The Child Care Crisis and the Work-Family Conflict: A Policy Rationale for Federal Legislation

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This Article examines the severe lack of affordable quality child care in the United States today, concluding that the best solution to the child care crisis is increased federal funding and regulation of child care. The author provides a comprehensive analysis of the numerous harms created by the lack of affordable quality child care to illustrate both the breadth and the depth of the problem. The author also examines how the current child care crisis remains, in large part, because of Americans' complex attitudes towards child care, dependency, the role of mothers, and the role of government in assisting families. This Article further examines the way norms theory applies to the issue of child care. Specifically, this Article argues that increased government funding and regulation of child care would have an expressive function and would indicate societal approval of child care. Such government support would, in turn, affect American's attitudes towards child care. The author concludes that additional federal funding and regulation is necessary – both because of the direct benefits of increased funding and regulation of childcare and also because of the expressive effect of such legislation – and that this funding should occur primarily through a voucher program.

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I. INTRODUCTION

A significant problem affecting American families with young children is the lack of affordable quality child care. One of the most noted demographic changes of the last few decades has been the huge increase in maternal employment. As a result, the majority of families with young children no longer have a full-time, stay-at-home mother available to care for the children. Unfortunately, the availability of child care has not kept pace with the entrance of mothers into the paid workforce, and there is

currently a severe shortage of child care. Even when parents are able to secure a spot for their children at a child care center, the cost is often prohibitive, with child care being the fourth largest expense in the average family budget after food, housing and taxes. Americans understand the severity of the problem, and the majority of Americans support increased funding for child care. Yet despite this public support, increased government funding and more meaningful regulation of child care has not been seriously considered at the federal level since 1990. Instead, child care has essentially been privatized, and parents are left to piece together whatever child care arrangements they can on their own. Parents have the primary burden of not only paying for child care, but also determining whether the child care they choose meets minimal levels of health and safety, and whether it is run in a developmentally appropriate manner. While children’s education, health care, equipment, and toys are regulated by the government to ensure minimal levels of safety, the same monitoring does not exist for child care. Among economically advanced nations, the United States is unique in its failure to provide meaningful regulation of, and support for, child care. In much of Europe, Canada, Israel and Japan, child care is viewed as a collective responsibility that receives significant government support.

This Article examines the severe lack of affordable quality child care in the United States today, concluding that the best solution to the child care crisis is increased federal funding and regulation of child care. Unlike other academic commentators who have focused on a specific aspect of the harm caused by the child care crisis, this Article will provide a comprehensive analysis of the numerous harms in an effort to illustrate both the breadth and the depth of the problem. This Article will also examine how the current child care crisis remains, in large part, because of Americans’ complex attitudes towards child care, dependency, the role of mothers, and the role of government in assisting families. This Article further differs

5. See Philips & Adams, supra note 1, at 43-44.
from recent articles on the child care crisis because it examines the way norms theory applies to the issue of child care. Specifically, this Article argues that increased government funding and regulation of child care would have an expressive function and would indicate societal approval of child care. Such government support would in turn, affect American’s attitudes towards child care.

Part II of this Article discusses the demographic changes that have made child care an important issue in this country. Part III discusses the various forms of child care available to American families, focusing primarily on group child care. Part IV examines the federal government’s historical and current role in funding and regulating child care. Part V discusses how the harms caused by the lack of affordable quality child care are spread broadly throughout society, negatively impacting parents, children, employers, the economy, and exacerbating racial inequality. Part VI of this Article explains how American attitudes towards child care have permitted this harmful situation to remain unchanged, and it addresses the importance of norms theory in improving social policy. Part VII responds to some of the economic arguments that have been made against increased government funding of child care. Part VIII explains why additional federal funding and regulation is necessary, concluding that this funding should occur primarily through a voucher program.

II. DEMOGRAPHIC CHANGES AND THE NEED FOR CHILD CARE

The lack of affordable quality child care for children who have not entered school full-time is a significant problem in this country. One of the most noted demographic changes of the last few decades has been the dramatic increase in maternal employment. Between 1969 and 1998, participation in the labor force by married women nearly doubled, and participation by married women with children under age three nearly tripled. By 2002, 72% of mothers with children age one and older were in the paid labor force, and 55% of mothers with children under the age of


8. While this Article deals specifically with child care for children who are not yet old enough to be in public school full-time, the author recognizes that lack of child care for school-aged children is a serious problem that the government must also address. However, the discussion of child care for school-aged children is outside the scope of this Article.


one were in the paid labor force. Because the numbers of fathers caring for children has not increased proportionately, a large number of very young children are being cared for by someone other than a parent.

Regardless of one's personal opinion as to whether women with small children should be working outside the house for pay, the fact remains that the majority of women do and will continue to do so. Many women must work to support their families because of decreases in real wages, increases in single-parent families and unprecedented divorce rates. Many women—like many men—also get a sense of accomplishment and personal satisfaction from their employment. Studies indicate that women who work for pay have better physical and mental health. Paid employment is also crucial for mothers, since the only way for women to achieve true economic equality is by increasing their access to private wealth, and this usually occurs through meaningful employment opportunities. The majority of working women are not going to become full-time, stay-at-home mothers, and the need for quality child care for our nation’s young children is not going to disappear.

The author recognizes that many working parents—both mothers and fathers—want to have more time to spend with their children, and the author believes that the workplace must be made more accommodating to working parents. The Family and Medical Leave Act (FMLA), which provides twelve weeks of unpaid leave for a limited number of “covered employees” for the birth or adoption of a child, or for a family member’s

archives/fertility/001491.html. In recent years, the labor force participation rate of mothers with children age one and under has decreased slightly. From 1998 to 2002, this rate declined from 59% to 55%. Id.

12. Id.


17. Joan Williams, From Difference to Dominance to Domesticy: Care as Work, Gender as Tradition, 76 CHI-KENT L. REV. 1441, 1457 (2001) [hereinafter Williams, Difference]. Professor Williams explains that changing women’s access to public wealth would not lead to economic equality and that Sweden, with its outstanding social subsidies for care work, has an economy more segregated by sex than that of the United States: “To achieve economic equality for women, we need to change not only women’s relationship to public wealth, we need to change their relationship to private wealth as well. After all, most of the world’s assets are held by private parties—men—who gain it through employment and through the family economy.” Id.


serious medical illness, is inadequate and should be strengthened.\textsuperscript{20} However, parental accommodation in the workplace is only one step in solving the work-family conflict, and affordable quality child care is essential for those times when parents are at work.

\section*{III. Who is Caring for Young Children in the United States Today?}

This Part will discuss the two general types of child care that are available to American families. Parents may choose to send their children to group child care, which includes both formal center-based care and family day care. Alternatively, parents may have a child care provider—such as a baby-sitter, nanny, \textit{au pair} or other family member—care for the child in his or her own home. The primary focus of this Article will be on group child care, which is the most common and cost-effective form of child care for young children.

\subsection*{A. Group Child Care}

The two primary forms of group child care are formal center-based care and family-based care, which is usually provided in the caregiver's home. Approximately 40\% of all infants and toddlers whose mothers work are cared for in some form of group setting.\textsuperscript{21} The percentage of children in group child care is even greater when preschoolers are included. Formal group child care is the most common form of child care for children ages five and under.\textsuperscript{22}

Women earning higher incomes are more likely to rely on organized child care, while women earning lower incomes are more likely to rely on care from a relative.\textsuperscript{23} Quality group child care can have a positive effect on young children,\textsuperscript{24} and has been associated with advanced cognitive and linguistic skills.\textsuperscript{25} Children who attend excellent early child care programs

\footnotesize{\textsuperscript{21} Phillips & Adams, supra note 1, at 41.
\footnotesize{\textsuperscript{22} Suzanee W. Helburn & Barbara R. Bergmann, \textit{America's Child Care Problem: The Way Out} at 90 (2002).
\footnotesize{\textsuperscript{24} Helburn & Bergmann, supra note 22, at 58, 77-81. See also Phillips & Adams, supra note 1, at 41.
\footnotesize{\textsuperscript{25} Jay Belsky, \textit{Early Child Care and Early Child Development: Major Findings of the NICDH Study of Early Child Care}, 3 Eur. J. Developmental Psychol. 95 (2006) [hereinafter Belsky, \textit{Early Child Care}] (noting, however, that children who spent long hours in center-based care had some elevated, but non-clinical, levels of problem behavior). See also Helburn & Bergmann, supra note}
have improved test scores, are less likely to need special education services or to be held back in school, and are more likely to graduate from high school. Benefits associated with formal child care are most pronounced for children from disadvantaged backgrounds.

The most comprehensive study of child care conducted to date has determined that children benefit most from child care when caregivers are warm, responsive and sensitive, and "surround them with rich language." This type of quality care is most likely to occur when centers maintain a low teacher-to-child ratio (defined as the number of children for whom any teacher is responsible), and when the caregivers are more highly educated and have received specialized training.

The quality of child care centers in the United States varies drastically, ranging from dangerous to outstanding. Unfortunately, many centers in the United States are not very good. Differing state child care regulations, including regulations mandating the maximum permissible teacher-to-child ratios, make it difficult to ensure the quality of child care nationally. The often lax enforcement of state regulations compounds this problem. Furthermore, low salaries for day care providers lead to high rates of teacher turnover, and discourage talented potential employees from entering the profession. Because child care is a labor-intensive profession, salaries for teachers remain low, despite the significant expense

22, at 58. Some child development experts opine that children whose mothers go back to work during their first year of life do suffer some limited negative consequences. See generally Jeanne Brooks-Gunn, Wen-Jui Han & Jane Waldfogel, Maternal Employment and Child Cognitive Outcomes in the First Three Years of Life: The NICHD Study of Early Child Care, 73 CHILD DEVELOPMENT 1052 (2002).

26. HEYMANN, supra note 3, at 181-82.
27. GORNICK & MEYERS, supra note 6, at 254.
28. This comprehensive longitudinal study is examining the relationship between child care and child development and is being carried out by the National Institute of Child Health and Human Development (NICHD) of the U.S. Department of Health and Human Services. Updates of the study are available at http://public.rti.org/secc.
30. Id.
31. Id. at 41.
33. Phillips & Adams, supra note 1, at 43.
34. As one commentator points out, "although consumer protection agencies monitor food, toys, medication and equipment to ensure a baseline of safety for children, no equivalent safety threshold is promised to all infants and toddlers in child care—despite their considerable vulnerability." Id. at 43-44.
36. HELBURN & BERGMANN, supra note 22, at 191.
of child care for parents. Furthermore, many teachers lack adequate training and support.

Another significant problem is that there are not enough day care centers—particularly those providing care for infants and toddlers—to meet parent demand. This leads to long waiting lists. At some centers, it is not unusual to have waiting lists of over one year. It is also often particularly difficult to find evening and weekend care, as well as care for special needs children and sick children.

Child care at formal day care centers—especially for infants and toddlers, where the teacher-to-child ratios are usually lower—is often prohibitively expensive. After food, housing and taxes, child care is the fourth largest expense in the average family budget. The average price charged annually for caring for a four-year-old at a child care center is more expensive than the average annual tuition charged at state universities in all fifty states. While parents have about eighteen years to save for university tuition, they may need to start paying for infant care within a matter of weeks or months after their child is born. Furthermore, while adult students can take out student loans to pay for college, infants, toddlers and preschoolers do not have the option of borrowing money to finance their own child care. Rather, parents are responsible for paying for the entire cost.

A generally less expensive form of group-based child care is home-based day care or family day care. This type of child care usually involves small, mixed-age groups, and is run by a provider out of his or her home. Many of the problems involving cost, quality and availability of formal day care centers also exist with home-based child care. Additionally, health and

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37. In 2004, the mean hourly wage for all US child care workers was $8.37 and the median hourly wage was $7.90. The mean hourly wage ranged from $6.81 in Louisiana and West Virginia to $10.45 in Massachusetts. Service station attendants, bicycle repairmen and locker room attendants all have higher mean hourly wages than child care providers. See Center for the Childcare Workforce: A Project of the American Federation of Teachers Educational Foundation, 2004 Current Data on the Salaries and Benefits of the US Early Childhood Educational Worker, at 10, available at www.ccw.org/pubs/2004compendium.pdf.


39. Id.

40. HEYMANN, supra note 3, at 60-65, 67-72.

41. EYER, supra note 2, at 177-88. See also HEYMANN, supra note 3, at 50-51. The average price of child care varies widely by geographic area. See generally National Association of Child Care Resource and Referral Agencies, Breaking the Piggy Bank: Parents and the High Price of Child Care, available at www.naccria.org/docs/policy/breaking_the_piggy_bank.pdf. In Massachusetts, the average annual cost of infant care is $13,480 and the average annual cost of preschool care is $9,628. Id. at 16. In Massachusetts, the cost of infant care is 57% of a median single-parent family income and 15% of a median two-parent married family income. Id. at 18.

42. EYER, supra note 2, at 177.

43. HEYMANN, supra note 3, at 50.

44. EYER, supra note 2, at 187.
safety regulations of home-based care may be more lenient or even nonexistent, and regulations that do exist may be weakened by lax enforcement. Furthermore, family-based care providers tend to be paid lower wages than caregivers in formal centers, and as a result, family-based care has extremely high turnover rates.

B. Other Child Care Options

There are various other child care options available, but there are problems associated with these options as well. Some children are cared for by nannies, baby-sitters or au pairs in their homes. This is an expensive form of child care because the parents essentially become employers. While it is possible to find experienced, well-trained nannies and babysitters who are either American citizens or have valid work visas, these nannies tend to command the highest salaries based on their qualifications. Much of the demand for nannies and babysitters has been met by unregulated agencies and women looking for jobs for which no training or education is needed. Due to the difficulty many families have in finding good nannies, parents may be willing to hire or pay a nanny illegally. Parents may be concerned about the quality of care their children receive if they are left home alone with an unsupervised babysitter.

Some parents have relatives care for their young children while they are at work. However, this is not a realistic option for most families since few parents have extended family members who are available to help with child care on a daily basis. The quality of care provided by relatives differs drastically depending on the circumstances of the particular family, and may range from superb to neglectful.

Parents in two-parent households may work alternating shifts so that there is always a parent at home to care for the children. However, this often leads to exhaustion, particularly for the parent who works the night shift and then cares for the children during the day. It also limits the amount of time that the parents spend with each other and the amount of

45. Phillips & Adams, supra note 1, at 45; see also Mona Harrington, Care and Equality: Inventing a New Family Politics 35 (1999).
46. Eyer, supra note 2, at 187.
47. Harrington, supra note 45, at 31.
48. Id. at 21.
49. Eyer, supra note 2, at 176.
51. See Douglas & Michaels, supra note 3, at 262 (discussing how the media has encouraged parental, and particularly maternal, fear of abusive babysitters).
52. Heymann, supra note 3, at 93-98.
53. Harrington, supra note 45, at 35; Lamer et al., supra note 38, at 13.
54. Harrington, supra note 45, at 35.
time that the entire family spends together, which may cause considerable stress. Divorce rates are higher than average in families where the parents work alternating shifts.

IV.

GOVERNMENT SUPPORT FOR CHILD CARE

This Part examines the government’s limited role in funding and regulating child care in the United States. This Part first briefly describes the federal government’s historical involvement in funding and regulating child care in the United States. It then focuses on the current situation in the United States.

A. A Brief History of Federal Government Support for Child Care in the United States

To better understand government’s role in regulating and funding child care today, it is important to look at government’s historical involvement with child care in the United States. The first day care centers in the United States were established in the mid-nineteenth century to provide child care for the poor, and they operated as charities. The vast majority of women with children did not work, and if a mother did work, it was viewed as a sign of severe hardship. These centers provided low-quality care, and the stigma attached to using these charities was so great that mothers would only use them as a last resort.

During the New Deal era, the federal government became somewhat more involved in assisting mothers who did not have men supporting them, but this assistance was primarily through cash grants given to mothers to enable them to stay home and care for their children rather than through the establishment of child care centers. For example, during this era, widows became entitled to social security benefits, and divorced or never-married mothers were entitled to much less generous assistance through AFDC, which later became known as “welfare.” During the New Deal era, the federal government also sponsored child care through the Works Progress Association’s Emergency Nursery Schools Program.

55. GORNICK & MEYERS, supra note 6, at 52.
57. GORNICK & MEYERS, supra note 6, at 26.
58. HELBURN & BERGMANN, supra note 22, at 6-7.
59. Id.
60. Id.
One notable but temporary exception to government involvement with child care occurred during World War II, when millions of women went to work in factories to help with the war effort, and the federal government funded child care centers. Americans generally supported government funding for these centers because the working mothers were viewed as selfless and patriotic. At the end of the war, the government ended its support of these child care centers, and women were urged to return to their supposedly rightful place in the home.

In the post-war period, there was minimal child care support for working families. In 1954, a small federal tax break for working parents was enacted. During the 1960s, there was an increase in the number of mothers who worked for pay outside the house. As result of this increase in paid employment, support for the AFDC program—which had permitted single mothers to care for their children at home—decreased.

During the Nixon presidency, the federal government came very close to passing comprehensive child care legislation. In 1971, Congress passed the Comprehensive Child Development Act, which would have provided significant federal funding for early child care programs, but this Act was vetoed by President Nixon. The Senate failed to override the veto by only seven votes.

During the 1980s, there were significant cuts in federal funding for child care for low-income women. During the same time period, women's rights groups and child care experts continued to push for a comprehensive system of child care to address the needs of the increasing numbers of women entering the workforce. However, this era also saw national hysteria regarding alleged abuse in day care centers and preschools, and there were a number of sensational cases that received significant media attention.

62. HELBURN & BERGMANN, supra note 22, at 7. See also Sylvester, supra note 3, at 56.
63. Sylvester, supra note 3, at 56; but see HOLCOMB, supra note 35, at 248 (suggesting that even during WWII, when women's work was needed to help with the war effort, Americans were ambivalent about mothers with young children working).
64. DOUGLAS & MICHAELS, supra note 3, at 236.
66. HELBURN & BERGMANN, supra note 22, at 7.
67. Id. at 8; Michel, supra note 61, at 126-34.
70. DOUGLAS & MICHAELS, supra note 3, at 245.
71. HELBURN & BERGMANN, supra note 22, at 8.
72. DOUGLAS & MICHAELS, supra note 3, at 249.
73. The risk of a child being abused at a day care center has been greatly exaggerated by the media. See generally DOUGLAS & MICHAELS, supra note 3, at 95-103.
The 1990 Congressional session was the last time that comprehensive child care legislation was seriously considered at the federal level outside of the context of welfare reform.\footnote{74} The Child Care and Development Block Grant was eventually enacted in 1990, but its scope had been significantly reduced.\footnote{75}

When federal welfare law was reformed in 1996, the government increased the amount of funding that could be used for child care to enable welfare recipients to go to work.\footnote{76} However, this funding was still inadequate to help many former welfare recipients,\footnote{77} and the lack of affordable quality child care continues to be a major impediment affecting the ability of poor women to work for pay.\footnote{78}

**B. Current Government Support for Child Care in the United States**

Child care in the United States today is primarily privatized, with government providing minimal funding and oversight.\footnote{79} The three primary ways that the government helps to finance child care expenditures are through early education programs, subsidies, and tax policies.\footnote{80} The largest early education program is the federal Head Start Program, which provides funding to state and local providers for early educational opportunities for disadvantaged children.\footnote{81} Unfortunately, the majority of children who qualify for Head Start programs are unable to attend due to space limitations.\footnote{82} Public kindergartens are available in all states, and some states also provide pre-kindergarten programs. However, Head Start, kindergarten and pre-kindergarten programs provide limited child care assistance to working parents since they are often only half-day programs.\footnote{83}

The second way in which both federal and state government finance child care is by providing low-income families with subsidies for child care expenditures.\footnote{84} Since welfare was reformed in 1996, these subsidies have

\footnote{74. Dixon, supra note 4, at 562-63. See also infra notes 254-57.}
\footnote{75. See Helburn & Bergmann, supra note 22, at 8. See also Douglas & Michaels, supra note 3, at 254-55. According to Professors Douglas and Michaels, this legislation "did almost nothing to expand the amount of quality day care." Id. at 255. See also infra notes 87-88 and accompanying text.}
\footnote{76. Under welfare reform, Temporary Aid to Needy Families (TANF) replaced the former program of Aid to Families with Dependent Children (AFDC). For a discussion of government investments in child care since PRWORA, see Jane Waldfogel et al., Welfare Reform and Lone Mothers' Employment in the U.S., in Lone Parents, Employment and Social Policy: Cross National Comparisons (Jane Millar & Karen Rowlingson eds., 2001).}
\footnote{77. Douglas & Michaels, supra note 3, at 254-55.}
\footnote{78. See infra notes 89-91 and accompanying text.}
\footnote{79. Gornick & Meyers, supra note 6, at 185.}
\footnote{80. Id.}
\footnote{81. Id. at 188.}
\footnote{82. Heymann, supra note 3, at 183. See also Dixon, supra note 4, at 589.}
\footnote{83. Helburn & Bergmann, supra note 22, at 7.}
\footnote{84. Gornick & Meyers, supra note 6, at 188-89.}
increased, and the federal government now provides three types of block grants to the states that can be used to assist low-income families with child care costs. The largest source of grant funding is the Child Care and Development Fund (CCDF), which permits states to assist families whose incomes are up to 85% of the state median income. However, CCDF funding is insufficient to help many eligible families. The second major source of funding is the Temporary Assistance to Needy Families (TANF), which replaced the Aid to Families with Dependent Children Program (AFDC) during welfare reform in 1996. The funding provided under TANF has been insufficient to help many former welfare recipients, and the lack of affordable quality child care is a major impediment affecting the ability of poor women to work for pay. The smallest source of federal funding is the Social Services Block Grant (SSBG) The states have significant discretion in determining whether to allocate any SSBG funds for child care services or whether to use these funds for other services for the poor.

The third way that government helps to finance child care is through tax policies, including tax deductions and tax credits. The federal Child and Dependent Care Tax Credit permits parents to deduct a portion of their child care expenses. More than half of the states include additional child care tax benefits in their tax codes. However, the federal Child and Dependent Care Tax Credit is capped and therefore of limited assistance to

86. GORNICK & MEYERS, supra note 6, at 189.
87. Id. See generally HELBURN & BERGMANN, supra note 22, at 23, 142-43.
90. DOUGLAS & MICHAELS, supra note 3, at 254-55.
93. I.R.C. § 21(b)(1)(A)-(C); see generally HELBURN & BERGMANN, supra note 22, at 22-23.
94. See generally GORNICK & MEYERS, supra note 6, at 189.
families whose costs may exceed the cap. Furthermore, it does not help poor families who do not have any income tax liability. It also fails to eliminate large “up-front” costs that parents have when paying for child care. Parents who work for participating employers may choose to use the federal Dependent Care Assistance Plans (DCAP) to deduct child care expenses instead of the Dependent Care Tax Credit. However, DCAP is capped at $5,000 per family (not per child) per year and therefore provides limited assistance to working families whose child care costs may be much greater.

Governmental oversight of child care occurs primarily through state and local licensing requirements and regulations rather than through federal regulation. Regulations regarding health and safety, staffing, and teaching requirements vary greatly from state to state. In almost one-third of states, the standards are low enough to be considered dangerous by child care experts. Furthermore, there are states that exempt certain child care facilities from various regulations. Most states exempt small, family-based child care providers, and some states also exempt child care centers in religious institutions. As mentioned in Part III.A, there is often lax enforcement of child care regulations. In addition to state regulations, there are also voluntary accreditation systems for child care, the largest of which is the National Association for the Education of Young Children (NAEYC). While NAEYC accredited centers were found to be of higher quality overall than non-accredited centers, many accredited centers fell below the “good quality” range.

V. THE NUMEROUS HARMS CAUSED BY THE CHILD CARE CRISIS

This Part will examine the numerous harms caused by lack of affordable quality child care, and will also discuss the long-term negative
consequences caused by these harms. Some academic commentators have focused on a particular aspect of the harm caused by the child care crisis; for example, various scholars have looked at how the child care crisis negatively impacts women,\textsuperscript{107} the economy,\textsuperscript{108} or former welfare recipients.\textsuperscript{109} Others have described how lack of government support for child care leads to the unjust privatization of dependency.\textsuperscript{110} This Part attempts to provide a comprehensive view of the numerous harms caused by the child care crisis to illustrate the breadth—as well as depth—of the problem. Clearly, the lack of affordable quality child care has negative consequences for the individual families that need such care. However, the harm caused by the child care crisis negatively impacts not only parents and children, but also employers and society as a whole, and exacerbates racial inequality.

\textbf{A. Harm to Women}

While lack of affordable quality child care is a significant problem for both men and women with child care responsibilities, it is particularly problematic for mothers, since empirical evidence reveals that mothers continue to be much more likely than fathers to have primary responsibility for raising children.\textsuperscript{111} The need for affordable quality child care is an issue for the majority of working women because almost 90\% of working women do become mothers.\textsuperscript{112} Women who do not become mothers would also benefit from affordable quality child care because all women are harmed by the image of mothers as unreliable employees who need to miss work to care for their children.\textsuperscript{113} This stereotype is particularly problematic for younger women, who employers assume will eventually become mothers.\textsuperscript{114}

Motherhood—and the caregiving responsibilities associated with motherhood—have a strong negative impact on a woman's income.\textsuperscript{115}

\textsuperscript{107} See generally Dixon, supra note 4.


\textsuperscript{109} See generally Harper, supra note 91.


\textsuperscript{111} See GORNICK & MEYERS, supra note 6, at 34; Lester, supra note 20, at 20-33.


\textsuperscript{113} Dixon, supra note 4, at 574.

\textsuperscript{114} Id.

\textsuperscript{115} WILLIAMS, \textit{Unbending Gender}, supra note 6, at 2. See also Fineman, \textit{Foundational Myths}, supra note 110; GORNICK & MEYERS, supra note 6, at 45-48; HEYMANN, supra note 3, at 147-49.
Many mothers are forced to give up both educational and employment opportunities because of caregiving responsibilities coupled with inadequate child care. Without affordable child care, many mothers with young children are unable to work for pay outside the house. While the pay differential between men and women has decreased, the salary gap for mothers has increased. Studies indicate that this pay gap is strongly associated with differing family responsibilities and cannot be explained by differences in education, experience or hours worked. When women leave the workforce to care for young children, they incur penalties in their employment opportunities that last significantly beyond the early child-rearing years. The reduction in earnings associated with motherhood has been called the “mommy tax,” and has led some researchers to conclude that caregiving responsibilities, more than traditional sex discrimination, leads to high rates of poverty among women.

This author recognizes that affordable quality child care will not fully eliminate the “mommy tax.” Unlike other legal commentators, the author also does not believe it is feasible to establish a system of conveniently located day care centers that are open 24 hours a day and 365 days a year. However, the availability of reliable affordable child care could decrease the “mommy tax” for a majority of working mothers by increasing mothers’ ability to participate in the paid workforce.

Those who oppose government support for day care have argued that children are harmed when their mothers work, and government should therefore not support day care to help working mothers. The problem with this line of reasoning is that it focuses on the wrong issue since regardless of one’s personal opinion as to whether women with small children should work outside the home for pay, the fact remains that the majority of these women do work outside the home and will continue to do so. The relevant issue therefore is not whether mothers of young children

116. Dixon, supra note 4, at 573. Lack of affordable child care is a particularly acute problem for single mothers. For a discussion of the importance of day care as a means of promoting gender equality, see id. at 572-79, 632-36.
117. GORNICK & MEYERS, supra note 6, at 185.
118. When adjustments for education are taken into consideration, the gender-based earnings gap between mothers and fathers is larger than the earnings gap between blacks and whites. HEYMANN, supra note 3, at 148.
119. O'Connor-Felman, supra note 32, at 1296.
120. GORNICK & MEYERS, supra note 6, at 45-46.
121. Id. at 47.
122. See Dixon, supra note 4, at 652-59.
124. See supra Part II.
should work, but rather the type of care that young children will get when their mothers are at work.

B. Harm to Fathers

While mothers usually have primary caregiving responsibility for children, lack of affordable quality child care also affects fathers who are involved with raising their children. The expense of child care is a large part of many family budgets and affects many fathers as well as mothers. The cost of child care can be especially daunting for single fathers. When mothers leave the paid workforce as a result of inadequate child care, fathers may also suffer economically. Furthermore, fathers may need to increase their work hours to make more money if the mothers of their children leave the workforce, meaning they have less time to spend with their children.\textsuperscript{125} While it is predominantly women who “choose” to leave the workforce when they are unable to find adequate child care, there are also fathers who leave the workforce and become stay-at-home dads because of a lack of available child care.

C. Harm to Children

Young children are the individuals who are immediately affected when their parents are unable to find affordable quality child care. First, children in day care that is rated as only “minimally adequate” may lack developmentally-appropriate activities and be bored or unhappy.\textsuperscript{126} In extreme situations, children may even be placed in physical danger.\textsuperscript{127} Legal commentators who have addressed the needs of working families have argued that American society fails to adequately focus on social indicators—particularly the well-being and happiness of children—as a measure of national well-being.\textsuperscript{128} Second, while high-quality day care can enhance a child’s social and intellectual development, low-quality day care can be developmentally detrimental,\textsuperscript{129} and many centers in the United States are low-quality.\textsuperscript{130}

Furthermore, young children may also suffer when a lack of affordable child care results in his or her mother “choosing” to leave the workforce. Since a child’s financial security is often connected with the financial situation of his or her mother, children may end up suffering economically

\begin{footnotesize}
\begin{enumerate}
\item[125.] Nantell, \textit{supra} note 92, at 896.
\item[126.] HELBURN & BERGMANN, \textit{supra} note 22, at 77.
\item[127.] See supra note 73.
\item[128.] See O’Connor-Felman, \textit{supra} note 32, at 1312-17.
\item[129.] See HELBURN & BERGMANN, \textit{supra} note 22, at 77.
\item[130.] See EYER, \textit{supra} note 2, at 179; O’Connor-Felman, \textit{supra} note 32, at 1307 (noting “approximately fifty percent of childcare is of poor quality”).
\end{enumerate}
\end{footnotesize}
when their mothers leave the paid workforce.\textsuperscript{131} This is a particularly significant problem for the many children being raised in households headed by women.\textsuperscript{132} Because of a divorce rate of approximately 50% and a high percentage of out-of-wedlock births, approximately one-third of all children under age eighteen are being raised in a single-parent household, with the majority of these households headed by women.\textsuperscript{133} Children in two-parent households also suffer economically when a parent leaves the workplace, since the decrease in real wages over the past few decades makes paid employment of both spouses an economic necessity in many two-parent households.\textsuperscript{134}

\textbf{D. Harm to the Economy and Society}

In recent years there has been a growing focus by economists\textsuperscript{135} and legal scholars,\textsuperscript{136} as well as in popular literature,\textsuperscript{137} on the importance of human capital and the connection between early child care and human capital development.\textsuperscript{138} Human capital—which includes human knowledge, skills, and capabilities—is one of the most important factors in a nation’s economic success, and while natural resources are mostly fixed, human capital is not. Unfortunately, the United States is lagging behind. The skills of younger American workers are not at the same level as that of workers in other advanced nations, and there is concern that American children will be unable to compete successfully as adults.\textsuperscript{139}

Human capital development starts at birth, and the care that very young children receive sets the foundation for and greatly affects the skills that individuals have when they reach adulthood.\textsuperscript{140} Parents—and particularly mothers—currently do much of the work involving human capital

\begin{itemize}
  \item[\textsuperscript{131}] Fineman, Foundational Myths, supra note 110, at 20.
  \item[\textsuperscript{132}] The cost of child care often falls disproportionately on women, and there are a large number of single mothers who are solely financially responsible for their children. Dixon, supra note 4, at 652.
  \item[\textsuperscript{133}] Kessler, supra note 10, at 383. The poverty rate of female-headed households is higher than that of two-parent households. Id. at 384.
  \item[\textsuperscript{134}] Id. at 384.
  \item[\textsuperscript{135}] See generally Paula England & Nancy Folbre, Who Should Pay for the Kids?, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194 (1999); Warner et al., supra note 108.
  \item[\textsuperscript{136}] See generally Mary Becker, Caring for Children and Caretakers, 76 CHI.-KENT L. REV. 1495 (2001) (discussing the importance of caregiving); Fineman, Foundational Myths, supra note 110; Fineman, Contract and Care, supra note 110; O’Connor-Felman, supra note 32, at 1304-17.
  \item[\textsuperscript{137}] CRITTENDEN, supra note 50, at 71-78; HARRINGTON, supra note 45.
  \item[\textsuperscript{138}] Some commentators opine that child care expenditures should not be justified based on human capital development. As Helburn and Bergmann explain, “European critics of U.S. child care public policy have commented on our need to justify public expenditures on child care on pragmatic, utilitarian grounds – that better child care will have economic payoff. Americans, they say, are obsessed by economic results and evidently don’t feel compelled to pay more for child rearing unless there is proof that the children will become productive adults.” HELBURN & BERGMANN, supra note 22, at 85.
  \item[\textsuperscript{139}] O’Connor-Felman, supra note 32, at 1259.
  \item[\textsuperscript{140}] Id. at 1304-1306.
\end{itemize}
development. However, as explained in Part II, 72% of mothers with children ages one and older are in the paid labor force, and 55% of mothers with children under the age of one are in the paid labor force.\textsuperscript{141} Therefore, many young children are at times cared for by someone other than their mother.

As previously explained in Part III.A, while high-quality day care can enhance a child's social and intellectual development, low-quality day care can be developmentally detrimental.\textsuperscript{142} This affects the economic future of the country. Not surprisingly, money spent on early child care is money well invested, since quality early child care produces long-lasting results in a cost-effective manner. One well-known study found that society receives a seven dollar return for every dollar that it invests in child care and education.\textsuperscript{143}

Because society as a whole benefits economically when children receive good early child care, the burden of child care should not fall on parents alone. The fact that parents have primary responsibility for paying for child care is particularly unfair in today's economy.\textsuperscript{144} A century ago, parents bore much of the cost of raising children but also received a large economic benefit from their children who worked from a young age to help support the family and also supported their parents in old age. By contrast, children being raised today will support families other than their own through taxes such as Social Security and Medicare.\textsuperscript{145}

Quality affordable child care is also important because society suffers economically when parents are forced out of the workplace as a result of child care issues. For example, taxpayers—including employers—pay increased costs in the form of unemployment compensation and Supplemental Security Income.\textsuperscript{146} In addition, if parents cannot work for pay, they will also cease to pay taxes on their employment income. It should also be noted that an increase in the number of child care centers in the country would create a large number of jobs in the child care industry.\textsuperscript{147}

\textit{E. Harm to Employers}

Employers are harmed when their employees' job performance suffers as a result of their child care obligations. Employees—particularly mothers with young children—may be absent from work or unproductive while at

\textsuperscript{141} See supra notes 11-12 and accompanying text. 
\textsuperscript{142} See supra Part III.A. 
\textsuperscript{143} Warner et al., supra note 108, at 294. 
\textsuperscript{144} Fineman, \textit{Contract and Care}, supra note 110, at 1407. 
\textsuperscript{145} HEYMANN, supra note 3, at 170. See also Becker, supra note 136, at 1532. 
\textsuperscript{147} Dixon, supra note 4, at 644.
work due to child care obligations and concerns. Reliable child care has been shown to increase employee productivity and decrease absenteeism, lateness and employee turnover.\textsuperscript{148}

The benefits of reliable child care to employers are significant enough that some employers provide child care assistance in an effort to attract and retain top employees.\textsuperscript{149} These benefits may include subsidized on-site child care, financial assistance with off-site child care, and referral programs.\textsuperscript{150} One of the factors in determining Working Woman magazines' annual ranking of the best 100 companies for women to work for is whether the company offers any child care benefits.\textsuperscript{151} However, due to the high cost of child care, there are only a small number of employers that currently provide their employees with any child care assistance, and most of these are large companies.\textsuperscript{152} Even employers who organize child care at the worksite usually only subsidize a small portion of the cost of care, and parents are still responsible for most of the cost.\textsuperscript{153}

F. Harm to Children from Disadvantaged Families

Children from poor families—who are more likely to be members of minority groups—suffer the most from a lack of affordable quality child care.\textsuperscript{154} Child care is a huge expense, and lower-income families often do not have the resources to pay for any child care—and certainly not quality child care. Lower-income parents may work in shifts to save on child care costs, and when parents are at home, they may be primarily occupied with activities other than child care.\textsuperscript{155} Lower-income families are also more likely to leave their children with family members or with unregulated family child care providers.\textsuperscript{156} As a result, young children in lower income families are often cared for in a manner that does not focus on developmentally-appropriate activities. Studies indicate that many children in low-income working families do not receive “good” care and some do not even receive care that is “minimally adequate.”\textsuperscript{157}

\textsuperscript{148} Id.

\textsuperscript{149} Jaime Koniak, Note, Should the Street Take Care? The Impact of Corporate-Sponsored Day Care on Business in the New Millennium, 2002 COLUM. BUS. L. REV. 193 (2002) (discussing generally the advantages and disadvantages of employer-sponsored child care); see also Dana E. Friedman, Employer Supports for Parents with Young Children, THE FUTURE OF CHILDREN, Spring/Sumer 2001, at 63.

\textsuperscript{150} Diane C. Yu, The Kids are All Right: Childcare Benefits Are Beneficial to your Firm, LEGAL MGMT., Nov./Dec. 2003, at 62.

\textsuperscript{151} Id.

\textsuperscript{152} See Koniak, supra note 149, at 205.

\textsuperscript{153} HELBURN & BERGMANN, supra note 22, at 40.

\textsuperscript{154} See HEYMANN, supra note 3, at 125-31.

\textsuperscript{155} HELBURN & BERGMANN, supra note 22, at 121.

\textsuperscript{156} Id.

\textsuperscript{157} Id. at 122. A small percentage of poor children receive funding to attend subsidized centers and preschools and receive excellent care. Id.
This is particularly problematic given the long term developmental benefits associated with good early child care and the long term harm caused when such care is lacking. When poor children start kindergarten at an academic disadvantage, the impact is often permanent due to the cumulative nature of the American educational system.\textsuperscript{158} Children who start off behind in kindergarten are more likely to be at a disadvantage when applying to college or to jobs.\textsuperscript{159} By contrast, studies have shown that poor children who are placed in developmentally appropriate child care at a young age are more successful both academically and professionally than children who do not receive such care.\textsuperscript{160} These studies highlight the critical importance of providing low-income children with access to quality early child care.

VI.
AMERICANS’ ATTITUDES TOWARDS CHILD CARE

Despite the numerous benefits associated with affordable quality child care, such care remains largely unavailable in the United States today. In recent years, there has been little vocal public demand for government to increase its funding for or improve its regulation of day care.\textsuperscript{161} Despite its potential to benefit the 90% of women who become mothers, many national women’s organizations do not focus on the importance of affordable quality child care.\textsuperscript{162} For example, the National Organization of Women (NOW) does not list child care as one of its six “Top Priority Issues.”\textsuperscript{163} Catalyst, an organization whose mission is to conduct “research on all aspects of women’s career advancement,” focuses primarily on what happens in the workplace and not on the child care necessary for women with young children to succeed while at work.\textsuperscript{164}

This lack of vocal support for affordable quality child care is surprising, since when polled, a majority of Americans recognize the need

\textsuperscript{158} Dixon, supra note 4, at 637.
\textsuperscript{159} Id. at 637-38.
\textsuperscript{160} CRITTENDEN, supra note 50, at 213-15.
\textsuperscript{161} At other times in American history, there has been greater vocal public support for increased government funding of child care. See supra Part IV.A and infra Part VI.B. Federal child care legislation has not been seriously considered outside of the context of welfare reform since 1990. See infra notes 254-57 and accompanying text. There are some organizations that advocate for improved child care such as Zero to Three and the Child Care Law Center (CCLC); see Zero to Three, http://zerotothree.org (last visited July 9, 2007), and CCLC, http://www.childcarelaw.org (last visited July 9, 2007). CCLC is the “only organization in the country devoted exclusively to the complex legal issues that affect child care.” Id.

\textsuperscript{162} There are some national women’s organizations that do advocate for improved child care. For example, the National Women’s Law Center (NWLC) lists “Child Care and Early Education” among its top issues. See http://www.nwlc.org (last visited July 9, 2007).


for child care and specifically state that they do support additional government funding for child care. This lack of public advocacy for improved child care is best explained by Americans' attitudes and beliefs regarding dependency, the role of mothers, and the role of government in assisting families. This Part will focus on how these attitudes and beliefs, as well as some pragmatic considerations, have allowed the current child care crisis to remain in the United States today.

Americans are ambivalent about child care and the role of mothers in caring for children. About two-thirds of Americans believe that mothers should stay at home and care for their children. This belief is held by both men and women, with almost 70% of both genders believing it is best for children if their mothers are at home caring for them. This view has remained relatively constant. This is a striking statistic since the reality is that the majority of women with young children not only work, but also prefer to work, at least part time. When women do work, many are opposed to formal group care and instead choose child care that is as home-like at possible. Despite the fact that the majority of Americans think that mothers of young children should not work, the majority of Americans do support increased funding for child care indicating that they understand that mothers of young children are, in fact, working.

A. Lack of Government Funding and the Expressive Influence of Law

This Part will examine some of the factors that have affected Americans' attitudes towards child care and will also discuss the importance of legislation as a means of changing these attitudes. In doing so, this Part will discuss how norms theory applies to the issue of child care. This Part will specifically examine how laws, and particularly legislation, can have an expressive function that affects norms and therefore human behavior independently of any legal sanctions. This Part will first provide a brief overview of norms theory and will then examine the applicability of norms theory to comprehensive child care legislation.

165. See DOUGLAS & MICHAELS, supra note 3, at 243; HEYMANN, supra note 3, at 164; Sylvester, supra note 3, at 54.
166. Sylvester, supra note 3, at 55-56.
167. Id. at 55.
168. See id. at 56; WILLIAMS, UNBENDING GENDER, supra note 6, at 49; see also supra Part II.
169. Sylvester, supra note 3, at 56.
170. HOLCOMB, supra note 35, at 205-11.
171. WILLIAMS, UNBENDING GENDER, supra note 6, at 50.
172. See DOUGLAS & MICHAELS, supra note 3, at 243; HEYMANN, supra note 3, at 164; Sylvester, supra note 3, at 54.
1. An Overview of Norms Theory

Since the early 1990s, law and economics scholarship has included the study of norms theory, which focuses on social norms—as opposed to legal sanctions—as an important factor influencing human behavior. First generation norm theory focused on norms as distinct from the law. Harvard Law School Professor Lawrence Lessig has explained that the hypothesis of first generation theorists was that "norms constrained independently of law; that they were not simply dictates of law, and that they were not open to the simple control or direction of law. Norms were relatively fixed, essentially unmovable, unyielding to the influence of law—they were in this sense nonplastic."

Second-generation theorists, on the other hand, recognized that laws themselves can affect social norms. These theorists have studied how laws and norms influence each other. Professor Sunstein has explained that "[m]any laws have an expressive function . . . . Most simply, they are designed to change existing norms and to influence human behavior in that fashion." Part of the function of laws is to express "social values" and to encourage norms to move in a particular direction.

Professor Sunstein does not simply opine that laws can affect social norms, but further argues that government action should be used to affect social norms. According to Sunstein, while norms greatly influence human behavior, individuals have little control over social norms, including norms that "are obstacles to human well-being." Norm management can be the least costly and most effective way to influence human behavior to achieve positive goals. He explains that "changes in norms might be the best way to improve social well-being; and government deserves to have, and in many cases inevitably does have, a large role in norm management."

Professor Lessig has also focused on the expressive effect of law and how laws regulate indirectly by changing social norms. He explains that

176. See ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991). Professor Ellickson was one of the first legal scholars to focus on the importance of social norms.
177. See Lessig, supra note 175, at 673.
179. Sunstein, supra note 178, at 964.
180. Id. at 953.
181. Id. at 910. Professor Sunstein recognizes that there are times where private groups can "test or even change norms," but that there are also times where "private groups are unable to produce desired results on their own." Id. at 947.
182. Id. at 908.
183. Id. at 907.
184. See Lessig, supra note 175, at 671.
“norms might constrain, but law can affect norms.” According to Professor Lessig, the question is never “‘law or something else.’ The question is always to what extent is a particular constraint a function of the law, and more importantly, to what extent can the law effectively change that constraint.”

Professor McAdams has developed an attitudinal theory of expressive law that specifically explains how legislation affects social norms and indirectly regulates human behavior. There are three components to McAdams’ theory. First, an individual’s behavior is motivated in part by “what actions she believes others will approve or disapprove.” Second, people often have “imperfect information” about others’ views. Third, “[l]aw changes behavior by signaling the underlying attitudes of a community or society. Because people are motivated to gain approval and avoid disapproval, the information signaled by legislation and other law affects their behavior.”

According to Professor McAdams, since legislation is positively correlated with public attitudes, changes in legislation “influence behavior by causing people to update their prior beliefs about what others believe and disbelieve.” In support of this thesis, he describes an experiment in which subjects were more likely to support a position after they had been told that legislation had been passed in support of that position.

Second generation norms theorists have also recognized that the “choices” individuals make are a result of existing social norms. Professor Sunstein explains that “social norms play a part in determining choices; that people’s choices are a function of their particular social role; and that the social or expressive meanings of acts is an ingredient of choice.” He provides the example of a poor woman in India who may “choose” to remain illiterate because of the social sanctions she would face if she learned how to read. However, this does not mean that she “prefers the status quo,” and does not aspire to improve herself and not be dependent on others. Her choice not to learn to read is a “function of social norms.”

Professor Sunstein specifically recognizes that social norms regarding

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185. “Law not only regulates behavior directly, but law also regulates behavior indirectly, by regulating … other modalities of regulation directly.” Id. at 666.
186. See id. at 672.
188. Id.
189. Id.
190. Id. at 340.
191. Id. at 368.
192. Sunstein, supra note 178, at 911.
193. Id. at 937.
194. Id.
appropriate gender roles affect the choices that individuals make. Professor Geisinger has also recognized that laws can change the social meaning of an act, which can bring about "a change in preference." 

2. Federal Child Care Legislation and Norms Theory

Norms theory illustrates that increased government funding and regulation for child care may be important not only for what it does, but also for what it says about the importance of child care. Lack of government funding for child care affects Americans' attitudes towards child care because quality child care is very expensive and difficult to maintain without government funding. Due to problems associated with the high costs of providing quality day care—such as cost constraints that make it difficult for centers to maintain low teacher-to-child ratios, and to pay teachers decent salaries—there are many low-quality day care centers. As explained in Part III.A, there is also a shortage of centers, and many centers are prohibitively expensive. As a result, mothers often cannot find affordable quality child care and are left with the "choice" of sending their children to poorly run centers or staying home to care for their children. Given these "choices," many women may "choose" to stay home. The choices made by mothers would be vastly improved if affordable, quality child care was an option.

However, lack of government funding and support for child care also independently affects Americans' attitudes towards day care by sending the message to the American public that group child care is not something that the government values or supports. Among economically-advanced nations, the United States is unique in its failure to provide meaningful support for child care. In much of Europe, Canada, Israel and Japan, child care is viewed as a collective responsibility and receives significant government support. France and Sweden in particular are often singled out as countries that have excellent systems of child care. In France and Belgium it is estimated that approximately 95% of preschool aged children attend government-funded schools. In the Scandinavian

195. Id. at 963-64.
197. As explained in Part V.A, some mothers have no choice but to enter the paid workforce and send their children to poor quality child care. The "choice" to stay home is primarily available to higher income mothers.
198. See Dixon, supra note 4, at 58; see also GORNICK & MEYERS, supra note 6, at 197-236 (comparing the situation of families in the United States to the situation of families in Europe); Waldfogel, International Policies, supra note 6 (comparing international policies towards child care and parental leave); WILLIAMS, UNBENDING GENDER, supra note 6, at 49.
199. See EYER, supra note 2, at 203-27.
200. Becker, supra note 136, at 1501; WILLIAMS, UNBENDING GENDER, supra note 6, at 49-50.
201. EYER, supra note 2, at 205.
202. WILLIAMS, UNBENDING GENDER, supra note 6, at 49.
countries, between two-thirds and 90% of three- to five-year-olds are in public care. Additionally, significantly more child care support is available in these countries to families with children under age three than in the United States.

When governments support child care, it is viewed as an investment in the next generation, and signals societal approval of child care. Government support not only improves the quality of child care, but the support itself also affects attitudes towards child care. It is noteworthy that the widespread negative stigma attached to day care in the United States does not exist in these countries. To the contrary, in countries with government support of child care, parents often feel that their children benefit socially, educationally and developmentally from being cared for in a group setting.

By contrast, as Professor Joan Williams has explained, “in the United States, day care is seen as an expression of the market.” While Americans view the market as a good way to buy consumer goods, many feel uncomfortable with the concept of buying child care in the market, and therefore have a visceral dislike for day care. Professor Williams has further explained that this distaste for the market as a means of providing child care is rooted in an ideology of domesticity. This ideology suggests that while men are out working and making money, women should remain at home to provide a warm, nurturing and selfless environment to counter the self-interested forces of the market. According to Professor Williams, domesticity “raises the frightening sphere of children relegated to a callous and self-seeking market realm.” Furthermore, if child care is viewed as little more than an expression of the market, there is no sense of a collective societal obligation to help parents who voluntarily choose to buy this particular consumer good.

Lack of government support for day care has also permitted another, somewhat contradictory stigma to remain: that day care is a service for the poor. As discussed in Part IV.A, the first day care centers in the United States were established in the mid-nineteenth century for poor children. Child care has been unable to lose this stigma, and as a result, many wealthy families prefer having a nanny in the house and not sending their children to group care. As explained above, in countries where there is

203. GORNICK & MEYERS, supra note 6, at 199.
204. Id. at 199-206.
205. WILLIAMS, UNBENDING GENDER, supra note 6, at 49.
207. WILLIAMS, UNBENDING GENDER, supra note 6, at 49.
208. Id. at 31.
210. See id. at 1 (arguing “day care emerged out of pity in nineteenth century Philadelphia”).
significant government support for child care, early child care centers are not viewed as a service for the poor, and many middle class mothers fight to get their children into the good child care centers.\textsuperscript{211}

Norms theory indicates that increased government funding and regulation of child care would have an expressive function independent of the fact that such funding would also increase the quality of daycare. Comprehensive federal legislation could shift societal norms by indicating public support for child care, and recognition that high quality daycare benefits children. As explained in Part II, the majority of American mothers with young children do work and therefore need some type of child care. Unfortunately, working mothers today may feel that they are criticized by society for performing as “ideal workers” and for being too “career-oriented.”\textsuperscript{212} A shift in societal norms would relieve the emotional burden mothers may feel from working and using child care—particularly group daycare—and indicate societal support for the paid work that these mothers do. Comprehensive child care legislation could both change the idea that child care should not be “bought” in the market and also erase daycare’s stigma as a service for the poor. In this way, government regulation could be used to shift norms to achieve socially desirable goals.

Norms theory also indicates that social norms effect people’s choices by changing the social meaning attached to a given choice.\textsuperscript{213} Despite the documented benefits of quality group child care, in the United States today there is a stigma attached to group child care and the mothers who use it. As a result, mothers may “choose” to leave the workforce,\textsuperscript{214} in part, because of the stigma attached to sending their children to daycare and the societal pressure they feel to be ideal stay-at-home mothers.\textsuperscript{215} If the norms regarding child care changed, more mothers might “choose” to remain in the workforce and use some form of child care, particularly daycare. Furthermore, mothers that did choose to be stay-at-home mothers would be less likely to base their “choice” on societal pressure, and might also feel more comfortable using daycare to get a break from the demands of motherhood.

American attitudes towards child care are also affected by attitudes towards care and dependency in general. In recent years, a number of legal scholars have focused on issues involving the importance of care work,
including child care. Professor Fineman, who has published on issues involving dependency and care, has explained that historically in the United States it is the private sphere—specifically the family—that has been deemed responsible for issues of dependency. Within the family, the caregiving role has been assigned primarily to women. According to Professor Fineman, this is fundamentally unjust and society has an obligation to assist caregivers and dependents. She explains:

A sense of social justice demands a broader sense of obligation. Without aggregate caregiving, there could be no society, so we might say that it is caregiving labor that produces and reproduces society. Caregiving labor provides the citizens, the workers, the voters, the consumers, the students, and others who populate society and its institutions.

Despite the fact that Americans have historically viewed care and dependency as a private family responsibility, there have been circumstances when the government has supported child care. For example, during World War II, when millions of women went to work in factories to help with the war effort, the federal government funded child care centers. The American public supported this funding for early child care based on the view that working mothers were making a patriotic sacrifice for their country. Patriotism also played a role in government support for child care for members of the military. In 1989, the Military Child Care Act was passed in response to poor quality child care at military installations, and today the military runs one of the largest and most successful child care programs of any employer in the United States.

Americans’ attitudes towards dependency and child care were an issue during the welfare reform debate. When federal welfare law was reformed in 1996, additional government funding was mandated for child care in order to enable welfare recipients to go to work. One commentator explained that government funding for child care had broad appeal under these circumstances due to Americans’ strong beliefs in “the value of work and self-sufficiency.” However, the funding was inadequate to help many former welfare recipients, and lack of affordable quality child care continues to be a major impediment affecting the ability of poor women to work for pay.

216. See generally Becker, supra note 136; Fineman, Foundational Myths, supra note 110; Fineman, Contract and Care, supra note 110; HARRINGTON, supra note 45; Schultz, supra note 16, at 1899-1907; Williams, Difference, supra note 17.

217. See supra note 110.

218. Fineman, Foundational Myths, supra note 110, at 19.

219. HELBURN & BERGMANN, supra note 22, at 7; Sylvester, supra note 3, at 56.

220. Sylvester, supra note 3, at 56.

221. HELBURN & BERGMANN, supra note 22, at 100.

222. See supra notes 76-78 and 85-91.

223. Sylvester, supra note 3, at 57.

224. See supra notes 90-91 and accompanying text.
Despite American’s historic views on care and dependency, it appears that these views are changing. As Helburn and Bergman explain, child care is now widely viewed as a “merit good” in the United States, which is a good that is important for people to have regardless of their willingness or ability to pay for it.\textsuperscript{225} Polls indicate that Americans believe that children deserve good care and the majority of Americans are willing to help pay for it.\textsuperscript{226}

The expressive effect of child care legislation is therefore important since it would signal to the public that—while American do have some ambivalence towards care and dependency—these attitudes are, in fact, changing.\textsuperscript{227} Legislation in particular has an expressive effect and causes individuals to update their beliefs in accord with what they believe are public attitudes.\textsuperscript{228} However, many Americans may simply be unaware that attitudes on care and dependency are shifting because individuals have imperfect information about the beliefs of others."\textsuperscript{229} Comprehensive child care legislation could serve as a crucial source of information on American attitudes.

The traditional belief that child care is harmful and that mothers should be home caring for their children has also been affected by psychological theories that have originated primarily in the United States.\textsuperscript{230} In particular, attachment theory focuses on the importance of the mother-infant bond and the need for infants to become securely attached to their mothers.\textsuperscript{231} In research that has been subsequently criticized and the results of which have been “hotly debated,”\textsuperscript{232} developmental psychologist Jay Belsky has argued that under certain circumstances, day care can be harmful to infants because babies in day care are at greater risk for insecure attachment to their mothers, which leads to greater problems in childhood.\textsuperscript{233} The media has highlighted Belsky’s negative findings regarding day care, without focusing on his research on the benefits of day care.\textsuperscript{234} Belsky himself has stated that his research was misconstrued and that his concern was not day care \textit{per se}, but rather, poor quality day care.\textsuperscript{235}

\begin{itemize}
\item \textsuperscript{225} Helburn & Bergmann, \textit{supra} note 22, at 166.
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{See supra} notes 166-72 and accompanying text.
\item \textsuperscript{228} \textit{See} McAdams, \textit{An Attitudinal Theory, supra} note 187, at 340.
\item \textsuperscript{229} \textit{Id.}
\item \textsuperscript{230} \textit{See} Holcomb, \textit{supra} note 35, at 204.
\item \textsuperscript{231} \textit{See generally} Eyer, \textit{supra} note 2, at 69-105 (discussing the flaws with attachment theory).
\item \textsuperscript{232} Helburn & Bergmann, \textit{supra} note 22, at 58.
\item \textsuperscript{234} Douglas & Michaels, \textit{supra} note 3, at 257-58.
\item \textsuperscript{235} Judith Warner, \textit{Perfect Madness: Motherhood In The Age Of Anxiety at 109} (2005) [hereinafter \textit{Warner, Perfect Madness}].
\end{itemize}
A continuing study conducted by the National Institute of Child Health and Human Development (NICHD) has determined that in most cases, non-maternal child care does not affect mother-child attachment. The study has found that in most cases, preschool children who spent many hours in non-maternal care had no more problems than children cared for by their mothers, and that those children receiving high-quality child care received some benefits that children cared for by their mothers did not receive. The NICHD data did indicate that preschool children who spent more than thirty hours a week in non-maternal care were slightly more likely to be considered aggressive by their teachers. However, when Jay Belsky, who was a member of the NICHD team, presented the data, the media ignored most of his presentation, and instead chose to focus primarily on the arguably greater incidence of aggressive behavior.

Professor Belsky's most recent publications in 2006 and 2007 - which were based on the NICDH data - continue to explain that there are both benefits, and mild risks associated with young children attending center based care. The media, in reporting on these publications has persisted in focusing on any potential problems with daycare and has failed to highlight the potential benefits of daycare. As one commentator has explained, "Day care is supposed to be bad for kids, so it is. The headlines don't change."

Studies currently being conducted in the United States continue to illustrate how American researchers are influenced by lack of government support for child care. For example, the long-term NICHD study is examining the effects of non-maternal child care on children, indicating that maternal care is the norm to which other types of child care should be compared.
To the extent that comprehensive child care legislation has an expressive effect on individuals—including researchers and reporters—this could influence how research is conducted in the United States, and how the media presents this research to the public, further influencing public opinion. This is particularly important since the media currently covers the latest child care research extensively.245

B. Political Opposition to Child Care Legislation

Historically, religious conservatives have played an important role in influencing American’s views on child care. In particular, Christian conservatives have opposed government support for early child care based on their belief that children should be cared for at home by their mothers.246 As explained in Part IV.A, in 1971, Congress passed the Comprehensive Child Development Act, which would have provided federal funding for early child care for most American children. Unfortunately, President Nixon vetoed this Act describing it as “truly a long leap into the dark for the United States government and the American people,”247 and “the most radical piece of legislation to emerge from the 92nd Congress.”248 According to Nixon, the legislation would have placed “the vast moral authority of the National Government to the side of communal approaches to childrearing against the family-centered approach.”249 Nixon’s veto was motivated, in part, by a letter writing campaign by evangelicals who opposed mothers working and therefore opposed the bill.250 Nixon was also motivated by fear that he would be challenged in the 1972 Republican primaries by a candidate on the far right.251

During the 1980s, the well-funded religious right responded to the rise of feminism and the increased participation of women in the workforce by endorsing a rhetoric of “family values,” which meant advocating for keeping mothers at home to care for children.252 During the Reagan era, there were significant cuts in federal funding for child care for low-income women.253

245. See Bazelon, supra note 241.

246. See generally CRITTENDEN, supra note 50, at 251; Dixon, supra note 4, at 615-19; DOUGLAS & MICHAELS, supra note 3, at 88, 245-57, 318; HARRINGTON, supra note 45, at 106-109; HELBURN & BERGMANN, supra note 22, at 6; WARNER, supra note 235, at 264.


248. Id.

249. Id.

250. Dixon, supra note 4, at 618 n.259.

251. DOUGLAS & MICHAELS, supra note 3, at 245.

252. Id. at 88.

253. HELBURN & BERGMANN, supra note 22, at 8.
Outside of the context of welfare reform, comprehensive child care legislation was last seriously considered by Congress in 1990.\textsuperscript{254} During the 1990 session, there were a number of failed legislative attempts to pass a comprehensive federal child care bill.\textsuperscript{255} The most significant proposed legislation of this time period was the Act for Better Child Care Services (the ABC Bill),\textsuperscript{256} which failed for a variety of reasons, including the fact that conservatives were concerned with promoting a traditional family where "fathers work and mothers remain at home."\textsuperscript{257}

Christian Conservatives may be less likely to oppose child care legislation today than they have been in the past.\textsuperscript{258} The percentage of working mothers with young children is much greater today than it was when Nixon issued his veto.\textsuperscript{259} It is now clear that the demographic changes discussed in Part II have not been temporary. Many middle class families, of all religious and political backgrounds, are struggling to find affordable quality child care.\textsuperscript{260} A "substantial majority of Republicans, Democrats and Independents" all believe that the government should assist lower and middle income families with child care costs.\textsuperscript{261}

Conservative Christian organizations such as Focus on the Family\textsuperscript{262} now take a more nuanced view of child care. While Focus on the Family believes that it is best for children to be cared for at home by a full-time, stay-at-home mother, it also recognizes that "safe, clean, loving child-care facilities are a necessity in today's culture."\textsuperscript{263}

Some liberals have also opposed government funding for early child care programs when such funding could have been used by religious institutions providing child care.\textsuperscript{264} During consideration of the ABC Bill, the American Civil Liberties Union (ACLU) opposed Republican insistence that religious institutions be eligible to receive government funding for

\textsuperscript{254} Dixon, supra note 4, at 562-63.

\textsuperscript{255} Id. at 588. More than 100 bills involving child care were introduced during the 100th session of Congress. See Barbara Reisman, The Economics of Child Care: Its Importance in Federal Legislation, 26 HARV. J. ON LEGIS. 473 (1989).

\textsuperscript{256} Dixon, supra note 4, at 588.

\textsuperscript{257} Id. at 588, n. 130. For a general discussion of the ABC Bill, see id. at 588, 602-06; DOUGLAS & MICHAELS, supra note 3, at 253-54.

\textsuperscript{258} Some conservatives continue to opine that child care should be unregulated and unsubsidized. See HELBURN & BERGMANN, supra note 22, at 160.

\textsuperscript{259} See supra notes 9-12.

\textsuperscript{260} Dixon, supra note 4, at 626-31.

\textsuperscript{261} HEYMANN, supra note 3, at 164.


\textsuperscript{264} In addition, the "liberal media" has run numerous stories that have exaggerated the dangers of day care. See WARNER, PERFECT MADNESS, supra note 235, at 108.
child care. This was one of the main reasons that the ABC bill failed. Political opposition to government funding for child care at religious institutions should no longer be a major issue, since based on the Supreme Court's 2002 holding in Zelman v. Simmons-Harris, such funding would not violate the Establishment Clause. The Zelman Court determined that a publicly funded school voucher program permitting parents to use voucher money at public, private secular or private sectarian schools—and thus involving both parental choice and indirect government funding—did not violate the Establishment Clause.

Under the Court's reasoning in Zelman, a similar type of voucher program permitting parents to use public funds to pay for child care at sectarian day care centers would likely be constitutional. However, Zelman was a 5-4 decision that offered parents real choice between public and private schools and any reliance on Zelman would be limited to the narrow facts of that case. Additionally, in Zelman, the private schools that accepted funding agreed not to discriminate on the basis of race, religion, or ethnic background, or to "teach hatred of any group on the basis of race, ethnicity, national origin or religion." Religious organizations might oppose this type of provision in the child care context because it would limit day care facilities' hiring and admissions processes, as well as what the centers could teach.

C. The So-Called "Mommy Wars"

Another factor that has kept an important segment of the American public—mothers of young children—from advocating for government support for early child care programs is the so called "mommy wars," which turns stay-at-home mothers and working mothers against each other. The term "mommy wars" is certainly an oversimplification because many mothers do not fit neatly into either the "career woman" or "stay-at-home mother" category, but rather may work part-time (or at least fewer hours than extremely ambitious men and women), and take time off

265. Dixon, supra note 4, at 588. Some Republican Senators also expressed concern that this provision would be unconstitutional. See 135 Cong. Rec. S7152 (daily ed. June 22, 1989) (statement of Senator Arlen Specter (R-PA)).
266. Dixon, supra note 4, at 588.
268. Id. at 662.
269. Organizations that advocate a strict separation of church and state might still oppose indirect government funding of religious child care on religious grounds. See infra notes 333-36 and accompanying text.
270. Zelman, 536 U.S. at 645.
271. See generally DOUGLAS & MICHAEL CRITTENDEN, supra note 235 at 250-55; WARNER, PERFECT MADNESS, supra note 6, at 146-50.
at various points in their careers to care for their children. Nonetheless, many mothers—regardless of where they stand on the working mother/stay-at-home mother continuum—feel that society is critical of the “choices” they have made and therefore become defensive about these choices. Stay-at-home mothers often feel that the important family work they do is not valued by society, and may oppose government support for early child care programs, believing that these programs would not benefit them and would rather further decrease their status as caregivers.

At the same time, working mothers may feel that they are criticized by society for performing as “ideal workers” and for being too “career-oriented,” but are concerned that if they cut back their hours they will not be treated as serious professionals. Working mothers are often caught between two competing and irreconcilable norms—the norm of maternal care and the norm of an “ideal worker.” In response, they may emphasize the importance of mothers having careers in a manner that may offend stay-at-home mothers.

The media has arguably exaggerated the conflict between working and stay-at-home mothers; the very term “mommy wars” places mothers in two warring camps that cannot work together for the benefit of their children. However, there have been times that mothers on various points of the working mother/stay-at-home mother continuum turn against each other instead of jointly working on issues that are extremely important for virtually all mothers, such as the need for affordable, quality child care.

The benefits of improving the quality and decreasing the cost of child care for children who currently attend day care should be clear from the foregoing Parts of this Article. Furthermore, mothers of children who are not currently in day care could also benefit from such improvements. If affordable, quality child care were available, there would be some stay-at-home mothers who would choose to work, at least part-time. Affordable quality child care would also provide a greatly needed break for parents who work alternating shifts because they are unable to afford child care. Furthermore, full-time stay-at-home mothers might also choose to use some child care if quality affordable care was available.

273. DOUGLAS & MICHAELS, supra note 3, at 204; WILLIAMS, UNBENDING GENDER, supra note 6, at 147.

274. See generally WILLIAMS, UNBENDING GENDER, supra note 6, at 146-50 (discussing how domesticity divides women by both devaluing the family work that homemakers do and also being critical of working mothers who perform as “ideal workers”).

275. DOUGLAS & MICHAELS, supra note 3, at 235. The term “mommy wars” was first used in NEWSWEEK in 1990. Id. at 204.

276. For example, the Equal Rights Amendment (ERA) was defeated in part because Phyllis Schlafly convinced homemakers that it would harm their interests as homemakers. As Professor Williams explained, “[T]he ERA was defeated when Schlafly turned it into a war among women over gender roles.” WILLIAMS, UNBENDING GENDER, supra note 6, at 147.

277. For example, many stay-at-home mothers in France use government supported child care. HEYMANN, supra note 3, at 158.
D. Advocacy Constraints at the Federal Level

There are some purely practical reasons why there has not been more public advocacy in support of early child care programs in recent years. The adults that would most directly and immediately benefit from government support for early child care are working parents of young children. However, working parents of young children are a group that has little time to organize and advocate since they both work and care for their children. Parents may be more likely to put their energy into improving K-12 public education, since this will directly affect their children for approximately thirteen years, while early child care programs will only directly affect their children for approximately five years. Parents may also focus more on their children's public education in kindergarten through high school because parents tend to have more free time as their children get older and become more independent.

In addition, parents and other individuals who support early child care programs may become disillusioned when child care legislation fails to pass and they may stop devoting energy to a cause they feel they cannot win. For example, the individuals and organizations that worked for passage of the 1971 Comprehensive Child Development Act were dealt a huge blow when President Nixon vetoed the legislation. This sense of disappointment was repeated when comprehensive child care legislation failed to be enacted in 1990.

Finally, good child care is labor-intensive and therefore expensive to provide. A relatively large amount of government funding would be necessary to meaningfully increase the availability of affordable quality child care. While Americans may in theory support additional government funding for child care, this cost cannot be ignored. However, while the absolute dollar amount may be great, once this cost is put in context, it does not appear to be quite as large. For example, Helburn and Bergman explain that the amount of money the federal government spends annually on direct payments to farmers—a program that provides few benefits or even negative side-effects—would be enough to "fully fund affordable child care of improved quality."
VII.

PROBLEMS WITH MARKET SOLUTIONS TO THE CHILD CARE SHORTAGE

This Part will briefly respond to two economic arguments that have been made opposing government funding and regulation of child care. The first argument is that tax-payers should not be responsible for financing an individual’s private choice to have children.1 According to this line of reasoning, parents choose to have children and therefore should bear the financial responsibility for raising these children. This argument that childrearing is simply a matter of private concern fails for the various reasons discussed in Part V. As Part V.D explained, all of society benefits when children are well-cared for and given a good start in life. Therefore, society as a whole has some obligation to ensure that young children get the care that they need. Furthermore, as discussed in Part V, to the extent that government is concerned with ensuring gender and racial equality and giving all children a fair start in life, affordable quality child care must be a societal concern.

Commentators have further opined that parents not only choose whether and how many children to have but they also control the manner in which these children are raised.2 This argument fails to recognize that government does regulate many aspects of childrearing through child welfare laws. In fact, working parents may find themselves facing legal difficulties if they are forced to leave their children unattended or with inadequate care in order to go to work to support their families.

Second, some critics are opposed to subsidies for and regulation of child care based on their general opposition to government interference with the market.3 This Article does not attempt to provide an in-depth economic justification for government interference with markets, but rather will highlight some of the unique issues affecting the child care market. As explained in Part III, the market is currently failing to provide an adequate level of affordable quality child care. As one commentator opined, “We are the only industrialized country to engage in an experiment that is almost entirely private-sector based. While this experiment may have been worth attempting, it has clearly failed to provide work benefits to most Americans or to change basic social conditions.”

Economic conservatives argue that government subsidies decrease the price consumers pay for a good, and therefore consumers may buy more

283. See generally Burkett, supra note 112.
285. See, e.g., Heymann, supra note 3, at 46-47.
286. Helburn & Bergmann, supra note 22, at 52. As explained in Part VI.B, there are also conservatives who oppose child care based on their belief that children should be cared for at home by their mothers.
287. Heymann, supra note 3, at 167.
and better quality goods without taking cost into consideration. With regard to a luxury good, such as a Porsche, this criticism makes sense. However, as Helburn and Bergmann point out, overproduction of child care is not a serious concern because young children must be cared for twenty-four hours a day in a safe and appropriate manner. In other words, there is no realistic concern that children will have too much care or that care might be "too good" for them. As explained in Part III, the problem today is not that the market provides too much child care or that caretakers provide an excess of quality child care, but rather that many children are receiving a substandard level of care.

Furthermore, as Helburn and Bergman have explained, there are a number of "peculiarities" about the child care industry that make government intervention necessary to ensure an appropriate level of affordable care. Parents purchase care for their children—not for themselves—and parents may not know if their children are receiving care that is inadequate. Theoretically, efficient markets require consumers to act in their best interests. But in the case of child care, the direct consumer—the child—is not the person who makes the decisions.

There are a number of additional reasons why parents are not ideal consumers. Parents often do not have prior experience in buying child care services and do not know what to look for in child care services. Many parents are poorly informed and do not have access to adequate information on which to base their decisions. This information asymmetry between buyers and sellers results in a "lemons" problem, where buyers are unable to distinguish between good and poor quality services. Furthermore, parents are often limited by factors such as location, hours and cost. Parents with less flexibility in their work schedules and fewer financial resources are forced to make their child care decisions based on factors other than quality. As compared with experts, parents tend to overestimate the quality of care that their children are receiving.

There are also currently shortages of particular types of child care. It is difficult to find child care in rural and low-income areas, and for children

288. HELBURN & BERGMANN, supra note 22, at 52.
289. Id. at 53.
290. It is unrealistic to think that subsidies will lead to an unnecessarily high level of care. For example, day care centers are not going to start having ratios of one teacher to one child or requiring that staff have PhDs.
291. See generally HELBURN & BERGMANN, supra note 22, at 161-66.
292. Id. at 161.
293. See id. at 162 (discussing why parents are not ideal consumers).
295. Id. at 163-64.
who need evening and weekend care. It is also difficult to find care for infants, sick children, and children with disabilities or special needs. However, the problem is not simply a supply side problem. Part of the reason there is an absence of more high-quality day care is that most parents simply cannot afford to pay the true cost of good care. The cost of day care cannot be decreased by labor-saving machinery, because the biggest expense of day care is the providers' salaries. Furthermore, good centers cannot cut back on their staff, since an important indication of a center's quality is a low teacher-to-child ratio and a high level of teacher training.

VIII.
POLICY SUGGESTIONS

This Part will provide an analysis of the primary options that have been suggested for resolving the child care crisis in the United States, concluding that the best approach is increased federal funding and regulation of day care, primarily through a voucher program. This Part will first discuss the limitations of private charities and employers in solving the child care crisis. It will then address the advantages of federal funding and regulation.

A. The Limitations of Private Charities and Employers

Private charities cannot solve the child care crisis. First, charities simply do not provide enough money to fund child care programs. Charities currently provide less than 1% of the financing for child care and early childhood programs. Secondly, as explained in Part VI.A, legislation has an expressive effect, and increased government funding for child care is important not only for the additional revenue it provides, but also for what it says about the importance of child care. Part of the stigma currently associated with child care stems from the fact that day care was initially established by charities as a service for the poor. Funding day care centers through charitable contributions would perpetuate this stigma. On the other hand, if the federal government supported child care, it would send the message that child care is something society approves of, and this, in turn could affect American attitudes towards child care and the mothers that use it.

296. Id. at 177.
297. Larner et al., supra note 38, at 12.
298. HEYMANN, supra note 3, at 60-65.
299. Id. at 69-89.
300. See supra notes 41-43 and accompanying text for a discussion of the cost of child care.
301. HELBURN & BERGMANN, supra note 22, at 21.
302. Sylvester, supra note 3, at 54.
303. HELBURN & BERGMANN, supra note 22, at 38.
304. See supra notes 209-10 and accompanying text.
Others have suggested that employers provide child care for their employees.305 As explained in Part V.E, because employers are harmed when employees are either absent or unproductive due to child care problems, some employers do provide child care assistance in an effort to attract and retain top employees. However, due to the high cost of child care, few employers provide their employees with any child care assistance, and those that do are mostly large companies.306 Even employers who organize child care at the worksite usually only subsidize a small portion of the care, leaving parents responsible for most of the cost.307

Despite the fact that employers benefit when their employees have access to reliable child care, it is unlikely that employers will take the lead and provide the funding necessary to solve America’s child care crisis.308 In recent years, the trend in the United States has been for employers to decrease the benefits that they offer to their employees, including benefits such as health care that traditionally have been available to most full-time workers.309 In this climate, it is unrealistic to think that child care benefits, which only directly help employees with young children, will be increased. Furthermore, while it might make business sense for a company to subsidize child care for highly skilled employees who are difficult to replace, it makes less business sense for an employer to subsidize child care for unskilled workers who are easier to replace.310 Quality child care should be available to all children, not just to children of highly skilled workers.

In addition, employer-sponsored child care centers are problematic because there has been a decline in long-term employment in the United States.311 Whenever parents changed jobs, children could lose access to child care or experience discontinuity in care providers. Employer-sponsored child care would not help unemployed parents, or parents who are full-time students. Even if employers were to provide child care to the same extent that they provide health insurance, many of the same problems of discontinuous coverage and leaving out workers in low-income jobs would likely exist.312

305. See generally Koniak, supra note 149; see also Friedman, supra note 149.
306. See Koniak, supra note 149, at 205.
307. HELBURN & BERGMANN, supra note 22, at 40.
308. See id. at 39; HEYMANN, supra note 3, at 165-71.
309. HELBURN & BERGMANN, supra note 22, at 39.
310. Id. at 40. See also GORNICK & MEYERS, supra note 6, at 295 (arguing that “high quality childcare is simply too expensive for most employers to finance out of the added productivity of their own workers”).
311. See generally Rachel Arrow-Richman, Accommodation Subverted: The Future of Work/Family Initiatives in a “Me Inc.” World, 12 TEX. J. WOMEN & L. 345 (2003) (arguing that employers today are not likely to view employment relationships as long-term, and therefore, have less of an incentive to invest in employees).
312. HELBURN & BERGMANN, supra note 22, at 40-41.
For the reasons discussed in Part VIII.B, below, the federal government is the best source of financing childcare and the best means for ensuring that centers receiving financing meet minimal licensing standards.

B. The Federal Government

1. The Need for Federal Funding

The best approach for ensuring that American children have access to affordable, quality child care is through increased federal funding made available only to child care providers and centers that meet minimal licensing requirements. Increased federal funding is necessary for two reasons. First, as Helburn and Bergman have explained, the federal government is the only realistic source of the large scale funding necessary to finance child care. As explained in Part III, quality child care is a huge expense that many families simply cannot afford and a significant increase in funding is essential.

Second, federal legislation is also important for its expressive effect and what it says about the importance of child care. Americans currently have negative attitudes towards child care, in part because of lack of government support for group child care. As explained in Part VI.A, child care legislation can change norms by causing individuals to update their beliefs about child care in accordance with what they perceive to be public attitudes regarding child care. Increased government funding for child care is important not only for the additional resources it would provide to child care centers, but also because it indicates societal support for child care.

Increased federal funding for child care could be provided in one of three ways. First, the government could establish a national system of day care centers. Second, the government could contract directly with private child care providers. Third, the government could provide parents with vouchers that could then be used to pay for all or part of the cost of child care, depending on the parents’ income.

Some commentators have suggested that the federal government should establish federally regulated day care centers that are fully funded by the government. One commentator has opined that these centers should be conveniently located, have an adequate number of spots for infants, toddlers, and sick children, remain open on evenings and weekends, and operate year-round. However, this type of comprehensive and expensive

313. Id. at 218.
314. See supra notes 198-208 and accompanying text.
315. See, e.g., Dixon, supra note 4, at 659.
316. See id. at 652-59.
system of child care that requires no co-payment by parents, regardless of their income, is not an economically feasible policy goal.

Furthermore, the federal government should not be the exclusive source of establishing a child care system because different parents want different types of care for their children. According to polls, Americans believe that parents should be primarily responsible for choosing the care that their young children receive, and that government's role should be to assist parents in making choices. Any proposed legislation that would increase federal funding should therefore maximize parental choice. While the federal government should set minimal health, safety and developmental standards, it should not micromanage every aspect of child care, since care needs to be responsive to the needs of individual families and communities. Furthermore, if the government directly established and ran daycare centers, they would need to be nonsectarian to avoid violating the Establishment Clause. It is likely that Christian conservatives would oppose a national child care system which excluded religious day care centers. As explained earlier in this Article, opposition by religious conservatives has been a major factor in previous failed attempts to pass federal child care legislation.

The second option is for the government to directly contract with private child care providers, and then permit parents to choose among these contracted centers. The advantage of this option is that it could build up supply where it is needed—for example, it could increase the supply of evening and weekend care, as well as care for infants, special needs and sick children. The disadvantage of this type of system is that it would provide only limited parental choice because the federal government would decide which centers to contract with, and parents would be forced to choose among those centers. It would also be unconstitutional for the government to directly contract with sectarian day care centers; the voucher plan at issue Zelman was specifically upheld because it involved indirect government funding of sectarian educational institutions. Christian conservatives are therefore also likely to oppose this type of child care system. The final option is a voucher system funded by the federal government, which will be discussed in the next Part.

317. Sylvester, supra note 3, at 60-61.
318. See supra Part VI.B.
319. HELBURN & BERGMANN, supra note 22, at 47.
320. Id.
321. Zelman, 536 U.S. at 662 (upholding constitutionality of voucher plan on grounds it “provides benefits directly to a wide spectrum of individuals [and] … permits such individuals to exercise genuine choice among options public and private, secular and religious.”).
2. A Federal Voucher Program

The best solution to the child care crisis would be for the federal government to establish a voucher system supplemented with contracted care in areas where there is a shortage of child care providers. The advantage of funding child care primarily through a voucher system is that it maximizes parental choice. It also provides greater flexibility because parents could still receive voucher funding even if conveniently located contracted centers were full. Furthermore, vouchers might give parents more opportunity to avoid or leave poor quality child care providers, thus ensuring that funding goes to the better providers.

While this Article does not provide specifics regarding how funding should be distributed, parents would need to pay for a portion of the cost of child care based on their income for such a system to be politically feasible. While licensing could still be done at the state level, the federal government should also set minimal health, safety and developmental standards that caregivers must meet to be eligible for federal voucher payments. The federal government should also assist the states in establishing better resource and referral agencies which could help parents locate quality child care centers. For the various reasons discussed in Part VII, parents are not ideal consumers and for a voucher system to work efficiently, parents would need access to better information.

Three controversial issues that are likely to arise under a federal voucher program are (1) whether voucher money should be available for care in a child's home, and the related issue of whether this money should be available to pay for unlicensed child care; (2) whether parents should be permitted to use voucher money to pay for child care at a sectarian child care center; and, (3) whether stay-at-home mothers should receive voucher funding.

To maximize parental choice, parents should be permitted to use voucher money to pay for care in a child's home so long as a licensed caregiver is used. There are many valid reasons why a parent might prefer to use in-home care. It may be logistically difficult for parents to get their children to child care centers depending on the age and number of children. Parents may lack cars or access to reliable transportation. Parents who

322. This approach was advocated by Helburn and Bergmann. "We would suggest that a judicious mix of vouchers and contracted spaces might be the best solution." HELBURN & BERGMANN, supra note 22, at 48.
323. See, e.g., Sylvester, supra note 3, at 53 (discussing how government support for child care should maximize parental choice).
324. HELBURN & BERGMANN, supra note 22, at 48.
325. Id.
326. See id. at 46-50, 140-41, 216-17 (discussing how a voucher system could work).
327. Id. at 225-26.
328. Id. at 216.
work long hours or night shifts might also prefer in home care. Some parents may also prefer having a family member care for their child—particularly if the child is very young.

However, as explained in Part III.A, there are developmental benefits to children attending group child care, and group child care is also easier to regulate than care in a child’s home. These are reasons to encourage parents—particularly those of preschool-age children—to use group child care. Group child care is also generally more cost-effective than having a caregiver provide in-home care, and any voucher funding will likely cover only a portion of most parents’ child care costs. Therefore, parents who choose private, in-home care will likely have higher out-of-pocket expenses. This would both encourage parents to use group child care, while at the same time, provide parental choice.

Many children receive in-home care from relatives, au pairs, or nannies who are largely unlicensed and unregulated. Additionally, many children attend unlicensed group child care. If the goal of a voucher program is to increase the quality—as well as the affordability—of child care, funding should only go to licensed providers who provide a higher level of care overall than unlicensed providers.\(^3\) However, as Helburn and Bergman have opined, licensing standards could be less onerous for caregivers who care for only one or two children in their own homes or who care for a group of siblings in the siblings’ homes.\(^3\) This compromise would increase parental choice without unduly risking children’s safety and development.

Another controversial issue is whether parents should be permitted to use federally funded vouchers to pay for child care at sectarian child care centers. As explained in Part VI.B, the controversy surrounding government funding of sectarian child care was one of the primary reasons that the ABC bill failed in 1990. Based on the Supreme Court’s holding in \textit{Zelman},\(^3\) a voucher program that allowed parents to freely choose whether to use their voucher money at a secular or sectarian day care facility—and thereby involved both true parental choice and indirect government funding of sectarian educational institutions—would most likely be constitutional.\(^3\)

However, even if such a voucher program was held constitutional, organizations that advocate a strict separation of church and state may still oppose such funding on policy grounds because it can be divisive and lead to sectarian strife.\(^3\) Justice Souter expressed concern in his dissenting

\(^{329}\) Id. at 35-37. See \textit{Heymann, supra} note 3, at 125-26 for a discussion of the advantages of licensed care.
\(^{330}\) \textit{Helburn & Bergmann, supra} note 22, at 37.
\(^{331}\) \textit{Zelman}, 536 U.S. at 639.
\(^{332}\) See supra Part VI.B.
opinion in *Zelman* that once voucher money became widely available, religious organizations might start competing for funding and thereby create discord. Voucher money may also come with strings attached, which may seem coercive to religious organizations. Civil rights organizations, including the ACLU, have expressed concern that religious organizations do not need to obey federal, local and state civil rights laws.

On the other hand, religious organizations are likely to oppose any program that excludes sectarian child care, particularly in the aftermath of *Zelman*. This opposition may be significant, because religious parents and sectarian organizations are often concerned with starting religious education at a very young age. Additionally, in recent years, child care centers at religious facilities have been one of the fastest growing sectors of the child care market. Therefore, a significant amount of funding may be at issue. It might be politically necessary to include sectarian child care centers in any voucher program.

A third issue is whether full-time, stay-at-home parents, who in most cases are mothers, should be eligible to receive voucher money. Many conservatives believe that children are best cared for at home by a full-time, stay-at-home mother. The primary argument in favor of stay-at-home mothers’ eligibility for funding is that if the government is willing to provide funding for an outsider to care for a young child, it should also provide funding for that child’s own mother to care for her or him.

But there are a number of policy reasons not to fund full-time, stay-at-home mothers. There is no guarantee that parents will use a cash payment to actually improve the care that their children receive and not for another purpose. Furthermore, in 1996, federal welfare law was reformed specifically to eliminate cash payments to stay-at-home mothers and instead provided funding for child care to enable former welfare recipients to go to work. The majority of Americans believe that single mothers should work for pay to support their children. It seems fundamentally unfair to enact legislation that would provide middle-class mothers with a cash treatment to children under the age of six. Since the payment is taxed based on the income of the lower earning spouse, it most benefits families with a full-time, stay-at-home parent. Elsa Cherny, *Giving Day Care Cash to Stay-at-Home Parents Sounds Like Politics to Some Canadians*, WALL ST. J., July 3, 2006, at A2.

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335. *Id.* at 712.
337. HELBURN & BERGMANN, supra note 22, at 92.
338. Canada recently enacted a law that provides parents with a cash payment for each child under the age of six. Since the payment is taxed based on the income of the lower earning spouse, it most benefits families with a full-time, stay-at-home parent. Elena Cherny, *Giving Day Care Cash to Stay-at-Home Parents Sounds Like Politics to Some Canadians*, WALL ST. J., July 3, 2006, at A2.
339. See supra Part VI.B.
340. See supra notes 89-91 and accompanying text.
341. HELBURN & BERGMANN, supra note 22, at 51.
payment to stay at home and care for their children in the aftermath of welfare reform, which eliminated similar assistance to needier families.\textsuperscript{342}

Providing stay-at-home mothers with a cash payment also does nothing to alleviate many of the harms caused by a lack of affordable quality day care that were discussed in Part V. Cash grants to stay-at-home mothers do not increase gender equality, but rather show governmental support for a return to traditional gender roles.\textsuperscript{343} Cash grants also do not assist employers or ensure that children from disadvantaged families receive a higher level of care. Cash grants to stay-at-home parents would disproportionately benefit families with a full-time stay-at-home parent. For example, if two families with children have the same income and one of these families has a full-time stay at home parent, that parent is providing services—such as child care, cooking and cleaning—that the other family has to pay for.\textsuperscript{344}

Furthermore, the fact that the federal government will provide funding for child care does not mean that parents must use this child care and that parents cannot stay at home to care for their children. The government funds the K-12 public school system, and yet there are parents who home school their children or send their children to private schools. To some extent, government funded child care can be viewed as simply lowering the minimum age at which the government will provide funding for a child’s education.\textsuperscript{345}

Despite these policy concerns, it might nonetheless be necessary to provide funding to stay-at-home mothers for a voucher program to be politically feasible.\textsuperscript{346} There could otherwise be significant opposition by those who support “traditional families.”\textsuperscript{347} As previously explained, conservatives opposed the Comprehensive Child Development Act and Nixon vetoed this Act since it went “against the family-centered approach [to childrearing].”\textsuperscript{348} Conservatives also opposed the ABC bill based on their concern about protecting the traditional family. Conservative Christian organizations now recognize the need for affordable quality child care, and might be supportive of a voucher program—particularly one that included sectarian child care centers and payments to stay-at-home mothers.\textsuperscript{349} It might therefore be politically necessary to include cash

\begin{thebibliography}{99}
\bibitem{342} WARNER, supra note 235, at 267-68.
\bibitem{343} HELBURN & BERGMANN, supra note 22, at 51.
\bibitem{344} Id. at 50.
\bibitem{345} HEYMANN, supra note 3, at 182.
\bibitem{346} For a discussion of the “mommy wars,” see supra Part VI.C.
\bibitem{347} HELBURN & BERGMANN, supra note 22, at 52.
\bibitem{349} See supra notes 258-63 and accompanying text.
\end{thebibliography}
payments to stay-at-home mothers in order to garner the support of this political bloc.

IX.
CONCLUSION

Increased federal funding and regulation of child care—primarily though a voucher program that is supplemented with contracted care in areas where there is a shortage of child care providers—is the best solution to the child care crisis in the United States. As this Article has explained, lack of affordable, quality child care negatively impacts not only parents and children, but also employers and society as a whole and exacerbates racial inequality. Despite the numerous benefits associated with affordable, quality child care, such care remains largely unavailable in the United States today. Comprehensive federal child care legislation is crucial because the federal government is the only realistic source of the large scale funding necessary to finance child care. Norms theory indicates that such legislation is also important because it would have an expressive function. Child care legislation could change societal norms by indicating public support for child care—particularly group child care—and by extension, the working mothers that use child care. Comprehensive federal child care legislation should therefore be enacted, both because of the direct benefits of increasing federal funding and regulation of child care and also because of the expressive effect of such legislation.