundaries of some of these skills and virtues, such as the extent to which citizens need to be able to rationally weigh different courses of collective courses of action, there is at least considerable agreement around their core.

Not only does Gilles’ proposal fail to safeguard the relevant civic interests, it also gives little weight to safeguarding children’s autonomy. It is somewhat ironic that Gilles relies so firmly on autonomy in his defense of parental rights but would deny the preconditions of autonomy to their children insofar as he defers to parental views that their children should not be exposed to other ways of life or systems of thought or values. The bar of acceding to “normal human development” that Gilles requires that parents clear is so low that it would allow parents to deny their children the knowledge that they have basic choices about how to live their lives. Liberalism’s respect for diverse ways of life is tied directly to the importance that it places on respect for an individual’s self-determination. In placing so few safeguards on children’s right to self-determination, and so much power in parents’ hands to deprive children of opportunities necessary to achieve it, Gilles’ violates these fundamental liberal precepts.
Amy Gutmann: The Interests of the Democracy

Gutmann’s Theory -- In contrast to Gilles, Amy Gutmann presents a theory of civic education that places the lion’s share of authority to resolve controversies over public education with the democracy. Gutmann points out that, in accord with Gilles, that although liberal theories often skirt the issue, reasonable people will inevitably disagree over what constitutes the best education for children.\textsuperscript{172} This means to Gutmann, as a practical matter, that any attempt to solve disputes regarding public education by advocating the substantive content of that education is incomplete unless it also reckons with how to solve reasonable disagreements. Conservative theorists, such as Gilles, seek to deal with this inevitable disagreement by saying that parents are the appropriate parties to solve these disputes. Gutmann argues that this approach is unsatisfactory because it fails to recognize that children are not only members of their family, but also members of the polity, which has a strong interest in the qualities and capacities of its future citizens. This means, in Gutmann’s view, that “the educational authority of parents and of polities has to be partial to be justified.”\textsuperscript{173} Gutmann therefore proposes a power-sharing agreement in which parents educate their children about their own conceptions of the good life at home; meanwhile, the democratic state has the task of educating students in accordance with its own principles at school.\textsuperscript{174} Gutmann argues that the shared educational authority that she advocates “supports the core value of democracy: conscious social reproduction in its most inclusive form.”\textsuperscript{175}

\textsuperscript{172}Gutmann, supra note 152, 9.

\textsuperscript{173}Id. at 30.

\textsuperscript{174}Id. at 42-43.

\textsuperscript{175}Id. at 42.
Gutmann grounds the moral justification for public control of children’s education on the moral claims of deliberative democracy. She argues that “[t]he most justifiable way of making mutually binding decisions in a representative democracy – including decisions not to deliberate about some matters – is by deliberative decision making, where the decision makers are accountable to the people who are most affected by their decisions.”\textsuperscript{176} In determining the content of the public education that children will receive, Gutmann counsels, “[t]he policies that result from our democratic deliberations will not always be the right ones, but they will be more enlightened – by the values and concerns of the many communities that constitute a democracy.”\textsuperscript{177}

This does not mean, for Gutmann, that the simple will of the majority that should guide a democracy’s decisions regarding the substantive content of education. To the contrary, Gutmann argues that the same democratic principles that give moral weight to the deliberative decisions of the polity also “commit[] it to assuring children an education that makes those freedoms both possible and meaningful in the future.”\textsuperscript{178} Put another way, “[d]eliberative decision making and accountability presuppose a citizenry whose education prepares them to deliberate, and to evaluate the results of the deliberations of their representatives. A primary aim of publicly mandated schooling is therefore to cultivate the skills and virtues of deliberation.”\textsuperscript{179} Gutmann argues that this deliberative mission not only gives schools a positive program to effectuate, it also constrains democratic authority in two specific ways. First, education must conform to the principle of nonrepression – that is, it

\begin{thebibliography}{99}
\bibitem{176} Id. at xiii.
\bibitem{177} Id. at 11.
\bibitem{178} Id. at 30.
\bibitem{179} Id. at xiii.
\end{thebibliography}
may not exclude deliberation regarding any particular rational ideas. Second, it must conform to the principle of nondiscrimination – meaning that neither parents nor a democracy may adopt practices that would keep some children or groups of children from developing the skills necessary to participate in democratic deliberation. Under this scheme, communities are allowed to shape their children’s world, but they may not exercise this authority in ways that deprive these children of the same right to participate in deliberations about their collective fate at a later time.

For Gutmann, this means that in the Mozert case, the parents’ challenge to the school’s exposing their children to the readers was appropriately denied on the ground that the challenged readers were within the school system’s prerogative. The fact that some parents opposed the content of these readers based on deeply-held religious beliefs should not serve as a ground for exempting the children or abandoning the curriculum. “The right to free exercise of religion does not entail the right of parents to near-exclusive or comprehensive authority over their children’s schooling.” While fundamentalists have a right to teach their children their religious beliefs at home, parents do not have a right to withdraw their children from the school’s chosen curriculum unless the education violates the principles of nonrepression or nondiscrimination. Otherwise, “democratic institutions are denied their legitimate role in shaping the character of citizens.” In Gutmann’s view, this means that civic education may exceed what scholars such as Galston refer to as the “civic minimum” necessary to ensure that a democracy runs smoothly.

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180 Id. at 298.
181 Gutmann, supra note 156.
182 “Having granted that publicly subsidized and publicly mandated schools should serve civic purposes, civic minimalists lack good reasons for insisting that the civic purposes of schooling be minimal” (Id. at 303).
Analysis – At the time it was first published, in 1987, and through to the present, Gutmann’s argument has been the most eloquent and important defense of the democratic interests at stake in public education, and the importance of conscious social reproduction. And it is not only democratic interests, as measured by the deliberated will of the majority, that is served by her theory: Gutmann’s emphasis on the necessary preconditions to the exercise of that will, in the form of ensuring that children develop the qualities and skills that enable them to make deliberative decisions about their individual and collective lives, ensures that children develop what I have referred to as “civic goods.” Further, when these qualities and skills are paired with Gutmann’s principles of nondiscrimination and nonrepression, although she derives these principles from democratic purposes, her theory both promotes and safeguards the liberal good of children’s autonomy.

Despite these considerable accomplishments, Gutmann’s theory fails to give adequate weight to one important set of goods: the interests of parents in transmitting their ways of life to their children. Gutmann contends that public education does not need to be limited to protect this parental interest because parents still have the opportunity to pass along their ways of life through their contact with their children at home. Yet the broad scope that she accords the state to educate within public schools would allow parents little area immune from the contestation of the state. Take, for example, Gutmann’s discussion of sex education in schools. Gutmann acknowledges the thorniness of this issue but argues that, ultimately, democratic deliberation and decisionmaking should determine whether the subject should be taught. She would therefore accept the conservative position to avoid teaching sex education, or the liberal position that all children should be taught sex education even over

Gutmann, supra note 152, 298-303.
the objection of their parents, so long as the determination arrived at was democratically sanctioned.\textsuperscript{183} She argues, however, that although any such decision reached through democratic processes would be legitimate, and should be instituted; either such decision would be unwise policy. Failing to teach sex education, she argues, will not, as conservatives believe, restore the sanctity of sex; while, contrary to liberal beliefs, mandatory sex education would also be unwise because it is as “offensive to parents who believe it the sanctity of sex as mandatory prayer is to parents who do not believe in God.”\textsuperscript{184} As a result, such policies could “lead conservative parents to flee the public schools.” Taking this into account, Gutmann argues that a wiser policy would allow schools to offer such programs but allow parents to exempt their children from such courses.\textsuperscript{185}

While it seems to me that Gutmann likely reaches the right result in advocating an opt-out policy with respect to sensitive issues of sex education, her rationale for allowing the opt-out – that sex education is legitimate but, as a prudential matter, not wise since conservative parents might otherwise leave the schools – seems to me inadequately to safeguard the parental interests at stake. We are not simply a democracy, we are a liberal democracy. Because of this, the deep respect for the will of the majority that comes with democracy must be tempered by a deep respect for personal autonomy, including the autonomy of parents to raise their children according to their own view of the good. How these two important goods should be balanced (as well as balanced against other important goods) raises difficult issues, but to conclude that democracies have no obligation to

\textsuperscript{183}See id. at 109.

\textsuperscript{184}Id. at 110.

\textsuperscript{185}Id. at 110.
safeguard parental interests at school, although it might be a matter of good policy to do so, evades the important job of helping to define the appropriate balance.\textsuperscript{186}

Put another way, Gutmann uses the prudential rationale that parents might otherwise pull their children out of public schools to reach the conclusion that schools should adopt opt-out policies for issues such as sex education, but the intuitive rationale against imposing such education over the objection of parents really stems from recognition of the strong parental interest in this issue. There are other issues that might also cause conservative parents to leave the schools – for example, teaching evolution in schools – that we, including Gutmann, would not consider dropping from the curriculum as a result. Should schools therefore allow parents to pull their children out of classes in which evolution is taught? The reason we likely find evolution to be a less sympathetic case for allowing parents to opt out is not because we think that parents are less likely to pull their children out of schools, but because we think that some areas of sex education are less central to school’s appropriate mission than they are central to parents’ comprehensive beliefs, and therefore more of an area in which parental wishes should be respected than science education.

Gutmann, it seems to me, also uses prudential reasons to reach a result that accords with liberal principles when she considers the issue of whether schools should teach children religious standards. She argues that it would be unwise for schools to teach such religious standards because “secular standards constitute a better basis upon which to build a common education for citizenship than any set of sectarian religious beliefs – better because secular standards are both a fairer and a firmer basis for peacefully reconciling our differences.”\textsuperscript{187}

\textsuperscript{186}See also Galston, supra note 149, 247 (Gutmann’s account is “not robust enough to generate anything like a liberal account of protections for individuals and groups against the possibility of majority usurpation”).

\textsuperscript{187}Gutmann, supra note 152, 103.
Although Gutmann’s conclusion ultimately accords with liberalism’s reticence for the state to teach comprehensive philosophies, her rationale would presumably permit such lessons if inculcating children with religious ideas would serve a firmer basis for reconciling citizens’ differences. Yet even if it could be shown that the government could settle differences better through teaching children particular religious concepts, surely that would still violate our notions that it is the function of parents, rather than the state, to teach children to religion. Thus, although Gutmann reaches conclusions that ultimately accord with liberal intuitions, this should not obscure the fact that her theory contains no principled limitations on schools’ education students in ways that deeply violate these intuitions.

In sum, Gutmann’s theory does not pay sufficient attention to how to integrate the liberal ideals that, along with democratic ideals, are fundamental to our political system. Since significant tensions exist between democracy and liberalism – the former focusing on group decisionmaking, the latter focusing on individual rights – Gutmann’s valuing one and ignoring the other makes for inadequate reconciliation of the principles guiding liberal democracy. We generally assume that under a liberal democratic form of government some issues and decisions should remain immune from direct government intervention, even the relatively gentle persuasion of education. Gutmann, however, doesn’t help us to think through the location of these limits. Neither does she give sufficient weight to our intuition that, at least in many areas, we have some greater interest in passing our beliefs along to our own children than we do generally as a polity in determining the course of the next generation at large. In this respect, Gutmann’s answer that our children should submit to civic education because we, as citizens, have had the opportunity to participate in the democratic process seems less than satisfactory.
William Galston - Civic Liberalism

Galston’s Theory -- Last but not least, I turn to William Galston’s proposal for civic education. In contrast to the theorists I have discussed thus far, Galston specifically seeks to balance the competing interests at stake in civic education. He notes that “the most poignant problems raised by liberal civic education is the clash between the content of that education and the desire of parents to pass on their way of life to their children.”188 According to Galston, liberal polities can legitimately require their citizens to accede to a “basic civic education” that gives them “the beliefs and habits that support the polity and enable individuals to function competently in public affairs.”189 In Galston’s view, this means that even if it conflicts with parents’ basic beliefs, the state may require children to participate in civic education that seeks to inculcate, among other qualities, “the disposition to respect the rights of others, the capacity to evaluate the talents, character, and performance of public officials, and the ability to moderate public desires in the face of public limits.”190

However, in order to give parents’ liberty interests their due in our liberal system, Galston argues that the state may legitimately go no further than providing the basic education that this “civic minimalist” standard requires.191 In contrast to the more ambitious goals that Gutmann supports of teaching children to deliberate about different ways of life, in Galston’s view, the fact that the United States is a representative democracy rather than a participatory democracy limits the acceptable scope of civic education because it requires

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188 Galston, supra note 149, 252.
189 Id. at 252
190 Id. at 246.
191 Id. at 252.
less of citizens to function competently in the political system. Specifically, Galston argues that a representative democracy does not require citizens to engage in rational deliberation; therefore the state may not legitimately develop children’s ability to think about ways of life apart from their own. In Galston’s words, “liberal freedom entails the right to live unexamined as well as examined lives – a right the effective exercise of which may require parental bulwarks against the corrosive influence of modernist skepticism.” He argues as well that liberal freedom means that schools do not have the right to expose children to a range of possible ways of life. According to Galston,

The state may act in loco parentis to overcome family-based obstacles to normal development. And it may use public instrumentalities, including the system of education, to promote the attainment by all children of the basic requisites of citizenship. These are legitimate intrusive powers. But they are limited by their own inner logic. In a liberal state, interventions that cannot be justified on this basis cannot be justified at all. That is how liberal democracies must draw the line between parental and public authority over the education of children . . .

By the same token, Galston’s views on the manner in which civic education should be performed are influenced by the elementary level of understanding and participation he contends are required in a representative democracy. He asserts that teaching children to support liberal democracy cannot be accomplished through teaching them rational inquiry since liberalism takes sides on disputed issues such as equality, freedom and human good that are not definitively settled from a philosophical point of view. Instead, civic education should be taught on a more simplistic level in which loyalty to the realm is inculcated, not through a warts-and-all description of American history, but through a “nobler moralizing

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192 See id. at 246-48.
193 Id. at 254.
194 Id. at 254-55.
history: a pantheon of heroes who confer legitimacy on central institutions.”¹⁹⁵ In Galston’s view, “[i]t is unrealistic to believe that more than a few adult citizens of liberal societies will ever move beyond the kind of civic commitment engendered by such a pedagogy.”¹⁹⁶

On these grounds, Galston disputes Gutmann’s argument that the Amish parents in *Yoder* should have been required to send their children to high school in order to expose them to other ways of life, and to teach them to deliberate about their collective lives. In Galston’s words,

> In a liberal-democratic polity, to be sure, the fact of social diversity means that the willingness to coexist peacefully with ways of life very different from one’s own is essential. Furthermore, the need for public evaluation of leaders and policies means that the state has an interest in developing citizens with at least the minimal conditions of reasonable public judgment. But neither of these civic requirements entails a need for public authority to take an interest in how children think about different ways of life. . . . In short, the civic standpoint does not warrant the state’s conclusion that the state must (or may) structure public education to foster in children skeptical reflection on ways of life inherited from parents or local communities.¹⁹⁷

*Analysis* -- In my view, Galston gets the task right when he seeks to carve out a workable balance between the civic and liberal interests in determining the permissible breadth of civic education (although I would include democratic interests, as well). Yet I believe that he still does not arrive at a workable accommodation among them in several respects.

First, in seeking to give so much deference to the diverse beliefs held by citizens, Galston defines citizens’ necessary competencies too narrowly to support a vigorous liberal democracy, even a representative one. The education that Galston prescribes for future

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¹⁹⁵ Id. at 244.

¹⁹⁶ Id.

¹⁹⁷ Id. at 253.
citizens risks forfeiting the check on government power that a healthy democracy demands. A vigorous representative democracy requires that representatives be constrained at least to some significant extent by the interests of the people, rather than be dictated by the will of only some small portion of the population. While this doesn’t require that each citizen be able to act independently as a watchdog against government corruption, it at least requires that some significant portion of the population be able to weigh and heed the claims of the press and others who act as watchdogs. Galston’s willingness to allow future citizens to learn little about politics, to leave their own beliefs about the world unexamined and their critical faculties unhoned, and, indeed, his advocating that the state teach support for the realm in an uncritical manner, run the risk of producing citizens who are too easily led by the government, and too quick to believe inadequate justifications and explanations.

Galston’s theory also does not contain the safeguards necessary to insure the preservation of individual rights and the commitment to allowing diversity that a liberal polity requires. In this regard, Galston draws an overly-clear demarcation between children accepting that others should coexist peacefully and children respecting other ways of life. The former, he argues, is required of liberalism; the latter is not. The fact of the matter, though, is that the line between the two is a murky one. The political events of the past few years regarding same-sex marriage show that even when certain sectors of society, in this instance fundamentalist Christians, learn to coexist peacefully with others in the sense that they can agree not to deprive them of their citizenship (although many would still like at least to imprison them for sodomy), this does not stop repeated efforts to deny them, for reasons that cannot be justified without resort to their own comprehensive philosophies, the same privileges that are accorded to others. A commitment to coexist peacefully in some very
narrow sense, then, is not enough to fulfill liberalism’s commitment to equality under the laws. More fundamentally, despite Galston’s stated support for teaching children to coexist peacefully, by allowing parents to overrule schools’ decisions to expose children to diversity, Galston would deny children the tools to understand what peaceful coexistence in a society marked by profound differences really means. It is easy to make students understand coexisting peacefully with those who have similar beliefs; the challenge of liberal democracy is coexisting with others with very different beliefs. Without this exposure, lessons about peaceful coexistence mean little.

More than that, Galston’s narrow vision for civic education, far from the recipe to appease different groups that Galston perceives it to be, is a recipe for civic disharmony. A polity composed of citizens untrained to deliberate rationally about collective concerns yields a polity likely to devolve into partisan bickering rather than reasoned attempts to bridge differences and to find a common path that those from diverse walks of life can choose together. Further, citizens who cannot rationally deliberate about their common future and who have not been made to confront what the later John Rawls called the “fact of pluralism,”198 are likely to choose leaders whose beliefs not only match their own, but who see no difficulty with imposing these beliefs on others. Such a polity cannot safeguard the autonomy and protection of individual rights and liberty that a liberal polity must guarantee its citizens.

This is not to deny that, as Galston points out, significant attention must be paid to the extent to which requiring particular types of civic education alienates particular societal groups. Yet, as Galston recognizes, there is a delicate balance to be struck between

attempting to accommodate as many viewpoints as possible and furthering the core commitments of liberal democracy. Galston’s fundamental impulse, in seeking to promote diverse sets of beliefs as well as the moral backbone that strong, committed belief systems can promote, tilts him too far toward accommodation. For Galston,

The greatest threat to children in modern liberal societies is not that they will believe in something too deeply, but that they will believe in nothing very deeply at all. Even to achieve the kind of free self-reflection that many liberals prize, it is better to begin by believing something. Rational deliberation among ways of life is far more meaningful if (and I am tempted to say only if) the stakes are meaningful, that is, if the deliberator has strong convictions against which competing claims can be weighed. The role of parents in fostering such convictions should be welcomed not feared.199

At base for Galston, a moral culture of strong individual beliefs is necessary in a good liberal democratic system; the capacity for strong and informed political participation is less important.

The exact contours of the line of demarcation between the prerogatives of the state and the rights of individual citizens in a liberal system cannot be determined as if it were an abstract math problem, unaffected by the particular political context and community at issue. Where exactly the line should be drawn instead depends in some large part on the characteristics of the particular polity at issue – including such considerations as how diverse the populace is, how polarized it is in its beliefs, and how likely citizens are to learn important civic virtues without the assistance of the state. Measured in light of current conditions, Galston in my view gets this balance terribly wrong. The events of the past few years have shown us that the contemporary threat to liberal democracy in the United States is not that citizens will believe too little, but rather that an uninformed and illiberal citizenry will erode individual rights and fail to call the undemocratic impulses of the government to

199Galston, supra note 149, 255.
account. Indeed, the events of the past few years represent in many respects the unhappy realization of Galston’s straitened vision of civic education.

We possess a citizenry that, by and large, has strong but unexamined views, is exceedingly loyal to its country, and tends to pick its leaders based on vague notions of character rather than on considered opinions about its leaders’ platforms. To the extent that voters do seek candidates who match their views with respect to particular policies, these views are not the product of rational deliberation about different ways that diverse citizens can best live together, but instead tend to be gut level choices that favor those who have the same comprehensive beliefs as the voter. Galston’s calls to ensure that the state develops citizens’ loyalty to the realm seems to have been answered in spades by citizens who have remained credulously loyal to a government that repeatedly undercut liberal rights and values and disregarded their interests in favor of special interests.

These are not citizens who have the weakness of lacking strong beliefs. Rather, their weakness from the point of view of liberal democracy is that these strong beliefs have little to do with support for liberal democratic principles and institutions, including the separation of church and state, a free press, and the rule of law – all of which are on increasingly shaky foundations of citizens’ support. At a time in which only about half of America's high school students think newspapers should be allowed to publish freely, without government approval

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200 For example, the administration has sought to deny U.S. citizens arrested on U.S. territory attorneys and the right to be charged to (see, e.g., Harper 2005); has disregarded citizens’ rights to information through secretly paying news commentators to promote its policies (see, e.g., Kurtz 2005; Toppo 2005); has used wiretaps on U.S. citizens without following warrant requirements (see, e.g., Lichtblau 2005).

201 News accounts of federal agencies giving away contracts to administration favorites in the reconstruction of New Orleans and Iraq are legion (see, for example, Holmes 2005; McClure 2005; AP 2005). So are accounts of the administration and government agencies altering proposed legislation, rules, and regulations to favor particular agencies at taxpayer expense (see, for example, Lieberman 2005 (energy bill); New York Times editorial, 2005, “Protecting Public Lands” (attempted give-away of public lands to mining industry). This all may pale next to recent changes in tax policy that favor wealthy citizens in favor of all other taxpayers (see, for example, Paul Krugman 2004a; b).
of their stories, and a third say the free speech guarantees of the First Amendment go "too far", this is no mere academic debate. And at a time in which the great majority of citizens are more religious than in other industrialized countries, and higher percentages believe that religious leaders should assume a strong political role than in other countries, the strength of this liberal democracy does not depend on strengthening citizens’ comprehensive commitments, but on strengthening their commitment to liberal democratic principles. In an important presidential election in which a majority of likely voters for the winning candidate were, as an objective matter, wrong about a number of important facts, being able to think critically and evaluate are crucial skills necessary for the perpetuation of a democracy that truly serves the interests of the people.

202 A recent study by the John S. and James L. Knight Foundation's High School Initiative, available at http://firstamendment.jideas.org/findings/findings.php, found startlingly little support for, and even less appreciation of, basic First Amendment guarantees. The study found that nearly three-quarters of high school students said either that they don’t know how they feel about the First Amendment, or that they take it for granted. Students lack knowledge about fundamental aspects of the First Amendment: seventy-five percent believe that flag burning is illegal; almost half believe that the government can restrict indecent material on the Internet. See also Herbert 2005 (summarizing results of John S. and James L. Knight Foundation's High School Initiative).

203 A recent survey across several nations found that nearly all U.S. respondents said faith is important to them, a far higher percentage than in other countries. Only 2 percent of Americans said they do not believe in God. Almost 40 percent said religious leaders should try to sway policymakers, notably higher than in other countries. "Our nation was founded on Judeo-Christian policies and religious leaders have an obligation to speak out on public policy, otherwise they're wimps," said David Black, a retiree from Osborne, Pa., who agreed to be interviewed after he was polled. (Deseret News 2005). See also Zoll 2005.

204 Several weeks before the 2004 presidential election, a study conducted by the Program on International Policy Attitudes and Knowledge, a joint program of the Center on Policy Attitudes and the Center for International and Security Studies at University of Maryland, found that a significant majority of supporters of George W. Bush had incorrect beliefs about a number of objectively verifiable facts. Seventy percent believed that Iraq had actual weapons of mass destruction or a major program for developing them. Fifty-six percent assume that most experts believed Iraq had actual weapons of mass destruction. Similarly, 75% of Bush supporters continued to believe that Iraq was providing substantial support to al Qaeda, and 63% believed that clear evidence of this support had been found. Sixty percent of Bush supporters also assumed that this was the conclusion of most experts, and 55% assumed that this was the conclusion of the 9/11 Commission. Despite the overwhelming results of polls from other countries showing disapproval of the war, only 31% of Bush supporters recognized that the majority of people in the world opposed the U.S. having gone to war with Iraq. Program on International Policy Attitudes (2004).
Galston is certainly right that we should seek to guard against the risk of becoming a nation of citizens with few morals and fewer ideals. We must also, however, guard against becoming a nation in which few have the interest or capacity to actively engage in public affairs and to help determine collectively the future of the polity. In the United States, where belief in God and association with organized religion is higher than in any other industrialized country, but in which voting participation and voter’s knowledge is extremely low, the risk of disinterest and inability to engage competently in public affairs seems significantly higher than the risk of having few strong comprehensive views. While Galston seeks to mediate between an inclusive liberalism that can support strong moral views and a liberalism that ensures a vigorous democratic polity, the elements of his theory ultimately risk the vibrant liberal democracy for which he strives.

Civic Liberalism -- Reconciling the Interests

Can we have a theory of civic education that reaches a more workable accommodation among the complex values at stake in a liberal democracy than current theories of civic education? In this section, I contend that we can, and present the outlines of such an approach. To do so, I first lay out a rough sketch of how these complex interests should be accommodated. I then refine that sketch by considering how this approach would deal with the programs challenged in recent case law.

A Proposal

Let me begin with a few points that help to clarify the scope of the more difficult issues. At a minimum, there are two interests attached to civic education that must, whatever

\[205\] See supra note 203.
else occurs, be respected by both the state and parents. First, children must be provided with
the resources necessary to achieve at least a basic level of autonomy, in the sense that they
are (or will be) capable of being self-directing. The fundamental importance that liberal
democracy attaches to self-determination would be meaningless in the absence of children
achieving a capacity for autonomy in which they possess sufficient information and skills to
make basic decisions about the conduct of their own lives. It is true, as William Galston
points out, that liberalism’s respect for the life plans of others means that unexamined life
plans need to be respected as much as plans that are arrived at rationally. However, this does
not lead to parents being able to deprive children of developing the capacity for self-
determination. The concept of moral personhood on which liberal democracy rests does not
allow one person to serve simply as a pawn to satisfy another person’s life plan, even when
the other person is a parent. This interest in acquiring the basic skills needed to develop a
life plan is so fundamental to liberalism’s respect for individuals that it may not be sacrificed
to other interests.

The other insuperable interest, the polity’s interest in insuring adequate civic
education to ensure the survival of the polity, is grounded in a combination of liberal and
democratic rationales with a fair dose of realpolitik thrown in. Insofar as a liberal democratic
government is a minimally-objectionable form of government as a moral matter, both
because it allows individuals a considerable amount of individual freedom as well as the
freedom to collectively determine one’s future, citizens must consent to surrendering
sufficient liberty to ensure the continuation of the polity.

The difficult questions come with respect to how to balance the various interests over
and above these threshold preconditions. Should the remainder of this authority be given to
parents, as Stephen Gilles would have it? To the democracy, as Amy Gutmann proposes? To children’s interest in autonomy, as Ackerman suggests? Or to some more even distribution of authority – and in which case where should the lines be drawn?

In my view, the tension among these values can be dispersed to at least some extent by a more nuanced account of the legitimate interests at stake.\footnote{In making this argument, I am following in the footsteps of Spragens, supra note 149, who argues that a more nuanced conception of the goods at stake in liberal democratic theory generally permits a richer notion of liberalism capable of encompassing a broader range of goods.} Beginning with the liberal corner of the triangle, two specific wrinkles relating to children’s autonomy are worthy of attention in this context. First, as Thomas Spragens points out, autonomy is not a good that a liberal democracy should seek to maximize. We value autonomy as an intrinsic element in a fully human life, yet a life spent pursuing as much autonomy as possible would be destructive because it would erase our ties with others and our situatedness\footnote{Id. at 127.}. Instead, autonomy is better conceptualized as a good for which there exists some (as yet undiscussed) optimal level, presumably higher than the threshold level of autonomy below which a state may not go. Over and above the capacity necessary to achieve this optimal level of autonomy, more autonomy is not better. Second, children’s capacity for developing and exercising autonomy increases as they grow toward adulthood; we would therefore expect a toddler to have far less of a capacity for autonomy than a teenager.

A nuanced account of parents’ legitimate interest in passing on their way of life to their children should also recognize several different facets of this interest. First, it can never be given absolute sway: as I argued before, parents’ complete control of children’s education is abhorrent to the notion that children, themselves, must develop the capacity for self-
determination, and detrimental to the polity’s legitimate interest in survival. Second, in a liberal polity in which the state seeks to allow citizens significant personal freedom, parents’ interest in passing along their ways of life is strongest when it comes to passing along to children what John Rawls called “comprehensive” conceptions of the good life – those beliefs that are part of an all-encompassing conception of the good life. In contrast, parents’ interests are weaker when it comes to passing along political virtues, which liberalism has historically treated as at least partly the job of the public domain. Third, and finally, parents’ legitimate interests in determining their children’s education diminish to some extent as their children approach maturity and become more of their own persons capable of exercising their own autonomy, as well as closer to assuming the mantle of citizenship and their own place as citizens in the polity.

The state’s civic interests associated with public education are in certain respects the inverse of parents’ interests. In contrast to parents, the state has little legitimate interest in citizens’ comprehensive conceptions of the good, in themselves, unless these conceptions impact the political health of the polity. Rather, the state’s legitimate concern is the development of citizens’ political virtues. And also in contrast with parents, the polity’s legitimate interests in preparing children for citizenship increases as children mature and are both more capable of dealing with a diverse range of opinions, as well as closer to joining the larger public world.

The legitimate scope of a democracy’s interest is far less settled in our tradition, which has, as Sheldon Wolin writes of Rawls’ work, demoted democracy to the subaltern position relative to liberalism (Wolin 1996). Yet we can discern several things about democracy’s position relative to liberalism that help to define its role. First, if children truly
are to be seen as members of the political community as well as the family, the political community should have some say over children’s education. Second, that interest, like the state’s civic interest, should increase as children mature and prepare to enter the political community. Third, a democracy’s legitimate interest in children’s education in a liberal system are properly confined, at least in the ordinary course of affairs, to children’s political rather than comprehensive beliefs.

So where does this leave us in terms of delineating a framework for assessing the legitimacy of educational programs? It means that the state should be confined to teaching political virtues rather than comprehensive virtues. Regardless of what the majority of a democracy desires with respect to children’s acculturation, this is, after all, a liberal democracy, which must therefore reserve a wide swath of freedom from the state. Moreover, even with regard to teaching political virtues, the state’s power should not be used in the delicate area of shaping citizens’ preferences and characters without significant reasons for doing so, particularly when they conflict with parents’ comprehensive beliefs. This does not mean, however, that the state should adopt the posture sometimes called “civic minimalism,” which theorists like Galston advocate, in which it can use civic education only to develop basic virtues necessary for the polity to function. Instead, the recognition of the importance of a healthy democratic polity that balances both the importance of a vibrant civic realm against values of individual liberty, as well as the recognition that children are not only members of their families but also of the larger society, should give the state at least somewhat more leeway with respect to children’s education that a minimalist standard would dictate, particularly as the children get older and more able to cope with a diversity of opinions.
In other words, I am arguing that the best way to balance the liberal, democratic, and civic interests in a manner that conforms to both our considered intuitions and our aspirations for a robust liberal democracy is to confine the state generally to teaching political virtues, and to allow both parents and the democracy to exercise complementary levels of authority over students’ civic education as children mature. Taking a leaf from Bruce Ackerman\textsuperscript{208} and Thomas Spragens \textsuperscript{209} in turn, parents should have declining, and democracy should have ascending, authority to educate students as they get older. Both the interest that Ackerman calls attention to – the child’s interest in personal integrity – and the strong link between child and family that we as a society value in a child’s early years, suggest that although a democracy may institute the civic education necessary for a healthy liberal democratic polity, it may not go further than nurturing such core values and virtues during the child’s primary education. At this time, parents’ control of children and their interest in inculcating their children into their way of life are sufficient to outweigh any other interest of a democracy in stamping its imprimatur on its youngest citizens. This limit of civic minimalism also has the virtue of likely requiring the teaching of tenets that are less offensive to parents (although certainly some parents will still disagree), at a time when children are less likely to be able to sort out conflicts between their parents’ views and the views they learn at school. At this stage, teaching children generally to respect others is appropriate. And while care should be used, children may also be acquainted with the basic fact of difference, for example in religions and family forms. Yet the state should refrain at this age from going further than. Thus, it would be appropriate in elementary schools to expose children to the fact that

\textsuperscript{208}Ackerman, supra note 157, 142-43.

\textsuperscript{209}Spragens, supra note 149, 242.
different people have different religious beliefs. Exposing young children to significant
difference in the content of these beliefs (as opposed to some basic differences in traditions
or culture) would be inappropriate, however. So would exposing children to anti-tobacco or
anti-drug messages: at younger ages, schools should seek to limit the messages they convey
to those central to the success of a liberal polity.

However, the weight assigned parents’ interest in inculcating their way of life should
decrease as children grows older. At this point, children are coming closer to becoming their
own citizens in the democracy. At the same time, they are more capable of understanding
controversial viewpoints regarding liberal democracy, as well as of making sense of the
difference between parents’ and schools’ views. For both these reasons, a civic liberal
democracy has more freedom to move beyond civic minimalism and to institute a wider
sphere of democratic civic education as children mature. Thus, as students beyond the lower
grades, the state may acquaint students with lessons that the polity believes is important for
its particular ways of life and necessary for a healthy liberal democratic polity.

In contrast to the civic minimalist position appropriate when children are younger,
this might be called the “civic medium” position. Under it, in deciding what civic education
older children should receive, the democracy should focus on those values at stake in the
civic/liberal/democratic triangle, but should pay careful attention to those liberal values that
traditionally have served as a check on the power of democracy. Because of the weight that
must be paid to these liberal virtues, including individual autonomy and diversity, the state
should never adopt a “civic maximalist” position with regard to civic education, of the type
that Gutmann would allow. Further, because of the increasing autonomy and intellectual
capacity of older children, the civic education provided to them is appropriately taught with
more complexity; in teaching more controversial proposals, a school should present the issues in a way that allows students themselves to work through the issues. This means that schools can go appreciably further in communicating virtues and values to students in high school than they might when students are younger. For example, while purely private morality should never be taught in public schools, a school might seek to convey to older students information about birth control, sexuality, and disease prevention, in order to foster legitimate public health goals, even if such material would not be appropriate for younger children, both because of their majority and because this information is not so connected to core public purposes. Education regarding the morality of particular sexual practices, however, such as premarital sex, masturbation, and birth control would be left to parents.

Under this proposal, some parents’ efforts to pass along their beliefs and ways of life will be disadvantaged by their children’s exposure to other ways of life, to lessons of political tolerance of groups disapproved of by parents, or by teaching children to reason about their future. As Stephen Macedo notes, however, liberal democracy promises that it will not prohibit citizens from holding or communicating a wide variety of beliefs, including illiberal and undemocratic beliefs. It does not promise, however, that all such beliefs will be given a level playing field by the state\textsuperscript{210}. To promise otherwise takes inadequate account “of the degree of moral convergence it takes to sustain a constitutional order that is liberal, democratic, and characterized by widespread bonds of civic friendship and cooperation” (2).

\textit{Difficult Issues: Equality}

I have thus far considered the way in which the liberal good of autonomy intersects with the civic and democratic goods at stake in civic education. Yet, as I have noted before,

\textsuperscript{210}Macedo, supra note 149, 219.
autonomy is not the only good central to liberalism, even if it is the good that gets the most attention. Equality, too, is central to the core aspirations of liberalism. Chief among the other goods is that of equality. Yet determining how to square the commitment to equality with parents’ autonomy when it comes to civic education is a difficult issue. Consider, for example, whether public schools may teach the principle of sex equality. Doing so will no doubt violate the beliefs of many parents—for some of these parents, their firmly held religious beliefs. Should schools be able to teach such doctrines over these parents’ objections? And, if so, what kind of equality should schools be allowed to teach? Must the equality taught be confined to the political realm, so that schools may only teach that women should have the same legal and political rights as men? Or may the lessons be broader, teaching children that women and men should be equal in families and in society, as well? To teach the latter would violate the fundamental tenets of a number of religions, including Southern Baptists, whose governing body in 1998 encouraged wives to submit graciously to the leadership of their husbands.

In my view, there are two reasons that liberal democracy’s commitment to equality requires that schools not only teach sex equality in political life, but also teach that this doctrine applies to citizens’ private lives. First, equality is one of those few core liberal democratic values which, to use Thomas Spragens’ terms, is “semi-comprehensive,” in the sense that it applies beyond the political domain, strictly defined\textsuperscript{211}. This is because it is premised on liberalism’s commitment to human dignity, which goes beyond just the political realm. As a consequence, although the liberal state should not force this ideal on those who reject it by, for example, requiring adult men and women to share washing the dishes, the state should have the power to persuade citizens of its validity, and this persuasion should be

\textsuperscript{211}Spragens, supra note 149, 129.
an important part of civic education. Just as parents do not have unlimited authority to
discipline their children in any way they see fit, they may not maintain a monopoly on
inculcating views in children that would contradict these basic liberal tenets.

Second, the interrelatedness between political and social equality means that the first
cannot be achieved without the second. Since the 1970s we have seen repeatedly that
women’s unequal participation in the public realm is inherently tied to their disparate roles in
the private realm. The centrality of political equality to the moral justifications of liberal
democracy means that schools must teach social equality to children, even over parents’
objections, and that such lessons pass the test of civic minimalism applicable to younger
children.

*Revisiting Challenged School Programs*

How do the requirements challenged in *Yoder* and *Mozert* and the cases that followed
them fare under this standard? In *Yoder*, the contested requirement sought to keep children
in high school until age 16 in order to prepare them to participate effectively in the liberal
democratic system, as well as to be self-sufficient participants in society. Under my
framework, the fact that the challenged requirement was directed at political rather than
comprehensive virtues weighs in its favor. So does its application to older children. In this
context, the parents’ argument that contact with other children is more hazardous to older
children rather than those who are younger because older children are more cognizant of
differences and different ways of life should weigh in favor of, rather than against, the law’s
permissibility: the fact that these children are becoming capable of a more complex
understanding of differences and of autonomy lessens parents’ legitimate realm of control
over their children. Further, the challenged requirement occurs at the period in which the
state’s interests in children’s civic education is at its highest since the children at issue will soon be voting citizens entrusted with shaping the future of the polity.

Moreover, the relationship between school attendance and the health of the polity is justified even under a civic minimalist rationale, which I have argued is a harder test for schools to meet than the standard that should apply to older children. Citizens who have little understanding of diversity because they have had little exposure to it, and indeed, little understanding of ways of life apart from their own, are ill-equipped to elect representatives charged with forging a common path among citizens. The fact that the parents do not choose that their children take any kind of active place in the polity does not give these parents the right to exempt these children from these requirements. To deprive children of the basic tools needed to participate in society beyond the role that their parents have chosen for them violates both the absolute requirement that children should be able to develop the basic preconditions for autonomy and the state’s responsibility to ensure that children have the capacity to become responsible citizens who are up to the difficult task of collective self-government.

Mozert, the case that challenged the series of readers used in primary school, is a slightly harder case under my framework, since the students involved in that case were younger, and therefore subject to the civic minimalist requirement. With that said, simple exposure of students to other ways of life to which the parents objected is certainly a prerequisite to the training in citizenship needed to prepare children to live in a diverse liberal democracy. Absent a clearer message that the readers communicated approval of these various ways of life, rather than simply acknowledged their existence, the challenged readers should be deemed as consistent with liberal democratic principles.
Brown v. Hot, Sexy, and Safer Productions, by contrast, is a relatively easy case in the other direction. While the state has an interest in teaching students AIDS-awareness and alternatives to unprotected sex (given the link between children’s sexual behavior and the state’s legitimate public health goals), it has no business making light of premarital sex. Given the central role that sexual behavior plays in many systems of comprehensive beliefs, the state should tread especially carefully in this area to ensure that the information communicated is closely tied to political rather than comprehensive justifications. The challenged regulation fails this test.

The community service requirement challenged in *Immediato* falls at the opposite end of the spectrum. Teaching its future citizens the importance of civic contributions falls squarely into the political mission of the state. It would be permissible under the civic minimalist standard applicable to younger children, and would therefore certainly be acceptable under the more lenient standard to justify educational programs for older children.

This leaves only the health education classes challenged in *Leebaert*, which in my view is the most difficult of all these cases. In that case, under my analysis, the some of the contentious issues that the public school sought to teach the children, such as drug and alcohol education, were important, but probably didn’t rise to the level of the core public values that the state should teach younger children. As such, in my view, the program, even with the opt-out alternative, should have appropriately been saved until high school. And even then it remains necessary for the school to justify teaching each of the subjects with respect to an important public purpose. While it seems to me that all of the challenged subjects -- health, character, citizenship, family planning, human sexuality, AIDS awareness, and social aspects of family life -- can be articulated in ways that meet this bar, the curricula
of some, such as health, character, family planning, and social aspects of family life, might need to be tailored fairly narrowly to comport with this requirement.

**Conclusion**

I have argued that, when it comes to civic education, a healthy liberal democracy must do the delicate work of balancing a number of different goods and purposes that stand in tension with one another. In the remaining two chapters, I consider the extent to which the state effectively balances these relevant purposes in two other areas of law: work and foster care. I turn to these now.
CHAPTER 7

PARENTING POLICIES, WORK, AND THE FAMILY-STATE RELATIONSHIP

Newspapers, public opinion polls, and political speeches all proclaim that Americans strongly support children and believe in the importance of good parenting. However, Americans are, in overwhelming numbers, concerned that they are failing their children.212 They are particularly concerned that they have too little time to spend with their children.213 It is therefore surprising that where parenting responsibilities conflict with work—unquestionably the activity that most limits parenting activities214—this groundswell of support for children and parenting has resulted in very little legal support for working parents. There is, in fact, less support for working parents in this country than in any other

212 According to a U.S. News and World Report poll, 83% of Americans said they thought it harder in general to be a child today than a generation ago (Whitman and Chetwynd 1997). According to a Knight-Ridder poll of voters, nearly three-fourths worry about how children are being raised at home. Blacks and whites, young and old, ranked lack of attention for children as the second most important problem facing this country, following only crime (Cannon 1996).

213 The 1996 “What Families Really Value” poll conducted by the National Parenting Association of New York found unexpected unity among parents across race, gender, and income lines on naming the “family time famine” as a major concern. According to the president of the association, “[w]hat does fall out of this survey is the enormous and, I think, desperate search for more time with their children” (Cummins 1996; see also Galston 1997, 293-94). Popular opinion that parents are spending less time with their children appears justified by the facts. According to a 1985 study by a University of Maryland sociologist, parents spent an average of only seventeen hours per week with their children as compared to thirty hours in 1965 (Etzioni 1993; see also Thomas 1995 (citing study showing that parents in the United States spend less time with their children than parents in any other nation in the world – 40% less time than even a generation ago)). Recent studies show that this gap may be closing, at least to some small extent, by fathers spending more time on workdays with their children than they did a generation ago (Families and Work Institute 2002).

214 The current workforce includes roughly 94% of fathers and 70 of mothers with children under 18 (Bureau of Labor Statistics 2005, based on 2004 statistics). This includes 62% of mothers with children under 6, and 77% of mothers whose youngest child was 6 through 17. More than half of the parents polled who said that they spent too little time with their children reported that they did so because they had to spend time working in order to support themselves and their families (Galston 1997, 294).
industrialized country.\textsuperscript{215} This chapter seeks to explore this apparent paradox. It asks why the United States, a well-off country whose political rhetoric trumpets the value of parenting, has provided so little legal support for working parents. A major part of this answer, I contend, derives from the same misguided assumptions about the family-state relationship that I critiqued in earlier chapters, here cropping up in the dominant public philosophy shared by members of Congress responsible for passing laws, by judges who interpret them, and by citizens who hold such beliefs even while they proclaim support for broader parenting protections. These views bear a strong similarity, although they are not identical to, their liberal academic counterparts. These assumptions, I argue, prevent formulation of a coherent legal framework able to cognize and support parenting and the goods associated with it.

Part I of this chapter explores the limits of the law's current approach to work-and-parenting issues. In it, I argue that the two legal frameworks used to evaluate parenting issues—sex discrimination analysis under Title VII of the Civil Rights Act of 1964 (hereinafter “Title VII”), and the Family and Medical Leave Act of 1993 (hereinafter “FMLA”)—are poor fits to deal with the complex of interests and goods at stake in this area.\textsuperscript{216} In Part II, I discuss the assumptions underlying this area of law that lead to this poor fit.

\textsuperscript{215}According to a 1997 report by a United Nations agency, of 152 industrialized countries, the United States ranks dead last in benefits and protections it offered to parenting. The report found that paid maternity leave is required by law in about 80% of countries surveyed, and about a third of the countries permit these leaves to last more than 14 weeks. Breaks for nursing mothers are required in more than 80 countries (Grimsley 1998). In contrast, until the passage of the Family and Medical Leave Act of 1993, the United States did not guarantee any job protection at all (Kamerman and Kahn 1991: 10). Even after passage of the FMLA, the United States permits parental leave for only up to 12 weeks and continues to provide no income replacement.

\textsuperscript{216}Two insightful comparative scholars, Paolo Wright-Carozza (1993) and Mary Ann Glendon (1987), have performed some of the intellectual spadework for this first section by pointing out that Western European countries provide greater protection to working parents, emphasize broader notions of social equality, and have laws supporting parenting that evidence far more complex normative concerns than the United States.
Finally, in Part III, I propose a revision of work-and-family law that better cognizes and protects the important interests at stake in this area of the law.

**Parenting and the Law**

Employees whose work and parenting responsibilities conflict generally have two different avenues of legal protection available to them: Title VII and the Family and Medical Leave Act. On their face, these two statutes are very different: Title VII is concerned with eliminating employment discrimination from the workplace, while the FMLA provides protection for employees requiring time off work to attend to serious family needs. Yet both share certain features: They are extremely limited in the protection they provide working parents. They selectively focus on particular interests at stake in the intersection between work and family at the same time as they obscure others. And they share a particular, narrow interpretation of what is required, and what is at stake, in parenting.

*Antidiscrimination Law As A Framework*

In a society whose rhetoric is steeped in the value of families but which remains ambivalent about the value of sexual equality, it is paradoxical that the dominant legal framework through which the relationship between parenting and the workplace has been negotiated is sex discrimination law. Yet because until passage of the FMLA in 1993 no other law provided protection for working parents, and because of the limited scope of the FMLA since that time, those seeking protection for parenting activities have generally litigated their claims under Title VII. That Act encompasses both a general prohibition on sex discrimination in employment and an amendment, the Pregnancy Discrimination Act of 1978 (hereinafter “PDA”), which declares discrimination on the basis of pregnancy or childbirth-
related conditions to be sex discrimination. The result of trying to fit work-and-family issues into the antidiscrimination framework constructed by Title VII and the PDA is like the proverbial act of trying to fit a square peg into a round hole: in order to make it fit, such a large portion of the peg needs to be pared away that it becomes virtually unrecognizable.

*Title VII*

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of . . . sex" (42 U.S.C. § 2000e-2(a)). In order to fit parenting and work conflicts into a form cognizable by this antidiscrimination statute, the relevant interests at stake in parenting are pared down to two: those of the employer and those of the employee as an employee. In this regard, Title VII protects the employee only when their work has been or will be affected by parenting responsibilities, and then only if this conflict can be linked to sex discrimination. The law is not triggered when the employee/parent's parenting has been or will be affected by work responsibilities. Hence, Title VII excludes from consideration the needs of the child in receiving adequate parenting, the interests of communities and the state in ensuring that their future citizens are raised adequately, and the importance to the parent-employee of fulfilling child rearing responsibilities (Wright-Carozza 1993, 576-78).

Moreover, by virtue of its limited goal of eliminating discrimination in the workplace, Title VII promises no substantive protection for parenting: it provides only the same level of protection to the act of parenting that it provides to other ways in which women may be disadvantaged relative to men: if all women were miserable parents and simply attended to work responsibilities while leaving their children unsupervised, the conditions of the sex discrimination framework would be satisfied. In other words, treating parenting within an
antidiscrimination framework protects parenting only insofar as it is necessary to avoid discrimination. It does not support parenting because of its importance to children, parents, or the polity. The problem is not chiefly that antidiscrimination law is failing to fulfill the function intended by Congress, but that its function, by nature, is limited, and that no other framework exists within United States' law provides adequate protection to the broader spectrum of interests at stake in work-and-parenting conflicts.

The Pregnancy Discrimination Act

Despite the clear link between parenting and women's inequality (see, for example, Crittenden 2001), the only place in which Title VII provides any explicit protection for parenting is in the PDA, which forbids employers from discriminating based on pregnancy. Even here, however, the enactment takes a constricted view of the interests at issue. First, in keeping with the broader antidiscrimination framework of which it is a part, the PDA considers only the employment interests of the pregnant employee by focusing on her ability or inability to work. It does not consider the broader range of goods furthered by caretaking, or cognize the harms that result from inadequate parenting.

Second, the PDA protects only the medical aspects of pregnancy. A pregnancy-related condition is limited to "incapacitating conditions for which medical care or treatment is usual and normal" (Wallace, 789 F. Supp. at 869; see also Cooper v. Drexel Chem. Co. at 1279-80 (N.D. Miss. 1996)). All non-medical circumstances that accompany pregnancy and childbirth are excluded from consideration under the statute. So is childrearing. As the House Report for the Pregnancy Discrimination Act states, “if a woman wants to stay home to take care of

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217 The PDA provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work” (42 U.S.C. § 2000e(k)).
the child, no benefits must be paid because this is not a medically determined condition related to pregnancy.”

Third, even when medical conditions for pregnancy are at issue, the PDA sets no substantive floor on an employer’s treatment of pregnant employees. It requires accommodation for pregnancy and childbearing only insofar as such accommodations are made for other medical conditions. As the Supreme Court stated in *Wimberly v. Labor and Industrial Relations Commission* (1987), under the PDA, "the State cannot single out pregnancy for disadvantageous treatment, but it is not compelled to afford preferential treatment" (518).

*The limits of antidiscrimination law*

**Limited focus: Johnson Controls and Maganuco**

*International Union, UAW v. Johnson Controls, Inc.* (U.S. 1991), highlights the limitations of the antidiscrimination approach to work-and-parenting issues. In that case, employees of defendant Johnson Controls, a battery manufacturer, challenged a company policy excluding all women from jobs involving actual or potential exposure to lead, except

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218 See H.R. Rep. No. 95-948, at 5 (1978); see also *Piantanida v. Wyman Center.* (8th Cir. 1997, 342) ("[A]n individual's choice to care for a child is not a 'medical condition' related to childbirth or pregnancy. . . . An employer's discrimination against an employee who has accepted this parental role . . . is therefore not based on the gender-specific biological functions of pregnancy and childbearing . . . ."); *Soreo-Yasher v. First Office Management* (N.D. Oh. 1996) ("Yasher alleges that FOM and Huffner discriminated against her based upon her pregnancy. However, there is no evidence that Yasher was replaced because of her pregnancy. Due to the nature and duties of a property manager for an apartment complex, FOM believed that it needed an onsite manager. There is no evidence in the record that Yasher was treated any differently than nonpregnant employees who were on leave for a similar period of time.").

219 See also *Best v. Distribution and Auto Services* (Tennessee Court of Appeals, 1999) ("Finally, we reject Best's contention that DAS's leave policy discriminated against her because it unfairly required her to exhaust all of her medical leave due to her pregnancy. Contrary to Best's suggestion, the Pregnancy Discrimination Act did not entitle her to any additional medical leave beyond that assured by DAS's general leave policy. Rather, the PDA merely prohibited DAS from treating Best, for all employment-related purposes, any differently than it treated 'nonpregnant employees who [were] similarly situated with respect to their ability to work.'").
those whose infertility was medically documented. The company had instituted the policy to respond to the risks of fetal hazards caused by lead exposure. Plaintiffs claimed that the policy violated Title VII's prohibition on actions that discriminated based on sex. The employer, in response, argued that although its exclusionary policy treated women differently from men, the policy was lawful because it fell under Title VII's bona fide occupational qualification ("BFOQ") exception. That exception permits employment practices that discriminate based on sex if they are "reasonably necessary to the normal operation of that particular business or enterprise" (42 U.S.C. § 2000e-2(e)(1)).

In ruling for the plaintiffs, the United States Supreme Court declared that the BFOQ exception applied only to a worker's ability or inability to perform the job in question, and could therefore not cognize possible harm to the fetus from lead exposure. According to the Court: "[e]mployment late in pregnancy often imposes risks on the unborn child, . . . but Congress indicated that the employer may take into account only the woman's ability to get her job done" (499 U.S. at 205). The “welfare of the next generation” could not be cognized within this framework: (206-07): "No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential element of battery making” (203-04). Having discarded the welfare of children, and the public’s own interest in children’s welfare from the statute's consideration, the Court cast the issue in terms of parental autonomy, declaring the employer's policy unlawful, because "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them" (207).

The needs, aspirations, and goods at stake in the intersection between work and parenting are complex. They include, among others, the economic needs of workers and their
families, workers' interests in working in the job of their choosing, women's interest in sex
equality, parents and the community's interest in healthy children, and the employer's interest
in an efficient workplace. Of this number of interests, the Court ruled that only the
employers' interest in efficiency, and women's interests in autonomy and sex equality were
cognizable by Title VII. In doing so, the statute’s and the Court’s blinkered perspective
excluded consideration of alternatives that might accommodate this broader range of
concerns. Under the antidiscrimination framework applied here, employers are required to
allow women to stay in jobs that pose fetal hazards so long as these jobs are open to men.
Under a broader framework, consideration of the larger social concerns, in addition to sex
equality interests, might have resulted in other solutions, such as requiring that the employer
offer women and men seeking to bear children the opportunity to transfer into safer jobs with
equal pay and at least equivalent working conditions.

Furthermore, the Court framed even the two employees’ interests it deemed
cognizable in contestable ways. First, in its refusal to consider harm to fetuses on the ground
that this might violate parental autonomy, the Court construed parental autonomy as
antithetical to state action, and therefore argued that supporting this interest disfavored legal
involvement. In doing so, it failed to recognize that allowing individuals to determine the
welfare of their children and future children is not necessarily inconsistent with legal support:
if individuals decide that it is not in their future children's interest to be exposed to lead,
judicial insistence that employers accommodate such decisions would further rather than
hinder parental autonomy.220 Instead, the Supreme Court's insistence that parents make and

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220 I do not address here the difficult issue of how the law should frame injuries to fetuses who later become born
children. A burgeoning literature attempts to deal with and to reconceptualize the fetus's legal position in ways
that do not infringe on women's autonomy. See, for example, Johnsen 1992; Note 1990; Jerdee 2000; Roberts
1991; Rhoden 1986. I note here only that, under Johnson Controls, whether this injury is conceived in terms of
act on determinations privately forces parents to make decisions from a range of employment options that all may be unacceptable to them precisely because these options are formulated without taking children's welfare into account.  

In addition, in limiting the antidiscrimination inquiry to securing women equal terms and conditions of employment, the Court abstracted women's interests in equal employment from the rest of their lives. The exclusion of women's aspirations and responsibilities in bearing and rearing children requires women to deal with these factors by leaving their jobs, if these factors are to be considered at all. Thus, while Johnson Controls may in theory seem a victory for women, when conceived in terms of women's lived reality, which for many include aspirations and commitments involving childbearing and child rearing, the Court's blinkered definition of women's interest in equality ultimately perpetuates women's subordinate status in the workplace.

My point here is not to argue that Johnson Controls was wrongly decided given the limited framework of inquiry provided by antidiscrimination law or that sex equality harm to communities’ interests in healthy children, the parents’ interest in healthy children, the interests of the fetus that is later born, or any combination of the three, it cannot be cognized under employment discrimination law. In my view, insofar as the interests of the fetus are conceptualized separately from the interests of the woman, in almost all cases, the woman will be in the best position to determine the interests of the fetus and to balance these interests against other relevant interests.

The importance of the issues excluded by the antidiscrimination framework is driven home by the inane scope of the debate between the majority and the minority opinions in Johnson Controls. Neither side disputed that the statute did not cognize harm to employees in their roles of persons who might wish to bear children, to future children, or to communities of which these injured children might one day be a part. Instead, the debate centered only on whether the statute cognized financial harm to the employer from tort suits brought on behalf of children injured by fetal hazards. See Justice White, concurring in part and concurring in the judgment (208-11); Justice Scalia, concurring in the judgment (213-15, 223-24). Severe economic harm to an employer caused by a tort suit, the Court tells us, may be cognizable under Title VII. Severe harm to fetuses, however conceptualized legally, that would later serve as the basis for such tort suits cannot be.

And, indeed, it has been hailed as a victory for women by a number of commentators. See, for example, Cleghorn 1995; Solomon 1991; Miller 1993; Dixon 2005 635.
concerns should not have weighed strongly – or even have been the determinative factor\textsuperscript{223} in assessing the permissibility of the company's policy.\textsuperscript{224} I argue here only that other important interests should have been taken into account in addition to the autonomy and sex equality interests that were considered by the Court. Indeed, for the law to set up a framework in which to cognize pregnancy issues that does not consider the possibility of serious injury to the fetus demonstrates that something has gone seriously awry in this area of the law.

The Seventh Circuit Court of Appeals decision in \textit{Maganuco v. Leyden Community High School District 212}, also demonstrates the manner in which United States law pares down the issues at stake in the work-and-parenting context. In that case, Rebecca Maganuco, a schoolteacher, presented a PDA challenge to a leave policy that would not allow her to combine a period of paid sick leave with a period of unpaid maternity leave in order to take a year off from work following the birth of her child. The collective bargaining agreement between the school and the teachers provided for both kinds of leave, but required her to choose between them. The Seventh Circuit rejected Maganuco's claim on the ground that the PDA "is limited to policies which impact or treat medical conditions relating to pregnancy and childbirth less favorably than other disabilities" (444). Because Maganuco sought time off from work to parent, rather than solely as a result of a physical disability relating to pregnancy and childbirth, the court held that her claim was not cognizable under the PDA.

\textsuperscript{223}Indeed, plaintiffs presented compelling evidence of sex discrimination by demonstrating that although the company excluded only women from positions involving lead exposure, that exposure also posed a risk to the fetus through the father's sperm, a risk against which the company's policy did not guard (198, 221-22). Because of its narrow framework of consideration, the Court used this evidence to justify allowing women in their childbearing years into jobs involving lead exposure, rather than to seek alternatives that would prevent exposing men, women, and their possible future children to lead exposure.

\textsuperscript{224}Neither do I contend that the company, rather than the government or women, themselves, was the appropriate decisionmaker in developing fetal protection policies.
Maganuco demonstrates the disadvantage that the narrow focus of antidiscrimination law can have not only for society and for children, but even for the very interest that the scheme would seem most likely to protect—sex equality.\textsuperscript{225} By requiring parents to choose between the welfare of their children and a job that is not required to take this welfare into account, in our gender-structured society it is usually women who leave the paid labor force in order to ensure their children's well-being.\textsuperscript{226}

**Interpretive choices**

Protection for parenting is not only limited by the restricted range of goods cognized with sex discrimination law, but also by the manner in which courts interpret the act of parenting. Chief among these interpretations is the judicial construction of parenting activities as a "choice," which therefore relieves society of responsibility. In *Barrass v. Bowen* (1988), the Fourth Circuit expressed this view through contrasting the (in its view, justifiable) medical leaves for those "suffering extended incapacity from illness or injury" to the (in its view, less justifiable) leaves for "young mothers wishing to nurse their babies for six months" (931-32). Similarly, in *Armstrong v. Flowers Hospital* (1993), the court used the concept of choice to dismiss a challenge to the termination of a pregnant nurse for her refusal

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\textsuperscript{225}Indeed, as a number of feminist legal theorists have noted (for example, Joan Williams 1991), it is only because the law assumes a male standard for a worker that it could avoid requiring substantive protections for the accommodation of parenting responsibilities: the law clearly assumes that others besides workers (i.e., mothers) are taking care of children.

\textsuperscript{226}*Armstrong v. Flowers Hospital*, (M.D. Ala. 1993), also illustrates the way in which the *Johnson Controls* approach redounds to the detriment of women. In that case, the court rejected a pregnant hospital employee's claim that she should not be required to care for an AIDS patient due to the increased exposure to infections that employees experienced in the treatment of AIDS patients. The plaintiff contended that such exposure posed a greater risk to pregnant employees than to non-pregnant employees. The court, relying on *Johnson Controls*, upheld the employer's right to apply the policy to pregnant employees. According to the *Armstrong* court, *Johnson Controls* required employees, not employers or the court, to respond to fetal hazards: "The Court held specifically that, in the context of action being taken by the employer, it is the woman's decision to make as to whether or not to subject the fetus to harm" (1191-92). In other words, the only option pregnant employees have to respond to fetal hazards is to quit their jobs.
to follow a policy requiring her to care for patients with AIDS. Plaintiff sought to challenge the policy based on the higher risks that such work might pose to pregnant women than to other employees. In the court's words, however, it was not the hospital's policy that caused the plaintiff's termination but rather the "conscious decision of the plaintiff to refuse to do her job" (1191). By the same token, the court in Maganuco construed the plaintiff's challenge as "dependent not on the biological fact that pregnancy and childbirth cause some period of disability, but on a . . . schoolteacher's choice to forego returning to work in favor of spending time at home with her newborn child" (444). Courts then use this interpretation of parenting to deny legal protection to women on the ground that they could have "chosen" not to parent or, alternatively, could have "chosen" to parent in a manner that did not hamper work responsibilities.

Refusing to accommodate parenting activities on the ground that parenting is a "choice" begs a number of questions. In the first place, it does not consider how the range of available options affects choice. As Justice O'Connor recognized in Planned Parenthood v. Casey (1992), the law orders both thinking and living through the choices it makes available to individuals (885). In failing to require that such considerations be recognized by law, courts force parents to decide between two unpalatable outcomes: on the one hand, they can choose their job and, therefore, economic security for their children, in which case they may not have and adequate opportunity to parent; on the other, they can choose to ensure their child is adequately parented, but may not be able to afford to rear them.

Moreover, using the parenting-as-choice interpretation to deny legal support evades the question of whether society has some interest in and responsibility to children once parents have "chosen" to bear them. The accident that befell Jessica McClure, the toddler
who fell down an abandoned well when she was playing in her aunt's backyard in 1987 springs to mind. Dozens of citizens participated in her rescue as the nation watched in concern. Failure to help because her parents "chose" to bear her would have been unthinkable. Once born, she was a human to whom the obligation to help was due. Employment law, however, considers the possibility of legal protection for parenting to be negated by the determination that parents have "chosen" to bear a child.

Again the consequence of such an approach for sexual equality issues is apparent. Joan Williams aptly summarizes the situation by stating that "[i]n the work/family context, the rhetoric of choice masks a gender system that defines childrearing and the accepted avenues of adult advancement as inconsistent and then allocates the resulting costs of child rearing to mothers" (Williams 1991, 1596). In contrast to the past blanket exclusions of women from the work world, women are now allowed to take jobs in the labor market but are neither relieved of the domestic responsibilities assigned to them by social roles nor accommodated with regard to these responsibilities at work. When women leave work to accommodate these domestic responsibilities, they are deemed to have made a "choice" and to have only themselves to blame. The ideology of choice therefore privatizes and individualizes a system of subordination and then uses the notion of consent to justify it.

**The Family and Medical Leave Act**

The sole exception to the limited vision of parenting found in sex discrimination law derives from the Family and Medical Leave Act and its state counterparts. Unlike antidiscrimination law, the FMLA sets a solid floor beneath which positive protection for parenting may not fall: covered employees are entitled to up to twelve weeks of aggregated annual leave, after which their jobs are guaranteed back to them. Moreover, the prefatory
language to the Act seeks protection of a broader range of interests than are cognized under Title VII. The preamble to the FMLA recognizes the importance of the "development of children and the family unit"; the interests of "fathers and mothers [to] be able to participate in early child rearing" without being forced "to choose between job security and parenting;" the national interest in preserving "family integrity;" and the goal of equal opportunity for men and women (29 U.S.C. § 2601).

Yet the support to parenting actually afforded by the FMLA is minor. The twelve weeks of leave that it allows constitutes only a fraction of the time necessary to raise sound children. In addition, the statute applies only to employees who work for companies with fifty or more employees. This provision restricts coverage to only five percent of American businesses and under 50 percent of the workforce (Williams and Segal 2003, 148). The majority of private sector employees – roughly forty-one million – are not protected (Swift 1997: 70). Moreover, the FMLA provides for no wage replacement during that time. As a result, the majority of covered employees – roughly 78% -- cannot afford to make use of the available leave (Center for Policy Alternatives 2005).

Finally, the FMLA confines the conditions of leave to care for children to circumstances involving the birth or adoption of a child, or to situations involving a severe medical emergency. Parents who need time for caregiving in other circumstances are left to fend for themselves. As pointedly stated by the district court in *Kelley v. Crosfield Catalysts* (N.D. Ill. 1997):

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227Note, however, that California in 2004 passed a provision qualifying workers in the state up to six weeks of *paid* family leave to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption. (California Unemployment Insurance Code § 3301(a)(1) (2004). Thus far it is the only state to make such paid leave available.
The Act clearly does not provide qualified leave for every family emergency. A call from a police station or from school authorities, a minor ailment that keeps a child home from school with no help immediately available, or a personal crisis in the life of a child or a parent may cause a severe conflict for an employee between work and family responsibilities. None is covered by the FMLA. The legislative history makes it clear that the Act is intended to reach four situations: to provide leave relating to the birth of a child or to the adoption or initial foster care of a child by one not his or her parent, to care for a seriously ill child, spouse, or parent, or to attend to the employee's own serious health condition. The statute provides minimal protection in those circumstances (1048).228

Ironically, the protections accorded under the FMLA largely ignore the broad interests discussed in the Act's preamble. In limiting the events eligible for leave to the birth or adoption of a child or the serious illness of dependents, and in confining its protection to a period of twelve weeks, the FMLA restricts protection for caretaking to periods involving the physical vulnerability of mother or child. At bottom, the FMLA, like the PDA, is premised on a medical model rather than on one that protects the broader interests at stake in parenting. The ease with which employment law cognizes medical needs stands in sharp contrast with its difficulty cognizing other issues implicated in the parenting relationship.

The law here does not simply create a hierarchy of interests in which medical needs are privileged over other interests; instead, it completely disregards other needs, deeming medical needs the only ones worthy of legal protection. The FMLA takes no account of the fact that it requires far more than twelve weeks to raise a child, that children need substantial

228See also S. Rep. No. 103-3 (1993, 29) (stating that Congress sought to exempt "minor illnesses which last only a few days and surgical procedures which typically do not require hospitalization and require only a brief recovery period"); *The Family and Medical Leave Act of 1993*, 29 C.F.R. 825.113 (1997) ("[L]eave to provide 'child care' would not ordinarily qualify as FMLA leave if the child is not a newborn (in the first year of life after birth."); *Seidle v. Provident Mutual. Life Insurance Co.* (1994) (holding that a child's ear infection is not a serious illness triggering mother's coverage by FMLA); *Perry v. Jaguar of Troy*, 353 F.3d 510 (6th Cir. 2003) (holding that caring for a child with attention deficit hyperactivity disorder does not qualify an employee for FMLA leave); *Fioto v. Manhattan Woods Golf Enterprises*, 270 F.Supp.2d 401 (S.D.N.Y., 2003) (holding that taking a day off of work to attend to a mother while she underwent brain surgery did not qualify an employee for FMLA leave absent evidence that he was needed to contribute in some concrete way to her care).
amounts of care, that most parents will be working during that time, and that the majority of parenting will be performed under conditions not triggered by the medical requirements of the FMLA.

In summary, current protection for the act of parenting, insofar as parenting conflicts with work requirements, is confined to two different statutory enactments, neither of which adequately conceptualizes or supports the range of important interests at stake. Under Title VII, parenting protections are forced into a sex discrimination model that can cognize only the worker's interest in her job. This model is individualistic, premised on voluntarism, and ignores the broader implications of work-and-parenting issues. Under the FMLA, parenting protections are forced into a medical model that cognizes serious medical needs but not children’s broader needs for care and affords legal protection only in crisis situations.

Public Philosophy and Parenting

Given the importance in public discourse on children and parenting, what has prevented the development of a legal framework that adequately supports these interests? And why does the little support we have take such a straitened form? In my view, particular presuppositions about the family-state relationship that are widely held are responsible for the inadequate, and inadequately conceptualized, legal framework. These presuppositions are related to (although not exactly the same as), those underlying Rawlsian-era liberal theory.

The Autonomous Family

As I argued in chapter 3, while public philosophy does not repeat academic liberalism’s ignorance of the fact of dependency, it substitutes for it, as Martha Fineman
(2004) points out, the myth of the autonomous family. This view, in contrast to Rawlsian liberalism, recognizes the dependency of the human condition. Yet it sees this dependency as properly confined to families, where the capable and autonomous adults who head these families can properly manage it. Families perform their task correctly, according to this view, without aid from others – including the government and employers. By conceiving of adults as autonomous, and therefore the families they head as autonomous, the popular view simply converts academic liberalism’s belief in the autonomous individual to the belief in the autonomous family. From this view derives a conception of the state’s responsibility conceived in terms of protecting individuals and families from incursions by others rather than in terms of supporting the right to care or to positive assistance. The end-product in public thought therefore bears a clear resemblance to Rawls’ concept of adults as the head of households; in both, all the state needs to do to provide for families and the fact of dependency is to distribute goods and resources in a just way to the household’s head. In this framework, we have far less difficulty conceiving of children as falling within a parent's personal sphere of autonomy – and thus allowing parents the right to be free of interference in order to raise and school children as they see fit—than of recognizing how the state might actively support parents in caring for children.

Current law comports with this framework in failing to recognize children’s needs for care, except in the most extreme instances. Instead, what gets cognized are the adult’s interest, which are presumed to encompass children’s interests. And of these adult interests, it is liberty and equality – the two that, to use Thomas Spragens’ words, often appear on the liberal “masthead” (1999: 110) that are comprehended within the law.
The view of parents as autonomous and as the sole proper providers for their families is linked to the case law’s conception of family as a “choice,” which therefore divests the public of any obligation. This view obscures the way in which adequate caretaking of children is related to the health of the polity of which children will one day be citizens. It also obscures consideration of the possibility that the state has responsibilities to children who are “chosen.” By conceptualizing parenting as a matter of individual choice, this case law and the public philosophy on which it is based conceive of parenting as a private issue that requires a private solution, rather than an issue appropriate for collective assistance.

The tendency of various elements of public philosophy to privatize families is reinforced by a newer strand of public thought that counterposes the liberal adulation of family autonomy against the threat of dependence, which is conceived broadly in terms of receiving most types of public support. This threat of dependency justifies public support as a necessary evil only when the perceived "normal" state of familial autonomy has broken down, and then only until the crisis can be overcome. The dichotomy drawn between autonomy and dependence (viewed in terms of public support) limits state support for parenting to conditions of. It therefore forecloses examination of the rationales for the state to support parenting in the ordinary course of the lives of parents and children.

\[229\] The debates regarding welfare reform are a case in point. See, for example, “The 1998 Campaign,” New York Times, Oct. 17, 1998 (comments of New York governor George Pataki) (welfare reform has changed people's lives and replaced a system that encouraged dependency with one that requires responsibility.); David Brooks, “More Than Money,” New York Times, Mar. 2, 2004. It should be noted, however, that support for the middle-class and wealthy, including homeowner mortgage interest deductions, social security, and support for particular industries are defined in the popular mind in a manner that does not raise the risk of dependency. See Nancy Fraser and Linda Gordon (1997, 121) for a discussion of changes in the concept of "dependence" in United States discourse.
The demarcation drawn in the liberal tradition between the public and private realms also impedes legal support for parenting. Two distinct aspects of this dichotomy hinder protection of parenting in the employment context. First, the realm of work is frequently seen as "public," in contrast to the "private" domestic realm. The activities associated with each sphere are then considered properly confined to that sphere. Activities such as child care that are associated with the private realm are in this view bracketed from consideration in the public realm of work. For this reason, while the workplace is considered an appropriate place for some social policies, including those that protect the welfare of workers by requiring employers to pay into the workers' compensation and unemployment compensation systems, laws providing for leave due to pregnancy, childbearing, or child rearing are seen as inappropriate "social engineering" (Kasindorf 1996 (quoting Jack Kemp on family leave); see also Fraser, 1997, 168). This ideology forces parenting issues out of the workplace and the economic realm, and leaves many full-time jobs with structures inconsistent with parenting. Because care is considered a private activity, it is deemed inappropriate in the work world.

In this conceptualization, it is only in the private realm of the family that the activity of care is valorized. And insofar as parenting issues cannot be accommodated within the domestic realm, they are displaced not into the labor market, but into the social services realm, where such protections are considered to be "charity" rather than a matter of right, and the dangers of “dependency” are seen as properly limiting the public aid that families

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230 In Joan Tronto's words: "Care has little status in our society, except when it is honored in its emotional and private forms" (Tronto 1993, 122). Katharine Silbaugh (1996) makes the related point that housework’s association with the domestic realm and that realm's perceived affectionate atmosphere causes housework to be perceived as not "really work" and therefore not accorded the benefits and protections accorded to wage labor.
receive. All of this shares a closer relationship with Rawls’ belief that the family had some “natural” mode of functioning that made it best left as untouched as possibly by the public world.

The implications for women's equality of this public/private dichotomy have been explored by a number of feminist writers (for example, Williams1991; Olsen 1983, 1985; Pateman 1988; Finley 1986; Smith 2004; Hasday 2000). They note that not only are certain activities and qualities traditionally associated with women in the popular mind located within the private realm, but that women, themselves, have been and to a considerable extent continue to be associated with this sphere. Indeed, the maintenance of this dichotomy depends on a gendered structure of society – the public world can exclude the domestic and embrace the concept of freedom only because women are left in the private realm to focus on necessities such as rearing children. Because of this formulation, those women who do enter civil society must do so on socially "male" terms as liberal subjects who can separate themselves from the demands of the private realm (Brown 1995, 184). The task is often an impossible one for women, insofar as these demands can be confined to the domestic realm only if women stay there in order to meet them.

A second aspect of the liberal demarcation between "public" and "private" also undercuts support for working parents. In this conception, while the workplace is public when defined against the domestic realm, it is private when contrasted with the public realm of government. While the first aspect of the public/private dichotomy holds that the

231 Carole Pateman (1988) argues that the very founding of the modern liberal state required the construction of a civil society in contradistinction to the private sphere. The creation of this dichotomy allowed construction of the liberal formulation of free and equal men in civil society at the same time as it relocated men's patriarchal right over women to the private domain and deemed it natural rather than political.
workplace should not accommodate parenting responsibilities because these responsibilities are private, the second view then allows workplace policies that fail to accommodate parenting to appear nonpolitical, as merely the private, individual decisions of employers.

Nancy Fraser's analysis of this issue is persuasive:

In male-dominated, capitalist societies, what is "political" is normally defined contrastively over against what is "economic" and what is "domestic" or "personal." Here, then, we can identify two principal sets of institutions that depoliticize social discourses: they are, first, domestic institutions, especially the normative domestic form, namely, the modern restricted male-headed nuclear family; and, second, official economic capitalist system institutions, especially paid workplaces, markets, credit mechanisms and "private" enterprises and corporations (Fraser 1997, 168; see also Olsen 1989b, 1501 (distinguishing market and family dichotomy from state and civil society dichotomy)).

Thus, in the area in which work-and-parenting issues intersect, parenting issues are, first, bracketed as domestic and therefore inappropriate for intervention in the work sphere and, second, bracketed as altogether nonpolitical because they intersect with the economic system.

The Neutral State

The liberal conception of the state as neutral regarding individual life plans, which I discussed in chapter 1, is voiced less in public philosophy than in academic theorizing. Nevertheless, this theme is sometimes sounded in public thought, and likely bears some role in the failure to develop adequate parenting protections. The law, in this view, simply provides a neutral framework of rights, defined as fair procedures, in which individuals can

232 Interestingly, the view that the government should be neutral on questions of the good life appears to weaken once one moves outside of the framework of legal rights, narrowly construed. Government encouragement of particular activities through U.S. tax policy, for example, is often considered far more acceptable than adoption of laws favoring these activities. Thus, in the 1996 vice-presidential debates, Jack Kemp opposed the Clinton administration's proposal to institute broader family protections on the ground that granting family leave rights to parents violated government neutrality: "That isn't America, that's social engineering" (Kasindorf 1996, A5). In its place, however, Kemp proposed a tax break to support families.
choose their own valued ends. It neither imposes a substantive vision of the good life nor
privileges some versions of the good life over others. This conception therefore militates
against a framework that provides support for parenting over and above other activities.

In this conception of neutrality, state protection for citizens’ rights is generally
justified on the importance of preserving citizens’ liberty (which, as I discuss in chapter 2,
communitarians have pointed out is actually not neutral at all). Yet although liberty
undoubtedly has pride of place in the hierarchy of liberal values, equality is the other highly
esteemed value in this tradition, and the other recognized, albeit more controversial, ground
for state protection (Spragens 1999, 42). In public philosophy, the tension between these two
values is expressed by the divide between two camps of liberals: libertarians, who emphasize
liberty, and egalitarians, who stress equality. Both, however, share an individualistic, rights-
oriented approach that eschews normative complexity in favor of a focus on these two
dominant values (Spragens 1999, 44). Within this culture, state intervention is justified on
liberty or equality grounds, or not at all.

This conception of the government simply as a neutral arbiter of rights makes it far
easier to place parenting issues in a framework that pits women's rights to equality against
the liberty of employers than to consider the broad range of interests at stake in parenting.
Just as Rawl’s conceived of his theory of justice, bottomed on liberty and equality to be
neutral, the popular view conceived these values to be somehow more acceptable and neutral
for the state to further than ends such as promoting the welfare of children. Within this
liberal framework, the law then converts equality into a narrow guarantee of the right to fair
procedures for individual women rather than to a particular end-state: freedom from
discrimination is guaranteed, a workplace in which men and women share power equally is
not. Further, the right to equality in the sense of guaranteeing women the same procedures applied to men ultimately redounds to women’s detriment by abstracting the right to equality from the rest of women’s lives. Giving women the formal access to jobs that do not accommodate childbearing or child-rearing is an empty gesture for the considerable numbers of women committed to such activities. In addition, under this conception of government neutrality, the issue of how work could be structured to best realize public objectives besides liberty and equality, such as to promote workers who lead full lives as moral persons and parent healthy, well-adjusted children, is not open for consideration.

In summary, several elements of contemporary public philosophy work together to hinder adequate work-and-family protections. The conception of adults and families as properly autonomous, and the conception of children as freely chosen obligations, misconceive the function of families and prevents recognition of the role that the state can play in supporting families. The liberal demarcation between the public and private realms legitimizes the view that parenting responsibilities have no place in the realm of work and that government has no business instituting family policies in the employment realm. The conception of the state as simply a neutral arbiter of rights impedes the state from actively supporting parenting. Finally, the liberal tradition's emphasis on liberty and formal equality obscures the more complex range of goods associated with parenting.

The current legal treatment of the intersection between work and parenting mirrors this liberal philosophy. Title VII does so in framing work-and-parenting issues solely in terms of

\[\text{See Contreras v. City of Los Angeles (1982), 1275 n.5, 1279 (Title VII does not ultimately focus on ideal social distributions of persons of various races and both sexes. Instead it is concerned with combating culpable discrimination."); 1277 (Title VII "tolerates a disparate impact on racial minorities so long as that impact is only an incidental product of criteria that genuinely predict or significantly correlate with successful job performance, and does not result from criteria that make race a factor in employment decisions.").}\]
the right of employers to conduct their business freely and the interests in equality of employees, conceived apart from relationships with children. In keeping with the view of the neutral state as enforcing the right to fair procedures, the law then construes the employee's interest in equality as the right to be free from sex discrimination at work, rather than the right to substantive equality. In doing so, it precludes consideration of ways in which the law might affirmatively support parenting responsibilities. The employee's moral commitment to fulfill parenting responsibilities remains uncomprehended and unprotected in this analysis. Similarly, the needs of children and the importance to the polity of caretaking go unrecognized. Child rearing, in this view, is conceived solely in voluntarist terms and is valued only as another lifestyle choice (see generally Sandel 1996, 108). While employees are allowed the right to choose to bear and rear children, they are not supported in securing the conditions that will enable them to combine a productive work life with this “choice.”

Under the FMLA, liberal philosophy limits assistance of parenting to crisis situations. Its recognition of the government’s role in supporting caretaking is so grudging that it occurs only at the margins, in situations in which a concrete, tangible need can be verified by a health care professional. The less measurable needs of children – the need to feed them, supervise them, love them, teach them – are invisible under these standards.

**Toward a More Complete Vision of Legal Protection for Parenting**

Moving from the current framework of legal protections to one that does a better job of requires revision of the problematic assumptions now embodied in dominant public thought.

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234Paolo Wright-Carozza (1993, 537) notes that Article 3 of Italy's Constitution contains a much broader conception of the ends furthered by law: “It is the task of the Republic to remove the obstacles of an economic and social nature that, by substantively limiting citizens' liberty and equality, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.”
In the first part of this section, I walk through how these assumptions might be reformulated in the work-and-family context. In the second, I consider what a reformed system of workplace protections for parenting might look like.

Reconceiving the Relationship Between Work and Family

Developing adequate parenting protections requires eradicating family autonomy as an ideal (see Fineman 2004). As I discussed in Chapter 3, it belies reality to suggest that families should be conceptualized autonomously from society or the state. In the contemporary world, no family exists as an island that can completely provide for all of its members’ needs. Instead, all families depend on a web of resources and social and legal infrastructure to meet their members’ needs. Further, as I have discussed, the family is already pervasively regulated both directly and indirectly by the state, from the determination of which groups constitute a family to the ways in which divorce laws affect who remains married (see, for example, Brinig and Buckley 1998). By the same token, work regulations, specifically, have a profound affect on how families operate. The existence or non-existence of minimum wage laws, union rights to bargain, and overtime provisions affect parents’ ability to meet the financial needs of their children. The stability and security of job protections affect stress levels in the household, not to mention income levels if jobs are lost, which also affects the quality of parenting. The intricate interrelationship between families and the state means that, contrary to the dominant conception of the family as removed from the state, the state is always already a constant presence that affects the functioning of families. The question is therefore whether the state will deliberately direct state power toward supporting caretaking and ameliorating conflicts between work and family, or
whether it will continue to regulate in ways that affect families without seeking to ease this
tension.

This means that the conception of the state as neutral with respect to citizens’ versions
of the good must also be rethought. Once dependency is recognized as a normal state of
human affairs, and families are no longer considered to be autonomous, simply enforcing
employee/parents’ right to fair procedures or ability to "choose" whether to stay in a job that
does not accommodate parenting is no longer sufficient to respect human dignity. Instead,
respecting dignity requires recognizing the importance of caretaking and structuring
institutions to support this activity. In the context of the work-and-parenting issue, it requires
changing the perspective from enforcing the right to choose to parent to providing
institutional support for caretaking.

An adequate conceptual framework for work-and-parenting policies also requires
reorienting the meaning of the conceptual divide between public and private. The boundaries
between these zones must be conceived as more permeable in the sense that the public
sphere, defined here to include both the state and the market, should be structured in ways
that insure that families can meet their caretaking responsibilities. Thus this model
conceives a more integral role for state support of parenting than simple crisis management.
Likewise, in this reconceptualization, the boundaries between the “private-economic” and the
“public-state” divide must be deemed more permeable. In this more porous boundary, the
fact that individual businesses are privately owned may not serve as a barrier to the state’s
regulating this institution to ensure parents can perform the important responsibility of caring
for children.
In moving away from a framework of supposed neutrality toward one that actively seeks to support caretaking, the state must adopt both a more nuanced and a broader account of the interests at stake in the intersection between work and parenting. Such an account should recognize the ways in which the needs and aspirations of parents, children, and communities are implicated in parenting. In this regard, the state should recognize that the relationship between caretaking and the fitness of its citizens means that supporting caretaking is not only necessary for human dignity, it is wise policy. It should, moreover, recognize that valuing parenting solely for the way in which it furthers sex equality too narrowly not only the range of interests at issue, but sex equality itself, given that it seeks to abstract women’s interest in employment from their aspirations to parent. At the same time, this account must recognize the complex ways in which women's historical assignment of primary parenting responsibilities relates to these other issues. To do so, at the same time that it recognizes the social value of parenting and the necessity of parenting in any community that will sustain itself, it must also recognize that women more than men conceive of their identities as closely tied to their children because of the gender roles they have been assigned in their subordinate status.

Recognition of the strong link between child rearing and the health of the polity accords with the longstanding counsel of democratic theorists that democracies depend on well-reared citizens. Thus, Aristotle recognized that the upbringing of citizens crucially affects the character of the state, "at least if it is true that it makes a difference to the soundness of a state that its children should be sound. . . . And it must make a difference; for . . . from children come those who will participate in the constitution" (Aristotle, 97). In the words of John Stuart Mill, "if we ask ourselves on what causes and conditions good government in all its
senses . . . depends, we find that the principal of them, the one which transcends all others, is the quality of the human beings composing the society over which government is exercised” (Mill 1991a, 225).

Toward a Revised Parenting and Work Policy

Such a “supportive state” approach to child rearing requires specific attention to questions that do not get asked within the current framework. It requires democratic deliberation over what conditions children within this society need to flourish and the ways that the state can support the instantiation of these conditions by ameliorating the tension between parenting and work. As I argued in chapter 3, the goal of public policy should be to construct institutions that allow citizens to integrate both paid work and caretaking into their lives. There are some number of proposals that would help further this goal through seeking to accommodate job structures to the demands of caretaking. To the extent that particular jobs permit it, making flex-time available is one such means to this end. This goal also requires generous leave provisions for caretakers to deal with both the major and minor emergencies that arise in all caregiving relationships. And in order for this to really be available to caretakers, this leave needs to be paid. Is it not as important to provide for a system of compensation when parents need time off from work to parent as it is to provide workers' and unemployment compensation?235

235Because such leave would be justified in part by the state's interest in ensuring the development of its future citizens, principles of fairness would suggest that the state bear at least some part of the economic burden for this leave. California has begun moving in this direction in providing six weeks of paid leave in its new Unemployment Insurance Code (§ .3300(g) (2004) (“The family temporary disability insurance program shall be a component of the state's unemployment compensation disability insurance program, shall be funded through employee contributions, and shall be administered in accordance with the policies of the state disability insurance program created pursuant to this part. Initial and ongoing administrative costs associated with the family temporary disability insurance program shall be payable from the Disability Fund.”)
Further, as several scholars have argued, harmonizing work with caretaking responsibilities also requires reducing the standard 40-hour workweek, which was developed when employees had wives at home to perform the caretaking (see McClain 2005, 169; Jacobs and Gerson 2005, 186). Finally, the state should ensure that workers not only have the formal opportunity to participate in caretaking, but also the practical ability to do so. Doing so requires ensuring a high enough standard of living for low-wage workers, either through an increased minimum wage or through subsidization of their living standard through programs like paid child care and an enhanced earned income tax credit, so that they are not required to perform second and third jobs to make ends meet.

The other side of the work-family equation requires ensuring that citizens have adequate caretaking that allows them to work. This requires a far better network of childcare and elder-care arrangements than currently exists in the United States. Such a system of care should include early care for those younger than school age, after-school care for school-aged children, and elder care for the elderly. Different alternatives exist for the provision of this care. The least radical would continue private provision of these services, but move to a system of public accreditation to ensure the quality of dependents care, in combination with a workable system for subsidizing low-income families child-care needs. Alternatively, the United States could move toward a system of public provision of caregiving, such as France’s system, which includes a system of free public crèches and nursery schools and highly subsidized spaces in day care centers for children up to age three whose mothers are employed (Palley and Bowman 2002).

It might be contended that my proposal, in arguing that a broader range of interests should be included in work-and-family regulation, largely assumes that the relevant interests
that support parenting protections will coincide and therefore overlooks the way in which these interests may conflict. In this view, gender equality interests can often conflict with the needs of children, the needs of mothers can conflict with the needs of children, the interests of parents can diverge from one another, and the needs of communities can diverge from the needs of parents. By assuming the convergence of the interests of parents, children, and family, according to this objection, I am romanticizing family relationships in a manner that ignores the reality of relationships and the power disparities that operate within society.

In my view, while the legitimate interests of children, mothers, fathers, and the community are clearly not identical, and perhaps often in potential conflict, these interests are often sufficiently interrelated that they can and should be pursued simultaneously. Thus, while in an abstract situation, the needs of children can be considered separately from the needs of parents, in the real world, the interests of both parents and children are generally far more interrelated. For example, as an abstract matter, it might be argued that it is better for children to have a parent stay at home with them and devote the better part of his or her life to them. However, in the real world, children are parented by real people whose own needs and aspirations in employment are important to them, and are part of a family with economic needs that must be fulfilled. Even considering the issue only from the perspective of the child's welfare, a happy, fulfilled parent for some part of the day is far more in the interest of the child than a disgruntled, unfulfilled parent for all of it; moreover, food on the table is better than a parent home all day with no food to eat. By the same token, while it is possible to consider gender equality interests as independent from and, possibly, in conflict with the interests of children, in fact, these interests are also interrelated (see, for example, Okin
Because mothers often take their children's interest into account in making career decisions, furthering interests in sex equality requires factoring in the well-being of children.

The goal should therefore be to construct arrangements that improve the position of all these parties rather than set up zero-sum situations in which satisfying some operates to the detriment of others. To do so, however, will require careful attention to the ways in which the aspirations and needs of affected parties may conflict. In this way, the situation is similar to the debate regarding fetal hazards. Although the prevailing view is to cast the issue in terms of conflict between the mother and fetus, as one commentator notes, this model "has undermined the development of effective policy by focusing on the competing rather than the common needs of the mother and the fetus" (Note 1990, 1336; Johnsen 1992; see also Cohen 2005). A more productive approach is to craft policy in order to promote the needs of both mother and fetus.

**Conclusion**

I have argued that existing law regulating the intersection between work-and-family demonstrates an impoverished vision of the possibilities for the family-state relationship. I have also argued for reenvisioning the state’s role from supposed neutrality to a “supportive state” model in which the state seeks to ensure that parents have the necessary institutional support to ensure adequate caretaking for their children. In the next chapter, I turn to consider law regarding welfare and foster children. I argue that the same maladaptive assumptions that I have discussed in this chapter undermine that area of law, as well.
CHAPTER 8
RETHINKING THE RELATIONSHIPS IN THE CHILD WELFARE SYSTEM

Law regarding the intersection between work and family is not the only area in which the United States does a poor job supporting children and families. The child welfare system, and specifically laws governing foster care, is another. That system, which is designed to ensure the health and wellbeing of the nation’s children, is, in the words of the chair of the Pew Commission on Children in Foster Care “unquestionably broken.”\(^{236}\)

In this chapter, as in the last, I consider the source of the disconnect between the United States’ stated commitment to children’s welfare and the system that it implements, this time with respect to the child welfare system. I argue that a fundamental source of the difficulties of the child welfare system in the United States are the same problematic assumptions regarding the family-state relationship that I have discussed in earlier chapters. According to these assumptions, child rearing is an activity that can and should be performed autonomously by parents, without aid from those outside the family. Further, children’s welfare should be solely the parents’ responsibility in the normal course of events. The conception of the family-state relationship bottomed on these assumptions unwisely

\(^{236}\) These are the comments of Pew Commission Chairman Bill Frenzel (R-MN), a twenty-year veteran of Congress and former Ranking Minority Member of the House Budget Committee (Pew Commission 2004). According to Pew Commission Vice Chairman William H. Gray (D-PA), former Majority Whip and Chairman of the House Budget Committee, "The foster care system is in disrepair. Every state has now failed the federal foster care reviews and we've seen far too many news stories of children missing from the system or injured while in care.” (Pew Commission 2004).
conceives the state as needing to step in only in crisis situations. Moreover, the fact that state assistance is required is seen to demonstrate that the parents have “failed.”

In Part I of this chapter, I discuss the “crisis-intervention” model of child welfare built on these assumptions, and argue that it imposes significant costs on the state, parents, and, most particularly, children. In Part II, I contend that this model of the state’s position with respect to children’s welfare is founded on incorrect and unproductive assumptions. In its place, I advocate the model of the “supportive state,” in which the state actively seeks to foster children’s wellbeing both inside and outside of families. In part III, I consider how a revised child welfare model premised on this revised model would be structured.

The Family-State Relationship In the Dominant Model of Child Welfare

In earlier chapters I discussed the conception of the family-state relationship that has dominated in law and popular culture in the United States. That dominant conception is built on, in Martha Fineman’s (2004) words, the “myth of the autonomous family.” According to this conception, families are the responsibility of parents, who are supposed to provide the resources and the environment that children need to thrive. This view holds that, in the normal course of events, when all goes well, the state has no need to enter the picture. To this point of my dissertation, I have not yet specifically addressed what happens when all does not go well and children fail to thrive under this approach. In those circumstances, the child welfare system comes into play.


In keeping with the dominant conception of the autonomous family, contemporary child welfare agencies generally do nothing to promote children’s welfare unless and until
they receive a report of inadequate care. When that occurs, the child welfare system is in a somewhat precarious position conceptually given its ideological underpinnings: according to the myth of family autonomy, it should not be needed at all. Welfare law negotiates this tension by conceiving of families deemed to require state intervention as “failed” families, and of the parents as inadequate. Conceived in this light, state intervention has two possible goals: On the one hand, it can try to “fix” the biological family through therapeutic services to parents that allow them to remedy their deficiencies and the state to withdraw. On the other hand, it can terminate the child’s relationship with the failed family and position the child with some other family that does not need state aid, so that the state can withdraw from the picture once again. In either case, the end goal is to ensure that when the state does become involved, its relationship with families will be both brief and finite.

While child welfare laws have historically vacillated between these two alternative goals, recently the view that most “failed” families are irrevocably and permanently failed has gained ascendancy, and led to a push to break up rather than seek to reunify children with their biological families. This view is the driving force behind Congress’s recent overhaul of the child welfare system in the Adoption and Safe Families Act of 1997 (“ASFA”). ASFA represents Congress’ belief that previous child welfare laws focused too much on the possibility of keeping children with their biological families. This earlier law, Congress believed, led to children languishing in foster care because too many biological families

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237 Duncan Lindsey (1991, 4-5) refers to the current approach to child welfare as the “residual approach,” because state support is available only after the family has exhausted its own resources.

238 Barbara Woodhouse dubs the now-prevailing view that, where one parent fails to meet the expectations of the child welfare system, that parent can and should be replaced by another parent, the belief in a “fungible mother” (Woodhouse 2002, 85, 86).
simply could not be repaired. ASFA therefore prompts the state to terminate the parental rights of those families who have not been deemed to parent adequately if the condition cannot be corrected within a relatively short amount of time – according to the Act, if a child has been in foster care for fifteen of the previous twenty-two months. And, in keeping with the dominant conception’s dim view of families who need state aid, it requires states to pursue efforts to find adoptive homes for children in foster care concurrently with efforts to reunite these children with their family, on the view that such reunification efforts are often unsuccessful (42 U.S.C. §71(a)(15)(F)).

To be fair, ASFA does direct that states should generally seek to keep children in their home or, alternatively, to reunite them with their biological families before they turn to the adoption alternative. The Act mandates that states make “reasonable efforts . . . to preserve and reunify families . . . prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home” (42 U.S.C. § 671(a)(15)(B)). Yet in keeping with the dominant conception’s recalcitrance toward state aid of families, only a minority of families in the system actually receive any assistance besides emergency services to keep children from being put in foster care. Moreover, when they

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240Where a child has been in care for fifteen out of twenty-two months, absent certain exceptions, ASFA shifts the burden to the state to show why a petition to terminate parental rights should not be filed (42 U.S.C. § 675(5)(E)); see also Statement of Rep. Kennelly) (“This legislation we can all agree on is putting children on a fast track from foster care to safe and loving permanent homes.”); Statement of Sen. Rockefeller (bill would “move [severely abused and abandoned] children out of foster care and into adoptive and other permanent homes more quickly and more safely than ever before”).

Even this period of time is not required if a court determines that “reasonable efforts” to reunify a family are not warranted. In this event, the state must hold a permanency hearing within 30 days, as well as must make “reasonable efforts” to find another permanent placement for the child (42 U.S.C. § 671(a)(15)(E)).

241Most family preservation programs limit services to 30, 60 or 90 days (Lindsey 1997). See also Courtney
do receive anything besides emergency services, the services provided tend to be for short-term periods and relatively token, as well as geared toward therapy designed to help parents correct their own supposed inadequacies rather than to provide structural and institutional supports to families. Despite the close connection between children in the welfare system and poverty, only 26.2 percent of those who received services received financial assistance; 16.7 percent received help with transportation; and 7.5 percent received employment assistance (Lindsey 1991, 145; see also Barth and Berry 1994, 325). In contrast, the service most often available to families was counseling, received by 42.7 percent of families in this position – indicating the state’s view that the problem is not poverty, but parental dysfunction.

The situation is similar once a child is taken into foster care. The majority of families at this point receive no services to aid reunification. And, when services are provided at all, the service most often provided is counseling (to 35.2% of separated families), rather than more concrete institutional supports such as employment assistance (to 3.8% of separated families); financial assistance (17.8% of separated families); and transportation assistance (8.1% of separated families) (Lindsey 1991, 145; Barth and Berry 1994, 325).

The minimal efforts made toward reunification of families as against adoption into new families owes a considerable amount to the federal funding scheme for child welfare services. This scheme makes it difficult for states to receive funding to prevent children from being mistreated in the first place, or to be returned to their parents following a period of

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1994 (survey of children entering foster care between 1988 and 1991 found 70% received only emergency response services, 20% received no services, and only 10% received extensive services); Fein and Maluccio 1992, 339 (family preservation programs are “short-term, crisis-oriented, and stopgap”).

242 Families with incomes of less than $15,000 annually are twenty-two times more likely to be involved in the child welfare system than families whose incomes exceed $30,000 (Children’s Defense Fund 1998, 66).
foster care, but relatively easy to be reimbursed for expenditures on foster care and for adoption after such mistreatment occurs. As one report concludes, “With a cap on federal funds for prevention, support, reunification, and an open-ended entitlement on placement expenses, researchers and advocates have noted that states have little financial incentive to reinforce the child welfare goal of keeping families together . . . .” (Scarcella 2004). The resulting system of foster care reflects these incentives: In 2002, the federal government spent at least nine dollars on foster care and three more dollars on adoption for every dollar spent to prevent foster care or speed reunification (Scarcella 2004).

In sum, the end state that ASFA seeks, whether the children are eventually returned to their biological parents or placed with adoptive parents, is a family that, on its own, will ensure its children’s health and welfare. 243 And while the Act at least pays lip service to the idea that the preferred outcome is reunification rather than termination, the strong view underlying that legislation is that families requiring state intervention are problems unlikely to be fixed. 244

**The Price of the Crisis Intervention Model**

A number of commentators have debated the issue of whether Congress should have moved from an emphasis on family preservation in child welfare to an emphasis on family care. 243 ASFA does, however, deviate from the dominant model’s conception that the state should have no long-term involvement with parents insofar as it makes available ongoing subsidies for adoptions where children have special needs, as well as guaranteeing that such children will remain eligible for government-subsidized health care after they are adopted. 42 U.S.C. § 671(a)(21).

244 In 1994, then-House Speaker Newt Gingrich exemplified the view that parents who require aid from the state have no business raising children when he proposed giving states money to place the children of families who have been terminated from welfare rolls in orphanages (Seeley 1994; Welch and Phillips 1994). His plan called for financing these orphanages with money saved from denying benefits to unwed teens, and for promoting adoptions to parents who have the resources to care for their children (Brito 2000).
termination and adoption. In my view, both of these approaches are part of the “crisis intervention” model, in which the state involves itself in supporting families only in exceptional situations, and only when a family is deemed to have failed. Both of the approaches – taking children into foster care while attempting short-term fixes to reunify biological families, or termination of parental rights – has such serious costs that they should require us to rethink the crisis-intervention model itself.

Whether or not most children removed from their homes under the existing system would be better off than if they were allowed to remain with their biological families – and there is considerable evidence and debate on both sides of this issue – this model of the family-state relationship indisputably imposes its own heavy set of costs on children. Under the current approach, a staggering number of children - approximately 303,000 annually - enter the foster care system. The state’s failure to support children’s welfare until children enter the system means that most of these children will have been raised in poverty (Pelton 1989, 38-42; Lindsey 1991, 139-55), and the overwhelming majority will have some sort of physical or mental abnormality on entering foster care that requires medical attention, including greatly elevated rates of suicidal and homicidal ideation, as well as high levels of abnormal results on developmental screening examinations (Garrison 2005).

245 For example, compare Gelles and Schwartz 1999 (arguing that state expends too much effort to keep biological families together) with Guggenheim 1999, 147-48 (pointing out that no more than 10 percent of cases involve serious abuse, and commenting that “if the remaining ninety percent of children in foster care are there for reasons other than serious abuse, we now appear to have lost sight of our first principles.”).

246 For example, compare Garrison 2005 (“Reformers . . . alleged that out-of-home care was frequently imposed on parents who needed only day care or financial assistance. They argued that the provision of intensive, in-home services could frequently avert placement, at lower cost and with less harm. . . . There was little evidence to support any of these propositions, however. Worse, there was evidence that contradicted them.”) and Wexler 2001, 130 (“AFSA was the culmination of an assault on safe, effective programs to keep families together that began in the 1990s. . . [I]n the name of child safety, it has made children less safe.”).

247 U.S. Department of Health and Human Services 2004 (AFCARS Report for FY 2002). In total, 532,000 children were in the foster care system as of September 30, 2002. Ibid.
Taking these children into foster care, regardless of whether it saves them from future harm, also causes them trauma. It is difficult to overestimate the emotional anguish experienced by these children as a result of being separated, even temporarily, from their parents, their siblings, and their home. As stated by an expert witness in Nicholson v. Scoppetta (2002), “the attachment between parent and child forms the basis of who we are as humans and the continuity of that attachment is essential to a child’s natural development.”

And, because of the multitude of problems with state’s administration of the foster care system, some significant portion of these children will suffer more than the trauma of separation that must inevitably accompany foster care. The difficulty that states have had administering and monitoring the foster care system means that children who enter it are far from assured a benign experience. The state has a record, as Martin Guggenheim and Christine Gottlieb (2005) put it, “as an exceedingly poor parent of needy children.” In this system, a significant number of children are shuffled from placement to placement. They are, moreover, at far greater risk for abuse than in the general population (Wexler 2001, 137-38). In fact, the problems with the foster care system have been so pervasive that, at the time AFSA was being considered in Congress, twenty-two states had been forced to enter into

248Nicholson v. Scoppetta (testimony of Dr. Peter Wolf); see also Goldstein 1977, 649-50 (“Although breaking or weakening the ties to the responsible and responsive adults may have different consequences for children of different ages, there is little doubt that such breach in the familial bond will be detrimental to the child’s well-being.”).

249As of September 30, 1998, nearly two thirds of the children then in foster care had experienced between one and two placements, 21% had experienced three or four placements, and 16% had experienced five or more (U.S. House of Representatives 2000, Table 11-27).

A study of Washington State’s child welfare system found that children as young as age 3 are moved from placement to placement, sometimes several times in the same year. It also found delays in responding to child abuse (Children’s Bureau 2004). In that system, one-third of children in foster care experienced between four and nine placements; and one-third experienced ten or more placements (Washington Department of Social and Health Services 2003).
consent decrees as a result of badly managed child welfare systems (Woodhouse 2002 (citing 143 Cong. Rec. 12211)). Newspaper stories of foster care mismanagement and abuse that have emerged from state after state graphically illustrate how flawed this system is in actual operation.250

Moreover, the model of episodic state involvement that marks the current child welfare system, in which the state offers limited crisis-oriented services to parents for relatively short periods of time, does not deal effectively with the deep-seated issues that generally prompt state intervention in the first place. Indeed, research demonstrates that a large proportion of children whose families receive traditional services continue to be abused or neglected by those families.251 The first among these deep-seated issues rarely dealt with by the state is poverty. And issues relating to poverty overlap and interconnect with other

250See, for example, Kaufman 2003 (“Review by two child welfare experts of hundreds of cases handles by New Jersey Youth and Family Services Division finds that . . . more than half children in foster care in state are not checked on with the regularity that federal guidelines demand.”); Polgreen and Worth 2003 (“The parents of four boys adopted from New Jersey's troubled foster care system were arrested Friday, two weeks after the police found that the children, ages 9 to 19, had been starved to the point that none of them weighed more than 50 pounds, according to the Camden County prosecutor.”); Olinger 2004 (“All three were Colorado foster children placed in government custody to protect them from harm. Yet the circumstances of all three deaths remained hidden from from public scrutiny despite internal investigations that faulted the foster parents and the agencies supervising them.”); Kresnak 2004 (“The beating death of an emotionally disturbed 4-year-old foster child in Detroit last year led to imprisonment for his foster mother, criminal charges against two foster-care workers and the departure of two employees of the Michigan Family Independence Agency.”); Goodnough 2004 (“At 16, Yusimil Herrera won a suit against Florida's child welfare agency for churning her through foster homes where she said she was beaten, slapped, kicked and sexually abused from the time she was 2. . . . On Sunday, Ms. Herrera, now 20, was arrested on charges of severely beating her own young daughter in their North Miami apartment. Eight months pregnant with her second baby, she stands accused of the same cruelty that plagued her own childhood and made her a compelling symbol of the system's deepest failings.”); Goodnough 2005 (“A caretaker for Rilya Wilson, the foster child whose disappearance four years ago exposed serious flaws in Florida's child-welfare system, was indicted Wednesday on charges of murdering the girl, who was 4 years old when she vanished. The caretaker, Geralfy Graham, was also charged with kidnapping and aggravated child abuse. Rilya's body has never been found. Rilya, who was born to a cocaine addict whose parental rights were terminated when Rilya was an infant, went missing in January 2001. Ms. Graham has said that a representative of the Florida Department of Children and Families took the girl away from her Miami home that month, a claim the agency denies. The agency has said it failed to notice Rilya's disappearance for 15 months because a caseworker lied about visiting her home.”).

251See Wald 1988, 95-97 (two-thirds of children of families receiving in-home services were subject to continuing neglect or abuse).
issues that have no quick fix. As Marsha Garrison (2005) points out, problems leading to foster care are generally serious and multiple: one well-regarded study finds that 33 percent of caretakers with children in foster care suffered from severe mental or emotional problems; 60 percent had alcohol abuse problems; 53 percent had a severe health problem; and 76 percent of families had at least one child with a serious health problem. In Dorothy Roberts’ words, “How can agencies expect to solve problems arising from any combination of deplorable conditions – chronic poverty, dangerous neighborhoods, shoddy housing, poor health, drug addiction, profound depression, lack of childcare – with a three month parenting course or ephemeral crisis intervention?” (Roberts 1999, 124; see also Lindsey 1997, 145).

The complexity of these issues, in combination with the ineffectiveness of the short-term services offered to them, means that a large proportion of children who are put in foster care will be returned to families that still have the same problems that prompted the children’s removal in the first place. This, in turn, means that many of these children – roughly 25% – will eventually be returned to foster care yet again (Hearing before the Senate Committee On Finance, Statement of Rep. Camp; Roberts 1999, 123 n.54). Alternatively, these children will have their relationship with their biological parents legally terminated because the parents are unable to resolve their problems sufficiently. In 2002 alone, this

252In contrast to the traditional, limited range of crisis-oriented services offered through most child welfare agencies, states have begun to experiment with more intensive family preservation services programs during the last few decades. Evidence regarding the effectiveness of these programs has, at least until recently, been equivocal. Several studies assessing these programs in the 1990s had failed to find significant effects of such programs. See, for example, Littell and Schuerman (“There is little solid evidence that programs aimed at preventing out-of-home placements or reunifying families with children in foster care have the intended effects.”); Rossi 1994. More recent examinations, though, criticize these previous assessments for their research design and methods, which, these critics argued, failed to detect treatment effects that did, in fact, occur. See, for example, Heneghan 1996; Kirk 2000, 1-8 (discussing controversy regarding studies finding no effects of intensive research programs). More recent research that uses more rigorous research methods has demonstrated the efficaciousness of at least some intensive family preservation services programs (Kirk 2000, 48-51 (demonstrating effectiveness of intensive services programs in North Carolina). See also Wexler 2001, 145.
occurred for roughly 62,000 children in foster care (U.S. Department of Health and Human Services 2004). In this latter group, over and above the wrenching emotional toll of having their homes, parents, and sometimes siblings taken from them,\textsuperscript{253} many of these children will not be adopted because of the shortage of families seeking to adopt from this pool of children. For example, in 2002, 53,000 were adopted from foster care. This left 126,000 children in the foster care system waiting to be adopted (U.S. Department of Health and Human Services 2004).

Martin Guggenheim’s (1995) empirical work on adoption in two states that aggressively sought adoption for foster children during a five- year period before the passage of AFSA anticipated the current problem of adoption overload. He concluded: “Five years of aggressively terminating parents’ rights has produced a clear pattern: The number of children freed for adoption goes up every year; the number of children adopted fails to keep pace with the number of adoption-eligible children; and the total number of orphaned children not adopted continues to increase fastest of all” (131).

Older children, African-American children, and children with disabilities suffer particularly under the existing model. These children have a significantly lower chance of being adopted than other children whose parental relationships have been terminated.\textsuperscript{254}

\textsuperscript{253}This toll seems to have been almost completely overlooked by Congress in the passage of ASFA. Indeed, some members of Congress exhibited a bizarre belief that children could and should trade up families, much the same way that a driver trades up cars. See, for example, Hearing before the Senate Committee On Finance, Statement of Rep. Camp (“Adoption is good for children. The reason is simple. Nearly every adopted child is put in the midst of the best child-rearing machine ever invented – the family. Children reared in families, especially two-parent families, grow up to do well on nearly every measure – marriage, employment, education, avoidance of crime, and independence from welfare.”); see also Woodhouse 2002 (criticizing belief in “fungible mother”).

\textsuperscript{254}See Schmidt-Tieszen and McDonald 1998, 15 (“A common theme is woven throughout these studies. A child remains in foster care longer and is less likely to be adopted if he/she has minority status, particularly African-American; is older; or possesses social-emotional or physical handicaps.”); Freundlich 1998, 13, 28-43. (“Data show that the children in foster care who are adopted are primarily younger children. In FY 1990, for example, almost 55 percent of all finalized adoptions were of children between birth and five years of age, with
Grade school children are almost four times as likely as preschool-aged children to be slated for long-term foster care rather than adoption; that goes up to 33 times as likely for adolescents (Schmidt-Tieszen & McDonald 1998, 23-24). Non-Caucasian children, meanwhile, are roughly three times more likely to end up in long-term foster care than white children, when other factors are held constant (Ibid. 23).

As a result, many older, minority, or disabled children will linger in foster care until they “age out” of the system, an upbringing that is devastating based on almost any measure of wellbeing. For example, a University of Wisconsin study found that after aging out of foster care, 27 percent of males and 10 percent of females were incarcerated within twelve to eighteen months. In addition, 50 percent of the former foster care children were unemployed, 37 percent did not graduate from high school, 33 percent were on public assistance, and 19 percent of the females had given birth to their own children within that twelve to eighteen month period (Vobejda 1998, A1; see also Moye and Rinker 2002, 377). A longer-range study by the General Accounting Office (1995, 14-15) showed that by two and a half to four years after youths left foster care, more than 60 percent of young women had given birth to a child. In addition, 45% are homeless at some point in the year after aging out (Barriers to Adoption 1996, 79 (statement of Peter Digre)). On top of that, 47 percent of former foster children were receiving some form of counseling or medication for mental health problems before aging out, and that number only dropped to 21 percent after leaving the system (Vobejda 1998, A1).

And even many of those older children who are fortunate enough to be adopted, because of their attachment to their biological parents, will never be able to build a bona fide steadily declining percentages represented by each successive and older age group of children.”).
parental bond with their adoptive parents (Gibbs et al. 2004; Gordon 1999, 668-69). The current, crisis-oriented model of the family-state relationship therefore underpins a system that, whether or not taking children into foster care protects them from more serious injury, leaves most, if not all, children who come into contact with it significantly damaged.

This model also imposes heavy emotional costs on the roughly 51,000 parents who lose their children every year (Children’s Defense Fund 2004), sometimes permanently, because they cannot meet the responsibility assigned to them. This toll falls disproportionately on the poor, who make up the vast majority of the parents involved in the foster care system. By the same token, African American children are removed from their families at a far greater rate than their white counterparts. Many of these parents cannot afford the conditions and services – decent housing, medical care, mental health care, adequate child care while they work – that the current system requires parents to provide their children (see Lindsey 1991, 127-35). That poor children are removed from their parents at such disproportionate rates, and that so many of these children are black, poses a

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255 While circumstances connected with poverty are the cause of a large proportion of removals of children from poor homes, biases against the poor and minorities also play a role (Cahn 1999, 1199 (discussing studies that show bias in assessment of abuse)).

256 As of September 30, 2002, African-American children comprised 37 percent of the children in foster care although they were only 15 percent of the general population under age 18 (U.S. Department of Health and Human Services 2004). By contrast, white children comprised only 39 percent of the foster care population, (U.S. Department of Health and Human Services 2004), although they made up 64 percent of the country’s children (Annie E. Casey Foundation 2004). Furthermore, African-American children are more likely to be placed in residential or group care than foster care, and less likely to be reunified with their families (Annie E. Casey Foundation 2004).

257 Linda Gordon describes this same phenomenon at the turn of the last century:

Only one variable other than single motherhood was a better predictor of child removal: poverty . . . The Society [protective services] was sensitive to allegations that it kidnapped poor people’s children, and its stated policy was that it never removed children from their homes for poverty alone. But poverty was never alone. The characteristic signs of child neglect in this period [1880-1920] – dirty clothing, soiled linen, lice and worms, crowded sleeping conditions, lack of attention and supervision, untreated infections and running sores, rickets and other malformations, truancy, malnutrition, overwork – were often the results of poverty (1988, 94-95).
strong challenge to the foundational belief that basic rights, including the right to rear one’s own children, should not depend on a person’s wealth or race.

Finally, the dominant model imposes heavy costs, both financial and non-financial, on the state. At first glance this model seems relatively cost-effective for the state in that it assumes that parents rather than the state should generally assume responsibility for children. However, in operation, this model imposes an enormous financial burden on the state. A recent study by the Urban Institute calculates that states spent upward of $22 billion on child welfare in 2002 from federal, state, and local sources, most of it for foster care (Scarcella 2004, 6) – and that is only what they paid directly. The vast indirect financial costs resulting from the damage to children incurred in the prevailing system, in both biological families and in the foster care system, which take their toll in juvenile delinquency, loss of productivity, and adult criminality, are far higher – by one estimate an additional $94 billion annually (Fromm 2001). Even more important are the vast non-financial costs to the polity from having hundreds of thousands of its most vulnerable citizens, each of whom should be developing their capabilities to become vigorous and active citizens and productive members of society, become physically, mentally, and emotionally damaged, many of them for life, by the current system.

The Supportive State: An Alternative Conception of the Family-State Relationship

The current child welfare model possesses a number of conceptual and practical drawbacks. First, this model’s view that the state should intervene only in emergencies to deal with the underlying problems that plague vulnerable families, and then only on a short-term basis, is problematic. As I have described in earlier chapters, the view that the family can be seen as completely separate from the state is itself problematic as a conceptual matter:
the state defines families and influences their operations at every turn (see also Olsen 1985). This complicated interrelationship between families and the state means that, contrary to the dominant conception of the state’s role in the child welfare system, there can be no assessment of whether parents’ care is adequate “before” the state steps in, no neutral, isolated position into which the state can retreat to wait while families exhaust their responsibility to care for dependents. As a consequence, insofar as the state has a responsibility to vulnerable children, state involvement with families to protect and support children’s welfare should, and must, be conceived as existing concurrently with parents’ responsibility to care for their children.

On a related note, the foster care system wrongfully focuses all responsibility for children’s welfare on their parents, and conceive it to be solely the parents’ failure when children fail to thrive. Yet the care and wellbeing of children cannot simply be reduced to their relationship with their parents, as the crisis intervention model would have it. As Barbara Woodhouse (2005) demonstrates, instead, children inhabit a variety of systems – family, neighborhood, faith community, school – that, in interconnected ways, profoundly affect children’s development. And even those systems that children do not directly encounter can still pervasively affect their wellbeing. For example, a parent’s work responsibilities and job benefits profoundly influences the care a parent can provide a child. In this way, neither the child nor the parent-child dyad operate in a vacuum, but in a community in which the character of other systems and the availability of particular resources and support profoundly affects both the child and the parents’ ability to provide care for the child.
Seen in this light, the way in which the standard model focuses on the success or failure of the particular caregiver, taken alone, is misleading. Instead, we should be talking about the success or failure of the systems surrounding the child, systems in which the parent is an important, but not the only, part. What is viewed in the standard model as a failure of parental care looks, in this reframing, more complicated. Is a mother’s leaving her infant with a twelve-year old neighbor so that she can go to work the fault of the mother or a problem with the lack of affordable daycare? Is a mother’s drug addiction an example of failed parental care or the result of a lack of appropriate drug treatment programs? Is a family’s homelessness the fault of the parents, or the product of a larger crisis in affordable housing in this country?

The current crisis-intervention model also fails on a practical level. As Marsha Garrison (2005) points out using a wealth of empirical evidence, short-term therapeutic strategies to “cure” child abuse and neglect just do not work. The problems that give rise to intervention are generally not short-term problems that can be dealt with using short-term solutions able to patch families up once and for all. Instead, the solutions called for are longer-term and require continuous rather than episodic involvement from the state to support families.

These insights suggest the need for a full-scale rethinking of the family-state relationship with respect to child welfare. A better conception, in my view, is what I have referred to in early chapters as the “supportive state” model. In this model, the state’s responsibility to children is conceived as both ongoing and concurrent with parents’ responsibilities. The supportive state model, like the dominant model, conceives of parents as bearing primary responsibility for the day-to-day caring for (or arranging the care for)
children and other dependents, since they are ordinarily in the best position to do so and have the greatest motivation to know them and act in their best interests (see Buss 2004, 31). The supportive state model recognizes, though, that how institutions are structured makes a huge difference in both parents’ ability to parent children, and in children’s wellbeing generally. Given the difficulty for parents of adjusting institutional rules on their own, and the unique capacity of the state to do so, the state’s responsibility to children’s welfare should be exercised through ensuring that societal institutions are structured in ways that support children’s wellbeing. The state’s goal, in this regard, is to achieve a situation in which a parent who works hard and plays by the rules can raise sound children.

My argument in favor of the supportive state model may, for some, raise the specter of a totalitarian state usurping parental control of children. State involvement with families, it might be argued, will lead to the standardization of families and the weakening of parental authority. Such an objection, however, misconceives the state’s role in this proposal. The current approach to the child welfare system pits parents and the state in a zero-sum game: as the state becomes more involved, it increasingly wrests children away from the control of their parents. In contrast, a major goal of the supportive state model is to align the interests of the state and parents; in it, the state assures parents the resources that they need to parent without taking control from them. Were the state, for example, to pass laws that prohibited employers from requiring employees to work against their wishes more than 40 hours a week, the greater hours that these employees could spend with their children would strengthen, not weaken, parental authority.

Another set of objections that might be raised to the supportive-state approach is based on the view that the state’s providing aid to parents will allow parents to shirk their
own responsibilities toward their children. In this vein, it might be argued that state assistance to parents will redound to children’s detriment, since their wellbeing depends on their being raised by capable parents, rather than by the state. On a related note, these policies might be claimed to promote a culture of dependency, in which citizens depend on the state rather than themselves to meet their and their families’ needs.

These objections founder, however, on their assumption that parents and families properly should be autonomous and, thus, as a normative matter, capable of rearing children completely independently from the state. As Martha Fineman has eloquently argued, children’s dependency is both natural and inevitable, and this dependency induces the “derivative dependency” experienced by caretakers who, as a result of caring for dependents, must depend on others for access to societal goods (see Fineman 2004, 35-37).258 Far from being stigmatized, dependency should be recognized as a necessary feature of the human condition, and responded to by the state in a humane manner rather than ignored (Fineman, 37-38). In addition, I would add that raising children is a sufficiently complex and difficult endeavor that there is more than enough responsibility to go around. As a result, both parents and the state have difficult and important roles to play with respect to children.

**Toward a Revised Family-State Relationship In the Child Welfare System**

How would a supportive state structure its institutions to facilitate the wellbeing of children? In contrast to the existing model, in which the government spends the vast bulk of its child welfare resources paying private companies and foster parents to care temporarily

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258 Linda Gordon and Nancy Fraser have reached a similar result by showing that what is now scorned as welfare dependency and seen as a moral failing was historically accepted as women’s status stemming from their caring for their children (Fraser & Gordon 1997, 121).
for children whom the government deems inadequately parented,259 the government would funnel its resources into creating structures that would support parents’ caretaking, as well as the well-being of children in systems beyond the family sphere, including day care centers, schools, and neighborhoods.

With respect to families, a supportive state would seek to develop institutional structures that enable parents to care for their children physically, emotionally, and financially. Despite the fact that a major institutional obstacle to parenting is the tension between labor market and parenting responsibilities,260 as I argued in chapter 6, the United States has until now done little to restructure labor market requirements to accommodate caretaking. A supportive state approach would adopt the policies I suggested in chapter 6 to ensure that working parents had adequate opportunity to parent and adequate child care when they worked.

The clear link, as Marsha Garrison (2005) discusses, between at least some children’s early education programs and significantly reduced levels of child maltreatment makes the provision of such programs all the more crucial to fulfilling the state’s responsibility to promote children’s welfare.261 So does the evidence linking these programs to higher levels

259In fact, officials from Los Angeles County feared that heavy opposition from what they called the “private child-abuse industry,” which had grown wealthy over the years from the $20 billion-a-year child welfare system, would squelch badly needed reforms that would keep more children with their families (Anderson 2003, N1). The local newspaper’s investigation “found widespread misuse of taxpayer funds and some of the highest salaries in the nation among the nonprofit foster family agencies and group homes responsible for most of the 30,000 children in foster homes. . . . In the private care agencies that oversee most of the children, some executives receive up to $310,000 a year in salaries and benefits and spend millions of taxpayer dollars for posh offices, expensive furniture and luxury cars. . . .” (Ibid.).

260In a long-term study of the child welfare system in New York, R.C. Pryor observed that "child left unattended" was the major reason that children were reported for child abuse in New York (Lindsey 1991, 72, 82) (citing R.C. Pryor).

261Garrison cites Reynolds and Robertson 2003 and Reynolds 2003 for this proposition, who attribute some large part of these programs decrease in maltreatment to the parental involvement component of these programs (Reynolds and Roberson 2003, 17-18).
of education and employment for those exposed to it as children (Currie 2001, 217-20).\footnote{262} For older children, after-school programs that insure that children are cared for safely and constructively until their parents return home are a basic, much needed way for the state to secure children’s well-being.\footnote{263}

A supportive state would also ensure the availability of adequate programs to deal with parental substance abuse. Although studies implicate parental substance abuse in anywhere between one-third and two-thirds of existing cases in the foster care system (Garrison 2005, n.74), there is currently a severe shortage of publicly-funded substance abuse programs available to parents.\footnote{264} And, in fact, during the same year in which Congress shortened the time frame for terminating parental rights if parents failed to meet state criteria for parenting, it considered and rejected proposals to expand drug treatment services for families involved with child protection agencies (Roberts 1999, 123 note 47). Furthermore, most of the drug treatment programs that do exist were developed for men and are a poor fit for women with childrearing responsibilities.\footnote{265}

Similarly, a responsive state would ensure access to mental health services for parents and children. Seven and one-half million children in the U.S. have a mental disorder, half of

\footnote{262}The High/Scope Educational Research Foundation found in a long-term study that 40-year-olds, who as children had been in a preschool program for poor three-and-four year olds, were far more likely to be successful on a variety of measurements including education, employment, and probability of having a criminal record (Schweinhart 2002).

\footnote{263}The U.S. Census Bureau estimates that 2.1 million children under thirteen are without adult supervision before and after school (U.S. Department of Health and Human Services 1997).

\footnote{264}The shortage of such programs for women has been called a “serious national problem” (Magura and Laudet 1996, 202).

\footnote{265}Most substance-abuse programs emphasize strict, structured routines, often in residential settings, and clients are directed to focus time and energy on themselves and their recovery. These programs, most of which don’t even offer childcare during program sessions, are ill-suited to mothers who are the primary caretakers of their children (Magura and Laudet 1996, 264).
these a condition that causes serious disability (The National Alliance for the Mentally Ill 2005). The Surgeon General estimates that 80 percent of those children with mental disorders do not receive necessary treatment (Goldberg 2001). In the foster care system, specifically, roughly 33 percent of parents who maltreat their children have mental health problems, and between 35 and 85 percent of children entering foster care need mental health treatment (Leslie 2000, 466-67). Many of these children enter the system because their parents cannot afford the mental health treatment that they require (Jenkins 2004, B1).266

Given that the largest barrier to obtaining mental health services is the cost, 267 a responsive state would ensure the provision of affordable mental health treatment for those who are uninsured, particularly for the working poor who do not qualify for public benefits, as well as require employers to give mental health treatment parity with benefits for other medical treatment in employee insurance plans. The state must also insure the availability of community mental health services in poor areas, which frequently do not have the resources to sustain them (Chow 2003, 792). This is a particular problem for minorities, who have poorer access to these services, are less likely to receive services at all, and, when they do receive such services, often receive lower quality care (Surgeon General 2001; Chow 2003, 792). Finally, states must begin to coordinate child welfare preventive services with mental health services, rather than treat them as two separate systems (Blanche 1994). As one

266“Almost one of every four children in Virginia's foster care system is there because parents want the child to have mental health treatment, a report commissioned by the General Assembly states. The study – the result of a months-long examination of the state's foster care and mental health services – chronicles the difficult decisions that thousands of Virginia parents have made to relinquish custody of their children to the foster care system so they can get mental health services that are otherwise unavailable or unaffordable” (Jenkins 2004, B1).

267The Surgeon General (1999) notes that a national telephone survey revealed that 11 percent of the population perceived a need for mental or addictive services, with about 25 percent of these reporting difficulties in obtaining needed care. Worry about costs was listed as the highest reason for not receiving care, with 83 percent of the uninsured and 55 percent of the privately insured listing this reason. See also Harrison 2002.
expert stated, parents with mental illness “are caught in the gap between child welfare and mental health systems. Their mental illness is viewed as an individual problem that is the responsibility of the local mental health system, whereas the safety and welfare of their children is the responsibility of the child welfare system” (Ackerson 2003, 190; see also Sands 2004, 317).

Given the strong link between not only poverty and child maltreatment, but also between poverty and children’s welfare generally (Children’s Defense Fund 2005), a responsive state would pay special attention to the welfare of children in poor families. Because commentators have already done an excellent job laying out the programs needed by children in low-income families (see, for example, Roberts 2002a, 2002b; Guggenheim 1999, 147), I won’t belabor the issue. Briefly, in addition to the state action already discussed, a responsive state would ensure the development of an adequate amount of low-income housing so that these parents would have a decent home in which to raise their children. At least four separate studies since 1996 have found that 30% of foster children could remain safely in their own homes if their parents had access to decent housing (Harburger and White 2004, 500-01). Securing poor children’s welfare also requires raising the minimum wage for

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268 Marsha Garrison (2005) points out the complexity of the link between poverty and foster care placement. It is not clear how much of poor families’ placement rate is directly caused by poverty, and could therefore be reduced by reducing poverty, how much is caused by bias against poor families so that the state is more willing to remove poor children from their families, and how much of this link results from parental difficulties that lead to the family’s poverty, and for which a poverty-prevention strategy would therefore not cure. Garrison 2005. Garrison ultimately concludes that the data show “that poverty reduction might play a useful role in an effective prevention campaign, but do not demonstrate that poverty reduction offers the ‘silver bullet’ that we would like to find.”

269 In a 2001 study, researchers found that “all the major metropolitan areas . . . visited mentioned severe shortages of affordable housing” (Malm et al. 2001, 14). Between 1973 and 1993, the number of low cost apartments ($300 a month in 1993 dollars) fell from 5.1 million to 2.1 million. At the same time, the numbers of families in poverty increased considerably (Dreier 1997, 8). In the District of Columbia in 1999, "the fair market rent for a two-bedroom apartment . . . was $ 820, 77 percent of the average monthly income for a worker earning the State minimum wage, and 115 percent of the maximum monthly TANF cash assistance grant plus Food Stamps for a family of three" (Moye and Rinker 2002, 389).
workers to insure that workers with children can make ends meet.\textsuperscript{270} In addition, it requires a special effort to ensure the provision of day care (the necessity of which I have already discussed for children generally) to children of the working poor.\textsuperscript{271}

Finally, children’s welfare is powerfully influenced by other spheres outside the family, including schools and neighborhoods. A supportive state would ensure that these systems, too, facilitate children’s well-being. This means that the state should give priority to transforming blighted neighborhoods and schools.\textsuperscript{272} Projects like New York’s Ten Year Plan can serve as models for transforming the poorest neighborhoods (see, for example, Ellen 2003, 71). Such projects would not only reduce the risk factors for child maltreatment, they would increase the well-being of children and all of the community’s citizens.

While there is little doubt that the implementation of these programs would require a significant financial investment, redirecting a significant portion of the more than $22 billion dollars that the government spends each year on the foster care system (Scarcella 2004, 6 (for the year 2002)) would go far toward paying this bill.\textsuperscript{273} And money spent by the state to

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\item A mother of two who works full-time at the current minimum wage of $5.15 an hour now earns wages that place her family 24 percent below the poverty line (AFL-CIO Factsheet 2005).
\item The Child Care and Development Fund (2001), which is the child care subsidy program created by Congress as part of the welfare reform package in 1996, was intended to facilitate participation in employment and employment-related activities such as education and training. However, the Joint Center for Poverty Research concluded in 2003 that only 10.4 percent of eligible single mothers with young children received any subsidization of child care costs (Blau and Tekin 2001). Currently, in North Carolina alone, 31,000 children are on the waiting list for day care subsidies, so their mothers can work or go to school to lift themselves out of poverty (Fitzsimon 2004).
\item Beginning with the work of William Julius Wilson, researchers have documented the impact of living in neighborhoods with high concentrations of poor people, which generally have high rates of unemployment, homelessness, crime, substance abuse, and mental health problems (Wilson 1987; Sampson, et al. 1997). Since then, a number of studies have demonstrated the negative effects of such poverty areas on the children who live in them. These include vulnerability to mental health problems, behavioral problems, and signs of chronic stress caused by the poor living conditions and levels of violence in their neighborhoods. See, for example, Aneshensel and Sucoff 1996; Bell and Jenkins 1993. Such children often experience chronic distress symptoms and behavioral problems (Hill and Madhere 1996).
\item Marsha Garrison (2005) notes that the cost of foster care may rise as high as $50,000 per child per year. In
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support these children’s wellbeing while they are young avoids the far greater costs imposed on the polity later on as these damaged children become adults.\textsuperscript{274} Even more important, adopting a truly effective program to safeguard children’s wellbeing would move this money from a stop-gap system that, even when it keeps children from more serious harm, still causes them significant damage, to a system that actively contributes to their wellbeing.

Would the state’s support of parenting and restructuring of institutions mean that the state would then be able to shut down foster care programs? Of course not. Even with all the institutional prerequisites in place, there will still be parents who either cannot or will not rear their children in ways that adequately support their welfare. Based on the evidence we have available, though, far fewer children would be removed from their homes than in the current system, and far fewer children would be maltreated.

**Conclusion**

Our current foster care system is premised on a flawed conception of the relationship between families and the state. In it, the state sees children’s welfare solely as their parents’ responsibility in the normal course of events, safeguards children’s welfare only in the abnormal situation after parental safeguards fail, and then acts only for limited periods of time to “fix” the family’s situation. The consequence of this conception is a system that is

\textsuperscript{274}For example, the High/Scope Educational Research Foundation found the provision of early education to be cost-effective for the state: researchers determined that society gained more than $17 for every tax dollar invested in preschool programs for at-risk kids as a result, for example, of greater tax receipts and less money in costs for welfare and prisons (Schweinhart 2002). The Economic Policy Institute’s report, “Exceptional Returns,” found similar results looking at a broader range of early childhood programs, and concluded that a comprehensive program for all poor children in the country would save billions of dollars within 25 years, not to mention have a tremendous effect on the lives of children involved (Lynch 2004, viii, 9-17; see also Garrison 2005, notes 110-11 and accompanying text).
costly to the polity, to parents, and, most importantly, devastating to children. In its place, we should move toward the model of a state that is truly supportive to children’s welfare. In such a model, the state would be seen as integrally involved and supportive of children’s welfare on a continual basis; further, it would ensure that parents have the societal resources necessary to rear their children adequately, and that other societal institutions support children’s wellbeing. Our responsibility to children, their parents, and the polity requires that we do no less.
CHAPTER 9

CONCLUSION

I have argued through much of this dissertation against the view that the state can and should be neutral to families. In its place, I have contended that the state should actively seek to support families’ capability to engage in caretaking. In this regard, I have asserted that the state must be conceived to have a continual responsibility to structure societal institutions to foster caretaking in the ordinary course of events, rather than simply to step in when families are deemed to fail. And I have contended that such a posture on the part of the state can be pursued consistently with (or, at least not in irreparable contradiction to) the other goods that a liberal democratic state should and must pursue, including autonomy, equality, and justice.

To make this argument, I have pointed out that once we accept the (in retrospect, rather obvious) insight of feminist theorists that dependency is a normal condition experienced by all humans at various points in their lives, liberalism’s respect for human dignity, which drives its support of autonomy and equality, requires more than that the state protect the right to be left alone by either individuals or families. Because families can respond adequately to dependency needs only in a network of institutions that are supportive of caretaking, liberalism’s core postulate of human dignity requires that the state structure institutions in ways that allow these dependency needs to be met with dignity. I have spent the bulk of this dissertation trying to sort out how a more capacious liberalism that
recognizes the importance of caretaking would incorporate this good along with the more traditionally recognized liberal goods and virtues in a variety of areas involving the family-state relationship for which liberal theory now gives us few answers – the state’s responsibility with respect to care for dependents, relationships between adults, civic education, work-and-family issues, and the child welfare system.

My argument in favor of the supportive state model may, for some, raise the specter of a totalitarian state that will lead to the standardization of families and the weakening of citizens’ autonomy and wholesale invasion into their private lives. Such an objection, however, misconceives the state’s role in this proposal. The current dominant approach leaves families to their own devices regarding dependency matters. In doing so, it forces them to choose from a range of options that all may be unacceptable because they don’t consider the need for caretaking. By requiring societal institutions to take caretaking into account along with other legitimate goods, the supportive state model gives citizens the resources to pursue their responsibilities with dignity. This bolsters rather than retards their autonomy. For example, laws that prohibit an employer from requiring overtime by employees with younger children would strengthen, not weaken, parents’ ability to fulfill their goals.

The supportive state proposal therefore requires recognizing the complexity of the autonomy to which liberalism gives pride of place in two particular ways. First, it requires recognition that citizens’ ability to further their own life plans is not always best promoted by the state simply staying out of citizens’ business and enforcing the right to be left alone. Citizens still require the basic resources and institutional framework to accomplish their purposes. This is particularly the case with respect to caretaking, which requires positive
action to assure the framework in which caretaking can occur.

Second, autonomy, itself, must be seen as an accomplishment rather than an ontological fact of the human condition. This means, in the case of children, that the state must pay attention to the formative process for developing citizens capable of being self-directing. In Thomas Spragens words, citizens must be seen as “separate individuals whose integrity and particularity must be respected. But they are people whose lives and identities and aspirations and activities are all generated via their association with others. . . . [T]hey are not born autonomous but become so through a complex and sometimes arduous process of socialization, acculturation, and education.” (1999, 260). The liberal democratic state, as many have argued before me, must pay considerable attention to the process by which citizens become autonomous, including receiving good family care and a strong civic education. I would add that it must also pay attention to and seek to support the institutions that have a role in this process through positive action by a respectful yet supportive state.
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