

January 2003

Caretaking and the Contradictions of Contemporary Policy

Michael Selmi

Naomi Cahn

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Labor and Employment Law Commons](#), [Law and Gender Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 Me. L. Rev. 289 (2003).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol55/iss1/13>

This Article and Essay is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

CARETAKING AND THE CONTRADICTIONS OF CONTEMPORARY POLICY

Michael Selmi and Naomi Cahn

- I. INTRODUCTION
- II. MARRIAGE AND WELFARE REFORM
- III. THE LEFT'S TURN TO CARETAKING
- IV. MOVING FORWARD
 - A. Education*
 - B. Restructuring School Days*
 - C. The Continued Importance of Discrimination*
- V. CONCLUSION

CARETAKING AND THE CONTRADICTIONS OF CONTEMPORARY POLICY

*Michael Selmi and Naomi Cahn**

I. INTRODUCTION

Contemporary social policy relating to women's employment remains strikingly ambivalent. Those in favor of traditional family structures, a position that is generally associated with conservative political agendas, have often expressed a preference for a family model that emphasizes the woman's role as a homemaker, or to use the more recent term, a caretaker. At the same time, as the 1996 Welfare Reform Act demonstrates, if the choice is between providing financial support that would enable lower-income women to stay in the home and forcing those women into the labor market, the conservative agenda will opt for the latter. More recently, and as an adjunct to the continuing welfare reform, policy makers on the right have advocated policies intended to promote marriage as a means of reducing poverty and providing for a more stable home for children. In some ways, these marriage promotion policies can be seen as a substitute for employment and as a way of striking a balance between the competing goals entangled in the welfare debate.

Although these specific marriage proposals are of recent vintage, the objectives on the right, of promoting traditional families while deemphasizing women's role in the labor market, are familiar and long-standing. What has been more surprising is the convergence of policy objectives with the developing interest on the left of support for women's caretaking roles with public subsidies. In the last several years, there has been a veritable explosion of books and articles emphasizing women's role as caretakers and the difficulties women have balancing their roles as mothers and paid wage earners. As a way of ensuring a better balance between what are typically seen as two distinct roles, this literature suggests that it would be a desirable social policy to facilitate women's caretaking, through more extended parental leave, nonmarginalized part-time work, and by placing a greater social value on caretaking.¹ These proposals, however, would likely have a serious negative effect on the quest for greater equality for women, particularly in the workplace, and they are likely to produce a replay of the debate over "difference" feminism from the 1980s by identifying women as caretakers and by appearing to accept gendered differences. Just as is true of the marriage proposals on the right, these policy suggestions might signal a return to the past rather than a move forward for women.

* Professors, George Washington University Law School. We thank Jennifer Wriggins for organizing this thought-provoking symposium, and the other participants for their comments, in particular Kate Silbaugh who provided detailed critical comments on an earlier draft. Although we should be clear that she disagreed with much of our analysis, we benefited substantially from her critical insights. We would also like to thank Todd Melnick for his library assistance and George Washington University Law School, and Dean Michael Young, for their extensive support that has allowed us the time and space necessary to attain a balance between our work and family demands.

1. These issues are discussed in more detail *infra* Part III.

The right's marriage proposals and the left's carework proposals nonetheless appear to focus on different aspects of women's roles. As the left recognizes, women can be mothers without being wives and support for caretaking is an unquestionably important social goal, which the left acknowledges through its advocacy of public responsibility for caretaking. The right, on the other hand, is attempting to force mothers to be wives while continuing to devalue the caretaking done by poor women by decreasing public support for caretaking. The proposals do, however, have a similar effect; each set of proposals can be seen as reinforcing, and in some ways reifying, women's role within the home.

While we support the goal of providing increased recognition to the value of caretaking, we contend that this revaluation should be achieved without diminishing the role of women in the workplace. First, we challenge the view that marriage provides a cure for welfare dependence. Second, we argue that in addition to stressing the importance of caretaking, the left should focus on other issues that affect women's equality, such as education, the timing and length of the school calendar, and continued workplace discrimination.

It is important to recognize that much of the carework literature does, of course, challenge the gendered nature of the workplace and in this essay we are challenging one aspect of the literature, that which focuses on facilitating women's carework.² Our goal is to change the gendered female character of carework; although we approach the issue from outside of the home, we also seek to facilitate men's performance of household work and women's performance of market work.

II. MARRIAGE AND WELFARE REFORM

Congress and the executive branch are currently considering a series of pro-marriage proposals as a purported means of improving the public welfare system. While this essay does not discuss these proposals in great detail, it explains some of them in an attempt to illustrate their intent and potential impact. For example, proposed legislation would change the purpose of TANF so that it explicitly encourages the formation of "married" families and would also provide \$100 million over five years for state programs to promote married two-parent families.³ Similarly, President Bush has also supported spending millions of dollars to promote

2. In discussing the carework literature, we are painting with a broad brush, and we do not mean to group all carework literature together. As noted in the text, our analysis in this paper focuses on some of the more popular manifestations of a complex literature, and there are many other examinations of carework that are either more sensitive to the issues that we discuss or which deal with distinctly different issues. See, e.g., Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-Home Industry in the United States and Israel*, 24 HARV. WOMEN'S L.J. 89 (2001) (analyzing role of immigrant women in caretaking); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997) (discussing role of race and gender in care work); Katherine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) (exploring the economics of household labor and the importance of treating carework as a commodity). We also do not mean to dichotomize carework and marketwork literature so as to repeat the feminist debates in the 1970s and 1980s over women's sameness and difference to men. Our point is that we need both carework and workplace reform, and that we cannot focus on one without the other. The carework authors we discuss in this paper seem to accept women's role as primary caretaker, even though some of their policy proposals appear to state the contrary.

3. H.R. 4737, 107th Cong. §§ 101, 103 (2002) (discussed in LEVIN-EPSTEIN ET AL., *infra* note 22, at 4-5, 7).

marriage as part of welfare reform.⁴ These marriage promotion activities are designed to reduce the number of children born to single parents in order to decrease welfare dependence and promote child welfare.⁵ In this essay, our focus is not on the relationship between marriage promotion and welfare reform, but instead on how marriage promotion activities marginalize working women with children because they change the focus from the workplace to the family, and from systemic problems faced by women to individual blame.

Historically, the promotion of marriage has served political and cultural ends designed to reinforce the primacy of heterosexual marriages, with the man in the role as the breadwinner. Underlying its language of companionship, marriage is a public status that has historically been subjected to regulation designed to serve the interests of the state.⁶ In her examination of the institution of marriage, Professor Nancy Cott shows how marriage has traditionally promoted a political agenda. She observes that the federal government manipulated notions of citizenship during the nineteenth century based on a woman's marital status in order to form and reinforce appropriate gender roles.⁷ Marriage also functioned as a training ground for virtuous citizenship, molding immigrant families into the appropriate father-headed household, much in the same way that contemporary efforts to promote marriage seek to transform the family.⁸ The contemporary efforts have striking historical parallels with Congressional efforts to promote marriage in the late nineteenth century through birth control laws, as well as in the Freedmen's Bureau's emphasis on legitimizing the marriages of freed slaves to ensure conformity to the existing model of the nuclear family.⁹

4. See Robin Toner, *Sort of Deserving: Helping the Poor in the Post-Welfare Era*, N.Y. TIMES, Mar. 3, 2002, at 4-1; Editorial, *Bush's Family Plan*, BOSTON GLOBE, Mar. 4, 2002, at A14; see generally Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999); M.M. Slaughter, *Fantasies: Single Mothers and Welfare Reform*, 95 COLUM. L. REV. 2156 (1995) (reviewing MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995)).

5. See THEODORA OOMS, CENTER FOR LAW AND SOCIAL POLICY, MARRIAGE-PLUS (2002), at www.clasp.org/DMS/Documents/1023290035.07/marriage-plus.pdf. Ooms also points out that liberals are worried that marriage promotion activities have the hidden agenda of returning women to the kitchen.

6. See generally Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOC. INQUIRY 541 (1998).

7. Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440, 1442 (1998).

8. See, e.g., Jennifer Wriggins, *Maine's "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages": Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345 (1998); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two are Better Than One*, 2001 U. ILL. L. REV. 1. For purposes of this paper, we are not even discussing problems with the federal statutory definition of marriage in the Defense of Marriage Act, 1 U.S.C. § 7 (2000).

9. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 83-94 (2000); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 307-09 (1999) (noting that the right to marriage for African-Americans in the post-Civil War era was of mixed benefit; while it allowed blacks access to an institution, the state nonetheless used that institution to punish nonconformers).

Marriage also serves to privatize dependence.¹⁰ Judges and legislatures have used marriage as a means to foster women's dependence on men rather than on the state.¹¹ By finding a marriage where evidence was doubtful as to its existence, judges made men, not the state, responsible. Historically, doctrines of common law marriage and putative spousehood have recognized marriages based on the parties' expectations and actions, notwithstanding a lack of compliance with the requisite formalities.¹² These doctrines created marriages where there had been no wedding ceremony, or where there was another impediment (such as the existence of another spouse); they have also, however, provided financial protection to women who would otherwise be left without support upon the death or desertion of the male breadwinner,¹³ transferring financial dependence from public welfare to private individuals.

There are a series of more practical problems embedded in the contemporary welfare reform marriage proposals. First, although marriage per se does not decrease the number of hours that women work (or the percentage who work), married women with children work less, and are less likely to work, than unmarried women with children.¹⁴ Thus, the combination of child care and marriage results in decreased workforce participation by women. Proposals to encourage marriage will, consequently, result in fewer working women. As Rhona Mahony points out in her book, *Kidding Ourselves*, girls begin, at an early age, and long before they actually find a partner, to make decisions with respect to education and work that reflect the intense but often implicit social pressure to marry.¹⁵ In college, women face a strong peer culture that often values sexual attractiveness over intellectual accomplishments, and that encourages women to temper their career aspirations.¹⁶ Many women who work tend to specialize in female occupations that are lower-paying than male occupations, notwithstanding comparable college graduation

10. See generally Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000); Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

11. Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1919-20 (1998); Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOC. INQUIRY 541, 578-80 (1998).

12. See generally Dubler, *supra* note 11.

13. E.g., Bowman, *supra* note 10, at 12-15; Lindsay, *supra* note 6, at 546-53.

14. Jane Waldfogel, *The Effect of Children on Women's Wages*, AM. SOC. REV., Apr. 1997, at 209, 209; Michelle Budig & Paula England, *The Wage Penalty for Motherhood*, AM. SOC. REV., Apr. 2001, at 204, 204.

15. RHONA MAHONY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* 67-71 (1995). Law and economics scholars, as well as their critics, have looked at the family to examine the alleged logic of role differentiation. See, e.g., Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119 (1997).

16. DOROTHY C. HOLLAND & MARGARET A. EISENHART, *EDUCATED IN ROMANCE: WOMEN, ACHIEVEMENT, AND COLLEGE CULTURE* 8, 223-24 (1990).

rates.¹⁷ Middle-class women acquiesce, or "choose,"¹⁸ or negotiate this lifestyle, sometimes consciously, sometimes not; the marriage proposals force poor women to make these choices.

In addition, marriages have a high failure rate; between 40-50% of all couples divorce, and the highest rates of divorce occur among younger couples.¹⁹ Financial provisions upon divorce are inadequate; women's and children's standard of living decrease dramatically upon divorce.²⁰ There is an interesting correlation between women's economic independence and an increasing divorce rate; privatizing women's dependence on men rather than on the state might in fact decrease the divorce rate, but at great expense to women's rights. In contrast to the divorce rates, the unemployment rate, even among single mothers, is well below 40%.²¹ Education, training, and jobs provide more stable protection against poverty than does the simple fact of marriage.

Indeed, notwithstanding the marriage promotion efforts in contemporary welfare law, two-parent families are still treated more harshly than single parent families in a variety of ways, such as work participation requirements.²² While states are permitted to adopt the same eligibility requirements for single parent and two-

17. Kristin McCue & Manuelita Ureta, *Women in the Workplace: Recent Economic Trends*, 4 TEX. J. WOMEN & L. 125, 149-151 (1995).

18. Choice is obviously a problematic concept. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1193 n.140 (1998). Professor Carol Rose has shown how the perception that women are more likely than men to cooperate results in limiting women's possibilities for economic advancement. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 442 (1992). Once women "choose" to cooperate in marital relationships, they find themselves in situations that encourage more "cooperation," in which women become the person primarily responsible for maintaining the household. *Id.* at 431. Rather than "face a scene" when she asks her husband to perform household work, a woman often will simply acquiesce, and there will be a cumulative and disadvantaging effect on her. *Id.* at 440-41. Professor Rose suggests that women use their alleged taste for cooperation to their own advantage, cooperating with others who will help them, and learning "selective noncooperation." *Id.* at 456-57.

19. See MATTHEW D. BRAMLETT, PH.D. & WILLIAM D. MOSHER, PH.D., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES 5, available at www.cdc.gov/nchs/data/ad/ad323.pdf ("If the wife was a teenager at first marriage, the marriage is much more likely to dissolve than if the wife was at least 20 years of age at marriage.").

20. E.g., SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 19-27 (1994); Theodora Ooms, *The Role of the Federal Government in Strengthening Marriage*, 9 VA. J. SOC. POL'Y & L. 163, 182 (2001) (discussing public welfare provisions as they affect the two-parent family).

21. As of October 2002, the official unemployment rate stood at 5.7%. See UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION tbl.A-1 (2002). In 2001, the rate for unmarried women with children under eighteen was 8.0%. UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2001, at tbl.5 (2002). The unemployment rate for single mothers may be misleading in that it only includes those who are actively looking for work. A better indicator of the employment situation of single women is their labor force participation rate, which in 2001 was 78.7%, significantly higher than the rate for married mothers, which was 69.6%. See *id.*

22. JODIE LEVIN-EPSTEIN ET AL., CENTER FOR LAW AND SOCIAL POLICY, SPENDING TOO MUCH, ACCOMPLISHING TOO LITTLE 7 (2002), at www.clasp.org/DMS/Documents/1023821143.64/HR_4737_family_form_analysis_061102.pdf (on file with the Maine Law Review). Seventeen states and the District of Columbia have differing eligibility criteria for the two kinds of families. *Id.*

parent families, a significant number have developed eligibility rules that make it easier for single-parent families to receive assistance.²³

Finally, when two low-income people get married, we still have a low-income family. While only 6% of married couples with children live in poverty,²⁴ and 33% of single-mother headed households live in poverty,²⁵ poverty and marriage have a much more complex relationship than these stark figures indicate. Poor women are less likely to get married than are non-poor women, and men who are low earners are less likely to get married and more likely to get divorced than men who have higher earnings.²⁶ Moreover, a decrease in wages for low-income men results in a lower marriage rate.²⁷ In contrast, one study found that increasing the income of poor working people increased their marriage rates.²⁸

The ongoing Fragile Families Study, which has examined approximately 5000 children and their parents in twenty cities has discovered some fascinating things about unmarried parents—more than one-third of both men and women have less than a high school education; almost all of the men worked in the year preceding their child's birth; both mothers and fathers said that being able to spend time together was a significant source of conflict; and while 90% of the women said that having a husband with a steady job was important to a successful marriage, 50% of the men said that having a wife with a steady job was important to a successful marriage.²⁹ These statistics show that marriage promotion activities depend on creating stable jobs; stable jobs, in turn, require education and training.³⁰

In a careful study of the impact of welfare reform on family formation, researchers analyzed seven of the major demonstration projects that had reported findings on this particular issue.³¹ They found the data mixed: one program had generated both increases and decreases in different locations; two other programs resulted in increased marriage rates; while four programs had virtually no impact on family formation. In an evaluation of one of the few programs to examine whether welfare reform affects attitudes towards marriage, welfare recipients with lower levels of education experienced increased desires for marriage, while those

23. *Id.*

24. STEPHANIE COONTZ & NANCY FOLBRE, COUNCIL ON CONTEMPORARY FAMILIES: MARRIAGE, POVERTY, AND PUBLIC POLICY 3 (2002), at www.contemporaryfamilies.org/briefing.html (on file with the Maine Law Review) (citing Kathryn Edin, *A Few Good Men: Why Poor Mothers Don't Marry or Remarry*, AM. PROSPECT, Jan. 3, 2000, at 28).

25. *Id.*

26. *Id.* at 5.

27. Francine Blau et al., *Understanding Young Women's Marriage Decisions*, 53 INDUS. & LAB. REL. REV. 624, 645 (2000); Robert A. Nakosteen & Michael A. Zimmer, *Men, Money and Marriage*, 78 SOC. SCI. Q. 66 (1997).

28. OOMS, *supra* note 5 (discussing the Minnesota Family Investment Program).

29. SARA McLANAHAN ET AL., THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY BASELINE REPORT tbls. 1, 2, at <http://crcw.princeton.edu/fragilefamilies/nationalreport.pdf> (on file with the Maine Law Review).

30. See Sara A. McLanahan et al., *Women's Roles and Women's Poverty*, in GENDER AND FAMILY CHANGE IN INDUSTRIALIZED COUNTRIES 258, 275 (Karen Oppenheim Mason & An-Magritt Jensen eds., 1995) ("The only mothers who have a better-than-average chance of staying out of poverty are [mothers] who combine parenthood and work with marriage.").

31. David J. Fein et al., *Welfare Reform and Family Formation: Assessing the Effects*; Jane G. Mauldon et al., *What Do They Think? Welfare Recipients' Attitudes Towards Marriage and Childbearing* (both available at www.abtassociates.com/wrffproject (last visited Nov. 27, 2002)).

with higher levels of education experienced reduced expectations.³² The researchers concluded that marriage promotion activities per se are unlikely to result in an increased marriage rate,³³ but that policies which make marriage "economically feasible" may have an impact.³⁴

While many critiques of marriage formation proposals focus on children, welfare dependence, or on marital stability, our focus instead is on getting women into the workplace and letting them stay there. Thus, while others have found that forced marriage leads to domestic violence,³⁵—which, in and of itself is, of course, deeply problematic—domestic violence in turn results in decreased workplace performance as well as relationships that are bad for women and children. Domestic violence has become an increasingly important issue in workplace reform as well as in the public welfare debate.³⁶ While domestic violence occurs outside of marriage as well as within marriage, marriage promotion activities may cause more women to stay with men in violent relationships.³⁷

Moreover, marriage itself does not benefit children; extensive research has shown, for example, that children in stepfamilies and children in single parent families are at a comparable risk for decreased school performance and increased juvenile delinquency, notwithstanding the existence of two parents married to each other.³⁸ Thus, marriage promotion may have undesirable effects regardless of its effect on women's workplace performance.

Ultimately, however, the problem with marriage promotion activities is that they change the focus from the systemic problem of women's inequality in the workplace to individual women's decisions to marry.³⁹ Marriage promotion activities detract from the underlying causes of women's poverty: lack of education and other resources. Rather than provide funds for women's full workplace participation, marriage promotion activities provide funds for individual decisions to reconstruct the traditional family, so that fathers will be responsible for breadwinning and mothers for caretaking.

32. Fein, *supra* note 31, at 5; Mauldon, *supra* note 31, at 5.

33. Fein, *supra* note 31, at 7.

34. *Id.*

35. See e.g., *Testimony of NOW Legal Defense and Education Fund on "Welfare Reform and Marriage Initiatives": Hearing on "Welfare Reform and Marriage Initiatives" Submitted to the S. Fin. Comm., 107th Cong. 6-8 (2001)* (statement of Jacqueline K. Payne, Policy Attorney, and Sherry Leiwant, Senior Staff Attorney, NOW Legal Defense and Education Fund).

36. *Id.* at 6-7.

37. *Id.*

38. SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 44 tbl.1, 120 fig.15 (1994); JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (2000); NANCY DOWD, *IN DEFENSE OF SINGLE PARENT FAMILIES* 4 (1997); Katharine B. Silbaugh, *Accounting for Family Change*, 89 GEO. L.J. 923 (2001) (reviewing JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (2000)); Naomi Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997) (reviewing NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* and BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997)).

39. See Nancy Ehrenreich, *Surrogacy or Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369 (1992) (reviewing CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1989)); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1840-43 (1990); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1594-96 (1991).

III. THE LEFT'S TURN TO CARETAKING

Just as the right remains ambivalent about women's relationship to the labor market—preferring them to remain at home unless the choice is between subsidizing their time at home and compelling them to work—the left expresses a parallel ambivalence, one that has most recently been embedded in the interest over women's role as caretakers. In the last several years, a rising chorus of authors, in and out of law, academic and nonacademic alike, have urged greater societal attention to what has been labeled care work, a term that is intended to break down the dichotomy between care and work by fusing the antinomies. Although those who have focused on care work differ substantially in their emphases and approaches, much of the literature addresses a question that has long been central to feminist thinking, namely the devaluing of work that occurs outside of the paid labor market and the difficulties women have in balancing their home and workplace demands. But the new work also encompasses decades of prior research and seems distinct in that it is largely borne out of a frustration with the lack of progress women have made over the last several decades; in particular, how women continue to be primarily responsible for caretaking despite their increased presence in the labor market and notwithstanding the rhetorical pressures on men to share parenting.⁴⁰ For most women, the quest for equal parenting has proved elusive and, indeed, women continue to perform the majority of work in the home, while failing to obtain substantial equality in the workplace in terms of wages, status, or power, much of which can be traced to their caretaking responsibilities. In addition to the frustration over the lack of progress toward equality, there is also a renewed interest in women's role as caretakers in a way that seeks to diminish the importance of gaining workplace equality by emphasizing the social importance, and the persistent devaluing, of caretaking. It is this latter emphasis in the literature that we seek to address in this essay.

Within law, Martha Fineman and Joan Williams have been at the forefront of this new wave of scholarship by emphasizing the societal need to facilitate women's duties as caretakers. Martha Fineman, for example, has urged greater public subsidies for caretaking,⁴¹ while Joan Williams has advocated restructuring the workplace so as to minimize the existing workplace norms that have been developed around men without substantial family responsibilities and by substituting distinctly different workplace norms that would acknowledge that workers have others they need to care for.⁴² One of us has recently commented on both of these

40. Mary Becker nicely captures this sentiment when she writes:

Equal parenting has been a major item on the feminist agenda in the United States for at least the last thirty years. It has not happened yet . . . Perhaps an equal division of carework might be possible in the future. Who can say? Even if it is, however, we need alternative strategies for the short term, ways in which women's well being can be improved and inequality lessened even though women continue to do most care-taking work.

Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 93 (2002).

For a discussion of proposals placing more responsibility on men, see, for example, Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000).

41. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 230-33 (1995); see also Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL'Y & L. 13, 26 (1999).

42. See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 4 (2000); see also Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 817-18 (2002).

authors,⁴³ and in this essay we will primarily turn our attention to other recent works that have sought to reemphasize women's roles as caretakers as a way of illustrating both the insights and the dangers of this new turn.

We also believe it is important to stress that our differences with the caretaking literature are largely strategic in nature, as we share many of the same goals. In particular, we strongly believe that caretaking should be valued more highly and that we ought to devote more societal resources to the care of dependents, including through publicly-financed daycare facilities, decoupling benefits from employment, and developing more flexible working conditions to enable those responsible for caretaking to devote adequate time to their responsibilities. As should become clear, our primary disagreement involves the exclusive focus on caretaking as a means of furthering women's interests, as we believe women's interests are likely to be furthered to a greater extent by providing better access and opportunities in the paid labor market, and that wage labor should not be seen as incompatible with women's caretaking responsibilities.

In her book, *Care and Equality: Inventing a New Family Politics*,⁴⁴ Mona Harrington seeks to devise what she defines as a liberal program that would assign weight to care as a national value. She writes, "[t]he key idea for a new politics of family care . . . is to add care to the pantheon of national social values."⁴⁵ Through a series of anecdotes combined with references to academic research, Harrington emphasizes how little support our society devotes to the family and how this lack of national attention adversely affects women both in and out of the workplace in ways that are by now quite familiar. Although the vast majority of women are now working, they remain disproportionately responsible for the care of children and elderly relatives—the latter of which is an often overlooked group of more than twenty-two million individuals that is certain to increase over the next decade—and the structure of work "severely compromises [women's] ability to provide a reasonable amount of care for various family members."⁴⁶ Her response, borrowing loosely from Martha Fineman, is to gain greater public recognition of the importance of motherhood in a way that might enable them to become "equal participants in all of the country's affairs."⁴⁷

Like much of the work in this genre, Harrington vacillates between stressing the importance of women's attachment to the home and to the workplace, perhaps in part due to her stated belief that the current system "cannot yield both care and equality," here defining equality as having a relation that is distinct from caregiving.⁴⁸ And while her emphasis is plainly on the social value of care work,

43. See Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHIC.-KENT L. REV. 1557 (2001) (commenting on Martha Albertson Fineman, *Contract and Care*, 76 CHIC.-KENT L. REV. 1403 (2001) and Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHIC.-KENT L. REV. 1441 (2001)). These articles were part of an excellent symposium issue edited by Katherine Silbaugh.

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

45. *Id.* at 48.

46. *Id.* at 51. Harrington also uses an expansive definition of care that would include far more than children or the elderly but would also encompass others who while not dependent on women for care still require attention, which includes just about anyone in the household. *Id.* at 49-51.

47. *Id.* at 117.

48. *Id.* at 41.

she ultimately desires to extend public support for caregiving so as to enable women to choose how they want to structure their lives, and presumably to do so free from the penalties that typically attach under the current societal regime that discounts the value of care work.⁴⁹ As will be discussed in more detail below, this move is also characteristic of the genre but at the same time adds a utopian flavor to what is an otherwise pragmatic approach, suggesting that women's decisions should be free of the economic realities that often influence those decisions.

Ann Crittenden is more explicit in her emphasis on the importance of motherhood, and on accommodating the needs of mothers who want to spend time out of the paid labor market. In her recent book entitled the *Price of Motherhood* she seeks to calculate the costs of what she calls the "the mommy tax"—the cost levied on women who care for their children or other dependents, a cost she places at more than \$1 million for college-educated women.⁵⁰ She also criticizes both the lack of more and better part-time jobs, which she claims is "what many mothers really want," and the way in which gender ideologies tend to harden in the home after the birth of a child.⁵¹ Her policy recommendations seek to redesign work around parental norms, including a year's paid leave, proportional benefits for part-time work, child allowances, and adding unpaid household labor to the GDP.⁵²

There are a number of other recent and similar works that stress the importance of women's role as caregivers but these two popular books exemplify the themes of the emerging literature.⁵³ Not surprisingly, a number of feminist scholars have critiqued the care work literature for its privileging of motherhood, and others have suggested that there is an essentializing undercurrent to the literature that closely resembles the "difference" school of feminism.⁵⁴ We want to skirt that debate, to the extent possible, so as to focus on what we believe is the inaccurate empirical underpinning of the caretaking literature, as well as its misleading nature. Our primary critique is that the focus on care work is misleading in ways that ultimately reinforce prevailing gender stereotypes, and we also believe, much like the marriage proposals discussed earlier, emphasizing care work will ultimately lead to public policies designed to facilitate women's work in the home without substantially changing the gender dynamics of the home or the workplace, in which case it is difficult to see how these proposals benefit women.

49. *Id.* at 117.

50. See ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 87-93 (2001).

51. *Id.* at 235.

52. *Id.* at 258-68. Crittenden does include some proposals that would enable women to spend more time in the paid labor market, including universal preschool for three and four year-olds, although preschools are often available only for half days. *Id.* at 263-65.

53. For additional arguments, see EVA FEDER KITAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999); NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (2001); ROBIN WEST, *CARING FOR JUSTICE* (1997).

54. See, e.g., Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 183-97 (2001) (critiquing emphasis on care work because it privileges motherhood); JUDITH A. BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* 39-55 (1999) (equating care work with the "difference" school of feminism); Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001) (questioning the justification for treating children as a public responsibility).

The care work literature is misleading in several important respects. First, the literature is premised on the notion that most women are unable to balance the demands of work and family and thus are forced to choose between the two, with a further implication that women are dropping out of the workforce in significant numbers to care for their children. But, as we know, this is not an accurate picture; the majority of married women with children, even those who are very young, are in the workforce and only a relatively small percentage of women exit the workforce after having children. Nor is this a recent phenomenon: by the mid-1980s, more than half of mothers with children under two years of age were in the workforce.⁵⁵ Even so, during the last two decades, women with children under the age of three nearly doubled their workforce participation rates, rising from 33% in 1975 to 63% in 2000.⁵⁶ Most of these women are working full-time—only about a third of women work part-time, and the percentages of those working part-time are roughly the same for women with children and those without children.⁵⁷

These general figures were confirmed in a recent survey of women working more than twenty hours a week, which found substantial continued labor force attachment among women following the birth of a child.⁵⁸ Among the survey population, only about 16% of the women failed to return to the labor force within twelve months of giving birth,⁵⁹ a rate, the authors noted, that was comparable to nonchildbearing women.⁶⁰ The study also found that mothers experiencing their first births did not substantially differ in their labor force behavior from mothers who already had children.⁶¹ Significantly, the authors found that job turnover for women was reduced most effectively by extending leave periods and reducing overtime hours rather than through flexible work practices such as part-time work. With respect to the latter, the authors concluded, “We believe that reduced work options, such as part-time work, were often accompanied by such serious reductions in autonomy, upward mobility, benefits, and pay that they did not appeal to most new mothers.”⁶²

One explanation for the misleading focus on women exiting the workforce to care for their children is that it is often assumed that all of the women who are not

55. See Jacob Alex Klerman & Arleen Leibowitz, *Child Care and Women's Return to Work After Childbirth*, AM. ECON. REV., May 1990, at 284, 284.

56. See Marisa DiNatale & Stephanie Boraas, *The Labor Force Experience of Women from "Generation X"*, MONTHLY LAB. REV., Mar. 2002, at 3, 9.

57. In a recent article, Professor Anne Alstott presented the following statistics: at every income level but the lowest (under \$10,000) more mothers work full-time than part-time, and in the year 2000, 54% of mothers worked full-time while 27% were not working, and 16% worked part-time. Anne Alstott, *Limited Options*, BOSTON REV., Feb./March 2002, at 15-16 n.4, available at <http://bostonreview.mit.edu/BR27.1/alstott.html>.

58. See Jennifer L. Glass & Lisa Riley, *Family Responsive Policies and Employee Retention Following Childbirth*, 76 SOC. FORCES 1401, 1417 (1998). The study was based on an interview sample of 324 women who were employed more than twenty hours a week during their third trimester, and the respondents were recruited from hospitals in Indiana. Although the sample is neither large nor geographically diverse, the results of the study largely replicate previous studies, and is used here as an example rather than as definitive proof.

59. *Id.*

60. *Id.* at 1426 (citing Jacob Klerman & Arlene Leibowitz, *Explaining Changes in Married Mothers' Employment Over Time*, 32 DEMOGRAPHY 365 (1995)).

61. *Id.* at 1424.

62. *Id.* at 1426.

in the paid labor force have chosen that path in order to care for their children. It is worth noting, therefore, that many women remain out of the workforce both before and after they have children, and it is not the presence of children that explains their decision. Indeed, there is a core group, which represents roughly 20% of the working-age female population, that is never in the workforce, and a smaller group of women exit the labor force for significant periods of time after having children.⁶³

There is also a distinct classist element that underlies much of the care work literature, one that fails to acknowledge the ways in which most women are able to achieve some balance between their home and work responsibilities. Much of the literature, and this is particularly true of Harrington and Crittenden, is focused on the demands faced by professionals—most often lawyers, journalists, and professors—demands that frequently involve the high costs of child care, or the difficulties of working with intransigent elderly relatives.⁶⁴ If it were not for the obsessive preoccupation with female professionals in the caretaking literature, it would be entirely unnecessary to note that most women are not working the sixty hour weeks that are common for some lawyers, and most are not spending upwards of \$1000 a month on child care. The high cost of child care is often said to justify women's exit from the labor force when they have children, but there is little empirical support for this argument. For example, more than 40% of child care is provided by relatives, generally at little or no cost, and this practice is particularly common among low-wage earners.⁶⁵ A recent survey by the Census Bureau found that the average cost of care provided through institutional settings was \$326 per month, certainly not an insignificant amount but generally not so high as to justify women's exit from the labor market, particularly given that only about 20% of child care is provided through institutional settings.⁶⁶

63. It is conceivable that some significant portion of women exit the workforce upon marriage in anticipation of having children. While we do not have any data documenting this behavior, even if it were true, it would seem more likely that the behavior was attributable to gender ideology relating to traditional families rather than to the anticipated presence of children.

64. Mona Harrington, for example, describes the experiences of a female professor with a job in Oregon, who had to relocate for some time to care for her elderly father, who was extremely difficult to deal with. HARRINGTON, *supra* note 44. While the situation sounded unpleasant, it obviously has little relevance to most people's lives, as this was a family where the woman was able to take an extended leave of absence from what is a high-esteem and flexible job, apparently without pay, to move across country to care for her father, who was financially self-sufficient. The difficulties the woman faced were largely due to her father's cantankerousness, an issue that public support for caretaking is not likely to remedy.

Professor Peggie Smith observes that the conflict between caretaking responsibilities and work "is particularly acute for low-income single parents, who typically hold jobs that lack flexibility and provide few, if any, benefits. Whereas dual-income couples with children may experience work-parenting conflicts that are simply disruptive inconveniences, similar conflicts can devastate low-income single parents." Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1453-54 (footnote omitted).

65. See HARRINGTON, *supra* note 44, at 31-35. A 1996 survey by the United States Department of Education found lower rates of relative care for preschoolers, with just over 30% of those in nonparental arrangements being cared for by a relative. UNITED STATES DEPARTMENT OF EDUCATION, DIGEST OF STATISTICS 1996, at tbl.47 (1997), available at <http://nces.ed.gov/pubs/d96/D96T047.html>.

66. See KRISTIN SMITH, U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 1997, at 14 (2002), available at www.census.gov/prod/2002pubs/p70-86.pdf.

Moreover, whatever overtime workers are putting in tends to compensate for the lack of substantial wage gains they have obtained over the last decade. Indeed, a better balance between work and family demands could be achieved through the development of a living wage, one that would free both men and women to spend more time outside of the paid labor market, accompanied by a generous benefits plan.⁶⁷ And ultimately, it is women at the bottom, not the top, of the income scales who should be the focus of policy initiatives, those who have the fewest not the most choices.

We do not mean to suggest that the costs of childcare are unproblematic, or that balancing the demands inside and outside of the home is easy to achieve. Obviously, the high cost of much child care substantially burdens many families and deserves serious public attention in the form of greater public subsidies. What we mean to suggest is that the costs of child care rarely cause, or justify, women to exit the labor force, nor is it the case that it is impossible to achieve some reasonable balance—which is generally contrary to the picture drawn by much of the existing literature.

Not only does the focus on care work often provide a misleading picture of the complicated relationship between paid labor and unpaid care work, but there is little reason to believe that the various policy proposals advocated by the authors would substantially increase women's life choices. Much of the recent writing on care work looks to France as a model of a nation that provides extensive public support for childrearing, including free nursery schools and generous child allowances.⁶⁸ While the public support system in France, as is true in much of Europe, is impressive, and certainly far more extensive than what is found in the United States, from the perspective of gender equality, France appears to be at best an imperfect model for adoption. Indeed, on all of the various economic indicators of equality, French women are on par or fall behind their American counterparts. Depending on the figures that are used, the labor force participation rates in the two countries are quite similar, as is the wage gap,⁶⁹ though women dominate the part-time sector to a greater extent in France, occupying 85% of the part-time jobs and relatedly constituting 80% of workers earning under \$600 per month.⁷⁰ Women also hold a slightly higher percentage of executive management positions in the

67. As Peggie Smith notes, "[w]hile part-time work is a favored strategy to help professional employees cope with work and parenting conflicts, studies indicate that workplace *flexibility* is especially crucial for low-income workers with children." Smith, *supra* note 64, at 1454 (footnotes omitted).

68. See, e.g., CRITTENDEN, *supra* note 50, at 264-67; Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1502-05 (2001); FOLBRE, *supra* note 53, at 131-34.

69. The data on the wage gap in France vary considerably depending on the particular measure that is used, and on some scales, French women fare substantially better than American women. A recent comprehensive survey indicated that among full-time workers during 1996, the wage gap in France was .8999 based on net earnings, whereas on a slightly different measure, the United States gap was .763. Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 14 J. OF ECON. PERSP. 75, 92 (2000). Other estimates show a smaller gap between the two countries. See FRANCINE D. BLAU ET AL., *THE ECONOMICS OF WOMEN, MEN AND WORK* 353 tbl.11.4 (1998) (reporting a 1993 wage gap in France of .81 with a gap in 1994 for the United States of .76).

70. Dominique Meda, *Women and Work*, at www.info-france-usa.org/atoz/wom_work.asp (last visited Oct. 17, 2002).

United States (5.1%) than they do in France (4.7%),⁷¹ and according to data compiled by the United Nations, American women occupy a substantially higher percentage of high level government jobs (33.1% to 10.8% in 1996),⁷² and hold a slightly higher number of positions in the elected branch of government.⁷³ Perhaps most significantly, France's vast public support system has done little to alter gender inequality in the home. A 1998-99 poll found that French women performed 80% of domestic chores,⁷⁴ again, a substantially higher percentage than for American married women who tend to perform two to three times as much as their husbands. A recent comparison between the limited British public welfare state and the extensive French system led two authors to conclude, "the widespread availability of state child-care facilities in France seem to have done little to create a more equal gender division of childcare, or indeed of domestic or community work."⁷⁵

It might be objected that these figures provide a misleading impression of women's well-being in France insofar as they are limited to comparisons with men in the workplace. In her comments at the conference where this paper was presented and in a recent article, Mary Becker correctly noted that French women experience far lower degrees of poverty than their American counterparts, which she attributed to the more extensive state support available in France for mothers.⁷⁶ This observation raises two important questions, one perhaps more fundamental than the other. On the more methodological level, our response is that the lower poverty levels evident in France are not the product of the state support

71. See LINDA WIRTH, INTERNATIONAL LABOR ORGANIZATION, *BREAKING THROUGH THE GLASS CEILING: WOMEN IN MANAGEMENT* 38, 41 (2001); see also Dora L. Costa, *From Mill Town to Board Room: The Rise of Women's Paid Labor*, 14 J. ECON. PERSP. 101, 114 (2000) ("Although comparisons of women's success in business are harder to make across countries, the available data suggest that women in the United States fare relatively well."); Erik Olin Wright & Janeen Baxter, *The Gender Gap in Workplace Authority: A Cross-National Study*, 60 AM. SOC. REV. 407, 420-21 (1995) (in a cross-national study, the United States and Australia consistently ranked the highest on women's workplace authority measures).

72. DIVISION FOR THE ADVANCEMENT OF WOMEN, UNITED NATIONS FACT SHEET ON WOMEN IN GOVERNMENT (1996), at <http://www.un.org/womenwatch/daw/public/percent.htm> (last visited Oct. 17, 2002).

73. Neither the United States nor France ranked especially high in their percentage of elected leaders, with the United States at 56th place at 14% of its lower house and 13% of the upper chamber, while France was listed at 61st with 12.3% and 10.9% respectively. INTER-PARLIAMENTARY UNION, *WOMEN IN NATIONAL PARLIAMENTS* (2002), at <http://www.ipu.org/wmn-e/classif.htm> (last visited Oct. 17, 2002). These numbers remained roughly the same following the most recent elections: 59 of the 435 (13.6%) seats in the United States House are occupied by women, with 14 women in the Senate. See Mary Lynn Jones, *Year of the Woman? That Remains 1992*, CHI TRIB., Nov. 13, 2002, at 7. In France, 70 of the 555 seats (12.6%) in the French Parliament are held by women. See Alan Covell, *Chirac, Riding High, Reappoints His Prime Minister*, N.Y. TIMES, June 18, 2002, at A9.

74. Meda, *supra* note 70.

75. Abigail Gregory, *Women's Work in Britain and France: Insights for a Wider Understanding of Women's Work* 14 (2002) (unpublished manuscript, on file with authors).

76. Mary Becker, *supra* note 40, at 105-10 (2002). Becker writes: "In France, families with children receive many supports from the state, with the result that although child poverty rates are about equal in France and the United States prior to governmental supports . . . after governmental supports, only 5.7% of French children remained poor whereas 21% of American children remained poor." *Id.* at 105 (footnote omitted); see also Karen Christopher, *Family-Friendly Europe*, AM. PROSPECT, Apr. 8, 2002, at 59 (discussing poverty rates for women and children).

systems available to mothers but are rather a product of the much more extensive French social welfare state, as well as the more centralized wage-setting role the state plays in France which has led to lower levels of income inequality for both men and women.⁷⁷ Not only does the United States have higher levels of poverty than most other industrialized countries, but it also has the highest per capita income, a fact that reflects the United States tolerance for higher levels of income inequality and resistance to state intervention as a means of reducing that inequality.⁷⁸ An extensive statistical analysis of the gender wage gap across countries found that institutional wage setting structures played a significant role in the level of women's wages: women tended to have greater wage parity in countries with less inequality across incomes and more centralized wage setting structures.⁷⁹ The wage structure in the United States is defined as highly decentralized with high levels of income inequality, which may explain why the wage gap in the United States appears larger than in many other countries.⁸⁰ Similarly, a cross-national survey found little correlation between state support of the family through various forms of subsidies and the welfare of women.⁸¹ As Karen Christopher has recently noted, the countries with the two lowest poverty rates among single mothers worldwide—Finland and Sweden—also have the highest employment rates among single women, and employment at decent wage levels.⁸²

But on the more fundamental level, there is the difficult question of how we measure women's well-being—should we consider women better off in France because their burden of caretaking is lessened through extensive public support even if that support has not empowered women either in the paid labor force or in the home? As the data indicate, women in France seem to have fewer economic choices than American women, although it is also possible that the greater public support caretaking receives in France has lessened the need to seek power and autonomy outside of the home,⁸³ a fact that may be consistent with the goals of the caretaking literature. This seems to us a limited objective and one that too willingly accepts the gendered division of labor despite the effects that division has on women's autonomy or power. Making women's work less onerous seems far less

77. For a helpful discussion of these differences, see Seymour Martin Lipset, *Still the Exceptional Nation?*, WILSON Q., Winter 2000, at 31.

78. *Id.* at 38 ("A 1996 survey shows that a policy that reduces income disparities is supported by less than one-third (28 percent) of Americans, while positive responses elsewhere range from 42 percent in Austria to 82 percent in Italy.").

79. Francine D. Blau & Lawrence M. Kahn, *Wage Structure and Gender Earnings Differentials: an International Comparison*, ECONOMICA, May 1996, at S29, S30. The study did not include France but it did include a number of other similarly situated European countries, including Germany and Italy.

80. *Id.*

81. Ann Orloff, *Gender in the Welfare State*, 22 ANN. REV. SOC. 51 (1996).

82. Christopher, *supra* note 76, at 60. Christopher also notes that raising employment rates is insufficient to reduce poverty, rather, it is essential that the United States provide good jobs for single mothers. *Id.* at 61.

83. For commentary on women and power in the household, see Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177 (2000).

important a goal than changing the nature of the choices available to women⁸⁴ and to men. Indeed, rather than seeking to improve women's material conditions without challenging the existing gender order, it is crucial to find ways to improve economic conditions while disrupting gender subordination.⁸⁵

One reason extensive state support has not substantially improved women's equality is that gender ideologies, particularly surrounding childrearing, have remained stubbornly resistant to change, even in the face of extensive public policies designed to facilitate childrearing. The strongest predictor of whether a woman is likely to be in the labor market, before or after she has children, is her gender ideology—those women who hold traditional views about the role of women are substantially more likely to be out of the labor market than those who have more egalitarian views regarding childrearing and family income. Polls continue to demonstrate preference for maternal care. In one recent poll, more than 40% of women believed it was best for a child to have a mother at home,⁸⁶ and a *Washington Post* poll several years ago indicated that 40% of the respondents had a nostalgic longing for the traditional model of a male breadwinner with a stay-at-home wife.⁸⁷ Other polls purport to demonstrate greater progress on the evolution of our social norms; the percentage of respondents in a Gallup poll who indicated that preschool aged children suffered if their mother worked declined from more than 70% to 33% in the last two decades.⁸⁸ Although this figure may appear low, it is worth noting that it is slightly higher than the number of women who remain out of the labor force.

Even when parents share responsibilities, they generally do not completely escape traditional gender patterns; in his study of shared parenting, Scott Coltrane found that women remained much "more likely to do laundry, plan meals, arrange for babysitters, and mop, while men remained more likely to take out the trash and do household repairs."⁸⁹ Even when working class couples work split shifts, and

84. It is interesting to note that the debate currently occurring in the United States was played out in a very similar fashion in the 1920s and 1930s in both Britain and France. At the time, many feminists opposed the child allowances as reifying women's role in the home at the expense of women's participation in the labor force. British social reformer and feminist Eleanor Rathbone argued against fighting for equal access to jobs and equal pay and in favor of "valuing and paying women for their work as wives and mothers." Joya Misra, *Mothers or Workers? The Value of Women's Labor: Women and the Emergence of Family Allowance Policy*, 12 *GENDER & Soc'y* 376, 381-82 (1998). In France, where family allowances among private employers dates to the nineteenth century, tensions existed among pronatalists who saw family allowances as a means to increasing the birth rate and keeping women out of the workforce, while feminists, aided by the Catholic church, sought to support family allowances and equal pay for equal work as a way of recognizing the importance of motherhood and satisfying the needs of working-class women. *Id.* at 390.

85. Orloff, *supra* note 81, at 69 (relying on Guy Molyneux, *Mobilization Without Emancipation? Women's Interests, the State and Revolution in Nicaragua*, 11 *FEMINIST STUD.* 227 (1985)).

86. HARRINGTON, *supra* note 44, at 113.

87. Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat*, WASH. POST, Mar. 22, 1998, at A1 (reporting that "4 in 10 of those surveyed said, it would be better to return to the gender roles of the 1950s").

88. Costa, *supra* note 71, at 116 (noting that by 1991 only 34% of poll respondents believed that preschool children suffer if a mother works).

89. Naomi Cahn, *The Coin of the Realm: Poverty and the Commodification of Gendered Labor*, 5 *J. GENDER RACE & JUST.* 1, 7 (2001). SCOTT COLTRANE, *FAMILY MAN: FATHERHOOD, HOUSEWORK, AND GENDER EQUITY* 65-66 tbl.3.1 (1996).

men are solely responsible for children while their wives work, men still tend to cede responsibility to their wives as soon as they return home because of the men's perceptions of the gendered nature of child care.⁹⁰ The ideology remains traditional, even though the reality of worksharing is somewhat egalitarian.⁹¹

Ideological expressions of a preference for maternal care, however, does not mean that women would likewise prefer to provide maternal care if that means having to leave the workforce. This is one area where the care work literature feeds into old gender stereotypes, despite its intentions to the contrary.

This highlights another important limitation of the care work literature, particularly as it relates to its theoretical underpinning. If the care work literature fails to capture the empirical reality of women's attachment to the labor market, then it appears to be based on a normative rather than a positive foundation. Implicit in the literature that emphasizes facilitating women's work in the home is the notion that women would prefer to be devoting more time to care work, and less time to their labor market activities, which also implies that women value care work over paid labor market work. We have stated that this assumption is implicit in the literature because most of those advocating greater attention to care work disavow, often heatedly, any consideration of care work as women's work, or that women are by nature caretaking, and instead, seek to focus on the reality that women continue to bear disproportionate responsibility for care work. But it is the solutions and policy proposals that reveal a preference for care work, all of which are designed to facilitate, or accommodate, care work outside of the labor market rather than to lighten the burden of care work so as to enable women to devote more time to paid wage work. This is true of the proposals for public subsidies, part-time jobs, more flexible workplaces, restriction on working hours, and even paid leave provisions. Given that all of the authors disclaim a belief that care work is women's work, these proposals appear to be targeted more at benefiting dependents rather than women, and in this respect we find a parallel with the marriage proposals, which are likewise designed with the best interests of children in mind.

Instead, emphasizing the importance of care work to women, and its status as a public good, suggests that women do, and should, privilege care work over their paid market work, and in this way, the theory from the left on care work begins to resemble the marriage promotion proposals on the right. This analogy should not be overplayed, as there are obvious and important differences between the two perspectives, with the primary difference stemming from the importance of heterosexual marriage and its corresponding ideology to the marriage proposals, whereas the left emphasizes the importance of supporting care work in a way that is not dependent on a male breadwinner. At the same time, the proposals of the left carry many of the same dangers and stigmas as those flowing from the right.

IV. MOVING FORWARD

Where does this leave us? We suggest that rather than stressing the importance and value of care work, we should focus our efforts on three particular areas

90. FRANCINE M. DEUTSCH, *HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS* 171-73 (1999).

91. Beverly H. Burris, *Employed Mothers: The Impact of Class and Marital Status on the Prioritizing of Family and Work*, 72 SOC. SCI. Q. 50, 63 (1991); see generally Francine M. Deutsch & Susan E. Saxon, *Traditional Ideologies, Nontraditional Lives*, 38 SEX ROLES 331 (1998).

as a way of seeking to enhance the life choices of women. These areas are education as both a means to provide more economic choices to women and of chipping away at the prevailing gender stereotypes; restructuring the school day and school year to accommodate wage labor, rather than concentrating solely on restructuring the workplace; and finally, rethinking the ways in which workplace discrimination continues to limit women's opportunities.⁹²

A. Education

Without question, education remains the strongest vehicle for increasing women's life choices, as education provides the best means out of poverty and the greatest market opportunities. Women with college degrees or beyond have a labor force participation rate of 86%, while only 55% of women without high school degrees are in the labor force.⁹³ There is likewise a sharp and well documented wage premium associated with increasing education levels: women with college degrees earn approximately 45% more than women who have obtained a high school degree and about 35% more than women with some college education.⁹⁴ The substantially higher wages associated with higher levels of education undoubtedly enhance women's economic power while providing a greater array of choices, often including the choice of full-time motherhood given that higher status women tend to marry higher status men.

Women already outpace men in educational attendance and achievement, but with fewer than 30% of the population holding college degrees,⁹⁵ there is still wide room for growth. Currently about 65% of women enter college within two years of graduating from high school, and about two-thirds of those women enter a four-year college. However, only about 30% will ultimately earn a college degree, while many others will opt for a two-year associate degree or leave without obtaining any degree at all.⁹⁶

Obtaining a college degree provides a particularly important advantage for women compared to their male counterparts because women face a sharply limited low-skill market, whereas among male-dominated positions there are still well-

92. We recognize that there are additional options for reconciling caretaking and equality in the workplace for women, for example, Smith, *supra* note 64, at 1447; see also, Selmi, *supra* note 40; but we focus on these as the most important both practically and symbolically.

93. See DiNatale & Boraas, *supra* note 56, at 5. For men the difference in participation rates is not nearly as dramatic: 95% of men with college degrees participate in the labor force compared to 86% who do not have high school degrees. *Id.* at 6.

94. LAWRENCE MISHLE ET AL., THE STATE OF WORKING AMERICA 2000/2001, at 149 (2001) (data are for 1999). For additional analysis on the wage premium for higher education see UNITED STATES CENSUS BUREAU, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS 3-5 (2002).

95. Given that educational levels differ significantly by generation, with substantially higher levels of education among younger age groups, educational attainment levels are typically broken down by specific age groups. Based on data from the Current Population survey, 28.2% of those aged twenty-five to twenty-nine years old have attained a bachelor's degree, with similar percentages for those up to fifty-four years old, after which the figures drop significantly. See UNITED STATES CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES 2 (2000). Among the twenty-five to twenty-nine age cohort, 29.5% of women and 26.8% of men had attained at least a bachelor's degree. See *id.* at 3.

96. See DiNatale & Boraas, *supra* note 56, at 3 (noting that "in 2000, 30 percent of women aged 25 to 34 years had completed 4 or more years of college, compared with 18 percent 25 years earlier").

paying careers available for high school graduates, though the number of such positions is decreasing with each passing year. Again, the data are revealing: in 1999, one third of women were in jobs paying poverty-level wages compared to 20% of men, and women with less than a high school education earned \$2.39 less per hour than their male counterparts.⁹⁷ African-American and Latina women stand to benefit the most from increasing their education levels, since they tend to be concentrated in the lowest rungs of the low-wage sector and will therefore receive the strongest wage boost from obtaining higher levels of education.

Education, of course, is no guarantee of equality, and even highly-educated women continue to face workplace barriers while confronting the many difficulties of balancing their work and family demands. At the same time, enhancing the educational attainment of women remains the best means for achieving greater equality and choices, and higher levels of education are also associated with more progressive views on issues involving gender equity. Relatedly, there is a strong negative relationship between single-parenthood and education, so increasing the focus on education should lead to a decrease in single-parenthood.⁹⁸ Thus, if we are truly concerned about the welfare of women, we should be providing more public support for college education, rather than trying to marry women off or support their care work in the home.

Another aspect of the focus on education involves gender equity within education. If math and computer classes are filled mostly with boys, occupations that rely on such skills will likewise remain dominated by men. The converse is also true: so long as girls "choose" other courses, their career paths are likely to be limited, thus frustrating the possibility of achieving workplace quality.

B. Restructuring School Days

As noted earlier, restructuring the workplace around parental norms occupies a central place in the care work literature. These proposals have a strong appeal on many levels though there are substantial questions regarding how they might impact women's concerns relating to power and autonomy, and whether they are in the least bit feasible. It is worth noting that that many European countries have far more extensive part-time sectors, and nowhere do we find a robust part-time market in which workers are not penalized in either wages or promotional opportunities for working part-time. Equally clear, wherever an extensive part-time market has been implemented, part-time work is almost exclusively women's work.⁹⁹ With respect to the part-time sector in the Netherlands, generally considered the most

97. MISHÉL ET AL., *supra* note 94, at 149, 155 tbl.2.19, 156 tbl.2.20.

98. Francine D. Blau et al., *Understanding Young Women's Marriage Decisions: The Role of Labor and Marriage Market Conditions*, 53 INDUS. & LAB. REL. REV. 624, 634 (2000) (describing "the well-known negative relationship between single-parenthood and education").

99. Within Europe, the Netherlands has created the most substantial part-time labor force, and women tend to dominate the sector, with more than two-thirds of employed women working part-time, as well as 95% of employed mothers of young children. See EILEEN APPELBAUM ET AL., *SHARED WORK, VALUED CARE: NEW NORMS FOR ORGANIZING MARKET WORK AND UNPAID WORK* 17 (2002). This study was sympathetic to the development of part-time work as a way of allowing women to balance their competing demands, but its survey of European countries concluded that substantial number of well-paying and meaningful part-time jobs was still lacking in all countries. See *id.* at 17-19.

extensive in Europe, Joel Handler has observed:

There has been a huge spread of part-time work: nine out of ten jobs created in the last ten years has been part-time. Now more than a third of all jobs are part-time, and nearly three-quarters of part-time workers are women. Part-time jobs mean employment insecurity, low wages, no career, and no independence from men.

Perhaps most significantly, up to 40% of part-time workers within the Netherlands would prefer to work longer hours.¹⁰⁰

Rather than focusing solely on restructuring the workplace, we emphasize the need for restructuring the school day to make it more compatible with full-time work. The structure of the school day has not advanced significantly from a time when women were at home waiting their child's arrival, and indeed, the schedule still largely presumes that an adult (generally a woman) will be available by mid-afternoon to assume care of a school-aged child.¹⁰¹ To ensure efficient use of school transportation, schools often start and end at different times for different grade levels—frequently beginning very early in the morning—with corresponding ending times, and these staggered schedules make it even more difficult for parents to combine work and their children's schooling.

In terms of accommodating working parents, a school day that is longer than the workday would be the best option, although such a lengthy day may be too difficult on many children and would surely be opposed on this ground.¹⁰² Continuing the school day until later in the afternoon would be helpful; alternatively providing more publicly-funded after-school programs would also provide some accommodation for working parents. Publicly-financed full-day preschool and daycare would also be necessary to enable women to have a more continuous labor force attachment. To be sure, extending the school day, and the age at which public education becomes available, would be enormously costly, but no more so than the costs of the many proposals advanced by care work advocates. Moreover, extended school days would offer significant benefits to many children, particularly if the publicly provided care was of high quality.¹⁰³ We want to emphasize, however, that the benefits these policies might provide to children are of secondary importance, and our focus is on developing policies that would be best for women. Although the interests of women and children are certainly not mutually exclusive, and we should be concerned about any policies that would obviously be harmful to children, it is also the case that their interests are not always coexten-

100. See Joel F. Handler, *The "Third Way" of the Old Way?*, 48 KAN. L. REV. 765, 777 (2000). There are certainly many examples of companies that have created good part-time jobs, some of which are detailed in the Appelbaum report cited above. APPELBAUM ET AL., *supra* note 99. But these examples all remain isolated and those who advocate expanding the part-time sector must explain why we should expect those jobs to be meaningful rather than marginalized, which has been by far the most common kind of part-time job to date.

101. In a recent article, Judy Heymann observed, "We have school days and calendars that matched the agrarian work cycle; we should update them to match parents' industrial and postindustrial work schedule and children's increasing need for high-level skills." Jody Heymann, *Can Working Families Ever Win? Helping Parents Succeed at Work and Caregiving*, BOSTON REV., Feb./Mar. 2002, at 4, 13.

102. It is worth noting that for many children in daycare a day that begins before and ends after the typical workday is already the norm.

103. See Becker, *supra* note 40, at 68-69 (noting "mounting evidence that children in quality daycare do as well or better than children raised by stay-at-home mothers on every imaginable indicator of well-being").

sive either—what is good for children will not always be good for women, and when a conflict arises, as may be the case with a longer school day, we should be attentive to policies that benefit children at the expense of women's labor force activity. A final advantage to restructuring the school day is that such a proposal is more consistent with the emphasis in the caretaking literature on the public responsibility for children, insofar as the restructuring occurs in the public sphere of state-financed education rather than in the traditionally private sphere of the workplace.

By emphasizing the advantages to restructuring the school day, we do not mean to exclude workplace reforms, and indeed, we believe that reforming both sectors would prove the optimal solution. Providing parents with more flexible work schedules, including allowing parents dedicated time to participate in their children's education, would help alleviate some of the current burden shouldered by women trying to balance the often conflicting demands in and outside of the paid labor market. This might be done by increasing the flexibility of sick leave, or by allowing a certain number of days of leave, other than vacation, without any restrictions on their use. However, the important point here is that the focus of reform should not be on deemphasizing the workplace role of women.

C. The Continued Importance of Discrimination

Another limitation with the focus on women's lives outside of the workplace as caretakers or marriage partners is that such a focus can easily overlook continuing issues of workplace equity, or may suggest that these issues are no longer of substantial importance. Indeed, lost in the debate over care work has been the continued impact of workplace discrimination on women's lives. Although there remains concern regarding the effect of sexual harassment in the workplace, far less attention has been devoted to the pervasiveness of other forms of discrimination that limits women's opportunities and likely shapes their attitudes toward their work. For a variety of reasons, including discrimination, women continue to be excluded from vast segments of the labor market—a labor market that in the United States remains highly segregated on the basis of gender.¹⁰⁴

In the last decade, there have been a series of large class action cases alleging sex discrimination that have revealed institutional discrimination involving intentional overt discrimination, much of which involves discrimination based on stereotypes or notions of male dominance that we often mistakenly associate with an earlier era. These cases have been filed against some of the largest corporations in America, including Home Depot, Wal-Mart, Mitsubishi, State Farm, Merrill Lynch and many other brokerage houses, as well as a whole series of suits against many of the largest grocery store chains in the country including, Safeway, Lucky's, and

104. See Selmi, *supra* note 40, at 736-37 (discussing high levels of occupational segregation and their relation to the wage gap).

Publix Markets.¹⁰⁵ Most of these cases have been based on stereotypical attitudes regarding women's abilities and interests.

In the case against Home Depot, for example, women were typically assigned to work on cash registers rather than on the sales floor from which promotions were made.¹⁰⁶ The company argued that its hiring practices were based on women's interests and experience, a defense borrowed directly from the notorious case against Sears that began in the early 1970s,¹⁰⁷ while the plaintiffs contended that it was the defendants' beliefs about women's abilities and interests that determined its hiring patterns. The grocery store litigation demonstrated similar patterns of intentional discrimination with women being assigned to newer departments such as the bakeries and delicatessens, while men worked in the more traditional departments such as meat and produce, which again proved to be the source of most of the promotional opportunities. The cases against the brokerage industry, as well as the series of sexual harassment cases, likewise involved overt intentional discrimination in what were male-dominated industries that saw women more as sexual opportunities than colleagues. For all of these cases, there was nothing subtle or even indirect about the discrimination; rather, they all raised claims of intentional overt discrimination that had the effect of severely limiting women's job opportunities—the very same kind of claims that have formed a substantial portion of discrimination allegations going back to the early 1970s.¹⁰⁸

Another example of the pervasiveness of gender discrimination is provided in a report coauthored by Joan Williams and Nancy Segal on discrimination against working parents.¹⁰⁹ Williams and Segal document a series of cases in which parents have challenged workplace practices that distinguish between workers with and without family responsibilities. Among their examples are lawsuits involving an employer who deliberately excluded married women as well as women with children from initial employment,¹¹⁰ and an employer who refused to promote a woman because he believed that she should stay home with her family.¹¹¹ As will

105. Many of these cases are discussed in Michael Selmi, *The Price of Discrimination: The Nature and Effect of Class Action Employment Discrimination Litigation* (forthcoming TEXAS L. REV. 2003). For additional discussions see Reed Abelson, *Can Respect be Mandated? Maybe Not Here*, N.Y. TIMES, Sept. 10, 2000, at C1 (discussing Mitsubishi harassment case and subsequent reform efforts); Krysten Crawford, *Barnhart v. Safeway*, THE RECORDER, Apr. 6, 1994, at 2 (the plaintiffs "alleged that Safeway consistently overlooked women when making management promotions, assigned them to lower-paying jobs in the deli or bakery . . ."); Kristen Grimsley, *Home Depot Settles Gender Bias Lawsuits*, WASH. POST, Sept. 20, 1997, at D1; Anne Hull, *A Woman's Place*, ST. PETERSBURG TIMES, Feb. 2, 1997, at 1A (discussing case against Publix Markets); Susan E. Reed, *Taking the Bull by the Horns*, AMER. PROSPECT, Aug. 14, 2000, at 35 (discussing suit against Merrill Lynch).

106. See Selmi, *supra* note 105, at 49-50.

107. See EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988). Although the case was ultimately decided in the late 1980s, the suit itself began in the 1970s.

108. For several early discussions of the role of sex stereotyping, see CYNTHIA FUCHS EPSTEIN, WOMAN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS 152-66 (1970) (sex typing in occupations); Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978) (describing the role sex stereotyping plays in Supreme Court jurisprudence).

109. Joan Williams and Nancy Segal, *The New Glass Ceiling: Mothers—and Fathers—Sue for Discrimination* (Aug. 2002) (unpublished manuscript, on file with the Maine Law Review).

110. *Id.* at 5.

111. *Id.*

be apparent to anyone familiar with the doctrine, these cases resemble one of the earliest gender discrimination cases to reach the Supreme Court, *Phillips v. Martin-Marietta Corp.*,¹¹² which involved discrimination faced by a woman with children, but not a man. Both mothers and fathers face discrimination based on their caregiving responsibilities, apart from any gender discrimination that women themselves also face.

These discriminatory practices impede not just individual women, but they also reflect more widespread beliefs about gender and work, beliefs that underlie the pro-marriage and pro-carework proposals. These proposals downplay the continued significance of discrimination in both limiting and shaping opportunities for women, and instead see women's caretaking obligations as limiting, and in some cases properly, their economic opportunities.

We believe it is important to comprehensively restructure market work and carework so that women can spend time in both the workplace and with their children. Our emphasis remains on equity and equality, rather than caring for children; we begin with women's dual roles as workers and as caretakers and we seek changes in both aspects of women's lives so that both caretaking and market work are valued.¹¹³ As such, we recognize the importance of various strands of carework literature that link the devaluation of caretaking to women's poverty but we seek to point out the dangers of the carework literature that focuses on rewarding upper-middle-class women for staying home to take care of their children.

V. CONCLUSION

Finally, we want to address the lingering desire to have it all, and the profound frustration that accompanies what has proved to be an elusive quest for having it all. For example, part-time work offers the illusion of remaining in the workplace while spending time at home. Instead, however, part-time workers typically have fewer benefits and have generally taken themselves off of the same promotion track as their full-time coworkers.

As much as we might like to believe otherwise, it is critical that we recognize that we cannot have it all, and that very few people, men or women, are able to attain all of their aspirations in both the home and the workplace. This is also true for men—men who shirk their family responsibilities because of the amount of time they spend in the workplace should not be seen as having it all. Instead, their lives are limited by their devotion to the paid labor market and they forgo many of the joys of family life. What we ought to be seeking is a semblance of balance, for men and women, in the workplace and at home, one that will inevitably involve compromises, imperfect options, and many frustrations, but one that will also lead us to better policy choices designed to balance our needs rather than satisfy them all. This semblance of balance necessitates a change in the valuation of work within the home, but it also requires changes outside of the home and in the workplace to enhance women's and men's life choices.

112. 400 U.S. 542 (1971).

113. See Becker, *supra* note 40, at 60 ("We need to target both the cultural over-valuation of masculine qualities and the cultural under-valuation of feminine qualities.").