

FAMILIES, HUMAN DIGNITY, AND STATE  
SUPPORT FOR CARETAKING: WHY THE  
UNITED STATES' FAILURE TO AMELIORATE  
THE WORK-FAMILY CONFLICT IS A  
DERELICTION OF THE GOVERNMENT'S  
BASIC RESPONSIBILITIES\*

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*In the last two generations, the hours worked by American families have increased significantly as greater numbers of women have moved into the workplace. The resulting work patterns have put considerable stress on family life, particularly when it comes to accomplishing the caretaking tasks traditionally performed by women. The legal and policy responses to this problem have been surprisingly muted in the United States. Compared with many European nations, for example, the United States has done very little to ensure adequate time for family life, to ameliorate conflicts between work and family, and to ensure that critical functions such as child rearing, which were once largely handled within families, are still adequately accomplished. This gap in law and public policy has left American families to deal with these issues privately. The various routes they have taken, however, impose large costs on important public goods, including children's welfare, sex equality, and civic participation.*

*This Essay argues that the United States' failure to help families negotiate work-family issues is not only poor policy, it is a dereliction of the state's most basic responsibilities. The liberal democratic commitment to human dignity that is foundational to the United States' understanding of itself, this Essay contends, requires it to support caretaking in order to meet the dependency needs that are inevitable in*

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*human lives. Because of the large role that the condition of dependency plays in human lives, supporting caretaking is every bit as important to maintaining human dignity as protecting citizens' security or defending their individual rights.*

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#### INTRODUCTION

During the last two generations, women have moved into the paid workplace in unprecedented numbers. They have also remained there, even after marriage and children.<sup>1</sup> While some single and working class mothers have long been members of the labor market, as have many women of color, the number of mothers working has expanded both within and beyond these groups.<sup>2</sup> Because women have been, and largely still are, the primary caretakers for children

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1. See generally Saul D. Hoffman, *The Changing Impact of Marriage and Children on Women's Labor Force Participation*, MONTHLY LAB. REV., Feb. 2009, at 3, 6 (describing data concerning the effects of marriage and children on women's participation in the workforce over time).

2. *Id.* at 4; see also Heather Boushey, "Opting Out?" *The Effect of Children on Women's Employment in the United States*, FEMINIST ECON., Jan. 2008, at 1, 5-6 (examining data concerning single and married mothers in the labor force since 1979). Married mothers as a group have experienced a particularly sharp rise in labor market participation. In 1960, roughly 25% of married mothers were employed; by 2000, that figure had nearly tripled. See Sharon R. Coheny & Emy Sok, *Trends in Labor Force Participation of Married Mothers of Infants*, MONTHLY LAB. REV., Feb. 2007, at 9, 10.

and others with dependency needs,<sup>3</sup> their movement into the workplace poses a weighty challenge for ensuring these needs are met in a just and humane manner.

Yet women's entry into the workforce in the United States has not been accompanied by changes in work structures. Although other countries have reacted to these labor market changes through regulations that help working families to accommodate caretaking,<sup>4</sup> the United States has made almost no changes in public policy to ameliorate work-family conflict. The view that underlies this area of public policy in the United States is that dependency issues are private matters that are appropriately left to the responsibility of individual families. Thus, families are left to deal with these issues by making adjustments on their own and by negotiating with employers; the market, rather than the state, is seen as the appropriate institution to resolve these conflicts.

This Essay argues that negotiating the boundaries between families and the market in order to support families' caretaking efforts is not only an appropriate subject for state action, it is a fundamental responsibility of the state.<sup>5</sup> This responsibility stems directly from the commitment to human dignity that underlies the liberal democratic form of government.<sup>6</sup> Because of the significance

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3. In the largely agrarian American society that prevailed until the mid-nineteenth century, most work occurred at home. JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 25 (2003). As industrialization swept through the United States, though, most men moved to jobs outside of the home. *See id.* at 26. Most women, in the meantime, remained home to take care of homemaking and child care needs. *Id.* In 1900, almost 85% of men worked for pay, in contrast to 18% of women, and only 5% of married women. *See id.* The estimated fifty hours per week of unpaid labor that married women performed enabled their husbands to focus on market work. *See id.* at 27. This pattern continued through the mid-twentieth century. *Id.* at 25–26.

Despite their increased entry into the workforce beginning in the second half of the twentieth century, women still devote far more of their time to unpaid work than men. *Id.* at 34–35. Research suggests that American women spend somewhere between 62 and 70% of their total work hours on home production, while men spend somewhere between 26 and 39% of their total work hours in unpaid labor at home. *Id.* at 35. In all, fathers spend only 44% of the time mothers spend in unpaid work. *Id.* at 35, 71.

4. *See infra* notes 51–55, 151, 154 and accompanying text.

5. I develop the appropriate contours of the state's responsibility to families in greater detail in my forthcoming book, MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (forthcoming July 2010).

6. I use the term "liberal democratic" here to refer to governments that are committed to the principles of sovereignty by the people, significant respect for individual self-determination, and the equal worth of citizens. My usage is therefore broader than the use of the term "liberal" in common parlance to refer to those who hold political beliefs at the opposite end of the political spectrum from conservatives. It is also broader than those who equate the term with neoliberalism, or economic liberalism. *See, e.g.*, Cato Institute,

of dependency in the human condition, this commitment to human dignity requires the state to support caretaking. Since families are the institution through which most caretaking is accomplished, the state's responsibility entails supporting families in their caretaking efforts. The United States' current failure to help families negotiate the work-family conflict is an abrogation of its responsibility in this area.

The argument in this Essay proceeds in two parts. Part I describes the lack of support for caretaking in contemporary U.S. law when work interferes with employees' caretaking responsibilities. Part II then argues that the respect for human dignity at the root of the United States' liberal democratic understanding of itself makes it every bit as imperative that the state guarantee support for workers' caretaking responsibilities as that it has a capable police force to ensure citizens' security and to defend their individual rights. This Essay concludes that the current hands-off approach by the state to the work-family conflict is based on a misguided notion of the state's appropriate role.

#### I. THE FAILURE OF U.S. LAW TO RECONCILE WORK AND FAMILY

In 1930, less than half of all children lived in a home with two employed parents: roughly 55% lived with a father who worked for pay and a mother who was the homemaker.<sup>7</sup> Today, in contrast, a family with a breadwinner and a homemaker is the exception rather than the rule: 70% of children live with two parents who both work, or a single parent who works.<sup>8</sup> The current workforce includes roughly 90% of fathers and 68% of mothers with children under eighteen.<sup>9</sup> On average, these employed mothers work thirty-six hours

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Individual Liberty, Free Markets, and Peace, <http://www.cato.org/about.php> (last visited Mar. 16, 2010) (equating the term "liberal" with "supporters of human rights and free markets," but stating that this meaning has been "corrupted by contemporary American liberals"). While neoliberal arguments often rely on early liberal sources for support, much in these sources supports a broader role for the state than neoliberals would have it. Indeed, there is nothing intrinsic to liberalism that is incompatible with many aspects of modern social democracy, including a comprehensive welfare state and strong state regulation of the market. In fact, as I argue here, liberalism is better interpreted as requiring these features.

7. GORNICK & MEYERS, *supra* note 3, at 30.

8. *Id.* (citing Donald Hernandez, *Children's Changing Access to Resources: A Historical Perspective*, SOC. POL'Y REP., Spring 1994, at 1, 2).

9. U.S. DEP'T OF LABOR & U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 13 (2009), *available at* <http://www.bls.gov/cps/wlf-databook-2009.pdf>. This includes 60% of mothers with children under six and 74% of mothers with children between the ages of six and seventeen. *Id.*

per week.<sup>10</sup> Moreover, roughly 15% of workers routinely provide care for an elderly relative or friend.<sup>11</sup>

Women's movement into the labor force means that the people who had been largely responsible for raising children and for caring for others with dependency needs now have significant other demands on their time. The result is a caretaking void when it comes to ensuring that society's caretaking needs are met. This first Part traces the effects of women's movement into the labor market on the caretaking needs of families. It begins by considering the dependency issues that arise in any human society, including our own. It then considers the extent of workplace adaptation—or rather, the lack of adaptation—to dependency needs since women have entered the labor market in large numbers. In doing so, it compares the lack of action on these issues by federal and state governments in the United States with the vigorous efforts to reconcile work and family in European countries. Finally, it considers the consequences of U.S. inaction for important public goods, including children's welfare, sex equality, and civic life.

#### A. *The Necessity of Caretaking in Human Lives*

Before women began to enter the workforce in increasing numbers, a large portion of their time was spent performing the myriad caretaking tasks required in any human society. This caretaking is necessitated by the fact that, as feminists have pointed out, dependency is both an inevitable and a significant part of the human life cycle.<sup>12</sup> Children are born completely dependent, and live in near total dependence on others for roughly the first decade of their lives. They spend their next decade requiring considerable assistance from others, although generally to a decreasing extent. During these first two decades, and often longer, they require a number of things to become healthy, flourishing adults and contributing members of the polity. For one thing, they require significant caretaking, which, for young children, will involve a wide array of tasks. They must be supervised to ensure they are safe,

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10. SUZANNE M. BIANCHI ET AL., CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 44 tbl.3.1 (2006).

11. NAT'L ALLIANCE FOR CAREGIVING & CTR. FOR PRODUCTIVE AGING AT TOWSON UNIV., THE METLIFE STUDY OF SONS AT WORK: BALANCING EMPLOYMENT AND ELDERCARE 2 (2003), available at <http://www.caregiving.org/data/sonsatwork.pdf>.

12. See, e.g., MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 35 (2004); EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 29 (1999).

played with, interacted with, fed, bathed, changed, put to bed, picked up when they are crying, taken to the doctor when they are sick, among a hundred other activities. In addition to caretaking, children require certain things to foster the human development it takes for them to become sound adults and good citizens.<sup>13</sup> During the course of youth, they must learn for themselves to perform many of the tasks that adults have performed for them. They must also develop deep and stable attachments with at least a few others, receive moral guidance, learn social skills, acquire an education and skills to support themselves when they reach adulthood, and develop citizenship skills.<sup>14</sup> Meeting human development needs, like meeting caretaking needs, requires a considerable investment of time, attention, and resources.

Some small but significant number of citizens will never achieve a substantial degree of independence from the caretaking of others because of physical or mental disabilities.<sup>15</sup> Most others will enter an adulthood in which they are largely, although never completely, independent. When it comes to dependency issues, no adult is an island; virtually all adults have some periods in which they require significant caretaking because of physical or mental illness, and most have intermittent periods of such dependence.<sup>16</sup> Further, a considerable portion of adults will experience serious disabling conditions that will leave them dependent on others for care for long periods of time, if not permanently.<sup>17</sup>

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13. See generally JANE WALDFOGEL, WHAT CHILDREN NEED (2006) (describing caretaking of children as including the need to promote their health, cognitive development, and social and emotional well-being).

14. See *id.* at 12.

15. See MATTHEW W. BRAULT, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, AMERICANS WITH DISABILITIES: 2005, at 4 (2008), <http://www.census.gov/prod/2008pubs/p70-117.pdf>. In 2005, 10.8 million people (4.7%) over the age of fifteen reported having one or more disabilities for which they required assistance with daily activities. *Id.*

16. See *id.* Approximately 19% of Americans self-reported that they had some level of disability in 2005, and 12% reported that they had a serious disability. *Id.* In a report based on 2002 census data that considered the duration of disabilities, “more people reported needing assistance for 1 to 5 years (40.7 percent) than reported needing help for less than 1 year (23.3 percent) or needing help for more than 5 years (34.1 percent).” ERIKA STEINMETZ, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, AMERICANS WITH DISABILITIES: 2002, at 7 (2006), <http://www.census.gov/prod/2006pubs/p70-107.pdf> (reporting duration of disabilities).

17. See BRAULT, *supra* note 15, at 3. In 2005, “of people 6 years and older, 11.0 million people (4.1 percent) needed personal assistance with one or more activities of daily living,” such as bathing, dressing, eating, or toileting, or instrumental activities of daily living, such as managing finances, preparing meals, performing light housework, or using the phone. *Id.*

And as they age and approach the end of life, adults will become increasingly dependent on others for care.<sup>18</sup> The aging process in many respects reverses the childhood pattern of increased independence. Senior citizens are much more likely to suffer severe, chronic illnesses than the general population,<sup>19</sup> and this likelihood increases as they age.<sup>20</sup> Additionally, the chronic conditions experienced by seniors are far more likely to cause substantial limitations in daily living, including driving, walking, dressing, or eating.<sup>21</sup> This means that many elderly adults need substantial amounts of caretaking, including aid in activities such as dressing, bathing, and getting around, both inside and outside of home.<sup>22</sup> The inevitability of dependency in the human life cycle not only means that most people spend a good deal of their lives dependent on others, it also means that a great portion of the lives of others will necessarily involve caretaking for children or ill, disabled, or aging adults.<sup>23</sup> Now that the majority of women, who used to meet these

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18. Data from the 2005 Current Population Report demonstrates that the number of adults requiring assistance for one or more daily activities increases for each subsequent age group; 1.9% for those twenty-five to forty-four, 3.4% for those forty-five to fifty-four, 5.7% for those fifty-five to sixty-four, 7.6% for those sixty-five to sixty-nine, 9.6% for those seventy to seventy-four, 16.1% for those seventy-five to seventy-nine, 29.2% for those eighty and over. *Id.* at 4.

19. See WAN HE ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: SPECIAL STUDIES, 65+ IN THE UNITED STATES: 2005, at 59 (2005), <http://www.census.gov/prod/2006pubs/p23-209.pdf>; Laura P. Sands et al., *Rates of Acute Care Admissions for Frail Older People Living with Met Versus Unmet Activity of Daily Living Needs*, 54 J. AM. GERIATRICS SOC'Y 339, 339 (2006). As the demographers at the U.S. Census Bureau summed up disability levels in the elderly population: "20 percent of older Americans have chronic disability, about 7 percent to 8 percent have severe cognitive impairments, and about 30 percent experience mobility difficulty. Census 2000 counted about 14 million civilian noninstitutionalized older people, representing 41.9 percent of the older population, who had some type of disability." HE ET AL., *supra*, at 59. Roughly 30% of adults aged seventy-five or older cannot perform one or more daily activities such as meal preparation and eating, bathing, dressing, toileting, and walking or driving by themselves. Sands et al., *supra*, at 339. According to Census Bureau reports, although the disability rates of the elderly population are declining, that population is on the threshold of a boom, as baby boomers begin to turn sixty-five beginning in 2011. HE ET AL., *supra*, at 60.

20. GRACE CHRIST & SADHNA DIWAN, CHRONIC ILLNESS & AGING 7 (2008), <http://depts.washington.edu/geroctr/mac/ResourceReviews/HealthFiles/CI-Sec1-Demographics.pdf>.

21. See Agency for Healthcare Res. & Quality, U.S. Dep't of Health & Human Servs., *Preventing Disability in the Elderly with Chronic Disease*, RES. ACTION, Apr. 2002, at 1, 1-2, available at <http://www.ahrq.gov/research/elderdis.pdf>.

22. YVONNE J. GIST & LISA I. HETZEL, U.S. CENSUS BUREAU, WE THE PEOPLE: AGING IN THE UNITED STATES 11 (2004), <http://www.census.gov/prod/2004pubs/censr-19.pdf>.

23. NAT'L ALLIANCE FOR CAREGIVING & AARP, CAREGIVING IN THE U.S. 6-7 (2004), available at <http://www.caregiving.org/data/04finalreport.pdf>. In addition to caring for children, a 2003 study by the National Alliance for Caregiving and the AARP

needs, are now in the paid workplace, these caretaking needs create significant conflicts in citizens' lives when they interfere with work.

*B. The Work-Centric Nature of U.S. Job Structures*

In 1965, married mothers with children worked an average of six paid hours per week; by 2000, they worked 23.8 hours a week.<sup>24</sup> While work hours for married fathers have slightly declined in that same period, from 47.8 to 42.5 hours, this decrease does not begin to offset the increase in mothers' hours.<sup>25</sup> As a consequence, the total paid workload of families has increased significantly.<sup>26</sup> In two-parent families it has risen from 53.8 hours to 66.3 hours.<sup>27</sup>

The workforce that American women have joined generally keeps longer hours than other industrialized countries. For most of the twentieth century, the United States fell roughly in the middle of industrialized countries when it came to average total working hours for individual workers.<sup>28</sup> During the last three decades, though, peer countries have funneled increases in productivity into reducing workers' weekly work hours dramatically, in comparison to the United States, which has reduced them only very slightly.<sup>29</sup> The 1,966 hours that the average American worker now works annually amounts to roughly ten more weeks a year of work than Swedish

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estimated that "there are 44.4 million American caregivers (21% of the adult population) . . . who provide unpaid care to an adult age 18 or older. These caregivers are present in an estimated 22.9 million households (21% of U.S. households)." *Id.* The great majority of caregivers (83%) are helping relatives. *Id.* By 2020, it is expected that 40% of the workforce will care for an elderly relative. Peggie Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 353 (2004); see 139 CONG. REC. 1969 (1993) (statement of Rep. Schenk) ("Women can expect to spend 17 years of their lives caring for their children and 18 years caring for an elderly relative."); Sarah Rimer, *Blacks Carry Load of Care for Their Elderly*, N.Y. TIMES, Mar. 15, 1998, at A1 ("[N]early one in four American families is taking care of an elderly relative or friend, doing everything from changing diapers to shopping for groceries."); Martha Lynn Craver, *Growing Demand for Elder Care Benefits*, KIPLINGER BUS. FORECASTS, May 29, 2002, [http://www.kiplinger.com/businessresource/forecast/archive/growing\\_demand\\_br\\_for\\_elder\\_care\\_benefits.html](http://www.kiplinger.com/businessresource/forecast/archive/growing_demand_br_for_elder_care_benefits.html).

24. BIANCHI ET AL., *supra* note 10, at 55.

25. See Jerry A. Jacobs & Kathleen Gerson, *Overworked Individuals or Overworked Families?*, 28 WORK & OCCUPATIONS 40, 44-45 (2001).

26. See BIANCHI ET AL., *supra* note 10, at 48-53; Michael Hout & Caroline Hanley, *The Overworked American Family: Trends and Nontrends in Working Hours 1968-2001*, at 11 (Univ. of Cal., Berkeley, Survey Research Ctr., Working Paper, 2002), available at [http://ucdata.berkeley.edu/rscensus/papers/Working\\_Hours\\_HoutHanley.pdf](http://ucdata.berkeley.edu/rscensus/papers/Working_Hours_HoutHanley.pdf).

27. See BIANCHI ET AL., *supra* note 10, at 55.

28. See LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2008/2009, at 365 (2009).

29. See *id.*

workers (1,552 hours), and significantly more hours than workers in France (1,656), Germany (1,560), Canada (1,732), and the United Kingdom (1,731).<sup>30</sup> This means that even in the countries at the higher end of the scale, Canada and the United Kingdom, employees work roughly the equivalent of six fewer weeks a year than their American counterparts.<sup>31</sup>

The longer hours that Americans work generally, in combination with the dearth of protections for working parents in the United States,<sup>32</sup> have resulted in American parents working far longer hours in the workplace than their overseas counterparts. In the United States, two-earner families, in which both parents work full time, together spend an average of eighty hours a week at their jobs, compared to seventy-one hours for dual-earner couples in the United Kingdom, and sixty-nine hours per week in Sweden.<sup>33</sup> Particularly remarkable is the high percentage of American couples working very long hours. Almost two-thirds of American couples with children in which both parents work full time report total work hours each week of eighty hours or more.<sup>34</sup> A study by Janet Gornick and Marcia Meyers that compared the United States with eleven other wealthy countries showed that except for Canada, “no more than one-third of couples in [their eleven] comparison countries [spent] this much time at the workplace.”<sup>35</sup> What is more, in the United States, 13% of dual-earner couples with children work more than one hundred hours a week.<sup>36</sup>

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30. See GORNICK & MEYERS, *supra* note 3, at 59.

31. See *id.*

32. There are no laws in the United States that limit the number of hours an employer may require an employee to work. The Fair Labor Standards Act (“FLSA”) of 1938, and its amendments, established the standard workweek in the United States by requiring employers to pay time-and-a-half for each hour worked beyond forty hours in a week. Fair Labor Standards Act of 1938 § 7, 29 U.S.C. § 207 (2008). Most individual states have overtime laws that track the FLSA; a few provide for overtime based on an eight-hour day rather than a forty-hour week. See, e.g., ALASKA STAT. § 23.10.060 (2008); CAL. LAB. CODE § 510(a) (West 2003); NEV. REV. STAT. ANN. § 608.018(1)(b) (LexisNexis 2006).

33. See GORNICK & MEYERS, *supra* note 3, at 61.

34. *Id.* at 60–61. Note that this figure considers married couples in which both parents work full time. In contrast, the 66.3 hour per week workweek for two-parent families discussed earlier considers the paid workload of all two-parent families including those in which one spouse works part time or not at all for pay. See *supra* note 27 and accompanying text.

35. GORNICK & MEYERS, *supra* note 3, at 61. The comparison countries were Belgium, Canada, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. See *id.*

36. *Id.* at 33 (citing Jacobs & Gerson, *supra* note 25, at 57, 59).

Despite the expectation that women will now join their husbands in the workplace, there have been few changes in the labor market to help families deal with dependency needs. Instead, job structures have largely remained premised on the job structures established when most husbands had wives at home. Paid family leave is rarely available.<sup>37</sup> Moreover, part-time work is severely penalized financially and is often unaccompanied by benefits.<sup>38</sup> Finally, child care that is developmentally enriching also remains either unavailable or unaffordable to most parents.<sup>39</sup>

C. *The U.S. Government's (Lack of) Response to the Work-Family Conflict*

Both state and federal law have done little to ease the burden on working families. The only statutory protection explicitly granted by federal law to protect caretaking when it conflicts with work is the Family and Medical Leave Act of 1993 ("FMLA").<sup>40</sup> The twelve weeks of unpaid leave that the FMLA guarantees, however, cover only a fraction of the time necessary to raise sound children or care for aging parents.<sup>41</sup> Furthermore, the FMLA defines the conditions that give rise to leave in a manner that excludes most of the caretaking that family members require.<sup>42</sup> Parents may obtain leave to care for children only for circumstances involving the birth or

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37. See BUREAU OF LABOR, U.S. DEPT OF LABOR, COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES 28 (2007), <http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf>. According to the U.S. Department of Labor, only 8% of workers have paid family leave to care for newborns and other family members. *See id.*

38. See GORNICK & MEYERS, *supra* note 3, at 62–63. Women who work part time earn about 21% less per hour than women who work full time, after other differences in human capital are controlled for. *See id.* Furthermore, "[a] disproportionate share of part-time workers work for employers who offer no health insurance at all." *Id.* at 149–50. Even workers who work for employers who do offer health benefits are often excluded from coverage due to their part-time status. *Id.* at 150.

39. See LINDA GIANNARELLI & JAMES BARSIMANTOV, URBAN INST., CHILD CARE EXPENSES OF AMERICA'S FAMILIES 18 (2000), available at [http://www.urban.org/UploadedPDF/310028\\_occa40.pdf](http://www.urban.org/UploadedPDF/310028_occa40.pdf). Government programs to assist low-income families do not come close to satisfying the available need; many have extensively long waiting lists. *See* LINDA GIANNARELLI, SARAH ADELMAN & STEFANIE SCHMIDT, URBAN INST., GETTING HELP WITH CHILD CARE EXPENSES 20 (2003), available at [http://www.urban.org/UploadedPDF/310615\\_OP62.pdf](http://www.urban.org/UploadedPDF/310615_OP62.pdf). By one estimate, only roughly 21% of low-income families receive any financial assistance for child care. *See id.* at 26. For a discussion of the availability of good quality day care, see *infra* notes 82–84 and accompanying text.

40. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2008).

41. 29 U.S.C. § 2612(a), (c).

42. *See* § 2612(a)(1).

adoption of a child, or for situations involving a severe medical emergency.<sup>43</sup> Parents who need time to deal with more mundane caretaking needs, or to stay at home with a child sick with the flu, are left to fend for themselves.<sup>44</sup>

The FMLA's scope also excludes most of the care that aging adults need. Much of the help that senior citizens require involves such tasks as ensuring that they get to necessary places when they can no longer drive, making sure that they have adequate groceries, helping them prepare meals, and picking up the antacid pills they need from the drugstore. Yet because the FMLA limits leave to situations requiring medical care, none of these activities are covered by the FMLA.<sup>45</sup>

Moreover, the terms of the FMLA's coverage severely restrict the application of even the minimal guarantees that it does provide. Because the statute applies only to employees who work for companies with fifty or more employees, and employees must satisfy particular prerequisites,<sup>46</sup> roughly 50% of the workforce—sixty-five

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43. See § 2612(a)(1)(A)–(C).

44. As pointedly stated by the district court in *Kelley v. Crosfield Catalysts*:

The Act clearly does not provide qualified leave for every family emergency. A call from a police station or from school authorities, a minor ailment that keeps a child home from school with no help immediately available, or a personal crisis in the life of a child or a parent may cause a severe conflict for an employee between work and family responsibilities. None is covered by the FMLA. The legislative history makes it clear that the Act is intended to reach four situations: to provide home leave relating to the birth of a child or to the adoption or initial foster care of a child . . . , to provide care for a seriously ill child, spouse, or parent, or to attend to the employee's own serious health condition. The statute provides minimal protection in those circumstances.

*Kelley v. Crosfield Catalysts*, 962 F. Supp 1047, 1048 (N.D. Ill. 1997), *rev'd on other grounds*, 135 F.3d 1202 (7th Cir. 1998); see also *Perry v. Jaguar of Troy*, 2003 FED App. 0459P, ¶¶ 7–11, 353 F.3d 510, 514–16 (6th Cir.) (holding that caring for a child with attention deficit hyperactivity disorder does not qualify an employee for FMLA leave); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 246 (E.D. Pa. 1994) (holding that a child's ear infection is not a serious illness triggering mother's coverage by FMLA); S. REP. NO. 103-3, at 28 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 30 (“[Congress sought to exempt] minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period.”); 60 Fed. Reg. 2180, 2191 (Jan. 6, 1995) (codified at 29 C.F.R. § 825.120 (2009)) (“[L]eave to provide ‘child care’ would not ordinarily qualify as FMLA leave if the child is not a newborn (in the first year after the birth) . . .”).

45. 29 U.S.C. § 2612(a)(1)(C) (limiting the ability of employees to care for a parent to times when that parent “has a serious health condition”).

46. § 2611(2)(A)–(B) (defining “eligible employee[s]” as those who have been employed by their employer for at least twelve months and for at least 1,250 hours with that employer in the last twelve months and excluding employees whose employer has less than fifty employees within seventy-five miles of their worksite).

million employees—are not eligible for leave.<sup>47</sup> Furthermore, the FMLA simply guarantees that a worker can return to his or her job after the leave; it provides for no wage replacement during the leave.<sup>48</sup> As a result, the vast majority of covered employees—by one count, 78%—cannot afford to make use of the available leave.<sup>49</sup> Only three states have thus far made any move toward filling this void in caretaking protections by providing workers with paid leave for family medical emergencies.<sup>50</sup>

In contrast to other wealthy countries, the United States guarantees no paid maternity leave, no paid parental leave, no protection against parents working long hours, no parity of wages or benefits for workers who work part time in order to accommodate caretaking, and no paid vacation.<sup>51</sup> In fact, a recent comparison of policies in 173 countries found that when it came to parental leave protections in the workplace, the United States came in dead last, tied with only three other countries: Liberia, Papua New Guinea, and Swaziland.<sup>52</sup>

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47. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FAMILY AND MEDICAL LEAVE ACT REGULATIONS: A REPORT ON THE DEPARTMENT OF LABOR'S REQUEST FOR INFORMATION 128 (2007), <http://www.dol.gov/whd/FMLA2007Report/2007FinalReport.pdf>. A few states have mandated family leave policies for firms with fewer employees than are covered by the federal FMLA guidelines. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 844 (2009) (covering establishments with fifteen or more employees); MINN. STAT. ANN. §§ 181.940–941 (West 2006) (covering firms with twenty-one or more employees for a lesser period than federally mandated); OR. REV. STAT. § 659A.153 (2007) (covering firms with twenty-five or more employees). *See generally* Wage & Hour Div., U.S. Dep't of Labor, *Federal vs. State Family and Medical Leave Law*, <http://www.dol.gov/whd/state/fmla/index.htm> (last visited Jan. 29, 2010) (listing additional states that have their own family leave legislation).

48. 29 U.S.C. § 2614(a).

49. U.S. Dep't of Labor, *Foreword* to DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS viii, x (2001), *available at* <http://www.dol.gov/whd/fmla/foreword.pdf>.

50. *See* SARAH FASS, NAT'L CENTER FOR CHILDREN IN POVERTY, PAID LEAVE IN THE STATES: A CRITICAL SUPPORT FOR LOW-WAGE WORKERS AND THEIR FAMILIES 6, (2009), *available at* <http://www.paidfamilyleave.org/pdf/PaidLeaveinStates.pdf>. California was the first to give workers paid leave for family medical emergencies by providing up to six weeks of paid leave in its new Unemployment Insurance Code. CAL. UNEMP. INS. CODE § 3301(a)(1) (West 2010). Two other states, Washington and New Jersey, have followed California's lead. *See* N.J. STAT. ANN. § 43:21–26 (West 2009); WASH. REV. CODE. § 49.86.030 (2009).

51. For an excellent discussion of U.S. public policy on the work-family conflict compared with peer countries, *see generally* GORNICK & MEYERS, *supra* note 3.

52. *See* JODY HEYMANN, ALISON EARLE & JEFFREY HAYES, THE WORK, FAMILY, AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP? 1 (2007), <http://www.mcgill.ca/files/ihsp/WFEI2007.pdf>. The 2007 Work, Family, and Equity Index found that paid maternity leave is guaranteed in 169 countries, with over half these countries providing fourteen or more weeks of paid leave. *Id.* In contrast, the United

Further, despite the assumption of the U.S. welfare system that all adults should work, even parents of young children,<sup>53</sup> the government has played little role in ensuring adequate care for children while their parents work. In contrast to many other wealthy nations,<sup>54</sup> the United States does not provide either public day care or early education for young children.<sup>55</sup> Neither does it generally subsidize care for children in the private system, even for those whose families could not otherwise afford it.<sup>56</sup> There are no federal standards for safety, staffing, or teaching curricula for privately provided early childhood care or education.<sup>57</sup> To the extent that private early child care is regulated at all, it is generally regulated only through state licensing standards, which address issues of health and safety, but do not otherwise usually cover quality of care.<sup>58</sup> In

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States is one of only four countries that do not guarantee paid leave for mothers in any segment of the workforce in connection with childbearing. *See id.* at 1–2. Over a third of the countries studied also ensure that fathers receive paid parental or paternity leave, which the United States does not require. *See id.* at 2. Further, at least 107 countries require breaks for breastfeeding with almost all of those countries providing one hour or more per day; in at least seventy-three countries these breaks are paid. *Id.* at 3. Until recently, the United States provided no protection for employees who were breastfeeding. *See id.* The new health reform law, however, includes a provision requiring employers to provide employees with unpaid leave to breastfeed. *See Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4207, 124 Stat. 119, \_\_\_ (2010) (to be codified at 29 U.S.C. § 207).*

53. *See The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 607(a) (2008).* According to the welfare reforms passed in the late 1990s, states must ensure that a particular percentage of parents receiving cash assistance are enrolled in work programs. *Id.* Under these requirements, the target rate of single-parent recipients are required to work at least thirty hours per week by 2000 (twenty hours per week for single parents with a child under age six). § 607(c). Two-parent families must work thirty-five hours per week. *Id.*

54. *See GORNICK & MEYERS, supra note 3, at 200–01.* For example, Denmark, Finland, Norway, Sweden, Belgium, France, Germany, Luxembourg, and the Netherlands all publicly provide some combination of day care and early education. *See id.*

55. *See GIANNARELLI & BARSIMANTOV, supra note 39, at 17.* The main exception is the federal Head Start program, which provides means-tested education for three- and four-year-olds. *See GIANNARELLI ET AL., supra note 39, at 1.* Roughly half of states provide additional funding for Head Start or run equivalent state programs. *Id.* at 26. Yet Head Start only serves an estimated 36% of income-eligible four-year-olds, and far fewer younger children. *Id.* Even when assistance from Head Start is included with other financial assistance, government aid for child care still reaches only roughly 21% of low income families (defined as those earning below 200% of the poverty line) needing assistance. *Id.*

56. *See GIANNARELLI & BARSIMANTOV, supra note 39, at 11.*

57. *See id.*

58. GORNICK & MEYERS, *supra note 3, at 195.* For example, state licensing standards often deal with ensuring that children in such centers are properly immunized and that playground equipment is safe. *See, e.g., 10 N.C. ADMIN. CODE 09.0605 (2008) (regulating outdoor equipment at child care centers); 10A N.C. ADMIN. CODE 09.1721 (2008)*

addition, many types of caretaking arrangements, including informal babysitters and small family child care homes, are exempted by state law from even meeting these licensing standards.<sup>59</sup> Because the majority of nonparental care takes place in these settings, most child care goes virtually unregulated.<sup>60</sup>

*D. The Cost of the United States' Failure to Ameliorate the Work-Family Conflict*

The failure of state and federal law to ameliorate conflicts between family and work means that families are left to deal with these issues privately. Faced by job structures that do not accommodate caretaking, most American families have only a limited set of options from which to choose. In many families, all parents (both parents in two-parent families, or the only parent in single-parent families) plunge full time into a labor market that demands long hours and put their children in paid child care, often for extended periods of time.<sup>61</sup> In other families, one parent—generally the woman in heterosexual families—detaches herself from full participation in the labor market.<sup>62</sup> Finally, in some families, one parent takes a job working nonstandard hours in order to ensure his or her availability for child care.<sup>63</sup> All of these options, however, as explained below, impose significant costs on important goods that we as a nation should care a good deal about.

For the majority of families, in which all parents work full time,<sup>64</sup> the long hours required in their jobs result in their placing their children in some form of paid caretaking for many hours a day. More than three-quarters of preschool-age children with working mothers are cared for by someone other than their parents; roughly half of

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(requiring that child care centers obtain copies of immunization records). They far less often ensure that teachers have a high school education. GORNICK & MEYERS, *supra* note 3, at 195.

59. GORNICK & MEYERS, *supra* note 3, at 195.

60. *Id.*

61. *See, e.g.*, Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Characteristics of Families in 2008, at 8–10 tbls.3–5 (May 27, 2009), <http://www.bls.gov/news.release/pdf/famee.pdf>.

62. *See id.* at 11 tbl.5. Sixteen percent of all mothers with children under age eighteen and just under 24% of all working women with children under eighteen worked part time in 2008. *See id.* Thirty-two and one-half percent of mothers with children under eighteen did not work at all. *Id.*

63. *See* HARRIET B. PRESSER, WORKING IN A 24/7 ECONOMY: CHALLENGES FOR AMERICAN FAMILIES 61–63 (2003); *see also infra* note 74 and accompanying text (noting the hours parents who work nonstandard hours work).

64. *See* Press Release, Bureau of Labor Statistics, *supra* note 61, at 11 tbl.5.

these children are in nonparental care settings for more than thirty-five hours a week.<sup>65</sup> This is true even for young children: two-thirds of children under age one whose mothers work are cared for outside the home; so are three-quarters of two- and three-year-old children.<sup>66</sup> For school-aged children, ages six to twelve, whose mothers work, almost half spend an average of 12.5 hours a week in nonparental care beyond their time in school.<sup>67</sup> Moreover, while their parents work, 5% of six- to nine-year-olds are latch-key kids with no parent at home for some time each week, as are 23% of ten- to eleven-year-olds, and almost 50% of twelve-year-olds and older children.<sup>68</sup>

Faced with jobs that do not accommodate caregiving and inadequate child care options, many families that can afford to have one parent step off the career track and either leave the paid workplace entirely or choose part-time jobs in order to have more time for child care.<sup>69</sup> While this may be the best decision they can make among the available options for their families, this strategy takes a large financial toll on women. For a complicated array of reasons in our gender-structured society, it is generally women who are the ones who “step down” from full attachment in the labor market.<sup>70</sup> Stepping down, even a little, from complete attachment in

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65. GORNICK & MEYERS, *supra* note 3, at 43–44 (citing JEFFREY CAPIZANNO ET AL., URBAN INST., CHILD CARE ARRANGEMENTS FOR CHILDREN UNDER FIVE: VARIATION ACROSS STATES 2 (2000), available at <http://www.urban.org/publications/309438.html>).

66. *Id.* at 44 (citing JENNIFER EHRLE ET AL., URBAN INST., WHO’S CARING FOR OUR YOUNGEST CHILDREN? CHILD CARE PATTERNS OF INFANTS AND TODDLERS 16 (2001), available at <http://www.urban.org/url.cfm?ID=310029>).

67. See JEFFREY CAPIZANNO ET AL., URBAN INST., CHILD CARE PATTERNS OF SCHOOL-AGE CHILDREN WITH EMPLOYED MOTHERS 6 tbl.1 (2000), available at <http://www.urban.org/publications/310283.html>.

68. *See id.*

69. *See* Press Release, Bureau of Labor Statistics, *supra* note 61, at 11 tbl.5. Because more well-off families can afford to have just one partner work, married women’s hours during the past thirty years have risen significantly less for those in top quintiles of family income (32% and 33%, respectively) than they have for those in the bottom three quintiles (57%, 61%, and 47%, respectively). MISHEL ET AL., *supra* note 28, at 90–91, tbl.1.21. The slighter increase in hours of women in the bottom quintile than in the quintiles above it is likely due to the fact that the lower wages women in the bottom quintile earned working would be offset by the child care costs they would incur while working.

70. *See* Press Release, Bureau of Labor Statistics, *supra* note 61, at 11 tbl.5. In fact, while having children significantly decreases women’s attachment to the labor market, it increases men’s attachment. GORNICK & MEYERS, *supra* note 3, at 36. Fathers are more likely to be employed, employed for more hours and at higher hourly rates than other men. *Id.* In contrast to the 32.5% of mothers who did not work at all, only 9.5% of fathers did not work at all. *Id.* In contrast to the 16% of all mothers and 24% of working mothers who worked part time, only 3.6% of all fathers and 4% of all working fathers worked part time. *Id.*

the labor market generally results in significant economic costs to the mother.<sup>71</sup> Moreover, many women move from full-time to part-time jobs, at least while they have young children; these jobs generally pay far less than proportional pay or benefits to full-time jobs.<sup>72</sup> According to Ann Crittenden, this “tax” on motherhood may cost a typical middle-class educated woman upward of \$600,000 over the course of her life.<sup>73</sup>

Other dual-parent families deal with the work-family conflict by having one parent switch to a job schedule with nonstandard hours so that he or she can care for children during regular working hours. According to Harriet Presser, in 35% of dual-earning couples with children under five, and 31% of couples with children under fourteen, at least one parent works nonstandard hours or weekends.<sup>74</sup> While some of these parents say they do so because their jobs in the service economy require it, 35% of mothers with a child under five who work nonstandard hours do so primarily so that they can take care of children; another 9% said that they did so in order to care for another family member.<sup>75</sup>

Such “split-shift” or “tag team” parenting, however, also imposes considerable costs on these families.<sup>76</sup> Working nonstandard hours is associated with a number of medical risks,<sup>77</sup> and significantly increases the risk of marital dissolution.<sup>78</sup> Married men who work at

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71. See, e.g., ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 87 (2001) (describing the loss of earnings to women as a result of their unequal child rearing responsibilities, a loss that Crittenden has dubbed “the mommy tax”); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 214 (2001) (estimating that mothers pay a penalty in wages of about 5% per hour for each child they bear); Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, J. ECON. PERSP., Winter 1998, at 137, 145 (calculating that young, childless women earned 90% as much as men, compared to mothers, who earned only 70% as much as men).

72. As noted earlier, see *supra* note 38, women who work part time are often excluded from medical care and pension benefits and are paid roughly 79% of what their full-time counterparts earn on an hourly basis, even when basic differences in human capital are controlled for. GORNICK & MEYERS, *supra* note 3, at 62–63, 149–50.

73. CRITTENDEN, *supra* note 71, at 89.

74. PRESSER, *supra* note 63, at 64 tbl.3.2.

75. *Id.* at 19 tbl.2.2.

76. GORNICK & MEYERS, *supra* note 3, at 51 (citing PRESSER, *supra* note 63, at 61).

77. See *id.* at 51–52. These medical risks include “likelihood of suffering coronary disease, sleep disturbances, gastrointestinal disorders, and chronic malaise; round-the-clock employment also raises the likelihood of workplace accidents.” *Id.* (citing INT’L LABOUR ORG., *CONDITIONS OF WORK DIGEST: WORKING TIME AROUND THE WORLD* 22 (1995), available at <http://www.ilo.org/public/english/protection/condtrav/pdf/1995digest.pdf>); Harriet B. Presser, *Toward a 24-Hour Economy*, 284 SCIENCE 1778, 1779 (1999).

78. GORNICK & MEYERS, *supra* note 3, at 52.

night are six times more likely to get divorced than those who work days; married women on a night schedule are three times more likely to get divorced than those who work days.<sup>79</sup> Finally, mounting evidence suggests that children whose parents work nonstandard hours have lower achievement at school and are far more likely to be disciplined at school.<sup>80</sup>

Ultimately, the system in which American families are left individually to negotiate work-family issues imposes debilitating costs on several important public goods. The first of these is children's welfare. Large numbers of children spend long hours in day care,<sup>81</sup> most of them in settings that are not developmentally enriching. Although children who attend good quality day care generally fare as well as those who are cared for by a parent,<sup>82</sup> most day care in the United States' lightly regulated system is not good quality. More than half of day cares provide care that experts deem "poor" to "mediocre."<sup>83</sup> Only roughly one in seven provides care that has been deemed developmentally enriching.<sup>84</sup>

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79. *Id.*

80. JODY HEYMANN, *THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY—AND WHAT CAN BE DONE ABOUT IT* 53–57 (2000).

81. *See supra* notes 67–69 and accompanying text. While the use of child care has risen steadily for all children as mothers' working rates have increased, it has increased particularly for very young children. *See* GORNICK & MEYERS, *supra* note 3, at 44.

82. *See* NAT'L INST. OF CHILD HEALTH & HUMAN DEV., U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE NICHD STUDY OF EARLY CHILD CARE AND YOUTH DEVELOPMENT: FINDINGS FOR CHILDREN UP TO AGE 4 1/2 YEARS 1* (2006), available at [http://www.nichd.nih.gov/publications/pubs/upload/seccyd\\_051206.pdf](http://www.nichd.nih.gov/publications/pubs/upload/seccyd_051206.pdf). The National Institute of Child Health and Human Development ("NICHD") study is the most comprehensive longitudinal study on this issue. It found that "[c]hildren who were cared for exclusively by their mothers did not develop differently than those who were also cared for by others," but that children who experienced higher quality care demonstrated somewhat better cognitive and developmental skills than did those in lower quality care. *Id.* Children exposed to higher quality day care were also more ready for school at age four and fared better in standardized literacy and number skills tests than did their peers in lower quality care. *Id.* at 12.

The NICHD study measured child care quality in two ways. *Id.* at 8. First, it examined features sometimes regulated by public agencies or professional associations specializing in early childhood education that are relatively easy to measure, such as adult-to-child ratio, group size, and the training of the child care provider. *Id.* Second, the study examined what it called "process" features of children's daily experiences in child care, such as children's social interactions with adults and other children. *Id.* In including process features, the study sought to weigh the extent of "sensitive, encouraging, and frequent interactions between the caregiver and the child." *Id.* at 10.

83. SUZANNE HELBURN ET AL., *COST, QUALITY, AND CHILD OUTCOMES IN CHILD CARE CENTERS: PUBLIC REPORT 26* (1995).

84. *Id.* A later study reached a somewhat more optimistic conclusion about the percentage of child care that is developmentally enriching. *See* Nat'l Inst. of Child Health and Human Dev. Early Child Care Res. Network, *Characteristics and Quality of Child*

Meanwhile, older children left home alone are also at risk.<sup>85</sup> Studies suggest that juvenile crime, drugs, sex, and other risky behavior increase dramatically during unsupervised afternoon hours.<sup>86</sup> Furthermore, many parents do not even make it home from work by dinner time. In fact, a recent UNICEF report ranked the United States twenty-third out of twenty-five Organisation for Economic Co-operation and Development (“OECD”)<sup>87</sup> countries in terms of the percentage of teens who eat dinner with their parents several times a week, an indicator of parent-child interaction that the report found to be an important determinant in children’s well-being.<sup>88</sup>

Poor children are particularly disadvantaged within the United States’ system. Good-quality child care, in general, costs more than poor-quality child care.<sup>89</sup> And most center-based child care is outside the budgets of poor parents. According to a recent study, the average cost of center-based child care across all families with children in care in 2008 varied from \$4,560 to \$15,895 a year for an infant, depending on the state.<sup>90</sup> For a four-year-old child, costs varied from \$4,055 to \$11,680 a year.<sup>91</sup> As the study reports:

In every region of the United States, average child care fees for an infant were higher than the average amount that families

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*Care for Toddlers and Preschoolers*, 4 APPLIED DEVELOPMENTAL SCI. 116, 130 tbl.5 (2000) (finding that positive caregiving experiences were characteristic for 28% of infants and 22% of toddlers in center-based care).

85. See *supra* notes 67–68 and accompanying text.

86. Mary B. Larner et al., *When School Is Out: Analysis and Recommendations*, FUTURE CHILD., Fall 1999, at 4, 9.

87. The Organisation for Economic Co-Operation and Development (“OECD”) is an organization of thirty countries, most of which are regarded as having high-income economies. See OECD, <http://www.oecd.org> (last visited Feb. 6, 2010). The United States is a member. *Id.*

88. INNOCENTI RESEARCH CENTRE, UNICEF, CHILD POVERTY IN PERSPECTIVE: AN OVERVIEW OF CHILD WELL-BEING IN RICH COUNTRIES 22, 24 fig.4.2(a) (2007), available at <http://www.unicef.org/media/files/ChildPovertyReport.pdf>. This measure of parent-child interaction put the United States behind Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. *Id.* Only Finland and New Zealand had lower rankings. *Id.*

89. Jeanne Brooks-Gunn, Greg J. Duncan & Nancy Maritato, *Poor Families, Poor Outcomes: The Well-Being of Children and Youth*, in CONSEQUENCES OF GROWING UP POOR 1, 2 (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1997).

90. NAT’L ASS’N OF CHILD CARE RES. & REFERRAL AGENCIES, PARENTS AND THE HIGH PRICE OF CHILD CARE 1 (2009), available at [http://www.naccra.org/publications/naccra-publications/publications/665-0410\\_PriceReport\\_FINAL\\_051409.kv.pdf](http://www.naccra.org/publications/naccra-publications/publications/665-0410_PriceReport_FINAL_051409.kv.pdf).

91. *Id.*

spent on food. Furthermore, monthly child care fees for two children at any age exceeded the median rent cost, and were nearly as high as, or even higher than, the average monthly mortgage payment.<sup>92</sup>

The cost of child care centers combined with the lack of government subsidies means that many poor families are limited to family care or relative care arrangements. Poor children generally receive relatively poor quality care in these settings.<sup>93</sup> In one study, only 9% of family child care homes were considered “good.”<sup>94</sup> Thirty-five percent of the homes were considered “inadequate.”<sup>95</sup> Yet the quality of care has a profound effect on the children’s future. Children from low-income families who attend good quality early childhood education have higher IQs, do better in school, and become more productive citizens than those in poor quality programs.<sup>96</sup>

Not only do poor children fare badly under this system, the system also creates more poor children. The lack of income supports for parenting, including the lack of public provision of day care, contributes to a situation in which 22% of children in the United States are poor.<sup>97</sup> This is a substantially higher rate than in many European countries; for example, only 2 to 4% of children in the Nordic countries are poor.<sup>98</sup> The high child poverty rates in the United States contributed to the UNICEF report that ranked children’s well-being among countries to rate the well-being of children in the United States as second to last overall among OECD nations measured—twentieth of the twenty-one countries ranked, when all areas of children’s well-being were measured.<sup>99</sup> Chronic

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92. *Id.*

93. NICHD Early Child Care Research Network, *Poverty and Patterns of Care, in CONSEQUENCES OF GROWING UP POOR*, *supra* note 89, at 100, 127–28. Part of this is a consequence of the fact that between 33 and 46% of home caregivers have not completed high school; only 6 to 15% have a college diploma. GORNICK & MEYERS, *supra* note 3, at 226.

94. ELLEN GALINKSY ET AL., *THE STUDY OF CHILDREN IN FAMILY CHILD CARE AND RELATIVE CARE, HIGHLIGHTS OF FINDINGS* 81 (1994).

95. *Id.*

96. See W. Steven Barnett, *Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, *FUTURE CHILD.*, Winter 1995, at 25, 44–45, available at [http://www.futureofchildren.org/futureofchildren/publications/docs/05\\_03\\_01.pdf](http://www.futureofchildren.org/futureofchildren/publications/docs/05_03_01.pdf).

97. MISHÉL ET AL., *supra* note 28, at 386.

98. *Id.* at 385.

99. INNOCENTI RESEARCH CENTRE, *supra* note 88, at 2. This composite measure put the United States behind Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Norway,

poverty for children jeopardizes not only their present well-being but their future prospects. Among other things, it puts children at risk of lower cognitive development, poor school achievement, and early childbearing themselves.<sup>100</sup>

The United States' free market approach to work and family also entrenches sex inequality. A growing body of evidence suggests that the reduction in women's pay caused by child rearing is the primary factor in women's continued economic inequality with men in the United States.<sup>101</sup> Those women who are childless, by one calculation, earn 90% as much as men do; mothers, however, earn only 70% as much as men.<sup>102</sup> This wage gap does not appear to be diminishing over time.<sup>103</sup> Not only does the work-family conflict create inequality through women reducing their work hours or leaving the workplace altogether, the incompatibility of jobs with caretaking precludes the many husbands who would like to take a more active role in child rearing from sharing these responsibilities with their wives.<sup>104</sup>

Finally, the state's failure to create a buffer on work's intrusion into family life negatively affects the health of civil society. Parents, it turns out, have gone to great lengths to ensure that they do not lose parenting time with their children as the work hours of families have risen during the past decades.<sup>105</sup> As a consequence, they have spent significantly fewer hours socializing with friends and engaging in community activities than they once did.<sup>106</sup> This has caused their social circles to narrow dramatically, and the broader social networks in neighborhoods and communities to shrink. A study by sociologists at Duke University and the University of Arizona comparing data from 1985 and 2004 found that the mean number of people with whom Americans can discuss matters important to them dropped by

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Poland, Portugal, Spain, Sweden, and Switzerland. *Id.* Only the United Kingdom was given a lower ranking. *Id.*

100. GORNICK & MEYERS, *supra* note 3, at 73–78.

101. CRITTENDEN, *supra* note 71, at 88; GORNICK & MEYERS, *supra* note 3, at 46.

102. GORNICK & MEYERS, *supra* note 3, at 47 (citing Waldfogel, *supra* note 71, at 145).

103. Sarah Avellar & Pamela J. Smock, *Has the Price of Motherhood Declined Over Time?: A Cross-Cohort Comparison of the Motherhood Wage Penalty*, 65 J. MARRIAGE & FAM. 597, 604 (2003).

104. See BIANCHI ET AL., *supra* note 10, at 133 (finding that a full 60% of fathers reported that they did not have enough time to spend with their oldest child).

105. *Id.* at 64. Bianchi et al., through sifting through four decades of time diaries from American parents, reached the surprising conclusion that the hours that American parents spent with their children actually increased to some extent between 1965 and 2000, despite the far greater number of hours that parents engaged in paid work. *Id.* at 62–65.

106. *Id.* at 111.

nearly one-third, from 2.94 people in 1985 to 2.08 in 2004.<sup>107</sup> In the same time period, the percentage of people who talk to at least one person outside of their family about important matters decreased from about 80% to about 57%, while the number of people who depend totally on their spouse increased from about 5% to about 9%.<sup>108</sup> The study concluded that citizens have turned away from close ties formed in neighborhood or community contexts and toward relationships with close kin, especially spouses.<sup>109</sup> Not only does this affect the quality of lives of those adults whose social circles have narrowed but also the well-being of communities, which lack the benefits of engaged citizens. Further, the weakening of social ties among citizens negatively affects levels of civic trust in society, which is important for a liberal democracy to function well.<sup>110</sup>

## II. HUMAN DIGNITY AND THE STATE'S RESPONSIBILITY FOR CARETAKING

There are strong reasons, many of which are described above, that the United States' doing more to help families resolve the work-family conflict would be good policy. Yet its responsibility to support caretaking is more fundamental than the concept of "good policy" suggests. When it comes to a number of other functions of government, we do not assert that the state should perform them only because there are good policy reasons to do so. For example, we do not say that the government should arrest violent criminals who have attacked other citizens only because it is good policy; nor do we believe that the state's having an adequate military that can repel attacks to the United States is simply a wise move because it would prevent bad outcomes. Instead, we consider these functions to be part of the basic responsibilities of government. Supporting caretaking should similarly be conceived as a basic responsibility of government in a liberal democracy, such as the United States, because of the commitment to human dignity embodied in this form of government.

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107. Miller McPherson et al., *Social Isolation in America: Changes in Core Discussion Networks Over Two Decades*, 71 AM. SOC. REV. 353, 357-58 (2006).

108. *Id.* at 359.

109. *Id.* at 357-58.

110. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (analyzing the decline of American social capital and arguing that this trend impairs the functioning of democratic government); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993) (using Italy as a case study of the importance of "social capital" in facilitating effective democratic governance).

This Essay's grounding of the state's responsibility to support caretaking on its commitment to human dignity argues for similar policies, but on different grounds, as those who argue that the state must subsidize parents' caretaking for children because children are public goods.<sup>111</sup> Proponents of the "public goods" argument contend that the state has a fundamental responsibility to ease the conflict between family and work because parents are performing the vital work of raising children, who will one day serve as the replacements in the work force that are needed in any ongoing society.<sup>112</sup> In this argument, because the state relies on parents to raise children—an activity that requires significant time, effort, and money on the part of these parents—the state owes parents for their efforts and must compensate them for their services.<sup>113</sup>

This Essay agrees with this view insofar as it contends that the state has a responsibility to assist families in caretaking. However, it contends that this responsibility does not come from a debt that the state owes to families for raising productive workers. Instead, the state's responsibility to support caretaking exists whether or not a particular child or other societal dependent has future labor market prospects for the state. Certainly, the state's responsibility should extend to a child with cystic fibrosis, who is unlikely to live far into adulthood, just as it extends to other children. Likewise, the state's responsibility should also extend to an elderly person with Alzheimer's disease or a twenty-year-old with Down's Syndrome. The "children as public goods" argument errs in buying into the idea that the state's responsibilities are cabined to supporting and ensuring the continuation of the market and market-based activities. Ultimately, however, the state's support for those with dependency needs should rest not on whether they will one day be money-makers but on the fact that they are members of our society.

#### A. *Human Dignity and Caretaking for Dependency*

In contrast to both advocates of the current U.S. approach and to those who argue that the state should support parents because of children's future economic contributions, this Essay casts the state's responsibility to support families' caretaking on the basic functions that the state is supposed to serve. Liberal democracies are premised

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111. See, e.g., FINEMAN, *supra* note 12, at xvii; Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86–87 (1994).

112. FINEMAN, *supra* note 12, at xvii, 263; Folbre, *supra* note 111, at 87–88.

113. FINEMAN, *supra* note 12, at xvii, 263; Folbre, *supra* note 111, at 87–89.

on a commitment to human dignity.<sup>114</sup> It is the recognition of the dignity of all humans that underpins the justification for liberal institutions, including sovereignty of the people rather than divine rule of kings; a limited state; and a commitment to individual liberty and individual rights.<sup>115</sup> Certainly, this does not mean that liberal democracies always fulfill this commitment to human dignity; throughout our history, the United States has failed to do so in countless ways.<sup>116</sup> It does mean, however, that the commitment is an important part of the ideals justifying our system of government, and that the state therefore can and should be held to account for departures from this ideal.

Yet, our view of what the commitment to human dignity demands has been cramped by the particular, limited notion of personhood that has long served as the model of our citizens. The notion of a citizen handed down in our tradition from Hobbes and Locke to us is built on a vision of able, autonomous adults.<sup>117</sup> What

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114. Proving the assertion that liberalism's moral appeal comes at least significantly from its grounding in the value of human dignity is beyond the reach of this Essay. I note, however, that many of the most eloquent defenses of liberal systems of rights and liberties, including of the U.S. Constitution, ultimately ground them in the value of human dignity. For example, in interviews with Bill Moyers for the public television series *In Search of the Constitution*, both Justice William Brennan and Professor Ronald Dworkin asserted that the bedrock value on which the Constitution, particularly the Bill of Rights, is built is the value of human dignity. See *Introduction to THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 1* (Michael J. Meyer & W.A. Parent eds., 1992) (discussing *In Search of the Constitution: Mr. Justice Brennan* (Public Affairs Television broadcast 1987); *In Search of the Constitution: Ronald Dworkin: The Changing Story* (Public Affairs Television broadcast 1987)).

115. See Remarks by John Wildman (Oct. 29, 1647), in *PURITANISM AND LIBERTY: BEING THE ARMY DEBATES (1647-9) FROM THE CLARKE MANUSCRIPTS WITH SUPPLEMENTARY DOCUMENTS* 65, 66 (A.S.P. Woodhouse ed., 1938). The English Leveller, John Wildman, was an early harbinger of the recognition of human dignity on which liberalism is premised when he declared at the time of the Putney Debates on October 29, 1647: "Every person in England hath as clear a right to elect his representative as the greatest person in England." *Id.*

116. The United States Supreme Court decisions in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393 (1857), upholding slavery; *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896), allowing racial segregation; and *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944), finding the internment of Japanese citizens during World War II to be constitutional are some of the most blatant failures.

117. THOMAS HOBBS, *LEVIATHAN* 74 (Edwin Curley ed., Hackett Publishing 1994) (1651); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 4, at 8 (C.B. Macpherson ed., Hackett Publishing 1980) (1690). Thomas Hobbes, for instance, begins his account of the state of nature, from which he derives the appropriate limits of the state, with fully grown, healthy men:

Nature hath made men so equal in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and

citizens modeled on this image need to be accorded on account of their dignity is protection of their individual right to liberty and some basic measure of equality. Providing these requires giving them a say over their own lives and a role in collective government, as well as protecting their liberty to both.

It is based on such a conception of the “natural dignity of man” that Thomas Paine argued for individual rights and freedom from patriarchy.<sup>118</sup> It is on this same model of personhood from which the notion has been derived that the core functions of government are providing for citizens’ security and ensuring that citizens’ individual rights are protected.<sup>119</sup> Conceiving of these as key state functions is a natural outgrowth of conceiving of citizens as adults, each of whom has his or her own conception of the good life, and that this conception is entitled to respect. Because citizens’ conceptions of the good life are entitled to respect, the state must safeguard their rights to achieve them. Furthermore, since we cannot reasonably expect these able adults to safeguard their own security at all times, we also need a state to handle security issues.<sup>120</sup>

Focusing on the dependency of the human condition, however, makes the picture of what citizens need more complex than the liberal democratic theory passed down to us would have it. Once the human life cycle is introduced into this picture, the importance of

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man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he.

HOBBS, *supra*, at 74. Dependency plays no role in this account. As the conservative critic of Hobbes, William Lucy, wrote more than three hundred years ago: “Methinks . . . that he discourses of Men as if they were . . . born out of the earth, come up like Seeds, without any relation one to the other. . . . [By nature a human is] made a poor helpless Child who confides and trusts in his Parents, and submits to them.” JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S*, at 20 (1984) (quoting WILLIAM LUCY, *OBSERVATIONS, CENSURES, AND CONFUTATION OF NOTORIOUS ERRORS IN MR. HOBBS HIS LEVIATHAN AND OTHER HIS BOOKS* 139 (London 1663)) (internal quotation marks omitted). By the same token, Locke’s state of nature begins with men in “a *state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.” LOCKE, *supra*, § 4, at 8. Here, too, human dependency is not taken into account.

118. THOMAS PAINE, *RIGHTS OF MAN* 41 (Gregory Claeys ed., Hackett Publishing 1992) (1791).

119. See, e.g., HOBBS, *supra* note 117, at 106–09 (arguing that the state’s purpose is to avoid discord and civil war among men); LOCKE, *supra* note 117, §§ 87–90, at 46–48. Although Hobbes had a key role in developing the model of the citizen that liberals adopted, he of course was no liberal himself, since he believed that citizens surrender their natural rights in return for the state’s protection. See HOBBS, *supra* note 117, at 110–45.

120. See HOBBS, *supra* note 117, at 106; LOCKE, *supra* note 117, § 21, at 16.

caretaking and human development come to the fore as every bit as necessary and important to human dignity as safeguarding citizens' liberty and security. The able adult of our tradition of liberal theory must therefore be put in context: This description applies to citizens for only a limited part of their lives and, even then, is an idealized description. A more appropriate theory would conceptualize citizens as existing somewhere on a spectrum between complete autonomy and complete dependence, with their exact position changing over the course of their lives, and depending on their individual situation. This conception owns up to the fact that dependency is an inevitable condition in all human lives. It does not disavow the ways in which humans can be autonomous, but makes it clear that this autonomy will never be complete. It also focuses attention on the fact that humans do not emerge with their faculties, personalities, and desires fully formed, as liberal political theory sometimes takes them.<sup>121</sup> Instead, their identities develop within the social world, and within the web of institutions in which they are raised.

Once we adjust the image of citizens to account for dependency in the human life cycle, respect for human dignity entails more than just protecting citizens' individual rights: It entails a commitment to meeting dependency needs through supporting caretaking and human development so that citizens can live dignified lives. In the same way that we conceive the state to have a basic responsibility to protect citizens' individual rights and security—a responsibility that applies whether or not doing so is economically productive—it has a basic responsibility to support caretaking and human development.

### *B. The State's Role in Supporting Caretaking*

Yet a liberal democracy properly expects that its citizens will and should do those things that they can do for themselves. As Hobbes and Locke argued, it is only because citizens cannot guard their security that the state has the duty to undertake these functions.<sup>122</sup>

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121. See *supra* notes 114–17 and accompanying text.

122. See, e.g., HOBBS, *supra* note 117, at 106 (“The final cause, end, or design of men (who naturally love liberty and dominion over others) in the introduction of that restraint upon themselves in which we see them live in commonwealths is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war . . . when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants and observation of th[e] laws of nature . . .”); LOCKE, *supra* note 117, § 21, at 16 (“To avoid this state of war (wherein there is no appeal but to heaven, and wherein every the least difference is apt to end, where there is no authority to decide between the contenders) is one great reason of men’s putting themselves into society, and quitting the state of nature:

Why, then, should the state have the duty to support caretaking and human development? Can't families do these things for their members by themselves? In fact, the answer to this question is "not completely."

To begin with, the idea that families can ever be fully removed from state action is an inaccurate way to think about the relationship between the family and the state. In today's complex society, the ways in which families function are always deeply and inextricably intertwined with government policy.<sup>123</sup> For example, the relaxation of divorce laws in the 1970s affected whether and which families stayed together.<sup>124</sup> The provision of public education shaped and continues to shape the lives of children and to affect parents' control over them.<sup>125</sup> Equal employment legislation encouraged women's movement out of the household and into the labor market.<sup>126</sup> Equal employment laws likely also contributed to the increase in divorces, as women in unhappy marriages began to have more financial wherewithal to leave their husbands.<sup>127</sup>

Most importantly for the purposes of this Essay, the care that children and other dependents receive from family members is inextricably intertwined with state policies. This care takes place in a matrix of constraints and entitlements that affect family members' ability and opportunity to care for other members. The existence or nonexistence of minimum wage laws, union rights to bargain, and overtime provisions affect parents' ability to meet the financial needs

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for where there is an authority, a power on earth, from which relief can be had by appeal, there the continuance of the state of war is excluded, and the controversy is decided by that power.") (emphasis omitted).

123. See Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 836 (1985).

124. See IRA ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 237–41 (4th ed. 2004). The relationship between divorce laws and cultural changes, however, was a more complex one than often recognized. See *id.*

125. Cf. STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 201–11 (2000) (describing the effect of public education's attempt to inculcate a common national perspective in children from diverse backgrounds).

126. See William J. Carrington, Kristin McCue & Brooks Pierce, *Using Establishment Size to Measure the Impact of Title VII and Affirmative Action*, 35 J. HUM. RESOURCES 503, 504 (2000) (supporting the view that federal intervention increased women's labor market participation in the 1960s and 1970s).

127. See Paula Mergenhausen DeWitt, *Breaking Up Is Hard to Do*, AM. DEMOGRAPHICS, Oct. 1992, at 52, 53.

of their children and other dependents.<sup>128</sup> Welfare reform laws requiring recipients to work in order to receive welfare subsidies affect parents' ability to care for those with dependency needs.<sup>129</sup> Family leave laws influence parents' opportunity to stay home with their children.<sup>130</sup> The stability and security of a parent's job affects stress levels in the household, which also affect the quality of parenting. In these circumstances, the family has no "natural" manner of functioning that it can be left to "apart from" the state. Nor does the modern administrative state have a neutral, isolated position it can assume while leaving families autonomously to deal with their own affairs. Instead, the state is always and continually influencing how families conduct their affairs. The issue is not whether state policy will influence families but whether it will be formulated with this inevitable influence in mind. When it comes to the ways families function, no family is an island.

But why should supporting caretaking be considered a basic responsibility of the state? Certainly when it comes to ensuring that family members receive caretaking, there are good reasons to expect that family members will shoulder much of the responsibility to provide or coordinate this care. Where children and spouses are concerned, doing so holds citizens accountable for obligations they have assumed. Citizens who have children should be responsible for their decision to do so and should be expected to plan carefully and budget wisely for them, as well as to care for them. Where family members beyond children and spouses are concerned, holding citizens accountable for shouldering some responsibility for family members is still generally consistent with the idea that society should recognize "nested obligations" among citizens.<sup>131</sup> As explained by Eva Feder Kittay, moral obligations toward others are appropriately created not only by agreement of the parties but also by a more broadly based sense of reciprocity, in which the caretaking actions of one person toward another within a network of care obligates the second person to care for others within that network of care.<sup>132</sup> Thus,

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128. See, e.g., Ronald B. Mincy, *Raising the Minimum Wage: Effects on Family Poverty*, 113 MONTHLY LAB. REV., July 1990, at 18, 22–23 (discussing the higher than expected impact of raising the minimum wage on family poverty).

129. See, e.g., LISA A. GENNETIAN ET AL., MDRC, MAKING CHILD CARE CHOICES: HOW WELFARE AND WORK POLICIES INFLUENCE PARENTS' DECISIONS (2002), <http://www.mdrc.org/publications/182/policybrief.html> (examining the effect of welfare to work policies on parent's child care choices).

130. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1) (2008).

131. See KITTAY, *supra* note 12, at 67–68.

132. See *id.*

we may care for an elderly aunt because we were once cared for by family members and will likely be again, and we should ensure this same caretaking to others.<sup>133</sup> Expecting that some portion of the responsibility for caretaking should rest with family members also accords with the moral precept that those who are best positioned to care for the vulnerable should have the responsibility to do so.<sup>134</sup> In many cases, family members will be in the best position to care for other family members, both because they know the needs of their family members better than others and because they are most motivated to act in their interests because of their emotional bond.

Yet the view that family members should bear responsibility for the caretaking of other family members does not exempt the state from responsibility for its citizens' dependency needs, as well. In fact, there is little controversy over the proposition that the state bears some responsibility for dependent citizens: For example, few would argue that the state has no duty to take into its care a child who has been orphaned. This is the case because the controversy between opponents and proponents of state support for dependents is not really over *whether* the state has a duty but over *when* that duty of the state is triggered: Even those who generally oppose of state support concede that the state has a "residual" duty in the sense that it is responsible for dependents *after* families fail in some serious way.<sup>135</sup> The orphan example is therefore uncontroversial in terms of state's responsibility because the child's parents have already died. The theoretical tenets embedded in current child welfare law and in a broad array of public policies adopt this residual view of the state's responsibility.<sup>136</sup>

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133. See *id.* As Kittay quotes one caregiver: "Well, what goes round comes round." *Id.* at 68.

134. See ROBERT E. GOODIN, *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* 153 (1985).

135. See, e.g., Mary Ann Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1785 (2001) ("Once we acknowledge that there should be 'some collective responsibility' for child care we might still conclude that forced extractions from the collective in aid of this responsibility should kick in only after those with an individual responsibility, notably fathers, are forced to kick in their fair share . . . ." (quoting Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1403 (2001))); see also DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 24-25 (1994) (describing the residual view of state responsibility). Duncan Lindsey coined the term "residual responsibility." See *id.* at 3-5.

136. See, e.g., Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

The current theory of residual responsibility represents an apportionment of responsibility that Robert Goodin, in his schematization of the division of moral responsibility for vulnerable persons, refers to as “disjunctive.”<sup>137</sup> The defining feature of disjunctive responsibility is that “[i]f *A* is vulnerable to *B* or to *C* or to *D*: any one of them could provide the needed assistance; and if any one of them does, none of the others need to.”<sup>138</sup> The paradigm case of this type of responsibility is that of a drowning child at a crowded, but unguarded beach: Any single bystander could rescue the child, and the other bystanders need not take action if anyone else does.<sup>139</sup> In the case of disjunctive responsibility, a particular person (for example, the nearest adult) may have a moral obligation to aid the vulnerable person before others need attempt a rescue; this primary responsibility does not let all others off the hook, however. Once it becomes clear that the person with primary responsibility is not going to act, responsibility devolves on others.<sup>140</sup> This, in essence, is the theory proposed by those who advocate only a residual role for the state when it comes to meeting children’s dependency needs: parents are conceived to have primary responsibility for children’s welfare; this duty devolves on the state only if parents fail in their responsibility.

But a disjunctive division of responsibility is not the only possible division of responsibility. As Goodin counsels, responsibility can also be divided in a “conjunctive” way, so that several persons—or, in this case, family members and the state—have a responsibility to ensure caretaking jointly.<sup>141</sup> The paradigm case for a conjunctive division of responsibility is a person trapped in a burning house.<sup>142</sup> Not only does the firefighter who helps her out of the window have a moral obligation to do so; so do the firefighters who hold the trampoline below; and so does the emergency medical technician who provides emergency medical aid. To spin this out still further, the firefighter also requires training from others to be able to do her job well, as well as sufficient equipment. The fact that one actor bears responsibility to act therefore does not preclude concurrent responsibility on the part of others.<sup>143</sup>

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137. GOODIN, *supra* note 134, at 134.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 136.

142. *Id.*

143. *Id.*

So which type of responsibility, disjunctive or conjunctive, should we associate with the state's duty to meet citizens' dependency needs vis-à-vis families? As argued earlier,<sup>144</sup> the intricate interconnections between families and the state make it conceptually inaccurate to conceive of a family acting "before" the state steps in. Instead, state action always and already affects families' capacity to deal with dependency issues. In addition, families and the state are not similarly situated when it comes to dealing with dependency needs. Families are better suited to performing the hands-on care and arranging the care for those with such needs, yet are less well-suited to arranging institutions outside the family to support this care. In contrast, the state is uniquely suited to ensuring that dependency needs are accommodated at an institutional level by establishing relevant laws and regulations. In this situation, it makes far more sense to conceive of the state's and families' responsibility as conjunctive.

Returning to the example of the child drowning near multiple adult bystanders makes it clear why the model of disjunctive responsibility is a poor fit to the situation of caretaking for dependents. First, the actors at issue—families and the state—do not act independently of one another, as they do in the beach example. Instead, institutions structured directly and indirectly by the state profoundly affect families' ability to care for their members. A child's best chance for achieving well-being when it comes to caretaking is therefore not for the nearest adult to rescue the child single-handedly while the state acts just as another bystander. Instead, a child is best served by families and the state acting in conjunction with each other. Put another way, to recall the beach example once more, the state's position could be likened to a pilot in a nearby helicopter, who could drop a life-preserver near the struggling child that would assist the adult in towing the child back to shore. Seen in this light, when it comes to caretaking, the positions of the relevant actors are considerably closer to the situation of conjunctive responsibility that Goodin describes, in which the actors should work together to protect the vulnerable person.<sup>145</sup>

The ocean rescue example, however, omits some of the strongest reasons in favor of conjunctive state responsibility for children and other dependents. Raising children and caring for dependents are activities that cannot be wrapped up in seconds or minutes like an ocean rescue. Instead, they are complex tasks that are part of a

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144. See *supra* notes 123–30 and accompanying text.

145. See GOODIN, *supra* note 134, at 136.

process that generally takes years. No family can reasonably accomplish all these tasks without some forms of help. During that time, moreover, dependents interact with a number of institutions aside from the family that profoundly influence their development and well-being, including schools, day care centers, the labor market, and the health care system. By the same token, caretakers interact with a number of institutions, most prominently, the labor market, that profoundly influence their ability to meet family members' dependency needs. Given the limits of families in controlling and navigating these other institutions, as well as the opportunity that the state has to exercise influence over these other institutions, there are strong reasons to assign the state responsibility alongside of parents and other family members.

Determining that the state and families are both conjunctively responsible for meeting dependency needs does not mean that the state's role should be identical to families'. Rather, each should bear responsibility for the area in which it has greater competence. This means that families should bear responsibility for the day-to-day caring for (or arranging the care for) children and others with dependency needs. Meanwhile, the state should bear the responsibility for structuring institutions in ways that help families meet their caretaking needs, and that support human development. This includes ensuring that families have safe and affordable caretaking options, as well as structuring other societal institutions, such as schools and communities, in ways that foster children's and other dependents' development and well-being. This division of responsibility recognizes the malleability and contingency of institutional structures. It does not artificially separate state action from the realm of families or presume that completely clear boundaries can be drawn between them, but it does assume certain spheres of authority will exist between the two.

In dividing responsibility in this way, this model, which I have described elsewhere as the "supportive state" model, respects citizens' autonomy by treating them as responsible persons who are accountable for the results of their choices and ties with others.<sup>146</sup> The liberal state, in this view, provides a scaffold on which citizens can construct their lives, but it does not plan their lives for them, or absolve them of the responsibility to plan carefully and budget wisely to achieve their goals.<sup>147</sup> Yet, it maintains that the meeting of

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146. EICHNER, *supra* note 5.

147. *See id.*

dependency needs that these family members perform should be accomplished within institutional structures that facilitate caretaking and citizens' welfare, and that it is the state's responsibility to secure such institutional structures.<sup>148</sup> This approach recognizes the fact of dependency and that the ability of families to nurture their members does not simply exist as a matter of fact, or spring up as a matter of spontaneous generation; instead, it is an achievement to be pursued jointly by both citizens and the state.

*C. The Limits of the State's Support for Caretaking*

How far does the state's obligation to support caretaking extend? And how should the state weigh this obligation against other goods and purposes of a liberal democracy? Clearly, the answer to these questions cannot be determined through a kind of "moral geometry,"<sup>149</sup> in which a single, correct answer can be absolutely and firmly calculated once and for all. Nevertheless, some guideposts can at least mark out the parameters of this duty. At a minimum, the state should structure institutions in such a way that family members can, through exercising diligent, but not Herculean efforts, meet the basic physical, mental, and emotional needs of children and other dependents and promote human development while avoiding impoverishment or immiseration. This means that the state must regulate the workplace to ensure parents enough time with their children so that the children are well-parented and supervised, and the parents are not so pressed for time or frazzled by time pressures that it interferes with adequate caretaking. In this view, the state shirks its responsibility when it forces parents to choose between working to put food in their children's mouths and ensuring that their children receive adequate caretaking.

Translated into concrete government policies, when it comes to the intersection of family and work, this means the state should ensure paid maternity leaves and job guarantees for women at childbirth and parental leave rights and benefits during children's first few years, in order to give workers time and opportunity for caregiving while allowing them to retain their jobs.<sup>150</sup> It also requires granting family members the right to some further paid leave in order to deal with other needs for care that arise as a result of family

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148. *Id.*

149. The term is Thomas Spragens's. See THOMAS A. SPRAGENS, JR., CIVIC LIBERALISM: REFLECTIONS ON OUR DEMOCRATIC IDEALS 59, 64 (1999).

150. As I note earlier, many other countries already have such policies in place. See *supra* notes 51–52 and accompanying text.

members' dependency needs. The funding for all these leaves should be public, in order to distribute the cost across society and minimize the cost to individual employers. In addition, working-time policies that set the standard workweek below the United States' current standard of forty hours would help parents who are employed full time have adequate opportunity for caregiving.<sup>151</sup> So would adequate flex-time policies and regulations that improve the quality of and compensation for part-time work. Finally, the state should ensure realistic access to alternative caretaking arrangements for children while parents work, at a level of quality that supports children's development. These include public or publicly subsidized early childhood education and care programs, public schooling that is scheduled in a manner compatible with parents' work schedules, and after-school programs that are either paid for by the state or whose costs are shared between the state and families on a sliding scale basis.<sup>152</sup>

While proposals that would help ameliorate the conflict between work and family tend to be dismissed in the United States as "pie-in-the-sky," the fact of the matter, as Janet Gornick and Marcia Meyers demonstrate in their excellent book, *Families That Work*, is that a number of other developed countries, particularly Denmark, Finland, Norway, and Sweden, but also France, Belgium, and Canada, are much further along the road to this goal than is the United States.<sup>153</sup> As they conclude, "[m]any of the problems besetting American families are less acute in other industrialized countries that have more extensive public policies that help families manage competing demands from the home and the workplace without sacrificing gender equality."<sup>154</sup>

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151. GORNICK & MEYERS, *supra* note 3, at 157. These types of policies are in place in many European nations. As Gornick and Meyers write:

All across Europe, as of approximately 2000, normal full-time weekly hours are set at levels below the forty hours that is the legal norm in the United States—thirty-five hours in France and between thirty-seven and thirty-nine hours everywhere else. The incidence of very long hours (for example, beyond fifty hours a week) is limited in Europe by the European Union-wide policy of setting maximum weekly hours at forty-eight hours a week [including overtime].

*Id.*

152. As noted earlier, many European countries already offer some of these programs. See *supra* note 54 and accompanying text.

153. GORNICK & MEYERS, *supra* note 3, at 297–98.

154. *Id.* at 5. Although both pundits and the press in the United States sometimes suggest that these generous social programs have devastated the economies of European nations. See, e.g., George Will, *French Work Ethic Shaken to the Core*, CHI. TRIB., Aug.

## CONCLUSION

The view embodied in current U.S. law and public policy that families should be left to negotiate the conflict between work and family is costly to important public goods: it undercuts children's welfare, most particularly for poor children, entrenches sex inequality, and saps the vitality of our civil society. It also fundamentally misconceives the role of the state and thereby shirks the state's basic commitment to support citizens in leading dignified lives. For these reasons, it is past time to reverse the current course and for U.S. law to help secure the conditions that would allow families to support themselves financially while still meeting the caretaking needs of family members with dignity.

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31, 2007, at C25; George Will, *Is France Willing to Work*, WASH. POST, May 20, 2007, at B7; George Will, *Childish French Make Grown-Up EU Call*, CHI. SUN-TIMES, Jun. 2, 2005, at 39. For example, MIT Economics Professor Oliver J. Blanchard dismisses the idea that there is any "obvious relationship between the degree of social protection and the unemployment rate today." Oliver Blanchard, Nat'l Bureau of Econ. Research, *Explaining European Unemployment*, NBER REPORTER: RESEARCH SUMMARY, Summer 2004, <http://www.nber.org/reporter/summer04/blanchard.html>. Princeton economist Paul Krugman concludes that

a head-to-head comparison between the economies of the United States and Europe—France, in particular—shows that the big difference is in priorities, not performance. We're talking about two highly productive societies that have made a different tradeoff between work and family time. And there's a lot to be said for the French choice.

Paul Krugman, Op-Ed., *French Family Values*, N.Y. TIMES, July 29, 2005, at A23. Krugman states that French unemployment tends to run roughly four percentage points higher than in the United States, but the bigger difference is that the French have made a tradeoff of less pay for more time with their families. *Id.*