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Transgressive Caregiving

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TRANSGRESSIVE CAREGIVING

LAURA T. KESSLER*

ABSTRACT

Family caregiving can be a form of political resistance or expression, especially when done by people ordinarily denied the privilege of family privacy by the state. Feminist and queer legal theorists have, for the most part, overlooked this aspect of caregiving, regarding unpaid family labor as a source of gender-based oppression or as an undervalued public commodity benefiting children. This Article addresses this gap in the feminist and queer legal theory literature, demonstrating the way that family caregiving can be a liberating practice through a detailed historical analysis of the law regulating the sexuality, reproduction, and parenting of African Americans, gay people, and straight men. The story of transgressive care presented in this Article is particularly relevant to the present debates in our country over same-sex marriage and welfare. Because political expression is a fundamental value protected by our Constitution, recognizing the political significance of transgressive caregiving adds a new justification for supporting the care practices of transgressive caregivers, while also providing a conceptual basis for limiting unwanted state intervention into their families. By revealing how extended care networks and minority communities are coconstitutive, this Article also invites us to fundamentally rethink the way in which law regulates families in a wide range of areas, such as child custody, foster care, and adoption.

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I. INTRODUCTION

A. *The Claim*

Can family caregiving be a form of political resistance or expression? It can, especially when done by people ordinarily denied the privilege of family privacy by the state.

Feminist and queer theorists within law have, for the most part, overlooked this aspect of caregiving, regarding unpaid family labor as a source of gender-based oppression or as an undervalued public commodity. Consequently, prominent feminist and queer legal theorists have set their sights on wage work or sexual liberation as more promising sources of emancipation for women.¹ Although other legal

1. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 182 (2001); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000). Similar contributions from junior scholars include Kerry L. Quinn,

feminists continue to focus on the problem of devalued family labor, these theorists tend to justify increased support for care work primarily on the benefits it confers on children and society,² on liberal theories of societal obligation,³ on ending gender oppression,⁴ or on simple human needs.⁵

This Article examines a less well-explored conception of family caregiving within the feminist and queer legal theory literature, revealing the way that family caregiving can be a liberating practice for caregivers *qua* caregivers.⁶ Specifically, care work can constitute an affirmative political practice of resistance to a host of discriminatory institutions and ideologies, including the family, workplace, and state, as well as patriarchy, racism, and homophobia. I label such political work “transgressive caregiving” and locate it most centrally—although not exclusively—in the care work of ethnic and racial minorities, gays and lesbians, and heterosexual men.

Transgressive caregiving occurs all around us, despite widespread attempts by state and federal lawmakers to domesticate it.⁷ Unmarried parents now make up one-third of households with children less than eighteen years old,⁸ and unmarried parenthood is the predominant family form in the African-American community.⁹ Somewhere between one million and nine million children have at least one gay

Mommy Dearest: The Focus on the Family in Legal Feminism, 37 HARV. C.R.-C.L. L. REV. 447, 458-70 (2002) and Laura A. Rosenbury, *Some Thoughts on Sex Negativity* (Apr. 4, 2005) (unpublished manuscript, on file with author).

2. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 48 (2003) [hereinafter FINEMAN, MYTH]; Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 62-63 (2002); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 18-19 (2000).

3. See, e.g., ANNE L. ALSTOTT, *NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS* 49-72 (2004); Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673 *passim* (2001); Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1408 (2001).

4. See, e.g., FINEMAN, MYTH, *supra* note 2, at 37; JOAN WILLIAMS, *UNBENDING GENDER* 13-39 (2000); Becker, *supra* note 2, at 103-05; McClain, *supra* note 3, at 1680.

5. See, e.g., Becker, *supra* note 2, at 57, 97-109.

6. Critical race theorists are a major exception to this point. See, e.g., PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997); DOROTHY ROBERTS, *KILLING THE BLACK BODY* [hereinafter ROBERTS, *KILLING THE BLACK BODY*] (Vintage Books 1999) (1997); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 237-38 (2002) [hereinafter ROBERTS, *SHATTERED BONDS*]; Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 116-31 (1998) [hereinafter Perry, *Transracial and International Adoption*]; Twila L. Perry, *Alimony: Race, Privilege and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2491-92 (1994) [hereinafter Perry, *Alimony*].

7. See discussion *infra* Parts II.A, II.B, II.C.

8. JASON FIELDS, U.S. DEP'T OF COMMERCE, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, CURRENT POPULATION REP.* P20-553, at 8 (2004).

9. *Id.* Here, I refrain from using the common term “single parent” because it obscures the extended care networks of many unmarried parent families. See discussion *infra* Parts II.A, II.B.

or lesbian parent in the United States.¹⁰ In 2003, 4.6 million couples cohabited outside of marriage,¹¹ and children were present in about forty percent of those households.¹² Finally, although I hesitate to paint too rosy a picture of recent improvements in the gendered division of household labor within marriage, men have increased their share of housework over the past few decades.¹³ These contexts illustrate that the conventional wisdom that caregiving is experienced primarily as a condition of patriarchal oppression, or even as a benign activity benefiting children and society, tells only part of the story.

My thesis regarding the transformative political potential of care is necessarily partial, for it relies on a view of care as a practice whose meaning is fluid and dependent upon the contexts in which it is performed. Caregiving is not one single thing, but a complex practice in dynamic relationship with other social practices and institutions. A woman who does significantly more housework and child care than her husband is likely to view caregiving work differently than an unmarried welfare recipient who wishes to gain an exception to her state's workfare program in order to spend more time with her infant child¹⁴ or a lesbian choosing to bring a child into her family through alternative insemination.¹⁵

Even this wide range of examples does not fully capture the contingency of the meaning and experience of care. The experience of care is a function not only of the caregiver's status—for example, "stay-at-home wife," "welfare recipient," "lesbian mother"—but also of the multiple and diverse relationships an individual caregiver has to institutions and people around her. So, for example, an African-American attorney who chooses to work part time so she can devote more time to her family challenges a host of gender, class, and race-based stereotypes that have historically served to subordinate women of color.¹⁶ Along the same lines, a gay man in an intimate relation-

10. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 164 (2001) (discussing the different definitions of "gay" that affect this estimate). See generally LAURA BENKOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 34-81 (1994) (documenting the increase in childbearing and childrearing among lesbians and gay men).

11. See FIELDS, *supra* note 8, at 16.

12. *Id.* at 17.

13. See Francine D. Blau, *Trends in the Well-Being of American Women, 1970-1995*, 36 J. ECON. LITERATURE 112, 150-55 (1998) (showing that, from the 1970s to the 1990s, the amount of time spent by women on housework declined from four times that spent by men to two or three times that spent by men); Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208, 1208 (2000) (same).

14. See discussion *infra* Part II.A.

15. See discussion *infra* Part II.B.

16. See discussion *infra* Part II.A.

ship in which a relatively traditional division of household labor is practiced, with one partner serving as the primary breadwinner and the other serving as the primary stay-at-home parent, may nevertheless experience his wish to receive societal recognition of his family as an assertion of equal citizenship.¹⁷ And a married man who seeks a family leave from work may experience the request as a challenge to the male-breadwinner ideal, as will his employer in all likelihood, even though his wife may be doing the bulk of the domestic labor.¹⁸ Similarly, a woman's efforts to convince a family law judge to value her unpaid domestic labor in a divorce proceeding challenges the class-based subordination of women perpetuated by divorce law, which works with gender to allow a male elite to retain property.¹⁹ Her argument remains potentially transformative even if the woman married and bore children in part due to heteronormative and reproductively normative societal pressures and even if her argument may also reinforce traditional gender roles to some extent. Any group inequality, in short, intersects with others in complex ways.²⁰ As numerous scholars have established, no single aspect of identity is sufficiently stable to have fixed meanings, whether positive or negative.²¹

In keeping with this complexity and contingency, this Article departs from other legal feminist work, including my own, that has examined caregiving as a status largely corresponding with the categories "woman" or "mother."²² Rather, drawing on standpoint epistemology and postmodern theory, I examine care work as a practice with transformative potential contingent on the situatedness of the caregiver. Such an approach has at least seven advantages: First, reconceptualizing care work as a practice with unstable and complex meanings engaged in by women, men, mothers, and nonmothers responds to feminist and queer critiques of essentializing sex or gender. Second, this conception of care builds bridges between feminist legal theory and queer and race theory. Third, viewing care work as a practice with political or expressive significance might protect families from unwanted state intervention, a concern that is particularly

17. See discussion *infra* Part II.B.

18. See discussion *infra* Part II.C.

19. See generally Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2236-41 (1994) (uncovering and analyzing a system of family property rules, unchanged since coverture, that allocates ownership of family wealth to husbands).

20. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584-85 (1990).

21. See, e.g., ELIZABETH SPELMAN, *INESSENTIAL WOMAN* (1998); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 *passim* (1994).

22. See Laura T. Kessler, *Is There Agency in Dependency?: Expanding the Feminist Justifications for Restructuring Wage Work*, in *FEMINISM CONFRONTS HOMO ECONOMICUS* 373-99 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

acute within racial and sexual minority communities. Fourth, reading political significance into the practice of care might serve as an additional basis to articulate a theory of rights for caregivers, building on accounts based on the public value of children, the state's obligation to provide for the needs of its citizens, and gender discrimination. Fifth, such a conception may provide a richer and more positive account of caregiving work than can be conveyed by the story of gender oppression alone. Sixth, recognizing the political significance of transgressive caregiving work may provide a basis for articulating a theory of rights for transgressive caregivers while avoiding some of the disciplinary effects typical of formal equality justifications. Seventh and finally, thinking of care work as a practice that occurs outside of blood or marriage ties may serve to decenter the normative structure of the nuclear family.²³

This Article is part of a larger project in which I seek to develop a theory of cultural feminism based on individuals' capacity for political agency within the context of nurturing functions, rather than on relational theories of the self.²⁴ This reconstructed cultural feminism can bridge the differences among legal feminists in the care work discourse, as well as bring together diverse critical theory communities. It does this by expanding beyond feminist legal theory's preoccupation with the oppressive aspects of family care work.²⁵ Certainly, there are serious and legitimate bases for this preoccupation.²⁶ However, not all women share a history of subservience to men,²⁷ and men can be and are partners with women in their quest for gender equality in certain contexts.²⁸

23. See Elizabeth B. Silva & Carol Smart, *The 'New' Practices and Politics of Family Life*, in *THE NEW FAMILY?* 1-12 (Elizabeth B. Silva & Carol Smart eds., 1999). This conception of care work as a "practice" is influenced by the work of Pierre Bourdieu, who was interested in the way in which the family as a social category is reproduced through language and everyday practices. See Pierre Bourdieu, *On the Family as a Realized Category*, 13 *THEORY CULTURE & SOC'Y* 19, 21 (1996). Although Bourdieu has less to say about how language and everyday practices may also undermine the traditional family, his move from status to practice constitutes an important step toward that claim, which is discussed more fully in Part I.B, *infra*.

24. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); ROBIN WEST, *CARING FOR JUSTICE* 14, 117 (1997).

25. See *supra* text accompanying notes 8-13.

26. Indeed, I have written on the gendered division of labor within marriage, its effect on women's labor force attachment, and the failure of employment discrimination law to remedy this problem. See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 *U. MICH. J.L. REFORM* 371 (2001).

27. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER* (1995) [hereinafter FINEMAN, *NEUTERED MOTHER*] (examining and critiquing the cultural and legal processes which designate the sexual intimate connection, and the marital family in particular, as the dominant construction of the family within our society).

28. See discussion *infra* Parts II.B, II.C.

Furthermore, gender is not the only source of oppression with which feminism should be concerned. This project is part of the legal feminist effort to integrate the perspectives of other liberatory social movements more deeply and thus to make effective alliances. Each group must learn to think from the perspective of the lives of all of the humans whose interests they claim to represent, and this is true of feminism, too. "Thinking from women's lives"²⁹ means thinking from all women's lives.³⁰

Adopting this methodology of thinking from multiple lives leads, at least tentatively, to a new insight about care within feminist and queer legal theory: Although family caregiving may simply seem to support patriarchy, closer examination reveals that it can also be a deeply and complexly subversive practice. Specifically, when practiced by individuals whom the state has historically denied the privilege of family privacy, caregiving work may constitute a positive political practice of resistance to oppression. Ethnic and racial minorities, gay men and lesbians, and heterosexual men are constituencies whose care work and intimate relationships have been heavily regulated by the state. Analyzing these three groups is the heart of this project.

B. *The Basis for the Claim*

Before I turn to an examination of specific types of transgressive caregiving practices, it will be helpful to clarify the basis of my claim that caregiving may have positive political significance. In considering this claim, the question arises: Do persons who engage in transgressive caregiving see what they are doing as politics? If not, may the practice of care in certain contexts have disruptive meanings that critical legal scholars might wish to exploit, putting aside the individual consciousness of the caregiver? The answer to both of these questions is "yes," at least to a greater extent than many legal feminists and queer legal theorists have acknowledged. My claim that "transgressive caregiving is politics" is both existential and epistemological.

To put the existential claim simply, social science research demonstrates that transgressive caregiving often has conscious political meaning for those who practice it.³¹ This consciousness is achieved through the shared social situation of those who engage in transgressive caregiving and through a common history of oppression. This existential claim fits in with the tradition of standpoint epistemology

29. SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES* (1991).

30. Here, I am paraphrasing Harding. *See id.* at 285-86.

31. *See discussion infra* Parts II.A, II.B, II.C.

within feminism, which asserts that women (or any systematically oppressed group) have superior knowledge of the character of their oppression than other individuals. This knowledge allows them to see social inequality and to challenge it where others cannot.³² Standpoint theory also posits that preferable outcomes result when we theorize from the position of the most disadvantaged, because those deeply situated within oppression are better able to see it, describe it, and develop less partial strategies for its elimination.³³ For example, starting from the perspective of a lesbian may enable us to comprehend matters that might otherwise be invisible, not just about the lives of gay women but also about heterosexual men and women's lives. Thus, feminist standpoint epistemology gives us a tool for seeing the political significance of certain acts that may be unrecognizable from a majoritarian perspective.

However, it is not necessary to my claim that a person engaging in transgressive caregiving possess any conscious intention, for post-modern theory teaches us that a practice can have powerful political meaning and effects regardless of what the individual engaging in it thinks. According to this theory, family care work receives its meaning from its relation to the context in which it is practiced and regulated.³⁴ For example, to a certain degree, divorce law, social welfare law, and the doctrine of family privacy suggest that women are naturally suited for care work and men for wage work; that only heterosexual women and men deserve state protection for their caregiving practices; that a "normal" family is one in which a man and woman reproduce biologically; and that a "normal" family is one in which the male breadwinner ideal is practiced. Because black families, gay families, and families where men do significant care work often do not reflect these norms,³⁵ the law has tended to construct them and the care provided in those arrangements as "abnormal."

But there is a more positive side to this story, for the discursive process just described works in both directions. Thus, majoritarian conceptions of care, gender roles, and racial and sexual hierarchies can be disrupted when care is practiced outside of traditional con-

32. See HARDING, *supra* note 29, at 119-33. Moreover, this privileged knowledge may be most accessible to socially disadvantaged individuals with multiple, conflicting identities—for example, black women, gay men, etc.—who, by simultaneously occupying positions of relative privilege and disadvantage, may be most readily able to understand how a system of exploitation operates. *Id.* at 131-32 (discussing sociologist Patricia Hill Collins' conception of the "outsider within").

33. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* (2002); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 387-98 (1987).

34. See JUDITH BUTLER, *GENDER TROUBLE* 1-2 (1990); WILLIAMS, *supra* note 4, at 198-204.

35. See discussion *infra* Parts II.A, II.B, II.C.

texts. Transgressive care practices thus bring into relief the constructed status of traditional care practices and norms, the family, and the law itself. Stated another way, when previously incongruent identities are juxtaposed—for example, lesbian mother, married gay man, black housewife—opportunities are opened up for disrupting discursive systems that construct and oppress.³⁶ Given this conception of how knowledge is produced, it is not necessary for individuals consciously to intend the political meaning of their acts for them to have political significance,³⁷ for their meaning derives from the relation of the acts themselves to other institutions and acts, including the law.³⁸

My assertion about the political implications of transgressive caregiving proceeds from these feminist epistemological theories. In making these claims I am not saying that individuals who practice transgressive caregiving always consciously see their care work as a form of political expression, although sometimes they do. Nor am I suggesting that transgressive care work will always be understood by others as political or that it will always necessarily serve to disrupt oppressive majoritarian norms. Rather, the circumstances of transgressive caregiving make political consciousness and political transformation *possible*. Thus, we see care in an illuminating new way if we understand its transgressive potential. Toward that end, this Article will examine the care work of African Americans, lesbians and gay men, and heterosexual men, demonstrating how transgressive caregiving may constitute a practice of political significance.

36. See BUTLER, *supra* note 34, at 31; see also Elizabeth Anderson, *Feminist Epistemology and Philosophy of Science*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2004), available at <http://plato.stanford.edu/entries/feminism-epistemology> (last modified Sept. 4, 2003).

37. Cf. Judith Butler, *Competing Universalities*, in CONTINGENCY, HEGEMONY, UNIVERSALITY 177 (2000) (“It would be a mistake to imagine that a political claim must always be articulated in language. . . . [L]ives make claims in all sorts of ways that are not necessarily verbal.”).

38. While this theory may seem esoteric, it is recognized within mainstream legal discourse. For example, Justice O’Connor’s concurring opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), located the harm of laws criminalizing sodomy not in their direct enforcement, but in their construction of gay men and lesbians as second-class citizens: “[B]ecause Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.” *Id.* at 583 (emphasis added). Justice Scalia at least implicitly shares this postmodern insight, for the “massive disruption of the current social order,” *id.* at 591, he sees in *Lawrence* cannot possibly follow from the elimination of a handful of sodomy prosecutions across the country; it is the decision’s discursive legitimization of gay and lesbian sex and identity that he fears. *But cf.* Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1411 (2004) [hereinafter Franke, *Domesticated Liberty*] (suggesting that *Lawrence* signals a mere tolerance of nonnormative sex, “so long as it takes place in private and between two consenting adults in a relationship”).

C. A Note on Methodology

An explanatory note regarding this Article's chosen methodology is also in order. There are many possible ways to structure an analysis of transgressive caregiving. For example, an examination of care as it is practiced within nontraditional family forms such as unmarried cohabitant families, single parent families, and polyamorous families could provide a basis for an analysis of transgressive caregiving. Because these diverse family forms cut across race, sex, gender, and sexuality lines, such an approach might better avoid the essentialist problems inherent in an examination of the care practices of specific identity groups. There may also be less political risk in such an approach, because there are not as yet well-developed social or legal advocacy movements organized around family types.

However, there are certain benefits to organizing an analysis of transgressive care practices around specific racial or sexual identities. First, although there has been significant analysis of nontraditional family forms among critical and family law scholars,³⁹ less attention has been given to the care practices of specific identity groups, especially within the recent feminist discourse on care work.⁴⁰ Although race and sexual orientation are heavily implicated in this discourse, they have not been fully part of the conversation. At the risk of essentializing the groups this Article analyzes, such a direct approach provides an opportunity to address some of the issues lurking inside this discourse. One of those issues, I contend, is the partial erasure of racial and sexual minorities and straight men from the discourse of family care work within legal feminism. The ap-

39. See NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997); FINEMAN, NEUTERED MOTHER, *supra* note 27; Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001); Cynthia Grant Bowman, *Legal Treatment of Cohabitants in the United States*, 26 LAW & POL'Y 119 (2004); Margaret F. Brinig & Steven L. Nock, *Marry Me Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403 (2004); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274 *passim* (1991); Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379 (2003); Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439 (2003).

40. Conceded, there has been scholarship on care and sexuality within critical race theory, but that scholarship has not been substantially incorporated within feminist and queer legal projects analyzing the family. See, e.g., DAVIS, *supra* note 6; ROBERTS, KILLING THE BLACK BODY, *supra* note 6; ROBERTS, SHATTERED BONDS, *supra* note 6; Karen Engle et al., *Round Table Discussion: Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 197, 220-25 (2003) (presentation of Adrienne Davis) (noting the absence of black women in legal feminist and judicial analyses of gender); Perry, *Alimony*, *supra* note 6; Perry, *Transracial and International Adoption*, *supra* note 6.

proach presented here constitutes an attempt to remedy that problem.

Second, a central premise of this Article is that we must get away from examining “caregiver” as a status, moving instead to an examination of how care as a practice may be transformative whenever it is performed. Abandoning analysis on the basis of various family types or forms is consistent with such a premise.

Third, moving from family forms to identity groups presents a fundamental challenge to the idea that a legitimate family is organized primarily around sexual ties.⁴¹ Even though unmarried cohabitants, single parent families, and polyamorous families present radical challenges to the traditional nuclear family, examining caregiving even within those contexts reifies the idea that a sexual tie is central to the meaning of family. Specifically, such an approach suggests that transgressive families are traditional families except for the addition or subtraction of adult sexual partners, or the absence of a formal legal tie among sexual partners. As this Article will demonstrate, the care practices of African Americans and gay people in particular extend well beyond the sexual family, often involving numerous social kin in care work. These practices are obscured when care is studied through the lens of cohabitation, single parenthood, or polyamory.

Finally, it should be noted that the chosen methodology of this Article is by no means intended to suggest the equivalency of African Americans, gay people, and heterosexual men with regard to their experiences of state-sponsored oppression in the realm of family life. Although gay men and lesbians have been subject to state-sponsored violence—including castration, imprisonment, and commitment⁴²—African Americans suffered all of that and more under chattel slavery and its aftermath. Moreover, although the closet was and remains its own form of oppression, never secure in any case, passing has been more of an option for gay men and lesbians than for most African Americans. Finally, and most obviously, heterosexual men have historically occupied a uniquely privileged place within the law, especially white, heterosexual men.

At the same time, there remain important commonalities among African Americans, sexual minorities, and heterosexual men worth exploring. Most notably, the law and society more broadly have systematically marginalized the family care practices of each of these identity groups. Indeed, if there is one observation that can be drawn

41. Martha Fineman has thoroughly deconstructed this notion. See FINEMAN, NEUTERED MOTHER, *supra* note 27, at 145-76.

42. See WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 42-43 (1999).

from the research presented in this Article, it is that a central means of oppressing a disfavored group in our society is to wage war on their familyhood. The identity groups examined here were chosen because they represent especially fruitful examples of this phenomenon, but their inclusion should not be seen as occupying the field. Rather, this Article represents an initial exploration of transgressive care intended to initiate a conversation about the potential of care as a form of political resistance. With these caveats in mind, it is hoped that the advantages of this Article's methodology outweigh its obvious risks.

This Article represents an attempt at modest intervention in the critical legal discourse on intimacy and family care work. It would not have been possible without the foundational contributions of feminist, queer, and race scholars within law. Most important have been the works of Kathryn Abrams, Nancy Dowd, William Eskridge, Martha Fineman, Katherine Franke, Twila Perry, Nancy Polikoff, Dorothy Roberts, and Joan Williams. They have developed the conceptual basis for a social constructionist vision of the family and the integration of outsider standpoints within family and discrimination law. I have tried to credit these prominent scholars throughout this Article; any failure in that regard is unintended, for this piece if anything is a tribute to their pathbreaking work.

This Article proceeds in four parts: Part II highlights the ways in which caregiving is an exercise of political resistance for transgressive caregivers such as African-American women, gays and lesbians, and straight men. Part III summarizes conventional feminist and queer legal theory positions on family caregiving, focusing on the extent to which many legal scholars working within these traditions overlook ways that caregiving may be a positive act of agency for caregivers. Part IV critiques this assumption and looks to a more complicated conception of caregiving as a form of political agency to resolve some of the current disagreements among critical legal theorists in the care work discourse. Finally, Part V examines the implications for law of this new conception of caregiving, concluding that feminist and queer legal theory can transcend the current stalemate of the "sameness/difference" debate by further complicating our vision of caregiving work.

II. TRANSGRESSIVE CAREGIVING AS POLITICS

A. *African-American Care Practices*

The state has heavily regulated black women's sexuality, reproduction, family caregiving work, and wage work from slavery to the present. Black women resisted and sought refuge from this structural discrimination in part through family and community relationships.

Caregiving work within black families and communities is thus imbued with significant political meaning that derives from blacks' historical experience of oppression. This pattern is borne out by historical materials tracing black women's activism, as well as by contemporary social science research.

1. *Sexuality/Reproduction/Mothering*

Controlling black women's reproduction was central to slavery.⁴³ Slave owners owned black women's labor and commodified their biological reproduction. This was enforced through the Roman property doctrine of *partus sequitur ventrem*, establishing that the issue of a female slave is born in the condition of the mother.⁴⁴ Put simply, black women's fertility produced their owners' labor force.

According to historian Deborah Gray White, "Slave masters wanted adolescent girls to have children, and to this end they practiced a passive, though insidious kind of breeding."⁴⁵ Techniques such as assigning pregnant women lighter workloads, giving pregnant women more attention and rations, and rewarding prolific women with bonuses such as clothing, money, or promises of emancipation were all used to increase black women's reproduction.⁴⁶ If these subtle manipulations failed, then masters could and sometimes did resort to outright force.⁴⁷ For example, slave masters forcibly arranged "marriages" with the aim of producing the maximum number of healthy child slaves.⁴⁸ Rape was common, and on some plantations a substantial portion of the infants born into slavery were of mixed race.⁴⁹ Infertile women were treated "like barren sows and . . . passed from one unsuspecting buyer to the next."⁵⁰ Enslaved people could not form legally recognized marriages; intimate partnerships were regularly disrupted by sale, hiring out, and apprenticeships; and

43. See Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11 (2001).

44. See Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 215 (1987).

45. See DEBORAH GRAY WHITE, *AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 98 (1985).

46. *Id.* at 98-100.

47. *Id.* at 102.

48. *Id.* at 102-03; see also JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW* 34-35 (Vintage Books ed., 1986) (1985).

49. See DAVIS, *supra* note 6, at 53-56.

50. See WHITE, *supra* note 45, at 101. Reported judicial decisions addressing breach of warranty claims based on female slaves' infertility suggest the prevalence of this practice. See, e.g., *Hambright v. Stover*, 31 Ga. 300 (Ga. 1860) ("defect" of the womb); *McCeney v. Duvall*, 21 Md. 166 (Md. 1864) (prolapsed uterus).

children were regularly and permanently separated from their mothers, often without notice.⁵¹

While a comprehensive review of black women's resistance to their unique place within slavery is not possible here, one helpful example pertains to black feminist abolitionist ideology. Black feminist abolitionists identified the commodification of enslaved women's reproduction as central to the system of slavery.⁵² This vision was an alternative to mainstream abolitionist movements which defined the *sine qua non* of freedom as the right to sell one's labor in the free market and which aimed to emancipate black women from their slave masters so they could come under the aegis of black patriarchs.⁵³ In contrast, black women equated freedom primarily with the right to own their bodies unqualified by gender relations or capitalist exploitation.⁵⁴

This "recessive" strain of abolitionism developed by black women activists is evident, for example, in a lecture delivered by free black abolitionist Sarah Parker Remond. On a speaking tour of England for the American Antislavery Society in 1859, Remond defined property in the sexual body, as opposed to the laboring body, as the essential difference between slavery and freedom.⁵⁵ Similarly, reflecting on her newly emancipated status, ex-slave Bethany Veney stated, "A new life had come to me. I was in a land where, by its laws, I had the same right to myself that any other woman had . . . My boy was my own, and no one could take him from me."⁵⁶ This conception of freedom demonstrates the way in which black women transformed intimacy and reproduction into practices of political resistance by reclaiming them for themselves in the face of oppression by white slave masters and more tangentially by black men.

51. See DAVIS, *supra* note 6, at 90-108, 237.

52. See AMY DRU STANLEY, FROM BONDAGE TO CONTRACT 30 (1998). For a similar analysis of slavery within law, see Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 246-47 (1999) (identifying slavery as a "sexual political economy" and "a gendered as well as a racially supremacist institution").

53. See STANLEY, *supra* note 52, at 30-34.

54. *Id.*

55. See *Lectures on American Slavery*, ANTI-SLAVERY REP., July 1, 1859, at 148, 501. According to a summary of the lecture:

She (the lecturer) [stated that she] knew something of the trials and toils of the women of England—how . . . they were made to "Stitch, stitch, stitch," till weariness and exhaustion overtook them. But [according to Remond] there was this immeasurable difference between their condition and that of the slave-woman, that their persons were free and their progeny their own, while the slave-woman was the victim of the heartless lust of her master, and the children whom she bore were his property.

Id.

56. Bethany Veney, *The Narrative of Bethany Veney, A Slave Woman* (Worcester, Mass. 1889), in COLLECTED BLACK WOMEN'S NARRATIVES 38 (1988). The electronic edition of the Bethany Veney work is available at <http://docsouth.unc.edu/veney/veney.html>.

The historical control of black women's reproduction and black women's resistance through family and community relations continues to the present. In the last century, with the end of the economic system of slavery, the regulation of black women's sexuality and reproduction has manifested primarily through state-sponsored efforts to *limit* their childbearing. This more recent history includes the role of the eugenics movement in our country's early birth control policy,⁵⁷ sterilization abuse of black women during the 1960s and 70s,⁵⁸ recent campaigns to encourage the use of long-term birth control methods such as Norplant and Depo-Provera among black teenagers and welfare mothers,⁵⁹ and welfare reforms aimed at eliminating supposed financial incentives to poor, black women's childbearing.⁶⁰

In the modern era, black women have been accused of failing to discipline their children, of abusing their children, of retarding their children's academic achievement, and of emasculating their sons and husbands.⁶¹ The alleged failure of black women's caregiving and the expectation that black women should work were central themes in the major welfare reforms of the last decade.⁶² The construction of black women's mothering as deviant has similarly been the basis for the heavy involvement of the state in black families through the child welfare system. Today, forty-two percent of all children in foster care nationwide are black, even though black children constitute only seventeen percent of the nation's youth.⁶³

In response, black women activists, beginning in the 1960s, focused considerable energy on defending black motherhood and the black family. *The Moynihan Report*,⁶⁴ published in 1965, served as a catalyst for this defense. In the report, Assistant Secretary of Labor Daniel Patrick Moynihan drew heavily from the work of black soci-

57. See ROBERTS, *KILLING THE BLACK BODY*, *supra* note 6, at 56-81.

58. *Id.* at 89-103.

59. *Id.* at 104-116, 144-49.

60. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601 (2004) (transforming welfare from an entitlement program to a time-limited, work-focused program that includes provisions aimed at decreasing biological reproduction and increasing marriage rates among poor women); ROBERTS, *KILLING THE BLACK BODY*, *supra* note 6, at 209-25; Laura T. Kessler, *PPI, Patriarchy, and the Schizophrenic View of Women: A Feminist Analysis of Welfare Reform in Maryland*, 6 MD. J. CONTEMP. LEGAL ISSUES 317, 336-38 (1995) (discussing "family caps" aimed at influencing the reproductive behavior of welfare recipients by eliminating or limiting welfare grant increases for the birth of additional children).

61. See, e.g., Daniel Patrick Moynihan, *The Negro Family: The Case for National Action*, in *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 39-124 (Lee Rainwater & William L. Yancey eds., 1967).

62. See Fineman, *supra* note 39, at 274-89; Kessler, *supra* note 60, at 365-68.

63. See ROBERTS, *SHATTERED BONDS*, *supra* note 6, at 8.

64. See Moynihan, *supra* note 61.

ologist Edward Franklin Frazier⁶⁵ to depict the black family as a “tangle of pathology,” an intergenerational morass of welfare dependency, criminality, and illegitimacy.⁶⁶ Moynihan held the uniquely matriarchal structure of the black family responsible for this pathology.⁶⁷ According to the report, “matriarchal” upbringing left boys morally weakened and lacking the strong work ethic that would enable them to succeed in American society.⁶⁸ It also reasoned that black boys needed strong male role models, and that if the black family did not provide them, the military would; there, they would be properly socialized by male authority figures.⁶⁹

Black women’s resistance to such depictions was complicated by their allegiance with black men in the black liberation struggle.⁷⁰ The black community saw the report as an example of a covert governmental policy of genocide against African-American people, along with sterilization abuse and black men’s disproportionate representation in the war against Vietnam.⁷¹ This perception moved certain segments of the civil rights movement toward a nationalist and pronatalist perspective. As explained by historian Lauri Umansky:

[M]any black nationalists asserted that the black nation needed to fortify itself with numbers. On the most basic level this meant that blacks must have more babies. . . . [B]lacks were enjoined to resist by drawing themselves into father-dominated families and having many babies, for “procreation is beautiful, especially if we are devoted to the Revolution.”⁷²

Consistent with this ideology, black men activists urged black women to stop using birth control.⁷³

Thus, black feminists’ efforts to reclaim the black family and black motherhood occurred against the backdrop of both racist, antinatalist policies of the white majority and sexist, pronatalist ideology within the black nationalist movement. In response, black activists and feminist writers reconceptualized black motherhood as a positive politics of resistance to both racial and gender oppression. For exam-

65. See EDWARD FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* 125-45, 358 (1939) (dubbing the predominance of female-headed households in the black community as “the matriarchate” responsible for blacks’ poverty and family “disorganization”).

66. See Moynihan, *supra* note 61, at 75-92.

67. *Id.* at 76-80.

68. *Id.* at 76-83.

69. *Id.* at 88-89.

70. See Lauri Umansky, “*The Sisters Reply: Black Nationalist Pronatalism, Black Feminism, and the Quest for a Multiracial Women’s Movement, 1965-1974*,” 8 *CRITICAL MATRIX* 19, 24 (1994).

71. *Id.* at 20-21.

72. *Id.* at 21-22 (quoting Black Unity Party, *Birth Control Pills and Black Children*, in POOR BLACK WOMEN (1968), available at <http://scriptorium.lib.duke.edu/wlm/poor/#Birth> (online archival collection at Duke University)).

73. *Id.* at 23.

ple, black feminist writers recast the black matriarch as a symbol not of emasculation but of “maternal fortitude.”⁷⁴ Distinct from black matriarchy, which wrongly conceptualized black women as having actual material power to govern the family or society, maternal fortitude reversed the logic of the castrating black matriarch, but it retained an emphasis on the family as the key to liberation.⁷⁵ For example, black feminist writers such as Toni Cade Bambara pointed out that women’s strength had benefited entire African societies without emasculating their men.⁷⁶ This focus on the strong African mother challenged Moynihan’s claim about black women’s emasculation of black men.

Angela Davis, in a famous essay she wrote from prison, refuted the notion of black matriarchy through a detailed historical analysis of slavery that demonstrated how society had misinterpreted as female dominance the “deformed equality of equal oppression.”⁷⁷ Like black men, black women were expected to bear the burdens of slavery and the lash.⁷⁸ As such, their “virtue” as women was never protected.⁷⁹ Even motherhood did not improve their position:

[W]omen who had sucking [sic] children suffered much from their breasts becoming full of milk, the infants being left at home; they therefore could not keep up with the other hands: I have seen the overseer beat them with raw hide so that the blood and the milk flew mingled from their breasts.⁸⁰

Yet, Davis argued, as mothers and nurturers inside slave quarters, enslaved black women enabled enslaved people to endure materially and spiritually. Significantly, “[i]n the infinite anguish of ministering to the needs of the men and children around her (who were not necessarily members of her immediate family), she was performing the *only* labor of the slave community which could not be directly and immediately claimed by the oppressor.”⁸¹ Thus, the slave woman and black women more generally were not to be faulted for their power,

74. *Id.* at 27-28.

75. *Id.*

76. Toni Cade, *On the Issue of Roles*, in *THE BLACK WOMAN* 101, 103-04 (Toni Cade ed., 1970).

77. Angela Davis, *Reflections on the Black Woman’s Role in the Community of Slaves*, 3 *BLACK SCHOLAR* 2, 8 (1971).

78. *Id.* at 7-8.

79. *Id.* at 7.

80. *Id.* at 8 (quoting MOSES GRANDY, *NARRATIVE OF THE LIFE OF MOSES GRANDY: LATE A SLAVE IN THE UNITED STATES OF AMERICA* 18 (1844)).

81. *Id.* at 7.

which never really existed in the sense implied by Moynihan's "black matriarchy,"⁸² but were to be recognized as revolutionaries.⁸³

This black feminist ideology recognizing the central role of black motherhood to racial resistance was distinguished from the pronatalist cultural position of black nationalism. It was achieved through a simultaneous assertion of the right of black women to control their fertility and to control their vision and practice of motherhood.⁸⁴ In sum, although the tension between antiracism and pronatalism was present within black feminist ideology, it represented an acknowledgment of the agentic potential of black motherhood.

Resistance to dominant conceptions of black motherhood can also be found in the practice of "othermothering" in the black community.⁸⁵ Othermothers are women who assist blood mothers by sharing mothering responsibilities.⁸⁶ They can be but are not confined to such blood relatives as grandmothers, sisters, aunts, cousins, or supportive fictive kin.⁸⁷ Historically, othermothering has operated not only informally, but also through well-developed institutions and movements such as black churches,⁸⁸ black women's clubs,⁸⁹ black

82. *Id.* at 5.

83. *See id.* at 7; *see also* WHITE, *supra* note 45, at 159 ("When Frazier wrote that slave women were self-reliant and that they were strangers to male slave authority he evoked an image of a domineering woman. . . . [Yet] [s]lave women did not dominate slave marriage and family relationships Acting out of a very traditional role, they made themselves a real bulwark against the destruction of the slave family's integrity").

84. *See, e.g.*, Patricia Harden et al., *The Sisters Reply*, in POOR BLACK WOMAN (1968), available in Documents from the Women's Liberation Movement, An On-line Archival Collection, Special Collections Library, Duke University, at <http://scriptorium.lib.duke.edu/wlm/poor/#reply>.

85. *See* Patricia Hill Collins, *The Meaning of Motherhood in Black Culture and Black Mother/Daughter Relationships*, 4 SAGE 3, 4-5 (1987); Rosalie Riegle Troester, *Turbulence and Tenderness: Mothers, Daughters, and "Othermothers" in Paule Marshall's Brown Girl, Brownstones*, 1 SAGE 13, 13 (1984).

86. *See* sources cited *supra* note 85.

87. *Id.*

88. *See* Cheryl Townsend Gilkes, *The Roles of Church and Community Mothers: Ambivalent American Sexism or Fragmented African Familyhood?*, 2 J. FEMINIST STUD. RELIGION 41, 43-44 (1986).

89. The Black Club Movement developed around the turn of the twentieth century to address the urgent needs of the poor in black communities in a period of rapid industrialization. Gerda Lerner, *Early Community Work of Black Club Women*, 59 J. NEGRO HIST. 158, 158 (1974). Its members consisted primarily of middle- and upper-class black women. *Id.* at 160. The achievements of black women's clubs and black club women are significant, including the development and operation of kindergartens, nursery schools, day care centers, orphanages, libraries, public health clinics, hospitals, shelters for juvenile delinquents, and old-age homes in black communities. *Id.* at 159; Stephanie J. Shaw, *Black Club Women and the Creation of the National Association of Colored Women*, 3 J. WOMEN'S HIST. 10, 18-19 (1991).

community service organizations,⁹⁰ and the black civil rights movement.⁹¹ According to black feminist writers, othermothers have formed one of the important bases of power within black civil society.⁹²

Othermothering is credited with contributing to black survival, but its significance for women's liberation is just as great. As a practice, othermothering threatens both patriarchal and capitalist norms. Most obviously, to the extent that othermothering is defined by women-centered, fluid, family-like networks that have different purposes—for example, socialization, reproduction, consumption, emotional support, economic cooperation, and sexuality, which may overlap but are not coterminous⁹³—othermothering undermines the patriarchal family, the male-breadwinner ideal, and the notion of biological motherhood. Perhaps less obviously, it also threatens capitalist norms, for it moves away from the concept of children as the private property of individual parents.⁹⁴

On an individual level, the experience of unconditional love has been especially important in the black parenting experience. Black children affirm their mothers; this affirmation is important in a society plagued by racism and the politics of black womanhood. As legal feminist Dorothy Roberts explains, “The mother-child relationship

90. “Community mothers” are black community workers committed to improving conditions in black communities. See Arlene E. Edwards, *Community Mothering: The Relationship Between Mothering and the Community Work of Black Women*, 2 J. ASSOC. RES. MOTHERING 87, 88-89 (2000) (summarizing literature on community mothers); Katrina Bell McDonald, *Black Activist Mothering: A Historical Intersection of Race, Gender, and Class*, 11 GENDER & SOC'Y 773, 775-80 (1997) (study of California-based “Birthing Project”); Nancy A. Naples, *Activist Mothering: Cross-Generational Continuity in the Community Work of Women from Low-Income Urban Neighborhoods*, 6 GENDER & SOC'Y 441, 446-50 (1992) (study of primarily African-American and Latina community mothers employed by antipoverty programs in two urban cities).

91. See Edwards, *supra* note 90, at 90-91.

92. See PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 178-83 (2d ed. 2000). Othermothering within the African-American community has deep roots that can be traced to at least the earliest days of slavery. See DAVIS, *supra* note 6, at 133; WHITE, *supra* note 45, at 126-28.

93. Here, I am paraphrasing LEITH MULLINGS, ON OUR OWN TERMS: RACE, CLASS, AND GENDER IN THE LIVES OF AFRICAN AMERICAN WOMEN 74 (1997).

94. Patricia Hill Collins explains this point as follows:

[S]topping to help others to whom one is not related and doing it for free can be seen as rejecting the basic values of the capitalist market economy.

. . . The traditional family ideal assigns mothers full responsibility for children and evaluates their performance based on their ability to procure the benefits of a nuclear family household. Within this capitalist marketplace model, those women who “catch” legal husbands, who live in single-family homes, who can afford private school and music lessons for their children, are deemed better mothers than those who do not. In this context, those African-American women who continue community-based child care challenge one fundamental assumption underlying the capitalist system itself: that children are “private property” . . .

See COLLINS, *supra* note 92, at 182.

continues to have a political significance for Black women. Black women historically have experienced motherhood as an empowering denial of the dominant society's denigration of their humanity."⁹⁵ Alice Walker offers a glimpse of the positive liberatory potential of the black mother-child relationship:

[I]t is not my child who tells me: I have no femaleness white women must affirm. Not my child who says: I have no rights black men must respect.

It is not my child who has purged my face from history and her-story and left mystory just that, a mystery; my child loves my face and would have it on every page, if she could, as I have loved my own parents' faces above all others

. . . .

We are together, my child and I. Mother and child, yes, but *sisters* really, against whatever denies us all that we are.⁹⁶

In sum, black women activists and feminist writers have long recognized the potentially positive political power of family and community caregiving. This recognition flows not so much from material accounts of black women's role in biological reproduction as from a conception of black women's oppositional moral agency.⁹⁷ Black women have expressed this moral agency not by rejecting care work—an untenable strategy given the importance of caregiving and the family to combating racial and economic oppression—but by practicing care consistent with antiracist, antisexist ideology. The next section will explore the significance of black women's paid work experiences to the "transgressive care as politics" conception.

2. *Wage Work*

The wage work that black women have performed has to a significant extent been in the service of whites. For at least seventy-five years after emancipation, black women were confined to two occupa-

95. See ROBERTS, SHATTERED BONDS, *supra* note 6, at 238; see also Perry, *Transracial and International Adoption*, *supra* note 6, at 117-18 ("Black women see mothering as a political undertaking, one in which they must do what they can to protect their children from a racist society and to teach their children how to survive on their own in a racially hostile world." (footnote omitted)).

96. See Alice Walker, *One Child of One's Own: A Challenging Personal Essay on Childbirth and Creativity*, MS., Aug. 1979, at 8, 42-50, 72-75.

97. But see Patricia Haden et al., *A Historical and Critical Essay for Black Women in the Cities*, 3 NO MORE FUN AND GAMES: A J. OF FEMALE LIBERATION 71 (1969), reprinted in VOICES FROM WOMEN'S LIBERATION 316-24 (Leslie B. Tanner ed., 1970) (venerating the black maternal body as the source of civilization and criticizing the appropriation of women, blacks, and nature by white men in pursuit of urbanization, industrialization, and capitalism).

tions, field work and domestic work for white families.⁹⁸ After the migration to northern cities, most black women moved solely into domestic work in urban settings.⁹⁹ Black women who were not domestics typically worked in factories as janitors or in heavy labor.¹⁰⁰ Whereas special protective legislation rendered many occupations unfit for white women, occupations in which black women predominated escaped regulation entirely.¹⁰¹

Many black women sought to retreat from domestic and factory work, not to imitate white middle-class notions of domesticity and femininity, which were also bound up in racism, but rather to strengthen the political and economic position of their families. As historian Patricia Hill Collins explains, "Their actions can be seen as a sustained effort to remove themselves from the exploited labor force in order to return the value of their labor to their families and to find relief from the sexual harassment they endured in domestic service."¹⁰² Those who could not retreat from paid work—that is, most black women—did not conceptually separate it from their family care work. Rather, they connected economic self-reliance with motherhood, viewing paid work as providing a better chance for their children.¹⁰³ Thus, contrary to dominant conceptions of wage work within

98. See COLLINS, *supra* note 92, at 53-54.

99. From 1890 to 1920, black women's employment as domestic servants hovered around forty percent. PHYLLIS PALMER, *DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945* 12 (Ronnie J. Steinberg ed., 1989). With the Depression diminishing job options and World War I halting the waves of white, European immigration that had supplied the majority of domestic servants in previous decades, domestic service became racially defined as an occupation. See *id.* at 13. By 1940, black women made up over sixty percent of domestic workers nationally. *Id.* at 13.

100. Specifically, according to Collins:

In the South, Black women entered tobacco factories, cotton mills, and flour manufacturing. Some of the dirtiest jobs in these industries were offered to African-American women. In the cotton mills Black women were employed as common laborers in the yards, as waste gatherers, and as scrubbers of machinery. With Northern migration, some Black women entered factory employment, primarily in steam laundries and the rest in unmechanized jobs as sweepers, cleaners, and ragpickers.

See COLLINS, *supra* note 92, at 57 (citation omitted).

101. See ALICE KESSLER-HARRIS, *OUT TO WORK* 185, 188 (1982). Indeed, a central theme animating protective labor laws was a growing eugenics movement and concern about "race suicide." *Id.* at 185. Hence, Justice Brewer's statement in *Muller v. Oregon*, upholding Oregon's ten-hour work day for women, "[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." 208 U.S. 412, 421 (1908).

102. See COLLINS, *supra* note 92, at 54.

103. Summarizing three qualitative studies of domestics of color, historian Evelyn Nakano Glenn explains:

[D]omestics saw their responsibilities as mothers as the central core of their identity. The Japanese American women I interviewed, the Chicana day workers Romero interviewed, and the African American domestics Bonnie Thornton Dill interviewed all emphasized the primacy of their roles as mothers As a

liberal and radical feminism, work was not an “escape” from family obligations. Such a position would have been incomprehensible in light of the discrimination and exploitation that most black women experienced in the workforce. Rather, paid work was seen as an extension of family work.

Even in contemporary society, the work performed by many poor employed black women resembles duties long associated with domestic service.¹⁰⁴ With the increased commodification of domestic labor in the last half of the twentieth century, black women are disproportionately employed as service workers in institutional settings where they “carry out lower-level ‘public’ reproductive labor.”¹⁰⁵ On average, approximately one-third of black women and men find work in the low-paid service sector serving as cooks, waitresses, laundry workers, day care workers, and health aides to service the needs of affluent middle-class families.¹⁰⁶

As with slavery and domestic work for whites during the first half of the twentieth century, a comprehensive review of black women’s resistance to labor force exploitation in the modern service economy is not possible here. However, a discussion of the welfare rights movement of the 1960s provides an important case in point. Comprised primarily of poor black women, the movement organized campaigns to demand higher welfare benefits, civil rights protections, and better treatment by caseworkers.¹⁰⁷ Support for women’s roles as mothers was central to the political strategy and ideology of the Na-

Japanese immigrant single parent expressed it, “My children come first. I’m working to upgrade my children.” . . .

....

In a similar vein, Pearl Runner told Dill, . . .

. . . “I really feel that with all the struggling that I went through, I feel happy and proud that I was able to keep helping my children, that they listened and that they all went to high school. So when I look back, I really feel proud, even though at times the work was very hard and I came home very tired. But now, I feel proud about it. They all got their education.”

See Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1, 18-19 (1992) [hereinafter Glenn, *Servitude*] (quoting EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE 240 (1986) and Bonnie Thornton Dill, *The Means to Put My Children Through: Child-Rearing Goals and Strategies Among Black Female Domestic Servants*, in THE BLACK WOMAN 113 (La Frances Rodgers-Rose ed., 1980)). In this passage, Glenn also refers to Mary Romero, *Day Work in the Suburbs: The Work Experience of Chicana Private Housekeepers*, in THE WORTH OF WOMEN’S WORK 77 (Anne Statham et al. eds., 1988). Cf. also Denise A. Segura, *Working at Motherhood: Chicana and Mexican Immigrant Mothers and Employment*, in MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 211 (Evelyn Nakano Glenn et al. eds., 1994).

104. See COLLINS, *supra* note 92, at 62; Glenn, *Servitude*, *supra* note 103, at 19-20.

105. Glenn, *Servitude*, *supra* note 103, at 3.

106. See COLLINS, *supra* note 92, at 62.

107. See Premilla Nadasen, *Expanding the Boundaries of the Women’s Movement: Black Feminism and the Struggle for Welfare Rights*, 28 FEMINIST STUD. 271, 272 (2002).

tional Welfare Rights Organization,¹⁰⁸ which by 1972 identified itself as a women's organization.¹⁰⁹ Although resonating with a rising trend within black nationalism to reinforce traditional gender roles for women, this strategy was fundamentally different, for its goal was increased independence of women from men.¹¹⁰ The focus on gaining financial support for motherhood also stood in contrast to white liberal feminist ideology that employment, not motherhood, led to liberation. As historian Premilla Nadasen explains, "[Welfare activists] proposed that women have the option of staying home by providing adequate public support. This, in itself, was a radical challenge to the socially defined gender roles of poor Black women, who had never been seen primarily as homemakers or mothers."¹¹¹

Although this discussion has focused primarily on poor and working class women, it should be noted that black women professionals have not escaped workplace exploitation or domestic servant roles. Black middle-class women have been dubbed the "new mammies" or "modern mammies" by black feminist theorists.¹¹² Black women professionals are disproportionately employed in the government sector, where they are responsible for "the personal needs of the destitute and the weak in public institutions."¹¹³ According to these theorists, black women professionals are expected to fix systems that are in crisis due to underfunding, infrastructure deterioration, and demoralized staffs.¹¹⁴

When considered in the context of this history, black women's care work—whether performed in a single-parent family, in a traditional marriage, or other intimate partnership—can be understood at least in part as an act of resistance to wage market exploitation, not simply as a form of patriarchal oppression.¹¹⁵ This vision contrasts with the "cult of true womanhood"¹¹⁶ associated with the traditional family ideal and opposed by many feminists, in which family care work is defined as being primarily private, potentially at odds with women's liberation, and apolitical.

108. *Id.* at 278.

109. *Id.* at 274.

110. *Id.* at 279.

111. *Id.* at 286.

112. See COLLINS, *supra* note 92, at 65; BARBARA OMOLADE, *THE RISING SONG OF AFRICAN AMERICAN WOMEN* 55 (1994).

113. See COLLINS, *supra* note 92, at 65.

114. *Id.*; see also Elizabeth Higginbotham, *Black Professional Women: Job Ceilings and Employment Sectors*, in *WOMEN OF COLOR IN U.S. SOCIETY* 113-31 (Maxine Baca Zinn & Bonnie Thornton Dill eds., 1994).

115. See Perry, *Alimony*, *supra* note 6, at 2494 ("For women who do not have the option of attractive, well-paying professional jobs, staying home may not be considered a sacrifice; it may be seen as a luxury.")

116. See Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 *AMER. Q.* 151, 151-74 (1966).

3. *Contemporary Social Science Research*

The history just recounted is corroborated by contemporary social science research exploring the meaning of motherhood for black women. These studies demonstrate that black motherhood constitutes a positive political practice, often conscious, of resistance to racial- and gender-based oppression.

For example, one small qualitative study of seven teenage black mothers found that mothering was a form of “resistance to the idea that young, Black motherhood was ‘deviant.’”¹¹⁷ All of the women in the study expressed the idea that mothering was a form of black pride. Through motherhood, “the women . . . were asserting that a) they could have children and b) under the tyranny of anti-Black racism as a means of survival, it was imperative to do so.”¹¹⁸ While the study found that heterosexism may have subconsciously contributed to the teenage mothers’ decisions to bear children, “resistance to major oppressive ideologies of Blackness, womanhood, and motherhood” played a conscious, significant role.¹¹⁹ This study demonstrates the continuity of the ideology of motherhood as resistance among young black women.

A second qualitative study of twenty working-class African-American women found that for most, and possibly all of the women, raising children was not seen or practiced as an individual undertaking.¹²⁰ Good mothering was not defined by the mother’s singular, irreplaceable presence.¹²¹ Rather, shared care arrangements most often were the norm, not just to accommodate the mothers’ job or school schedules, but as part of a view of the “value of shared child rearing and the benefit to children of close kin relationships.”¹²² Exclusive motherhood was seen as neither practical nor desirable. For example, one mother “wanted her two children to be mothered by her sister and aunts so that they would grow up as she had, surrounded by kin.”¹²³ The shared child-rearing arrangements often were regularized, long term, and extensive, that is, occurring two to four days a week for several years.¹²⁴ The women also resisted the assumption that legal marriage was required for good mothering; they did not express strong desires to marry or to rely on male breadwinners. At

117. See Crystal’Aisha PerrymanMark, *Resistance and Surrender: Mothering Young, Black, and Feminist*, 2 J. ASSOC. RES. ON MOTHERING 130, 134 (2002).

118. *Id.* at 135.

119. *Id.* at 135-36.

120. See Linda M. Blum & Theresa Deussen, *Negotiating Independent Motherhood: Working-Class African American Women Talk About Marriage and Motherhood*, 10 GENDER & SOC’Y 199, 206-07 (1996).

121. *Id.* at 207.

122. *Id.*

123. *Id.*

124. *Id.*

the same time, they valued long-term partnerships and the presence of fathers in their children's lives. Thus, they practiced independence from "male family headship," but not rejection of men.¹²⁵ Contrary to mainstream arguments that black single-parent motherhood is a result of cultural pathology stemming from welfare dependency or the lack of stable employment for black men, this study suggests that it is at least in part an expression of a distinct, positive, conscious ideal of community-based independence involving shared family caregiving and nonmarital partnerships with men.

While there are fewer studies on the meaning of family care work to black middle-class women,¹²⁶ cultural evidence suggests that they also see their domestic labor as a form of political resistance to racism. For example, Mocha Moms is a national support group for "mothers of color who have chosen not to work full-time outside of the home in order to devote more time to their families."¹²⁷ According to the Mocha Moms mission statement, full-time parenting by mothers of color is a political act because "[slave] mothers could not participate in the raising of their children" and generations of black mothers worked while "generations of white mothers enjoyed the privilege of being able to stay at home and spend time with their children."¹²⁸ According to founder Jolene Ivey, Mocha Moms' conscious politicization of motherhood is a response to contemporary conditions as well:

You can say that mothering is the same whether you're White, Black, or green . . . It is and it isn't. I'm the mother of five Black boys. I can't raise them the way a White woman would raise her sons. I have to do things like teach them how to act if the cops stop them.¹²⁹

125. *Id.* at 208. While this study represents but one contemporary example, its findings are consistent with other social science research on African-American kinship networks. See, e.g., CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 62-89 (1974).

126. The closest study within law is Bernie D. Jones, *Single Motherhood by Choice, Libertarian Feminism, and the Uniform Parentage Act*, 12 TEX. J. WOMEN & L. 419 (2003) (discussing "single motherhood by choice" among older, economically independent women as a statement of empowerment).

127. See About Mocha Moms, <http://www.mochamoms.org/about.html> (last visited Dec. 2, 2005). The name itself suggests a group of women who can afford to take their kids to Starbucks for playdates, as well as racial pride.

128. See Mocha Moms, Anti-Discrimination Statement, http://www.mochamoms.org/anti_disc.html (last visited Dec. 2, 2005).

129. See Ylonda Gault Caviness, *The Mommy Club: Black Stay-at-Home Mothers Look to One Another for Support*, ESSENCE MAG., Aug. 2002, at 152. Lesbian mothers share this perspective on motherhood. See, e.g., Linda Mulley, *Lesbian Motherhood and Other Small Acts of Resistance*, in *THE POLITICS OF MOTHERHOOD* 311, 317 (Alexis Jetter et al. eds., 1997) ("[T]here are differences between being a mother and being a lesbian mother. . . . [T]he lesbian mother [must] educate her children about the hate that exists in the world, and how that hate can affect them.").

Another member explained that she responds to the curious eyes of strangers with the refrain, "No, I'm not the nanny."¹³⁰ In sum, Mocha Moms represents a conscious effort to resist the unique way in which black women experience the intersection of sexist and racist ideology with regard to family life.¹³¹

4. *Summary: Black Women's Care as Politics*

When considered in the context of the history, body of social science research, and cultural evidence presented here, black women's caregiving can be understood at least in part as an act of resistance to the exploitation and control of their sexuality, mothering, and wage work by men and the state. This conception of caregiving as an affirmative act of political resistance is well-developed within black feminist thought. Patricia Hill Collins notes that African-American women's contributions to their families' well-being in the face of structuralized racism suggest that black women see their family care work more as a form of resistance to oppression than as a form of exploitation by men. She highlights how this conception of political activism varies from traditional liberal conceptions of politics as resistance that is effected through public institutions in the public sphere: "Prevailing definitions of political activism and resistance misunderstand the meaning of these concepts in Black women's lives. Social science research typically focuses on public, official, visible political activity even though unofficial, private, and seemingly invisible spheres of social life and organization may be equally important."¹³² Similarly, dominant accounts of motherhood within legal and political theory (including much feminist legal theory) as an institution in which women are apolitical, isolated with their children within private families, and removed from politics and social struggle are inconsistent with central understandings of caregiving for many black women.¹³³ For such women, reproduction and care are not just bio-

130. See Monica Leas, Stay-at-Home Mothers Grow in Number; Mocha Moms Fill a Void, *Columbia News Services*, at <http://www.jrn.columbia.edu/studentwork/cns/2003-06-22/316.asp> (last visited Dec. 2, 2005).

131. *Id.* To be sure, Mocha Moms is not without apparent contradictions. For example, the organization's official platform includes "a strong commitment to marriage and to the support of our husbands." See About Mocha Moms, <http://www.mochamoms.org/about.html> (last visited Dec. 2, 2005). These seemingly traditional aspirations regarding care present significant complexities when we consider the background against which they developed. That is, marriage may be a transgressive act in a community where state-sanctioned marriage was denied historically and in which unmarried motherhood is the norm. As discussed in the next Part, this insight equally applies to the gay community.

132. See COLLINS, *supra* note 92, at 202.

133. See Eileen Boris, *The Power of Motherhood: Black and White Activist Women Redefine the "Political"*, 2 *YALE J.L. & FEMINISM* 25, 48-49 (1989); Annelise Orleck, *Radical Mothers in International Perspective*, in *THE POLITICS OF MOTHERHOOD* 3 (Alexis Jetter et al. eds., 1997).

logical or developmental functions but are also an expression of politics.¹³⁴

B. *Gay/Lesbian Care Practices*

Gay men and lesbians also have long suffered state-sponsored discrimination with regard to their reproduction, sexuality, and family life.¹³⁵ As in the race context, the state has effected this discrimination through the denial of substantial rights and benefits of citizenship. Gay men and lesbians have challenged this discrimination in part through their intimate relationships, not solely outside of them as traditional liberal theory would suggest. Given the possibility of a radical alternative to the hetero-patriarchal family presented by same-sex intimacy, the potential for political emancipation (as well as oppression) through family and intimate life is well understood by gay men and lesbians and by the larger society. This understanding of the political significance of intimacy within the gay community is supported by historical materials and contemporary social science research.

1. *Sexuality/Reproduction/Parenting*

In the realm of family and intimate life, the state has relied on sexual orientation to deny gay and lesbian individuals sexual privacy, marriage and its benefits, child custody, alternative reproduction services, and adoption rights. Indeed, a core historical purpose of

134. This is not to say that all transgressive caregiving among black women represents a particular political stance against racism or patriarchy. Indeed, bearing children outside of marriage, for example, may represent black women's practical response to demographic and economic realities. See Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM. L.Q. 461, 464-65 (1999) (identifying the shortage of black men at every age group and the precarious economic situation of many black men as critical factors affecting black women's low marriage rates). Yet, as this Part has demonstrated, state-sponsored oppression of black family life significantly colors its meaning, transforming family care work at least partly into a practice of political significance for many African Americans.

135. This section builds on the work of William Eskridge and Nancy Polikoff, whose scholarship has defined the field of gay parental rights and "gaylaw" more generally. See ESKRIDGE, *supra* note 42; David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 524-30 (1999); Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 *passim* (1976); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 527-43 (1990) [hereinafter Polikoff, *Redefining Parenthood*].

A note on terminology is apropos here. I use "gay men and lesbians" to undermine the assumption that findings about gay men hold equally for lesbians. At times, however, I also employ "gay" as a generic term embracing both women and men. Although other sexual and gender nonconformists are not explicitly included, i.e., bisexuals, transgendered people, and transsexuals, many of the claims of this section apply equally to all individuals whose sex, gender, and sexuality do not neatly line up according to dominant norms.

family law has been the promotion of heterosexual, monogamous marriage and patriarchal gender relations. For example, coverture, adultery, legitimacy, and other pre-1970s family regulations instituted procreative, heterosexual, patriarchal marriage as the American norm. Although constitutional litigation has resulted in the elimination of most de jure preferences for the patriarchal family,¹³⁶ it continues a robust de facto existence in the law. For example, family law, income security law, and tax law all privilege heterosexual, married individuals, especially men within heterosexual marital relationships.¹³⁷ The marginalization and elimination of nonheterosexual, nonpatriarchal intimacy has been an essential corollary to this normalization project.

The state's aggressive stance with regard to sexual nonconformity began in earnest after World War I, increased in intensity after World War II, and has subsided to a certain degree in the face of the modern gay rights movement.¹³⁸ A full recounting of this history is beyond the scope of this Article. However, certain themes emerge from this history that shed light on my central claim that transgressive caregiving may constitute a form of political resistance or expression.

First, the state has sought to enforce compulsory heterosexuality through family law, rendering the family a key site of emancipatory struggle for gender and sexual nonconformists. To be sure, the state has pursued its heteronormative goals in a wide range of contexts,

136. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (decriminalizing private, consensual sodomy); *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (equalizing the rights of marital and nonmarital children with regard to paternity statutes of limitation); *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (protecting extended families from state intervention); *Orr v. Orr*, 440 U.S. 268, 282-84 (1979) (invalidating gender-based spousal support statutes); *Eisenstadt v. Baird*, 405 U.S. 438, 464-65 (1972) (decriminalizing the use of contraception by unmarried persons). De jure support for the patriarchal family continues in some areas, most notably with regard to same-sex marriage. See sources cited *infra* note 188 and discussion in this Part.

137. See, e.g., FINEMAN, NEUTERED MOTHER, *supra* note 27, at 143-64 (tracing and criticizing the law's privileging of heterosexual, monogamous pairings); Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 313, 326-27 (2003) (detailing the privileging of married couples conforming with traditional gender roles within tax and social security law); Williams, *supra* note 19, at 2248-54 (demonstrating the continued informal operation of coverture in the context of divorce).

138. See generally ESKRIDGE, *supra* note 42 (reviewing history of state rules relating to gender and sexual nonconformity). Prior to World War I, most regulation of sexual nonconformity was achieved through family and social pressure. Where the law did come into play, it focused primarily on policing gender nonconformity, such as female prostitution and cross-dressing. *Id.* at 18-24.

including the military,¹³⁹ employment,¹⁴⁰ and immigration,¹⁴¹ public and semi-public spaces such as cafes, bars, social clubs, bathrooms, and bathhouses;¹⁴² and with regard to speech.¹⁴³ But the legal regulation of the family, through rules that seek to control the sexuality, reproduction, and parenting of gay men and lesbians, represents a central component of the state's heteronormalization effort.¹⁴⁴

Second, the protection of children from "oversexed," "predatory" gay men has been a recurring theme in the history of state regulation of same-sex intimacy and family life. Indeed, social historians attribute the development of the concept of the "homosexual" in America around the turn of the twentieth century in part to cultural anxieties about the protection of the sexual innocence of children.¹⁴⁵ These anxieties translated into legal rules with both benign and harmful effects. Under the auspices of child protection, states adopted increasingly strict laws prohibiting child molestation and rape, but they also used child protection as a pretext for the widespread criminalization of adult, consensual, same-sex intimacy and the civil regulation of gay reproduction, adoption, and parenting.¹⁴⁶ For example, until relatively recently, many states criminalized same-sex sexuality,¹⁴⁷ no state recognized same-sex marriage,¹⁴⁸ and express presumptions ex-

139. See, e.g., *Thomasson v. Perry*, 80 F.3d 915, 934 (4th. Cir. 1996) (en banc) (holding that the Navy's "Don't Ask, Don't Tell" policy was constitutionally applied to expel a lieutenant after he declared his homosexuality and refused to offer evidence to rebut the presumption that he had engaged in homosexual acts); *Steffan v. Perry*, 41 F.3d 677, 697-98 (D.C. Cir. 1994) (en banc) (same). See also generally ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990); ESKRIDGE, *supra* note 42, at 49-52, 174-204.

140. See, e.g., *Shahar v. Bowers*, 114 F.3d 1097, 1110-11 (11th. Cir. 1997) (en banc) (holding Georgia Attorney General's revocation of employment offer to plaintiff because of her purported "marriage" to another woman violated no constitutional rights).

141. See ESKRIDGE, *supra* note 42, at 35-36, 132-34, 383-84.

142. *Id.* at 78-80, 93-95, 112-16; see also Allan Bérubé, *The History of Gay Bathhouses*, in *POLICING PUBLIC SEX*, 187-220 (Ephen Glenn Colter et al. eds., 1996).

143. See ESKRIDGE, *supra* note 42, at 76-78, 95-96, 116-25.

144. Admittedly, these regulatory contexts are not exclusive. For example, sodomy laws can be understood as a form of family regulation, as a form of spatial regulation and, at least derivatively, as a form of military, employment, and immigration regulation.

145. See ESKRIDGE, *supra* note 42, at 3. Contributing to these anxieties were new understandings of children's gender and sexual development. The other set of anxieties leading to the emergence of the category "homosexual" surrounded "increased social and economic opportunities for women outside the home, which fueled not only a robust feminist movement but also a reaction that emphasized rigid gender lines and roles." *Id.*

146. *Id.* at 60-61, 136-37; PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 61-66, 85-87, 90, 124-25, 156-63 (1998).

147. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding Georgia's sodomy law).

148. See, e.g., *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971). For a review of the history of the struggle over same-sex marriage, see ESKRIDGE, *supra* note 42, at 134-35 and Chambers & Polikoff, *supra* note 135, at 524-30.

isted against child custody for gay or lesbian parents, particularly when a heterosexual parent sought custody.¹⁴⁹

To be sure, there has been enormous progress in all of these areas in the past two decades. In the past two years alone, the U.S. Supreme Court decriminalized private, consensual gay sex;¹⁵⁰ through judicial or legislative action, the state of Massachusetts¹⁵¹ and the countries of Canada,¹⁵² South Africa,¹⁵³ and Spain¹⁵⁴ overturned or cleared the way for legislative repeal of those jurisdictions' opposite-sex requirements for marriage; and the executives of several American cities and counties directed their clerks to extend the privilege of marriage to same-sex couples.¹⁵⁵ Many states, municipalities, and corporations now provide some rights and benefits to domestic partners.¹⁵⁶

Moreover, the majority of states no longer take into account the sexual orientation of a parent in custody disputes. This approach,

149. See, e.g., *Roe v. Roe*, 324 S.E.2d 691, 692-93 (Va. 1985). For a detailed review of the struggle over gay parenting, see Chambers & Polikoff, *supra* note 135, at 532-43; Hunter & Polikoff, *supra* note 135, *passim*; Polikoff, *Redefining Parenthood*, *supra* note 135, at 527-43.

150. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

151. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003). Similar cases are pending in appellate courts in California, New Jersey, New York, and Washington states. See Lambda Legal Marriage Project, <http://www.lambdalegal.org/cgi-bin/iowa/issues/record2?record=9> (last visited Dec. 2, 2005) [hereinafter Lambda Marriage Project].

152. See *In re Section 53 of the Supreme Court Act*, [2004] D.L.R. 193 (clearing the way for legislative repeal of Canada's ban on same-sex marriage); *Civil Marriage Act*, 2005 S.C., ch. 33 (Can.) (legalizing same-sex marriage in Canada).

153. See *Minister of Home Affairs v. Fourie*, No. CCT 60/04, slip op. at 51-52, 100-01 (S. Afr. CC Dec. 1, 2005), available at <http://www.constitutionalcourt.org.za/Archimages/5257.PDF> (holding that excluding same-sex couples from marriage represents an unjustified violation of the constitutional rights of equal protection, nondiscrimination, and dignity, and giving the South African Parliament one year to legalize same-sex marriage or the court's order will take effect).

154. See Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (B.O.E. 2005, 11364), available at <http://www.boe.es/boe/dias/2005/07/02/pdfs/A23632-23634.pdf>; see also Renwick McLean, *Spain Legalizes Gay Marriage; Law Is Among the Most Liberal*, N.Y. TIMES, July 1, 2005, at A9.

155. Here I am referring to the events surrounding Valentine's Day 2004 when, following the lead of San Francisco Mayor Gavin Newsom, officials in New Paltz, New York, Multnomah County, Oregon, and Sandoval County, New Mexico, began issuing marriage licenses to same-sex couples, resulting in some 7000 licenses when all was said and done. See Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24; Evelyn Nieves, *Calif. Judge Won't Halt Gay Nuptials; New Mexico County Briefly Follows San Francisco's Lead*, WASH. POST, Feb. 21, 2004, at A1; *Portland Oregon to Allow Gay Marriages*, UNITED PRESS INT'L, Mar. 2, 2004, available at LEXIS (News Library); Sabrina Tavernise & Thomas Crampton, *Gay Couples to Be Wed Today in New Paltz, Mayor Declares*, N.Y. TIMES, Feb. 27, 2004, at B2.

156. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 499-501 (2d ed. 2002). Most recently, the state of Connecticut, without any order of a court, passed a domestic partnership law. See 2005 Conn. Legis. Serv. 05-10 (West).

known as the “nexus test,” makes the sexual orientation of a parent irrelevant unless there is evidence that it will negatively impact the best interests of the child.¹⁵⁷ And more than ten states and the District of Columbia now recognize “second-parent” adoption, which is the right of the partner of a biological parent to adopt without terminating the parental rights of the biological parent, thereby ensuring legal ties between children and both their lesbian or gay parents where the parents seek to formalize the relationship.¹⁵⁸ In this spirit, the American Law Institute’s (ALI) *Principles of the Law of Family Dissolution*,¹⁵⁹ a major restatement and reform effort in family law, recognizes functional parenthood by augmenting traditional definitions of parenthood based on blood and marriage with the concepts of the parent by estoppel and the de facto parent.¹⁶⁰ Although no state has formally adopted these ALI proposals, many states have pro-

157. See, e.g., *Downey v. Muffley*, 767 N.E.2d 1014 (Ind. Ct. App. 2002) (holding that there was no rational basis for trial court order prohibiting ex-wife from cohabiting with same-sex partner while living with her children.); *Fulk v. Fulk*, 827 So. 2d 736 (Miss. Ct. App. 2002) (holding that trial court was precluded from placing too much emphasis on wife’s lesbian affair as a basis for awarding custody to husband and that the judge should have considered that the husband had trapped his pregnant wife in the home and that he had threatened to kill her and her family); *Damron v. Damron*, 670 N.W.2d 871 (N.D. 2003) (holding that modification of child custody from ex-wife to ex-husband based on ex-wife’s homosexual household was clearly erroneous); *Hogue v. Hogue*, 147 S.W.3d 245 (Tenn. Ct. App. 2004) (restraining order that prohibited husband from exposing child to his “gay lifestyle” did not describe the prohibited acts in reasonable detail and was unenforceable).

158. See CAL. FAM. CODE §§ 8601, 9000 (West 2004); 750 ILL. COMP. STAT. 50/2 (2004); VT. STAT. ANN. tit. 15A, § 1-102 (2004); *In re Hart*, 806 A.2d 1179, 1186-87 (Del. Fam. Ct. 2001); *In re M.M.D.*, 662 A.2d 837, 859-61 (D.C. 1995); *In re Petition of K.M.*, 653 N.E.2d 888, 893-94 (Ill. App. Ct. 1995); *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1256-57 (Ind. Ct. App. 2004); *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 538-39 (N.J. Super. Ct. App. Div. 1995); *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227, 228-29 (N.Y. App. Div. 2004); *In re Adoption of R.B.F.*, 803 A.2d 1195, 1202-03 (Pa. 2002); *In re Adoption of M.J.S.*, 44 S.W.3d 41 (Tenn. Ct. App. 2000); *State ex rel. D.R.M.*, 34 P.3d 887, 894 (Wash. Ct. App. 2001) (dicta). In a recent California case, the court recognized a nonbiological gay mother’s right to a second-parent adoption even over the wishes of her former partner, where the adoption proceedings had been initiated before the couple’s separation. See *Sharon S. v. Superior Ct.*, 73 P.3d 554, 574 (Cal. 2003).

159. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter ALI PRINCIPLES].

160. See *id.* § 2.03. Parents by estoppel and de facto parents are individuals who, though not legal parents under state law, lived with the child for a significant period of time and acted in the role of parent for reasons primarily other than financial compensation, pursuant to an agreement with the legal parent, when a court finds that recognition of the individual as a parent is in the child’s best interests. *Id.* Although not relevant here, some important differences exist between the two categories. *Id.* Note also that the ALI PRINCIPLES specifically prohibits consideration of the sexual orientation of a parent in custody matters. *Id.* § 2.12(1)(d).

posed them, and several state courts have recognized functional parents as legal parents applying these and other theories.¹⁶¹

In 2000, the National Conference of Commissioners on Uniform State Laws revised the Uniform Parentage Act of 1973, governing in part the status of children born through donor insemination, to remove bias in favor of married couples.¹⁶² Although not revised explicitly with lesbians in mind, the change was made “in light of . . . the constitutional protections of the procreative rights of unmarried as well as married women.”¹⁶³ In sum, the law is moving toward the recognition of gay and lesbian care practices, as well as the care practices of individuals who may parent in extended or other less traditional family arrangements.

At the same time, it would be a mistake to conclude that gay men and lesbians have achieved full freedom or equality with regard to the law of domestic relations. The state continues to exercise significant regulatory control over same-sex intimacy and family life. For example, despite the adoption of the “nexus” doctrine, courts still may deny gay and lesbian parents custody or visitation for other seemingly insufficient reasons, suggesting that there is still bias op-

161. See, e.g., *Elisa B. v. Super. Ct.*, 117 P.3d 660, 670 (Cal. 2005) (recognizing former lesbian partner of biological mother as a “presumed parent” under the Uniform Parentage Act); *K.M. v. E.G.*, 117 P.3d 673, 675, 678 (Cal. 2005) (recognizing former lesbian partner of gestational mother—and the genetic mother of the child—as a natural mother under the Uniform Parentage Act, and refusing to apply statute treating a sperm donor as if he is not a natural father); *Kristine H. v. Lisa R.*, 33 Cal. Rptr. 3d 81, 83 (Cal. 2005) (recognizing former lesbian partner of biological mother as a parent pursuant to an estoppel theory); *In re E.L.M.C.*, 100 P.3d 546, 564 (Col. Ct. App. 2004), cert. denied, 2004 WL 2377164 (Col. 2004); 125 S. Ct. 2551 (2005) (recognizing former domestic partner of adoptive mother as a “psychological parent”); *In re the Parentage of A.B.*, 818 N.E.2d 126, 130-33 (Ind. Ct. App. 2004) (recognizing former domestic partner of biological mother as a parent by estoppel); *Jones v. Barlow*, Case No. 034907803 (Utah 3d Dist. Ct. 2004) (holding that former lesbian partner of biological mother may meet the threshold factors for *in loco parentis* status) (on file with author), appeal docketed, No. 20040932 (Utah Oct. 29, 2004); *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005) (holding that former lesbian partner of biological mother may be a de facto parent); *In re Clifford K.*, 610 S.E.2d 138, 157 (W.Va. 2005) (holding that former lesbian partner of deceased biological mother had standing to intervene in custody proceeding under “exceptional cases” provision). For a comprehensive review of the various equitable theories recognized by courts and some state legislatures, see Polikoff, *Redefining Parenthood*, *supra* note 135, at 483-509 and ALI PRINCIPLES, *supra* note 159, § 2.03, reporter’s notes, cmts. b-c.

162. See UNIF. PARENTAGE ACT § 702 (2002). Specifically:

The 2000 UPA further increases anonymity protections [previously afforded only to married couples] by removing the . . . marriage requirements, providing that “[a] donor is not a parent of a child conceived by means of assisted reproduction.” Thus, the 2000 UPA makes it easier for women, who are either single or partnered with women, to have children without being vulnerable to a donor’s fatherhood claims and also provides donors with increased security from being held financially or otherwise responsible for the child.

Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 20 (2003).

163. UNIF. PARENTAGE ACT § 702 (2002).

erating in custody disputes.¹⁶⁴ For example, courts applying the nexus test commonly find a gay parent's "lifestyle" sufficiently harmful to limit custody or visitation, especially if the parent resides with an intimate partner.¹⁶⁵ And some states still explicitly retain a presumption against custody by an openly gay or lesbian parent¹⁶⁶ or retain it as a factor in the best interest determination.¹⁶⁷ Such rules and decisions effectively operate as a "don't ask, don't tell" policy in the context of custody law.¹⁶⁸

Although relatively early and widespread acceptance of second-parent adoption for gays and lesbians is a hallmark of the American gay rights movement,¹⁶⁹ increasing anxieties over same-sex marriage

164. See, e.g., *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996) (denying custody to lesbian mother not because she was a lesbian but because did not have a stable lifestyle); *Hertzler v. Hertzler*, 908 P.2d 946, 949 (Wyo. 1995) (limiting visitation of mother not because of her lesbianism, but because both parents could not resolve their conflict over religious and gay values (mother smuggled with children and her female companion in bed, had children march with her in a gay and lesbian rights parade, and had children participate in a commitment ceremony with her companion)).

165. For example, in 2004, an Idaho court modified a gay father's previously shared custody arrangement even more than his ex-wife had requested, ruling that his children could visit him only if he did not reside with his partner. *McGriff v. McGriff*, 99 P.3d 111, 120-21 (Idaho 2004). Even though "[s]exual orientation, in and of itself, cannot be the basis for awarding or removing custody," the court justified its affirmance, *inter alia*, on the basis of the "[f]ather's plan to openly reside with his homosexual partner," which could not be minimized in light of the conservative Mormon community in which the family resided, and his "unilateral decision to discuss his sexual orientation with one of the children." *Id.* at 116-19.

166. See, e.g., *L.A.M. v. B.M.*, 906 So. 2d 942 (Ala. Civ. App. 2004) (holding that *Lawrence v. Texas*, 539 U.S. 558 (2003), did nothing to disrupt that state's presumption against child custody for gay parents, and affirming a change of custody from a lesbian mother to a heterosexual father pursuant to that presumption).

167. For example, in 2005, a Mississippi court transferred custody of two girls from their lesbian mother to their heterosexual father. See *Davidson v. Coit*, 899 So. 2d 904, 906-07 (Miss. Ct. App. 2005). "[T]he substantial change in circumstances was the fact that Davidson exposed the children to the sexual nature of her relationships with other women," even though the mother's sexual orientation was known by the court at the time of the original custody determination. *Id.* at 910. The court also based its decision on the fact that Davidson's partner was the children's primary caregiver, *id.* at 911, which it found troubling, and the fact that the father regularly attended church with the girls. *Id.* at 911-12. The appellate court affirmed, noting that "the court can consider a homosexual lifestyle as a factor relevant to the custody determination of the child, as long as it is not the sole factor." *Id.* at 911.

168. See also *In re Z.B.P.*, 109 S.W.3d 772, 779 (Tex. App. 2003) (upholding change in custody from a mother to father, in part, because the mother was living with a "female paramour" in a "non-traditional family setting"); *Jenkins v. Jenkins*, No. 05-98-01849-CV, 2001 WL 507221, at *6 (Tex. App. May 15, 2001) (holding that wife could take her children and move away from husband, in part, because he had disregarded the best interests of the children by "introduc[ing] [them] to his new [male] paramour"). For a comprehensive review of cases on this issue, see ALI PRINCIPLES, *supra* note 159, § 2.02, reporter's notes, cmt. f.

169. See Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711 *passim* (2000) (describing and analyzing the divergent paths taken by European countries and America with regard to gay rights, and specifically the progres-

beginning in the 1990s fueled renewed attention on preventing lesbians and gay men from adopting. From 1994 to 1999, four states enacted prohibitions on second-parent adoption by same-sex couples;¹⁷⁰ four additional states embraced similar prohibitions in the early part of this decade.¹⁷¹ For example, in 2002 a Nebraska court denied a petition by two mothers to have the nonbiological mother adopt their son, even though she had helped to raise him from birth, was his primary caretaker, and demonstrated “remarkable parenting skills.”¹⁷² In 2000, the Utah legislature passed a law restricting adoption to married couples and unmarried individuals not cohabiting in a sexual relationship.¹⁷³ Although not formally stated, its purpose was widely perceived as the exclusion of gay men and lesbians from adoption in a manner that would withstand constitutional attack.¹⁷⁴ In contrast, every state in the country except Florida permits gay, lesbian, and bisexual persons to petition individually to adopt children,¹⁷⁵ evidencing the existence of a “don’t ask, don’t tell” policy in the context of adoption as well as custody.

The Supreme Court’s recent decision in *Lawrence v. Texas*¹⁷⁶ decriminalizing private, consensual sodomy on substantive due process grounds has thus far had little impact on state-sponsored discrimination against gay men and lesbians in the area of parental rights. For example, in 2004 gay foster parents Steven Lofton and Roger Croteau failed in their constitutional attack of Florida’s statutory ban on adoption by gay people. The court upheld the law, even though Lofton and Croteau were the only parents of their foster child, Bert, since he was an infant.¹⁷⁷ Similarly, an Alabama court held in 2004 that *Law-*

sion from parenting to partnership rights in the United States, and partnership to parenting rights in Europe).

170. See *In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. Ct. App. 1996); *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999); *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998); *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994). Earlier prohibitions included Florida and New Hampshire. See FLA. STAT. § 63.042(3) (Supp. 2004) (enacted 1977); N.H. REV. STAT. ANN. §§ 170-B:2(XV), 170-F:2 (IV) (2005) (enacted 1986), *repealed* by Act of May 3, 1999, 1999 N.H. Laws 18.

171. See MISS. CODE ANN. § 93-17-3(2) (2004); *In re Adoption of Luke*, 640 N.W.2d 374, 378 (Neb. 2002); *cf.* 10 OKLA. STAT. § 7502-1.4(A) (2004) (prohibiting the recognition of “an adoption by more than one individual of the same sex from any other state or foreign jurisdiction”); UTAH CODE ANN. § 78-30-1 (2004) (prohibiting adoption by unmarried cohabitants).

172. Lambda Legal, In Court, referring to *In re Adoption of Luke*, 640 N.W.2d 374, 378, <http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=161> (last visited Dec. 2, 2005).

173. See UTAH CODE ANN. § 78-30-1 (2004).

174. See *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

175. See Lambda Legal, Overview of State Adoption Laws, <http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=399> (last visited Mar. 13, 2005).

176. 539 U.S. 558 (2003).

177. See *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

rence did nothing to disrupt that state's presumption against child custody for gay parents, transferring custody from a lesbian mother to a heterosexual father.¹⁷⁸

Finally, the 1973 version of the Uniform Parentage Act or its equivalent favoring married couples with regard to alternative insemination remains in force in nearly half the states,¹⁷⁹ leaving lesbians utilizing alternative insemination at risk of paternity claims by sperm donors.¹⁸⁰ Among the mere ten or so American states formally legalizing surrogacy,¹⁸¹ virtually all require the intended parents to be a married couple, thereby excluding gay men.¹⁸² Surrogacy is unlawful, unlawful for compensation, or highly uncertain due to an absence of developed legal rules in most other states.¹⁸³ Even in progressive states, gay men and lesbians may face uncertainty with regard to court recognition of their contracts aiming to establish familial rights and obligations.¹⁸⁴ And, of course, same-sex marriage is still illegal in all but one American state,¹⁸⁵ with an enormous backlash

178. See *L.A.M. v. B.M.*, 906 So. 2d 942 (Ala. Civ. App. 2004).

179. See UNIF. PARENTAGE ACT refs. & annots, prefatory note (2002) ("As of December, 2000, UPA (1973) was in effect in 19 states . . . ; in addition, many other states have enacted significant portions of it."). Only Delaware, Texas, Washington, and Wyoming have adopted the 2000 version of the Act. *Id.*

180. See, e.g., *Tripp v. Hinckley*, 736 N.Y.S.2d 506, 506 (N.Y. 2002) (holding that sperm donor was entitled to be treated as a parent, rather than a sperm donor limited to terms of parties' written visitation agreement, and that he was not barred by doctrines of waiver or estoppel from seeking more frequent visitation); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1995) (granting sperm donor parental rights even though trial judge had characterized petitioner as an "outsider" who was "attacking" mother, her partner, and their child's family and had concluded that a filiation order "would not be in [the child's] best interests").

181. UNIF. PARENTAGE ACT, Art. 8 refs. & annots., cmt. (2002).

182. See Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 166-72 (2000).

183. *Id.* For a case illuminating the complexities and risks of entering a gestational surrogacy contract (even for heterosexual couples) in states with ambiguous or absent legal rules, see *J.F. v. D.B.*, No. 15061-2003, 2004 WL 1570142 (Pa. Com. Pl. Apr. 2, 2004), in which a court refused to enforce a gestational surrogacy contract.

184. For example, a California appellate court refused to recognize a formal contract entered into by lesbian partners and incorporated into a family court judgment establishing joint parental rights. See, e.g., *Kristine H. v. Lisa R.*, 16 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2004). The California Supreme Court reversed on the narrow ground that the biological mother was estopped from attacking the validity of a stipulated judgment that she had sought, not reaching the question of the validity of the judgment. See *Kristine H. v. Lisa R.*, 117 P.3d 690, 695 (Cal. 2005).

185. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

developing in the wake of the Massachusetts decision,¹⁸⁶ America's 2004 "winter of love,"¹⁸⁷ and earlier victories.¹⁸⁸

The protection of children from sexual predation and "abnormal"—that is, gay—sexual development remains an implicit if not explicit justification for these legal precedents. For example, gay parents fare much better when seeking to create or formalize parental

186. In September 2005, Massachusetts Attorney General Tom Reilly certified a ballot question to repeal same-sex marriage in Massachusetts. See *National Briefing in New England: Massachusetts: Same-Sex Marriage Ban*, N.Y. TIMES, Sept. 8, 2005, at A20.

Within one week of the *Goodridge* decision, United States Senator Wayne Allard introduced a federal constitutional amendment prohibiting same-sex marriage. Federal Marriage Amendment, S.J. Res. 4026, 108th Cong. § 2 (2003). Similar amendments have been proposed each year since 2002. See Edward Stein, *Past and Present Proposed Amendments to The United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 656-57 (2004).

The 2004 election season saw thirteen states newly amend their constitutions to define marriage as a union between one man and one woman. See ARK. CONST. amend. 83, § 1; GA. CONST. art. I, § 4; KY. CONST. § 233A; LA. CONST. art. XII, § 15 (upheld in *Forum for Equality v. McKeithen*, 893 So. 2d 715 (La. 2005)); MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29.

In April 2005, Kansas voters approved a constitutional ban. See 2005 Kan. Sess. Laws 211; *Kansas Voters Approve Amendment Banning Same-Sex Marriage*, N.Y. TIMES, Apr. 6, 2005, at A3. State constitutional amendments banning same-sex marriage have been approved by the legislatures and are scheduled for statewide vote in five additional states. See Sanctity of Marriage Amendment of 2005 Ala. Adv. Legislature. Serv. 35 (LexisNexis); 2005 S.C. Acts. 45; 2006 S.D. Bal. Meas. 1; 2005 Tenn. Pub. Acts 751; 2005 Tex. Sess. Law Serv. 6 (West).

Some of these amendments are so sweeping as to potentially deny any sort of legal recognition of a same-sex relationship. For example, Utah's constitutional provision reads: "(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." UTAH CONST. art. I, § 29.

187. See *supra* note 155 and accompanying text. With the exception of Massachusetts, swift and successful litigation resulted in the invalidation of most of the marriage licenses granted to gay couples in 2004. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 488 (Cal. 2004); *Li v. State*, 110 P.3d 91, 102 (Or. 2005). New Paltz's mayor as well as two Unitarian ministers were subject to criminal charges, ultimately dismissed, for performing weddings for same-sex couples. See *People v. West*, 780 N.Y.S.2d 723 (N.Y. Just. Ct. 2004); *People v. Greenleaf*, 780 N.Y.S.2d 899 (2004). New Mexico's attorney general declared the licenses granted by the Sandoval County clerk "invalid under state law" the same day they were issued. See *Nieves, supra* note 155.

188. See, e.g., ALASKA CONST. art. I, § 25 (1999); HAW. CONST. art. I, § 23 (1998); NEB. CONST. art. I, § 29 (2000), held unconstitutional by *Citizens for Equal Protection v. Bruning*, 367 F.Supp.2d 980, 1009 (2005); NEV. CONST. art. I, § 21 (2002); Defense of Marriage Act of 1996 (DOMA), codified at 28 U.S.C. § 1738c and 1 U.S.C. § 7 (2000) (defining marriage as a union between a man and a woman for federal purposes and relieving states of any obligation to recognize, under the Full Faith and Credit Clause, a same-sex marriage validly entered into in another state); CAL. FAM. CODE § 308.5 (2004) (constituting an example of a "mini-DOMA," of which there are presently approximately forty, defining marriage as a union between a man and woman for state law purposes). These measures were triggered by legal challenges in Hawaii and Vermont in the 1990s threatening to make same-sex marriage legal in those states. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

rights if they are not actively involved in an intimate relationship.¹⁸⁹ Once so involved, protection from discrimination on the basis of sexual orientation becomes far less certain. In such instances, concerns about “abnormal” childhood sexual, social, and emotional development often overpower the law’s relatively recent commitment to protecting gays and lesbians from status-based discrimination in family matters, and traditional analyses governing similar nongay cases will not apply.¹⁹⁰ Judges and the state often frame their anxiety regarding children in terms of their prerogatives to encourage “optimal” settings for child rearing in heterosexual, two-parent families.¹⁹¹ This suggests that gay and lesbian families provide second-class but satisfactory settings for children. But the persistence of these outcomes even in cases where the losing parent has lasting, strong, loving ties with the child,¹⁹² and sometimes even where competent heterosexual parents are nowhere to be found,¹⁹³ suggests that the more insidious and older conception of “homosexuality as an evangelistic cult”¹⁹⁴ creating “a new generation of perverts”¹⁹⁵ is at play in many of these decisions.¹⁹⁶

189. To paraphrase Richard Mohr, courts may give parental rights to gays by “ones,” but they remain less likely to give rights to gays by “twos.” See RICHARD D. MOHR, *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* 82 (1992).

190. See *supra* notes 164-68.

191. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d at 961 (“The department posits three legislative rationales for prohibiting same-sex couples from marrying [including] ensuring the optimal setting for child rearing, which the department defines as ‘a two-parent family with one parent of each sex’ . . .”).

192. See, e.g., *supra* note 172 and accompanying text.

193. See, e.g., *supra* note 177 and accompanying text; Kevin McDermott, *The Fight for Austin*, ST. LOUIS POST-DISPATCH, Apr. 17, 2005, at A1 (reporting the story of five-year-old Austin Johnson, whom a trial court judge removed from his lesbian foster mother’s home and returned to his grandparents, who had allegedly fractured his skull and leg). Austin Johnson was returned to his foster mother by order of the Supreme Court of Illinois. See *In re Austin W.*, 823 N.E.2d 572, 589 (Ill. 2005).

194. JENKINS, *supra* note 146, at 63.

195. *Id.*

196. Indeed, this reasoning was explicit in the Florida Supreme Court’s recent decision upholding Florida’s ban on adoption by gays and lesbians:

The Florida legislature could rationally conclude that homosexuals and heterosexual singles are not “similarly situated in relevant respects.” . . . [H]eterosexual singles, even if they never marry, are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence . . . Although the influence of environmental factors in forming patterns of sexual behavior and the importance of heterosexual role models are matters of ongoing debate, they ultimately involve empirical disputes not readily amenable to judicial resolution—as well as policy judgments best exercised in the legislative arena. For our present purposes, it is sufficient that these considerations provide a reasonably conceivable rationale for Florida to preclude all homosexuals, but not all heterosexual singles, from adopting.

Lofton v. Sec’y of the Dep’t of Children & Family Servs., 358 F.3d 804, 821-22 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

Within the context of this history, the meaning of sexual intimacy, parenting, and family life to gay men and lesbians takes on particularly acute political meaning. Sex, reproduction, and parenting—realms traditionally associated with the private family sphere within traditional liberal discourse—may constitute practices of conscious, political resistance to subjugating legal (and other) narratives.¹⁹⁷ This account is in tension with some feminist and queer legal discourse, which has framed an individual's decision to remain partner- or child-free as an important form of resistance to the patriarchal family.¹⁹⁸ But a categorical rejection of the transformative potential of care work and parenting does not sufficiently recognize the history of state-sponsored discrimination in the realm of gay family life or the radical challenge to heterosexual reproduction and family relations posed by same-sex intimacy.

2. Contemporary Social Science Research

The notion that gay care practices may constitute a positive, political practice of resistance is supported by a significant body of social science research. To paraphrase anthropologist Kath Weston, “gay families we choose,” including families in which children are present, represent opportunities for a radical departure from conventional understandings of kinship.¹⁹⁹ This understanding of the transformative potential of the gay family is a relatively recent conception, at least as a conscious matter. Prior to the 1980s, claiming a gay or lesbian identity was understood by many gays, lesbians, and society more broadly to be a rejection of the family and a departure from kinship.²⁰⁰ This understanding was based on two questionable assumptions: that gay men and lesbians do not have children and that they do not form enduring relationships. Weston explains:

It is but a short step from positioning lesbians and gay men somewhere beyond “the family”—unencumbered by relations of kinship, responsibility, or affection—to portraying them as a menace to family and society. A person or group must first be outside and other in order to invade, endanger, and threaten.²⁰¹

197. For a fascinating analysis of the active way in which courts discursively construct sexual identities through custody cases, see Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC'Y REV. 285 (2002).

198. See discussion *infra* Part III.B.

199. See KATH WESTON, *FAMILIES WE CHOOSE 2* (Richard D. Mohr et al. eds., 1991).

200. *Id.* at 22.

201. *Id.* at 23. See also Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 293-94 (2000) (“Law tells all people that lesbians and gay men are lone individuals despite the fact that they have ‘familistic’ relationships. This story is both false and stigmatizing.” (footnote omitted)).

Beginning roughly in the 1980s, many gay men and lesbians began to reject this othering discourse, recognizing that conformity with dominant conceptions of the isolated gay person living outside affective relational ties may represent a form of internalized oppression itself. Toward that end, they sought to reconceptualize kinship instead of rejecting it, systematically laying claim to a distinctive type of family characterized by Weston as a “family of choice.”²⁰²

Pursuant to this increasingly conscious redefinition project, lesbians and gay men have engaged in care and kinship practices that contest the centrality of biology and heterosexual intercourse to the meaning of family. As Weston’s anthropological research on gay and lesbian kinship demonstrates, a gay family of choice may include lovers, ex-lovers, friends, co-parents, and children brought into the family through adoption, foster care, prior heterosexual relationships, and alternative reproduction.²⁰³ Although many middle-class Americans define friendship in terms of emotional support, gay families of choice are characterized by both affective ties and the sharing of material resources:²⁰⁴

Services exchanged between members of different households who considered themselves kin included everything from walking a dog to preparing meals, running errands, and fixing cars. Lending tools, supplies, videotapes, clothes, books, and almost anything else imaginable was commonplace in some relationships. Many people had extended loans to gay or straight kin at some time. Some had given money to relatives confronted with the high cost of medical care in the United States, and a few from working-class backgrounds reported contributing to the support of biological or adoptive relatives (either their own or a lover’s).²⁰⁵

The AIDS epidemic provides a specific example of how chosen families are constitutive of gay communities. John-Manuel Andriote, in his exploration of how gay culture was reshaped by the disease, notes that “[w]hen AIDS first struck gay men, in 1981, activists quickly rallied to share information, provide services, raise money, prevent new infections, and demand assistance from a skittish federal government.”²⁰⁶ Support groups and “buddy programs” were organized throughout the country.²⁰⁷ Volunteer “buddies” helped out

202. WESTON, *supra* note 199, at 26-29, 118-19. It is noteworthy that this developing consciousness within the gay community formed around the same time that cultural feminism began to reconceptualize affective family ties as a means of challenging dominant gender norms. See GILLIGAN, *supra* note 24.

203. See WESTON, *supra* note 199, at 3, 31, 111-12.

204. *Id.* at 113.

205. *Id.* at 114.

206. See JOHN-MANUEL ANDRIOTE, VICTORY DEFERRED: HOW AIDS CHANGED GAY LIFE IN AMERICA 1 (1999).

207. *Id.* at 109.

with grocery shopping, cleaning, cooking, and emotional support.²⁰⁸ This impressive generosity and volunteerism served to sustain many men whose families had alienated them and friends had stopped calling.²⁰⁹ The AIDS epidemic also opened new possibilities for imagining lesbians and gay men as members of a unified community. In the words of one lesbian activist, “People used to say to me all the time, ‘Why do you work with AIDS and GMHC [Gay Men’s Health Crisis]? They wouldn’t work for breast cancer.’ . . . That’s partly true—but what did it have to do with the fact that all my friends were dying?”²¹⁰

Like the tradition of othermothering within the black community, gay families of choice are made up of fluid networks that have different purposes—including emotional support, economic cooperation, socialization, reproduction, consumption, and sexuality—which overlap but are not coterminous.²¹¹ The willingness of gay men and lesbians to care for each other in sickness and in health has been central to the success of their bids over the last quarter century to recognition and dignity as a community and as couples. Such families of choice also undermine the defining features of the hetero-patriarchal family: heterosexual sexual relations, the male breadwinner ideal (and the sexual division of family labor on which it rests), and biological reproduction.

The addition of children to gay families of choice does not necessarily diminish their transformative potential. Although “childlessness as resistance” is a strong theme within certain strands of feminist and queer theory inside of law,²¹² researchers of gay and lesbian families within the social sciences have demonstrated how lesbian parenting may also “represent[] a radical and radicalizing challenge to heterosexual norms that govern parenting roles and identities.”²¹³

For example, according to sociological studies, lesbian parenting is characterized by a more egalitarian division of household labor than heterosexual families;²¹⁴ the detachment of motherhood from its bio-

208. *Id.*

209. *Id.*

210. *Id.* at 117 (interview by John-Manuel Andriote with Sandi Feinblum, in New York City, N.Y. (Apr. 26, 1995)).

211. See WESTON, *supra* note 199, at 108.

212. See discussion *infra* Part III.B.

213. See Gillian A. Dunne, *Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship*, 14 GENDER & SOC’Y 11, 11 (2000).

214. *Id.* at 13; see also PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 127-31, 148-51 (1983); MAUREEN SULLIVAN, THE FAMILY OF WOMAN: LESBIAN MOTHERS, THEIR CHILDREN, AND THE UNDOING OF GENDER ch. 4 (2004) [hereinafter SULLIVAN, THE FAMILY OF WOMAN]; WESTON, *supra* note 199, at 114; Valory Mitchell, *Two Moms: The Contribution of the Planned Lesbian Family to the Deconstruction of Gendered Parenting*, 7 J. FEMINIST FAM. THERAPY 47, 55 (1995); Maureen Sullivan, *Rozzie and Harriet? Gender*

logical roots through social motherhood;²¹⁵ the inclusion of known sperm donors in some cases who actively co-parent,²¹⁶ becoming a “junior partner in the parenting team”;²¹⁷ and the involvement of social kin in children’s lives.²¹⁸ As one mother stated, “Our close friends really drew in and became aunts. It’s like it created an extended sort of family with a lot of our friends. Astrid [our daughter] has many aunts.”²¹⁹ Although there is less empirical information about gay fatherhood compared with lesbian motherhood,²²⁰ preliminary sociological studies demonstrate that gay fathers are “more astute to children’s needs, more nurturant in providing caregiving, and less traditional than heterosexual fathers who typically perceive their principle parenting function to be that of provider.”²²¹

Psychologists have observed the potentially restorative, affirming effect of parenthood for gay men and lesbians. Children affirm their gay and lesbian parents; this affirmation is important in a society plagued by homophobia.²²² As Dorothy Allison writes in an autobiographical account of the tensions she experienced within her family of origin:

“Family” is a big word, but very painful. The word “family” hides everything—including the people that you are despised by and yet hang on to . . . I hang on to my birth family pretty hard, sometimes over their protests. I’ve also built a completely separate family, which includes my lover, . . . our son, Wolf, our Daddy donor, . . . Wolf’s godmother, . . . and GrandMary. We’ve constructed a family—and it’s a family of people who have become related by dint of

and *Family Patterns of Lesbian Coparents*, 10 *GENDER & SOC’Y* 747, 756 (1996); Renate Reimann, *Shared Parenting in a Changing World of Work: Lesbian Couples’ Transition to Parenthood and Their Division of Labor* 219 (1998) (unpublished Ph.D. dissertation, City University of New York) (on file with author).

215. See SULLIVAN, *THE FAMILY OF WOMAN*, *supra* note 214, at ch. 3; Susan E. Dalton & Denise D. Bielby, “*That’s Our Kind of Constellation*”: *Lesbian Mothers Negotiate Institutionalized Understandings of Gender within the Family*, 14 *GENDER & SOC’Y* 36, 57 (2000); Dunne, *supra* note 213, at 15.

216. See SULLIVAN, *THE FAMILY OF WOMAN*, *supra* note 214, at ch. 7; Dunne, *supra* note 213, at 25.

217. Dunne, *supra* note 213, at 25.

218. See *id.* at 14; Fiona Nelson, *Lesbian Families: Achieving Motherhood*, 10 *J. GAY & LESBIAN SOC. SERVS.* 27, 38-39 (1999).

219. Nelson, *supra* note 218, at 39.

220. This lack of research in all likelihood is a product of the lower incidence of gay male parenting due to the continued force of traditional gender roles and the significant additional hurdles gay men face compared with lesbians in gaining access to alternative reproduction. See *supra* notes 181-82 and accompanying text. Gay men’s invisibility within research on fatherhood may also reflect a preoccupation with the experience of mothers within mainstream sociology and a focus on specific forms of gay-centered lifestyles in work on sexuality.

221. Jerry J. Bigner, *Raising Our Sons: Gay Men as Fathers*, 10 *J. GAY & LESBIAN SOC. SERVS.* 61, 64 (1999).

222. See Deborah F. Glazer, *Lesbian Motherhood: Restorative Choice or Developmental Imperative?*, 4 *J. GAY & LESBIAN PSYCHOTHERAPY* 31, 37 (2001).

having a child together. It's also a family of friends, which is pretty much something I discovered in the lesbian and gay community.²²³

To be sure, not all same-sex intimacy and parenting can be understood in terms of conscious, political resistance. Like heterosexual individuals, gay men and lesbians choose parenthood for complex, even retrograde reasons. For example, many contemporary lesbian and gay parents procreated within heterosexual marriages that they had entered with the hope of escaping the social and emotional consequences of homophobia.²²⁴ Lesbian parenthood outside of marriage still may represent conformity with repronormative forces imposed on all women in our society. It cannot be denied that through motherhood, lesbians make their lives "intelligible" to the larger society.²²⁵ As such, gay parenthood may be a symptom of oppression as much as a practice of resistance.

At the same time, because gay and lesbian parenthood is more often than not a product of long deliberation and significant effort, the possibility that it will be experienced as a conscious, affirmative political practice is significant. Gay men and lesbians will never accidentally or casually find themselves "expecting" a child.²²⁶ Rather, they have to make an affirmative decision, planning every step of the way. This process can be rigorous. In addition to the significant legal obstacles discussed earlier, prospective gay and lesbian parents often must navigate discrimination within the medical and mental health communities, which operate as gatekeepers to alternative reproduction, adoption, and foster care.²²⁷ Alternative reproduction and adop-

223. Dorothy Allison, *The Allison/Layman Family*, in *LOVE MAKES A FAMILY: PORTRAITS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PARENTS AND THEIR FAMILIES* 17 (Peggie Gillespie ed., 1999).

224. See Jerry J. Bigner & R. Brooke Jacobsen, *The Value of Children to Gay and Heterosexual Fathers*, 18 *J. HOMOSEXUALITY* 163, 170 (1989); Stacey & Biblarz, *supra* note 10, at 165.

225. See, e.g., Allison, *supra* note 223, at 18 ("As far as [my sisters were] concerned, lesbians, people who go to college, and writers are all creatures too strange for words. So when Alix and I got pregnant, I was finally doing something that they knew more about than I did.")

226. This term reveals the heteronormative construction of parenthood in our society, as if children passively fall into families.

227. For example, many physicians will not provide alternative reproduction services to unmarried individuals or gay partners. See *Benitez v. N. Coast Women's Care Med. Group, Inc.*, 37 Cal. Rptr. 3d 20, 22-27 (Cal. Ct. App. 2005), *reh'g granted* Dec. 30, 2005 (regarding denial of fertility treatment to a lesbian); Janet W. Kenney & Donna T. Tash, *Lesbian Childbearing Couples' Dilemmas and Decisions*, 13 *HEALTH CARE FOR WOMEN INT'L* 209, 211-13 (1992). Not all adoption agencies welcome "single" or gay parent adoptions. See Cheri A. Pies, *Lesbians and the Choice to Parent*, 14 *MARRIAGE & FAM. REV.* 137, 146 (1989); *Nation's Largest Adoption Website Sued for Discrimination Against Same-Sex Couples*, *BUS. WIRE*, Dec. 16, 2003 (LEXIS, News & Bus. Library, All News). Finally, studies show that psychologists and social workers making placement recommendations for adoption agencies may hold negative, discriminatory attitudes toward gay men and lesbians. See Isiaah Crawford et al., *Psychologists' Attitudes Toward Gay and Lesbian Parenting*, 30

tion also entail a significant financial investment.²²⁸ Gay men and lesbians cannot count on extended families for support when they choose to add children to their families.²²⁹ Obtaining or maintaining custody even of children born in the context of prior heterosexual unions is not assured.²³⁰ In sum, because the process of becoming a parent for gay men and lesbians often is so rigorous, greater possibility for political consciousness exists than for parenthood that occurs within the context of most heterosexual relations. Gay parenthood cannot be reduced to a gender-reinscribing performance; sociological and anthropological studies of gay families bear this out.²³¹

Finally, gay and lesbian care practices may have powerful political effects irrespective of individual political consciousness. This is because identical symbols can carry very different meanings in different contexts. By disconnecting family formation and reproduction from heterosexual relations, extended gay kin networks and gay parenthood reveal heterosexuality and biology to be mere symbols of a privileged relationship. To the extent that these symbols still constitute the central organizing principles of family law, then, same-sex intimacy serves as a powerful destabilizing force against the law itself. As such, care can be deeply transgressive and possess significant political potential. This account of care as a positive politics contrasts with dominant accounts of care within certain strands of feminist and queer legal theory.²³²

PROF. PSYCHOL.: RES. & PRAC. 394, 394 (1999); Scott D. Ryan, *Examining Social Workers' Placement Recommendations of Children with Gay and Lesbian Adoptive Parents*, 81 FAM. SOC'Y 517, 523-24 (2000).

228. A woman can expect to pay \$140-175 for a vial of sperm and \$200 or more for insemination, while fertility drugs can cost upwards of \$2000 a month, and a single attempt at in vitro fertilization (IVF) can cost \$12,000. See Bambi E.S. Robinson, *Birds Do It. Bees Do It. So Why Not Single Women and Lesbians?*, 11 BIOETHICS 217, 218 (1997). Surrogacy can cost upward of \$70,000. See, e.g., Surrogate Parenting Services, Inc., Cost Information, <http://www.surrogateparenting.com/financial.asp> (last visited Dec. 2, 2005). The cost of adopting a healthy baby is approximately \$5,000 to \$40,000. See National Adoption Information Clearinghouse, U.S. Dep't Health & Hum. Servs., *Costs of Adopting: A Factsheet for Families* (2004), available at http://naic.acf.hhs.gov/pubs/s_cost/s_costb.cfm.

229. See Pies, *supra* note 227, at 140-42; Nelson, *supra* note 218, at 36-41.

230. See *supra* notes 164-68 and accompanying text.

231. See, e.g., WESTON, *supra* note 199, at 135-36 ("Defined in opposition to biological family, the concept of families we choose proved attractive [to gay men and lesbians] in part because it reintroduced agency and a subjective sense of making culture into lesbian and gay social organization."); Amanda L. Siegenthaler & Jerry J. Bigner, *The Value of Children to Lesbian and Non-Lesbian Mothers*, 39 J. HOMOSEXUALITY 73, 84-87 (2000) (finding that lesbian mothers are less likely than non-lesbian mothers to have children because of social expectations).

232. See *infra* Part III.

3. Summary: Gay Men and Lesbians' Care as Politics

When considered in the context of the history of state regulation and control of the sexuality, reproduction, and family life of gay men and lesbians, gay care practices can be understood at least in part as acts of political resistance. This conception of caregiving as a form of politics is well developed within certain strands of feminist and queer thought outside of law. According to these theorists, far from approximating the heterosexual norm, gay family life (including gay parenting) is a testament to the concept of difference.²³³ Such theorists reject the normalizing tendency of formal equality justifications for rights as dangerous, because it obscures the radical alternative gay and lesbian lives can model. For these theorists, claiming “difference” is not an empirical generalization but a political act. In the words of sexuality theorist Jean Carabine:

Often the experience of being Othered acts as a catalyst for individuals and groups to transform a negative positioning as Other into a positive political identity, as with black, woman, gay, lesbian and disabled. It is the experience of being Othered rather than difference per se that results in individuals and groups claiming a positive identity out of a negative categorization. In this way, political identity is constructed out of and through the experience of oppression.²³⁴

This conception of political activism also varies from traditional liberal conceptions of politics because it transforms the private sphere of the family into a site of political resistance. As we shall see, this idea has much to offer to the discourse over care work within feminist and queer legal theory.²³⁵ Before exploring that proposition, the transformative potential of the care practices of heterosexual men will be briefly explored.

C. Care Practices of Men

The idea of testing and proving one's manhood is one of the defining experiences in American men's lives. In his 1996 book, *Manhood in America*, Michael Kimmel argues that the quest for manhood—the effort to achieve, to demonstrate, to prove men's masculinity—has been one of the formative and persistent experiences of men's lives.²³⁶ In the twentieth century, this quest for manhood was defined primar-

233. See, e.g., Celia Kitzinger, *Liberal Humanism as an Ideology of Social Control: The Regulation of Lesbian Identities*, in TEXTS OF IDENTITY 82-95 (Kenneth J. Gergen & John Shotter eds., 1989).

234. Jean Carabine, *Questioning Representing the Other*, in REPRESENTING THE OTHER 165, 166 (Sue Wilkinson & Celia Kitzinger eds., 1996).

235. See *infra* Parts III, IV.

236. MICHAEL KIMMEL, *MANHOOD IN AMERICA* 2 (1996).

ily through the family wage system. Under this economic and gender system, earning was the sole responsibility of husbands and unpaid domestic labor was the only proper long-term occupation of women. However, even at its height, the family wage system never quite worked. Working class men and men of color could not typically support their families on a single wage.²³⁷ Middle-class men were subject to the monotony of the modern workplace and alienation from their wives and children.²³⁸ Today, as an empirical matter, the family wage system is almost completely eroded. In an environment of rapid economic globalization the real wages of men have stagnated—or in the case of the least skilled men, substantially declined.²³⁹ Given the breakdown of the family wage system, married women's paid work is necessary to provide just the basics for their families.²⁴⁰

Despite this breakdown, the family wage ideal remains as a powerful norm that structures the workplace and the division of household labor within married families. Martin Malin's work on fathers and parental leave demonstrates the substantial workplace resistance facing men who seek paternity leave.²⁴¹ He explains:

[E]mployers often do not provide parental leave for men, and when they do, they often hide it under generalized classifications causing many men to overlook its availability. Second, parental leave for men is almost always unpaid; this makes it financially impossible for the father, who is saddled with the traditional role of primary breadwinner, to use it. Third, fathers who wish to take even unpaid parental leave are deterred by a high level of workplace hostility.²⁴²

Although this statement was made over a decade ago, subsequent research demonstrates the continued existence of employer hostility toward men who seek to deviate from the male breadwinner role. For example, a 2001 study of work and family conflict within the legal profession found that only about ten to fifteen percent of surveyed law firms and Fortune 1000 companies offer the same paid parental

237. See JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* 30, 40, 42-43 (1996).

238. KIMMEL, *supra* note 236, at 264-66; see also STEPHANIE COONTZ, *THE WAY WE NEVER WERE* 37 (1992).

239. See Frank Levy, *Incomes and Income Inequality*, in *STATE OF THE UNION: AMERICA IN THE 1990S* 1, 43-45 (Reynolds Farley ed., 1995).

240. See Peter Cattani, *The Effect of Working Wives on the Incidence of Poverty*, *MONTHLY LAB. REV.*, Mar. 1998, at 22, 27-28.

241. See Martin H. Malin, *Fathers and Parental Leave*, 72 *TEX. L. REV.* 1047, 1064-80 (1994) [hereinafter Malin, *Fathers I*]; Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 *N. ILL. U. L. REV.* 25, 39-43 (1998) [hereinafter Malin, *Fathers II*].

242. See Malin, *Fathers I*, *supra* note 241, at 1049. See also WILLIAMS, *supra* note 4, at 25-30, 100 (examining the persistence of the male breadwinner norm and documenting how men suffer the "worst penalties for failing to perform as ideal workers").

leave to men and women.²⁴³ Few fathers in law firms feel free to ask for more than a few weeks of paternity leave.²⁴⁴ Almost half of the male lawyers surveyed thought that it would not be acceptable for them to request part-time work, and almost no business or professional setting finds substantial numbers of men taking advantage of family-friendly policies.²⁴⁵

The workplace hostility experienced by men who may wish to participate in family caregiving is also evidenced by the dramatic fluctuations of men taking care of children during periods of economic recession. For example, census data reveal that the proportion of fathers taking care of preschoolers shifted dramatically upwards during the economic recession of 1988 to 1991, and then shifted back down to prerecession levels by 1993.²⁴⁶ Similarly, fathers who do not work, who work part-time, or who work at night are more likely to care for preschool children.²⁴⁷ This data suggest that the male breadwinner ideal and paid employment constitute a significant barrier to male involvement in family care work.

Significantly, the Supreme Court's recent decision in *Nevada Department of Human Resources v. Hibbs*,²⁴⁸ which upheld the Family and Medical Leave Act (FMLA) in the face of a constitutional challenge on federalism grounds, recognized this history of employment discrimination against men with regard to family care work. The plaintiff, William Hibbs, worked for Nevada's Department of Human Resources.²⁴⁹ He sought leave under the FMLA to care for his ailing wife, who was recovering from a car accident, experiencing chronic pain and suicidal tendencies, and waiting to undergo neck surgery.²⁵⁰ Nevada granted his request but allegedly terminated him before he exhausted his leave. He lost at the trial level on the ground that his FMLA claim was barred by the Eleventh Amendment,²⁵¹ and the Ninth Circuit reversed.²⁵²

243. See DEBORAH L. RHODE, AM. BAR ASS'N, *BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* 18 (2001).

244. *Id.*

245. *Id.*

246. See LYNNE M. CASPER, U.S. CENSUS BUREAU, *MY DADDY TAKES CARE OF ME! FATHERS AS CARE PROVIDERS* 2-3 (1997).

247. *Id.* at 3.

248. 538 U.S. 721 (2003).

249. *Id.* at 724.

250. See *id.* at 725; Appellant's Opening Brief at 2-3, *Hibbs v. Dep't of Human Resources*, 273 F.3d 844 (9th Cir. 2001) (No. 00-16321), 1999 WL 33621168; Hillary Rodham Clinton, Remarks to the American Constitution Society, July 23, 2002, available at <http://www.acslaw.org/events/july23/July23Transcript.htm> (last visited Dec. 2, 2005).

251. Under the Eleventh Amendment, a state is immune from suit under state or federal law by private parties in federal court absent a valid abrogation of that immunity by Congress or an express waiver by the state. See *Seminole Tribe v. Florida*, 517 U.S. 44, 64-68 (1996).

252. See *Hibbs*, 538 U.S. at 725.

In his decision reinstating Hibbs' claim and upholding the FMLA, Justice Rehnquist found that Congress's passage of the FMLA was justified on the basis of our country's long history of workplace discrimination against women, but he also emphasized the continued relevance of stereotypes against men: "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave."²⁵³

The employment context nicely demonstrates society's devaluation of men's family care work, but perhaps the most compelling context in which to study this phenomenon is in the realm of family law. A full discussion of the ways in which men who seek to participate in family care work may be disadvantaged in family disputes is beyond the scope of this Article. Among other complexities raised by such a discussion is the manipulation of equality rhetoric by men's and fathers' rights groups to gain substantial material and power advantages over women.²⁵⁴ Critiquing this trend has been one of the major projects of feminist legal theory; it cannot be fairly summarized or addressed here. However, at the risk of diminishing the seriousness and depth of that problem, it is worth briefly discussing the construction of men as inauthentic family caregivers within the law.

As Nancy Dowd's research on the status of fathers within the law persuasively has shown, family law has largely conceived of fathers as the owners of children or as family breadwinners, but support for the nurturing aspect of fatherhood is very limited.²⁵⁵ For example, the law of paternity defines fatherhood "by the status it can confer upon children, rather than in terms of responsibilities, obligations, relationship, or nurturing."²⁵⁶ For most of the twentieth century, states presumed men unfit to serve as custodians of children in the absence of a child's mother.²⁵⁷ Although the law has moved dramatically in

253. *Id.* at 736. There is some suggestion that Justice Rehnquist's willingness to write the majority opinion in *Hibbs* was due to his own experience with transgressive caregiving. See Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 55 SUP. CT. REV. 75, 140 n.272 (2003) (citing Linda Greenhouse, *Ideas & Trends: Evolving Opinions; Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, § 4, at 3 (discussing Rehnquist's involvement with the care of his grandchildren)).

254. See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 86-89* (1991) [hereinafter FINEMAN, *THE ILLUSION OF EQUALITY*]; FINEMAN, *NEUTERED MOTHER*, *supra* note 27, at 201-13; HERBERT JACOB, *SILENT REVOLUTION 136-43* (1988).

255. See NANCY E. DOWD, *REDEFINING FATHERHOOD 4* (2000).

256. *Id.* at 5.

257. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 658-59 (1972) (holding unconstitutional state rule presuming unwed fathers unfit to raise their children upon the death of the mother); *Ex parte Devine*, 398 So.2d 686, 687, 696-97 (Ala. 1981) (holding unconstitutional

the direction of shared parenting after divorce,²⁵⁸ joint physical custody is still quite rare and most custody and visitation schemes assume only a limited fathering role.²⁵⁹ After divorce, men are treated by the law primarily as economic providers, even though most men do not fulfill even that role.²⁶⁰ Historically, the welfare system was intended to support the family caregiving of women. Men were presumed able to work, and the public welfare system for men was designed primarily around their links to the workforce in the form of unemployment, income security, and worker's compensation insurance.²⁶¹ Although these latter social insurance systems provide significantly greater benefits, come with fewer conditions, and are generally considered "entitlements" in our society, the gendered bifurcation of the public welfare state in America also evidences the disfavored status of caregiving men within the law.

In addition to this history, two recent Supreme Court decisions further highlight the construction of men as inauthentic family caregivers within the law. In 2001, the Supreme Court upheld the constitutionality of a statute giving immigration preference to children born abroad to unmarried American mothers, but not to unmarried American fathers.²⁶² The plaintiff was a nonmarital father who had raised a child abandoned by his foreign mother.²⁶³ The Court justified the sex-based rule—and the son's deportation—because "[i]n the case of a citizen mother . . . the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth The same opportunity does not result from the event of birth . . . in the case of the unwed father."²⁶⁴

In 2004, the Supreme Court rejected a father's First Amendment challenge to the policy of his daughter's public elementary school requiring teacher-led recitation of the Pledge of Allegiance.²⁶⁵ Demonstrating an astonishingly technical reading of custody law, the Court held that only the child's mother had standing to challenge the policy, even though the parents shared joint legal custody and the father

state rule presuming the mother to be the proper person to be vested with custody of young children after divorce).

258. See ALI PRINCIPLES, *supra* note 159, § 2.08. This provision, which proposes allocating physical custodial responsibility to approximate the time each parent spent performing caretaking functions prior to their separation, will result in a true shared custody outcome where parents equally split caretaking tasks before divorce. *Id.*

259. See DOWD, *supra* note 255, at 132-42.

260. *Id.* at 143.

261. See *id.* at 146; LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935, at 7 (1994).

262. See *Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001).

263. *Id.* at 53.

264. *Id.* at 65.

265. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

had a strong presence in his daughter's life,²⁶⁶ because the family court order granting custody had stated that the mother "will continue to make the final decisions . . . if the two parties cannot mutually agree."²⁶⁷

In sum, when men engage in care work—even men in traditional marriages with relatively traditional gender patterns—they resist the male breadwinner ideal, the current structure of work, and the continued construction of men as inauthentic caregivers within family and social welfare law. Thus, again, we see that family caregiving may be subversive of patriarchy when manifested in the form of transgressive care practices. This transgressive caregiving story is contrary to the dominant feminist accounts of care work, which will be discussed in Part III.

III. FEMINIST AND QUEER LEGAL THEORIES OF CARE

This Part contrasts the positive political potential of care presented in Part II with the dominant accounts of care work within feminist and queer legal theory. As we shall see, many such theorists explicitly or implicitly reject family caregiving as a potentially liberating practice for caregivers qua caregivers. For the most part, feminists and queer theorists engaged in the recent legal academic discourse over care work instead regard family labor as a source of gender-based oppression or as an undervalued public commodity at best. They have set their sights on wage work or sexual liberation as more promising sources of emancipation for women. Although some legal feminists continue to focus on the problem of devalued family labor, they have tended to justify societal support for care work primarily on the basis of the oppression it causes for women, the benefits it confers on children and society, or the material needs it creates for caregivers. In this Part, I will aim to supplement these accounts by emphasizing the transgressive caregiving part of the "care" story, recovering care work as a potential source of liberation for women (and men).²⁶⁸

266. See Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. (forthcoming 2005) (manuscript at 8, on file with author) ("[H]e and his daughter's mother co-parented their daughter, sharing physical custody and living in close proximity. Approximately 30 percent of his daughter's time is spent with Newdow, and Newdow keeps pressing for 50 percent.")

267. *Elk Grove*, 542 U.S. at 14 n.6. The plaintiff in *Elk Grove*, Michael Newdow, is a strong advocate for a father's constitutional rights on the basis of a genetic tie. See Dowd, *supra* note 266, at 3 & n.14. This discussion is not meant to serve as an endorsement of that position.

268. This section builds on the work of the feminist, race, and queer theorists cited in Part II, as well as the work of legal feminists such as Kathryn Abrams, who have highlighted the possibilities of human agency under conditions of oppression. See sources cited

Divisiveness has defined feminism in general, legal feminism included. Some of the principal debates have been about the meaning of equality for women and the best way to achieve it, about gender and race, and most recently, about the nature of law itself—that is, whether it is essentially disciplinary or liberatory.²⁶⁹ The subject of family labor has been central to these debates. Indeed, the significance of domestic labor for women has defined some of the core controversies among legal feminists in the United States—from tensions between joint marital property and women’s suffrage advocates in the nineteenth century²⁷⁰ to contemporary feminist debates over the Equal Rights Amendment,²⁷¹ divorce reform,²⁷² and employer-sponsored maternity leave benefits.²⁷³ As we shall see, the latest controversy within legal feminism also centers on care.

There are many ways to characterize this age-old legal feminist split regarding domestic labor.²⁷⁴ I will describe it as a divide between maternalists and nonmaternalists, because it captures the current legal feminist controversy over care in the broadest, most bottom-line

supra Part II; Abrams, *supra* note 21; Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

269. There are several excellent anthologies that capture the richness of these debates. See MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* (1999); CRITICAL RACE FEMINISM (Adrien Katherine Wing ed., 1997); FEMINIST LEGAL THEORY (D. Kelly Weisberg ed., 1993); FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rosanne Kennedy eds., 1991). For an interesting history of the legal feminist canon, see Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J.L. & FEMINISM 429 (2002).

270. See Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1075-82 (1994) (contrasting the antebellum joint marital property movement, which celebrated women’s family role, with the postwar women’s suffrage movement, which discounted it).

271. See Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 222-23 (1998) (describing the constitutional litigation strategy spearheaded by Ruth Bader Ginsburg and the ACLU Women’s Rights Project as the product of a compromise between the “sameness” and “difference” feminists in the debates over adoption of the Equal Rights Amendment).

272. See, e.g., FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 254 (arguing that substantive, not formal, equality should have been the objective of divorce reform); Williams, *supra* note 19.

273. Compare Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality*, 13 GOLDEN GATE U. L. REV. 513, 517-18 (1983) (concluding that the equal treatment approach is by itself inadequate to ensure equal employment opportunity for women), with Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 351-80 (1985) (offering a rationale for the “equal treatment” approach for pregnancy and other characteristics unique to one sex).

274. Common descriptions of the split include: equal treatment/special treatment, sameness/difference, formal equality/substantive equality, liberal (or radical)/cultural, tomboy/femme, equal parenting advocates/maternalists, and postmodern/liberal (or cultural).

terms.²⁷⁵ Maternalists share a focus on ending the devaluation and nonrecognition of family labor within law.²⁷⁶ Nonmaternalists are concerned with other aspects of women's identity such as sexuality and wage work. They question the maternalist preoccupation with dependency relationships. Such a preoccupation, according to the nonmaternalists, essentializes women around caregiving, reinforces gender roles, and perpetuates repronormativity and heteronormativity, two pillars of gender oppression.²⁷⁷ This account admittedly overstates the divide. Some maternalist work is deeply threatening to the heterosexual family²⁷⁸ and some maternalists are focused on workplace equality.²⁷⁹ Moreover, nonmaternalists are concerned about dependency in certain contexts.²⁸⁰

However, my purpose here is not to explore these commonalities, which warrant further attention. Rather, I will focus on a more problematic commonality among critical legal scholars. Whatever their other differences (and commonalities), many feminist and queer legal theorists explicitly or implicitly reject family care work as a potentially liberating practice for caregivers *qua* caregivers. This is apparent in the rejection of caregiving as constitutive of women's identity by the nonmaternalists. To anyone familiar with debates within legal feminism over women's reproduction and care work, this is nothing new. Perhaps less well explored, however, is the implicit rejection of caregiving as a potentially liberatory practice by maternalists. Maternalists have tended to characterize family care work as a state of gender oppression that should be relieved through care-regarding legal doctrines, as a public good or value that should be recognized through compensation, or as a needs-producing condition that should be supported. These justifications present a powerful challenge to gender discrimination and market ideology, which together marginalize family care work and family caregivers. However, they stop short of recognizing care as a mechanism of positive social transformation

275. As a function of this breadth, my categories do not map onto the traditional strands of legal feminism one might use to describe the split. For example, compatriots of liberal and radical legal feminism occupy both sides of the divide. See *infra* notes 344-350, 368-372, and accompanying text.

276. See *infra* Part III.A.

277. See *infra* Part III.B.

278. See FINEMAN, NEUTERED MOTHER, *supra* note 27, at 228-30 (calling for an end of state-sponsored marriage and the legal privileges conferred by it); Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 955-56 (1991); Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 251-55 (2001); Polikoff, *Redefining Parenthood*, *supra* note 135, at 462-64.

279. See WILLIAMS, *supra* note 4, at 64-113; Kessler, *supra* note 26, *passim*.

280. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1775-76 (2005) (suggesting that extending marriage alternatives such as domestic partnership only to same-sex couples, in addition to devaluing same-sex unions both symbolically and practically, further marginalizes unmarried heterosexual couples).

for caregivers themselves. That is, maternalists have rationalized their project in a particular way that incorporates—or can be read as incorporating—an implicit assumption that care is of little value to caregivers themselves. In this section, I review the maternalist and nonmaternalist accounts of care work in some detail, demonstrating the shared position on care outlined here. Ultimately, I argue for a more complex conception of family care work that recognizes it as a deeply and complexly subversive practice with potential as a tool of political transformation for caregivers.

A. *Maternalist Conceptions of Care*

We start with maternalist conceptions of care because the recent controversy over care within legal feminism was sparked by this body of work, which has grown substantially in both its objects of critique and sophistication in the past decade.²⁸¹ Since that time, there have

281. Some have described the last decade as a period of renewed legal-feminist interest in care work after a two-decade hiatus during which legal-feminist energy was dedicated to theorizing sex. See Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1441-42 (2001). This seems somewhat inaccurate in that there has been a steady focus by some legal feminists on the problem of devalued family labor since the Second Wave began. It is probably more accurate to say that the legal feminists concerned with care spent the 1980s focused on the problems of devalued domestic labor within family law, particularly with regard to divorce, while the legal feminists focused on sex were concentrating on the sexual subordination of women by employers and other “public” institutions. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 9-18 (1979). Although perhaps overstating it a bit, the nonmaternalists were happy to leave theorizing the family to the maternalists, and the maternalists were satisfied for the time being to leave the workplace and the state to non-maternalist legal feminists. Perhaps these separate foci provided an inevitable and necessary cooling off period after the maternity leave controversy of the 1980s.

In the 1990s, welfare reform and the explosion of economic thinking within law inspired renewed attention by maternalists to the role of the workplace and state in the devaluation of family labor and fueled an increasingly sophisticated maternalist critique of the market as a mechanism of social control and inequality. At the same time, rapid political progress of the gay rights movement and the coming of age of queer theory revived nonmaternalist interest in the family. These developments set the two sides of the divide on an inevitable collision course.

The “sameness/difference” controversy within legal feminism in the 1980s was primarily a disagreement about political strategy; however, the current controversy is deeper and more dangerous, for it involves fundamental questions about the role of law in social change and the viability of feminist legal theory as a politically useful construct. In this climate, our energies are not best spent saving feminist legal theory from fragmentation, defections, or even death; such outcomes are as inevitable as the epistemological developments that produced legal feminism. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). Rather, legal feminists and other critical scholars should be working to develop a rich set of theories connecting legal feminisms together and connecting legal feminism to its presently gestating offspring, whatever forms they may take. This will require critical theorists to live with the inevitable discomfort that comes with change and growth. For similar sentiments, see Symposium, *Why a Feminist Law Journal?*, 12 COLUM. J. GENDER & L. 414, 638-72 (2003) (“Why Do We Eat Our Young?” panel).

been at least five monographs,²⁸² four law review symposia,²⁸³ and a number of free-standing articles in law reviews exploring the devaluation of care work within law.²⁸⁴ A number of developments fuel this expanding critique. Living wages and the social welfare state—our core societal supports for families—are eroding at an accelerating pace in an environment of political conservatism and rapid economic globalization. Legal maternalists have been particularly sensitive to the role of law in this undoing, notwithstanding the neoliberal regime which regards this stage of “late modernity” as natural, progressive, and unworthy of intervention.²⁸⁵ This process is occurring during a period of unprecedented prosperity in America, rendering the new legal and economic order especially ripe for criticism.

The sustained attention to care by some legal feminists may also be fueled by the sense that care work as a source of continued inequality for women has escaped the major feminist political action and law reform efforts of the past thirty years.²⁸⁶ For example, women

282. See ALSTOTT, *supra* note 3; FINEMAN, MYTH, *supra* note 2; FINEMAN, NEUTERED MOTHER, *supra* note 27; LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY (forthcoming 2006) (manuscript, on file with author); WILLIAMS, *supra* note 4. For examples of recent books in other disciplines, see NANCY FOLBRE, THE INVISIBLE HEART (2001) (economics); MONA HARRINGTON, CARE AND EQUALITY (2000) (political science); EVA FEDER KITTAY, LOVE’S LABOR (1999) (philosophy).

283. Symposium, *Gender, Work & Family Project Inaugural Feminist Legal Theory Lecture*, 8 AM. U. J. GENDER SOC. POL’Y & L. 1 (2000); Symposium, *Still Hostile After All These Years? Gender, Work & Family Revisited*, 44 VILL. L. REV. 297 (1999); Symposium on the Structures of Care Work, 76 CHI.-KENT L. REV. 1389 (2001); Symposium, *Women’s Work Is Never Done: Employment, Family, and Activism*, 73 U. CINN. L. REV. 361 (2004).

284. See, e.g., Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX. J. WOMEN & L. 345 (2003); Becker, *supra* note 2; Kessler, *supra* note 26; Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 3-5 (1996); PEGGIE R. SMITH, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1444-45; JOAN C. WILLIAMS & NANCY SEGAL, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 77-79 (2003).

285. I borrow here Austin Sarat and Jonathan Simon’s term for the current stage of late capitalism. See Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 15 (2001).

286. See, e.g., Kessler, *supra* note 26, at 389-429 (detailing the failure of American employment discrimination and family leave laws to address the profound differences between men and women with regard to caregiving despite women’s presence in the paid labor force for more than two decades); Williams & Segal, *supra* note 284, at 110-11, 119-20 (implicitly characterizing discrimination against caregivers at work as first-generation sex discrimination).

have achieved significant progress with regard to sexual harassment,²⁸⁷ sex stereotyping,²⁸⁸ and wage parity²⁸⁹ at work. But there remains a persistent and significant wage gap²⁹⁰ and labor force “attachment gap”²⁹¹ between mothers and other workers.²⁹² Our country’s family leave policies are far behind other industrialized nations.²⁹³ Women and children continue to be worse off economically after divorce than men.²⁹⁴ Individuals who claim social security as dependents of their employed spouses—typically women who have marginalized their wage work in order to devote significant time to domestic labor—are disadvantaged relative to their partners with re-

287. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

288. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (holding that a plaintiff may prove that sex was a motivating factor for an employment practice with circumstantial evidence; direct evidence is not required); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000) (amending Title VII to include pregnancy-based discrimination as a prohibited form of sex discrimination).

289. See HIGHLIGHTS OF WOMEN’S EARNINGS IN 2003, U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, REP. 978 (2004) (reporting that women’s median weekly earnings in 1979 were sixty-three percent of men’s, adjusting for hours worked (but not for differences in education, experience, or time in the workforce), while in 2003, the figure was eighty percent).

290. See Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 204, 219 (2001). The causes of this wage gap are unclear. Theories include sex stereotyping, differentials in human capital between women with and without children, and preferences of those with children for lower-paying, family-friendly jobs. *Id.* at 204.

291. See Kessler, *supra* note 26, at 384-87 (coining and describing the attachment gap).

292. There is a disagreement among feminist legal theorists as to whether women’s workplace inequality is attributable primarily to traditional forms of employment discrimination endogenous to the workplace—for example, stereotyping and workplace socialization—or to the gendered division of labor within the family. Compare Schultz, *supra* note 1, at 1900, and Williams & Segal, *supra* note 284, at 94-97 (both focusing on endogenous workplace socialization), with Kessler, *supra* note 26, at 385 (focusing on the gendered division of family labor). This issue is a red herring, as both stereotyping and male-centered work norms constitute sex discrimination against women. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (setting out framework for proving intentional disparate treatment under Title VII); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (setting out the framework for proving disparate impact discrimination under Title VII).

293. See KATHARINE T. BARTLETT, ANGELA P. HARRIS & DEBORAH L. RHODE, GENDER AND LAW 453 n.1 (3d ed. 2002) (collecting and summarizing studies); see also Jane Waldfogel, *International Policies Toward Parental Leave and Child Care*, 11 FUTURE CHILD. 99, 103 (2001).

294. See Kessler, *supra* note 26, at 357-58.

gard to retirement security.²⁹⁵ And support for a robust social welfare state in America has all but disappeared.²⁹⁶

Much of the recent legal feminist scholarship on caregiving is aimed at more fully articulating a critique of free market ideology, which has emerged as a dominant theoretical framework in American law. Among the free market concepts critiqued by the maternalists are autonomy, efficiency, utility, rationality, and even the market. Martha Fineman has been at the forefront of this effort, exposing the way market ideology hides the dependency of privileged individuals and institutions while constructing caregivers as irresponsible and dependent. In addition to her own substantial body of scholarship in this regard, she conceived and sponsored a series of workshops on feminism and economic theory that has worked to significantly advance the legal feminist critique of law and economics.²⁹⁷

Joan Williams also has been central to this effort, theorizing,²⁹⁸ securing major grant support for,²⁹⁹ and implementing a litigation and public education campaign to end employment discrimination against caregivers.³⁰⁰ Williams' efforts have produced impressive results, including the following: an array of legal theories giving plaintiffs the potential for recovery for discrimination relating to caregiving status,³⁰¹ model human resource policies aimed at avoiding bias against family caregivers,³⁰² a program to help law firms recruit and retain attorneys by offering meaningful reduced-hours schedules,³⁰³ and collaboration among legal scholars and experts in the fields of

295. This results from the following social security rules: A woman must remain married for ten years before she has any claim based on her spouse's social security contributions. If she divorces before ten years, she receives no social security benefit for her domestic labor. Even if married for greater than ten years, if she divorces, she loses the benefit upon remarriage. Also, a wife must choose, when she retires, whether to opt for benefits based on her own employment record or on her husband's, despite the fact that both wage work and household work constitute productive labor. See Silbaugh, *supra* note 284, at 38-39.

296. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601 (2004) (replacing Aid to Families with Dependent Children, an entitlement program, with Temporary Assistance to Needy Families, a time-limited, work-focused welfare program).

297. Fineman's efforts culminated in an edited volume presenting this substantial critique. See FEMINISM CONFRONTS HOMO ECONOMICUS (Martha Albertson Fineman & Terence Dougherty eds., 2005).

298. See Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 1 (2003); Williams & Segal, *supra* note 284.

299. See ALFRED P. SLOAN FOUNDATION, ANNUAL REPORT, STANDARD OF LIVING AND ECONOMIC PERFORMANCE PROGRAMS, WORKPLACE, TRUSTEE GRANTS, available at <http://www.sloan.org/report/2003/workplace.shtml> (last visited Dec. 2, 2005) [hereinafter SLOAN ANNUAL REPORT].

300. *Id.*

301. See Williams & Segal, *supra* note 284, at 123.

302. See SLOAN ANNUAL REPORT, *supra* note 299.

303. See Project for Attorney Retention, About PAR, <http://www.pardc.org/about> (last visited Dec. 2, 2005).

cognitive psychology and sociology on understanding how discrimination works.³⁰⁴

Maternalist legal feminists have effected their substantial critique of neoliberalism and its erasure of care work as a matter of public concern primarily through three lines of argument: caregivers should be supported and recognized through law because they are victims of gender oppression, because they are providing a valuable public service, and because they have material needs which flow from their positions as caregivers that cannot be ignored in a just society. In the next three sections, I will explore each of these justifications in detail, exploring their enormous potential as well as their limitations in certain regards.

1. Care as a Source of Gender Oppression

Nonmaternalists, as we shall see, view care work as a form of gender oppression, but they do not have a monopoly on this perspective. Although nonmaternalist liberal and radical feminists are well known for their critique of the oppressive and stultifying nature of domestic labor,³⁰⁵ this view is largely shared by maternalists, who also count liberal and radical legal feminists in their ranks.³⁰⁶ Indeed, it can fairly be said that the foundation of maternalist legal feminism is a theory of women's oppression stemming from the gendered division of family labor and the law's role in instantiating it.

For example, Joan Williams has developed a theory of women's gender oppression she calls "domesticity."³⁰⁷ Domesticity is an ideo-

304. See Symposium, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 287, 287-88 (2003).

305. See, e.g., BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 19 (1963) (calling the life of the 1950s American housewife "the problem that has no name"); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 191-94 (1989) (asserting that family privacy is "a right of men 'to be let alone' to oppress women one at a time").

306. See, e.g., ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 13 (1976) ("[M]otherhood as an institution has ghettoized and degraded female potentialities."); Polikoff, *Redefining Parenthood*, *supra* note 135, at 560.

307. I expect that Williams may disagree with my placement of her in the maternalist camp, given that she has explicitly disavowed herself as a maternalist. See Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 815 & n.8 (2002) [hereinafter Williams, *Snowing Down South*]. However, our definitions of maternalism differ. Mine includes all legal feminists who are devoted to the legal recognition of family labor. Her definition of maternalism—the ideology of "women committed to giving traditionally feminine gender performances"—more closely corresponds to what is commonly known as cultural feminism. *Id.* at 815. Because Williams has dedicated a substantial part of her life's work to ending discrimination against women who adopt traditionally male lifestyles as well as against women (and men) who conform to feminine gender roles, she is not a maternalist according to her own definition. Indeed, she is the author of a seminal critique of cultural feminism. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802-09 (1989). Williams is a maternalist, however, according to my broader definition. Her explicit

logical system that organizes market work around the life experiences of men and marginalizes family caregivers. She argues that domesticity is a form of sex discrimination against women (and men) that feminists should work to eliminate through the reorganization of market and family work.³⁰⁸ Central to the concept of domesticity is the idea that family care work is compulsory and oppressive: “[S]ocial forces . . . get encoded as women’s choice to devote themselves to caregiving rather than to market work. . . . Many women end up as they do not because they, from the beginning, shared an ethic of care. Maybe they were just making the best of a bad deal.”³⁰⁹ Williams envisions a world in which care work is shared more equally between women and men, and in which the workplace is structured around the life patterns of people with family responsibilities.

Not all maternalist legal feminists focus on the drudgery of care work or the unfairness of its compulsory nature for women. For example, although noting that women take on primary caretaking roles “within the constraints of social conditions, including history and tradition,”³¹⁰ Martha Fineman is less concerned about the assignment of caretaking to women than Williams. Her focus is more narrowly on the inequities that flow from the assignment (a concern which Williams shares) and on obtaining support for caretakers in the form of state financial support and institutional accommodations:

Even if someone does “consent” in the sense of taking risks or foregoing opportunities to undertake dependency work, should that let society off the hook? Should society tolerate the situation of dependency within the family and the mandated personal sacrifices a

acceptance of the inevitability of motherhood among women also supports her placement in the maternalist camp.

I lay out this defense with some trepidation for two reasons. First, like most legal feminist work today, neither Williams nor any of the other scholars I discuss in this Article can be placed in the traditional boxes that have been used to describe the various strands of legal feminism. More than ever, feminist legal theory defies neat categorization. The traditional stages of equality feminism, difference feminism, dominance feminism, antiessentialism, and postmodern feminism were oversimplifications when the terms first emerged, and they are almost incoherent now, given that each has made a lasting imprint on legal feminism. The result of this cross fertilization is that all legal feminism today is blended, with certain ideas or themes from each of these strands appearing together in virtually all legal feminist work. See CHAMALLAS, *supra* note 269, at 71. Second, there is great superficiality, danger, and power involved in any categorization project. For these reasons, I have attempted to keep my categories broad and to avoid the use of tired legal feminist categories in this Article. Any association of “maternalism” with the narrow category of cultural feminism is unintended by this author. With these disclaimers in mind, I forge ahead with this analysis.

308. See WILLIAMS, *supra* note 4 (especially chs. 6 & 7).

309. *Id.* at 188-89. Although it is not the core of her theory of domesticity, Williams also has acknowledged the positive political potential of care work when performed by less privileged women such as women of color and working class women. *Id.* at 161-68. This Article builds and expands on that insight.

310. See FINEMAN, MYTH, *supra* note 2, at 41.

caretaker typically encounters under current societal arrangements? In other words, are some conditions just too oppressive or unfair to be imposed by society even if and when an individual openly agrees to or chooses them?³¹¹

Other maternalist legal feminists, such as Mary Becker, go as far as to suggest that care work may include an element of pleasure.³¹²

Although Fineman and Becker are perhaps less focused than Williams on shifting the actual performance of domestic labor from women to men and the market, they also embrace a conception of care work as gender oppression as central to their maternalist projects. In Becker's words:

Traditionally, women have been—and women continue to be—caretakers of dependents, the young, the old, and others unable to care for themselves. Women have done this work for no pay, in their own families, or for low pay, when caring for dependents in other women's families. . . . Workers with significant caretaking responsibilities are at a disadvantage in the wage-labor market, in politics, sports, and other "public" areas of human endeavor. . . . [U]ntil we place greater value on caretaking and provide support for caretakers of dependents, women will continue to be unequal.³¹³

These examples demonstrate that, contrary to assertions by some nonmaternalist legal feminists, few maternalists are crude Gilliganists³¹⁴ who embrace romanticized conceptions of the gratifications of domestic labor or biological explanations of women's suitability for care work.³¹⁵ To be sure, some maternalist language, given a superficial reading, may suggest an essentialization of women around mothering. For example, Martha Fineman refers to "mothers" and "children" in her discussion of the parent/child dyad as the prototypical nurturing unit deserving legal protection. However, Fineman explicitly rejects the proposition that only women can or should be mothers, or that only children are the legitimate subjects of care work.³¹⁶

311. See *id.* at 42.

312. See Becker, *supra* note 2, at 71.

313. See Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *FORDHAM L. REV.* 2007, 2039 (2001).

314. Here, I borrow Mary Joe Frug's term for a politically conservative, reductive reading of Carol Gilligan's *In a Different Voice*. See Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 *HARV. WOMEN'S L.J.* 37, 50 (1992). Neither I nor Frug attributes "crude Gilliganism" to Carol Gilligan herself.

315. See, e.g., Franke, *supra* note 1 (suggesting that maternalists view motherhood as a "biological imperative" and fail to see the fundamental oppression of repronormativity).

316. She explains:

Mother is a metaphor with power to make the private visible. . . . The Mother/Child metaphor represents a specific practice of social and emotional responsibility. . . .

. . . .

Rather, like nonmaternalist legal feminists, maternalists conceive family care work as a socially constructed, gendered practice that serves as a source of inequality for women. Indeed, a conception of care work as oppression is foundational to the maternalist project of increasing societal support for care work through law and to the other conceptions of care they have proposed and developed in recent years, which are discussed in the following sections.

2. *Care as a Subsidy, Public Good, or Public Value*

Recently, there has been a discernable shift in the rhetoric of legal maternalism from discrimination theory to the economic language of public goods and subsidy. Given the centrality of economic thinking to the destruction of progressive social policies supporting dependency, this move may be a matter of strategy.³¹⁷

Fineman has employed the language of subsidy to expose the myths of individual independence, autonomy, and self sufficiency assumed by market ideology. According to Fineman, society and all its public institutions are dependent on the uncompensated and unrecognized dependency work assigned to caretakers within the private family:

In complex modern societies no one is self-sufficient, either economically or socially. Whether the subsidies we receive are financial (such as governmental transfer programs or favorable tax policy) or nonmonetary (such as the uncompensated labor of others in caring for us and our needs), we all live subsidized lives.

. . . Those who adhere to the myths of autonomy and independence must recognize that the uncompensated labor of caretakers is an unrecognized subsidy, not only to the individuals who directly receive it but, more significantly, to the entire society.³¹⁸

Joan Williams has similarly employed the subsidy concept to critique autonomy as the organizing principle of the American workplace. According to Williams, the American “ideal worker” norm can exist only with the benefit of a “flow of household work from

. . . [M]en can and should be Mothers. . . [T]he Child in my dyad stands for all forms of inevitable dependency—the dependency of the ill, the elderly, the disabled, as well as actual children.

FINEMAN, NEUTERED MOTHER, *supra* note 27, at 234-35.

317. Perhaps it is also due to co-optation, a possibility legal feminists have begun to explore. See, e.g., Martha Albertson Fineman, *Gender and Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405 (discussing legal feminism's role in deprivileging economics over the rest of the social sciences within mainstream legal scholarship).

318. See FINEMAN, MYTH, *supra* note 2, at 50; see also Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 91-93 (1998).

women.”³¹⁹ These analyses suggest that the family is subsidizing the workplace and society.

Maternalists also have employed the idea of care as a “public good” in their arguments for increased legal and societal recognition for care work, an economic concept related to subsidy. A public good is one that is nonrivalrous (meaning that once it has been produced everyone can benefit from it) and non-excludable (meaning that once it has been created it is impossible to prevent nonpaying individuals from gaining access to it).³²⁰ Martha Fineman argues that the family is crucial to the reproduction of important public goods such as children, workers, consumers, and taxpayers.³²¹

The mandate that the state (collective society) respond to dependency . . . is not a matter of altruism or empathy . . . , but is primary and essential because such a response is fundamentally society preserving. If infants or ill persons are not cared for, nurtured, nourished, and, perhaps, loved they will perish—we could say that they, therefore, owe an individual debt to their caretakers. But, it should also be apparent that without this type of caretaking in the aggregate there could be no society.³²²

Mary Becker is also a proponent of the “children as public goods” theory,³²³ which she traces to feminist economists Paula England and Nancy Folbre.³²⁴

Drawing on political theory, Linda McClain makes a similar argument in her conceptualization of care work as constitutive of important public values, including caring, democracy, community, and civic participation.³²⁵ She argues that the government should provide support for care because it is part of its responsibility to foster indi-

319. See Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 95-96 (1998). Williams has used this notion to challenge both the androcentric structure of work and divorce laws that classify the primary wage earner's increased future earning capacity post-divorce as separate property. See Williams, *supra* note 19.

320. See Paul M. Johnson, Auburn University, *A Glossary of Political Economy Terms*, at <http://www.auburn.edu/~johnspm/gloss> (last visited Dec. 2, 2005).

321. Fineman, *supra* note 3, at 1410.

322. *Id.* at 1410 n.17. The classic definition of a public good is one that would not be produced by the private market absent government funding, making the analogy inapt. See Johnson, *supra* note 320. However, economists recognize that at least a partial provision of public goods often occurs when there is a group of persons who feel they stand to benefit personally from a particular public good to such an unusually large degree that it is worthwhile for them to go ahead and just pay for the whole thing while ignoring the many other small-time free riders as irrelevant. *Id.*

323. See Becker, *supra* note 2, at 62-63 (“Children are a ‘public good,’ that is, a benefit to the general society like a good defense system or good roads.”).

324. See Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86, 86 (1994) (“[A]s children become increasingly public goods, parenting becomes an increasingly public service.”).

325. See McClain, *supra* note 3, *passim*. For an eloquent account of this argument outside of law, see FOLBRE, *supra* note 282, at 22-80.

viduals' capacities for self-government. She views families as "seed-beds of civic virtue," which, "in a good society, serve as places or sources of growth or development of capacities and virtues important to being good citizens and good people."³²⁶ The political theories of liberalism and civic republicanism McClain draws upon are concerned with government's role in fostering capacities for good citizenship generally. McClain's focus is on one aspect of the spectrum of government interest in this area: "nurturing children and ensuring their moral development and education in order to prepare them to take their place in the wider culture, as responsible, self-governing persons."³²⁷ In other words, it is the job of government to help parents in their responsibility of raising upstanding, productive citizens.³²⁸

Finally, although not explicitly invoking the language of public goods, Joan Williams has at times come close to this conception. She suggests that litigation against employers who discriminate against family caregivers may be won by emphasizing the importance and value of children in our society. In her words, "These cases can, and should, be framed around family values. There is a very widespread and uncontroversial sense [among judges and juries] that children need and deserve time with their parents. That's one of the things that give these cases 'legs.'"³²⁹

All of these conceptions of care—as a subsidy, public good, or public value—are aimed at reconstructing care as a public responsibility, or at least at shifting part of that responsibility to public institutions such as employers and the state. As McClain states in discussing welfare reform, "The definition of personal responsibility that informed the passage of PRWORA [the Personal Responsibility and Work Opportunity Reconciliation Act of 1996] reflected an impoverished and unsupportable conception of the proper relationship between parental and public responsibility for the support and well-being of children."³³⁰ Martha Fineman embraces the same goal: "I am arguing for the assertion of collective or public responsibility for dependency—a status or condition that historically has been deemed appropriately assigned to the private sphere."³³¹

3. *Care as a Source of Legitimate Needs*

A final conception of care work promoted by legal maternalists centers on the legitimate needs of caregivers and those who depend

326. See McClain, *supra* note 3, at 1690.

327. *Id.* at 1683.

328. A comprehensive exposition of McClain's theory of care will soon be available. MCCCLAIN, *supra* note 282, at chs. 2-3.

329. See Williams, *supra* note 298, at 11.

330. See McClain, *supra* note 3, at 1675.

331. See FINEMAN, MYTH, *supra* note 2, at xv.

on them. Building on the concept of needs, Martha Fineman has developed a comprehensive theory of dependency relationships within families and between families and other societal institutions. Fineman's theory is comprised of three interrelated points. First, dependency is a natural part of human existence.³³² All humans are dependent for at least some part of their lives, for example, when they are children, when they age, or when they are sick.³³³ She labels this type of dependency biological or "inevitable dependency."³³⁴ Second, "caretakers of inevitable dependents are themselves dependent on economic and institutional resources in order to provide that care."³³⁵ She calls this type of dependency "derivative dependency."³³⁶ Fineman questions how it is that only some members of society are assigned the status of derivative dependent and asks us to consider "the conditions under which caretakers should be expected by the society to undertake responsibility for inevitable dependency."³³⁷ Because derivative dependency negatively impacts participation in the paid labor force, caregivers need both monetary and material resources.³³⁸ Finally, linking this theory of derivative dependency with her work on subsidy discussed previously, she argues that the dependency work traditionally relegated to derivative dependents within the private family is unfairly subsidizing society and all its institutions. She calls for a public response in the form of a robust social welfare state.

Fineman is not alone among legal maternalists who have appealed to traditional liberal conceptions of human needs and justice in fashioning her arguments. Mary Becker also has taken this approach. Drawing on international human rights literature and the work of Amartya Sen and Martha Nussbaum in particular,³³⁹ Becker argues that a central goal of government should be to develop citizens' autonomy, capabilities, and connections with others.³⁴⁰ Poverty interferes with these basic human needs (and implicitly, rights) and highly correlates with being a woman and serving as a caretaker of children.³⁴¹ She offers some rather compelling statistics:

332. See Fineman, *supra* note 318, at 92-93.

333. *Id.*

334. *Id.*

335. *Id.* at 92.

336. *Id.*

337. See Jeffrey Evans Stake et al., *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 542 (1998) (Martha Fineman presentation).

338. See FINEMAN, MYTH, *supra* note 2, at 36.

339. See MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 39-47 (1999); Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993).

340. See Becker, *supra* note 2, at 97-105.

341. *Id.*

[C]hildren are more likely to be poor in the United States than in other countries with similar economies, and the poverty rate of women relative to that of men is higher in the United States than in other similar countries.

. . . In the United States 38% more women than men are poor, yielding a poverty ratio of 1.38 (women to men). . . . [W]omen are *less* likely than men to be poor in Sweden (where only 73 women are poor for every 100 men). Of the industrialized nations . . . , with the exception of Australia, all have considerably better poverty ratios for women.³⁴²

Becker's analysis suggests that the United States is violating the human rights of children and their caregivers by not meeting their basic human needs. In an appeal to nonmaternalist legal feminists, she urges, "If, as feminists, we want to improve the situation of real women living in the real world, and women who often live in poverty with real children, we must support the care movement."³⁴³

4. Summary

As the previous three sections demonstrate, maternalist legal feminists use distinct vocabularies, envision different policy solutions to society's devaluation of domestic labor, and emphasize different feminist traditions in their theories. Some maternalists are focused on restructuring the workplace; others on a more generous social welfare state. Maternalist theories of care as a subsidy or public good challenge the idea that caregivers "owe" something in return for public support. In contrast, Linda McClain's theory of care as a public value tolerates conditions on government support for care, such as requiring recipients of government welfare benefits to work for wages outside the home. Such conditions are acceptable to her so long as family caretakers receive basic or "primary" goods, such as access to "good jobs" and safe, affordable childcare.³⁴⁴ Her project is "to make more explicit the relationship between resources and responsibility."³⁴⁵ In contrast, Fineman and Williams seek to shift the rhetoric of responsibility more fully from the family to other societal institutions. To illustrate another point of departure, some maternalists see men as a potential solution to the burdens of care work on women. For example, McClain believes the "responsible fatherhood" movement, which aims to increase the incidence of marriage among welfare recipients, "may encourage incremental movement away from the traditional male breadwinner/female caregiver model."³⁴⁶ Wil-

342. *Id.* at 103-04.

343. *Id.* at 110.

344. McClain, *supra* note 3, at 1692-93.

345. *Id.* at 1680.

346. *Id.* at 1722.

liams' strategy centers on employment discrimination and divorce laws that promote "equal parenting" by women and men.³⁴⁷ In contrast, maternalists such as Fineman and Becker seek solutions that are less likely to involve tying women to men.³⁴⁸ They wish to disrupt traditional family norms radically. Finally, while each of these theorists draws on strands of cultural, liberal, radical, and postmodern legal feminism in her work, each adopts a different emphasis.

Despite these myriad differences, the theorists in this section share important assumptions and goals. Each assumes the universal nature of dependency and the inevitability of motherhood for women. As Joan Williams puts it, "American feminists have little choice but to take traditionally feminine gender performances as a given, for a simple reason: The traditions of femininity have proven remarkably persistent. . . . [E]ighty-five percent of women become mothers."³⁴⁹ Mary Becker concurs, "I believe that the point of feminism is to improve the quality of women's lives as lived in the real world in conjunction with improving the lives of other vulnerable people In the real world, most women are mothers."³⁵⁰ Each of these theorists also shares the goal of increased societal support for family caregivers. Because of this shared belief in the inevitability of motherhood and shared focus on increasing societal support for caregiving work, I suggest that this group of legal feminists can fairly be categorized as maternalists.

B. Nonmaternalist Conceptions of Care

Legal maternalism has provoked a number of critical reactions by a group of legal feminists I will call nonmaternalists. Nonmaternalist legal feminists, like maternalist legal feminists, are a diverse group of scholars whose members employ distinct vocabularies, envision different policy solutions to women's inequality, and emphasize various feminist traditions in their theories. What they do share is a rejection of the inevitability of motherhood for women and a rejection of maternalists' central focus on caretakers and caretaking labor. Nonmaternalists have set their sights on other aspects of women's identity such as sexual liberation or wage work as more promising sources of emancipation for women. Central to the nonmaternalist critique of legal maternalism is the charge—reminiscent of the 1980s

347. See WILLIAMS, *supra* note 4, at 232-41.

348. See Martha Albertson Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031, 1033 (2001) ("Within the family, powerful economic, cultural and social pressures continue to channel behavior into traditional, not egalitarian modes."); Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1512 ("I have been skeptical of the likelihood of men actually engaging in equal parenting . . .").

349. Williams, *Snowing Down South*, *supra* note 307, at 828.

350. See Becker, *supra* note 2, at 103.

critique of cultural feminism—that maternalism essentializes women around gender roles. Some nonmaternalists also question maternalists' faith in public solutions to the problem of devalued family labor, which they believe represents a naïve view of the state as a liberatory force. The next two sections will explore each of these critiques in more detail.

1. *The Charge of Essentialism*

Nonmaternalists charge maternalists with perpetuating an essentialist conception of women's identity. This critique is aimed both at the narrow definition of valuable care work implicit in much maternalist work and at maternalists' inattention to life endeavors other than care work.

As to the first concern, Mary Anne Case suggests that many maternalists are inattentive to the circumstances of childless women and women with family commitments that do not revolve around children:

[P]art of what needs to be questioned . . . may be the traditional and limited way care obligations and family relationships have been defined [by legal maternalists]. . . . [T]he parents of young children are not the only ones with family responsibilities. I am the legal guardian of a mentally incapacitated mother, but no part of the out-of-pocket expenses of caring for my mother . . . is covered in anything comparable to the way that . . . my current employer covers certain out-of-pocket expenses associated with childrearing.³⁵¹

Case reviews a laundry list of valuable employment benefits that parents receive in some workplaces that are unavailable to nonparents—including larger university-owned housing units, higher moving budgets, tuition breaks for the education of dependents, higher salaries (if male), more valuable health care benefits, paid leave, adjustments to work schedules, “protected absenteeism,” baby showers, and even the famously unattainable “free lunch”—as well as general societal benefits received by parents such as tax deductions and priority parking in shopping malls.³⁵² This analysis suggests that the workplace and society already are unfairly subsidizing certain preferred families with dependents.

Case also raises the concern that legally mandated employment benefits for employees with children, which some maternalists have

351. See Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1766-67 (2001) (footnotes omitted).

352. *Id.*

sought, will cause childless women workers to suffer increased discrimination and workload burdens:³⁵³

[T]he practical effect of localizing benefits [for children and their parents] at the level of the employer may be to effect something like a taking, not so much from the employer, as principally from one group of female employees (childless women who will remain childless), for the benefit predominantly of another group of male employees (those with wives and children).³⁵⁴

Although Case notes that many of her concerns would be addressed if workplace benefits were available regardless of parental status, her critique of legal maternalism is more fundamental: "The difficulty I have experienced goes beyond privileging certain kinds of family over others, and more broadly extends to a privileging of family matters over an employee's other life concerns."³⁵⁵ Here we find the core of the nonmaternalist critique of legal maternalism: Legal maternalists, in their focus on women with children and the family more generally, diminish other important aspects of women's lives.

Katherine Franke takes up this point in an essay challenging legal feminists for insufficiently theorizing sexuality as a positive force in women's lives.³⁵⁶ According to Franke, legal maternalists are unduly focused on dependency and reproduction to the exclusion of women's sexuality. Similarly, feminists focused on the problems of sexual violence are inattentive to the pleasure producing aspects of women's sexuality. She asks:

Why do legal feminists frame questions of sexuality more narrowly than our colleagues in other fields? Is there something intrinsic to a legal approach to sexuality that deprives us of the tools, authority, or expertise to address desire head on? Can law protect pleasure? Should it? Or have legal feminists implicitly made the (I believe mistaken) strategic judgment that feminist legal theory can-

353. *Id.* at 1758-59. This argument is not novel; it is a classic law and economics argument against regulating discrimination in the workplace. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 5-10, 65-81 (1957); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 340-49 (1992); Christine Jolls, *Accommodation Mandates*, 53 *STAN. L. REV.* 223 *passim* (2000); Richard A. Posner, *Conservative Feminism*, 1989 *U. CHI. LEGAL F.* 191, 195-98. For a careful refutation of the law and economics case against workplace regulation, see PAUL C. WEILER, *GOVERNING THE WORKPLACE* 225-311 (1990).

354. Case, *supra* note 351, at 1758 (footnote omitted). It should be noted that many reforms supported by maternalists, such as state-funded subsidies or insurance schemes for family care work, may avoid the problems of statistical discrimination Case fears. See, e.g., Kessler, *supra* note 26, at 463-64 (discussing a modified unemployment insurance scheme as a possible source of wage-replacement for family leave).

355. Case, *supra* note 351, at 1767.

356. See Franke, *supra* note 1.

not explore sexuality positively until danger and dependency are first eliminated?³⁵⁷

Franke points out the naturalist error committed by legal maternalists who accept the inevitability of motherhood for women. Noting that virtually all women are mothers, she questions why feminists have not sought to interrogate this repronormativity. According to Franke, legal feminists have “[left] to queer theorists the job of providing an affirmative theory of sex,” one that sees sex as more than a means to reproduction or a source of violence and harm.³⁵⁸ Her goal is “a set of legal analyses, frames, and supports that erect the enabling conditions for sexual pleasure.”³⁵⁹

Vicki Schultz makes a similar assertion with regard to the significance of paid work for women. In an essay that can be seen as a companion piece to Franke’s, she argues that legal maternalists have failed to take women seriously as wage workers.³⁶⁰ Paid work, according to Schultz, is the cornerstone of equal citizenship:

357. *Id.* at 182-83.

358. *Id.* at 207.

359. *Id.* at 208. Franke’s critique of legal maternalism does not end with the suggestion that legal feminism needs to dedicate more attention to developing a positive theory of women’s sexuality—a worthy project. In the name of questioning repronormativity for women, and citing Marx for authority, *see id.* at 188-89, Franke also defends the neoliberal regime which many legal maternalists seek to undermine. Toward this end, Franke challenges the dichotomy implicit in legal maternalism between selfish, individualistic, economic consumption and the generous, collective, and public social reproduction that allegedly results from mothering. Private market transactions such as purchasing a Porsche or using a gay-friendly rainbow MasterCard, according to Franke, also reproduce society, and parenting is often as much about consumption as it is about social reproduction. Regarding the latter point, Franke states:

What also strikes me as worthy of examination is the degree to which parenting is described as productive social activity while, in many regards, parenting has become as much or more about consumption than production. Sylvia Ann Hewlett, the founder of the National Parenting Association, mused in a recent op-ed piece in the *New York Times* about how the public fails to recognize the financial sacrifices that mothers make to raise children. What with “therapy, summer camp, computer equipment and so on,” kids are just darn expensive, she argued. The “and so on” explicitly includes a “three-bedroom home” in her calculus, but surely implicitly entails Pokémon accessories, My Little Pony dolls, Barbies, fancy sneakers, and other expensive articles of consumption that are aggressively marketed to children these days. While I don’t think that children of any economic class should be deprived of the toys and other items that bring joy into their lives, I am concerned about the bourgeois framing of an issue that gives the larger public the tab for the marketing-induced “needs” of children. And all in the name of “society-preserving work.”

Id. at 192 (footnotes omitted). Franke’s larger points regarding the disciplinary nature of the state and the absence of sufficient feminist theorizing on sexual liberation are important, although I fear they will not be heard by legal maternalists given her insensitivity to the role of class in gender and race subordination in this, her latest intervention. For a more developed version of this concern, see McCluskey, *supra* note 137, at 320-27.

360. *See* Schultz, *supra* note 1.

In my view, a robust conception of equality can be best achieved *through* paid work, rather than *despite* it. Work is a site of deep self-formation that offers rich opportunities for human flourishing (or devastation). To a large extent, it is through our work . . . that we develop into the “men” and “women” we see ourselves and others see us as being.

. . . Our historical conception of citizenship, our sense of community, and our sense that we are of value to the world all depend importantly on the work we do for a living and how it is organized and understood by the larger society. In everyday language, we are what we do for a living.³⁶¹

From this proposition, Schultz questions feminist “family-based” strategies to value women’s domestic labor through divorce reform and welfare laws.³⁶² Specifically, she asserts that legal maternalist proposals to give homemaking wives a claim at divorce on property which would otherwise be considered their husbands’ (for example, husbands’ increased future earning capacity) and proposals to increase state welfare payments to women encourage women to invest in homemaking and thereby “reproduce the very gender-based patterns of labor that create women’s disadvantage.”³⁶³ Schultz would rather see legal reforms that encourage the commodification of housework and that make fulfilling, well-paying, full-time wage work available to all men and women.³⁶⁴ Explicit in her analysis is the assertion that family care work is a less promising route to equal citizenship than wage work.

2. *The Dangers of State Support for Care*

A second critique of legal maternalism concerns maternalists’ affinity for public, state-based solutions to the problem of devalued family labor. According to this critique, maternalists’ efforts to justify employer and state support for dependency based on the valuable role of the family in social reproduction carries serious risks of government intrusion into the family, risks that are more likely to be borne by nontraditional families. Katherine Franke, who has dedicated a substantial portion of her scholarship to the disciplining nature of the state,³⁶⁵ is among the leaders of this critique. She warns of

361. *Id.* at 1883-84.

362. *Id.* at 1899-1919.

363. *Id.* at 1900; see also Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 289, 290 (2003) (asserting that proposals aimed at valuing domestic labor reify women’s traditional role in the home and negatively affect their quest for greater workplace equality).

364. *Id.* at 1900, 1928.

365. See, e.g., Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 253-55 (1999) [hereinafter Franke, *Becoming a Citizen*]; Franke, *Domesticated Liberty*, *supra* note 38, at 1401-03.

the mixed blessing of state involvement for emancipatory movements, citing the devastating social and economic consequences for African Americans of Reconstruction-era state efforts to “civilize” emancipated slaves by disciplining their familial lives to conform to the gendered rules of marriage.³⁶⁶

3. Summary

As the previous two sections demonstrate, like the legal maternalists, nonmaternalists use distinct vocabularies, advocate a wide array of law reforms, and emphasize different feminist traditions in their theories. Some nonmaternalists are focused on workplace equality;³⁶⁷ others more broadly on the regulation of sex, gender, and sexuality in a variety of contexts.³⁶⁸ Some nonmaternalists are deeply cynical about the role of the state in women’s liberation; others are less troubled about the state as a source of oppression. For example, Franke suggests that legal feminists have insufficiently developed a robust critique of the state,³⁶⁹ while Schultz sees a liberal rights model as a promising route to women’s freedom.³⁷⁰ Similarly, like the legal maternalists, nonmaternalists take different positions on the role of men in women’s liberation. While some nonmaternalists are focused primarily on empowering women outside of heterosexual relationships,³⁷¹ others seek “gender integration.”³⁷² Finally, legal nonmaternalists emphasize different feminist traditions in their analyses, ranging from liberalism to postmodernism. Despite these differences, I suggest that this group fairly can be categorized as nonmaternalists in that they all resist the construction of women’s identity around their caregiving functions, particularly to the extent that care is de-

366. See Katherine M. Franke, *Taking Care*, 76 CHI-KENT L. REV. 1541, 1550-51 (2001) (citing laws that, *inter alia*, permitted or required local officials to remove children from the homes of African-American families when their parents did not have the means to support them and laws that required freed men to be under a signed labor contract at all times or risk being prosecuted for vagrancy).

367. See Schultz, *supra* note 1.

368. See Case, *supra* note 280, *passim* (marriage); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 13 (1995) (employment); Mary Anne Case, *Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women in Leadership*, 1999 U. CHI. LEGAL F. 347, 349-50 (single-sex college education); Franke, *Becoming a Citizen*, *supra* note 365 (marriage); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 11 (1995) (employment); Franke, *Domesticated Liberty*, *supra* note 38 (sex).

369. See Franke, *supra* note 366, at 1556.

370. See Schultz, *supra* note 1 (advocating law reforms in the tradition of the civil rights, labor rights, and women’s rights movements that will achieve a right to meaningful work that pays).

371. See Franke, *supra* note 1, at 183 (challenging, *inter alia*, compulsory heterosexuality for women).

372. See Case, *supra* note 351, at 1756; Schultz, *supra* note 1, at 1937.

fined as raising children, and they all reject care work as a significant source of liberation.

In essence, legal nonmaternalism is a powerful internal feminist critique comprised of a cluster of claims about legal maternalism, each revealing a separate type of essentialist error.³⁷³ First, maternalists are said to embrace the essentialist error of false universalism by placing family-identified women with children at the center of their theories, thereby erasing childless women, women with care responsibilities other than children, and women committed to life endeavors outside the family. Second, maternalists commit the essentialist error of naturalizing reproduction by accepting the inevitability of motherhood for women—what Katherine Franke terms “repro-normativity.” Also implicit in the latter critique is that maternalism naturalizes heterosexuality for women. Third, legal maternalists commit the essentialist error of “gender imperialism” by proposing state-based solutions to the problem of devalued family labor, which are inattentive to the ways in which race, class and sexual orientation combine with gender to subordinate women.

IV. A SHARED POSITION: CARE IS NOT A POTENTIAL SOURCE OF LIBERATION

The nonmaternalist account of legal maternalism suggests a large gap between the two camps. I think this is wrong for two reasons. First, legal maternalism is not the crude form of cultural feminism that the nonmaternalists have made it out to be. As this section will demonstrate, given a fair reading, legal maternalism is far more consistent with legal nonmaternalism than the nonmaternalist account suggests. Second, and perhaps less obvious, legal maternalists *also* view care as an oppressive practice that women should be cautious to define themselves around. Although maternalism does not explicitly adopt this position, it is apparent, however subtle, in maternalists’ reliance on antidiscrimination-, child-, or needs-focused justifications for the legal recognition of care work—all justifications that stop short of acknowledging the potentially positive meaning of the practice of care to individual caregivers. Thus, we see that despite their fundamental disagreements, both sides of the maternalist/nonmaternalist divide demonstrate an explicit or implicit discomfort with viewing care as a practice with liberatory potential. The following two sections will outline this shared position and explore the possible reasons for it. Ultimately, I will argue that my intervention—adding a conception of care as a form of politics to this debate—

373. For this analysis, I am indebted to Angela Harris, who has helpfully disaggregated the various types of gender essentialism. See BARTLETT ET AL., *supra* note 293, at xxxvii, 1193-95.

has the potential to bring together more legal feminists around the issue of care, as well as to build bridges between legal feminism and other emancipatory legal movements.

A. *How Legal Nonmaternalism Insufficiently Credits
the Liberatory Potential of Care*

I will begin with legal nonmaternalism, because it presents the most explicit case against viewing care as a potentially liberating practice. It should be clear by now that legal nonmaternalists see caregiving primarily as a source of oppression for women. This characterization is misguided. As Part II demonstrates, when care is practiced outside the traditional family, it can be deeply subversive of gender, race, class, and sexuality norms. Nonmaternalists miss this aspect of care work; in doing so, they exclude a great many care practices and caregivers and thus perpetuate their own form of essentialism. Moreover, their antiessentialist critique rests in many regards on a caricaturization of legal maternalism as a crude form of cultural feminism.³⁷⁴ In this way, legal nonmaternalists insufficiently credit the radical potential of legal maternalism and caregiving more generally to subvert gender, race, class, and sexuality norms.

Contrary to this caricature, legal maternalism draws on widely divergent legal feminist traditions. In its presentation of a comprehensive theory of rights, legal maternalism represents the best of the tradition of liberal feminism.³⁷⁵ In its disruption of the heterosexual marital family, it is deeply radical. In its highly sophisticated critique of neoliberalism, it represents a refreshing and sorely needed revival of socialist feminism. In its deconstruction of the public and private, its understanding of the role of law in women's oppression, and its incorporation of axes of subordination other than gender (such as class), it is a postmodern feminism. And finally, in its strategic deployment of socially constructed gender differences to unsettle ineq-

374. To be fair, the oversimplification of legal maternalism by nonmaternalists may simply be due to the difficulty of giving an opposing vision full justice when one deconstructs it. Or, it may be a product of normal cognition. Individuals are likely to notice aspects of an object that are consistent with their preexisting ideas about it, and to resist information that is inconsistent with their preexisting ideas or "schemas." See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995). Thus, to the extent that legal maternalism has been associated with cultural feminism, nonmaternalists may tend to miss those aspects of it that are consistent with nonmaternalism.

375. We see this in Joan Williams' campaign, built on a civil rights model, to end employment discrimination against caregivers at work; in Martha Fineman's theory of rights, which would replace protection of the individual with protection of the caregiver/dependent dyad; in Mary Becker's efforts to look to international human rights law for a theory of substantive economic rights for caregivers; and in Linda McClain's efforts to put liberal theory to work for feminism. All of these projects fall within the liberal rights tradition as it has come to be broadly understood.

uities between the sexes, legal maternalism is indeed consistent with cultural feminism.³⁷⁶ Of course, these statements do not hold true for every theorist and every work falling within the tradition of legal maternalism described here, but they are accurate statements if we take legal maternalism as a whole.

Further, the insistence by nonmaternalists that the law reforms proposed by legal maternalists merely serve to perpetuate gender ideology insufficiently credits the subversive potential of such reforms. Welfare- and family-based strategies to end the devaluation of family labor deeply threaten gender ideology by supporting families where men are not primary breadwinners and by enabling women to exit marriage. The welfare and divorce reforms proposed by maternalists also challenge our country's class hierarchy, which systematically relegates women and racial minorities to a permanent underclass. To critique maternalism as uniformly gender-reinforcing is to miss the important lesson of antiessentialism that race, gender, and class are complex, interdependent systems of subordination. There is no single "right" place of entry to attack these systems because every move will be both potentially progressive and retrograde.

For example, looking to wage work as a promising source of citizenship for women, as Schultz has done, is a project worthy of feminist support; but to identify it as *the* preferred route to women's emancipation both insufficiently credits the transformative power of legal maternalism and perpetuates a racist, classist, and heterosexist understanding of the meaning of wage work. Work has meant equal citizenship primarily for white, straight, economically privileged women and men; it has been a significant source of exploitation for women and men of color, lower-class whites, and gay people, many of whom have historically occupied the bottom rungs of our wage economy.³⁷⁷ Moreover, the new economy of flexible labor markets, cooperative work arrangements, and technological innovation in which Schultz sees so much liberatory potential has been deployed in ways that reinforce status-based hierarchies. It has given professional, white, upper middle-class men and women relatively more free time and autonomy than less privileged workers, as well as a higher stake in the work enterprise, while delivering to the rest of the workforce progressively mechanized, outsourced, and contingent work charac-

376. See Frug, *supra* note 314, at 52 (providing a progressive reading of Carol Gilligan's *In a Different Voice* as a feminist "methodology for challenging gender").

377. See *supra* Part II.A.2 (discussing workplace discrimination against African Americans); ESKRIDGE, *supra* note 42, at 125-32, 231-34 (discussing employment discrimination against gay people and studies demonstrating a wage gap between gay/bisexual and straight employees for each sex).

terized by increased monitoring and control.³⁷⁸ To be fair, Schultz acknowledges the oppressive effects of modern capitalism.³⁷⁹ However, in the final analysis she maintains that wage work is a more viable source of women's liberation than care, thereby diminishing the significance of her own concession that there is nothing inherently democratizing or equalizing about the workplace.³⁸⁰

Similarly, although developing a liberationist theory of women's sexuality is an important project, I question whether legal maternalism constitutes as significant a roadblock to such a project as Franke suggests. Although many legal maternalists accept the inevitability of motherhood for women—indeed, this defines legal maternalism in part—perhaps this position should not be so facily equated with repronormativity. “Repronormativity” does not describe all reproduction, as Franke's argument suggests. Rather, it refers to women's reproduction *for men*, particularly white, straight men. The transgressive parenthood that legal maternalism potentially supports may thus present a subversion of repronormativity, not a furtherance of it.³⁸¹ As Part II explored, what of the reproduction and parenting of lesbians and gay men? Of racial minorities? Although the women at the center of a great deal of maternalist discourse are at least implicitly heterosexual, white women,³⁸² legal maternalism easily can accommodate women who do not seek to have sex with, reproduce with, or parent with men, as well as men who transgress traditional gender roles.

Can we not work toward a vision in which women (and men) are fully, positively, freely sexual beings and parents or caregivers as well? Other than the fact that human beings should not have to choose among various potential sources of joy, is it even possible to single out for protection, as Franke seeks to, the “domain of sexuality that is the excess over reproduction?”³⁸³ Which potential allies and liberatory paths are cut off as well as enabled by such a dualistic notion? Aside from the fact that a great deal of heterosexual sex is al-

378. See RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* (1998) (exposing the flexibility of modern capitalism as merely a fresh form of oppression); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 556-59 (1997) (same); Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 285 (2003) (showing how employers deploy technology in ways that perpetuate gender segregation and hierarchy in the paid labor market).

379. See Schultz, *supra* note 1, at 1921-29.

380. For a similar critique, see Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1036-37 (2004) (“Advocacy of waged work as the principal means for women's emancipation disregards the experiences of most women of color in particular.”).

381. See FINEMAN, *NEUTERED MOTHER*, *supra* note 27.

382. That is, women who are unmarried due to divorce or poverty.

383. See Franke, *supra* note 1, at 205.

ways potentially about reproduction, reproduction is potentially about sexual pleasure. Consider these findings: Many women experience increased sexual response and achieve orgasm more easily during pregnancy.³⁸⁴ Some women experience intense sexual pleasure or even orgasm during birth.³⁸⁵ Although the primary justification for breastfeeding is the health benefits afforded to infants,³⁸⁶ it also happens to be highly pleasurable for many mothers.³⁸⁷ A recent study suggests the pheromones produced by lactating women and their infants increased the sexual motivation of *other* women, measured as sexual desire and fantasies.³⁸⁸ To the extent that Franke is correct that women's sexuality has been conceptualized by legal feminists as little more than an object of biological or economic exploitation, something like a factory,³⁸⁹ or as a means of giving pleasure to men, could not reclaiming the sexual pleasure involved in reproduction threaten these conceptualizations just as readily as (if not more directly than) the "sex for sex's sake" approach?

384. Physiologically, the increased blood flow to the pelvis, the uterus, vagina and clitoris is enhanced, which makes orgasm more powerful. It can also cause a heightened libido. Also, the nipples and the breasts become larger, more sensitive and capable of feeling extreme sensation when touched or kissed. See HEIDI MURKOFF ET AL., WHAT TO EXPECT WHEN YOU'RE EXPECTING 233-35 (2002).

385. Accounts of orgasmic birth are found throughout the birth preparation literature, see, e.g., *id.*, and exist in modern works of fiction such as Alice Walker's novel, *Possessing the Secret of Joy*:

I had the most sought-after midwife in France—my competent and funny aunt Marie-Thérèse, whose radical idea it was that childbirth above all should feel sexy. I listened to nothing but gospel music during my pregnancy, a music quite new to me, and to France, and "It's a High Way to Heaven" ("... nothing can walk up there, but the pure in heart. . .") was playing on the stereo during the birth; the warmth of the singers' voices a perfect accompaniment to the lively fire in the fireplace. My vulva oiled and massaged to keep my hips open and my vagina fluid, I was orgasmic at the end. Petit Pierre practically slid into the world at the height of my amazement, smiling serenely even before he opened his eyes.

ALICE WALKER, POSSESSING THE SECRET OF JOY 98-99 (1992); see also CAROLE MASO, THE ROOM LIT BY ROSES (2000); Laura Shanley, *Orgasmic Childbirth*, <http://www.unassistedchildbirth.com/sensual/orgasmic.html> (last visited Dec. 2, 2005) (collecting accounts of orgasmic childbirth and birth erotica from various sources).

386. See Karen Bonuck et al., *Breast-Feeding Promotion Interventions: Good Public Health and Economic Sense*, 22 J. PERINATOLOGY 78, 78 (2002).

387. DIANA KORTE & ROBERTA SCAER, A GOOD BIRTH, A SAFE BIRTH, CHOOSING AND HAVING THE CHILDBIRTH EXPERIENCE YOU WANT 29 (1992).

The similarities between lovemaking and breastfeeding are . . . strong: The uterus contracts, the nipples become erect, the breasts receive extensive stimulation, and the skin flushes. Soon after a baby is put to the breast, a letdown brings the milk to the infant. Although the hormone oxytocin is responsible for this milk-ejection reflex, nursing mothers don't usually have orgasms when their milk lets down. Many nursing moms describe a feeling of well-being.

Id.

388. See Natasha A. Spencer et al., *Social Chemosignals from Breastfeeding Women Increase Sexual Motivation*, 46 HORMONES & BEHAV. 362, 367 (2004).

389. See EMILY MARTIN, THE WOMAN IN THE BODY 37-39, 44-57 (1987) (discussing how gynecology adopts a factory metaphor for conceptualizing the female reproductive system).

It is also worth considering the effect of women's reproduction on traditional gender relationships. Women's interest in sex with men decreases significantly in the postpartum period and marital satisfaction and stability decline with parenthood.³⁹⁰ In some instances, this decline in marital satisfaction after the birth of a first child is a significant contributing factor to divorce.³⁹¹ Perhaps reproduction is *threatening* to repronormativity and heteronormativity. Could we not just as easily be dusting off our Adrienne Rich³⁹² as our Shulamith Firestone?³⁹³ Franke's antiessentialist critique of maternalism unnecessarily slams the door on these promising lines of inquiry.³⁹⁴

390. See Alyson Fearnley Shapiro et al., *The Baby and the Marriage: Identifying Factors That Buffer Against Decline in Marital Satisfaction After the First Baby Arrives*, 14 J. FAM. PSYCHOL. 59, 67 (2000) (finding a significantly steeper decline in marital satisfaction for wives who became mothers relative to the wives who remained childless during the first six years of marriage); Susan E. Crohan, *Marital Quality and Conflict Across the Transition to Parenthood in African American and White Couples*, 58 J. MARRIAGE & FAM. 933 (1996) (finding that white and African-American spouses report lower marital happiness and higher marital tension after the birth of a child).

391. See HILARY HOGE, WOMEN'S STORIES OF DIVORCE AT CHILDBIRTH 9-11, 204 (2002) (finding that the transition to parenthood may contribute to divorce among previously happy couples); Jay Belsky & Emily Pensky, *Marital Change Across the Transition to Parenthood*, 12 MARRIAGE & FAM. REV. 133 (1988) (finding that the cascade toward divorce begins with the first decline in the wife's marital satisfaction after the arrival of the first baby).

392. See RICH, *supra* note 306 (arguing that women need liberation not from motherhood, but from male domination of motherhood).

393. See SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 233-34 (1970) (arguing that the only means to achieve women's liberation is through the technological separation of reproduction from the female body).

394. I expect that linking reproduction with sexual pleasure may go beyond the pale for some, or may be read as diminishing the real harms of repronormativity for women. However, those thought experiments that make us the *most* uncomfortable may be the ones most worth pursuing. If imagining a laboring or breastfeeding woman having an orgasm makes us want to run away, perhaps this is exactly the image that we should contemplate. What seems so unnatural about such a scene? For one, there is a child around, and we know children cannot be sexual as adults are. What feminist agendas might be facilitated by challenging the "asexual child" norm? To name a few: ending abstinence-only sex education, challenging restrictions on abortion for minors, addressing discrimination against gay and lesbian youth in primary and secondary schools, and eliminating routine "genital correction" surgery for intersexed infants. See generally JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX (2002). On a theoretical level, recognizing the sexual pleasure involved in reproduction also challenges Freudian theory and the notion of Victorian childhood (and correspondingly, motherhood), two theoretical frameworks that are deeply implicated in patriarchy.

Such a project is no more provocative or potentially diminishing than the argument, suggested by Franke, that markets can be a source of emancipation. See discussion *supra* note 359. Although I am concerned about the tendency of private, market-based strategies to leave behind those with the least market power, I agree with Franke that there are many ways to disrupt hegemonic power hierarchies. See, e.g., Naomi R. Cahn, *The Coin of the Realm: Poverty and the Commodification of Gendered Labor*, 5 J. GENDER RACE & JUST. 1 (2001) (showing how acceptance of market understandings of poor women's household labor may serve to increase public welfare benefits, change how we think of public welfare, and promote more flexible wage work arrangements); Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, in

However, my primary aim here is not simply defending legal maternalism. Rather, I wish to call attention to the ways in which *both* legal maternalism and legal nonmaternalism insufficiently credit the liberatory potential of family care work for caregivers. I expect that it is clear from the above analysis the degree to which nonmaternalists, wrongly in my view, reject care as a practice with positive political potential. However, as will be explored in the next section, maternalism also could go further than it has in acknowledging care as a potentially liberating practice for caregivers.

*B. How Legal Maternalism Insufficiently Credits
the Liberatory Potential of Care*

Legal maternalists have argued that caregivers should be supported and recognized through law because they are victims of gender oppression, because they are providing a valuable public service, and because they have material needs which flow from their positions as caregivers that cannot be ignored in a just society. Implicit in the choice of these justifications, however subtle, is the rejection of care work as a potential source of positive political transformation for caregivers *themselves*. This is problematic for at least two reasons. First, in its inattention to the positive political implications of care work, it does not fully internalize one of the purported premises of legal maternalism that care is a positive value worth mainstreaming throughout society. And second, to the extent that certain transgressive care practices may have positive political content, legal maternalism's inattention to that meaning unnecessarily excludes a good number of women (and men).

Why have legal maternalists, of all legal feminists, relied on justifications for supporting care that do not fully credit the liberatory potential of care for individual caregivers? The first reason is external to legal maternalism. Because legal maternalists are operating within the confines of the discipline of law, they must speak in its language. This has meant turning to justifications that may not suf-

RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 303-23 (Martha M. Ertman & Joan C. Williams eds., 2005) (demonstrating how the market for human gametes enables gays and lesbians to escape state-based discrimination with regard to family formation); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) (demonstrating how market understandings of household labor may undermine gender oppression).

However, if this postmodern impulse to see each move as both potentially subversive and retrograde is to be applied consistently, then we cannot so confidently dismiss strategies that may not fit into our own projects. Assuming this is the case, the challenge for legal feminism (and all liberatory movements) is to develop theories and strategies that maximize benefits while minimizing costs. Two additional criteria are that a theory must include as many possible allies without sacrificing its core values and goals, and a theory must at minimum work to protect the individuals most disadvantaged by the system one seeks to disrupt.

ficiently capture the positive potential of care for the individual. For example, legal maternalists' construction of care as a matter of public responsibility is a direct response to the law's definition of the private family as the proper societal institution for meeting the needs of dependents in our society.³⁹⁵ The argument that children are a public good represents an effort to counteract, on its own terms, neoliberal ideology, which increasingly dominates political and legal discourse. Theorizing the problem of devalued care as form of gender discrimination is consistent with the rights tradition that lies at the center of liberal legal theory and our law. These translation efforts mean that the battle is already half lost when it has begun.³⁹⁶ This is inevitable for any liberatory movement that employs law; one cannot get completely outside the frame.³⁹⁷

However, if we view even oppressive regimes as discursively created systems that are not fixed, opportunities for disruption will always exist, however small. Two methods of disruption suggested by postmodern theory are thinking from the perspectives of others and facilitating practices in which seemingly incongruent dominant meanings are juxtaposed, thereby revealing their constructedness.³⁹⁸ Building a theory of care as politics from the perspective of transgressive caregivers constitutes such an effort. Concededly, such a project also will inevitably be retrograde, for it employs the liberal legal concept of political expression, which has been conceptualized within mainstream legal and political theory primarily as a negative right. Nevertheless, my hope is that the addition of a theory of "transgressive caregiving as politics" will move legal feminism one small step closer to facilitating the legal recognition of care while limiting the inevitable risks inherent in any law project.

The second reason for the legal maternalist reluctance to recognize that care may be political in a positive, subversive sense is primarily strategic. Although legal maternalists explicitly reject the notion that supporting individuals in traditional gender roles will nec-

395. See Fineman, *supra* note 3, at 1405-06.

396. See Wendy Brown & Janet Halley, *Introduction to LEFT LEGALISM/LEFT CRITIQUE* 16 (Wendy Brown & Janet Halley eds., 2002) ("Submitting left projects to the terms of liberal legalism translates the former into the terms of the latter, a translation which will necessarily introduce tensions with, and sometimes outright cancellations of, the originating aims that animate left legalism in the first place.").

397. To borrow a metaphor used by Kathleen Sullivan in an essay on women and the Constitution, the project of obtaining legal recognition and public support for caregiving work is like writing a cookbook on what to cook when there's nothing in the kitchen. The main ingredients at hand have consisted of core concepts from modern legal and political theory, which have, for the most part, developed around the experiences and needs of men. It should be no surprise, then, that the theories that feminist theorists have cooked up have been somewhat inauthentic. See Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 763 (2002).

398. See Anderson, *supra* note 36.

essarily perpetuate them, I think they implicitly harbor such a fear, as evidenced by their less than full exploration of the potentially positive meaning of caregiving for caregivers. As demonstrated by Part II, contrary to the nonmaternalist critique and the implicit position of legal maternalists, care can be radical, at least to the degree that any practice can be. As such, legal maternalists do not have to turn away from care in their efforts to subvert oppressive gender, race, class, and sexuality norms. Rather, such a project can be furthered through a fuller recognition of transgressive caregiving as politics.

On the other hand, the nonmaternalist critique presents a series of legitimate concerns that should be addressed by maternalists—again, not by changing the subject as some nonmaternalists have suggested—but by developing a thicker, more positive conception of care. Here it is worth asking: Do the justifications relied upon by legal maternalists tap into the full potential of legal maternalism to fashion a theory of justice that takes into account the broadest array of individuals who could be, and should be, benefited by our projects? Are there risks involved when we rely on justifications that construct the family essentially as a site of public reproduction? Who stands to benefit and who stands to lose from such a conception? Those individuals for whom the state has been most disciplinary—for example, women of color and gays and lesbians—are at serious risk from such a conception of care, however useful it may be to challenging the present shift to private ordering. Further, can appeals to justice and human needs succeed in a country so committed to individualism and to liberal conceptions of rights? Will our efforts require a further articulation of why human needs should be recognized as human rights in a language our legal and political systems are likely to understand? And finally, can we supplement the existing conceptions of care with accounts that reflect the full range of care's meaning, including its positive potential? Here I am not arguing for a cheery story for its own sake or for appeasement of those tired of hearing about women as victims. Many are victims in many ways. But it is also true that caregiving constitutes a potentially empowering practice. Which additional important experiences are overlooked by these conceptions? I would suggest that it is the full range of experiences of those who engage in transgressive caregiving practices.³⁹⁹

399. Raising these questions does not diminish the enormous strength of the maternalist project or question the maternalist goal of valuing care. A movement's theories are as important as its goals, for they tell a story about the world that ultimately constructs that world. With that insight in mind, the ideas presented here are intended to take the maternalist analysis to the next level.

C. Summary

To summarize Part IV: legal maternalism and nonmaternalism constitute two strands of legal feminism which can be characterized primarily by their fundamentally different stances on the centrality of reproduction to women's identity. Nonmaternalists do not view women's reproduction as inevitable or desirable. They envision a world in which women's identity is not defined by this institution, and they eschew legal strategies that focus on women's reproduction to the exclusion of other aspects of their identity such as wage work and sexuality. In contrast, maternalists by and large view reproduction and the gendered division of family labor as inevitable. They seek strategies to lessen the costs of care work for women, such as law reforms providing for a more robust social welfare state, rules that credit the contributions of unpaid domestic labor at divorce, and reforms that would restructure the workplace to account for family care work. Legal maternalists and nonmaternalists also disagree among each other on various important strategic matters such as whether men can play a positive role in women's liberation and whether the state and the law are essentially liberatory or disciplinary in nature. However, despite these myriad disagreements, nearly all of the recent contributions to this discourse implicitly or explicitly seem to adopt the premise that caregiving is of little affirmative value to caregivers. This is apparent in the rejection of caregiving as constitutive of women's identity by the nonmaternalists. It is also apparent, however subtle, in the work of maternalists in their reliance on child-focused, antidiscrimination, and needs-based justifications for the legal recognition of care work.

Contrary to this dominant account within legal feminism, care can take on positive political meaning for those who engage in it. Specifically, I assert that care work can constitute an affirmative political practice of resistance to a host of discriminatory institutions and ideologies, including the family, workplace, and state, as well as patriarchy, racism, and homophobia.

In making the assertion that caregiving can be profoundly affirmative, I do not mean to suggest that housework or the care of intimates is unidimensionally positive or empowering. It is clear that gender polices women of all classes, races, and sexual orientations into traditional caregiving roles, and that the family, like wage work, can be a site of oppression for women. Rather, this project seeks to recover caregivers' agency, however restricted and distorted by gender-based domination, from the dominant feminist accounts of care work within law in an effort to complicate the story of caregiving. A theory that presents caregiving in all its messiness as a condition of oppression and power, drudgery and deep satisfaction, constraint and

choice, public and private expression, will be fundamentally more transformative in nature. This is not to diminish the value of thinking about caregiving as a product of gender oppression or as a service of public significance. These constructs marshaled by maternalists to justify support for caregiving are important, because they erode autonomy and efficiency as legitimate principles for organizing market work. Nor do I mean to suggest that because caregiving has political value, it should not be recognized as having monetary value. As Katharine Silbaugh has thoroughly documented, unpaid domestic labor is work that produces tremendous economic value.⁴⁰⁰ However, I worry that we lose many potential allies when we depict caregiving primarily as a condition of gender constraint or justify support for women in derivative terms.⁴⁰¹ Thicker conceptions of caregiving possess greater potential to bring women together across their differences.

A few legal feminists have begun to theorize care so that theorists from a wider range of perspectives might want to support it. For example, Martha McCluskey explores how strategies that seek to support “personal care” can unite more women. She defines personal care as the “unwaged, gendered caretaking work” critical to maintaining workers irrespective of the caretaking needs of children, such as “food, shelter, clothing, health care, emotional support, social capital, job training, and transportation.”⁴⁰² With this broader conception of care work in mind, McCluskey reveals how the U.S. federal income tax and social security systems direct public support to meeting the personal care needs of well-off men who are primary breadwinners in traditional marriages at the expense of unmarried workers and two-income couples.⁴⁰³ Reforming these income support systems to support modest- and low-income workers regardless of marital status, according to McCluskey, would benefit single mothers, unmarried

400. See Silbaugh, *supra* note 284, *passim*.

401. For a fuller articulation of the risks of seeking rights on derivative terms, see Martha M. Ertman, *Changing the Meaning of Motherhood*, 76 CHI.-KENT L. REV. 1733, 1735-38 (2001).

402. See McCluskey, *supra* note 137, at 316.

403. Specifically:

Upper income (and mostly male) married “breadwinners” with homemaking spouses typically receive not only “private” unpaid family labor but also major transfers of taxpayer dollars to support the domestic services that help sustain their market value and social status. In particular, the federal income tax “marriage bonus” should be understood as a support system for the care of affluent husbands because it provides a substantial special tax break to high-earning spouses (typically husbands) of nonearning or low-earning homemakers (typically wives). Similarly, the federal social security system’s spousal benefits provisions also have targeted special, generous benefits to relatively high-income workers married to homemaking spouses, at the expense of unmarried workers and dual-earning married couples.

Id. at 326 (footnotes omitted).

nonmothering women, and women in two-income marriages, that is, women who resist traditional gender roles to a greater or lesser extent.⁴⁰⁴ By broadening the definition of valuable care work and proposing legal reforms that cut across parental and marital status, McCluskey's approach has the potential to bring together legal feminists, queer theorists, and critical race scholars around the issue of care.

Martha Ertman also has sought to integrate the concerns of both legal maternalism and nonmaternalism through her proposals to use private law to value homemaking labor. Specifically, Ertman supports treating the family unit similar to other economic relationships. Toward that end, she proposes the importation of private business law concepts into family and social welfare law. For example, a divorcing spouse who marginalized her wage work during a marriage in favor of homemaking labor could be treated at divorce as a secured creditor consistent with Article 9 of the Uniform Commercial Code, with full rights to repossess property or to offset other debts.⁴⁰⁵ Or, like certain corporations and limited liability companies, "caregivers could enjoy limited liability for debts incurred in raising their children, treating them as investors in the entity (either the family, the mother-child dyad, or the child's citizenship)."⁴⁰⁶ Finally, "[t]he business judgment rule, which insulates businesses from meddling, could also be adapted to protect mothers receiving public support from government intervention in their families."⁴⁰⁷ Such private law approaches value family care work while limiting the risks of public law approaches, such as interference in families that do not conform to majoritarian values. Like McCluskey, Ertman addresses the main concerns of legal nonmaternalism while maintaining a focus on the problem of devalued family labor. As such, her work also constitutes a step toward bridging the maternalist/nonmaternalist divide.

My proposal that we recognize the positive political potential of caregiving continues the hard work of integrating legal maternalism and nonmaternalism so well begun by McCluskey and Ertman. Reconceptualizing care work as a political practice with unstable and complex meanings engaged in by women, men, mothers, and non-mothers alike is responsive to internal feminist debates regarding the essentialization of women. Given our country's longstanding tradition of protecting political expression, however unpopular, viewing care work as a practice with potential political significance might minimize the risks of harmful state intervention into nontraditional

404. *Id.* at 332-31.

405. See Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 39-50 (1998).

406. See Ertman, *supra* note 401, at 1745.

407. *Id.*

families. Reading political significance into the practice of care might also serve as an additional basis to articulate a theory of rights for caregivers, building on the existing accounts of care as a source of need or a public good. Finally, such a conception may have broad appeal by providing a more positive account of caregiving work than can be conveyed through the story of gender oppression alone. In the next Part, I will review the legal implications of this more complex conception of transgressive caregiving as politics.

V. IMPLICATIONS FOR LAW

What are the implications for law of recognizing transgressive caregiving as a political practice with subversive potential? Typically, resistance to oppression is not a justification for legal reform. Law usually is written from the perspective of the lawmakers being resisted. Yet minority perspectives may have some import at particular historical moments, such as when a political movement already has begun in a positive, emancipatory direction. Although the present status of transgressive caregiving within the law is in many regards consistent with past patterns of regulation and marginalization,⁴⁰⁸ it is increasingly gaining recognition and protection.

For example, despite the persistence of state-based oppression in the area of gay and lesbian family rights, there has been significant progress on that front in the past two decades—including the elimination of presumptions against custody for gay parents, increased access to adoption and alternative reproduction, and domestic partnership benefits.⁴⁰⁹ Most significantly, in the past couple of years alone, the U.S. Supreme Court decriminalized private, consensual gay sex,⁴¹⁰ and the Massachusetts Supreme Court overturned that state's opposite-sex requirements for marriage.⁴¹¹ Challenges to opposite-sex marriage requirements are working their way through the appellate courts of California, Iowa, New Jersey, New York, and Washington states.⁴¹² These developments have spawned counter movements,⁴¹³ but it is clear that the law is moving toward the recognition of gay and lesbian care practices, as well as the care practices of individuals who may parent in extended or other less traditional family arrangements.

At this emancipatory moment, the potential for transformation is great, but so are the risks that legal acceptance of previously mar-

408. See *supra* Part II.

409. See discussion *supra* Part II.B.1.

410. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

411. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003).

412. See Lambda Legal, Marriage Project, <http://www.lambdalegal.org/cgi-bin/iowa/issues/record2?record=9> (last visited Dec. 2, 2005).

413. See sources cited *supra* notes 186-88.

ginalized relationships and care practices will come on assimilatory terms. As Katherine Franke reminds us:

It is vital that we bear in mind that state recognition does not merely impose legal order on “facts in the world.” State ordering actually brings those facts into being in a range of ways, whether it be how individuals come to understand themselves in the shadow of law, by and through the law’s summons, or by the state’s creation of explicit and implicit incentive systems.⁴¹⁴

If this is true, strategies that do not easily fit within mainstream legal constructs will be potentially more subversive than those that simply seek to articulate rights in easily cognizable terms.

The impulse at this historic moment of recognition for transgressive caregivers, such as people of the same sex who wish to marry, is to use the language of equality. There are arguments for this approach. As a colleague suggested at the beginning of this project, wouldn’t it be much simpler and more straightforward simply to argue that transgressive caregivers are, upon closer examination, really just like traditional caregivers? Or, as many legal feminists have argued, if the goal is increased support for care, could we simply emphasize family values and the importance of children to society? Or describe the problem as one of sex discrimination, for which there already exists a comprehensive system of regulation? Although these strategies may have more appeal to lawmakers than the “transgressive caregiving as politics” conception, they are also more likely to reify the very hierarchies they seek to undermine. Explicitly adding the political dimensions of transgressive caregiving to the current rights discourse over same-sex marriage may counteract some of its assimilatory effects by maintaining the difference of gay people while also avoiding sociobiological conceptions of “difference.”⁴¹⁵

Beyond same-sex marriage, family law would be greatly enriched and the quality of people’s lives improved if the law recognized and protected transgressive care practices as a form of valuable political expression. For example, although many states now permit a child to have two legal parents of the same sex⁴¹⁶—a significant step forward for transgressive caregiving practices—American family law generally takes the position that a child can have no more than two legal parents.⁴¹⁷ Where consensual and in the best interests of the child,

414. See Franke, *Domesticated Liberty*, *supra* note 38, at 1418 (footnote omitted).

415. Cf. DAVIS, *supra* note 6, at 231-34 (suggesting the Fourteenth Amendment should be interpreted expansively to include same-sex marriage in light of our country’s antislavery history, which was aimed at eliminating deprivations with regard to marriage and family life imposed by slavery).

416. See *supra* notes 158-61 and accompanying text.

417. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 130-31 (1989) (holding that a child did not have a due process right to maintain filial relationship with both putative natural

why not allow more than two adults to serve as the legal parents of a child, with designated primary and secondary parents, which as a practical matter reflects the arrangement of many families within minority communities already?⁴¹⁸ Along the same lines, in the case of family dissolution, why not augment a child's right to receive child support from only one noncustodial parent—typically a male, biological parent?⁴¹⁹ If we look to the parenting practices in African-American and gay communities, a whole range of individuals are likely to have economic and affective ties to a child worth preserving.⁴²⁰ Recognizing such care practices, which can be highly functional and are constitutive of such communities, would represent long-deserved recognition of the value of that care.

This could take various forms. For example, in Canada, a court may order more than one noncustodial parent to pay child support concurrently (for example, a biological father and a stepfather) if the nonbiological parent stood in the place of a parent to the child,⁴²¹ apportioning support according to the role each adult played in the child's life or even applying the full guideline amount to each adult independently.⁴²² Or perhaps a more robust welfare state, in which both the state and a set of individuals would be jointly responsible for a child, would be the logical consequence of a society in which care-

father and husband); *Elisa B. v. Superior Ct.*, 33 Cal. Rptr. 3d 46, 51 (Cal. 2005) (suggesting in dicta that a child may have two natural mothers, except when more than two parties are eligible for parentage); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (refusing to recognize that a child had two legal mothers where gestational mother, genetic mother, and genetic father desired to continue relationship with child). This may be changing. Although there are few reported decisions, trial courts in a small number of jurisdictions are permitting "third parent" adoption. See National Center for Lesbian Rights, *Second Parent Adoptions: A Snapshot of Current Law*, <http://www.nclrights.org/publications/2ndparentadoptions.htm> (last updated Aug. 2003).

418. Although there are many ways this could be achieved—for example, through adoption law, contract law, or the application of equitable principles recognizing an adult who functions as a child's parent—the merits of each are beyond the scope of this Article. Suffice it to say that there are many existing models to guide a law reform project aimed at further recognizing transgressive care practices. See, e.g., ALI PRINCIPLES, *supra* note 159, § 2.03 (1)(b)(iii)-(iv) (leaving open the possibility of three legal parents under the ALI Principles—for example, a biological mother and father and a parent by estoppel).

419. See, e.g., sources cited *supra* note 417. For a discussion of the law's hostility to multiple parenthood generally, see Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 *passim* (1984).

420. See discussion *supra* Part II.

421. See *Chartier v. Chartier*, [1999] S.C.R. 242 (Can.) (holding that a stepparent who stands in the place of a parent to a child cannot unilaterally give up that status and escape the obligation to provide support for that child after the breakdown of the marriage).

422. See DEP'T OF JUSTICE CANADA, CHILDREN COME FIRST: A REPORT TO PARLIAMENT REVIEWING THE PROVISIONS AND OPERATION OF THE FEDERAL CHILD SUPPORT GUIDELINES 49-50 (2002), http://canada.justice.gc.ca/en/ps/sup/pub/rp/volume_2.pdf. In many provinces, this rule has been extended to individuals in cohabiting relationships, making the act of parenting (not marital status or the existence of other obligors) the determining factor in child support determinations. *Id.* at 17.

giving—transgressive and not—were recognized. Other law reforms that might follow, in one form or another, from a commitment to transgressive caregiving include open adoption⁴²³ and a foster care system where parental rights are not terminated on a fast track,⁴²⁴ but are shared with foster parents consistent with a child's welfare.⁴²⁵

In addition to informing debates surrounding the legal recognition of alternative family forms, reconceptualizing care as possessing positive political content under certain circumstances may serve to inform present discourses over the provision of welfare. The modern welfare state is characterized by time-limited, minimal grants with massive conditions. Whereas the 1980s and 1990s saw welfare reforms that aimed to influence the reproductive and parenting behavior of welfare recipients,⁴²⁶ the present decade is characterized by reforms that seek to eliminate “female family headship” entirely through marriage promotion and time limited benefit receipt.⁴²⁷ Poor women of color have borne the brunt of this assault. Political expression, however unpopular, is a fundamental value protected by our Constitution. Recognizing the political significance of transgressive caregiving thus adds a new justification for supporting the care work of women receiving welfare while providing a conceptual basis for limiting state intervention into their families.

423. An open adoption is one in which “the birth parents meet the adoptive parents . . . [and] relinquish all legal, moral, and nurturing rights to the child, but retain the right to continuing contact and to knowledge of the child's whereabouts and welfare.” Annette Baran et al., *Open Adoption*, 21 SOC. WORK 97, 97 (1976).

424. See ROBERTS, SHATTERED BONDS, *supra* note 6, at 104-33 (discussing the dramatic shift in federal adoption policy in the late 1990s from the reunification of children in foster care with their biological families toward swift adoption of children into new families).

425. Obviously these reforms implicate serious issues regarding family privacy, gender politics, and the best interests of children. Indeed, such reforms may involve reworking certain constitutional principles concerning the family. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000). Two points are worth making in that regard. First, the constitutional background rules that would allegedly constrain a greater recognition of transgressive caregiving are themselves a product of a set of power relations. Reconstructing such constitutional doctrines to more fully recognize, value, and protect transgressive care practices could result in a less partial and distorted legal regime. Second, there remains ample room for revision of existing constitutional doctrines regulating family and intimate life without elevating sperm donors, mere ex-lovers, and babysitters to the status of parent. Because such a law reform project would require careful line drawing, it would be a delicate and difficult one, but it would be achievable nevertheless. See, e.g., *In re E.L.M.C.*, 100 P.3d 546, 562 (Colo. 2004) (finding that even though legal mother had a constitutionally protected parental right and her ex-domestic partner did not, the state had a compelling interest in protecting the child from the harm that would result from termination of her relationship with her psychological parent).

426. See Kessler, *supra* note 60, at 339-41 (describing “child exclusion,” “learnfare,” and “medfare” welfare reforms of the 1980s and 1990s).

427. See John M. Fitzgerald & David C. Ribar, *Transitions in Welfare Participation and Female Headship* (Ctr. Econ. Studies, Working Paper No. 895, 2003), available at http://webserver01.ces.census.gov/index.php/ces/1.00/cespapers?down_key=101687 (research funded in part by the U.S. Census Bureau examining the effect of welfare on “female family headship”).

Finally, as a strategy that is likely to involve a wide range of individuals, conceptualizing transgressive caregiving as a positive political practice of resistance is likely to further advance such progressive law reform efforts. Much of the legal feminist and law reform discourse on care has been characterized by a split between those women who benefit from market-based solutions to the problem of devalued family labor and those who do not. For example, many middle-class women support punitive welfare reforms because they have experienced wage work as a positive source of liberation from the burdens of domestic labor, and because they can pass on their domestic labor to less privileged women. Because they have market power as both employees in the paid labor force and as employers in the domestic sphere, they may see their interests as being at odds with those of poor women. Yet, many of these same women may be transgressive caregivers. Perhaps they are unmarried cohabitants or lesbian caregivers. Perhaps they are married to men who do significant care work, thereby enabling them to see the importance of recognizing transgressive care work. Similarly, although African Americans as a class generally are more conservative on certain issues implicating “family values,”⁴²⁸ transgressive care practices are quite prevalent in African-American communities. The explicit linkage of gay and minority care practices may thus serve to forge important coalitions across race lines that will strengthen both the gay liberation and welfare rights movements. Finally, although the legal feminist discourse on care has largely conceptualized the interests of men and women as adverse, to the extent that men are transgressive caregivers in certain contexts, they too potentially can be part of law reform efforts aimed at valuing care. In sum, highlighting the common political content of transgressive caregiving across race, class, sex, gender, and sexuality lines may serve as a basis for more effective coalition building and law reform.

VI. CONCLUSION

Transgressive caregiving—that is, care work performed outside of traditional family contexts by those whom the state has historically denied the privilege of family privacy—is a potentially deeply and complexly subversive practice. Specifically, transgressive caregiving is a practice that can subvert a host of discriminatory ideologies, in-

428. For example, the shift in favor of same-sex marriage, however subtle, is seen in nearly every segment of American society with two exceptions—Evangelical Protestants and African Americans. See News Release, The Pew Forum on Religion and Public Life, Religion and Politics: Contention and Consensus 1-2, 17-18 (July 24, 2003), <http://pewforum.org/publications/surveys/religion-politics.pdf> (summarizing survey results).

cluding patriarchy, racism, homophobia, and class-based exploitation.

Feminist and queer legal theory have neglected transgressive caregiving as an important form of resistance for many women and men. This pattern is apparent in the explicit rejection of caregiving as a potentially positive source of identity by nonmaternalists. It is also apparent, however subtle, in the work of maternalists in their reliance on child-focused, antidiscrimination, and needs-based justifications for the legal recognition of care work.

Both sides of the maternalist/nonmaternalist divide have important contributions to the current debate within law on the significance of care work. It is time to do the hard work of integrating legal maternalism and nonmaternalism. Recognizing care as a potentially subversive political practice constitutes a small step in that direction. This thicker conception of care has the potential to bring together critical legal theorists around the issue of care, to produce even more transformative law reforms, and to build bridges among legal feminism and other emancipatory legal movements.