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Dependency and the Liberal Polity: on Martha Fineman's *The Autonomy Myth*

By Maxine Eichner†

In the last few years, a number of authors have published books discussing the heavy burdens that parents, especially mothers, bear in our society as a result of their caretaking obligations.¹ These works are only the most recent additions to the literature on an issue with which feminists and cultural critics have grappled for more than a generation.² Much of this literature engages the profound gender inequality that women experience as a result of rearing children.³ To this array, Martha Fineman adds yet another work.⁴

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† Associate Professor of Law, University of North Carolina School of Law; B.A., Yale College, 1984; J.D., Yale Law School, 1988. A number of people have given me insightful comments on earlier drafts of this essay, including Scott Baker, Kate Bartlett, Jennifer Collins, John Conley, Clare Huntington, Linda McClain, Mike Okun, Elizabeth Scott, Mary Shanley, and all those present at UNC's faculty workshop. Kathryn Abrams, Michael Corrado, Marion Crain, Adrienne Davis, Thomas Spragens and Mark Weisburd, out of the goodness of their hearts, read drafts not once but twice. Eric Stein, as usual, was an unceasingly patient editor.

1. *E.g.*, ANNE ALSTOTT, *NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS* (2004); *THE BITCH IN THE HOUSE: 26 WOMEN TELL THE TRUTH ABOUT SEX, SOLITUDE, WORK, MOTHERHOOD, AND MARRIAGE* (Cathi Hanauer ed., 2003); MONA CARRINGTON, *CARE AND EQUALITY* (1999); ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (2001); NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (2001); JANET GORNICK & MARCIA MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* (2003); JERRY JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* (2004); JUDITH WARNER, *PERFECT MADNESS: MOTHERHOOD IN THE AGE OF ANXIETY* (2005); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

2. *See, e.g.*, ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1989); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989); ARLENE SKOLNICK, *EMBATTLED PARADISE* (1991); JOAN C. TRONTO, *MORAL BOUNDARIES* (1993); Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

3. Childrearing impacts women more profoundly than men because women assume the bulk of the caretaking burden in our society. Women without children today earn roughly the same amount as men. *See* CRITTENDEN, *supra* note 1, at 87 (calculating that a childless woman earns roughly ninety-eight cents to a man's dollar). Raising children causes a precipitous drop in mothers' income, however.

It is a work, however, that turns the previous conversation on its head. In *The Autonomy Myth*,⁵ Fineman upends many of the assumptions in the existing debate over what to do about work-family issues and the sex inequality that attends them. Indeed, it is somewhat misleading to include this book in the work-and-family genre, given that its grand scope sweeps across a far broader terrain. In it, Fineman argues that political rhetoric and popular ideology in the United States have become so fixated on the myth that citizens should be autonomous that they fail to recognize the inevitability and normality of dependency. In contrast to the prevailing autonomy myth, Fineman contends that because dependency is an unavoidable feature of any society, the state has a responsibility to meet dependency needs and to support caretaking.

Fineman argues that the United States has failed woefully in this task. She points out the ways in which means-tested welfare programs, tax policy, labor market policy, and a range of other government programs either ignore dependency or stigmatize it when it appears outside of the domestic realm. She also criticizes recent proposals to shore up and subsidize the marital family as against other family forms, contending that such proposals misguidedly attempt to cabin dependency issues within families. In doing so, Fineman charges that such proposals merely repeat the autonomy myth at the level of the family, awarding state preferences to the marital family based on the mistaken notion that it is and should be self-supporting. Along the way, Fineman develops powerful arguments concerning the role of the state that have implications for legal and public policy discussions well beyond the work-and-family arena.

In this essay, I discuss the contributions that *The Autonomy Myth* makes to literature on work-and-family issues and assess Fineman's normative proposals. I argue that Fineman convincingly makes the case that

When working mothers are factored into the equation, the average earnings of all women workers, including those who work part-time, is only 59% of men's earnings. *Id.* at 93. Taking into account only women who work full-time, whether childless or with children, women earn an average of seventy-seven cents for every dollar men earn. *Id.*

4. Fineman, the Robert W. Woodruff Professor at Emory Law School, has already written prolifically about carework issues. See, e.g., *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); *Dependencies, in WOMEN AND WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE* 23 (Nancy J. Hirschmann & Ulrike Liebert eds., 2001); *Contract and Care*, 76 *CHI.-KENT L. REV.* 1403 (2001); *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 *AM. U. J. GENDER SOC. POL'Y & L.* 13 (2000); *The Family in Civil Society*, 75 *CHI.-KENT L. REV.* 531 (2000); *The Inevitability of Dependency and the Politics of Subsidy*, 9 *STAN. L. & POL'Y REV.* 89 (1998); *The Nature of Dependencies and Welfare 'Reform,'* 36 *SANTA CLARA L. REV.* 287 (1996); *Masking Dependency: The Political Role of Family Rhetoric*, 81 *VA. L. REV.* 2181 (1995); *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 *UTAH L. REV.* 387 (1993); *The Neutered Mother*, 46 *U. MIAMI L. REV.* 653 (1992).

5. MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

U.S. public philosophy obsessively focuses on autonomy as a public ideal. Furthermore, she proves her point that dependency is an inevitable human condition for which a good and just polity must assume responsibility. However, there are multiple ways in which the state's responsibility for dependency in a liberal polity can be conceptualized and fulfilled.⁶ In my view, while Fineman persuasively identifies the problem of the autonomy myth, her reconceptualization of the state's responsibility for dependency and her policy proposals concerning how the state should deal with this dependency require both refinement and revision. Ultimately, I assert that the state should support carework in a manner that would allow citizens to combine caretaking responsibilities with work in the labor market, rather than directly subsidize such carework in private homes. I also contend that the state's responsibility to support caretaking, which Fineman frames in terms of a debt that society owes to caregivers, is better conceptualized as a societal obligation to protect its most vulnerable citizens, as well as to develop their capabilities.

My discussion of *The Autonomy Myth* is organized in three parts. In Part I, I review Fineman's book and its contribution to the work-and-family discussion and related debates. In Part II, I evaluate how Fineman's proposal to shift responsibility for carework among societal institutions compares to other feminist proposals for dealing with the carework issue. In doing so, I seek to reconcile Fineman's position with that of feminists who argue for redistributing carework between the sexes, as well as feminists who caution that state support for carework may solidify the habitual association of woman with motherhood to the detriment of gender equality.⁷ In Part III, I consider how a liberal democratic polity should

6. I use the term "liberal" throughout this article to refer to the Anglo-American line of political thought that premises the legitimacy of government on the fundamental equality of all citizens, the importance of limits on government, and the significant emphasis on respect for individual rights. While the version of liberal theory that dominated at the end of the twentieth century presented liberalism as a philosophy that embodied no particular theory of the good life, mandated the state's neutrality, and limited the state's role to the protection of individual rights, liberty, and justice, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971), recent scholars argue that the liberal polity should be conceived, in Stephen Macedo's words, "as a construction for discernible collective ends and purposes, including [but not limited to] the preservation of a broad swath of liberty." STEPHEN MACEDO, *DIVERSITY AND DISTRUST* 5 (2000); see also WILLIAM GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); THOMAS A. SPRAGENS, JR., *CIVIC LIBERALISM: REFLECTIONS ON OUR DEMOCRATIC IDEALS* (1999). This essay is premised on this revisionist view. Specifically, it is grounded on the belief that a vigorous liberal polity must fulfill a number of responsibilities and pursue a number of social goods—including human dignity, substantive equality, civic harmony, and human development—that have too often been read out of standard liberal accounts. In my view, it is only by considering this broader range of goods and principles that the appropriate relationship between families and the state is brought into focus.

7. See, e.g., 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); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

conceptualize the state's responsibility regarding dependency, taking into account the complex range of goods that this form of polity should seek to pursue.

I

THE AUTONOMY MYTH

In *The Autonomy Myth*, Fineman takes on what she calls "core myths" of American society, which center on "the desirability and attainability of autonomy for individuals and families."⁸ 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. This "inevitable dependency," in Fineman's terms, occurs in children, often in old age, and at other points in most people's lives as a result of physical or mental illness. The needed care that this inevitable dependency creates, Fineman counsels, gives rise to a secondary form of dependency experienced by caretakers. To the extent that these caretakers are precluded from engaging in wage labor, they 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.⁹ As a result, those who bear the caretaking burden for dependents—primarily women in our society—assume the costs of carework without compensation for their work or accommodation through access to societal goods.¹⁰ The result is a nation rife with economic and sex inequality, which has no public philosophy that can redress these issues.¹¹

So, what is new about Fineman's book? Feminist theorists have long pointed out the problems with the liberal theory that dominates contemporary American political thought.¹² They have demonstrated that liberal

8. FINEMAN, *supra* note 5, at xiii.

9. *Id.* at 36.

10. *Id.* at 36-37.

11. Fineman wryly observes that the state selectively applies its ideology of autonomy: [A] society that imposed 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.

Id. at 3-4. By the same token, Fineman points out that those whom the state dubs "autonomous" ironically receive considerable government largesse (for example, the tax benefits awarded to married couples), whereas those dubbed "dependent," such as welfare mothers, are sometimes denied state aid so as not to promote dysfunctional dependency. *Id.* at 22, 31-33.

12. See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); TRONTO, *supra* note 2; Virginia Held, *Mothering Versus Contract*, in *BEYOND SELF-INTEREST* 287 (Jane J. Mansbridge ed., 1990); Nancy J. Hirschmann, *Rethinking Obligation For Feminism*, in *REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN*

theory's heavy reliance on the image of the autonomous individual and the societal structures built on this image far better reflect the social role historically assigned to men rather than women, and that it ignores dependents' need for care.¹³ In place of this image, these theorists have sought to assert the inevitability and normality of dependency.¹⁴ They have also argued that societal structures, including the workplace, must be adapted to accommodate carework.¹⁵ The typical arguments in this vein run roughly as follows: at various points in their lives, humans require significant amounts of caretaking. Society overwhelmingly assigns women this caretaking responsibility, which limits their ability to participate in the labor market and the public realm. Thus, for women to achieve equality, either men must assume an equal share of the caretaking, or important institutions that provide access to societal privileges such as the labor market must be adjusted to accommodate caretaking.

Fineman, in the way of great theorists, takes the different pieces of this argument, reshuffles them, and arrives at a very different picture. For Fineman, the main issue of justice is no longer that society assigns the caretaking responsibilities to *women* as against *men*. Instead, it is that society assigns the burdens of caretaking to *families* as against *other societal institutions*. These other institutions then reap the benefits of families' labor. Fineman argues against a conception of the family as a private institution intrinsically responsible for caretaking; rather, she asserts that it should be conceived of as a dynamic public institution that has been assigned a specific role for the benefit of society.¹⁶ Although families assume

POLITICAL THEORY 157 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996); Eva Feder Kittay, *Taking Dependency Seriously: The Family and Medical Leave Act Considered in Light of the Social Organization of Dependency Work and Gender Equality*, 10 HYPATIA 8 (1995); Linda C. McClain, 'Atomistic Man' Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171 (1992).

13. See ALSTOTT, *supra* note 1, at 16, 35; TRONTO, *supra* note 2, at 117; WILLIAMS, *supra* note 1; Maxine Eichner, *Square Peg in a Round Hole: Parenting Policy and Liberal Theory*, 59 OHIO ST. L.J. 133, 154 (1996).

14. See, e.g., TRONTO, *supra* note 2, at 117; Kittay, *supra* note 12, at 28-29.

15. Theorists who have made this argument, in chronological order, include: Frug, *supra* note 2 (arguing that the labor market is organized as if workers do not have family responsibilities; this organization disadvantages women, who continue to bear a disproportionate share of childcare responsibilities); Maxine N. Eichner, Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397 (1988); (arguing that job structures incompatible with caretaking responsibilities are modeled on a male norm and are actionable under Title VII's disparate impact cause of action); WILLIAMS, *supra* note 1 (same).

16. According to Fineman:

[In the] traditional 'separate spheres' understanding of society within legal discourse . . . the family 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 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.

the vast bulk of the caretaking burden without compensation, their carework is necessary to produce "the citizens, the workers, the voters, the consumers, the students, and others who populate society and its institutions."¹⁷ 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 creates a collective debt on the part of society which, in Fineman's words, "must be recognized, and payment accomplished, through policies and laws that provide both some economic compensation and structural accommodation to caretakers."¹⁸

Fineman's treatment of the family as a public institution that has been assigned the role of caretaking by society,¹⁹ rather than the "natural" place to deal with dependency, represents the logical development of feminist arguments contending that the ideological demarcation between the public and private realms unjustly shields the family from scrutiny.²⁰ In the picture previously painted by feminist theorists, the focus on gender inequality in caretaking logically led to two remedial strategies that feminists advocated with roughly equal emphasis: first, persuading men to share the burdens within the family; and second, requiring employers and the state to subsidize and accommodate women's caretaking. The picture Fineman paints of the assignment of caretaking to the family for the benefit of society highlights the latter of these two strategies.

In contrast to earlier accounts, however, as Fineman describes them, state and market subsidization of caretaking become payment of a debt owed—a matter of justice rather than of social engineering, charity, or affirmative action to achieve women's equality. By the same token, in Fineman's account, caretaking should be supported by society not simply to ensure women's equality, but because it is a "positive social and individual good, deserving of societal subsidy and support."²¹ Fineman's

FINEMAN, *supra* note 5, at xviii.

17. *Id.* at xvii ("[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.").

18. *Id.* at 263; *see also id.* at xvii ("Caretaking . . . creates a 'social 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.").

19. *Id.* at 208.

20. *See, e.g.,* Anita Allen, *Privacy at Home: The Twofold Problem*, in REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY (Nancy J. Hirschmann & Christine Di Stefano eds., 1996); Joan B. Landes, *The Public and the Private Sphere: A Feminist Reconsideration*, in FEMINISM, THE PUBLIC AND THE PRIVATE 135 (Joan B. Landes ed., 1998); Olsen, *supra* note 2; Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

21. FINEMAN, *supra* note 5, at 154.

approach therefore changes the basis of entitlement from need to desert, a far more honorable—and politically palatable—form of entitlement in our society.²² In this light, families are compensated for producing children to become future citizens just as government employees are compensated for performing their government jobs.

What is more, Fineman again takes feminist insights regarding the inevitability of dependency to new and original places when she applies them to the subject of family form. The state privileges and subsidizes the marital family, she argues, based on the autonomy myth—this time applied to how families, rather than individuals, should function.²³ According to this myth, married couples are seen as superior to other family forms because they are conceived of as strong and independent. Because of this, those who are married receive hundreds, if not thousands, of subsidies and privileges that are unavailable to others.²⁴ These include the right to a spouse's health insurance and pension, the right to file a joint income tax return, the right to own property as a tenancy by the entirety, automatic inheritance rights, and immigration privileges, among many others.²⁵

The state's subsidization of marriage is ironic, Fineman points out, since it is precisely the view of the marital family as autonomous that prompts the state to award this largesse. Further, insofar as the state seeks to subsidize marriage to improve the welfare of children, Fineman contends that this subsidization policy is misguided: the state should support childrearing in all families, not just those families in which the parents are married.²⁶ In addition, the state's willingness to subsidize the marital family simply because it better conforms to some citizens' notions of morality, she asserts, is unjust: the liberal state has no business furthering some family forms over others.²⁷

Equally as important, Fineman develops a rich vision of the state playing an active role in fostering a just and humane society. She demonstrates the weakness of current visions that limit state action to guarding against infringement of individual rights in the normal course of events, and permitting more positive action only in the unusual situations in which individual autonomy breaks down. Once we recognize the ways that individuals are not autonomous, she argues, it becomes difficult to sustain this

22. See NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 50* (1997) ("Desert has usually been seen as the primary basis of earnings-linked social insurance in the industrial welfare state.").

23. FINEMAN, *supra* note 5, at 57.

24. *Id.* at 104-05; see also TERENCE DOUGHERTY, NAT'L GAY AND LESBIAN TASK FORCE POL'Y INST., *ECONOMIC BENEFITS OF MARRIAGE UNDER FEDERAL AND CONNECTICUT LAW 1* (2004), available at <http://www.thetaskforce.org/downloads/CTMarriageStudy.pdf>.

25. See FINEMAN, *supra* note 5, at 103-04; see also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954-56 (Mass. 2003) (listing the extensive benefits that accompany marriage).

26. FINEMAN, *supra* note 5, at xvii.

27. *Id.*

minimalist role for the state. Instead, all individuals require aid, and therefore all individuals must be subsidized in some manner during the course of their lives.²⁸ This insight points to the need for a state that is supportive of its citizens' needs, rather than one that acts simply as a neutral arbiter of rights. The state should not assume its citizens are autonomous, or seek to make them this way—in Fineman's view this goal is not only unrealistic, but unpalatable. Instead, she argues for a "responsive state,"²⁹ which ensures that citizens' dependency needs are justly and humanely met, both directly through provisions of basic social goods,³⁰ and indirectly through ensuring that "derivatively dependent" caretakers are compensated for their work. Such a state, she contends, would regulate and ameliorate the excesses of the market and its institutions, rather than stand idly by on the grounds that the market is "working."³¹ Her views in this regard are a welcome addition to the debate, or rather, lack of debate in the United States regarding the state's role, where a vigorous defense of an active state has too long been absent.³²

For Fineman, state support of dependency requires not only direct subsidies for caretakers, but also job requirements that accommodate care-taking. In her words, we must "transform the workplace . . . so as to ensure family-friendly public institutions that do not require compromise between the demands of the workplace and the demands of dependents."³³ The list of requirements needed to transform job structures to the norm of the "dually responsible worker" is long, and the steps necessary to bring about this change are admittedly vexing.³⁴ Yet Fineman argues that this transformation should take place whether or not it imposes costs on employers or the state.³⁵ Caretaking, she argues, is too important to sacrifice for profit. In making this claim, Fineman makes a frontal assault on arguments that

28. *Id.* at xvii, 49-50.

29. *Id.* at xxii.

30. Fineman includes among these "essentials such as housing, healthcare, a minimum income guarantee, and other necessities that complement and facilitate the expression of an individual's civil and political rights in a democracy." *Id.* at 285.

31. *Id.*

32. Even those arguing loudest for more state action present an emaciated vision of the state compared to those offered in many other Western democracies, where the state is seen as a basic guarantor of social welfare. The public discussion surrounding the renewal of welfare reform in 2002, as Congress considered modifications to the Personal Responsibility and Work Opportunity Work Reconciliation Act of 1996, exemplified the paucity of this debate. In it, both the left and the right agreed that the overriding goal was to get mothers with young children off the government roles as quickly as possible, with little discussion of the well-being of children. *See, e.g.,* Jared Bernstein & Mark Greenberg, *Reforming Welfare Reform*, AM. PROSPECT, Jan. 1-15, 2001, at <http://www.clasp.org/publications/bernstein-j.html> (presenting a progressive vision of welfare reform that barely touched on the issue of children's welfare).

33. FINEMAN, *supra* note 5, at 200.

34. *Id.* at 201 (requiring "at a minimum, paid family leave for all workers, flexible workweeks, and subsidized child-care facilities in which the workers are decently paid . . .").

35. *Id.* at 260.

allow efficiency to trump proposals for workplace change. In doing so, she takes a much-needed position in the work-family conversation, which until now has largely limited calls for workplace change to those that could, at least arguably, be deemed "efficient."³⁶

Fineman not only challenges the use of economic principles to trump caretaker-friendly policies in the workplace, she more generally challenges the use of these principles as the preferred method of assessing public policy.³⁷ In doing so, she criticizes the view that privatization and the unregulated market are presumptively good, and government regulation presumptively bad. Fineman contends that the current focus on market well-being, marked by taking the Dow Jones average as the arbiter of the nation's overall health, has supplanted a more nuanced evaluation of national standing that considers the distribution of wealth and the well-being of the state's most vulnerable citizens.³⁸ She argues vehemently that the state's proper role is to ensure that conditions in the workplace and in other societal institutions provide for basic social needs, and to enforce norms of distributive justice and worker security.³⁹ Further, she urges, the state has an obligation to ensure that individuals have some basic equality of opportunity by redressing gross disparities that result from the free-market system.⁴⁰ For all of these reasons, Fineman rails against the view that the state should allow efficiency concerns to determine public policy. Fineman's views are thus a helpful corrective to current legal theory and public policy conversations that treat efficiency as the answer to public policy questions, rather than as one factor among many that ought to be considered.

II

LIBERAL DEMOCRATIC GOODS AND THE CAREWORK DEBATE

Fineman argues that since dependency is a normal part of life, the state should deal with this inevitable fact by arranging public institutions in a manner that supports and accommodates carework. This means reordering the welfare state and the labor market so that access to societal goods

36. See, e.g., WILLIAMS, *supra* note 1, at 107 ("If plaintiffs follow the proposal presented here, the fact that they request only *proportionate* pay, benefits, and advancement for part-time work will mean that the per hour costs of full- and part-time employees should be similar."). Cf. Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 759 (2000) (book review) (arguing that Joan Williams's *UNBENDING GENDER* "provides the internal critique that privileging this kind of worker does not always conduce to efficiency or productivity within the firm. However, Williams declines to take the next step: to challenge the notion that norms of efficiency and productivity should figure centrally in assigning privilege to work patterns.").

37. FINEMAN, *supra* note 5, at xii, 268.

38. *Id.* at 268 ("How would we assess our nation's well-being if what was reported on a daily basis instead were the increases or declines in the number of children or elderly having health insurance coverage, or the fluctuations in the number of Americans living in poverty, perhaps going to bed hungry at night?").

39. *Id.* at 261-62.

40. *Id.* at 264.

and privileges are not precluded for those citizens with carework responsibilities. Moreover, it means accommodating and subsidizing these responsibilities. Because *The Autonomy Myth* focuses on developing Fineman's position, it does not present a sustained analysis of how her approach compares to other feminist proposals. Her public support model, however, can be contrasted with two other models proposed by feminists for dealing with the issue of carework.⁴¹ The first of these other models, which I call the "parental parity" model, advocates policies that shift carework within families so that women no longer assume a disproportionate share relative to men's share.⁴² The second, the "anti-repronormativity" model,⁴³ calls for policies that encourage women to consider other life options beside bearing and rearing children, since these tasks are so closely linked with sex inequality.⁴⁴ Along with Fineman's public support model, these positions suggest very different routes for dealing with the inequality caused by women's disproportionate share of carework.

In this Part, I consider these three models. I first assess the promise inherent in each of these approaches to achieve sex equality and other societal goods that should matter to a liberal democratic polity. In doing so, I conclude that Fineman is correct: public support must be an essential component of any feminist solution to the carework issue. However, it cannot, I argue, be the sole component. I then consider the elements of other feminist models that should be included. Finally, I return to the public support model to consider what specific forms of support would best conform with liberal-democratic goals.

41. 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.

42. Fineman criticizes parental parity proposals as fundamentally misguided. *Id.* at 171. 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.

Id. 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." *Id.* at 165.

43. The term "repronormativity," coined by Katherine Franke, refers to the system of social incentives and pressures (both acknowledged and unacknowledged) that lead women to bear and raise children, and the treatment of these activities as natural and inevitable for women. *See* Franke, *supra* note 4, at 183.

44. *See id.*; Case, *supra* note 7.

A. Feminist Approaches to the Problem of Carework

1. Parental Parity Model

The parental parity model seeks to solve the carework issue by adopting policies that would equalize the caretaking performed by men and women within families.⁴⁵ Susan Okin espoused this approach in *Justice, Gender and The Family*,⁴⁶ 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.”⁴⁷ 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.”⁴⁸

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 disproportionate performance of caretaking responsibilities.⁴⁹ In addition, it would largely eliminate the existing leisure gap between women and men.⁵⁰ Further, because this approach seeks to shift responsibilities *within* the family, it, at least

45. Joan Williams is perhaps the most well-known feminist legal theorist to recently advocate a model of parental parity. In *UNBENDING GENDER*, *supra* note 1, she argues for “chang[ing] the allocation of family work within the household.” *Id.* at 232. Because she combines this focus on parental parity with a focus on restructuring the workplace, she does not fit clearly into the typology I describe in the text. *See supra* note 41.

A recent variant of the parental parity approach would require that husbands compensate wives for performing housework rather than seek to redistribute housework within the family. *See, e.g.*, Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 *TEX. L. REV.* 17 (1998) (proposing that premarital security agreements be used to value women’s greater carework); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 *Nw. U. L. REV.* 1 (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 direct subsidy model, discussed *infra* at Part II.A.3 and II.C, in that it would subsidize women for performing carework, rather than redistribute that burden. In the case of the direct subsidy model, however, the state rather than the partner pays.

46. OKIN, *supra* note 2.

47. *Id.* at 171.

48. *Id.* As mentioned in note 41, my typology consists of ideal-types for analytical purposes. An individual theorist’s work may therefore fit into more than one of these categories. For example, I am excerpting here the portion of Okin’s proposal that fits the parental parity model. However, other parts of her proposal comport with the public support model. *See id.* at 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.”).

49. *See generally supra* note 3.

50. *See generally* HOCHSCHILD, *supra* note 2, at 4, 37, 48 (discussing the “leisure gap”—that is, the unequal distribution of leisure time, between men and women in the United States); *see also* FRASER, *supra* note 22, at 47-48 (same).

theoretically, would not require changes to institutions *outside* of the family. To some who advocate parental parity, including Mary Anne Case, this is a primary virtue of the position.⁵¹ To Case, shifting the burdens of child-care to the state or the labor market unfairly relieves fathers from the responsibilities they should have assumed at the birth of their child. In her words, “[p]recisely 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.”⁵²

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 existing disincentives for men to perform this activity.⁵³ Among the most potent of these is the substantial financial penalty that caregivers currently suffer in the labor market. Put another way, any approach that seeks to persuade men to assume more carework within families will ultimately founder if performing carework continues to result in significant penalties being imposed from outside the family. Thus, the success of the parental parity model, in practice, requires adopting some measures of Fineman’s public support model.⁵⁴

Leaving aside the practical need to adjust other institutions in order to implement the parental parity model, how does the limited goal of parental parity fare in terms of achieving goods besides sex equality? Measured in terms of the welfare of children and others with significant dependency needs, the success of the parental parity model is questionable. Even if men were persuaded to assume half of the caretaking burden, they (along with 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. In addition, this model also leaves workers with significant caregiving responsibilities to rely on their own resources to locate and pay for substitute caregiving; the quality of

51. As discussed *infra* at Part II.A.2, Case is probably better viewed as an anti-repronormativity theorist, even though she also espouses some parental parity views.

52. Case, *supra* note 7, at 1756.

53. See Williams, *supra* note 1, at 235. As Ann Crittenden shows, even if the state were able to get men to perform considerably more carework than they now perform, but still less than women, women would likely still be penalized significantly. See CRITTENDEN, *supra* note 1, at 94-103 (citing studies showing that women who left the workplace only briefly for maternity leave and who worked only slightly fewer hours than men working full-time still had significantly lower salaries than men).

54. Fineman herself recognizes this point. See FINEMAN, *supra* note 5, at 201-02 (“By 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.”).

substitute care that they can find and afford will, in many cases, not be adequate to meet their dependents' needs.⁵⁵ Parental parity, moreover, would not lighten the heavy burden on the considerable numbers of single-mother families in which there is no man to share the workload.

Further, this system would continue to penalize workers with caregiving responsibilities to the extent that they cannot conform their caregiving to existing job structures. Those who have significant caretaking responsibilities will continue to be assigned to marginal positions in the workplace. For many, this will put them and their dependents in economic peril; some will be consigned to receiving means-tested welfare benefits which, in our work-oriented society, subjects them to stigmatization and exclusion. Given the inevitability and, often, the unpredictability of dependency, the failure to adapt the labor market to accommodate caretaking means that all workers are subjected to a system in which having a close family member become dependent can mean the sudden loss of many rights and privileges.

Supplementing the parental parity approach with the public support model, however, ameliorates these stark disadvantages. Adding the public support model to the mix would restructure institutions like the workplace to ensure that dependents get the care they need. It would also reduce disincentives for men to perform carework since it would eliminate the penalties parents currently suffer in the labor market. Finally, it would also ensure that workers with caregiving responsibilities would no longer be marginalized in that market.

2. *Anti-Repronormativity Model*

In the last few years, a new position has been sounded in the carework debates, most prominently by Mary Anne Case, at the University of Chicago, and Katherine Franke, at Columbia Law School.⁵⁶ Both argue that past discussions on this issue have simply assumed the relationship between 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 links between women, caretaking, and motherhood, and to promote alternate life paths for women.

As Katherine Franke explicates this view, recent feminist calls for public support of carework have collapsed women's identity into their roles

55. 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." Clare Huntington, *Welfare Reform & Child Care: A Proposal for State Legislation*, 6 CORNELL J.L. & PUB. POL'Y 95, 102 (1996). She notes that this ratio is even worse for care provided to infants and toddlers. *Id.*

56. Case, *supra* note 7; Franke, *supra* note 7.

as mothers, thereby reinforcing the "repronormativity" of motherhood.⁵⁷ 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 idea that these activities are women's necessary calling.⁵⁸ 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.⁵⁹

In a similar vein, Mary Anne Case argues that women must be given "a wider range of options for productive work,"⁶⁰ so that they will have alternative, fulfilling life paths aside from raising children.

These theorists' call to disrupt the persistent association of women with mothering adds an important, previously missing piece to the carework conversation. Their concern with challenging the vast array of cultural messages to women that suggest the only way to live a satisfying and productive life is through motherhood is vital to women's struggle for 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 relationship between rearing children and women's inequality, questioning the necessity of the link between women and motherhood is an important feminist project. Case and Franke are particularly on-target when they challenge the claim made by some carework advocates that public support is owed because the decision to bear children is a virtuous, community-enhancing choice. Both authors point out that this decision often has little to do with altruistic impulses.⁶¹ They also persuasively argue that many other activities contribute at least as much to the public good as the decision to bear children.

However, insofar as the two authors argue against state subsidization of childcare on these grounds, they translate valuable insights into flawed public policy. Both Franke and Case raise concerns about subsidizing and accommodating carework on the ground that doing so might encourage

57. Franke, *supra* note 7, at 183.

58. *Id.* at 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.").

59. *Id.* at 184-85.

60. Case, *supra* note 7, at 1781.

61. See, e.g., Franke, *supra* note 7, at 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.").

women to have children.⁶² From the perspective of furthering women's equality, adopting a policy against subsidization would be deeply troubling. Roughly 80% of women become mothers at some time during their lives.⁶³ At that time, they confront the profound economic and social disadvantages that attend caretaking.⁶⁴ Insofar as the anti-repronormativity position seeks to dissuade women from having children by decreasing assistance for caretaking, the likely result is dismal failure: if having women bear large costs in terms of economic and social inequality would deter them from having children, humanity would already be threatened with extinction.⁶⁵ Women's desires to have children—whether caused by social factors alone or by some mix of social and biological factors—have proved incredibly tenacious.⁶⁶ Given that, while it makes sense to adopt measures to increase women's understanding of and ability to withstand cultural pressures, the failure to adopt public policy measures that accommodate women's childrearing responsibilities will far more likely hurt than help women's equality.

Moreover, the anti-repronormativity position that both the state and private employers should not support caregiving ignores a central reality that Fineman and other feminists have long recognized: dependency is an unavoidable condition in human lives, rather than simply a product of women's choices.⁶⁷ Even if women could be convinced that they do not 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 had wives at home to deal with caretaking.⁶⁸ While that model is now described in gender-neutral terms,

62. See *id.* at 184; Case, *supra* note 7, at 1781 (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").

63. Franke, *supra* note 7, at 196.

64. See CRITTENDEN, *supra* note 1, at 93.

65. These claims bear a strong similarity to arguments 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 little 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. See, e.g., Philip Robins & Paul Fronstin, *Welfare Benefits and Birth Decisions of Never-Married Women*, 15 POPULATION RES. & POL'Y REV. 21, 37 (1996). The existence of even this correlation, however, is hotly contested because of the difficulty in separating out conflating factors. See, e.g., Robert W. Fairlie & Rebecca A. London, *The Effect of Incremental Benefit Levels on Births to AFDC Recipients*, 16 J. POL'Y ANALYSIS & MGMT. 575, 578 (1997).

66. See Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 70 n.65 (2002).

67. In addition to Fineman, see, e.g., TRONTO, *supra* note 2; Virginia Held, *Mothering versus Contract*, in *BEYOND SELF INTEREST* (Jane Mansbridge ed., 1990); EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 29 (1999).

68. See, e.g., Frug, *supra* note 2; FRASER, *supra* note 22; WILLIAMS, *supra* note 1; Eichner, *supra* note 15.

the structures premised on these assumptions remain unchanged. And, it is these structures that anti-repronormativity advocates would allow to remain intact.

In addition to its problematic implications for sex equality, the anti-repronormativity argument against accommodating childrearing would also hurt dependents. Although Mary Anne Case distinguishes between the state's providing benefits directly to children (which she would support to further children's welfare) and the state's 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 of these two policies on children's welfare cannot be so neatly delineated.⁶⁹ Children and other dependents need far more than direct subsidies: they need care. Care theorists have amply demonstrated the importance of caretaking to the well-being of the dependent.⁷⁰ 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, Case, in particular, presents a straitened view of the principles that should guide a liberal polity when she argues against accommodation for caretaking. While she pays lip service to the notion that care could serve as a legitimate public value,⁷¹ her essay repeatedly presumes that the state should apply a narrow version of equal treatment—in which the state treats all persons and all activities the same—as against other decision-making principles.⁷² She therefore rejects the notion that a good state might accommodate citizens' responsibilities to one another, including

69. See Case, *supra* note 7, at 1783-84 (“I have already expressed my own view that neither employers nor the state should be giving parents anything—from money to tax breaks to time off to parking spaces . . . to 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.”).

70. See, e.g., Eva Feder Kittay, *A Feminist Public Ethic of Care Meets the New Communitarian Family Policy*, 111 ETHICS 523, 542 (2001).

71. Case, *supra* note 7, at 1786.

72. See *id.* at 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.” *Id.* at 1768-69. “If there must be legislation on parental status discrimination, I agree with Elinor Burkett about its scope. [According to] Burkett . . . ‘Last time I checked, discrimination law generally cut both ways. We don't bar discrimination against women; we bar discrimination on the basis of gender, and so on. So why single out parents? Why not bar discrimination on the basis of family status? Why not make it illegal to presuppose that a nonparent is free to work the night shift or presuppose that nonparents are more able to work on Christmas than parents?’” *Id.* at 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 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’ . . .” *Id.* Cf. Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 96 (2002) (noting that Case “seem[s] uncomfortable with values” and wants the state “to act in a value-neutral manner”).

caregiving, without equally accommodating other activities in which citizens choose to engage.⁷³ Case's rationale for extending (limited) public subsidies to children exemplifies the paucity of her view: she frames the reasons that the polity should support children in terms of "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."⁷⁴ Notably absent from her account is any description of the positive reasons for extending such subsidies or any thicker sense of collective purpose that would justify state support.⁷⁵

3. *Public Support Model*

And what about a public support model, such as Fineman suggests? This 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 Fineman argues, there is little hope for achieving sex equality without public support for carework. So long as women bear an unequal share of caretaking responsibilities, they cannot attain equal status with men if societal prerogatives are denied based on these responsibilities. Moreover, as previously discussed with respect to the parental parity model, getting men to assume more responsibility for caretaking is unlikely in the absence of public support to eliminate the significant penalties incurred by caregivers.⁷⁶

Further, insofar as feminism seeks to transform society to truly accommodate both men and women, Fineman is right that it must transform public institutions that remain premised on traditionally male life patterns. The current 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."⁷⁷ Because most

73. See *id.* A sizeable contingent of political theorists recently highlighted the importance of fulfilling such responsibilities to a well-functioning democracy. See, e.g., GALSTON, *supra* note 6; SPRAGENS, *supra* note 6; CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS II* (1985); see also Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY* 166 (Henry Hardy ed., 1969).

74. Case, *supra* note 7, at 1785.

75. In this regard, Case's rationale for collective responsibility sounds much like Hobbes's description of the reasons that men should join together in a commonwealth, "[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." THOMAS HOBBS, *LEVIATHAN* 106 (Edwin Curley ed., Hackett Publ'g 1994).

76. See *supra* notes 53-54 and accompanying text.

77. FRASER, *supra* note 22, at 53.

women do not fall in 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 are awarded social prerogatives. Correspondingly, women who find themselves in caretaking roles are deprived not only of the salary and accompanying benefits of a job, they are also marginalized in a system that esteems the breadwinner, while it accords far less social value to the caretaker.⁷⁸

The public support model not only contributes to sex equality, it also supports the needs of dependents. Given that most existing work standards do not accommodate family responsibilities, public support for caretaking could mean the difference between adequate and inadequate caretaking for many children. By the same token, this is the only one of the three models that would help the rising number of single parent families in which there is no other parent either to provide support or to whom carework can be redistributed.

B. *Toward a Unified Approach to the Carework Issue*

Fineman is convincing in claiming that any viable solution to the carework issue must encompass societal institutions beyond the family. She is less persuasive, however, when she argues that this is the *only* solution that should be pursued.⁷⁹ Even assuming that a public support model were to be 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.⁸⁰ Therefore, until more men take on caretaking, it is likely to continue to be seen as low status women's work. Second, as a practical matter, even if the state adopted a public support model, it is difficult to imagine that it would subsidize caretaking to such an extent that caretakers will experience no societal penalties whatsoever.⁸¹ Hence, 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

78. "An employment-centered model, even a feminist one, has a hard time constructing an honorable status for those it defines as 'nonworkers.'" *Id.* at 54.

79. *See supra* note 42.

80. *See* Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495 (1997); *see also* Eichner, *supra* note 15, at 1401-02.

81. Even more ambitious proposals to subsidize family leave, for example, do not suggest compensating caregivers for their lost opportunities. Anne Alstott's work 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 parent caretakers of children under age thirteen 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* ALSTOTT, *supra* note 1, at 75-100.

carework would allow women the same amount of leisure time that men have to enjoy themselves, sustain themselves, and to develop their capabilities. Similarly, the sharing of carework would allow men, too, the opportunity to develop the important human capacities and capabilities that come from caring for others. Consequently, the goal of parental parity not only does not stand in tension with the public support model, it can and should be pursued as a complementary strategy.

In contrast, feminists 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 a crucial counterpart to the public support approach. Without it, a public support approach runs the risk of further solidifying this link. In contrast, feminists should reject anti-repronormativity proposals to deny support for caretaking. No doubt some tension exists between public initiatives that support caregiving and anti-repronormativity proposals that 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 analysis than is usually offered. Such an analysis 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.⁸² This analysis does not fetishize children, motherhood, or childrearing, yet it still recognizes the importance and dignity of carework.

C. *Disaggregating Public Support: Direct Subsidy Versus Public Integration*

I argued that Fineman is precisely correct when she asserts that public support should be a central part of any feminist response to dependency. To argue in favor of public support for caretaking, however, raises the question, “*what kind of public support?*” Here, Fineman's conceptual focus keeps her from disaggregating two different types of public support that would result in two very different public policies. 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

82. See also Linda C. McClain, 85 CORNELL L. REV. 1221, 1256 (2000) (“While relations of dependency are inevitable, and caretaking should be an important public value and the subject of public responsibility, a full account of autonomy should treat caretaking as one of many types of activities that are important to a person living a good life.”).

very different roles for the state with respect to caretaking. Fineman, to the extent that she discusses the issue, supports both approaches.⁸³

Both of these models are a drastic departure from the model that has dominated U.S. welfare policy since the New Deal era. As Nancy Fraser points out, welfare systems are constructed on a particular vision of social organization.⁸⁴ The New Deal era introduced a model of the welfare state built on the presumption that citizens should and do live in families comprised of a breadwinner married to a caretaker, and their children. Most of the programs developed on this model sought to replace the breadwinner's wage in the event of unemployment, sickness, disability, or retirement. For those who did not conform to this model, the system offered only meager, means-tested benefits that were accompanied by stigma since they were not associated with earnings by a family breadwinner.⁸⁵

Events in recent years have at least partially forced the demise of this breadwinner-married-to-caretaker model. The increased entry of women into the labor market and the fact that many jobs no longer pay enough wages to support a family have been responsible for some of this shift.⁸⁶ Further, policymakers have been increasingly confronted with the recognition that this model does not conform to the far more varied groupings in which people now live their lives.⁸⁷ Fewer than one in four U.S. families are composed of a husband, wife, and children today, compared with 45% in 1960.⁸⁸ The rise of divorce rates,⁸⁹ the increasing visibility of same-sex

83. While Fineman does not express a preference in favor of either the direct subsidy or public support models in *The Autonomy Myth*, see, e.g., FINEMAN, *supra* note 5, at 263 (arguing that societal debt to caretakers should be paid both through "economic compensation and structural accommodations"), her past work has focused on the importance of the state directly subsidizing caretaking. See, e.g., MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (2000). This focus has led some scholars to criticize her failure to focus on the importance of insuring women's full integration into the workplace. See, e.g., Baker, *supra* note 80, at 1514-20; Peter B. Edelman, *Promoting Family By Promoting Work: The Hole In Martha Fineman's Doughnut*, 8 AM. U. J. GENDER SOC. POL'Y & L. 85 (2000).

84. See FRASER, *supra* note 22, at 41.

85. See *id.* at 41-42.

86. The current workforce includes 78% of all women with six to seventeen year-olds, and 64% of women with children younger than six years of age. Ayelish McGarvey, *Women and Children Last*, AM. PROSPECT ONLINE, Aug. 13, 2004, at <http://www.prospect.org/web/page.wv?section=root&name=ViewPrint&articleId=8354> ("According to the Bureau of Labor Statistics, in 2002, 64 percent of mothers with children under age 6 and 78 percent of mothers with children ages 6 to 17 were in the labor force.")

87. In fact, Stephanie Coontz argues that the past dominance of the breadwinner-married-to-caretaker model was largely a myth, applicable only to a small class of people for a brief period of time. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992).

88. See *Executive Summary*, *supra* note 91.

89. For 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 JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 86-7* (2000); Andrew Cherlin,

relationships,⁹⁰ the mushrooming rates of single parent families,⁹¹ and the growing number of couples who choose to remain childless,⁹² contest conventional understandings of what it means to be a family. The question then becomes what model should replace the traditional breadwinner-married-to-caretaker model. Recent revisions of welfare policy have answered this question by turning to a model that presumes everybody should be a breadwinner. As Fineman demonstrates, however, in adopting this new “universal breadwinner” model,⁹³ current welfare policy fails to take account of dependency and to give caretaking the support it both requires and merits.

Yet if the traditional breadwinner-married-to-caretaker model fails to take account of the ways many citizens now live their lives, and its successor, the universal breadwinner model, fails to take account of dependency, on what alternative conception should the welfare state be premised? The two variants of the public support model—the direct support and public integration approaches—answer this question very differently. The direct subsidy approach holds 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, job structures are not required to change, and caregiving is still to be performed largely by family members

Marriage, Divorce, and Remarriage, in *DIVERSITY AND CHANGE IN FAMILIES: PATTERNS, PROSPECTS, AND POLICIES* 306 (eds. Mark Robert Rank & Edward L. Kain, 1995).

90. The 2000 Census counted 601,209 same-sex unmarried partner households. This means that roughly 1% of all couples sharing a household are same-sex. Anne-Marie Ambert, *Same-Sex Couples and Same-Sex-Parent Families: Relationships, Parenting, and Issues of Marriage*, Vanier Inst. of the Fam. 4 (2003), at <http://www.vifamily.ca/library/cft/samesex.pdf> (“[T]he 2000 U.S. Census estimate[s] that 1% of all couples sharing a household . . . are same-sex ones[.]”). 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. See David M. Smith & Gary Grates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households*, Urban Institute (2001), at <http://www.urban.org/urlprint.cfm?ID=8425>.

91. “In 1960, nine percent of children lived in single-parent homes. By 1999, that figure rose to 27%.” See Population Resource Center, *Executive Summary: The Changing American Family*, <http://www.prcdc.org/summaries/family/family.html>. 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 has increased at an accelerated pace beginning in the mid-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. See George Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277, 285 (1996). During the same period, married women’s fertility rate declined. *Id.* Overall, almost one in every three families with children is headed by a woman who has never been married. KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* 103 (1996).

92. See MILTON C. REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* 47 (1993).

93. This terminology is Nancy Fraser’s. See FRASER, *supra* note 22, at 51.

in private homes. The 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.

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 the roles of both caregiver and breadwinner into their lives. This approach therefore requires significant changes to the labor market. 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, I hope to persuade the reader that the public integration model is a significantly better choice for several reasons.⁹⁴

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 generally seek to replace only wages and benefits for the period of caretaking.⁹⁵ Under these proposals, caretakers are not compensated for the considerable loss of opportunities to develop their skills and broaden their experiences that they suffer during this time. As economists have shown, however, even small amounts of time taken out of the job market by caretakers generally result in large financial losses and considerably

94. My view in this regard dovetails with that of other scholars who contend that Fineman does not pay enough attention to the role of work in women's lives. See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1499-1506 (2001); Edelman, *supra* note 83, at 86; Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557, 1557-58 (2001). Other scholars have also concluded that an institutional model that allows individuals to combine caretaking with breadwinning offers the best prospect for fostering both caretaking and equality. See, e.g., GORNICK & MEYERS, *supra* note 1, at 91, 84-111 (seeking a "dual-earner-dual-carer society"); LINDA McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (forthcoming 2005) ("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.").

95. See ALSTOTT, *supra* note 1, at 75-100.

diminished financial prospects for the rest of their lifetimes.⁹⁶ Most of these losses would remain unredressed under direct support proposals.⁹⁷ In addition, as Vicki Schultz eloquently discusses, structuring societal institutions in a manner that allows caretakers to hold paid work would allow women opportunities for self-fulfillment and self-definition and a chance to realize aspirations in the larger world that were largely foreclosed to them until now.⁹⁸

Second, the public integration approach better combats the destructive myths about care that pervade American culture. As 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. It is this strand that both Case and Franke tap into when they talk about the pressures of repronormativity, and that gives their critique such traction.⁹⁹ In this narrative, children (in contrast to their complete disappearance in the autonomy narrative) are 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 adequately fulfill their roles as mothers. Mothers who fail to give their children virtually unlimited care and attention are regarded as selfish, and their children doomed to a life of failure.¹⁰⁰

96. See CRITTENDEN, *supra* note 1, at 96 (showing that female law school graduates who took short leaves for childbirth and worked less than one year part time over a fifteen year period, the rest of which they worked full time, had average earnings “not 10 percent lower, or even 20 percent lower than the men’s, but almost 40 percent lower”).

97. See CRITTENDEN, *supra* note 1.

98. See Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1883 (2000); see also Becker, *supra* note 66, at 1505-11.

99. See Case, *supra* note 7; Franke, *supra* note 7; see also SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 97 (1996) (pointing out the contradictions within an ideology that urges mothers to give unselfishly to their children while it valorizes the ideal of individuals pursuing personal profit).

100. See, e.g., 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) (arguing that two-parent couples in which both parents work are selfish 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); 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, and linking the problems of today’s children with the absence of mothers). Judith Warner’s recent book, *Perfect Madness*, critiques the cost to women of an intensive mothering model and interprets it as women’s individualized responses to the lack of institutional supports for a public integration model. See WARNER, *supra* note 1.

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 of thought. 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 notion 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.¹⁰¹ Indeed, the view that work and caretaking are mutually exclusive is largely restricted by race and class: historically, minority and working-class women have not had the luxury of believing they could not combine raising children with paid work.¹⁰² The public integration model dispels the view of mutual exclusivity by asserting that mothering and breadwinning roles can coexist, thereby allowing mothers to assume places in the public realm.

Third, the public integration approach ensures that children's needs are met but not fetishized. This 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 time in group care arrangements, but significantly less time than if they had parents working full-time in 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.¹⁰³ Children who regularly spend time in group care arrangements

101. See Baker, *supra* note 80, at 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 still not be able to compete with those that do not caretake . . . [W]hen 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.

Id. (citations omitted).

102. For example, in the years between 1961 and 1965, 65.7% of white women quit their jobs upon the birth of a child, compared to 39% of black women. See CYNTHIA M. TAEUBER, *STATISTICAL HANDBOOK ON WOMEN IN AMERICA* 110 (2d ed. 1996).

103. See BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 144 (2d ed. 1984) (advocating childrearing as a community activity, in contrast to the "idea that parents, especially mothers, should be the only child-rearers"); see also Claudia Card, *Caring and Evil*, 5 *HYPATIA* 321 (Spring 1990) (noting that community childrearing may take place more commonly than is acknowledged and has yet to receive fair consideration as an alternative).

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 to which they have grown accustomed.¹⁰⁴

III

FOUNDATIONS AND LIMITS OF PUBLIC SUPPORT FOR CAREWORK

I have just argued that public support, as Fineman contends, must be deemed an integral part of any solution to the issue of carework that takes the goal of substantive sex equality seriously. To say that achieving substantive sex equality requires state support of carework, however, begins rather than ends the conversation to justify adopting such measures in the United States. As Fineman points out, the American commitment to sex equality is generally conceived to guarantee only procedural fairness—“access and opportunity” to compete—rather than equality of outcome.¹⁰⁵ Furthermore, calls for public support of caretaking have been stymied by the view that it is the job of families, rather than the state, to deal with dependency, as well as by the view that citizens’ choices to have children absolves the state of any responsibility to support caretaking. Fineman seeks to undercut both these views by reframing the debate about public support on the inevitability of dependency. This inevitability, she argues, “is the conceptual foundation on which can be built a claim to societal resources on the part of the caretakers of inevitable dependents, in order to facilitate their care.”¹⁰⁶

In this section, I take a closer look at how Fineman grounds her argument in favor of state support for carework. I agree wholeheartedly with her basic claim that the state has a responsibility to support caregiving. In my view, however, Fineman weakens her case by conceiving this public responsibility as stemming directly from the inevitability of dependency and, alternatively, as a debt that results from the expected contribution of children to society. I suggest instead that public support is better justified based on the state’s responsibilities to protect the vulnerable and to ensure development of its citizens’ capacities. Grounding the justification for public support in these ways, I contend, has the added benefit of clarifying the limits of the state’s responsibility for dependency. This alternative formulation therefore answers critics of state support for caretaking, who argue

104. See Baker, *supra* note 80, at 1518 (discussing studies that show that children reared in community caretaking institutions are less demanding of parents, have strong moral development, and are better able to navigate new environments than those reared solely by parents); see also Gary Rivlin, *Facing the World With Egos Exposed*, N.Y. TIMES, June 3, 2004, at G1.

105. FINEMAN, *supra* note 5, at 10.

106. *Id.* at 38.

that caretaking proponents seek a virtually limitless redistribution of societal resources to parents and other caregivers.¹⁰⁷

A. Foundations of Public Support

1. Inevitable Dependency and Public Debt for Caregiving

Fineman argues for public support of caretaking based on the universality of "inevitable dependency," the dependency experienced by all children, many elderly, and those with illness or disability.¹⁰⁸ For Fineman, "the fact that biological dependency is a universal and inevitable phase in the human condition" makes this form of dependency "of necessity a collective or societal concern."¹⁰⁹ 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.¹¹⁰

She contends that current societal structures, by confining the responsibility to support caretaking to families, "create a collective or social debt and that each and every member of society is obligated by this debt."¹¹¹ Society's delegation of dependency work to families, Fineman argues, does not mean that families do not need to be compensated for their services, any more than its delegation of security matters to the armed forces means that soldiers do not need to be compensated.¹¹²

Fineman perhaps jumps too quickly, however, from the inevitability of dependency to the assertion that society has the responsibility to support it. The first is a statement of ontological fact; the second is a normative

107. See, e.g., Case, *supra* note 7.

[I]f the premise of some parents' advocates really is one of strong equality of result (i.e., that parents should, in effect, be held harmless in time and money from their decision to have children; that their decision to have children should be made as close as possible to costless), then we really are talking, if not quite about a zero sum game, then at least about a massive redistribution from nonparents to parents I am honestly unsure how most proponents of parental benefits, particularly for middle- and upper-income parents, conceptualize this. How much time is enough time? How much money is enough money?

Id. at 1771-72.

108. FINEMAN, *supra* note 5, at 38. Fineman distinguishes "inevitable" dependency from other forms of dependency, "[s]uch as economic, psychological, or emotional dependency." *Id.* She argues that these other forms of dependency "may appropriately be treated differently than forms that are considered inevitable or developmental" since they are not universal. *Id.* at 35, 37-38.

109. *Id.* at 48.

110. *Id.* at 48.

111. *Id.* at 47.

112. *Id.* at 49.

conclusion. And while the statement of ontological fact certainly has a bearing on the normative conclusion, without more, this statement cannot prove such a conclusion.¹¹³ If scientists discovered that all adult women had a biological drive 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 should support dependency.

Fineman's contention that the state gets some benefit from parents' caretaking efforts does not quite fit this bill. There are a number of instances in which the actions of private citizens produce benefits for society without accruing any legal or moral right to 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. Even if the music were to draw people into the surrounding cafes and give the area an economic boon, we would likely believe the same. Some people might be moved to drop a tip into the violinist's hat, but that does not create a debt by the town at large or, for that matter, the café owners. In the absence of an agreement between the violinist and others, more is required to support compensation on both legal and ethical grounds beyond the simple fact that one party received a benefit from the actions of another.¹¹⁴ Similar analogies come 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.¹¹⁵

What is more, the fact that society could not continue to exist without caretaking is also 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 the civic associations that generate

113. See also Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in *LIBERALISM AND THE MORAL LIFE* 159, 160 (Nancy Rosenblum ed., 1989).

114. For example, a court might find a contract implied-in-fact if the recipient of a valuable service had an opportunity to reject the service but chose not to with knowledge or with reason to know that the other party expected payment. Failure to reject the service in this circumstance operates as 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 is 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 in the case of a surgeon performing emergency services on an unconscious patient—a situation which is hardly analogous to the case at hand. See JOHN EDWARD MURRAY, *MURRAY ON CONTRACTS* § 51(B) (4th ed. 2001).

115. See, e.g., Elaine Marie Tomko, Annotation, *Landlord's Liability to Third Party for Repairs Authorized by Tenant*, 46 A.L.R. 1 (2004).

social capital, or goodwill among individuals.¹¹⁶ This makes it good policy for the state to encourage such associations. It might even be argued, somewhat loosely, that the state has the responsibility to encourage such associations. Yet this certainly does not give those who participate in such associations, including the now paradigmatic bowling leagues,¹¹⁷ 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.¹¹⁸

Fineman's framing of the state's responsibility in terms of debt raises several conceptual problems. First, it suggests that caretakers deserve subsidies because of the net benefits that children will bring to society in the future. 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. Reaching this conclusion requires assessing whether children's future contributions will exceed their costs to society. In this regard, opponents of state support might argue that the psychological costs from overcrowding outweigh the benefits of children. In addition, treating parenting as creating a debt owed by the state to parents raises the question of whether there should be a corresponding offset for the unique benefits parents receive from having children—benefits so substantial that huge numbers of children are deliberately conceived even without such subsidies.

116. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2001).

117. In his much discussed work, *Bowling Alone*, Robert Putnam argues that citizens' declining participation in civic organizations has a deleterious effect on the well-being of democracy because citizens develop fewer social ties with citizens outside their immediate circle of friends, as well as develop weaker civic norms and harbor less trust. Putnam cites as an example the decreased participation in town bowling leagues, in which citizens once met and mixed with others. See *id.*

118. FINEMAN, *supra* note 5, at xvii.

Further, grounding public support on the assertion that children are a net future asset to society produces some intuitively unpalatable results. For example, it 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.¹¹⁹ Fineman's argument also leads to other counterintuitive results: to the extent we are comfortable giving public support to parents of healthy children because they will likely grow up to be productive citizens, would we not support parents whose children had disorders such as cystic fibrosis that made it unlikely that they would reach adulthood to repay taxpayers' investment? The reason most of us would be horrified by this suggestion is that we intuitively conceive of public responsibility for caretaking as springing from something other than the likelihood of society receiving a future economic return.¹²⁰

In the end, what the caretaking-as-social-debt analysis demonstrates is the inability of economic terms like "debt" to take into account the array of considerations relevant to complex issues of public policy, including the extent to which the state should assume responsibility for caretaking. Indeed, it is ironic that Fineman, of all people, would hitch her argument for public support of caretaking to this economic rationale, given her insightful critique of economic justifications elsewhere in the book.¹²¹

2. *The State's Responsibility to Protect the Vulnerable*

In my view, however, Fineman's insight about the inevitability of dependency and the need for caretaking supports a stronger rationale for public support than the one she presents. Few would disagree that the state has some responsibility to protect and defend its most vulnerable citizens—children, the elderly, and other dependents—when they cannot protect

119. Case, *supra* note 1.

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.

Id. at 1775; see also Franke, *supra* note 7, at 192-95.

120. See also Eva Feder Kittay, *A Feminist Public Ethic of Care Meets Family Policy*, 111 *ETHICS* 523, 540 (2001) (criticizing an attempt 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").

121. See, e.g., FINEMAN *supra* note 5, at 267-71.

themselves.¹²² For example, most of us would agree that the state would have some obligation to protect an orphaned child who was starving in the streets. By the same token, most of us would agree that the state would have the responsibility to remove a child from her home if it learned that she was being seriously abused by her parents.

What is controversial is not *the fact* of the state's responsibility to children and others who are inevitably dependent, but, rather 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 I just gave are uncontroversial is because in the first example no family exists, and in the second example the family has clearly already failed. Opponents of state support for dependency therefore do not generally 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."¹²³

The view that the state should step in only after parents have tried and failed, however, rests on too simplistic a view of the state's relationship to families. As feminists, including Fineman herself have pointed out, not only is the very determination of whether a group of people constitutes a family determined by state action,¹²⁴ the ways in which families function

122. Even Case, who opposes aid for caretaking, exhibits a grudging support for aiding children directly. Case, *supra* note 1, at 1785. Cf. ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 197 (1985) (grounding duties in the need to protect those vulnerable to our acts).

123. William A. Galston, *Keynote Address, Public Morality and Public Policy: The Case of Children and Family Policy*, 36 SANTA CLARA L. REV. 313 (1996); see also Case, *supra* note 1 ("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.").

124. See, e.g., Martha Fineman, *Privacy and The Family: Panel III What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207-09 (1999). 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.

Martha Nussbaum, *The Future of Feminist Liberalism, in THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY* 186, 199 (Eva Feder Kittay & Ellen K. Feder eds., 2002).

are also deeply and inextricably intertwined with government policy.¹²⁵ Equal employment legislation affected women's movement into the labor market, which in turn influenced the availability of childcare within families.¹²⁶ This same legislation probably also contributed to the increase in divorce, as greater numbers of women in unhappy marriages developed the financial wherewithal to divorce their husbands.¹²⁷ By the same token, the relaxation of divorce laws affected whether and which families stayed together.¹²⁸ Laws governing the availability of health insurance for employees' family members influence not only who works in a family, but what kind of health care children and other family members receive. Further, U.S. welfare policy was, as Alice Kessler-Harris demonstrated, constructed deliberately on a model that pitted work and family in mortal conflict.¹²⁹ The modern administrative state built on this foundation has no neutral position into which it can retreat to wait while families exhaust their responsibility to care for dependents before the state acts.

It makes far more sense to abandon the fallacy that the state both can and should wait for the family to act, and instead recognize that, insofar as the state has a responsibility to foster the well-being of its vulnerable citizens, that responsibility must be deemed to exist *simultaneously* with families' responsibility to do the same. And fostering their well-being, as Fineman clearly shows, requires that these citizens receive care. This need not mean that the state's responsibilities in this regard are identical to families' responsibilities. Rather, consistent with the view that the state should expect citizens to perform responsibilities they can best perform for themselves, the state should expect families to bear responsibility for the day-to-day care of (or arranging for the care of) children and other dependents. Meanwhile, the state should bear the responsibility for structuring institutions in ways that help families to meet their caretaking responsibilities. In other words, the state should assume the responsibility to ensure that the

125. See, e.g., Martha Minow, *All in the Family and In All Families: Membership, Loving, and Owning*, in *SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE* (David M. Estlund & Martha C. Nussbaum eds., 1997); Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 *BYU L. REV.* 497, 500-02 (1993) (discussing the fiction of "laissez-faire" family policies and the reality of intensive family intervention in contemporary America).

126. See IRA ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 46-51 (1991) (discussing how women's influx into the workplace created childcare issues at home); Morley Gunderson, *Male-Female Wage Differentials and Policy Responses*, 27 *J. ECON. LIT.* 46 (1989) (concluding that antidiscrimination laws had a positive, albeit modest, effect on women's entry into the labor force).

127. See, e.g., Paula Mergenhausen De Witt, *Breaking Up is Hard to Do*, *AM. DEMOGRAPHICS*, V. 14, No. 10, Oct. 1992, at 53.

128. See, e.g., Margaret F. Brinig & F. H. Buckley, *No Fault Laws and At-Fault People*, 18 *INT'L REV. L. & ECON.* 325 (1998).

129. ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 10 (2001).

“rules of the game” facilitate caretaking.¹³⁰ 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 completely clear boundaries can be drawn between them. It does, however, assume certain spheres of authority that will distinguish one from the other.

The state’s responsibility to protect the well-being of dependents has a special corollary when it comes to children: an intrinsic part of ensuring their well-being involves ensuring that they have adequate conditions to develop their basic capabilities.¹³¹ Indeed, supporting development of their capabilities is not only a fundamental responsibility of the state, but is also central to the polity’s own self-interest. In John Stuart Mills’s 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.”¹³² Moreover, as Linda McClain points out, developing the capacity for self-government in children requires ensuring them adequate care.¹³³

The division of responsibility that I propose posits what might be called both “strong families” and a “strong state.” This division expects that people should seek to meet the dependency needs of their family members, and therefore requires families to take on the difficult task of caring for dependents. Yet it also maintains that such caretaking requires supportive institutional structures, and that it is the state’s responsibility to secure such structures. In contrast to the reigning autonomy myth, this approach 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.¹³⁴

130. 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 guarantee that they will be protected by rules and policies that facilitate their performance.” FINEMAN, *supra* note 5, at 49.

131. I am grateful to both Linda McClain and Mary Shanley for pointing this out to me. Cf. MCCLAIN, *supra* note 94; MARTHA NUSSBUAM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) (arguing that respect for human dignity requires that states provide conditions enabling citizens to develop a threshold level of central human capabilities).

132. JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 5, 91 (John Gray ed., Oxford 1991).

133. See MCCLAIN, *supra* note 94 (tying care to liberal and civic republican ideals regarding capacity, social reproduction, self-government, and independence); see also Linda McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1682-95 (2001).

134. As Eva Feder Kittay writes:

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

B. *Parameters of the Duty of Public Support*

In the preceding section, I contended that the state's responsibility to protect the vulnerable should compel it to structure societal institutions in ways that support caretaking. In this section, I explore the limits of this duty. How far does the government's obligation to support caretaking extend? How should we weigh this goal against other state objectives? Of course, the answer to these questions cannot be determined through a kind of moral geometry, in which a single, correct answer is 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 a way that allows family members, through exercising diligent but not herculean efforts, to 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 protect vulnerable dependents. Translated into concrete government policies, this means that the welfare system should ensure those at the bottom of the economic ladder who both work and have children 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, as well as enough time generally so that parents do not become so pressed for time or frazzled by time pressures that it interferes with adequate caretaking. The same holds true for direct financial support: those at the bottom of the income pyramid who have dependents should receive enough financial subsidization to provide these dependents with decent environments that promote the development of their basic capabilities. Similarly, the state should guarantee job leaves for periods of dependency when caregivers cannot realistically be expected to work—for example, when children are too ill to go to school, or when elderly parents require emergency care. These employment leaves should include wage replacement for those who could not otherwise afford to take them.¹³⁵ 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. Accommodating the workplace to caretaking demands, moreover, should be performed in a manner that supports sex equality. Here, although I question the way

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, *supra* note 70, at 535.

135. See GORNICK & MEYERS, *supra* note 1, at 117 (“[O]ne of the most important weaknesses of the family leave system in the United States is the lack of any paid leave for a substantial share of the workforce.”).

Fineman grounds her claim that the state should alter labor market practices,¹³⁶ most of her policy proposals, including flexible workweeks, seem on target.¹³⁷

The duties that I have just described are the minimum 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 must be balanced against other goals that the state might use its resources to promote. 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 does require 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 soundness of the future citizens are weighty reasons for the state to support carework as against other uses of its resources. Thus, supporting carework is good policy for the state, even if it is not the debt owed to caretakers that Fineman believes it to be.

Under these principles, the state could legitimately support caretaking over other pursuits that do not implicate its 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 have children.¹³⁸ In contrast to its obligation to protect dependents, society has no basic obligation to support the purchase of a Porsche. 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.

In assessing whether to subsidize over and above the threshold level, a liberal polity can find a common-sense median between, on the one hand, Case's stop-loss approach in which the state should only invest enough resources to keep the next generation out of prison,¹³⁹ and, on the other hand, an approach in which the state devotes virtually unlimited funding to children and other dependents. John Stuart Mill articulates one such sensible midpoint. He argues 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;

136. See FINEMAN, *supra* note 5, at 31-54.

137. *Id.* at 201.

138. Fineman refers to the argument that the state has no more duty to support a citizen's decision to have a child than it does to subsidize any other preference of an individual citizen, including the preference to own an expensive car, as the "Porsche preference" argument. *See id.* at 42-43.

139. See Case, *supra* note 7, at 1785.

but it is perfectly well able to make the rising generation, as a whole, as good as, and a little better than, itself.¹⁴⁰

Seeking to do a little better for the next generation 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 should also pursue.

Finally, toward 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 levels of caretaking at the expense of 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,¹⁴¹ and for the caregiver who may never get to pursue other courses in life. Although family members may still decide to give this higher level of care to their dependents, they should do so without state subsidization. As Fineman's book amply shows, however, current welfare policy is so far from this end of the spectrum that this limit is purely a matter of theory.

C. *The Choice to Have Children and the Limits of State Responsibility*

Up to this point I have been addressing what Fineman refers to as "inevitable dependency" in all its forms—that is, the biological dependency experienced by children, the aged, and those who are ill or disabled. There is one issue that concerns only the dependency of children that deserves special attention, however: 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 choose to have children in the first place.¹⁴² As Mary Anne Case phrases the objection, those who choose to forego children, including Case herself, have decided to invest their time, energy, and money in other projects. Why, then, should they be required to subsidize and accommodate other people's decisions to

140. MILL, *supra* note 132, at 91.

141. See Baker, *supra* note 80, at 1518; Rivlin, *supra* note 104, at G1.

142. See Case, *supra* note 1, at 1782-83; see also Amy L. Wax, *Against Neutrality*, BOSTON REV., Apr./May 2004, available at <http://bostonreview.net/BR29.2/wax.html>.

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.

have children when their non-childrearing projects are not similarly subsidized?¹⁴³

Fineman thoughtfully responds to these questions when she argues 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.”¹⁴⁴ 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.”¹⁴⁵ Fineman’s argument underscores the point that the state’s failure to support childrearing on the ground of parental choice would consign women to inequality. Fineman also forces us to recognize the limits of consent in this context. She points 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.¹⁴⁶

However, Fineman moves to murkier territory when she argues that the concept of choice needs qualification when discussing women’s decision to bear children because they make this decision under considerable social pressure.¹⁴⁷ While Fineman is certainly correct about the existence of this social pressure, this does not mean that parents should not be held responsible for their decision, even if it was a constrained decision. In liberal politics that envision citizens as responsible decision makers, we hold people accountable for many decisions that they make under equally constrained circumstances.¹⁴⁸ 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 decide to have sex and unintentionally have children, responsible as a result of social pressures varies too far from the notion that liberal citizens should be treated as responsible agents.¹⁴⁹

143. Mary Anne Case discusses an incident in law school that occurred when she attended a panel on varieties of legal practice. When she asked the panelists what types of practice would leave her enough time to pursue other interests, the female lawyer on the panel answered that she needn’t worry—her employers would accommodate childrearing. Case, however, had been referring to her interest in studying the history of feminism. She writes: “When I tried to make this clear, sympathy for my position and predictions of my ability to accommodate it within law practice quickly dissipated.” Case, *supra* note 1, at 1767.

144. FINEMAN, *supra* note 5, at 42.

145. *Id.*

146. *Id.*; see also WILLIAMS, *supra* note 1.

147. See FINEMAN, *supra* note 5, at 41 (“Women who choose not to have children are seen as having made a nontraditional, even unnatural choice.”).

148. I owe this point to a conversation with Mary Anne Case of the University of Chicago Law School in 2003. See also Tracy Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997); Wax, *supra* note 142.

149. See Wax, *supra* note 142.

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 the social pressure, as anti-repronormativity theorists advocate.¹⁵⁰ 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 should accept the responsibility for their children. Yet, the consequences that follow from this should result from caretaking within institutions supportive of that activity, of the type Fineman proposes, rather than institutions that refuse to accommodate caretaking and that impose heavy limitations on caretakers' life prospects. This view provides a rationale for state support of childrearing that still sees citizens as strong, responsible decision makers, although it also recognizes the limits on their autonomy. Moreover, this view does not deny that most parents made a choice—albeit a constrained choice—to which they must live up to the extent of their ability. However, the consequences of this choice should be limited by the state's own obligations to dependents.

CONCLUSION

The Autonomy Myth is a rich and innovative work that will not only reshape the contours of the work-and-family debate, but should also have a powerful effect on a broad spectrum of legal and public policy conversations. As I describe in this Essay, Fineman's path-breaking reconceptualization of dependency raises a series of important questions in the work-and-family arena. These include what kind of state support best lends itself to satisfying dependency needs while still allowing the state to achieve other important goals, and whether and where the state should set the limits on its support for carework. Beyond the themes explored in this essay, Fineman's compelling account of dependency and the importance of carework, her critique of current U.S. public policy, and her arguments for a state that actively seeks to meet the needs of citizens, have enormous implications for a broad array of legal doctrines and policy conversations. Debate on such wide-ranging issues as the future of marriage, welfare reform, the tax system, social security, and labor market regulations are all advanced significantly by this book.

150. See *supra* notes 56-61 and accompanying text.

