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SYMPOSIUM

LEGISLATIVE APPROACHES TO WORK AND THE FAMILY

NOTE

LEGISLATIVE RESEARCH BUREAU REPORT

INTRODUCTION

MARTHA MINOW*

Agenda-setting, the pros tell us, is the critical stage of the legislative process. This symposium issue of *The Harvard Journal on Legislation* demonstrates that the tensions between workplace demands and family duties have made it onto the legislative agenda. Indeed, Congress and state legislatures around the country are now teeming with proposals on these issues. But in the context of work and family policies, there is more to legislation than getting on the agenda. Difficult questions of information, rhetoric, and conception remain.

Disputes over information reflect disagreements over diagnosis and solution. Thus, sharp substantive differences underlie the debates undertaken by participants in this symposium, and in the legislatures, over the proper statistical description of the workplace participation of women and the economic circumstances of families. Besides disagreeing about the actual situation of women, children, and families, people diverge over the relative merits of public subsidies compared with favorable tax treatment for child care, employer contributions to child care expenses, and regulation of child care providers. They argue over whether there are any shared interests among families that differ in economic class, race, religion, and allocation of parenting responsibilities. They dispute whether the marketplace can provide solutions to child care if parents simply have more money to spend, or whether structural barriers require more direct governmental involvement. And they contest whether additional public monies, however allocated to assist families with children, should be traded against other programs for families or instead against expenditures for the military, for the highways, or for the bail-out of floundering industries and institutions.

The fights over data, assumptions, and goals are themselves buried in problems of rhetoric. Rhetorical ploys have been used to obstruct work and family legislation; opponents have effectively defeated past initiatives by calling aid to child care "socialism" or "communism." Today, the rhetorical devices show

* Professor of law, Harvard Law School. A.B., University of Michigan, 1975; Ed.M., Harvard University, 1976; J.D., Yale Law School, 1979.

the enduring power of images. Images of "Ozzie and Harriet" nuclear families obscure the variety of contemporary family forms; prevailing images of jobs seem incompatible with day-to-day parenting. The image of the stay-at-home mother as the primary provider of child care hovers in debates over efforts to increase fathers' involvement and also appears in challenges to neighborhood and center-based child care. Images of government, sometimes as an oppressive and inefficient octopus, sometimes as a friendly but sprawling resource, contribute to a sense that no easy solutions lie ahead.

Behind the images lies a conceptual conundrum that should be named explicitly and, I believe, dissolved: how can the government accept responsibility for children when childrearing is, in this society, a private duty? It is true that our courts maintain, especially in affirming the right to family privacy, that the state intervenes only when it concludes that families have failed.[1] Our legislative process, however, has continually recognized and responded to "crises in the family." Going back at least to Colonial days, public declarations of crises for the American family have sponsored legal efforts to reinforce family duties and to enable official involvement with families.[2] Periodic waves of reform included programs to assist families during the Depression. Another historic effort put federal funds into day care centers to facilitate employment of women in defense-related industries during World War II.[3] Head-Start as well as other War on Poverty programs developed in the 1960's. These programs, along with Title XX monies for subsidizing child care for income-eligible families in the 1970's, created programs targeting the poor. A separate track for middle- and upper-class families uses the child care credit of the personal income tax system. It is against this backdrop of class-based programs, none of which sufficiently addresses the needs of families and children, that the contemporary debate must be understood.

That backdrop also includes the legacy of bitter legislative battles waged during the 1970's and 1980's over child care and

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[1] *But see* Olsen, *The Myth of State Intervention in the Family*, 18 MICH. L. REV. 835 (1985).

[2] *See* W.N. GRUBB & M. LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN 3–4 (1982).

[3] This episode is commonly cited to demonstrate that when it becomes an important public priority, the government and private employers know how to accommodate working mothers. Yet, it is important to remember that during World War II, these day care centers provided space for less than 10% of those estimated to need it. *Id.* at 212.

services for families.[4] Why has this country, unlike some others,[5] failed to devise comprehensive policies that would assist parents in providing care for their children? Perhaps we are witnessing a backlash against feminism; perhaps this shows the perpetual resistance to state involvement with families; perhaps the general, widespread opposition to regulating workplaces has been fueled by fears of declining United States competitiveness in the world economy. Yet, these explanations depend upon misinformation and rhetoric, rather than reality. The reality is that feminists have neither put women in the workplace nor created the problems of child care; the economy has. The reality is that governments are inevitably implicated in families: the state presides over marriages, requires schooling, provides tax and fiscal benefits and burdens based on family status, and provides welfare, services, and even corrections and other institutional treatment to families. The reality is that employers in other countries with strong economies provide more assistance to working parents than do we, not only without apparent injury to their competitiveness, but with high levels of employee performance and satisfaction.

Or, that is how I see it. The symposium participants present their own versions of reality, for, in large measure, that is how we seek to persuade one another in the high stakes game of politics. The contributors here pursue diverse and, at times, antagonistic arguments about the information, rhetoric, and conception needed to respond to workplace and family tensions. They do not dispute, however, Sigmund Freud's insight that the tasks of adulthood are love and work.[6] As this nation reaches its adulthood, let us hope that individual parents can better achieve these most important tasks.

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[4] *See id.* at 216–32.

[5] *See* Dowd, *Envisioning Work and Family*, 26 HARV. J. ON LEGIS. 311 (1989).

[6] *See* Crouter & Perry-Jenkins, *Working It Out: Effects of Work on Parents and Children*, in IN SUPPORT OF FAMILIES 93 (M. Yogman & T.B. Brazelton eds. 1986).

IS THERE A ROLE FOR THE FEDERAL GOVERNMENT IN WORK AND THE FAMILY?

PATRICIA SCHROEDER*

In the past century, the federal government has attempted to improve the condition of the American family, yet the United States government has never been able to formulate a comprehensive family policy. Indeed, family policy, just as family law, has been assumed to be solely within the jurisdiction of the states. However, changes in the demographics of the American family and the American work force demand that our federal government now provide leadership and make a concerted effort to create a national family policy.

I. TOWARD A NATIONAL FAMILY POLICY

Americans have a healthy skepticism about federal government intervention in family life. We take pride in self-sufficiency, and do all we can to protect our privacy. It is only with great hesitation, therefore, that we acknowledge that federal resources may be necessary in certain circumstances to accomplish desirable social goals, such as making sure that all families have roofs over their heads, that all children have enough to eat, and that the home does not become a center of abuse. Even with our skepticism, we have had a long history of federal government involvement in work and family life.

The New Deal policies of the Roosevelt Administration, beginning in the 1930's, provide perhaps the best example of significant federal government support to families. Major social programs, including Social Security, unemployment compensation, and veterans' assistance, were designed to provide economic benefits and supports to dependents of the "common working man," who had been suffering under the Great Depression. But these dependents were very specifically defined. In

* Member, United States House of Representatives (D-Colo.). B.A., University of Minnesota, 1961; J.D., Harvard Law School, 1964. Congresswoman Schroeder is a member of the House Armed Services Committee; the House Select Committee on Children, Youth, and Families; the House Judiciary Committee; and the House Post Office and Civil Service Committee, whose Subcommittee on Civil Service she chairs.

determining eligibility for various programs, the definition of family assumed an employed husband/father, an unemployed wife/mother, and children under age eighteen.

Families have changed a great deal since the 1930's. The biggest changes have been increased divorce rates and greater maternal participation in the labor force. These demographic factors have combined with other major economic changes to produce a proliferation of single parent families and two-earner families. Current statistics on work and family reflect the scope of the current demographic revolution. Only 9.7% of all families are married couples with children under age eighteen where the husband is the sole wage earner.[1] Only 5% of all families fit the traditional image of a working father and a mother at home with two children.[2] Today, in 63% of all married couples earning an income, both partners are employed.[3] Consequently, as we debate appropriate ways for government to protect the well-being of its citizens under current circumstances, we must move beyond the New Deal theme of help for the common working *man*, and strike a new theme of help for the working *family*.

There is no question that government has always played a role in the work and family life of its citizens. The more significant issue is what is its *appropriate* role? In my mind, the government does have a role in protecting families' well-being, and in enhancing families' economic strength. However, as we develop a national family policy, it is important to keep in mind those areas of family life where government should restrain itself. Clearly, government should not usurp parental choice and decisions regarding personal lifestyles, or influence family related behavior. Government should not be dictating to its citizens whether, when, or how to have families.

In addition, government should not penalize families for their structure. In the Tax Reform Act of 1986, Congress did this when it reestablished a "marriage penalty" tax and, in effect, penalized two-wage earner couples.[4] This penalty effect results from the revised tax schedules that provide higher tax rates for married individuals filing separate or joint returns than for single taxpayers. A 1986 analysis of the tax reform proposal found

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[1] U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HALF OF MOTHERS WITH CHILDREN UNDER 3 NOW IN LABOR FORCE 8, table 5 (Aug. 20, 1982).

[2] *Id.*

[3] *Id.*

[4] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

that a marriage penalty exists when one earner earns between 15 and 50% of the couple's combined income. Further, the more equal both incomes are, the greater the penalty.[5] In 1987, economist Harvey Rosen of Princeton University estimated that under the Tax Reform Act of 1986, about 40% of United States families will pay a "marriage penalty" averaging $1100 and that lower-income couples with children will be among the hardest hit.[6]

This "marriage penalty" in the tax code is an example of the federal government taking an inappropriate role in family life, because it effectively favors one type of family over another. One of the essential ingredients of good family policy in this day and age is the recognition of family diversity. We should not be rewarding one type of family structure while penalizing another. We should not be pitting families against each other.

A more appropriate role for government is to strengthen families, without regard to how they are structured. Through its policies, government should ensure the financial, emotional, and material well-being that eludes too many American families. The family and medical leave issue is a good example of how policymakers can determine and then translate this more appropriate role in family life into real policies and programs. Congress has approached this issue by attempting to set uniform federal standards for an unpaid, job-guaranteed leave for workers to care for a newborn, newly adopted, or seriously ill child or seriously ill parent. For the remainder of this Article, I will concentrate on a closer examination of the congressional debate surrounding family and medical leave.

II. Parental Leave

For the first time in our history, the majority of American women in their childbearing years are also working outside the home. Nearly 74% of women in the labor force are of childbearing age, and about 88% of those age eighteen to thirty-four expect to become pregnant at some point during their lives.[7] Currently, about 50% of mothers with children under the age of

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[5] O'Neill & Ostrowski, *Tax Reform Proposals and the Marriage Penalty*, Tax Notes, June 9, 1986, at 1017–23.

[6] Rosen, *The Marriage Tax Isn't Dead Yet*, N.Y. Times, Aug. 13, 1987, at 31, col. 2.

[7] U.S. Bureau of the Census, Current Population Report Series P-20, No. 406, Fertility of American Women: June 1985 4 (1986).

one are in the labor force (most work full-time), and about 63% of new mothers plan to return to work within six months after giving birth.[8]

With so many women working outside the home, the decision to start a family or to have another child is no longer simply a private decision between husband and wife; it also involves their employers. An expectant mother must consider whether she can take leave from work to have her baby; whether the leave will be paid; whether she will continue to receive health insurance; and most importantly, whether there will be a job for her when she is ready to go back to work.

These concerns are very real to many working women because job protection is not guaranteed to many employees who need temporary leave to care for a newborn or newly adopted child or to care for a sick parent. In the United States, we depend on employers to voluntarily provide parental and sick leave benefits, yet it is estimated that only about 40% of employed women receive maternity leave with partial pay and a job guarantee.[9] The percentage of mothers in the work force is steadily increasing. For example, while in 1950 only 12% of all women with children under six worked outside the home, today 57% do.[10] As the number of mothers in the labor force increases, so does the need for flexibility in caregiving.

Both government and private industry have been slow to respond to this need. In fact, the United States is the only industrialized nation other than South Africa to *not* have a national maternity leave policy.[11] The United States has a long history of non-commitment to child care. For example, during World War II, after many men left their regular employment for the military, the work force was composed of an increasing number of women. Under the direction of Frances Perkins, then Franklin Roosevelt's Secretary of Labor and the first woman Cabinet official, the Women's Bureau issued guidelines calling for job-protected leaves for pregnant women. Noting that "some women who are pregnant or who have young children may find

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[8] MARKET COMPILATION AND RESEARCH BUREAU, SURVEY RESULTS: HOUSEHOLDS WITH NEW BABIES 2 (1986).

[9] S. KAMERMAN, A. KAHN & P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 139 (1983).

[10] SECRETARY'S TASK FORCE, U.S. DEP'T OF LAB., CHILD CARE, A WORKFORCE ISSUE 143 (1988).

[11] *See* Note, *Parental Leave: An Investment in Our Children*, 26 J. FAM. L. 579, 589–98 (1987–1988).

it necessary to work,"[12] the Bureau made some enlightened recommendations. The recommendations included a limited workday, rest periods, six weeks of prenatal leave, and two months of postnatal leave. Although the Bureau's suggestions were revolutionary in spirit, very little was accomplished; the federal government failed to make a commitment.

Two decades later, the federal government again turned its attention to pregnant women. In 1963, President Kennedy's Commission on the Status of Women set up two task forces to look specifically at the problem of maternity benefits for working women. The Commission recommended that employers, unions, and the government explore means of providing paid maternity leave or comparable insurance benefits for women to cover at least six months and to ensure that reemployment would not be forfeited.[13] But again the recommendations did not find their way into legislation and were forgotten.

Finally, in 1964, Congress passed the Civil Rights Act prohibiting discrimination on the basis of race, religion, national origin, or sex. The law was as significant a turning point for women as it was for blacks and other minorities. The word "sex" was added as a last-minute ploy by one Southern conservative to kill the civil rights bill altogether.[14] However, once it was included, Members fought hard to keep protection for women in the Civil Rights Act. Proponents believed that, among other benefits, the law would extend protection to pregnant workers. Unfortunately, it didn't. The Equal Employment Opportunity Commission (EEOC), charged with implementation, flip-flopped on the issue of whether pregnancy fell within the reach of the law. At first the Commission determined that pregnancy did not, and then, in 1972, it reversed itself, telling employers to treat pregnancy as they did other disabilities.[15] The confusion found its way into the courts. While the debate was going on, women were forced to take maternity leave, were fired, *and* were denied disability and maternity benefits.

The Supreme Court responded in 1976. It was then that the Court agreed to hear the case of *General Electric Co. v. Gil-*

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[12] U.S. DEP'T OF LABOR, WOMEN'S BUREAU, STANDARDS FOR MATERNITY CARE AND EMPLOYMENT OF MOTHERS IN INDUSTRY 2 (1942).

[13] S. KAMERMAN, J. KAHN & P. KINGSTON, *supra* note 9, at 36.

[14] *Id.* at 39.

[15] *Id.* at 39–41.

bert,[16] to decide whether General Electric (GE) had discriminated against its female employees by excluding pregnancy from coverage under its disability plan. The Court's decision in this case would determine the standard for the entire country. Surprisingly, the Supreme Court reversed the decisions of seven federal appeals courts and numerous lower federal courts throughout the country by concluding that discrimination against pregnant women did not constitute sex discrimination. It held that pregnancy was not a sex-related condition![17]

The decision sent shock waves throughout the country. It seemed incredible that the highest court in the land could rule that to treat pregnancy-related disabilities differently from other temporary disabilities was not sex discrimination. I believed, as did many of my colleagues in the House and Senate, that the Court had ignored the intent of Congress in its interpretation of the Civil Rights Act. We were outraged. The Court's reasoning was that no pregnant *person* would be covered—pregnancy as a condition was the issue, not gender.[18] Through some convoluted logic, the Court convinced itself it was being absolutely evenhanded. After all, if men got pregnant, they too would be denied these benefits. To make matters worse, part of the Court's logic rested on the premise that pregnancy was a "voluntary" condition and therefore did not have to be included in a disability benefit package.[19] The Court relied on this theory even though GE's disability plan covered many voluntary conditions such as sports injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and vasectomies. The only "voluntary" activity not covered was procreation.

The Court's decision stirred Congress to action. On March 15, 1977, I joined with eighty-one of my colleagues to introduce the Pregnancy Discrimination Act[20] (PDA) to amend the Civil Rights Act of 1964 so that it would specifically include pregnancy. Over forty women's organizations, civil rights groups, and labor unions formed the Campaign to End Discrimination Against Pregnant Workers. In 1978 the PDA became law, and

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[16] 429 U.S. 125 (1976).
[17] *Id.* at 136.
[18] *Id.*
[19] *Id.* at 136.
[20] Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1982)).

pregnancy had to be treated like any other temporary disability. However, the law did not direct employers to reinstate women in their jobs after they recovered from childbirth, nor did it provide them with disability benefits other than those provided to other employees.

Several years after passing the PDA, we began to address the problem of job security. Early in 1984, I met with the leaders of several women's organizations to discuss the possibility of introducing legislation to guarantee that women could reclaim their jobs after pregnancy. Introducing a maternity-leave-only bill was not the best solution, however, because it did not recognize that *fathers* were also parents. Nor did it acknowledge that employees other than pregnant women often risked losing their jobs when they were temporarily unable to work because of a serious medical condition.

In 1984 and 1985, a task force headed by Georgetown law professors Wendy Williams and Sue Ross and staff attorney Donna Lenhoff from the Women's Legal Defense Fund met with my staff and drafted a bill based on the PDA. Under what became called the Family and Medical Leave Bill,[21] employees could take up to eighteen weeks of unpaid, job-protected leave to care for a newborn, newly adopted, or seriously ill child. Disability leave of up to twenty-six weeks was provided to employees if they were unable to work because of a temporary serious medical condition, including pregnancy.

While we were working on this issue, child development and social policy experts Edward Zigler, Sheila Kamerman, Alfred Kahn, and T. Berry Brazelton, among others, established an advisory panel to recommend a national policy for infant care leave.[22] The panel endorsed a policy calling for six months of infant care leave for all employees, three of which, they suggested, should be paid.

In the fall of 1985, Congress held hearings on the issue of parental leave.[23] It was the individual testimony from people who had lost their jobs that had the most dramatic impact on

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[21] H.R. 2020, 99th Cong., 1st Sess., 131 CONG. REC. H1940 (daily ed. April 4, 1985).

[22] For background on this advisory panel, see THE PARENTAL LEAVE CRISIS xiii (E. Zigler & M. Frank eds. 1988).

[23] *Parental and Disability Leave: Joint Hearings Before the Subcommittee on Civil Service and the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service and the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 99th Cong., 1st Sess. (1985).

the congressional committee. We heard from a woman who had been promised a six-week job-protected leave, only to find she had been fired when she tried to make arrangements to return to work; a prospective adoptive parent who waited a year and a half to adopt a baby and then had to give it up because the maternity leave benefit provided by the city she worked for was available only to birth mothers; and, most tellingly, from a male mine worker who told us that miners were losing their jobs because they had missed too many days of work as a result of having to travel long distances to find proper care for children of theirs who were sick with cancer. What all of these accounts made evident was that employers were not providing reasonable leaves and job security to employees who chose to become parents.

It should be noted that some companies, like U.S. West, Eastman Kodak, and Merck, have led the way by implementing model parental leave programs.[24] There are now more employers who offer unpaid leave than ever before. Unfortunately, the success of individual employers has not translated into widespread support—in fact, quite the opposite. Some activists have ardently opposed family leave. For example, the Chamber of Commerce and the National Association of Manufacturers joined forces with the National Federation for Independent Businesses and a coalition of trade associations to try to defeat my bill. Their primary reason for the fight, they said, was philosophical. They claimed that the federal government should not "mandate" benefits; employers should have complete autonomy to decide matters such as when to grant leaves of absence and to whom. In numerous meetings and hearings, business representatives explained that they weren't against the concept of parental leave, rather they were unanimously opposed to the creation of an employee's right to such leave. Some argued that employees should have the "freedom" to negotiate for this benefit or to choose another.

This argument is not new. Employers have long argued that employees should have the "freedom" to negotiate with their

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[24] For example, Eastman Kodak adopted a policy, modeled after the Family and Medical Leave Act, that provided its 80,000 United States employees up to four months unpaid leave for the birth or adoption of a child, or for the serious illness of a family member. The program extends health and life insurance through those four months.

employers for health and safety protection in the workplace.[25] However, the Supreme Court long ago established the authority of Congress to set minimum labor standards for health and safety.[26] These minimum standards have been deemed *necessary*, not as "benefits" per se, but as standards that cannot be negotiated away.

Representatives of business have in the past also opposed child labor legislation, minimum wage and maximum hours laws, and equal pay provisions. However, after passing such legislation, we have learned that such regulations not only work, but are practical. If all employers have to follow the same rules, then offering an unpaid leave will not put any employer at a competitive disadvantage. Today, with employers picking and choosing what standards to apply, those employers who voluntarily follow standards favoring workers are less able to compete.

None of these issues is simple. I know that it can be quite difficult for a small business or office to operate without replacing even one employee who is out on leave, a point that opponents to parental leave legislation emphasize. In some situations, where a business is operating on a small margin of profit, the temporary loss of a skilled employee can have extreme repercussions. However, at the same time, there are repercussions in the lives of employees who feel they must weigh the desirability of having children against job security. Obviously, both sides have to make accommodations. While the issues are complex, many other countries have successfully dealt with them—and not by leaving parental leave up the whims of individual employers.[27]

It is imperative for federal legislation to lead the way to a comprehensive, uniform national parental leave policy. In advocating a national family policy, I am in no way suggesting that states' rights be preempted. Laws that affect family life have been, and should remain, the primary responsibility of the

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[25] *See* Lochner v. New York, 198 U.S. 45 (1905). In *Lochner* the Supreme Court struck down regulations governing bakers' working conditions because the regulations were deemed to interfere with freedom of contract principles. This case characterized an era of judicial scrutiny of congressional regulatory schemes in which courts formally endorsed the notion that employers and their employees should be left alone to bargain for wages, benefits, and on-the-job protections. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-3, at 567–70 (1988).

[26] *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upheld minimum wage law for women, finding valid state interest in protecting the health of women).

[27] *See* M.A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 53–54 (1987).

states. However, a state-by-state approach by itself would result in disparities among states and uneven coverage for families across the country. Also, as in the case of child support, disparate state regulations allow people to move around and shop for ways to evade local regulations they don't like. The federal government should be providing minimum guidelines and financial support to help states implement their own laws.

In the 100th Congress, a compromise version of the Family and Medical Leave Act[28] emerged that addressed many of the business community's concerns. The bill exempted businesses with fewer than fifty employees; after three years it would lower the number to thirty-five. An employee would have to have worked for at least one year to become eligible. The length of the leave was reduced from eighteen weeks to ten over a two-year period. Under the modified bill, an employee also could take time off to care for a seriously ill parent, however, medical leave was reduced from twenty-six to fifteen weeks in a one-year period. Finally, the bill guaranteed that employees taking either family or medical leave would have the right to return to the same position or a similar one, and that their seniority, pension rights, and health care coverage would be maintained.

This version of the Family and Medical Leave Act has been reintroduced in the 101st Congress.[29] Support for the legislation continues to grow. A recent poll found that 79% of American voters support parental leave legislation.[30] That is, they support *government* involvement in this issue, because they recognize the failure of individual employers to implement parental leave policies. Nevertheless, even with this popular support, the same business groups who lobbied to defeat the Senate and House bills in the last session will pose tough opposition again. Yet, proponents of family leave remain determined to fight for a policy that helps families balance the competing demands of work and family. Federal legislation is necessary to ensure that leave benefits are extended to all people; we can no longer depend on a voluntary system that denies protection to many working parents.

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[28] Family and Medical Leave Act of 1987, S. 2488, H.R. 925, 100th Cong., 1st Sess. (1987).

[29] Family and Medical Leave Act of 1989, S. 345, H.R. 770, 101st Cong., 1st Sess. (1989).

[30] MARTTILA & KILEY, INC., A SURVEY OF AMERICAN VOTER ATTITUDES CONCERNING CHILD CARE SERVICES (1988).

III. Conclusion

The changes in our country's demographics, family life, and economy make it imperative that our federal government provide leadership in family policy. A national family policy should have three basic goals: to acknowledge the rich diversity of American families; to protect the family's economic well-being; and to provide families with flexible ways to meet their economic and social needs. Government policy cannot be based upon a static definition of the family. It must take into account that Americans live in a variety of family structures throughout their lives. Two-parent families, single-parent families, blended families, extended families, and empty-nest families—all come with particular stresses and needs. An understanding of this diversity is essential if we are to avoid creating government policy that penalizes families that don't fit a particular mold.

There are several changes that the federal government must make in order to meet the needs of today's families. These include a more equitable treatment of diverse families in the tax code; the provision of family and medical leave; affordable child care; minimum health care coverage; retirement security; and a right to decide whether, when, and how to have a family. Government action is not the prescription for all of America's family ills. However, a government that plays little or no role in family policy is as bad as one that overcommits or overregulates. If the federal government recognizes its obligation to families and deals with these issues, it can improve the functioning of American families and can brighten the outlook for our country's future.

ENVISIONING WORK AND FAMILY: A CRITICAL PERSPECTIVE ON INTERNATIONAL MODELS

NANCY E. DOWD*

Work-family conflict is a subject of social policy that the United States has only begun to address. In developing policies to resolve the tension between work and family, it is critical to understand the nature of the conflict. It is equally if not more important how we envision the work-family relationship. Our vision affects how we speak about work and family, and how we determine the direction and shape of public policy.[1]

In defining our vision of work and family, it is natural and sensible to look to the experiences of other countries.[2] The

* Associate Professor of Law, Suffolk University Law School. A.B. University of Illinois, 1971; M.A. University of Connecticut, 1973; J.D. Loyola University of Chicago School of Law, 1981.

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[1] The impact of the ultimate vision on the shape of policy is illustrated by the struggles over the images of racial justice in civil rights policy. *See generally* Bell, *Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) (discussing the power of myth in civil rights law); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (examining the impact of the "perpetrator perspective" on civil rights law).

Another example of the importance of the vision underlying policy is the shifting vision of parenting and family reflected in child custody law. *See generally* Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (discussing the shift to shared parenting image and advocating a primary parenting rule); Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988) (arguing for reorientation of custody law to responsibilty and connection); 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 (1984) (discussing law's adherence to nuclear family and property-oriented notion of parenting).

[2] For a recent overview of the wealth of work-family policies in other countries that focuses on maternity and parental leave policies, see Note, *Parental Leave: An Investment in Our Children*, 26 J. FAM. L. 579, 589–98 (1987-1988). *See generally* BUREAU OF NAT'L AFFAIRS, WORK & FAMILY: A CHANGING DYNAMIC (1986); ECONOMIC POLICY COUNCIL OF UNA-USA, WORK AND FAMILY IN THE UNITED STATES: A POLICY INITIATIVE 60–63, 123–24 (1985) [hereinafter WORK & FAMILY IN THE U.S.]; S. KAMERMAN, MATERNITY AND PARENTAL BENEFITS AND LEAVES: AN INTERNATIONAL REVIEW (1980) [hereinafter INT'L REVIEW]; S. KAMERMAN & A. KAHN, CHILD CARE, FAMILY BENEFITS, AND WORKING PARENTS: A STUDY IN COMPARATIVE POLICY (1981) [hereinafter COMPARATIVE POLICY]; FAMILY POLICY: GOVERNMENT AND FAMILIES IN

United States is virtually the last industrialized country to address work-family policy and lags behind the policies of numerous third world countries as well.[3] The policies and institutional structures adopted by other countries provide a rich source of models and data that reflect different visions of the ideal work-family relationship and illustrate the assumptions and consequences of particular policy choices. A comparative analysis allows us to examine work-family policy from different vantage points and escape the constraints of our particular context.

It is essential, however, that we view this comparative data critically. There is as much to be learned from what has *not* changed as from descriptions of comprehensive policies and generous benefits. It is important to ask who is making policy, who is included or excluded, and how the policies function from the perspectives of gender, race, and class. All of these factors are essential to understanding the nature of work-family conflict and determining the appropriate direction for American work-family policy.[4]

This Article takes a critical look at the work-family policies of two countries, Sweden and France. It presents an impressionistic view, based primarily on interviews with a broad range of individuals in both countries conducted during the summer of 1988, under a grant from the Fund for Labor Relations Studies.[5] Sweden and France were chosen because of their very

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FOURTEEN COUNTRIES (S. Kamerman & A. Kahn 1978) [hereinafter FAMILY POLICY]; WOMEN WORKERS IN FIFTEEN COUNTRIES (J. Farley ed. 1985); Y. ERGAS, CHILD CARE POLICIES IN COMPARATIVE PERSPECTIVE: AN INTRODUCTORY DISCUSSION, PAPER 10, LONE PARENTS: THE ECONOMIC CHALLENGE OF CHANGING FAMILY STRUCTURE (Org. for Econ. Cooperation & Dev. 1987).

[3] Note, *supra* note 2, at 590–92.

[4] *See* Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 111–21 (1989).

[5] The Fund for Labor Relations Studies provides support for independent scholarly work on labor and employment relations. I was fortunate to receive support from the Fund at the end of a research year devoted to examining work and family issues under a grant from the Rockefeller Foundation. During that year, I sensed that my thinking was limited because of the assumptions of the American context. I sought by this comparative research to get outside the American context and examine work-family issues from different perspectives. I was primarily interested in the vision of work and family that underlies the policies of these two countries, and secondarily interested in the content and functioning of the policies themselves. Over the course of two months I interviewed slightly over seventy individuals, primarily drawn from government, academia and unions. I also conducted several interviews in other countries, including Norway, Denmark, Netherlands, and the United Kingdom, with work-family policy experts. The group interviewed reflects the broad range of people who have helped create, implement, and analyze policy. The interviews were open-ended, with no set

distinct family policies. The interviews reinforced this distinctiveness and revealed two very different underlying visions of work and family. While Swedish policy is articulated as a policy premised on the principle of equality, French policy is viewed as grounded on a woman-centered vision.[6]

This preliminary examination of work-family policy in these two countries indicated some heartening as well as some troubling patterns. The heartening trends included the extensive scope and integrated nature of work-family policies; the acceptance of social responsibility for, and the social valuing of, children; entitlement to familial support based upon a social compact, rather than upon a needs determination; and the active role of government in changing conceptions of parenting, particularly of fathering. The troubling indications included the persistence of the disadvantaged position of women in the labor market; the eclipse of race and class issues by the gender focus of these policies; the genesis of work-family policies in economic and demographic concerns; and the limited reach of even the most radical policies.

Neither country has resolved the conflict between work and family nor fundamentally changed the structure of the workplace. The policies represent some shift in the work paradigm but have not revised the masculine breadwinner model that lies at the base of the work structure. Despite improvements in the work-family support structure, there has been no significant development of an alternative vision of the relationship between work and family, or of the means to lessen the conflict between them. Policies have been ameliorative but not transformative.

This Article explores these mixed patterns and contends that they reflect the constraints and limitations of each country's underlying vision of the work-family relationship. Part I briefly summarizes the current American debate on work and family; Part II describes the work-family policies of Sweden and France. Part III outlines the perspective the experience of these

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series or progression of questions, but rather with a general focus on the vision underlying policy, assessment of that vision, and the actual functioning of policy.

Since this Article is primarily based on those interviews, it is necessarily impressionistic and exploratory and does not purport to be a comprehensive examination of the policies of those countries or of international models in general.

[6] *See infra* text accompanying notes 17–28 (Sweden) and 68–81 (France).

countries provides for the development of American work-family policy.

I. THE AMERICAN POLICY CONTEXT

Work and family issues have only recently emerged in the public sphere in the United States.[7] Parental leave legislation[8]

[7] Work-family issues only began to emerge in public policy debate in the last half of the 1980's and first became a national campaign issue in the 1988 presidential election. *See, e.g., Left and Right Fight for Custody of 'Family' Issue*, N.Y. Times, Aug. 20, 1987, at B12, col. 3; *Children Emerge as Issue for Democrats*, N.Y. Times, Sept. 27, 1987, at 36, col. 1; Safire, *Sleeper Issue for the '88 Campaign: Child Care*, N.Y. Times, Apr. 25, 1988, at A21, col. 1; *Congress Democrats Aim at G.O.P. By Pushing the Parental Leave Issue*, N.Y. Times, Sept. 18, 1988, at 36, col. 4. In the rush to enact important legislation prior to the November elections, Congress placed a parental leave bill in a small category of proposed legislation that was viewed as either too critical to avoid action (e.g., drug legislation), or as political hot potatoes that legislators could not risk voting against (e.g., Social Security legislation). Nevertheless, the bill was not enacted. *Day Care and Parental Leave Bills Die in Senate*, N.Y. Times, Oct. 8, 1988, at 7, col. 4.

At the state level, there has been greater experimentation with work-family legislation in this area, but still only in a handful of states. *See* Dowd, *supra* note 4, at 121–25.

The emergence of these issues may be due, in part, to attention generated by the U.S. Supreme Court's decision upholding California's guarantee of job-protected unpaid maternity leave. California Federal Savings & Loan v. Guerra, 479 U.S. 272 (1987). For an overview of maternity policies and the issues posed by *Cal. Fed.*, see Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699 (1986); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERK. WOMEN'S L.J. 1 (1985).

More broadly, the focus on these issues stems from social factors and demographic trends that have exacerbated work-family conflict. *See* Dowd, *supra* note 4, at 84–111.

[8] Family and Medical Leave Act of 1987, S. 2488, 100th Cong., 1st Sess., H.R. 925, 100th Cong., 1st Sess. (1987). *See also Family and Medical Leave Act of 1987: Hearings on H.R. 925 Before the Subcomm. on Labor-Management Relations and Subcomm. on Labor Standards of the Comm. on Education and Labor*, 100th Cong., 1st Sess. (1987); *Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits*, 99th Cong., 2nd Sess. (1986). *Parental and Disability Leave: Hearing on H.R. 2020 Before the Subcomm. on Civil Service and Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service, Jointly with Subcomm. on Labor-Management Relations and Subcomm. on Labor Standards of the Comm. on Education and Labor*, 99th Cong., 1st Sess. (1985). Although the scope of the proposed legislation extends beyond parenting leave to include care giving leave for seriously ill family members and disability leave for employees, the legislation is nevertheless commonly referred to as parenting leave legislation.

For an analysis of the legislation, see generally Lenhoff & Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 HARV. J. ON LEGIS. 403 (1989); *see also* Note, *supra* note 2; Delgado & Leskovac, *Review Essay, The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue*, 40 RUTGERS L. REV. 1031 (1988); Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1984–1985).

and child care proposals[9] have been the primary, and virtually the only, topics of public debate.[10] These two issues are rarely seen as elements of an integrated family policy, but rather have evolved as two separate policy initiatives. Thus, there has been little effort to calculate how child care needs would be affected by the structure or flexibility of leave policies, or how the unavailability of child care might undercut the work force stability that the leave policies are designed to ensure.[11]

The proposals addressing these two policy areas are extremely limited. No legislative proposal in either area provides for universal parental leave or child care.[12] Thus, many workers will continue to face the elemental choice between work and family, because leave and child care will remain unavailable or unaffordable. Furthermore, virtually all parental leave proposals and all presently enacted leave legislation provide job-protected leave *without* pay.[13] For many two parent families and for all single parents this reduces leave to a largely symbolic benefit. On the other hand, most child care legislation presumes that

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[9] *E.g.*, 1987 Act for Better Child Care Services, H.R. 3660, 100th Cong., 1st Sess., 133 CONG. REC. H10659; S. 1885, 100th Cong., 1st Sess., 133 CONG. REC. S1654-62 (the "ABC" bill); Child Care Services Improvement Act of 1988, S. 1679, 100 Cong., 2nd Sess., 134 CONG. REC. E3426 (the Hatch-Johnson bill). For analysis of the bills, see generally Liebman, *Evaluating Child Care Legislation: Program Structures and Political Consequences*, 26 HARV. J. ON LEGIS. 357 (1989). *See generally* Fisk, *Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees*, 2 BERK. WOMEN'S L.J. 89 (1986); J.P. FERNANDEZ, CHILD CARE AND CORPORATE PRODUCTIVITY, RESOLVING FAMILY/WORK CONFLICTS (1986).

[10] Elder care has been the other area that has received some attention, as is reflected in the care giving leave provisions of the proposed leave bills. *See* H.R. 925, 100th Cong., 1st Sess., § 103(a)(1)(C) (1987) (leave to provide care for seriously ill family member).

[11] Thus, for example, even the most generous leave policy will only defer, instead of resolve, work-family conflict if day care remains unavailable or only available at excessive cost when the leave period ends.

[12] For example, parental leave is limited to employees of businesses with 15 or more employees. H.R. 925 *supra* note 8, § (101)(4)(A)(i). A proposed alternative bill, H.R. 284, would extend coverage only to employees of businesses with 50 or more employees. *Debate on Parental Leave Bill Centers on Small Business Exemption, Panel Told*, 149 Daily Lab. Rep. (BNA) at A-13, A-14 (1988). Such a definition of coverage is estimated to exclude 44% of the workforce. *Id.* Even a 15-employee minimum, which was originally proposed, would exempt half of that number. *Id.* The ABC child care bill is designed to provide care for families most in need of care, defined as families earning up to 115% of median family income. H.R. 3660, *supra* note 9, § (3)(5)(b). The Hatch-Johnson bill similarly seeks to expand care through different means, but not to provide universal care. S. 1679, *supra* note 9, § 2.

[13] Even without pay, the economics of implementing leave have become a primary issue. *See* INST. FOR WOMEN'S POLICY RESEARCH, UNNECESSARY LOSSES: COSTS TO AMERICANS OF THE LACK OF FAMILY AND MEDICAL LEAVE (1988); Gen. Accounting Office, *Report on Cost of Parental Leave Bill HR 925, reprinted in* 217 Daily Lab. Rep. (BNA) at E-1 (Nov. 12, 1987).

cost is the only problem with the current structure of care. Therefore, while economic need is factored into most child care proposals, the quality of care often remains a negotiating point rather than a given.[14]

The narrow perspective of the current work-family debate is starkly evident when one looks at the range of policies adopted by other countries. More than one hundred countries, including virtually every industrialized nation, have instituted some elements of a work-family policy.[15] These policies encompass a range of measures including paid, job-protected maternity leave; universal health insurance; paid, job-protected disability leave; parental leave; family support in the form of tax benefits or family allowances; and nearly universal child care.[16] The experience of other countries such as Sweden and France, where there are already well-developed work-family policies, illustrates the variety of programs American policymakers could institute and the consequences that accompany particular policy choices.

II. SWEDEN AND FRANCE: TWO MODELS

Swedish and French work-family policies are remarkably similar in their basic components, while significantly different in their underlying visions of work and family. This part discusses each country's vision of work and family, its basic policy structure, and the consequences of particular policies.

A. *Sweden*

1. The Swedish Vision of Work and Family: The Equality Model

A vision of equality underlies Swedish work-family policy.[17] Equality is defined primarily in terms of gender; class equality

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[14] At best, quality of care becomes an issue in the context of determining the appropriate degree of child care provider regulation, but quality is not discussed as an accepted floor that must be supported by sufficient funding. *E.g.*, H.R. 3660, *supra* note 9, §§ 14, 18. On quality of care issues, see generally Zigler & Muenchow, *Infant Day Care and Infant Care Leaves, a Policy Vacuum*, AM. PSYCHOLOGIST 91, 92–93 (Jan. 1983).

[15] WORK & FAMILY IN THE U.S., *supra* note 2, at 64, 70.

[16] *See generally* COMPARATIVE POLICY, *supra* note 2; FAMILY POLICY, *supra* note 2; FAMILY & WORK: BRIDGING THE GAP (S.A. Hewitt, A.S. Illchman, & J.J. Sweeney ed. 1986) [hereinafter FAMILY & WORK].

[17] This is how the Swedes articulate the underlying vision. This Article does not use

is a secondary concern, or simply is presumed.[18] Gender equality means that men and women share the same opportunities and responsibilities for family and work. Each individual is expected to engage in paid market work and be self-supporting. Within the labor market, the equality vision requires not only equal pay for equal work, but also a roughly equal distribution of the sexes within occupations, within the power structure, and within particular companies.[19] In the family sphere, equality means a fifty-fifty division of all housework and child care tasks, as well as of time spent on family work.[20]

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the terms "equality" and "equality model" as descriptive terms, since the content of these labels is subject to considerable debate.

See generally on Swedish policy, Liljestrom, *Sweden*, in FAMILY POLICY, *supra* note 2, at 19; INT'L REVIEW, *supra* note 2, at 41–42; Ericsson, *Sweden*, in WOMEN WORKERS IN FIFTEEN COUNTRIES, *supra* note 2, at 38; Leijon, *The Origins, Progress, and Future of Swedish Family Policy*, in FAMILY & WORK, *supra* note 16, at 31; A. KAHN & S. KAMERMAN, DAYTIME CARE OF YOUNG CHILDREN IN SWEDEN, in NOT FOR THE POOR ALONE: EUROPEAN SOCIAL SERVICES 18 (1975); Poponoe, *Beyond the Nuclear Family: A Statistical Portrait of the Changing Family in Sweden*, 49 J. MARRIAGE & FAM. 173 (1987); Sidel, *What Is To Be Done?*, in WOMEN AND CHILDREN LAST, THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA (1986).

[18] This is opposite to the use of these terms in the Swedish language. In Swedish, *jamlikhet* and *jamstalldhet* both are translated as "equality," but *jamlikhet* is the broader term and would be understood to give class and income issues great importance, while *jamstalldhet* refers more specifically to gender equality. Letter from Karen Sandqvist, Department of Educational Research, Stockholm Institute of Education, to the author (Feb. 24, 1989) (on file with the author).

[19] This vision of labor market equity was expressed in law as a nondiscrimination statute long after it was adopted as the framework for affirmative public policy. The Act Concerning Equality Between Men and Women at Work, the statute most analogous to our Title VII of the 1964 Civil Rights Act, was enacted in 1980, when the Social Democrats were briefly out of power, and over the objections of the labor unions, who saw it as an intrusion on collective bargaining. Although theoretically more expansive than its American counterpart because it includes an affirmative action provision (Act Concerning Equality Between Men and Women at Work, section 6), the act nevertheless is rarely litigated and the affirmative action obligation has largely been delegated to the unions. Interview with Marianne Tejning, Legal Advisor, Swedish Ministry of Labour (June 7, 1988) (on file with the author).

In general, equality issues and work-family issues are included on the union agenda, but are not assigned top priority. Labor's top priority is co-determination, which is the right to union input on management enterprise decision-making. Interview with Jan Edling, LO (Swedish Trade Union Confederation) (June 9, 1988) (on file with the author); interview with Gosta Karlsson, TCO (Central Organization of Salaried Employees) (June 9, 1988) (on file with the author). The leadership structure is highly sex-segregated, even in unions dominated by, or with a substantial number of female members. Interview with Jan Edling, LO (Swedish Trade Union Confederation) (June 9, 1988) (on file with the author); interview with Gosta Karlsson, TCO (Central Organization of Salaried Employees) (June 9, 1988) (on file with the author). Sweden's work force is 80% unionized.

[20] Interview with Karen Sandqvist, Department of Educational Research, Stockholm Institute of Education (June 9, 1988) (on file with the author); interview with Gosta Karlsson, *supra* note 19. An alternative definition of equality in the family sphere would be an equal division of time spent on family work, but not an equal divison of qualitative tasks.

Gender neutrality is the hallmark of Swedish policy. While the equality vision does not dictate the absence or disappearance of gender, gender differences are largely ignored by the official equality vision. At the same time, an implicit focus on women lies beneath the facade of gender neutrality. The primary goal of Swedish work-family policy has been to promote labor market participation by women. Policies to promote equal familial responsibility emerged only as a necessary concomitant of women's labor market participation. Once it was recognized that a shift in gender roles was essential to permit women to enter the labor market, policy began to focus on male roles.[21] This resulted in government-led efforts to reshape public conceptions of fatherhood, especially to encourage fathers to become more involved in child care. To a lesser extent, men have been encouraged to assume equal responsibility for housework.[22] The reconception of male familial roles has not, however, led to a similar reconsideration of male labor market roles.

The Swedish model's focus on ensuring equal participation in the existing labor market structure reflects the fact that Swedish policy originated in labor market needs. Many of Sweden's policies arose in response to labor shortages in the 1960's and reflect a conscious decision to eschew other alternatives, such as immigration, in favor of tapping the pool of women who then remained at home outside the paid work force.[23] An additional

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[21] SWEDISH MINISTRY OF LABOUR, THE CHANGING ROLE OF THE MALE: SUMMARY OF A REPORT BY THE WORKING PARTY FOR THE ROLE OF THE MALE (1986). The government has not merely studied the male role, but also has been extraordinarily involved in changing public perceptions of the content of that role through public relations campaigns designed to encourage men to rethink masculinity to encompass involved, active parenting, including taking advantage of parenting leave, and also by requiring the public education system to promote equality and the rethinking of gender roles. How deeply the changes have permeated society is open to question. There is a remarkable similarity among Swedish and American young men in their vision of work and family and of gender roles. Interview with P. Intons-Peterson, Professor of Psychology, Indiana University (June 6, 1988) (on file with the author). *See also* P. INTONS-PETERSON, GENDER CONCEPTS OF SWEDISH AND AMERICAN YOUTH (1988).

[22] Interview with Karen Sandqvist, *supra* note 20; interview with Goran Lassbo, Goteborg University, Department of Education and Educational Research (June 14, 1988) (on file with the author).

[23] *See* COMPARATIVE POLICY, *supra* note 2, at 17; Leijon, *The Origins, Progress, and Future of Swedish Family Policy*, in FAMILY & WORK, *supra* note 16, at 31, 34; Liljestrom, *Sweden*, in FAMILY POLICY, *supra* note 2, at 32–34; SWEDISH INST., FACT SHEETS ON SWEDEN, EQUALITY BETWEEN MEN AND WOMEN IN SWEDEN 1 (May 1987).

Policymakers presumed that women at home were not working. The progression of policy reflects a backhanded recognition that in order to enable women to enter the labor market, one must replace women's "work" in the home. However, this recognition does not require acknowledgment of the place and value of *care*. *See* Bonnar, *Women*,

factor that contributed to the labor market focus, as well as the adoption of an equality vision, was Sweden's strong socialist tradition.[24] Class equality has been the ideological cornerstone of socialist policy—it followed that an equality model, with an economic/market stress, would be the basis for work-family policies.[25] Under that model, although gender equality was distinguished in name from class equality, it was assumed that the concept of equality was the same in the context of gender as in the context of class.

The labor market dynamic continues to affect Swedish policy. Unemployment in Sweden is very low, roughly two percent,[26] and there is substantial concern that Sweden will not be able to meet its future labor market needs. Because women now participate in the labor force at nearly the same rate as men (eighty percent), little can be gained from increasing the rate of labor market participation by women.[27] On the other hand, labor market participation patterns expose a pool of untapped labor, as nearly half of all working women are employed only part-time.[28]

2. Work-Family Policies: The Basic System

Swedish work-family policy[29] encompasses an expansive, well-integrated system that includes pregnancy benefits, family

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Work and Poverty: Exit from an Ancient Trap by the Redefinition of Work, in THE FUTURE OF WORK 67 (David & Ena Gil ed. 1987).

[24] The Social Democrats have held power for all but a six-year period during the postwar era. *See* KABLIK, POLITICAL LIFE IN SWEDEN No. 26, PREDICTING THE GREAT ONE (Dec. 1988).

[25] This emphasis in turn reflects the dominance of economic discourse and economic explanations in Marxist analysis, and the focus of Marxist analysis on the market sphere. It is also worth noting the difficulty that socialist feminists have experienced in reconciling feminism with Marxist theory or finding an analysis of women located within Marxist theory. Because they focused on the labor market, socialists viewed the family sphere as oppressive and repressive rather than as an institution or a sphere to support. This view obscured and ignored family work, caring work, and the relational importance of the non-market spheres of life. Interview with Tove Stang Dahl, Professor of Law, University of Oslo, (June 21, 1988) (on file with the author); *see also* Bonnar, *supra* note 23.

[26] SWEDISH INST., FACT SHEETS ON SWEDEN, SWEDISH LABOR MARKET POLICY 2 (June 1987).

[27] Ericsson, *Sweden*, in WOMEN WORKERS IN FIFTEEN COUNTRIES, *supra* note 2, at 138. There is only a 10-point participation differential compared with men. *Id.*

[28] *Id.* at 140. Virtually all part-time workers are women. Leijon, *supra* note 23, at 34.

[29] What is here called work-family policy is actually a combination of what Swedes label equality policy and family policy. These are viewed as two separate policies, although they sometimes overlap. Family policy extends beyond equality issues (equality being more a standard here than an incorporated policy) and includes health care, elder care, pensions, and so forth. It is part of the larger sphere of social welfare policy,

allowances, general social welfare policies, child care, and tax policy. The system reflects a public policy approach that places significant reliance on government structures and administration, while ensuring widespread access to the benefits provided by the support structure. Virtually all of these benefits, or some level of benefits, are available society-wide; few benefits are needs tested.[30]

Pregnancy benefits focus on the provision of comprehensive health services. These entitlements include prenatal, childbirth, and postnatal care and the right to transfer or leave two months prior to childbirth if the work environment poses a medical risk to the pregnancy.[31] Family allowances assist families in the expenses of child rearing. A basic child allowance is provided for all families, with an increased allowance for families with three or more children.[32] Support is also available for educational and housing expenses, although the latter is needs tested.[33]

The Swedish system provides two other significant allowances: caring allowances and parental insurance. These allowances provide time benefits as well as wage replacement. The caring allowance ensures income support for the caretaker parents of handicapped children.[34] Parental insurance guarantees income support for those who take leave to care for newborn, newly adopted, or sick children. At the birth or adoption of a child, parents are provided with 360 days of leave per child, with 270 days at ninety percent of pay and 90 days at a fixed, minimal benefit amount.[35] Since there is no separate maternity leave scheme the parental insurance scheme is intended to pro-

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which is far more expansive than our notion of it, but still reflects to some degree a separation of family and work. Equality policy is functionally equivalent to our equal opportunity policy, but with an almost exclusive focus on women. The separation of equality issues and family issues is significant: it seems to leave women out of family policy. *See, e.g.*, SWEDISH INST., *supra* note 23; SWEDISH INST., FACT SHEETS ON SWEDEN, SOCIAL INSURANCE IN SWEDEN (Sept. 1987).

[30] Leijon, *supra* note 23, at 32; interview with Soren Kindlund, Deputy Assistant Under-Secretary, Department of Children and Families, Swedish Ministry of Health & Social Affairs (June 10, 1988) (on file with the author). Needs tested benefits require a showing of economic necessity as a basis for social welfare benefits. The standard of "need" may range from an arbitrary poverty level to an arbitrary minimal standard of living.

[31] SWEDISH MINISTRY OF HEALTH & SOCIAL AFFAIRS, SUPPORT FOR YOUNG FAMILIES IN SWEDEN IN 1988 (May 2, 1988); Anders Agell, Professor of Law, Uppsala University, Information for Seminar at Harvard University, Family Law and Social Policy in Sweden: Welfare of Socialism? 2 (May 1988).

[32] SWEDISH MINISTRY OF HEALTH & SOCIAL AFFAIRS, *supra* note 31, at 1.

[33] *Id.* at 2, 3.

[34] *Id.* at 6.

[35] *Id.* at 5.

vide post-childbirth leave for the mother, as well as parenting leave for either the mother or the father. Both parents can be on leave for a limited period after the birth of a child, because the scheme guarantees fathers ten "daddy" days after the birth or adoption of a child.[36] Parental leave also is provided to enable parents to care for sick children, at the rate of sixty days per year; a limited amount of this time can be used for child-related absences, such as school consultations.[37] Finally, either or both parents are entitled to work part-time (defined as a six-hour day) until their child is eight years old.[38]

As do most industrialized countries, Sweden assures income maintenance in the event of unemployment or disability. In addition, there is a strong income maintenance structure for children in the circumstances either of divorce or extramarital birth. It has long been Swedish policy to require men to support their biological children, and there is a very high rate of acknowledged paternity (ninety-nine percent).[39] Child support allowances are available where necessary to replace or supplement support in the event that the non-custodial parent is unable or unwilling to pay adequate support.[40] Under current policy, the government assumes responsibility for obtaining support. If support is insufficient, the government provides a supplemental family allowance to ensure a minimally decent standard of living.[41]

Sweden also boasts an extensive child care system.[42] In the most recent election, the victorious Social Democrats pledged

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[36] R. REIMER, WORK AND FAMILY LIFE IN SWEDEN 2 (Social Change in Sweden No. 34, Apr. 1986). On fathers' use of leave time and general family role, see L. HAAS, FATHERS' PARTICIPATION IN PARENTAL LEAVE (Social Change in Sweden No. 37, Nov. 1987); Sandqvist, Swedish Fathers—On the Road to Equality (May 1988) (unpublished manuscript) (on file with the author); Sandqvist, *Swedish Family Policy and Attempt to Change Paternal Roles*, in REASSESSING FATHERHOOD (C. Lewis & M. O'Brien ed. 1987); Pleck, *Fathers and Infant Care Leave*, in INFANT CARE LEAVE (E. Zigler & M. Frank ed., forthcoming Yale Univ. Press); Lamb & Levine, *The Swedish Parental Insurance Policy: An Experiment in Social Engineering*, in FATHERHOOD AND FAMILY POLICY 39–51 (M.E. Lamb & A. Sagi ed. 1983).

[37] SWEDISH MINISTRY OF HEALTH & SOCIAL AFFAIRS, *supra* note 31, at 5.

[38] R. REIMER, *supra* note 36, at 3.

[39] Anders Agell, *supra* note 31, at 1.

[40] SWEDISH MINISTRY OF HEALTH & SOCIAL AFFAIRS, *supra* note 31.

[41] Interview with Karen Sandqvist, *supra* note 20.

[42] *See generally* A. KAHN & S. KAMERMAN, *supra* note 17, at 18–50; SWEDISH INST., FACT SHEETS ON SWEDEN, Child Care in Sweden (Apr. 1987).

There is no debate that the quality of care provided by this system is uniformly high. Interviewees expressed disbelief that quality would be an issue (as it seems to be in the United States). In the 1988 Swedish elections, there was discussion of a proposal by the center/conservative parties to pay mothers (officially parents, but everyone spoke

to achieve a universal system with a place for every child by 1991.[43] Financed primarily by general taxes, the system is administered by municipal authorities according to central standards.[44] It provides day care in a variety of settings for children between eighteen months and twelve years of age.[45] The system is structured to provide care after the period of parental leave, and therefore assumes that leave will be fully utilized.

Another distinctive component of Swedish work-family policy is the tax system, which is universally viewed as having a critical impact on family earning structures and patterns of labor market participation. Swedish tax policy has shifted from a family based system to an individually based system, in accord with the philosophy that each adult should be self-sufficient rather than dependent on others.[46] Since each individual is taxed separately, families benefit from more earners to a far greater degree than under the prior system, which lumped together family earnings. Under the old system, additional income, if viewed as "added" to existing income, was taxed beginning at the highest marginal rate applicable to the initial or primary wage earner. Under the current, individual system, which taxes each earner separately, a family may be better off with two moderate incomes than with

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of the proposal as though it were targeted at mothers) to stay home to care for their children. This was presented as an issue of *choice*, not as an issue of *quality*—there was no claim that mothers give better care. Indeed, several people said that children who were kept out of day care would probably be disadvantaged. Several reasons were cited: because most children are enrolled in day care, those who remained at home with their mothers would have few children in the neighborhood to play with; socialization skills are learned better in day care; and studies show good quality care is beneficial. Interview with Lars Gunnarsson, Assistant Professor, Department of Education and Educational Research, Goteborg University (June 16, 1988) (on file with the author).

[43] This proposal is connected to proposals to extend parental insurance to 18 months at the 90% rate. In essence, then, this envisions parental care or individual arrangements until a child is 18 months old, and then day care.

[44] SWEDISH INST., *supra* note 42 at 1. Child care costs are shared among the state, the local community, and the family. The family pays roughly 10% of child care costs, but that can vary by municipality. Gustafsson & Stafford, Daycare Subsidies and Labor Supply in Sweden 15, 17, 19 (Preliminary draft, 1988) (on file with the author).

[45] *Id.* It is important to note the limitations on the services provided. Day care is primarily preschool care. It is essentially unavailable before age two; it also is no longer provided after ages 10 to 12. There is no widespread system of after school care for latch-key children. There are some activities, but not a formal care program.

Another noteworthy feature of the Swedish structure is the minimum five-week vacation period to which Swedes are entitled by law. This policy makes it possible for a child with two parents to be covered for all, or most, of the summer school vacation period by the parents' vacation entitlement. Interview with Eva Falkenberg & Elisabet Nasmen, Arbetslivcentrum (Center for Working Life) (June 8, 1988) (on file with the author).

[46] SWEDISH INST., FACT SHEETS ON SWEDEN, Taxes in Sweden 1 (Nov. 1987); R. REIMER, *supra* note 36, at 1.

an equivalent, single, high income. The consequence of this system has been to encourage women to enter the labor market, because families reap the full benefit of each additional income.[47] Sweden's high rate of taxation further encourages women to enter the labor market by making a second income a practical necessity for many two-parent families.[48]

A final significant feature of Sweden's work-family policy is its treatment of single parents. Under the equality vision's notion that all people should be responsible for themselves, every effort is made to ensure that single parents can function in the labor market. Not only are single parents entitled to the same benefits as other parents, but they also receive preferences for child care and housing, are guaranteed an additional family allowance, and qualify for special tax breaks.[49] These provisions reflect the Swedish government's commitment to providing all children with adequate family support, without regard to family form.[50]

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[47] Ericsson, *supra* note 27, at 139; Liljestrom, *supra* note 17, at 39.

[48] *Id.* The high tax rates in Sweden are universally a cause for concern, complaining, and discussion.

[49] Although there is no tax deduction for children, there is a deduction for child support. Anders Agell, *supra* note 31. Single parents also enjoy a tax reduction, as do childless couples with a non-working spouse. SWEDISH MINISTRY OF HEALTH & SOCIAL AFFAIRS, *supra* note 31, at 7.

The support of single parents, and non-stigmatization of them and their children, also intersects with sex education and birth control policies, as well as paternity/fatherhood responsibility policies. Unacknowledged paternity is virtually unheard of, and boys and men take as a given that they are at a minimum economically responsible to contribute to the support of their children, regardless of whether the child is conceived within or outside of marriage. Men are required to support their biological children, and if they are unable to do so, the state will provide the necessary support and pursue the support obligation on behalf of the mother. Interview with Karen Sandqvist, *supra* note 20; interview with Soren Kindlund, *supra* note 30.

[50] Interview with Soren Kindlund, *supra* note 30. There is a sufficient level of economic support, without stigma, which impacts on the independence and equality of women. *Id.* For an overview of the support provided to single mothers and comparison with the approach taken toward single mothers in the United States, see D.T. ELLWOOD, VALUING THE UNITED STATES INCOME SUPPORT SYSTEM FOR LONE MOTHERS, PAPER 11, LONE PARENTS: THE ECONOMIC CHALLENGE OF CHANGING FAMILY STRUCTURES (Org. for Econ. Cooperation & Dev. 1987).

The consequences and desirability of family support regardless of family form under the Swedish model has been criticized by one American commentator, who deplores the decline of the patriarchal nuclear family. Poponoe, *supra* note 17, at 174, 181. On the other hand, a leading Swedish sociologist who has examined the same data on family patterns finds that Swedish policy has fostered principles of both autonomy and community ("separate but close") in family structures and has strengthened "family circles" of connection, including the family circle of the patriarchal nuclear family form. Interview with Rita Liljestrom, Professor of Sociology, Department of Sociology, Goteborg University (June 13, 1988) (on file with the author).

3. Theory and Reality: The Consequences of Policy

Swedish work-family policy has had a tremendous impact. By its own terms, it has dramatically changed family and work patterns for both men and women. This is due, in part, to the strength and consistency of the equality vision that underlies Swedish policy, as well as to the policy's integrated structure. Each component of Swedish family policy is viewed as interrelated; proposed changes in the system are analyzed in view of their potential impact on the rest of the system.[51]

The highly integrated nature of the Swedish system is not without its drawbacks. It favors particular work-family patterns while discouraging individual choice.[52] For example, the lack of child care for children under age two virtually requires parents to take their alloted leaves, regardless of individual desires or workplace needs. At the same time, the value placed on labor market participation pressures all parents to work. Swedish work-family policies operate through a public, government-controlled and operated structure that regulates much of family life. The advantages of this bureaucracy include assurances of equality and a significant measure of material support for all. The disadvantages include the inequities created by applying single standards in an unequal world and a stifling effect on the development of alternative approaches.

Two especially remarkable substantive aspects of Swedish policy are its efforts to reshape traditional gender roles and its treatment of single parents. The government has deliberately engaged in public education to stimulate the rethinking of gender roles, particularly of male roles. While the shift in male roles is

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[51] For example, extension of the parental leave system to permit 18 months leave at the 90% wage replacement rate has been proposed as a means to lessen the pressure to develop child care slots, particularly for very young children. Proposals for a universal entitlement to a six-hour day are viewed in relation to the economic consequences to the family. Interview with Ase Liddeck, Principal Administrative Officer, Swedish Ministry of Labour (June 10, 1988) (on file with the author); interview with Jan Edling, *supra* note 19; interview with Marianne Tejning, *supra* note 19.

[52] For example, the long period of parental leave is connected to the unavailability of public day care for children under the age of one and the scarcity of care for children under age two. Other options are not prohibited; they are simply unavailable.

Sweden is also considering a policy of quotation for parental leave, whereby each parent would be apportioned a non-transferable leave right, instead of permitting parents to divide the leave among themselves as they wish. Arguably the measure would limit choice. How one looks at the issue of choice, however, depends on where one stands. For economic and socio-psychological reasons, the current system favors women's "choosing" to utilize more leave than men. Quotation might enhance "real" choice by undercutting the impact of economic and socio-psychological factors.

not solely the result of government policy, government policy nevertheless has had a marked impact on public consciousness.[53] Sweden's support of single parents is also significant. Supplemental family allowances, housing allowances, and priority in child care programs ensure single parents self-sufficiency and a minimum standard of living.

Here again, however, it is also important to point out the constraints on these policies. Despite significant efforts to reorient gender roles, reality lags behind changed perceptions. And while Swedish single parents, and particularly single mothers, do not, as a group, suffer the severe economic deprivation typical of American single parents, they nevertheless are supported within limits.[54] Those limits seem designed to encourage two-parent families by not making single-parent life too economically desirable. The limits also seem to be premised on the assumption that two-parent families are critical to child development, despite data indicating that socio-economic factors and family stability, rather than the number of parents, correlates most strongly with developmental consequences for children.[55]

More significant and more troubling than the mixed results of particular policy choices, however, is the striking gap between the equality vision and the actual position of women in Swedish society. Swedish work-family policy has made it possible, even essential, for women to enter the labor market, but it has not significantly changed their position *within* the labor market. Policies that have significantly reduced work-family conflict by making it easier to combine family and work have nevertheless failed to achieve substantial gender equality in the workplace.

Though women participate in the labor market to virtually the same extent as men,[56] nearly half of the female work force works

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[53] There remains, however, a disjunction between reality and the image of equality, particularly in the division of household work.

One other development that was noted in several interviews is the rise of "father's rights" groups, often formed to combat alleged gender bias in child custody proceedings. Interestingly, one researcher found that contrary to the assertion that men are denied child custody in most cases, men were awarded custody in 24% of all *disputed* custody cases in Sweden in 1985. Mothers were awarded custody in 44% of the *disputed* custody cases; the balance of cases led to joint custody or gave custody to foster parents. The general principle guiding custody determinations is the "best interests of the child" standard. Interview with Anneka Halen, Department of Sociology, Goteborg University (June 14, 1988) (on file with the author).

[54] The level of economic support permits single parents to achieve a moderate standard of living, but one substantially below that of dual-parent married or cohabitating couples. Interview with Soren Kindland, *supra* note 30.

[55] Interview with Goran Lassbo, *supra* note 22.

[56] *See supra* note 27.

only part-time. Of that half, a large proportion work three-quarters of full-time.[57] Job segregation by sex is even stronger in Sweden than it is in the United States, both between and within occupations.[58] Women are concentrated in fewer jobs, have penetrated male-dominated occupations to a lesser degree, and rarely advance to the middle or upper levels of job hierarchies, even within female-dominated occupations.[59] The picture is somewhat better in the public sector than in the private sector, but this is attributed, in part, to the dominance of "women's work" in that sector: much of what was formerly unpaid caregiving work is now provided by the public sector.[60]

Family benefit utilization patterns also remain characterized by stark gender differentials. Women primarily utilize parental leave, usually taking the full benefit to which they are entitled; men, on the other hand, generally take their "daddy days" at childbirth, but only about one-quarter take a month or two of leave when the child is between five and nine months old.[61] Blue-collar women are the most likely group of women to take the entire leave covered by parental insurance; their husbands

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[57] *See supra* note 28.

[58] Ericsson, *supra* note 27, at 140–41; Leijon, *supra* note 23, at 34–35; Liljestrom, *supra* note 17, at 36–37; interview with Agneta Dreber, Swedish Ministry of Public Administration (June 8, 1988) (sex segregation is one of the most critical remaining problems of sex discrimination) (on file with the author); interview with Ase Liddeck, *supra* note 51 (only four occupational groups have equal male-female level of 40%, out of 52 groups; sex segregation is a major focus of the government's five-year action plan for equality policy); interview with Marianne Tejning, *supra* note 19 (9% of women work in factories, compared with 38% of men; 60% of women are public sector employees). In certain sectors of the employment structure where women predominate, the combination of sex segregation and the disproportionate use of the part-time work option by women has caused a shift to a structure where only part-time work is available. Interview with Gunnila Furst, Department of Sociology, Goteborg University (June 14, 1988) (on file with the author).

For American sex segregation patterns, see Dowd, *The Metamorphosis of Comparable Worth*, 20 SUFFOLK U. L. REV. 835 (1986).

[59] Ericsson, *supra* note 27, at 140–41; Leijon, *supra* note 23, at 34–35; Liljestrom, *supra* note 17, at 36–37; interview with Agneta Dreber, Swedish Ministry of Public Administration (June 8, 1988) (on file with the author); interview with Ase Liddeck, *supra* note 51; interview with Marianne Tejning, *supra* note 19; interview with Gunnila Furst, *supra* note 58. Indeed, many of the people interviewed remarked on this latter factor—the lack of women at the top of power hierarchies, not only in the labor market, but also in unions and in political parties.

There is great interest in the process and replication of gender stratification. The lack of discussion of hierarchy or power structures may hamper progress toward equal status for women in the labor market, as does the strong equality model. There is a great willingness to ascribe to "choice" and consciousness what I would ascribe to discrimination, structure, and power.

[60] Ericsson, *supra* note 27, at 139.

[61] Interview with Eva Falkenberg & Elisabet Nasman, *supra* note 45; letter to author from Karen Sandqvişt, *supra* note 18.

are the men least likely to do so.[62] One interviewee attributed this phenomenon, at least in part, to the relative desirability of leave as compared with the material conditions of work in many women's blue-collar jobs.[63] Another attributed it to stronger "traditional" sex roles and family attitudes among blue-collar families.[64] The only type of benefit that both sexes utilize on a nearly equal basis, across class lines, is leave to take care of sick children.

Several interviewees claimed that discrimination against women had actually increased as a consequence of work-family policies, although the term "discrimination" was rarely used.[65] Employers apparently quite readily admit that they avoid hiring women of childbearing age, or give preference to hiring men over women, because women are more likely to take extended parental leaves and request part-time work.[66] Such employer conduct is not viewed as sex discrimination, however, but rather as employer resistance to gender-neutral family policies. The motivation for the employers' conduct is seen as related to family, not to gender, even though the consequences disproportionately affect women. It was pointed out that women could choose not to take parental leave and avoid these problems, while men who choose to utilize family policy benefits could be disadvantaged in the same manner as women.

The most ironic consequence of the equality model for women, however, has been its effect on women's consciousness and the attention paid to the status of women. As one woman put it, the consequence of providing comprehensive and generous work-family support has been to "cut off the head of the revolution."[67] The strength of the official embrace of the equality principle and the perception that women have gotten everything that they want (or certainly enough) has made it difficult to critique policy from the perspective of women. Few challenge

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[62] Interview with Jan Edling, *supra* note 19; interview with Soren Kindlund, *supra* note 30; interview with Edward Palmer, Head, Research and Analysis Division, National Swedish Social Insurance Board (June 8, 1988) (on file with the author).

[63] Interview with Gunnila Furst, Department of Sociology, Goteburg University (June 15, 1988) (on file with the author).

[64] Interview with Margareta Buck-Wiklund, Department of Social Work, Goteburg University (June 14, 1988) (on file with the author).

[65] Interview with Eva Falkenberg & Elisabet Nasman, *supra* note 45; interview with Gunnila Furst, *supra* note 58.

[66] Interview with Eva Falkenberg & Elisabet Nasman, *supra* note 45.

[67] Interview with Mona Eliasson, Center for Women Scholars & Research on Women, Uppsala University (June 6, 1988) (on file with the author).

or critique the equality model because such actions seem fraught with the danger of losing precious ground. Thus, the equality principle effectively limits improvements in the status of women while simultaneously silencing women's voices. To the extent that women's status is examined, analysis remains within the equality framework. There is little debate of other models or critique of the equality model itself.

In sum, Swedish work-family policy has engendered a complex system that has yielded mixed results. Despite significant progress toward the goal of equality, defined by Swedish policy as equal work and family opportunities and responsibilities for both sexes, significant obstacles remain. Most disappointing, frustrating, and problematic of these obstacles is the fact that women continue to occupy a disadvantaged status, despite the implicit focus on women that lies at the heart of this gender-neutral scheme.

B. *France*

1. The Vision of Work and Family: The Woman-Centered Model

In sharp contrast to the Swedish equality vision, the French vision of the work-family relationship is woman-focused and woman-centered.[68] More implicit than explicit, the focus on women was apparent in the way interviewees described and discussed policy; they immediately focused on women as the object of policy and used the language of choice to describe the primary principle and goal of policy. The French vision supports women in their roles as childbearers and mothers, and presumes that they have a unique caregiving role. This presumption is

[68] The French vision of work and family is neither as coherent nor as self-recognized or self-articulated as the Swedish vision. In other words, the French might not describe or name their policy as woman-focused, or woman-centered. But a focus on women nevertheless was an assumption that pervaded talk about French policy. Again, the use of this term is not evaluative, but rather reflects the self-image of the French. *See* discussion *infra* text accompanying note 118.

On French policy, see generally Michel, *France*, in WOMEN WORKERS IN FIFTEEN COUNTRIES, *supra* note 2, at 112; Questieaux & Fournier, *France*, in FAMILY POLICY, *supra* note 2, at 129; INT'L REVIEW, *supra* note 2, at 34; Baudelot, *Child Care in France*, in FAMILY & WORK, *supra* note 16, at 39–51; Thery, *'The Interest of the Child' and the Regulation of the Post-Divorce Family*, 14 INT'L J. SOC. LAW 341 (1986); M. DAVID, F. EUVRARD & K. STARZEK, WORKING MOTHERS, (Documents du Centre d'Etude des Revenus et des Couts, #75, 1985).

grounded in the firmly entrenched view that the sexes are different.[69] The vision implicitly recognizes that the existing workplace structure creates problems for women who wish to combine work and family, and attempts to accommodate and support women.

Choice is a primary value underlying the French vision and is nearly as strongly expressed as the Swedish commitment to equality. Choice, however, is limited to a range of generally accepted gender roles. Women are presumed to be the primary caregivers within the family who may choose to assume an additional workplace role. Men are presumed to be breadwinners and economic fathers. While legislation is usually drafted in gender-neutral terms, neutrality is by no means characteristic of the underlying vision of work and family.[70] Gender-neutral terminology appears to be a concession to the equality principle rather than a reflection of vigorous or enthusiastic support of that principle.

Equality is a part of this vision only in a formal sense.[71] Equality is limited to the notion that women have a right to operate in both the work and family spheres. Actual equality

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[69] That the sexes are different was often expressed as a given and as a positive attribute to be noticed and incorporated into policy. The French do not view differentiation as discrimination. Interview with Catherine LaBrusse, Professor of Law, University of Paris (July 4, 1988) (on file with the author). At the same time, questions regarding the role family policy should assign to men, or changes in men's roles, were met with disbelief, laughter, or a grimace of toleration. If these questions were responded to at all, it was most often with the view that male roles were private matters beyond the reach of public policy.

All of this raises complex issues of difference and dominance, themes which have been explored by French feminists and within the French women's movemement. *See generally* FRENCH CONNECTIONS: VOICES FROM THE WOMEN'S MOVEMENT IN FRANCE (Claire Duchen ed. & trans. 1987); NEW FRENCH FEMINISMS (E. Marks & I. de Courtivron ed. 1981); FRENCH FEMINIST THOUGHT: A READER (T. Moi ed. 1987).

[70] For example, while the parental leave legislation is gender-neutral in its basic provision of leave, it also requires that if the father requests leave, he must submit a letter from the mother stating that she does not intend to exercise her entitlement to leave. CENTRE DE DROIT DE LA FAMILLE, LE DROIT ET LES MERES DE FAMILLE 214 (1987). As one commentator noted, gender neutrality means helping women. Interview with Martine Levy, Delegation of Women's Affairs, French Ministry of Social Affairs (July 11, 1988) (on file with the author).

[71] The French equivalent of American federal employment discrimination law is the Equality Act of 1983, known as the "Roudy law" after the minister who pressed for its enactment. Michel, *supra* note 68, at 117–18. *See also* J. LOVENCLOSKI, WOMEN AND EUROPEAN POLITICS: CONTEMPORARY FEMINISM AND PUBLIC POLICY 270–71 (1986). As in Sweden, the law has been more a symbol than a source of active litigation. Interview with Martine Levy, *supra* note 70. Also, as in Sweden, the law neither originated with, nor has been strongly embraced by, unions. Interview with Mme. Hau-Richard (July 4, 1988) (on file with the author). *See supra* note 19. The French work force is approximately 15% unionized. J. ARDASH, FRANCE TODAY 99 (1987).

between the sexes, and revisions of gender roles to promote equality, are viewed as private matters that cannot, and should not, be determined by the state. Thus, the reform of gender roles is seen neither as a legitimate goal of policy nor as a permissible state function.

The French vision is both paternalistic, in its protective aspects, and patriarchal, in its support of traditional gender roles and power relations. The fundamental organization of work and the family is not questioned. The vision does not reflect a sensitivity to gender, or to power imbalances in gender relations. Rather, it reflects a sensitivity to women in their existing gender-determined roles that stems from a concern for the perpetuation of families. The right of women to enter and remain in the labor market is incidental to the primary objective of French policy: encouraging women to bear and raise children.

The French system's support of women is primarily viewed as a means of accomplishing demographic goals.[72] Such objectives date from the nineteenth century, when France adopted family support policies to counter a falling birthrate and the devastation to its population wrought by war. In the most fundamental sense, children are seen as essential to the perpetuation of society, therefore justifying social responsibility and support.[73] Far secondary to this demographic concern is a social welfare dynamic, whereby family policy is a means of ensuring all children a minimal level of opportunity and support regardless of class.[74]

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[72] Interview with M. Le Grave, Director-General, French Ministry of Social Security (June 28, 1988) (on file with the author); interview with Professor Catherine LaBrusse, *supra* note 69. It is not surprising that French work-family policy is not viewed as a system of policies at all, because the reason for its existence is not viewed as supporting the interrelation between work and family. Rather, policies that ease the tension between work and family are primarily seen as family policies or social welfare policies. Interview with M. Le Grave, Director-General, French Ministry of Social Security (June 28, 1988) (on file with the author); interview with Professor Catherine LaBrusse, *supra* note 69.

These policies have not been the focus of government policy toward women, which has emphasized advancing women's position in the labor market (but does not focus on the work-family connection). Michel, *supra* note 68, at 117–21; interview with Martine Levy, *supra* note 70; interview with Elaine Dutarte, Attorney (June 28, 1988) (on file with the author).

[73] This is not to denigrate the motives for French policy or to suggest that the sense of social responsibility which so marks the French system is not genuine. It is simply to note that this sense of social responsibility is inextricably intertwined with the demographic perspective that also marks French policy. The acute sense of interdependency fostered by demographic concerns manifests itself both in the frank admission of the economic and military population needs, as well as in an appreciation of the interconnectedness of the political and social community.

[74] Questineaux & Fournier, *supra* note 68, at 135; INT'L REVIEW, *supra* note 2, at 31; interview with Catherine LaBrusse, *supra* note 69.

The primary focus of French policy has been economic, to provide the means of support for large families.[75] Traditionally, male breadwinners were provided with generous family allowances so that their spouses could remain full-time housewives and mothers.[76] The shift to gender-neutral entitlements and support of female labor market roles has emerged more recently as part of a continued effort to encourage women to have children and raise larger families.[77] The family support system has been reformed in recognition of the value many women place on their work-related roles and to prevent labor market realities from deterring childbearing.

Labor market needs, therefore, have not influenced the shape of French work-family policy as they have in Sweden. To the contrary, France has been plagued by high unemployment.[78] As a result, employee rights advocates have focused on unemployment issues and away from work-family issues.[79] The labor market dynamic has also lent support to proposals to pay wages for caregiving work performed in the home as a means of reducing the number of individuals seeking work in the traditional paid labor market.[80] High unemployment and more general economic malaise has posed a further problem for French work-family policy by making it difficult to enact benefit increases.[81]

2. Work-Family Policies: The Basic System

The French system is as comprehensive as the Swedish system but remarkably different in several key respects. Like the Swedish system, the French system includes liberal maternity benefits, parental leave, and generous family allowances. The elements of French policy that most distinguish it from Swedish policy are its family allowance and child care systems.

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[75] G. Calot, The Demographic Situation in France (unpublished manuscript) (on file with the author); Questieaux & Fournier, *supra* note 68, at 119; INT'L REVIEW, *supra* note 2, at 30.

[76] Interview with M. Chenais, Institute for Demographic Research (June 29, 1988) (on file with the author).

[77] *Id.*

[78] Interview with M. Chenais, *supra* note 76.

[79] Interview with Laure Batut, Force Ouvriere (FO) (July 6, 1988) (on file with the author); interview with Paul Cadot & Ann Marie Sevrier, Confederation Francaise Democratique du Travail (CFDT) (July 19, 1988) (on file with the author).

[80] *Id.*

[81] *Id.* The level of support originally was sufficient to support a family but has slipped in relation to the cost of living since the immediate postwar era. Interview with M. Chenais, *supra* note 76; interview with Professor Catherine LaBrusse, *supra* note 69.

The French family allowance system provides a baseline of economic support to all families and supplemental needs-based support for those families who require it.[82] The allowances reflect the recognition that having and raising children inevitably increases family expenses, while time away from work, due to childbirth or childrearing, may reduce family income. Support levels originally were designed to provide sufficient wage replacement so that women could stay home and raise children. Although current allowances, now provided on a gender-neutral basis, have not kept pace with inflation, they nevertheless remain considerable.[83]

This system of generous allowances is significantly limited by its orientation to large families. While certain allowances are provided regardless of family size, others are available only to large families. Large families are defined as those with more than two children. As one official of the agency responsible for administering the allowance system noted, the third child is "*le petit prince*" in the allowance system.[84] Roughly one in five families falls within this definition, and approximately thirty-eight percent of all children are members of such families. Over fifty-four percent of the benefits paid out by the family allowance system are paid to these families.[85]

For the vast majority of families, however, family allowances are more limited. Their primary allowances are short-term benefits related to childbirth. These allowances account for nearly forty percent of the benefits paid out by the allowance system and serve approximately one-quarter of all families.[86] Most of

[82] *See generally* INT'L REVIEW, *supra* note 2; Questieaux & Fournier, *supra* note 68. The shortcoming of the general allowances, and to a lesser extent, of the needs-based allowances, is that they provide a uniform benefit for diverse families and treat the child separate from the family unit. Interview with Gerard Calot, Director, Institute for Demographic Research (June 29, 1988) (on file with the author).

[83] Interview with Evelyne Sullerot, Sociologist (June 29, 1988) (on file with the author). There is concern about the undermining of the value of the allowance due to inflation, and there is a correlated rise in suggestions that more of the allowances be shifted to a needs basis. Interview with Professor Catherine La Brusse, *supra* note 69. Sometimes, debate over the particular structure or distribution of benefits also was characterized as concern for the appropriate balance between individual responsibility and social support, but within a framework where significant social support is viewed as a given. *Id.*; interview with Jacques Commaille, director, Centre de Recherche Interdisciplinaire de Vaucresson (CRIV) (July 19, 1988) (on file with the author).

[84] Interview with Phillipe Steck, Caisse Nationale des Allocations Familiales (CNAF) (June 6, 1988) (on file with the author).

[85] *Id.*

[86] *Id.* These allowances constitute 38% of all expenditures, serve 26% of families, and 27% of children. There is some overlap in the families served by these allowances and the families served by large family allowances, because a large family could also be entitled to this type of allowance, which is oriented to children under age three. *Id.*

these benefits are essentially maternity allowances paid only to women. For each child, mothers are entitled to an allowance from the fourth month of pregnancy until the third month after childbirth, regardless of whether the mother is employed.[87] This allowance may be continued on a needs basis for a maximum of thirty-two months.[88] Mothers may use these allowances as they wish. These benefits need not be allotted to health care, since virtually all medical expenses connected with pregnancy and childbirth are covered by national health insurance.[89]

The French system also provides all families with an allowance for children from birth until age two or three.[90] This allowance is provided regardless of whether one or both parents are employed. The allowance is designed to partially defray the cost of out-of-home or in-home care for infants and young children.[91]

Time benefits provided under French policy include mandatory maternity leave and optional parental leave.[92] Maternity leave, which must be taken because employers are subject to a penalty if a pregnant woman works during the leave period, provides for a sixteen-week, job-protected leave (six weeks before and ten weeks after childbirth).[93] Parental leave, which may be taken for up to two years, guarantees job-protected, unpaid leave for the father or mother. However, the coverage of this benefit is limited. In order to qualify for leave, an employee must work for a business with more than one hundred employees and have been employed for a period of at least twelve months prior to the birth or adoption of a child.[94] The French system does not provide for sick child leave.[95]

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[87] *Id.* (*Allocation de jeunes enfants*).

[88] *Id.*

[89] Interview with Evelyne Sullerot, *supra* note 83.

[90] Interview with Phillippe Steck, *supra* note 85 (*allocation de gardes de l'enfant*). This is provided regardless of need until the child is age two, and will continue on a needs basis until age three. It is no longer necessary after that age because of the availability of *crêche* or *école maternelle*, *see infra* text accompanying notes 98–102.

[91] Interview with Evelyne Sullerot, *supra* note 83.

[92] Another time benefit is vacation time, which as in Sweden is quite extensive, averaging five weeks. Interview with Olga Baudelot, National Institute of Pedagogical Research (INRP) (July 5, 1988) (on file with the author).

[93] Michel, *supra* note 68, at 119; INT'L REVIEW, *supra* note 2, at 34.

[94] CENTER DE DROIT DE LA FAMILLE, *supra* note 70, at 212–16; Michel, *supra* note 68, at 120. Unpaid postnatal leave can be taken for up to one year, but it is unpaid and is not job-protected. Michel, *supra* note 68, at 119; CENTER DE DROIT DE LA FAMILLE, *supra* note 70, at 211.

[95] To the extent that it is provided, sick child leave is unilaterally provided or provided pursuant to a collective bargaining agreement. Interview with Evelyne Sullerot, *supra* note 83.

The French child care and preschool education system is characterized by its nearly universal availability, regardless of whether the parent or parents are in the paid work force. The availability of and access to care regardless of participation in the paid work force are characteristics that distinguish the French system from that of Sweden and most other countries.[96] This structure reflects the child care system's evolution as part of the educational system. Although originally designed to aid the children of working-class families, the child care system has become essential to middle-class working parents.[97]

The child care system is divided into two basic components: day care for children under age two or three (*crêche*), and preschool for children over age two or three until they enter school at age seven (*école maternelle*).[98] *Crêche* is administered by municipalities. It is largely locally funded, although parents are charged some fees to defray costs. To the extent day care shortages exist under the French system, they exist in *crêche* care, which is expensive and subject to local politics. Because of the shortage of available spaces, enrollment is often limited to the children of working mothers.[99]

École maternelle, on the other hand, which dates from the late nineteenth century, is virtually universally available. It is centrally funded and administered, and provided free of charge.[100] Nearly all children over the age of four are enrolled on a full- or part-time basis.[101] Some municipalities also provide supplemental care during lunchtime and after school.[102]

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[96] WORK & FAMILY IN THE U.S., *supra* note 2, at 123–24; *see generally* COMPARATIVE POLICY, *supra* note 2, at 21.

[97] Interview with Olga Baudelot, *supra* note 92. *See also* Baudelot, *supra* note 68. There is a long tradition of child rearing outside the home in all classes of French society. At the same time, a nineteenth century movement toward "normalizing" working class families encouraged mothers to care for their children, as opposed to sending them to the country, and provided some schooling for working class children. Thus, the system originated as a paternalistic policy to discipline and control the children of the poor. Interview with Olga Baudelot, *supra* note 92.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* A full day totals eight hours, with six hours of day care and a two-hour break in the middle of the day.

[102] An interesting feature of *école maternelle* is that during the week no care is provided on Wednesday, although care is provided on Saturday morning. The reason for this pattern is that one day, the "church day," was traditionally set aside for religious training. Private arrangements are made for that day, or, in many offices, there is a general absence of women workers on Wednesday. *Id.*

In France, as in Sweden, single parents are eligible for benefits in addition to the benefits available to all families.[103] Special benefits for single parents are a relatively recent addition to the French system and are limited primarily to additional allowances from the family allowance system. Less than ten percent of all family allowance benefits fall into this category of allowances.[104] These allowances enable single parents to remain home to care for young children. The system also provides an allowance designed to provide short-term aid to recently divorced single parents before their expected entry or reentry into the labor market.

Considering the important role played by the tax system in Swedish family policy, it is worthwhile to compare how the French treat families under their tax system. As a matter of policy, however, the tax structure is not viewed as a component of the family support structure. The French tax system counts each member of the family under a unit system: each parent is one unit; each child is one-half of an adult unit. The total number of units is calculated and then used to divide and deduct tax liability.[105] Under this system, the wages of working parents are added to a collective pot of family income. As a result, the rate at which a family's income is taxed may increase with gains in net income. No incentive to labor market participation exists comparable to that of the individually-based Swedish tax system.

3. The Consequences of Policy

Viewed from the perspective of its primary demographic goal, the French system has been only moderately successful. The

[103] Interview with Phillippe Steck, *supra* note 84 (*allocation pour parent isole*). The allowance is 4000 francs per month, intended to be at the level of the minimum wage salary. The availability of this allowance was noted to have some perverse effects. The availability of this source of income, particularly in the context of high unemployment, pushes women to discourage fathers from acknowledging their children, since the allowance is not paid if the child is acknowledged. Interview with Evelyne Sullerot, *supra* note 83. *See generally* J.C. RAY, LONE PARENTS: THE ECONOMIC CHALLENGE OF CHANGING FAMILY STRUCTURE, FEMALE API BENEFICIARIES AND EMPLOYMENT (Org. for Econ. Cooperation & Dev. 1987). As in Sweden, family form is usually not a determinant of benefits per se.

[104] Interview with Phillippe Steck, *supra* note 84. The precise figure is that these special benefits for single parents constitute seven percent of all allowances. In 1984, the family allowance system took on the task of collection of child support against the non-custodial parent, usually the father. *Id.*

[105] Interview with Gerard Calot, *supra* note 82.

declining birthrate has stabilized at 1.9–2.0 children per woman.[106] This may be due, in part, to the system's preoccupation with "*le petit prince*," the third child. Several interviewees pointed out that it is the first child that most dramatically affects the family, particularly because of the drastic impact this child commonly has on the mother's life. To the extent that this impact is viewed or experienced as a burden, women are discouraged from bearing more children. Indeed, the large family size favored by the family allowance system corresponds to a dramatic reduction in women's labor market participation rates. While women with fewer than three children remain in the labor market to a significant degree, there is a marked drop in participation for women with three or more children.[107]

The allowance system also presumes that the determination to have children and the decision to join the labor force are primarily economically motivated.[108] It presumes that families will only have children if they can afford them. Nevertheless, the most generous allowances are reserved for large families. Thus, the system does little to provide the vast majority of families with the very economic support it presumes is necessary. At the same time, the system overlooks other motivating factors, for work and for family, by relying on economic explanations.

Viewed from the perspective of women's status, the French pattern is somewhat different from the Swedish pattern. Most significantly, family roles and responsibilities have been left virtually untouched by French policies. There has been no reexamination of men's roles comparable to that which has occurred in Sweden. In the labor market, however, the position of French women is remarkably similar to the position of Swedish women. Women are paid less, on the whole, than men, are concentrated in a small number of occupations, and are at the bottom of the occupational and managerial hierarchies.[109] This pattern is especially intriguing given the significant differences in the patterns of labor market participation by Swedish and French women. While French women are less likely to participate in the labor force than Swedish women, most French women who

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[106] Interview with M. Chenais, *supra* note 76. *See also* Calot, *supra* note 75.

[107] Interview with M. Chenais, *supra* note 76.

[108] Interview with Mme. Michaud, director, CNDIF (Center for Information on Women's Rights) (July 4, 1988) (on file with the author).

[109] Michel, *supra* note 68, at 114.

are employed work full-time.[110] France has not experienced the same movement toward a predominantly part-time female labor force that has occurred in Sweden.

As has the Swedish system, the French system of work-family policies has had enormous impact on the experience of work and family, providing essential support to women and families. The long-time existence of work-family policies means that the system is viewed as a given and that benefits are largely politically sacrosanct. At the same time, the very consensus surrounding the system has discouraged the reexamination or analysis of the vision that informed its creation. The extraordinary features of French policy, such as the availability of significant economic supports and child care without requiring labor market participation, are accidental from the perspective of current work-family needs, although no less valuable for their origin in demographic purposes. Nevertheless, the origin of French policy imposes a significant constraint on the system's underlying vision and structure. The French system reflects a patriarchal, paternalistic vision, despite the more recent addition of gender-neutral terminology. The narrowness of this vision defines and constrains the reach of French policy to traditional gender roles.

III. Implications for American Policy

A. *Models for Change*

The implications of Swedish and French work-family policies for American policy are complex and paradoxical. The positive aspects of Swedish and French work-family policy are easy to identify. The sheer volume of benefits provided by both countries is impressive, whether compared with the virtual dearth of benefits in the United States or with the benefit levels of other countries with work-family policies. Both Sweden and France provide substantial support for some of the most essential work-family connections. Pregnancy and childbirth are supported with health care, maternity leave, and job protection. The initial phase of parenting, whether of a biological or adopted child, is supported with parental leave. Ongoing parental and family solidarity is supported with nearly universal, high quality child

[110] *Id.* at 116; interview with Evelyne Sullerot, *supra* note 83.

care; care giving and vacation leave; and tax and family allowance benefits. Benefit recipients are not stigmatized in either country, because both systems provide support for all families. Thus, each country's work-family policy gives all families a vested interest in the system, rather than dividing families by economic need.

The range of means by which support is provided is significant. Cash benefits are the most common means, providing direct economic assistance to defray family-related expenses or to replace income lost due to removal or absence from the paid work force for family-related reasons. In addition, Sweden has used its tax system to supplement direct cash benefits with indirect benefits designed to encourage family members to maintain their labor market participation. Time benefits, primarily in the form of various types of employment leave that are either necessary (such as maternity leave or sick child leave) or desirable (such as parental leave and vacation leave) are a less common but equally important form of family support. Both countries have provided structural support for families by developing extensive child care systems. The French system is particularly intriguing because of its linkage to the educational structure—access is not dependent on work force participation. Finally, Sweden's public education program to change the conception of men's roles demonstrates the critical role government can play in the social construction and consciousness of work and family.

While both countries employ diverse means of implementation, their policies are characterized by a high degree of integration. Though the structure of each country's policy has evolved over time, proposed reforms and additions are analyzed in relation to the system as a whole. Adjustment or change of one part of the structure is often accompanied by other reforms. This approach encourages policymakers to transcend conceptual as well as bureaucratic divisions.

The substance of both policies recognizes the necessity for some structural change in the work-family relationship. Affirmative policy-making has added benefits to the workplace structure that lessen the conflict between work and family demands and support the essential functions of family. Each system reaches beyond short-term crisis management to encompass long-term social welfare goals. While neither country's policies have entailed a fundamental restructuring of the workplace, they

have meant acceptance of the need for family support structures to supplement the basic workplace structure.[111] Notably absent from this affirmative structural change is an anti-discrimination dynamic. Policy has not been oriented toward the corrective removal of discriminatory barriers but rather has relied upon affirmative action to refashion the existing structure.

Finally, both Swedish and French policy are imbued with an underlying ethic of social welfare and social policy considerably different from the American perspective. Both countries accept an expansive concept of the welfare state and provide a level of social welfare services that far exceeds American social programs.[112] Within the context of this strong social welfare ethic, the Swedish and French view the care of children as a societal responsibility. The social valuing of children, and the high priority placed on children, are very strong undercurrents of policy. It is not that Americans care less about children than the French or Swedes; Americans simply tend to see care in individual and voluntary terms.

B. *The Vision of Work and Family*

Perhaps the most critical lesson American policymakers can learn from the experiences of Sweden and France is the important role the vision of work and family plays in the development of policy. The vision defines the dialogue and sets the framework of policy.[113] If the vision is limited, then so are the policies that derive from it. Moreover, once chosen, the vision seems difficult to change. Work-family images reflect very fundamental moral, political, and social values. A vision around which a consensus has built holds great power and is relatively unyielding.

The vision of work and family that underlies Swedish and French policy focuses almost exclusively on women. This primary gender axis is explicit in France's woman-focused policy; it is implicit in Sweden's gender-neutral policy. Both visions are structured around women's roles, women's responsibility for family, and the relationship between women's primary familial

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[111] *See infra* Part III(C).

[112] The wealth of benefits and the government's significant role fits within a conception of welfare policy far different from the American conception. This concept is so different that to use the term "welfare" to describe it conjures up a mistaken image, based on American views of stigmatizing, often inadequate, economic support.

[113] *See supra* text accompanying note 1.

roles and work. Men's roles are either hidden or seen only in relation to women's roles.

The singularity of the focus on women not only leaves men out, it also excludes other important considerations from policy, particularly considerations of race and class. Women and families are essentially viewed as undifferentiated categories. The impact of class variables, both in terms of the demands and structure of work environments and the difference in economic support, is largely ignored except at the edge of poverty. Only in extreme economic circumstances are different needs taken into account, and then only in a purely economic fashion.

This absence of attention to class inequities is a particularly surprising aspect of Swedish policy. It exists alongside a tradition of class equality that seems to more deeply conceal the inequities that remain. The Swedish day care system is an example of this phenomenon. The system's structure is designed to integrate children of all classes and provide them with the same opportunity for quality care and education. Nevertheless, that very structure, in its location and daily operation, is geared to professional, middle-class workers.[114] The lack of express attention to the particular needs of different classes, which seems tied to the implicit orientation of the equality vision to gender concerns, therefore helps to explain why the Swedish vision of work and family is limited to an unconscious reflection of middle- and upper-class needs. Racial and ethnic difference is even more suppressed, and, in France, the suppression seems to be a defensive reaction to the rise of right-wing reactionary movements.

Work-family issues are not simply gender issues. The strong pull of gender and the consequences of a gender-based vision of work-family policy are vividly demonstrated by the Swedish and French examples. But even if judged only on the basis of gender, or more particularly, on the basis of women's status, both visions fall short. This reflects the limitations of a singular principle to encompass the complexity of women's roles and social status. But it also reflects the simple truth that neither vision is one *for* or *by* women. Neither the genesis nor the goal of either policy is the support or empowerment of women to

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[114] Interview with Eva Falkenberg & Elisabet Nasman, *supra* note 45; interview with Jan Edling, *supra* note 19.

permit them a range of life choices.[115] The failure of either the equality vision or the woman-centered vision to materially advance women's place beyond a basic standard of support suggests that *both* of these principles or visions must be carefully scrutinized, that neither of them is sufficient, and that the uncritical combination of the two will not provide the essential perspective.[116]

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[115] It also suggests both a fear of "real" choice as well as a fear of the implications of the changes in the work-family relationship. The fear is that women will not choose relationships or family in the absence of economic need, that women will not choose men, or family, in the absence of dependency.

Nowhere is this more evident than in the treatment of single parents, who are disproportionately women. Though both systems support single women to a far greater extent than is currently imaginable under American policy, there is always a clear limitation on this support. *See supra* text accompanying notes 54–55 and 104–105.

The limitation signals a qualification of governmental support of women's independence and a willingness to sacrifice the quality of life of children in order to uphold preferences for the traditional nuclear family. This suggests that one important measure of the treatment of women and children under proposed work-family policies is the degree to which policy supports single parents.

In other words, if a single standard or vision of family were essential to policymaking, the single parent family should be the model, since it is the most vulnerable family form under the existing system. At worst, other families might get some extra, additional benefits. *See generally* S. KAMERMAN & A. KAHN, MOTHERS ALONE: STRATEGIES FOR A TIME OF CHANGE (1988).

[116] European feminists offer some intriguing rethinking of policy perspectives that suggest a woman-generated, woman-focused sense of policy that can transcend a singular gender focus. *See, e.g.*, interview with Tove Stang Dahl, *supra* note 25 (the sphere of care and family should be viewed as primary, and the labor market sphere as secondary, as the basic orientation of policy; the socialist (and capitalist) focus on the labor market must be turned around); Dahl, *Taking Women as a Starting Point: Building Women's Law* 14 INT'L J. SOC. LAW 239, 244 (1986) (*freedom* as underlying value of women's law); T.S. DAHL, WOMEN'S LAW: AN INTRODUCTION TO FEMINIST JURISPRUDENCE (R.L. Craig trans. 1987); interview with Kirsten Ketscher, Professor of Law, University of Copenhagen (June 20, 1988) (structure law and policy to widen and support a range of choices, to support women's choices rather than reinforcing a singular male-structured standard) (on file with the author); Ketscher, *Strategies in Women's Law*, in FEMINIST PERSPECTIVES ON LAW 19, 21–22 (1986); interview with Rita Liljestrom, *supra* note 50 (importance of moving away from a single standard by recognizing difference and asymmetry, as well as supporting shift from patriarchal family structures); interview with Gunnilla Steen, Consultant, Kontura Personnel (June 9, 1988) (use women's cultural difference in a cross-cultural approach, as an alternative means of problem-solving essential to business) (on file with the author); interview with Christine Delphy, Sociologist (July 23, 1988) (importance of examining how existing social and fiscal policy reinforces traditional family and gender structures; to achieve real choice, the actual freedom of structuring family and work, must implement connected, interrelated policies in both the labor market and the family that strengthen and value women's position and freedom of choice-making) (on file with the author); C. DELPHY, CLOSE TO HOME: A MATERIALIST ANALYSIS OF WOMEN'S OPPRESSION (D. Leonard trans. & ed. 1984); interview with Diana Leonard, Professor, University of London (July 30, 1988) (importance of examining the operation of family as an economic system and the impact of that economic system, as well as the market, on women's "choices") (on file with the author); Delphy & Leonard, *Class Analysis, Gender Analysis, and the Family*, in GENDER AND STRATIFICATION (R. Crompton & M. Mahn ed. 1986); interview with Selma Sevenhuijen, Department of Political Theory and History, University of Amsterdam, (July 7 & 8, 1988) (instead of the language of equality and rights, we need to talk

The Swedish equality vision, although explicitly gender neutral, implicitly adopts a predominantly masculine standard of the work-family relationship. Equality means ensuring that women have an equal opportunity to work according to the existing (male) standard. Some time benefits are provided to take care of the obvious conflicts between family responsibilities and the workplace, and child care facilities are provided for replacement care giving. Secondarily, the standard itself has been somewhat modified to encourage reallocation of family responsibilities and to extend the equality principle from the work-family interface to the pure family realm.

This has moved women toward a rough equality of work and family responsibilities, but not to equality of status, opportunities, or the quality of responsibilities. More men take a more active role in child care and housework, but women still bear a heavier and different share of responsibilities in the family sphere. Although women have greatly increased their work force participation, job segregation persists, low-status part-time work is the norm, and the advancement of women to the middle or upper levels of job hierarchies is rare.

Arguably, the Swedish equality vision has had the effect of resolidifying unequal roles, responsibilities, and opportunities by superimposing an ideology and legal structure of equality upon a gendered, stratified, hierarchical work-family relationship. Swedish work-family policies and the equality vision operate in a context in which work and family were formerly tied to an explicit sexual division of labor, with women at home and men at work. The adoption of a different vision and the construction of different social roles have been externally generated, paternalistic overlays on this context.

The Swedish experience vividly demonstrates the limitations of the equality principle, which have been the focus of feminist analysis and critique.[117] As many feminists have pointed out,

about needs, welfare, responsibility) (on file with the author); Sevenhuijsen, *Fatherhood and the Political Theory of Rights: Theoretical Perspectives of Feminism*, 14 INT'L J. SOC. LAW 329, 336–39 (1986) (the dangers of constructing a legal strategy based on difference, and the importance of dealing with issues of power); interview with Carol Smart, Sociology Department, University of Warwick (July 28, 1988) (the power of legal analysis and legal discourse, but also the limits of the role of law) (on file with the author); C. SMART, THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS (1984).

[117] *See, e.g.*, Dowd, *supra* note 4, at 137–57; Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Littleton, *Reconstructing Sexual*

when equality is defined in terms of existing work-family relationships and structures, a male-oriented standard is assumed. Unless the standard is questioned or changed, then at best it redistributes who does what but does not change how things are done. Furthermore, the equality principle fails to acknowledge the context within which equality is to be achieved. The *in*equality of the historical and social context and the contours of the existing structure are obscured by the focus on ensuring equal opportunity to enter the workplace structure. Unless that opportunity is defined and related to its context, it may be largely formalistic and symbolic.

Application of the equality principle, then, may simply replicate the existing structure with few variations. The Swedish experience also suggests that the effect of the equality vision may be to silence demands for essential restructuring of the work-family relationship. Ironically, this silencing effect springs from the "success" of the equality principle and the strength of the official embrace of the equality vision.

The French alternative, an explicitly woman-centered vision, suggests a perspective that keeps women clearly in view and realistically confronts women's status. Women are perceived as special and different, with unique needs, tied not only to their role as childbearers, but also to their role as primary caregivers. Recognition of women's differences is essential to this view. Accepting differences as a given, policies are designed so that women can both have children and work. Implicitly, this approach recognizes the problems created by the workplace structure for women who wish to combine work and family.

The French woman-centered vision, like the Swedish equality vision, is not woman-generated. More important, the vision of women at the center is an illusion, unless it is the image of women at the center of a culturally defined gender cage. The image of women in this vision is firmly fixed in traditional gender roles. Consequently, women's roles as mothers are reinforced and work-family issues are viewed as solely women's issues. It sees men's family role as relatively unchanging: men are uninvolved and act essentially as economic fathers. The focus on women reflects a sensitivity to women in their existing gender

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Equality, 75 CALIF. L. REV. 1279 (1987); Fineman, *Implementing Equality: Ideology, Contradiction and Social Change* 1983 WIS. L. REV. 789; Finley, *supra* note 7.

roles stemming from a concern for the perpetuation of families. The sensitivity to constraints on women is engendered by necessity, not by empathy or a desire to empower.

The vision's focus on women is seductive, because it deals with women as they currently live and provides essential support for a valued aspect of women's lives. The general notion of a woman-centered vision attracts both traditionalists and feminists. This strange alliance is not new.[118] The common ground is found in shared values and beliefs: the significance of family and care, a distrust of the intrusive power of the state, and a strong belief in the importance of the protection of personal privacy. This common ground, however, is bounded by marked differences in goals. The traditionalists see the patriarchal nuclear family as an essential social structure. The woman-centered focus comports with their view of women's "natural" role. Feminists, on the other hand, view a woman-centered focus as a claim for the value of women's vision and choices, and a means to empower women to make their own life choices. The origin of French policies and the character of the existing power structure indicate that the traditionalist view underlies the woman-centered vision of official work-family policy.

The vision of work and family, as the experience of these two countries demonstrates, powerfully affects the shape of legislation and benefit structures. More important, it affects the ability to see the interrelation of work and family and to imagine a different relationship. The pull of the gender focus, and even more so, the pull of the focus on women, is evident. These focuses tend to result in strongly gender defined work and family roles and the view that the balancing of work and family is predominantly a woman's responsibility. Although it is easy to think of work-family issues only in terms of familiar categories, the inability to look beyond gender to recognize the extent of the conflict between work and family and adopt broadly defined policy goals has serious consequences.

C. *Structural Change*

Another consequence of the limited visions underlying Swedish and French policy is the lack of fundamental change in

[118] The same alliance has occurred in the pornography area. *See generally* Brest & Vandenberg, *Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987).

workplace structures. This is not to deny the structural impact of these countries' policies, but rather to point out that the policies have essentially added to the existing structure rather than challenging its premises or basic organization. This is evident in the nature of the benefits provided by the Swedish and French policies. The benefits primarily are cash benefits or short-term time benefits designed to ameliorate only the most glaring conflicts between family responsibilities and the existing workplace structure. The policies' primary impact on the workplace, therefore, has been the requirement that employers contribute to benefits through direct or indirect taxation. The most significant structural change, the creation of the child care structure, has occurred outside the workplace. The sole structural change within the workplace has been the addition of leave policies, which require employers to provide short-term leave to employees for childbirth and initial parenting. To the extent that employers have adjusted to this mandated structural change, they have done so either exclusively, or primarily, for women. Men exercise their entitlement to parental leave at the peril of job advancement. For women, the entitlement is accepted, but at the price of reinforcing the pattern of job segregation.

The only policy choice made by either country that has brought about more drastic structural change is the Swedish provision that entitles parents to work part-time (with comparable reduction in pay and benefits) until their children reach school age. This measure would represent a radical change in workplace structure if it meant that employee work life patterns became more flexible (and if other economic factors did not constrain who could exercise the right). However, this entitlement appears to have reinforced gendered job structures: part-time work has become the norm only in female-dominated occupations.

The lack of structural change can be attributed to the underlying assumptions of the policy structure: that the structure of work is essentially sound and that the current relationship between work and the family—fundamentally a relationship of separation, not of connection or interrelation—also is sound. The work ethic and its particular structural manifestations in work life patterns are not questioned.

Families must continue to adjust to work; the workplace has not been restructured to accommodate family. Just as strong as

the principle of separation of work and family is the principle that work takes priority over family. This does not mean that family is not valued; to the contrary, family and children are strongly valued in both of these countries. Moreover, the social responsibility for children is a very strong moral and social commitment in both countries. These values do not, however, displace workplace demands.

Arguably, more change has occurred on the family side than on the work side of the work-family relationship. Particularly in Sweden, where the equality vision has led to the redefinition of male roles, there has been significant change in the definition and experience of fatherhood. In addition, the marital relationship and the distribution of unpaid household work have undergone less dramatic change. These changes are essentially, however, a redistribution of an increased paid and unpaid work burden piled atop an unchanging need for caregiving.

The lack of structural change perpetuates inequities in the existing system. Acceptance of the basic structure assumes that those inequities are resolvable flaws, rather than fundamental structural problems. This approach turns a blind eye to historical context and avoids the inescapable moral choices embedded in criticizing the existing structure and creating a new one.

D. *Context and Power*

The limitations of the visions and of the scope of policy in these two countries illustrate the power of context and the importance of the context of power. The historical context that generated these policies strongly influenced the content of the vision and the impact of policies. Those who controlled the making of policy created a vision tied to their own goals.

The genesis of these gender-focused policies was neither woman-generated nor woman-controlled. The catalysts of policy-making had little to do with the interrelation of work and family, and less to do with women or children. Women were a means to an end: in Sweden, to fulfilling labor market needs; in France, to fulfilling population needs.

The emerging American concern with family policy is most often tied to labor market needs. Many argue that a work-family policy is a necessity given the labor market demographics of the next several decades. Those demographics indicate that

women and minorities will be the primary labor pools from which to expand the work force. This labor market pull is often paired with the push of family economics, which requires that most parents be working parents.

If economic and demographic factors are indeed the catalysts for the development of American work-family policy, then our vision of work-family policy is extraordinarily important. The political and historical context has powerfully affected the shape of policy in Sweden and France. This suggests the danger of a circumscription of vision if the policy debate is not freed from its origins. If the need for women in the labor market is the motivating force for policy, then how we envision women's roles, and more generally, gender roles, is critical. It is equally important to resist limiting the focus of policy to women or to gender concerns to ensure the vision's sensitivity to vital issues of race and class. If the vision of work and family is solely a woman-centered or gender-centered vision, then it may be implicitly a racist vision. The demographic pattern indicates that additional workers can be drawn from both the female *and minority* labor pools. If work and family policies focus solely on pulling more women into the workplace, then this seemingly neutral policy may perpetuate patterns of underemployment and unemployment of minorities. In particular, such a policy emphasis is likely to exacerbate the deteriorating economic position of black men. Racial equality should not be sacrificed for the sake of gender-sensitive or gender-progressive policies. The combination of the perspectives of gender and race in the envisioning of work-family policy also points to the necessary inclusion of a class perspective.

It is critical that we understand the structure and inequities with which we start, as well as the vision of where we hope to go. Understanding and recognizing the assumptions underlying the existing structure is essential. Recognizing *in*equality may be as important as setting equality as the goal.

It is also necessary to confront the importance of power, and of who defines the vision of policy. While the motivation for examining work-family issues may be limited, it need not limit the ultimate scope of policy. Both the goals of policy and the means employed to achieve these goals can empower individuals and families. It is possible to envision a broad, interconnected set of policies, incorporating principles of diversity, equity, and choice, and assuring meaningful support of families, to be

achieved by means that promote individual freedom and the value of community. That vision requires a voice, and that voice requires the power to be heard.

IV. Conclusion

American work-family policy is in a critical early stage when the parameters of debate are still fluid and capable of expansion. As the dialogue wears on, however, it will tend to frame our vision of what the relationship between work and family should be, and what role social policy will play in achieving that vision.

We begin from a point of flux, where the safe acceptance of a structure largely defined in explicit gender terms is no longer permissible. Though freed of that ideology, we remain bound by the structure and the patterns of socialization premised on that gendered set of assumptions. To be freed of those constraints, we must acknowledge them; to go beyond those constraints, we must imagine a rich, varied, changing, and complex vision that reflects how we value work and family.

Envisioning work and family thus challenges us to examine fundamental moral and social values. In order to reach beyond the narrow focus and inadequate scope of current policy proposals we must imagine a relationship between these two essential spheres of life freed of the constraints imposed by existing roles and structures. The experience of other countries can tell us much about what we can achieve and how much further we could go.

WORK AND FAMILY: POLICIES FOR THE WORKING POOR

PATRICIA A. SHIU*

> A broken leg is just as catastrophic as cancer for me, because my kids don't have health insurance and I can't afford to stay home for any extended time, because I wouldn't have a job to go back to. It is a question of survival.
>
> —Kim K., black, single mother of two.

The competing demands of work and family pose one of the most serious employment issues facing employers and working parents. Working parents face a daily struggle to be loving and caring parents as well as productive and efficient workers. Although all families with working parents face these competing demands, the impact of these demands on the "working poor" is particularly severe. This Article addresses the importance of work and family policies to the on-going participation and survival of the "working poor" in the labor force. The three principle components of any work and family policy are: (1) the right to take leave from work for a family-related or medical-related reason; (2) the paid or unpaid nature of the leave; and (3) the right to return to the same or similar job—the job guarantee. This Article focuses on the job guarantee as the most important component for the "working poor."

The reconciliation of the competing demands of work and family often affect female heads of households most severely. Sixty-two percent of women with children under the age of eighteen were in the labor force in 1985. Fifty-four percent of mothers with pre-school children were in the work force.[1] It is clear that increasing numbers of parents, particularly mothers,

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* Attorney, The Employment Law Center, San Francisco, California. B.A., University of California at Berkeley, 1979; J.D., University of San Francisco School of Law, 1982. The author wishes to thank Joan M. Graff, executive director of the Legal Aid Society of San Francisco, for her insight, valuable editorial assistance, and generous support. The author also wishes to thank Rachel Roth for her excellent research assistance.

[1] U.S. DEP'T OF LABOR, OFFICE OF THE SECRETARY, WOMEN'S BUREAU, FACTS ON WOMEN WORKERS: FACT SHEET NO. 86-1, at 3 (1986).

work out of sheer economic necessity.[2] Although the task of childrearing traditionally has been relegated to the mother, as women become a greater proportion of the work force[3] and assume greater professional responsibility, working fathers are more likely to assume primary childcare responsibilities. Therefore, the issue of family leave policies is not a "woman's issue" or a "man's issue." It is an issue as important to the welfare of the family[4] as it is to the successful operation of the workplace.

As the family structure continues to evolve, evidenced by the increasing reliance on dual incomes and the growth of single-parent households, there must be a different societal approach to the conflicting demands imposed by the workplace and the family. The challenge facing America today is how to address the new set of demands imposed on the working family in contemporary society.[5]

Family and medical leave policies are one important component to successfully resolving the competing demands of work and family. A national work and family policy should permit employees to take time off from work to have a baby, to recuperate from a medical disability, to care for an ill child, spouse, or parent, and to care for and bond with an infant or newly adopted child.[6] A family leave policy which addresses the needs

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[2] "Nearly two-thirds of all women in the labor force in March 1985 were either single (twenty-five percent), divorced (twelve percent), widowed (five percent), separated (four percent), or had husbands whose 1984 earnings were less than $15,000 (seventeen percent)." *Id.* at 2.

[3] U.S. DEP'T OF LABOR, WOMEN'S BUREAU, FACTS ON WORKING WOMEN: FACT SHEET NO. 88-1, at 1 (1988).

[4] The term "family" as used herein means a domestic unit. Although "family" has traditionally denoted a domestic unit comprised of a mother who works inside the home, a father who works outside the home, and one or more children, usage here encompasses a much broader interpretation, including the myriad of lifestyles reflective of contemporary society.

[5] The United States and South Africa are the only two industrialized countries in the world that do not have a national family leave policy. Most advanced industrialized nations, as well as lesser developed countries, provide some form of guaranteed leave from employment for pregnant female employees, job protection upon return to the job after the leave, and a cash benefit in lieu of or in addition to wages for the duration of the leave. S. KAMERMAN & A. KAHN, THE RESPONSIVE WORKPLACE: EMPLOYERS AND THE CHANGING WORKFORCE 54–55 (1987). In addition, most European countries provide some form of paid leave. *Id.* at 56. The Appendix below indicates examples of the specific policies of some of the countries offering family and medical leave policies. These countries compete with the United States in the international economy for goods and services. Certainly, if these competitors can provide family and medical leaves to their workers, the United States could and should follow suit.

[6] Although this author advocates that family leaves should be paid leaves, there are serious limitations to this position including the tremendous political resistance from organizations such as the Chamber of Commerce and the Merchants and Manufacturers Association to paid leaves. The priority for the United States is to establish a national

of both workers and employers is particularly critical for one segment of the workforce: the "working poor."

The "working poor" are those individuals who regularly work at the minimum wage or less, do not customarily receive any benefits, including medical coverage for themselves or their families, and face constant job instability. They are generally unskilled, seasonal, temporary, or part-time workers. The "working poor" may work forty hours a week, but earn less than the poverty level.[7]

The "working poor" are disproportionately women, black, Hispanic, and certain groups of Asians. Women maintain 51% of the working poor families and an even greater percentage of working poor minority families.[8] Employed women who head households have tended to remain in low-paying or less-skilled jobs.[9] The U.S. Department of Labor concluded that "characteristics of women who head families include higher unemployment, low educational attainment, more dependent children, and lower earnings when compared with other labor force groups. This explains in part the high incidence of poverty in families maintained by women."[10]

Family leave policies that have been enacted into law[11] provide for a right to return to the job or a similar job. The Family

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work and family policy and gain its acceptance, whether or not it provides for paid leave.

[7] "Full-time, year-round employment at the minimum wage now yields earnings that leave a family of three nearly thirty percent below the federal poverty line." CHILDREN'S DEFENSE FUND, A VISION FOR AMERICA'S FUTURE 104 (1989).

[8] In 1986, "women maintained seventy-five percent of poor Black families, including 3.2 million related children; about forty-nine percent of Hispanic families, including 1.2 million related children; and forty-two percent of poor white families, including 3.5 million related children." U.S. DEP'T OF LABOR, OFFICE OF THE SECRETARY, WOMEN'S BUREAU, FACTS ON WOMEN WORKERS: FACT SHEET 88-2, at 1 (1988).

[9] *Id.* at 3.

[10] U.S. DEP'T OF LABOR, WOMEN'S BUREAU, FACTS ON U.S. WORKING WOMEN: FACT SHEET NO. 86-2, at 1 (1986). This situation is particularly alarming because of its impact on children. Almost 55% of related children under eighteen in female-headed families in 1987 lived below the poverty level. Two-thirds of black children and seven-tenths of Hispanic children in female-headed households are living in poverty. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, MONEY INCOME AND POVERTY STATUS IN THE U.S.: 1987, at 29–30 (1988).

[11] At least 15 states provide some form of parenting leave or maternity leave (otherwise known as pregnancy disability leave). BUREAU OF NATIONAL AFFAIRS, PREGNANCY AND DISABILITY 93–106 (1987). For example, California requires employers with five or more employees to provide an unpaid, reasonable pregnancy disability leave not to exceed four months, during the time the female employee is disabled on account of pregnancy, childbirth, or a related medical condition. CAL. GOV'T CODE § 12945(b)(2) (West 1980). Massachusetts requires employers with six or more employees to provide up to eight weeks of leave for a childbirth or adoption with the right to return to the previous or similar position, unless the employer can establish business necessity. MASS.

Medical Leave Act of 1989[12] and state laws which provide some sort of parenting or family emergency leaves include the guarantee of *job reinstatement.* It is this job guarantee, the right to return to the same position or an equivalent position, that makes the enactment of the Family Medical Leave Act of 1989 and analagous state legislation so critical to the continued participation of the "working poor" in the American labor force.

A classic example of the need for this job security, especially for the "working poor," is illustrated by the case of Lillian Garland.[13] Ms. Garland, a young black woman, had been working for California Federal Savings and Loan for several years as a receptionist when she became pregnant. Upon her return from leave, Ms. Garland was told that she had been replaced, and that there was not another job available for her. Thus, she was terminated for having a baby and taking a very reasonable and unpaid pregnancy disability leave to recuperate from childbirth. After Ms. Garland lost her job, she was unable to pay her rent, lost her apartment, and also lost custody of her child.[14]

Ms. Garland filed a complaint with the Department of Fair Employment and Housing. The Department issued an administrative accusation that charged California Federal Savings and Loan with violating a California statute[15] that requires employers to provide female employees an unpaid pregnancy disability leave of up to four months with a right to reinstatement. California Federal Savings and Loan then sought a declaratory judgment in federal district court that the statute was preempted by Title VII[16] as amended by the Pregnancy Discrimination Act.[17] California Federal Savings and Loan contended that Title VII expressly prohibits the "special treatment" provided in California's statute and that the Pregnancy Discrimination Act forbids an employer from treating pregnant employees differently than other disabled employees.[18] The Supreme Court found no conflict between the California statute and Title VII justifying

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GEN. LAWS ANN. ch. 149, § 105D (West 1982). Tennessee requires that employers with one hundred or more employees provide an unpaid pregnancy disability leave of up to four months. TENN. CODE ANN. § 4-21-408 (1988).

[12] H.R. 770, 101st Cong., 1st Sess., 135 CONG. REC. H165 (daily ed. Feb. 2, 1989).

[13] *See* California Federal Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

[14] Parental Leave Recorder, Jan. 14, 1987, at 1. Ms. Garland was a client of the author.

[15] CAL. GOV'T CODE § 12945(b)(2) (West 1980).

[16] 42 U.S.C. § 2000(e) (1981).

[17] 42 U.S.C. § 2000(e)(k) (1981).

[18] *California Federal*, 479 U.S. at 284.

preemption since both promote equal employment opportunity by requiring employers to reinstate women after reasonable pregnancy disability leaves, thus ensuring that they will not lose their jobs on account of pregnancy disability.[19] The Court upheld the California statute reasoning that "Congress intended the PDA [Pregnancy Discrimination Act] to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'"[20]

Lillian Garland's story is not unique. There are many families in this country who face birth or adoption of children. At some point in their career, most workers need to take some time off work to recuperate from a medical disability or to care for an ill family member. Without the right to return to a job after taking a reasonable medical disability or family leave, a significant proportion of American families are extremely vulnerable to unemployment that will leave them dependent on unemployment insurance or welfare.

Although adequate family leave policies are critical to every worker, their necessity to the "working poor" is clear. The enactment of family leave policies, particularly a federally mandated policy, are central to the continued participation of the "working poor" in America's labor force. The critical component of any family leave policy is the job guarantee. Loss of a job means more than just the loss of wages for the "working poor." The tenuous connection between the "working poor" and society, established by a job, is also lost. Without a job, and without job stability, the "working poor" may be easily absorbed into what is often referred to as the "underclass."[21] As a con-

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[19] *California Federal*, 479 U.S. at 289.

[20] *California Federal*, 479 U.S. at 285 (citations omitted). Ms. Garland ultimately was reinstated by California Federal Savings and Loan after the administrative ruling and seven months after she first notified California Federal Savings and Loan of her readiness to return to work. *Id.* at 278 n.7.

[21] With regard to the black urban underclass, Professor William Julius Wilson has observed:

> Today's ghetto neighborhoods are populated almost exclusively by the most disadvantaged segments of the black urban community, that heterogenous grouping of families and individuals who are outside the mainstream of the American occupational system. Included in this group are individuals who lack training and skills and either experience long-term unemployment or are not members of the labor force, individuals who are engaged in street crime and other forms of aberrant behavior, and families that experience long-term spousal poverty, and/or welfare dependency.

W.J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 7–8 (1987).

sequence, a vast amount of human resources will be unutilized or underutilized, resulting in a waste of precious resources.

The existence of this underclass is alarming because of the material deprivation, the absence of role models in the community, and the failure of educational systems to provide a way out of the ghetto. However, the truly shameful aspect of this is the intense sense of isolation that the "underclass" experience. Without jobs, individuals do not feel they have a stake in society. Work brings people into the mainstream of society. Whether one is a laborer, a blue-collar worker, a white-collar worker, or a pink-collar worker, work is an important, common societal function that binds all of us. Our work reflects a large part of who we are and it allows us to provide an opportunity for our children. Therefore, work gives us that necessary stake in this society.[22]

Work and family policies are important to employees, children, and employers—all of whom benefit from a stable workforce. In critically analyzing these policies, however, let us not forget that sector of our society, the "working poor," upon whom these policy decisions have a profound impact.

The guarantee of job reinstatement ought to be a basic entitlement in the workplace. Through job protection, the "working poor" will have a greater chance of not only sustaining and nourishing themselves and their families, but continuing to be a vital and contributing segment of American society.

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[22] Imagine what it would be like to live in a community where very few people, if any, work outside the home, understand the concept of rising every morning to get to work by nine, having lunch at noon and returning home from work at five or six o'clock. For the underclass, work is a foreign notion. Crime and poverty are the hallmarks of the community. As a result, the underclass has a sense of isolation and a very deep-seated underlying sense of desperation. *See generally* W.J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987).

Appendix

Examples of Family Leave Policies for Pregnant Female Employees[23]

Country	*Length of Leave*	*Cash Benefits and Sources*	*Prohibition of Dismissal*
West Germany	14 weeks; 4 additional weeks in case of premature or multiple birth	100% of wages guaranteed during maternity leave (health funds cover cost up to a ceiling, the difference between this benefit and the average wage being paid by employer); monthly allowance of 750 DM (approx. US $207) during additional leave (paid by social insurance)	During pregnancy and until end of 4th month following confinement (if employer has been duly notified); entitled to return to former post
France	16 weeks; 2 additional weeks in case of multiple birth; possibility of unpaid parental leave of half-time work up to 2 years	90% of earnings (paid by maternity insurance)	As soon as pregnancy is diagnosed and for 14 weeks following confinement (16 weeks in the case of multiple birth); priority for reinstatement during 1 year following unpaid leave
Italy	5 months; optional 6 months' leave at the end of compulsory leave during 1st year of child's life; 6 or 3 months in case of adoption (according to child's age); possibility of unpaid parental leave if child is sick (until child is 3 years old)	80% of earnings during maternity leave (paid by social welfare); 30% of wages during optional leave; 80% or 30% of earnings in case of adoption (according to child's age)	During pregnancy and until child is 1 year old
Japan	12 weeks	60% of insured wages, as per wage scale, during maternity leave (paid by social security or insurance)	During maternity leave and 30 subsequent days

[23] BUREAU OF NATIONAL AFFAIRS, WORK AND FAMILY—A CHANGING DYNAMIC 181-90 (1986).

Canada	17 weeks; 24 weeks of parental leave (start of leave left to discretion of person concerned)	At least 60% of average weekly insurable wage over previous 20 weeks, for 15 weeks (paid by unemployment insurance)	Entitled to return to regular job or comparable post
Denmark	24 weeks, 10 of which can be taken by either parent; 2 weeks' paternity leave at birth	For manual workers, 90% of average weekly earnings for 18 weeks (first 3 weeks paid by employer, subsequent weeks by social security); for other categories, at least 50% of normal wages for up to 5 months (paid by employer)	During maternity leave and on account of pregnancy, confinement or adoption of a child
Iraq	10 weeks; up to 9 months' extension in case of illness due to pregnancy or confinement; additional 6 months to be taken during the first 4 years of the child's life (up to 4 times)	100% of wages during maternity leave; 75% of wages during extended leave; 50% of wages during the additional 6 months (up to 4 times) (paid by social security or insurance)	During pregnancy, maternity leave and illness due to pregnancy or confinement
Saudi Arabia	10 weeks; 6 months' extension in case of illness due to pregnancy or confinement	50% or 100% of wages during maternity leave (paid by employer)	6 months before confinement, during maternity leave and illness due to pregnancy or confinement

EVALUATING CHILD CARE LEGISLATION: PROGRAM STRUCTURES AND POLITICAL CONSEQUENCES

LANCE LIEBMAN*

The American political system is not good at choosing among worthy goals and then adopting programs well designed to achieve the desired purposes. Scholars and activists continue to debate the success and failure of the last quarter century of efforts to reduce inequality and achieve other social reforms.[1] But we have no well developed methodology for evaluating proposed programs and attempting to predict their likely consequences.

This Article asks what we know about choosing legal structures for programmatic efforts that seek social change. In particular, it asks whether we can predict relationships between different ways of pursuing public ends and likely outcomes. It does so by exploring various models for additional government involvement in providing care to children with working parents. The subject is timely because many political leaders recognize that demographic changes in the labor force have made the nonworking parent a rare commodity, and that these changes seem irreversible.[2] It seems likely that even at a time of stringency for public budgets, government will make new and expensive commitments to child care. Indeed, at this moment major initiatives are pending in Congress.[3] In addition, different states—functioning, in this instance, as the social laboratories that Justice Brandeis championed—are operating child care programs

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* Professor of law, Harvard Law School. B.A., Yale College, 1962; M.A., Cambridge, 1964; LL.B., Harvard Law School, 1967.

Canada [1] *See, e.g.*, HTING POVERTY: WHAT WORKS AND WHAT DOESN'T (S. Danziger & D. Weinberg ed. 1986); L. SCHORR & D. SCHORR, WITHIN OUR REACH: BREAKING THE CYCLE OF DISADVANTAGE (1988); SOCIAL EXPERIMENTATION (J. Hausman & D. Wise ed. 1985); R. HAVEMAN, POVERTY POLICY AND POVERTY RESEARCH: THE GREAT SOCIETY AND THE SOCIAL SCIENCES (1987).

[2] In 1988, both presidential candidates proposed reforms of child care; for Bush's proposal, see N.Y. Times, July 25, 1988, § 1, at 1, col. 1; for Dukakis' plan, see Mike Dukakis for President, Quality Day Care for America's Children (1988) (unpublished position paper, on file at the HARV. J. ON LEGIS.).

[3] *See infra* notes 75–89 and accompanying text.

that vary significantly in nature and approach.[4] It therefore seems appropriate to view the choices among alternative programmatic structures for improving the system of child care as a case study in the attempt to predict the consequences of particular varieties of government intervention. What can we say about how the form of a new child care program will influence social ideas and arrangements in the future?

I. THE PROBLEM IMAGINED AND DESCRIBED

Politicians, reformers, and social commentators all declare that there is a child care problem.[5] Most call it a crisis. Frequently, they cite the same few studies and announce the discovery of the same shocking numbers. But the child care problem is in fact several problems, and much of the argument over solutions can be won by seizing control of the diagnosis.

Parents who seek a facility in which to place a three-year-old for eight hours a day,[6] five days a week, in a large city, will need to pay at least $2000 per year, and quite possibly significantly more.[7] The relevant cost variables are immediately apparent: rent; ratio of staff to children; skill level of staff as reflected in pay; additional services (meals, medical and dental, field trips); liability insurance, especially for abuse; and return on capital investment.

Society can provide child care only by foregoing other uses for the land, labor, and capital that high-quality child care re-

[4] For an account of state programs, see U.S. DEP'T OF LABOR, CHILD CARE: A WORKFORCE ISSUE 57–124 (1988) [hereinafter A WORKFORCE ISSUE]; CHILDREN'S DEFENSE FUND, STATE CHILD CARE FACT BOOK (1987).

[5] *See, e.g.*, CHILDREN'S DEFENSE FUND, STATE CHILD CARE FACT BOOK 1 (1987): "[A]t a time when a growing number of American families desperately need child care, federal child care spending remains terribly inadequate and states, despite many responsible efforts, are unable to fill any but a fraction of the funding gaps"; GOVERNOR'S OFFICE OF HUMAN RESOURCES, COMMONWEALTH OF MASSACHUSETTS, FINAL REPORT OF THE GOVERNOR'S DAY CARE PARTNERSHIP INITIATIVE at ix (1987): "The changing composition of the workforce, and a concern for the well-being of children and families, creates a serious need for more day care that is safe, of high quality and affordable to working families"; 133 CONG. REC. S12,019–S12,020 (daily ed. Sept. 11, 1987) (statement of Senator Orrin Hatch): "[M]others are forced daily to make untenable choices regarding their children's welfare . . . . It is time to face reality. Our failure to do so jeopardizes the growth and development of the next generation of Americans . . . ."

[6] With lunch and commuting time, an eight-hour worker needs more than eight hours of child care.

[7] A WORKFORCE ISSUE, *supra* note 4, at 161–63. In Boston, day care can cost as much as $7000 a year. *See* Boston Globe, Feb. 23, 1989, at 31, col. 2.

quires.[8] Proposals to restructure the child care system must confront issues that also arise in the contexts of such "necessities" as housing, food, fuel, clothing, transportation, and medical care. Advocates of new government child care programs typically embrace one or more of the following tenets.

A. *Society Should Devote More Resources to Child Care*

One argument in support of certain proposed programs is that individuals do not purchase enough child care, with the result that the society as a whole obtains too little. Americans care about their children, are anxious when they leave their children and go to work, and invest resources in efforts to improve their children's opportunities. Yet it is possible to argue that the total of individual families' expenditures for child care is insufficient.

Two theories could explain a social decision to seek additional expenditures for child care. One is that good child care may have external benefits. That is, leaving children in settings that are unsafe or do not encourage the children's development may lead to tragic outcomes that society in general weighs more than the parents of those children do; or may bring consequences (lack of education, propensity for criminal conduct) that soon impose real costs on society. It strains credulity to argue that society's concern for children in general is greater than the commitment of parents to their own children, but the argument can at least be hypothetically stated.

Second, the mechanisms of social decision (politics and legislation) may value the future at a higher rate than the spending/investment decisions of individuals acting through economic markets. Politics may employ a different interest rate than economics. Given the cumulative impact of our recent political decisions (deficits, impoverished public capital investment, raids on pension funds, and so on), this argument too may be hard to make. Nevertheless, it is possible to argue that a political de-

[8] *See* V. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 5 (1988):

> [A]n "economic perspective" . . . means recognizing that we do not live in the Garden of Eden. In the Garden scarcity was unknown, but everywhere else human wants exceed available resources . . . . From this perspective, terms like "free daycare" or "low-cost daycare" are misleading because daycare requires labor, land, and capital that could be used to satisfy some other want; it cannot ever really be free, and good-quality care cannot be low cost. The true social cost of daycare is the value of the foregone alternatives as reflected in the resources used to produce the care.

cision about how much care should be provided to the nation's children would be a better decision than the sum of the choices of individual parents who must give up other purchases to obtain more expensive care for their children.

If the diagnosis is that government should seek to increase the aggregate resources devoted to child care, many institutional responses are justified. The range of responses includes tax credits (incentives for parents to obtain more child care with their own funds) and public provision through government-operated or government-subsidized enterprises. Also included are efforts to reduce the cost of certain factors needed for the provision of child care. The government can supply free or reduced-price space for child care centers, can provide funds for training child care professionals, and can alter tort law with the goal of reducing insurance premiums for child care facilities. The overriding purpose of these varied steps is to obtain more child care by lowering costs for one or more production factors, so that current dollars will buy more care and lower prices will lead individuals to purchase more of this good.

B. *The Poor Should Be Able to Purchase More Child Care*

A different justification for some government programs is that many people do not have enough income to purchase as much child care as would be good for them or for their children. A number of welfare-redistribution programs focus on satisfying particular needs with aid in kind rather than on supplying fungible dollars to poor persons. Examples include food stamps,[9] government-paid medical care, public schools, and fuel assistance. These programs have two goals: to focus government funds on persons with low income who have special needs (e.g., only the person who is sick gets medical assistance); and to attempt to skew the poor family's consumption patterns toward the goals paternalistically sought by government (e.g., food stamps cannot be spent on cigarettes, alcoholic beverages, or imported food). Child care paid in full or part by government

[9] On food stamps as an example of government providing means-tested certificates that can be spent to purchase prescribed commodities, see Finegold, *Agriculture and the Politics of U.S. Social Provision: Social Insurance and Food Stamps*, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 217–34 (M. Weir, A. Orloff & T. Skocpol ed. 1988); M. MACDONALD, FOOD, STAMPS, AND INCOME MAINTENANCE 21–48 (1977).

meets both these goals: it provides no assistance to childless poor families or to families that care for children at home;[10] and by paying only for the purchase of child care (often only child care meeting specified standards), government encourages families to obtain that service.

It may be that proposals to finance child care, as seen in the context of economic redistribution programs, raise questions that no society likes to confront and that U.S. political institutions positively recoil from addressing. What is the majority's view about whether poor families should be economically encouraged or disencouraged to have children? Is it better if children of the poor are cared for outside their parents' homes? Is it important that single mothers work, even if child care costs more than the parent's short-term earnings?[11]

C. *Child Care Workers Should Earn Higher Salaries*

Some advocates of new child care laws seek higher wages for professional employees, arguing that these workers are under-

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[10] It may be difficult for government to distinguish between care purchased from strangers, which should be subsidized with public funds, and care from family members, which (according to the rationale for some programs) ought not receive public money. *See* Miller v. Youakim, 440 U.S. 125 (1979) (Federal AFDC law requires Illinois to make payments to relatives functioning as foster parents); Bowen v. Gilliard, 107 S.Ct. 3008 (1987) (not unconstitutional to make smaller AFDC payments on behalf of child in household receiving money from absent parent).

[11] Should government offer subsidized child care to a poor single parent even if the cost to taxpayers is greater than the amount the parent can earn in the time freed for work? For the argument in favor, see L. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP (1986). For the argument against, see Gramlich, *The Main Themes*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 346 (1986).

For further discussion of these arguments, see Sarvasy, *Reagan and Low-Income Mothers: A Feminist Recasting of the Debate*, in REMAKING THE WELFARE STATE: RETRENCHMENT AND SOCIAL POLICY IN AMERICA AND EUROPE 255 (M. Brown ed. 1988) [hereinafter REMAKING THE WELFARE STATE]:

> [From the beginning of the AFDC program in 1935 through the Family Support Act of 1988, there has been] tension between mothering and working . . . . [S]ome progressive reformers advocated sending low-income mothers home to care for their children. Yet in tension with the ideal of government-supported, full-time mothering was the concern that mothers not be discouraged from taking low-paying, traditional women's jobs, because somebody had to fill the demand for that type of work.

See also Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983). The Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, is based on the assumption that single mothers should work and that government should pay at least some of the costs of child care. The act requires states to set up Job Opportunities and Basic Skills Programs (JOBS) for single parents of children over three. It allows states to require participation of parents whose children are older than one. But parental participation can be required only if child care is provided, and the child care must be continued for one year after the parent finds a job and ceases to receive AFDC.

valued and undercompensated. Human services workers, who are mainly women, do not receive the economic rewards of blue collar workers, who are mainly men. In this form, the argument for greater compensation for child care workers is a specific example of the need for comparable worth legislation[12] (or for comparable worth interpretations of Title VII).[13] The issue of workers' pay is relevant in considering which institutional forms are best for expanded child care programs. For example, if the government lowered the age at which children may attend public schools, it is likely that professional child care workers would be called teachers, would belong to teacher unions, and would receive teachers' salaries.

Controversy over such issues arose when states expanded public schooling to include kindergarten. The 1971 congressional battle over the Comprehensive Child Development Amendments[14] required compromises between teacher groups seeking to expand their membership to include child care providers and community and parent groups seeking to avoid what they saw as control by unresponsive professional educators and school bureaucrats. In addition, those opposing control of child care programs by the public schools sought to obtain more child care with available funds than would be available if workers received the higher salaries of teachers. Many legislative battles over child care, in Washington and in the states, have been replays of that disagreement.[15] Proponents of higher salaries for

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[12] Canada and the European Community have enacted such laws. *See* Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1769 n.160 (1986).

[13] *But see* AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985) (employee's "market-rate" explanation for paying women lower wages is a good defense to a Title VII claim).

[14] S. 2007, 92 Cong., 1st Sess., 117 CONG. REC. 45,612 (returned without approval by President Nixon, Dec. 9, 1971).

[15] Is child care education or merely custody? In Los Angeles County v. Kirk, 148 Cal. 385, 387, 83 P. 250, 251 (1905), the California Supreme Court ruled that kindergarten classes for four- and five-year-olds were not part of the "system of common schools," apparently because at that age children were only playing, not learning. "It is apparent that the work contemplated by such a system [kindergarten] is purely preliminary to, and entirely different in character from the ordinary work of the common school." Senator Kennedy's Smart Start proposal would commit the United States to an *educational* approach to children now referred to as "pre-schoolers." *See* Kennedy, *A Legislative Approach to Work and Family: Time for a Smart Start*, 26 HARV. J. ON LEGIS. 391 (1989). If the program is educational, the First Amendment may restrict more severely its religious content and environment. *See* Boothby, *The Establishment and Free Exercise Clauses of the First Amendment and Their Impact on National Child Care Legislation*, 26 HARV. J. ON LEGIS. 549 (1989); Liekweg, *Participation of Religious Providers in Federal Child Care Legislation: Unrestricted Vouchers Are a Constitutional Alternative*, 26 HARV. J. ON LEGIS. 565 (1989); Whitehead, *Accommodation and Equal*

child care workers also contend that present compensation indicates that a low value is placed on the service and results in low professional quality.

D. *The Quality of Child Care Services Should Be Higher*

Goals of quality and quantity are sometimes in tension in the child care debate. While some reforms seek mainly to expand the amount of child care, others seek to impose minimum standards of quality. The strongest measure government can take is to prohibit the use of child care unless it is of some minimum quality. Building codes and housing codes declare that individuals and families can only live in premises that meet a prescribed standard of decency. The governments that enact (and sometimes enforce) housing codes usually do not provide funds with which poor individuals can obtain code-complying housing. Thus the code can be seen as a statement that persons unable to afford decent housing are not wanted in that particular municipality. Similarly, many communities set regulatory standards for paid child care but offer no funds to working parents who cannot afford child care that meets the legal standard. This results in the purchase and sale of informal and sometimes unlawful care.

E. *Child Care Policies Should Promote Diversity*

Because child care is consumed collectively, the diversity or homogeneity of the student body is a relevant variable. Various government child care programs can be evaluated for their impact on the economic and racial composition of pupil populations. Sometimes subsidies for the children of better-off parents are justified with the argument that the effect is to put those children in child care facilities alongside the children of poorer parents.

Treatment of Religion: Federal Funding of Religiously-Affiliated Child Care Facilities, 26 HARV. J. ON LEGIS. 573 (1989).

F. *Parents Need Help in Borrowing Against Lifetime Earnings to Pay for Child Care*

Child care is needed for only part of the working life of parents, usually a small part. Some proposed government interventions seek to make it easier for parents to allocate their lifetime earnings so that child care can be purchased with less financial strain. Some subsidies for care of the children of AFDC recipients are supported with the argument that the short-term inefficiency (child care may cost more than the low-wage parent's earnings in the labor force) is justified because it increases the likelihood that the parent will work later rather than receive welfare.[16]

G. *Government Support for Child Care Will Help Women*

Since mothers usually become child care providers when other arrangements are too expensive, the current system restricts employment opportunities for both married and unmarried mothers, thus perpetuating labor market inequality between men and women. It is a strong argument for government-assisted child care expenditures that in fact such subsidies increase career opportunities for women.[17]

H. *Income Tax Treatment of Child Care Costs Should Be Altered to Make the Tax System Fairer*

It is sometimes argued that a fair and efficient income tax system would allow a deduction or a credit for funds spent to obtain child care. If a parent cares for children at home, no tax is levied on the imputed value of the service.[18] Putting the same point in another way, the second parent who joins the labor force only assists the family economically by the wage earned minus the cost of child care.

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[16] *See* L. MEAD, *supra* note 11.

[17] Victor Fuchs uses game theory to derive his conclusion that since "women's concern for children is, on average, greater than men's, . . . child allowances or child care subsidies help women, regardless of marital status." V. FUCHS, *supra* note 8, at 71.

[18] *See, e.g.*, Wolfman, *Childcare, Work and the Federal Income Tax*, 3 AM. J. TAX. POL'Y 153, 167 (1984).

I. *Information About Child Care Is a Public Good, and Should Be Provided by Government*

Government may be an efficient collector and provider of information and advice about child care. Many states operate child care information and referral programs. These are an inexpensive way for government to "do something about" the child care problem.

J. *Child Care Policies Should Pursue Population Goals*

Some countries have explicit population policies that are then reflected in child care programs. For example, China has sought to use economic incentives to encourage compliance with its one-child policy. Urban parents receive free child care if they have one child. If they have more than one, they must pay onerous child care fees for all their children, including the first.

In the United States public discourse rarely proceeds from arguments that the government should encourage parents to have more or fewer children. However, it is sometimes argued that those opposed to abortion should favor expanded public programs to assist parents in caring for children.[19]

II. PROGRAM OPTIONS

Supporters of government intervention "for child care" seek various goals. Program choices should depend on the priority given to the different ends being sought.

A. *Direct Government Provision of Child Care*

Government can buy or rent space and operate child care facilities. Child care could be a service like police protection, or education in kindergarten or the first grade. In American society, the following consequences seem likely to result from following such a policy:

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[19] *See, e.g.*, M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 53–57 (1987).

Employees would be protected by fourteenth amendment due process,[20] by civil service, and by public-sector collective bargaining statutes. The likelihood of their choosing to be union members would be vastly greater than is the case for employees of for-profit or not-for-profit child care centers. Thus wages and conditions for employees would probably be substantially higher.

Government would feel pressure to operate facilities that meet at least a minimal standard. It is true that some operations of state and local government are not conducted in a fancy way (compare a public sector to a private sector law office), but government is susceptible to embarrassing publicity when unfortunate consequences occur to persons for whom it has assumed a responsibility of care.[21] Certainly one could expect child care to include different services if government provided care directly than if individuals purchase child care using their own (even if tax-subsidized) funds.[22]

Government would need to decide who is eligible to use the child care facilities if fewer services were provided than maximum demand. One can speculate about whether government would assign limited spaces to those most in need (recognizing that more than one definition of need is possible), to those with political connections,[23] or to those satisfying some programmatic goal such as economic and racial integration. Provision by gov-

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[20] Rendell-Baker v. Kohn, 457 U.S. 830 (1982), held that fourteenth amendment limitations do not apply to a private social service agency receiving virtually all its funds from the state. Thus the fourteenth amendment is relevant only if government delivers the service directly.

[21] Even exposes of scandalous conditions in prisons and mental hospitals support this point. Bad conditions "at home" command less attention, and do not focus attention on a public agency obliged to respond. In addition, government's liability in tort is very different depending on whether a public agency has custody of the child. *Compare* DeShaney v. Winnebago County Dep't of Social Services, 109 S.Ct. 998 (1989) (no federal constitutional duty on state to protect child from abusing father) *with* City of Canton v. Harris, 57 U.S.L.W. 4270 (U.S. Feb. 28, 1989) (municipal liability for mistreatment of person in custody if city failed to properly train police officers).

[22] On other differences between government provision of service and government purchase from not-for-profit providers, see N. GILBERT, CAPITALISM AND THE WELFARE STATE: DILEMMAS OF SOCIAL BENEVOLENCE 5–20 (1983). On differences between political and economic arrangements for aggregating decisions, see D. MUELLER, PUBLIC CHOICE (1979); D. WEIMER & A. VINING, POLICY ANALYSIS: CONCEPTS AND PRACTICE (1989).

[23] There would be some constitutional limits on this form of political patronage. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976) (county sheriff who replaced non-civil-service employees with members of his own party violated First Amendment); Branti v. Finkel, 445 U.S. 507 (1980) (discharging public defenders because of their lack of membership in a particular party violated associational rights).

ernment might lead to pressure for expansion of service so that all those meeting some eligibility test could be served.

Government could charge fees. No one can ride the subway or cross a toll bridge without paying.[24] Probably government would feel compelled to arrange a pricing structure that adjusted fees according to parental capacity to pay. For all parent income levels above the poorest, price-setting would be complicated and controversial.[25]

If the service were supplied at no fee or if there were below-cost fees to some or all users, government would have to choose a revenue-raising device, such as general public revenues or a special tax. If, for example, employers were taxed, important issues would be raised that now arise in the context of mandatory employer-paid health insurance.[26]

B. *Government Payment of Some or All the Costs*

One outcome of the Great Society was the creation of a vast network of social services, funded by the federal government but supplied by private (usually non-profit) agencies.[27] The gaps caused by the Reagan Administration's cutbacks in these services were filled from the then-growing coffers of state government.[28] More federal and state social services money is now spent on child care than on any other service.

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[24] Boddie v. Connecticut, 401 U.S. 371 (1971), held government must waive the fee for a divorce for persons who cannot afford to pay. However, *Boddie* has not been applied to other "necessary" government services. *See, e.g.*, U.S. v. Kras, 409 U.S. 371 (1973) (upholding state filing fee requirement for judicial discharge in bankruptcy); Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) (upholding filing fee requirement for appellate court review of welfare reductions).

[25] On fee schedules in social services programs, see N. GILBERT, *supra* note 22, at 75–85.

[26] For a discussion of the disadvantages of charging employers for the cost of employee health care, see Liebman, *Too Much Information: Predictions of Employee Disease and the Fringe Benefit System*, 1988 U. CHI. LEGAL FORUM 57, 86–87.

[27] The trigger was the 1967 amendments to the Social Security Act, Pub. L. No. 90-248, 81 Stat. 821 (1967) (codified in scattered sections of 42 U.S.C.). For a discussion of this story, see M. DERTHICK, UNCONTROLLABLE SPENDING FOR SOCIAL SERVICES GRANTS (1975); N. GILBERT, *supra* note 22, at 63–66; Smith & Stone, *The Unexpected Consequences of Privatization*, in REMAKING THE WELFARE STATE, *supra* note 11, at 232.

[28] For the argument that states did not replace all the Reagan reductions, see M. KIMMICH, AMERICA'S CHILDREN, WHO CARES?: GROWING NEEDS AND DECLINING ASSISTANCE IN THE REAGAN ERA (1985).

In 1971, President Nixon successfully vetoed the only comprehensive child care legislation Congress has ever adopted.[29] Thus the United States failed to enact a right to child care or even a single national program to finance this service. But the Nixon view—that federally-funded child care would corrupt the moral fabric of the country by undermining traditional family values[30]—did not prevail. Instead, those who sought financial assistance for child care and those in the business of supplying it achieved appropriations that soon grew beyond even what would have been authorized by the 1971 bill. However, the new money was spent through several programs instead of one and with no comprehensive strategy or coherent rules of entitlement.

That is the current American scheme: the federal government spends about $2.9 billion in direct child care expenditures.[31] If, for example, the median expenditure per child who benefits from federal funds is $1500, then approximately 1.9 million children receive some type of federal child care support. This is less than one fifth of the 10.6 million preschool children in families with no stay-at-home parent, but if the funds went only to children in poor families, the number benefitted could be sixty percent of the 3.8 million children with no stay-at-home parent in families with incomes below $25,000.[32]

Summarizing current arrangements is difficult because state programs vary widely, but some general statements can be made:

First, entitlement bears little relation to income or wealth. Many families are helped who are economically better off than some denied help. However, sliding fee scales are common, so those who are helped often pay part of the cost. Different programs have different fee formulas.

Second, selection of children (or, more likely, of parents) to receive this substantial and important benefit is often decentralized to a low level. Thus political subdivisions or even neighborhoods may have an allocation, and local rules or politics govern selection.

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[29] S. 2007, 92 Cong., 1st Sess. (returned without approval by President Nixon, Dec. 9, 1971).

[30] *See infra* note 63 and accompanying text.

[31] A WORKFORCE ISSUE, *supra* note 4, at 17. This is in addition to $4 billion in federal income taxes that government foregoes through the Child Care and Dependent Tax Credit. *See* Besharov, *Fixing the Child Care Credit: Hidden Policies Lead to Regressive Policies*, 26 HARV. J. ON LEGIS. 505, at n.32.

[32] A WORKFORCE ISSUE, *supra* note 4, at 149–50.

Third, program goals reflected in child selection also vary. Racial and economic integration is sometimes pursued and sometimes not.

Is this a bad system? Discretionary authority to select recipients of such a large benefit is power. That power can be used to cement communities, to influence behavior in socially desirable ways, and to favor those in need according to criteria more sophisticated than those measurable by arbitrary rules. It can also be used to prefer those of a certain race or religion, to coerce political support, and to deter unconventional thought and action.

A separate question is whether it is acceptable to pay with public funds for a small percentage of a service needed, desired, and arguably deserved by many more.[33] Would it be better to choose between subsidizing all child care and paying for none? If there is to be subsidization for some of those who would like it, ought there to be coherent and defensible rules directing the selection: national rules that all of a certain income are entitled, and that all those with a certain income should receive a given amount or percentage of subsidy?

Even in a scheme where public funds were provided for the purchase of child care to the economically neediest families, so that the program coherently pursued expenditure-targeted income redistribution, it would be necessary to consider problems that have been presented by other non-cash transfers to the poor (such as food stamps, energy assistance, and Medicaid). One common problem with non-cash transfers is that sometimes the right to payment can be turned into cash, defeating government's attempt to limit the ways in which the money can be spent. This problem is frequently observed in literature about the food stamp program.[34] Presumably it would rarely be true of child care payments because the holder of a voucher would not have an easy time transferring it to another user for cash. Using tax credits to assist parents who purchase child care poses the problem that some claim the credit without purchasing any child care.[35] Recently the law was changed to require those

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[33] For analysis of the extent to which various programs serving children are funded at far lower levels than would be needed to serve all who are eligible, see CHILDREN'S DEFENSE FUND, CHILDREN'S DEFENSE BUDGET: FY 1989: AN ANALYSIS OF OUR NATION'S INVESTMENTS IN CHILDREN (1988).

[34] *See supra* note 9.

[35] *See* Besharov, *supra* note 31, at 505 nn.37–38.

claiming the credit to identify the Social Security number of the payee,[36] suggesting that the government believed that some providers did not declare child care fees as income.

Sometimes, targeted government payments may result in inefficiency since consumers may have inadequate capacity to assure quality[37] and little incentive to restrict quantity.[38] The first of these should not be the situation for child care; most parents will care about the quality of child care even if they are not paying for it. A harder question is whether free care for children of poor parents would cause the purchase of too much child care.[39] Sometimes, especially where a single parent has two or more preschool children, child care costs significantly more than the parent can currently earn in the labor market (especially taking account of work expenses). Provision of child care is justified in such cases on a theory that current parental work will make long-term work more likely, on a theory that the society wants that parent working even at net cost to taxpayers, or on a theory that it is fair that the parent have the option of working.[40]

Another problem with non-universal programs is that the program may lose broad support because only the poor benefit, and may not be ideal because it groups poor recipients together rather than integrating economic classes. These are real risks for a means-tested child care program.

C. *Subsidization Through the Income Tax System*

Government subsidization through tax expenditures imposes the least amount of public constraint on the nature of the ser-

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[36] *See* I.R.C. § 21(e)(9) (West Supp. 1988).

[37] This may be true as to nursing home conditions for residents without observant younger family members.

[38] A standard observation by analysts of the American health-finance system is that consumers who are fully protected (by employer-paid insurance, by Medicaid, or by Medicare) seek and receive more care than they would purchase if they had to pay for it themselves. *See, e.g.*, Newhouse, Manning, Morris, *et al.*, *Some Interim Results from a Controlled Trial of Cost Sharing in Health Insurance*, 305 NEW ENG. J. OF MED. 1501 (1981); Brook, Ware, Rogers, *et al.*, *Does Free Care Improve Adults' Health: Results from a Randomized Controlled Trial*, 309 NEW ENG. J. OF MED. 1426 (1983).

[39] This only makes the point that it is difficult for a society to determine exactly how much child care should be consumed. This Article explores the view (widely held right now) that current markets plus the current income distribution result in the purchase of too little child care. It is entirely possible that subsidies and other government interventions could lead to results that some would consider the purchase of too much child care.

[40] *See* L. MEAD, *supra* note 11.

vice. Parents choose a facility and pay the charges; government is involved only in accepting a smaller tax obligation. Government must still make some decisions: Is care by a relative covered? Will the benefit be provided if care is in a religious facility? Will the benefit be allowed if care is in an unlicensed facility? However, as is appropriate for an arrangement using the tax code, the major decisions will be financial: How many tax dollars will be forsworn for parents of what income? Will the benefit be a deduction, giving additional aid to persons in higher brackets, or a credit, thus not varying with the bracket of the taxpayer? Will it be refundable, authorizing a government payment if its effect is to reduce the parents' tax liability below zero?

D. *Licensing*

Government can seek to prevent paid child care from being used unless the program meets regulatory standards.[41] Many jurisdictions license child care providers.[42] It is relatively easy to make use of a licensed facility a condition for receipt of government subsidy funds. It is far more difficult to enforce a rule that a parent ought not to leave a child with an unlicensed paid provider. Certainly, government's inhibitions in enforcing this norm are similar to those that keep it from closing non-code complying housing. By new statutory provision, the federal government requires those using the child care income tax credit to identify those paid to provide care, thus assisting federal enforcement of the duty of providers to declare fees as income.[43] It is an interesting question whether the credit should be denied for child care provided in a facility that does not meet local or state licensing requirements.[44]

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[41] *See* Pre-School Owners Assn. v. Dep't of Children and Family Services, 119 Ill. 2d 268, 518 N.E.2d 1018 (1988) (rejecting constitutional challenges to provisions exempting some child care arrangements from the state's regulatory requirements).

[42] *See, e.g.*, Mass. Regs. Code tit. 102, § 7.00 (1987) (Standards for the Licensure of Group Day Care Centers); *id.* § 8.00 (1989) (Family Day Care Homes). On regulation by states generally, see A WORKFORCE ISSUE, *supra* note 4, at 171–80.

[43] I.R.C. § 21(e)(9) (West Supp. 1988). Some Republicans would exempt small-scale child care providers from taxation on some of their earnings. *See* S. 2084, 100th Cong., 2d Sess. § 403, 134 CONG. REC. S1,423 (daily ed. Feb. 25, 1988).

[44] The insurance requirement is an especially interesting licensing condition. Insurance premiums for the risk of child abuse are very high. Should government seek to prevent parents from using a facility without such insurance, even if the result is that there will be no facility certain parents can afford to use? Senator Hatch would expand support of child care by changing the tort system to make it harder to win a suit for child abuse against a child care provider. *See* S. 2084, at §§ 201–209.

What is the justification for a government intervention that declares minimum standards but does not provide the funds to make that standard affordable for all? The declaration of standards may inform parents of what the society believes children should have. Some who can afford the regulatory norm may obey it who would not do so if there were no rule. There are significant costs to declaring unenforced standards: underground transactions are encouraged; poor families feel inadequate; some desirable arrangements are not made; respect for government regulations diminishes. Yet it is easy to understand why government will continue to declare norms: doing so is an inexpensive way to appear to take action about a recognized problem; it responds to the periodic scandal about bad facilities or facilities where unfortunate accidents occur; provider groups press for existing programs to be better funded; parents whose children are now in day care are more effective politically than parents whose children would have spaces if funds were spread more widely.

It is of course possible to argue that minimum standards for child care should be enforced rigorously and not merely declared. Sub-minimum conditions endanger children, and certainly do not maximize children's potential.[45] Imagine a community that succeeded in preventing children from being placed anywhere not complying with the child care code and also prevented them from being left at home alone. This community would keep a parent at home unless the family obtained adequate alternative care. Presumably, corollaries of such a policy would be adequate cash assistance to pay for child care and a rule that government would not impose work requirements on parents (as a condition of income transfer eligibility) unless it made available satisfactory child care.[46] That is a coherent pol-

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[45] Several studies suggest that quality child care can have a positive effect on educationally disadvantaged children. *See, e.g.*, L. SCHWEINHART & E. MAZUR, PREKINDERGARTEN PROGRAMS IN URBAN SCHOOLS (1987); J. LALLY, THE SYRACUSE UNIVERSITY FAMILY DEVELOPMENT RESEARCH PROGRAM: LONG-RANGE IMPACT OF AN EARLY INTERVENTION WITH LOW-INCOME CHILDREN AND THEIR FAMILIES (1987); I. LAZAR & R. DARLINGTON, LASTING EFFECTS OF EARLY EDUCATION: A REPORT FROM THE CONSORTIUM FOR LONGITUDINAL STUDIES (1982). *See also* Kennedy, *supra* note 15.

[46] The Family Support Act of 1988 requires any state agency which institutes a program for job opportunities and basic skills training ("workfare") to:

> (A) provide (directly or through arrangements with others) information on the types and locations of child care services reasonably accessible to participants in the program, (B) inform participants that assistance is available to help them

icy, albeit difficult to enforce. One argument against such a rule would be that parents have a liberty interest in placing their children in sub-minimum child care so that the parents can pursue work or other activities. Another argument against it would be that in American society today, such a rule would deny career opportunities disproportionately to female parents. But it is possible that society over time could create a widespread (and perhaps even a legally enforced) understanding that a consequence of becoming a parent is the responsibility to take satisfactory care of children until they reach the age at which the state provides free schooling.[47]

E. *Loans*

Government could play a much larger role than it currently does in assisting families to manage the special short-term cash need that child care imposes. Child care is required at a time when many parents are on the upward slope of their income curve, and when they may well be "house poor." If schooling is to be free from kindergarten to grade twelve, and subsidized in many ways (including state college systems and subsidized federal loans) for college and even graduate school, why should only pre-kindergarten education be fully charged to parents? If it is, then it is a short-term expense that many parents will seek to amortize over some longer period of parenthood. Government has made money available on easy terms to allow college expenses to be paid over the student's worklife; it could do the same for child care expenses.

F. *Government Planning*

Government can undertake to pursue coordination and coherence in a web of child care systems which currently has major gaps and overlaps. It can also undertake to assemble

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select appropriate child care services, and (C) on request, provide assistance to participants in obtaining child care services.

Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, § 201 (amending § 402(a)(19) of the Social Security Act).

[47] The Family Support Act takes a small step in that direction with its attempts to impose bureaucratically enforcible financial responsibility on absent fathers. Family Support Act of 1988, §§ 101–129.

information for parents who must make choices about care of their children.[48]

G. *Government Attempts to Increase Supply*

Government makes some programmatic interventions in the child care system with the goal of expanding supply. Government sometimes supports the training of child care personnel. Sometimes it gives real estate tax or zoning advantages to developers who include child care facilities in their projects, presumably at less return than the alternative rental value of the space.[49] The specific consequences of these public efforts are hard to gauge. How much child care benefit is obtained for each dollar of expended or forgone government funds? And if more child care is supplied, who gets it? These interventions may expand service, but the added spaces may be used by persons like those who obtain care in an unregulated market. Supply-expanding efforts are probably sensible only if government has decided that all increases in child care are desirable, no matter who the users are; or if government sees disadvantages to interventions that implicate the public sector more directly; or if government seeks to encourage particular care arrangements closely related to the particular expansions of supply that are encouraged. Examples of the last point include training teachers who will use some favored educational method or giving real estate tax benefits for on-site care (sensible only if a decision has been made that on-site care should be preferred to other locations).

H. *Mandates on Employers or Landlords*

Government can tell someone else to pay for child care. One candidate is employers. Some fringe benefits are mandated.[50]

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[48] Regarding information and referral programs operated by business, see S. KAMERMAN & A. KAHN, THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE 204–07 (1987).

[49] *See* Note, *Child Care Linkage: Addressing Child Care Needs Through Land Use Planning*, 26 HARV. J. ON LEGIS. 591 (1989).

[50] For example, employers are required by federal law to pay taxes that establish worker participation in the Social Security system (retirement, disability, and Medicare benefits). *See* 42 U.S.C. §§ 401–433 (1982). Every state requires participation in a

Health insurance is usually not required,[51] but conditions are imposed when an employer chooses (often influenced by the tax advantages) to provide this benefit.[52] Government could say that employers must provide child care at the worksite, or must pay for some or all of it wherever it is obtained.[53]

The issue of whether employee compensation should be based on contribution or need is an old subject, sometimes addressed with the concept of the social wage.[54] One way to explore the issue in the child care context is to ask whether wages should be higher by a set amount for parents of children between birth and age five. (This seems much like a children's allowance, but only for workers and charged to employers.) The program would be more focused if, for example, it required payments only to parents who use paid child care and obtain it from a licensed provider. How is this different from requiring employers to pay health expenses? It is only different if the need for child care is more predictable and controllable than the need for medical services, thus increasing fears of employer discrimination among job applicants.[55] Such discrimination in employment can be made unlawful more easily than it can be prevented. Stated another way, workers are mobile and the need for child care

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Worker's Compensation program for workplace injuries. *See, e.g.*, CAL. LAB. CODE. § 3600 (West 1971). Federal law creates incentives to which every state has responded by enacting an Unemployment Insurance system. 42 U.S.C. §§ 501–504 (1982); I.R.C. §§ 3301–3311 (1982); *see, e.g.*, MASS. GEN. LAWS. ch. 151A (West 1982).

[51] Hawaii was the first state to take legislative steps toward compulsory benefits. *See* Hawaii Prepaid Health Care Act, HAW. REV. STAT. ANN. §§ 393-1 to -51 (1988). The Hawaiian law was held to be preempted by ERISA, the federal law regulating fringe benefits, in Standard Oil Co. of California v. Agsalud, 442 F. Supp. 695 (N.D. Calif. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981), and then Congress gave the Hawaiian program a special exemption from ERISA, 29 U.S.C. § 1144(b)(5) (1982). Washington and Massachusetts have also enacted legislation establishing compulsory benefits. *See* WASH. REV. CODE ANN. ch. 48.41 (1989); MASS. GEN. LAWS ANN. Ch. 118F (West 1989).

[52] *See, e.g.*, Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) (federal law does not preempt a Massachusetts requirement that health insurance programs provide specific minimum mental health benefits).

[53] It has been argued that employer expenditures on child care lead to higher profits. *See, e.g.*, J. FERNANDEZ, CHILD CARE AND CORPORATE PRODUCTIVITY: RESOLVING FAMILY/WORK CONFLICTS (1986). It is more difficult to argue that government would do a better job than business of evaluating the effect of child care on business profitability.

[54] On "the notion of a social wage as an alternative and supplement to a market wage," see Brown, *Remaking the Welfare State: A Comparative Perspective*, in REMAKING THE WELFARE STATE, *supra* note 11, at 25 n.5. *See also* Liebman, *supra* note 26, at 86 n.112, and works cited therein.

[55] Liebman, *supra* note 26, at 84–89.

can be predicted and planned. Thus it may seem wrong to charge such a large expense to the company that employs a parent during the child-care years. (Similar arguments are relevant to decisions about pregnancy costs, including parental leave.) On the other hand, the sense that the parent's job creates the need for child care is stronger than the feeling of employer responsibility for non-work caused illness.[56]

There are also various insurance alternatives. The company pays a percentage of its payroll as a fee, and the insurance company pays child care costs when individual workers consume the service.[57] (Is this a better arrangement than providing capital so that the parents can borrow the money, buy the service, and repay the loan over an extended period?)

Finally, a long-term alteration of our system to one in which employers provide or pay for child care would be another major step toward employer involvement in the lives of workers, reversing a twentieth-century development that emphasizes liberty and independence.[58] The price of employer responsibility for so many of the important and intimate aspects of employee life would be high. And, as compared to seeing child care as a responsibility of government, employer obligation would separate workers according to their employers (as happens vis-à-vis medical care), thus preserving hierarchies of entitlement and discriminations of service quality.[59]

A different approach is real estate "linkage": awarding zoning permission for new office buildings only to projects that contain child care facilities.[60] These programs expand the supply of child care by spending funds that are public in the sense that society ultimately pays (the space could contain offices or the building could be smaller and impose less congestion on the city) and in the additional sense that if government is selling development rights, it could tax the developer for housing or parks or education or income support for the poor instead of for child care. They are not public funds, or not fungible public funds, to the

[56] On employer response to the fact that some women must balance careers with parental responsibilities, see Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV. Jan.-Feb. 1989, at 65.

[57] Employer-financed insurance of nursing home care is now under discussion at many companies.

[58] Liebman, *supra* note 26, at 59 n.2.

[59] *See* V. FUCHS, *supra* note 8, at 136–37, discussing the inefficiency and inequity of imposing child care costs on business according to the number of employees who are parents.

[60] *See* Note, *supra* note 49.

extent that arbitrary constitutional restrictions[61] might allow this imposition to be put on a developer but disallow other taxes.

In any event, the goal is more child care. This device for expanding expenditure on child care also has predictable consequences. "Linkage" programs prefer child care at the office-site, child care facilities populated with children of co-workers, child care in expensive space, and an expansion in child care that benefits an arbitrarily selected subset of all those who would prefer an employer payment toward the care of their children.

III. Pending Proposals: Predicting Their Consequences

A. *The 1971 Comprehensive Child Development Program*

The modern context for federal child care legislation was set in 1971 when both houses of Congress adopted the Comprehensive Child Development Amendments[62] to the Economic Opportunity Act. The Nixon Administration, through its Secretary of Health, Education, and Welfare, Elliot Richardson, had participated in drafting this bill, but by the time it reached the President's desk, the political environment was dominated by conservative reaction to the Nixon-Kissinger opening to China. Mr. Nixon needed to make a conservative gesture, which he did by vetoing S. 2007, his veto message accusing the bill of "family weakening implications," and saying it would be "a long leap into the dark for the United States Government and the American people." Mr. Nixon characterized the bill as "the most radical piece of legislation to emerge from the Ninety-second Congress." Instead of committing "the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach," Mr. Nixon called for programs "consciously designed to cement the

[61] After Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), it is uncertain whether San Francisco's program requiring office developers either to include a child care facility or to pay into a city-wide child care fund is constitutional. *See* Note, *supra* note 49, at 625–30 nn.149–76.

[62] S. 2007, 92 Cong., 1st Sess., 117 Cong. Rec. 45,612 (returned without approval by President Nixon, Dec. 9, 1971).

family in its rightful position as the keystone of our civilization."[63]

Substantively, the Comprehensive Child Development bill was in most ways the parent of the 1988 and 1989 versions of the Act for Better Child Care. It rejected expanding public school education to provide for younger children.[64] Rather, the federal law would have blessed, in somewhat imprecise language, new community institutions generally modelled on the successful Mississippi Head Start program.[65] Local disputes over control of federal child care funds would have been resolved by the Secretary of HEW, under his authority to designate "prime sponsors,"[66] of which there might have been 40,000.[67] The bill also would have mandated state standard-setting, coordinating, and regulatory functions.

The bill would not have established a right to subsidized child care for any particular child or family.[68] Rather, it would have made a legislative declaration of the appropriateness of public

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[63] President's Message to the Senate Returning S. 2007 Without His Approval, 7 WEEKLY COMP. PRES. DOCS. 1634–36 (Dec. 9, 1971). The story of the 1971 veto is told in G. STEINER, THE CHILDREN'S CAUSE 113–16 (1976). For a less rhetorical statement of the arguments made in the Nixon veto message, see N. GILBERT, *supra* note 22, at 98:

> Critics of day-care services that facilitate the trend toward two career families are skeptical about the economic benefits that result after the costs of day care, work-related expenses, taxes, and the loss of leisure time are subtracted from the wife's earnings. As for the social consequences, they take a dim view of the notion that the less time working parents spend with their children somehow invests the experience with a "higher quality." There is also concern that as the use of day-care centers increases, a large measure of the traditional responsibility for socialization in the decisive years of early childhood will shift from the family to agencies of the state or private sector. Finally, and most important, day-care adversaries fear that by reducing the degree of social and economic interdependence among family members, day-care provisions would also scrape away at some of the basic adhesion of family life.

[64] This was the period of battles over "community control" in such contexts as school decentralization and the Model Cities Program. *See, e.g.*, C. HAAR, BETWEEN THE IDEA AND THE REALITY: A STUDY IN THE ORIGIN, FATE, AND LEGACY OF THE MODEL CITIES PROGRAM (1975); D. RAVITCH, THE GREAT SCHOOL WARS, NEW YORK CITY 1805 – 1973: A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELD OF SOCIAL CHANGE (1974); Liebman, *Social Intervention in a Democracy*, 34 PUB. INT. 14 (1974). This issue was alive as late as 1980, when supporters of Head Start successfully opposed transfer of the program to the new U.S. Department of Education. Marian Wright Edelman is quoted to this effect in Tompkins, *Profiles: A Sense of Urgency*, NEW YORKER, March 27, 1989, at 48, 68–69.

[65] On the birth and life of the Head Start program, see Miller, *Head Start: A Moving Target*, 5 YALE L. & POL'Y REV. 332 (1987).

[66] S. 2007, at § 513(a).

[67] G. STEINER, *supra* note 63, at 111.

[68] Specified percentages of the total appropriation were to go to the children of migrant farmers and Native American children. S. 2007, at §§ 503(b)(1)(A)–(B).

funding for this purpose, while providing funds for between five and ten percent of all those declared to be legitimate recipients. The bill would only have authorized expenditure of $2 billion per year, and the assumption was that early-year appropriations would be substantially smaller. There was a budget "crisis" then, as there has always been. Estimates of legitimate need were then (as now) uncertain, but $20 billion in 1971 dollars might have been a median estimate. Some states would have supplemented the federal expenditures.

The Comprehensive Child Development bill died when the Nixon veto was not overridden. Thus, the U.S. never enacted comprehensive child care legislation, instead appropriating funds through various programmatic structures that operated very much as the 1971 law would have. Before long, federal appropriations for this purpose were in the vicinity of $2 billion, the number used in 1971 that has become the talismanic figure in 1988 and 1989. Much child care was subsidized through provisions of the Social Security Act,[69] which were then folded into the Social Services Block Grant in the first Reagan budget.[70] It is uncertain how much of the federal block grant money goes to child care, but one estimate is that there is about $726 million that does so.[71] State programs vary, as do state financial commitments, but there is a program in every state, the care is obtained from appropriate (meaning licensed) providers, and local bureaucratic rules and political tussles select recipients from among those eligible.

Meanwhile, an entirely separate approach—tax credits—now provides $4 billion more in federal financial assistance for child care. The Child and Dependent Care Tax Credit awards a thirty percent non-refundable credit to families with incomes under $10,000. This credit declines on a sliding scale to twenty percent for families with incomes above $28,000.[72] The distributional consequences of these provisions are discussed by Douglas Be-

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[69] *See, e.g.*, 42 U.S.C. §§ 2931–2933, originally enacted as Pub. L. No. 88-452, Title V, § 581, 81 Stat. 713 (1967), repealed in 1981 by Pub. L. No. 97-35, Title VI, § 683(a), 95 Stat. 519 (1981). For the story of child care as part of the Social Security Act, see M. DERTHICK, *supra* note 27, at 1–14; N. GILBERT, *supra* note 22, at 61.

[70] The Social Services Block Grant, now 42 U.S.C. §§ 1397–1397(f), was created as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Title XXIII, § 2351, 95 Stat. 867 (1981).

[71] A WORKFORCE ISSUE, *supra* note 4, at 31.

[72] I.R.C. § 21(a)(2) (West Supp. 1988).

sharov in this issue.[73] By Mr. Besharov's calculation, this provision benefits 9.6 million families at an average of $419. Only thirteen percent of the foregone federal taxes go to families with incomes below $15,000, and about half go to families with incomes above the national median. In addition, more and more employers are permitting Dependent Care Services Tax Credits[74] (popularly known as Flexible Spending Accounts), which are opportunities for families to pay for child care with pre-tax income. Overwhelmingly, this tax opportunity is used by well-off families.

B. *The Act for Better Child Care Services*

The contemporary child of the 1971 Comprehensive Child Development bill is the Act for Better Child Care (known as the "ABC" bill),[75] supported in 1988 and 1989 by a broad coalition with Senator Christopher Dodd (D-Conn.) as the named leader. Governor Dukakis supported the ABC bill in his 1988 presidential campaign.

The 1989 version of ABC would authorize Congress to appropriate up to $2.5 billion per year for all the purposes identified in the act.[76] Specified percentages of the total appropriated funds would be set aside for territories and Indian tribes.[77] The remainder would be allocated among the states according to a complicated formula taking account of the state's number of children and number of poor children.[78] The state would then create an agency to administer the funds provided to it. States would be required to meet minimum national quality standards.[79] A committee named pursuant to the statute would establish the minimum national standards, including staff-child ratios for children of various ages.[80] The Secretary of Health and Human

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[73] Besharov, *supra* note 31, at 505; *see also* Robins, *Federal Support for Child Care: Current Policies and a Proposed New System*, 11(2) FOCUS 1 (1988); Wolfman, *supra* note 18.

[74] I.R.C. § 129 (West Supp. 1988).

[75] S. 1885, 100th Cong., 1st., Sess., 133 CONG. REC. S16,555 (daily ed. Nov. 19, 1987); S. 5, 101st Cong., 1st Sess., 135 CONG. REC. S167 (daily ed. Jan. 25, 1989).

[76] S. 5, at § 4(a).

[77] S. 5, at § 5(a).

[78] S. 5, at § 5(b).

[79] S. 5, at § 7(c)(3)(C).

[80] S. 5, at § 18.

Services (HHS) would be allowed to strengthen but not to weaken the standards recommended to him. Most of the state's money would be used to provide child care for children in families with no more than 100% of the state's median income.[81] The state would use a sliding scale to allocate its subsidies, thus giving more to the poorest families.[82] It would do its subsidization by direct subsidy to qualified provider institutions or by assigning child care certificates to families or by a combination of the two approaches.

The ABC bill declares priorities among applicant families that might well be in conflict: on the one hand, "priority to children . . . with very low income," and on the other hand, priority to child care providers which "to the maximum extent feasible, provide child care services to a reasonable mix of children . . . from different socio-economic backgrounds."[83] The bill seeks to encourage higher salaries for child care workers: "exceptionally low salaries . . . adversely affect the quality of child care services by making it difficult to retain qualified staff."[84] States must make sure that care is provided for hours and days adequate to full-time workers.[85] They must also allocate some of their funds to provide care for parents who work nontraditional hours (such as nights and weekends),[86] and to make child care available for children with handicaps.[87]

Thus this proposed legislation would be a step toward expanding the state and federal role as standard-setter and information-coordinator; would require greater enforcement of licensing requirements than is done presently; would put additional government authority behind the appropriateness of child care in high quality (therefore expensive) settings; and would declare millions of families to be eligible for government financial help toward child care costs, while authorizing only enough federal money to provide the necessary assistance to a small percentage of those eligible. Finally, the bill would provide little guidance

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[81] In the 1988 version of ABC the upper limit was 115% of the state median income. In Massachusetts the figure would have been $44,941. *See* Besharov, *supra* note 31, at 505, n.56.

[82] S. 5, at § 7(c)(10).

[83] S. 5, at § 7(c)(9).

[84] S. 5, at § 2(a)(13).

[85] S. 5, at § 7(c)(3)(N).

[86] *Id.*

[87] S. 5, at § 7(c)(3)(J).

about who should be selected to receive government financial assistance from among the many who would be eligible.

C. *Republican Alternatives*

In 1988, several Republican legislators took major initiatives on behalf of child care legislation. In September 1988, at the height of the presidential campaign, Vice President Bush combined the approaches supported by Senator Hatch (R-Utah), Senator Quayle (R-Ind.), and Congressman Tauke (R-Iowa) (along with Republican initiatives on such topics as funds for schools where the Pledge of Allegiance is recited and programs to attack youth gangs) into the American Family Act. Although not fully rendered into legislative language and only partially repeated in President Bush's 1989 budget proposals, the Republican campaign proposal can be described as a relatively coherent alternative to the Democratic approach.

Campaigning for President, Mr. Bush supported an additional refundable tax credit of $400 per dependent below age six for children in families that include at least one worker and have less than $20,000 in income, phased out at $20 per $1000 and so providing no relief to children in families with income above $40,000. He also favored federal funds for child care certificates, but only for children in the poorest families and with little emphasis on requirement that eligible centers meet licensing requirements and no ban on participation by religious facilities. Mr. Bush also endorsed federal funds for loans to encourage creation of new child care centers, and some federal tax assistance for establishment of on-site and near-site facilities by businesses.[88]

The plan put forward by Mr. Bush after he became President was somewhat different. For each child under the age of four, families would receive an income tax credit equal to fourteen percent of wages, with a maximum of $1000 per child. In the first year (1990), families with $13,000 or less in income would

[88] Senator Hatch's bill, S. 2084, 100th Cong., 2d Sess., 134 CONG. REC. S1,423 (daily ed. Feb. 25, 1988), would have provided federal tax benefits both for businesses providing child care and for family child care providers, with steps to encourage the latter to comply with local licensing standards. It would also have "reformed" state tort law to reduce the vulnerabilities of child care providers to suits alleging abuse. Senator Hatch re-introduced his bill in 1989. S. 692, 101st Cong., 1st Sess., 135 CONG. REC. S3,251 (daily ed. Apr. 4, 1989).

benefit. By 1994, families earning up to $20,000 would qualify, but only those below $15,000 would get the maximum benefit.[89]

D. *Comparing the Democratic and Republican Approaches*

The 1988 and 1989 Democratic and Republican approaches offer very different directions as legislative initiatives for addressing child care needs.

How much government regulation should there be? Every Democratic proposal includes a high degree of standard-setting. The 1989 ABC bill, for example, would mandate a process of standard-setting at the federal level (over which the Secretary of HHS would have limited influence), with states permitted to declare stricter standards. The scope of national minimum standards for child care centers would "reflect the median standards for all States." For all child care, national standards could not be "less or more rigorous than the least or most rigorous standard that exists in any of the States."[90] Most Republican proposals would provide funds (through tax benefits) for any child care arrangement made by parents, or would provide (where certificates or vouchers are used) far less in the way of governmental—and nothing in the way of federal—standards. (Indeed, the 1989 Bush proposal would give tax benefits to low income families that used no paid child care at all.) The Democratic proposals would attempt to put the legitimacy of the federal government behind certain models of child care—certain definitions, certain levels of staffing, and certain minimum physical standards for facilities. Some proposals would also encourage or require substantially increased enforcement efforts to shut non-complying facilities.

How much redistribution should there be? All Republican proposals are heavily focused on the poorest families. Many of the Democratic proposals would allow available funds to benefit substantially more than half the population. It would be difficult to estimate the net distributional consequences of such proposals without predicting whether better-off or less-well-off families would manage to obtain the limited certificates for which funds

[89] Wall St. J., March 16, 1989, at A18, col. 1.
[90] S. 5, at § 18.

would be appropriated. One can certainly predict that all approaches like that in the ABC bill would reward those who can succeed in complicated, local scrambles for a desirable resource, and that these are unlikely to be the neediest families.[91] For example, under the Older Americans Act, age alone—not economic need—establishes eligibility for services. Regulations require that low-income and minority elderly be served at least in proportion to their numbers. A GAO study[92] showed that Area Agencies on Aging had difficulty meeting this requirement.[93] Neil Gilbert's conclusion is that there has been in a number of social welfare programs a "drift toward universalism," as middle class claimants have managed to obtain a substantial share of limited benefits.[94]

Will government funds assist parents who place their children in facilities operated by religious organizations? The Democratic approach, by financing child care centers directly and supplying certificates usable only at qualifying facilities, walks head on into the religious issue. About one-third of child care today is provided by religious organizations.[95] The ABC bill thus had to ban expenditures which members of Congress predicted would not be permitted by the Supreme Court. It also had to forbid expenditures so entangled with religion that the bill would lose the support of public education groups concerned to prevent any precedent for public aid to religious schools. Finding language that all elements of the

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[91] Neil Gilbert provides "axioms" that explain why the poor do not get their share of discretionary benefits:

> Less troublesome clients will be served before more troublesome ones.
> Those who can pay will be served before those who cannot.
> Higher status clients will be served before lower status clients.
> . . .
> Middle-class clients will obtain more knowledge about social service resources to meet their needs than lower-class clients.
> When both middle-class and lower-class clients know where resources are available to meet their needs, the middle-class clients will be more effective in getting at the head of the line.

N. GILBERT, *supra* note 22, at 70.

[92] G.A.O., LOCAL AREA AGENCIES HELP THE AGING, BUT PROBLEMS NEED CORRECTING 33 (1977), *cited in* N. GILBERT, *supra* note 22, at 67 n.14.

[93] N. GILBERT, *supra* note 22, at 56.

[94] *Id.* at 47–66. *See also* Liebman, *supra* note 64, at 23–24.

[95] *See* Whitehead, *supra* note 15, at 573.

necessary coalition could support—language acceptable to the American Civil Liberties Union, the National Education Association, and the United States Catholic Conference, for example—proved impossible in 1988, torpedoing the bill. In contrast, all Republican proposals seek ways to assist families using religious facilities, either with tax credits available no matter what the facility's sponsor or with "vouchers"[96] cashable at religious as well as non-religious facilities.[97]

Are there any benefits for parents who stay at home? Republican, but not Democratic, rhetoric offers special solace to "traditional families," meaning families in which fathers work and mothers remain at home. Some Republican proposals, including the Bush 1989 plan, give the same tax benefit to a family whether or not it obtains paid child care. A related issue is whether a particular proposal assists a single-parent family in which the parent is not working (and thus receives AFDC benefits). The Bush refundable tax credit requires that there be a working parent, and thus assists the single parent only when he or she seeks training or obtains a job. All child care proposals must now be coordinated with the Family Support Act of 1988 ("Welfare Reform"),[98] which requires AFDC recipients being provided with child care to work or be trained, and that states begin (over several years) to provide the child care that would allow job training and work requirements to be enforced.[99]

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[96] Apparently, debates over school vouchers and housing vouchers give this word a meaning that emphasizes wide consumer choice, whereas use of the word "certificate" suggests more control by the issuer of the purposes for which the currency can be spent. On the voucher movement, see N. GILBERT, *supra* note 22, at 32–40.

[97] For discussion of constitutional differences between government expenditures and government exemptions from taxation, see Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system"); New Energy Co. v. Limbach, 108 S.Ct. 1803 (1988); Wolfman, *Tax Expenditures: From Idea to Ideology* (Book Review), 99 HARV. L. REV. 491 (1985); Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1425 at nn.34–35 (May 1989).

[98] Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343.

[99] *See id.* §§ 201, 301–302 (1988). For an alternative vision, see Sarvasy, *supra* note 11, at 269:

> I derive my conception of a feminist revaluing of nurturing and caretaking work in part from the lost feminist potential of the mothers' pension concept [AFDC]. A key aspect of this feminist potential was the assumption that the mother should be viewed as equivalent to the civil servant or the soldier and therefore entitled to public compensation . . . . [T]he concern is to revalue a social contribution that both men and women can make and for which they

Who has how much discretion in selecting recipients from among those who can seek the benefit? Democratic alternatives cast a wide net of eligibility; but because they supply funds only for a portion of those eligible, these alternatives include procedures for delegating the authority to select beneficiaries. Most of the Republican proposals focus their benefits on the poorest families.

E. *Creating the Future Politics of Child Care*

Hardest to analyze, *what is the effect of the two approaches on the future politics of the issue?* There has lately been substantial commentary on the political difference between inclusive and targeted benefit programs.[100] Social Security[101] is "inefficient," in that it returns a great deal of money to the same people from whom the money is taken in taxes.[102] But it is also politically popular, as government officials have learned when they considered cuts. On the other hand, it is often said that programs only for the poor become poor programs. They certainly lack a constituency with political power. Also, inclusive programs build an identity of citizenship, a sense of belonging, a—may one use the term—"republican" spirit.[103]

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should both be adequately rewarded. Today while it might be difficult to argue for mothers' pensions, it is politically feasible to argue for caretakers' pensions, which would provide social support, both financial and moral, for performing the important roles of taking care of children, sick parents, or perhaps a friend with AIDS.

[100] *See, e.g.*, Hacker, *Welfare: The Future of an Illusion*, in REMAKING THE WELFARE STATE, *supra* note 11, at 290; R. KUTTNER, THE ECONOMIC ILLUSION: FALSE CHOICES BETWEEN PROSPERITY AND SOCIAL JUSTICE 1984; N. GILBERT, *supra* note 22; Skocpol, *America's Incomplete Welfare State: The Limits of New Deal Reforms and the Origins of the Social Crisis*, in STAGNATION AND RENEWAL IN SOCIAL POLICY: THE RISE AND FALL OF POLICY REGIMES 35 (G. Esping-Anderson, M. Rein & L. Rainwater ed. 1987).

[101] In conventional American discourse, "Social Security" includes old age, survivors, and disability income transfers, and Medicare's payment of hospital bills for the elderly.

[102] On Social Security's political success—if such it is—in redistributing from better-off to less-well-off see N. GILBERT, *supra* note 22, at 76–78; A. MUNNELL, THE FUTURE OF SOCIAL SECURITY (1977); M. Ozawa, *Income Redistribution and Social Security*, 50 SOC. SERV. REV. 209 (1976).

[103] *See, e.g.*, R. KUTTNER, *supra* note 100, at 40–41:

> To win broad popular support, social programs must be of high quality and must serve the middle class as well as the poor. . . . [C]learly, there are equity gains simply in having the poor and the nonpoor treated in the same hospitals, educated in the same school system, and subjected to the same rules when income supports may be necessary.
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> . . . [M]ost forms of means testing, though administratively efficient, are politically doomed. Income-support programs narrowly trageted to the poor are notoriously unpopular politically, as well as destructive of social citizen-

But it is incorrect to see only the two choices of inclusive programs (Social Security) and programs targetted on the poor (AFDC, Food Stamps, and Medicaid). A third category is programs with broad eligibility but limited appropriations. The poor may not be effective at competing with the middle class for benefits. And the existence of the underfunded program may not lead to expansion of appropriations because those who care the most manage to obtain benefits.

The Democratic Party's approach to child care in 1988 and 1989 relies heavily on regulation. The proposed ABC bill would place the national government on the side of child care of a certain definition and minimum quality. Child care that is below these standards would be dispreferred, perhaps banned, and at least ineligible for subsidy. One likely consequence of this bill is the formation of a more coherent provider community. It is far easier to imagine effective participation by "owners" of for-profit and not-for-profit centers, and by their professional staff, than by grandmothers, unlicensed down-the-street providers, or even at-home caretaker parents.[104]

Second, the ABC bill defines a very large percentage of all parents of young children as income-eligible for at least some government financial assistance toward the expenses of child care. When one imagines the median-or-above family as eligible, the argument for subsidy cannot be redistribution. Rather, the argument must be that all taxpayers should pay for those who now need child care, or that the government should mandate family income-shifting toward the years when child care is needed. If enacted, this bill would thus legitimate child care as a public good, which government should at least partially finance.[105] Even though a small percentage of middle-income fam-

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ship. Means-tested programs tend to be stigmatizing, invasive, and shabby around the edges, especially when times are hard and the fiscal mood is testy. . . . [T]he recipients of middle-class social entitlements are treated as citizens, while welfare clients are presumed chiselers until proven otherwise.

[104] *See* Piven & Cloward, *Popular Power and the Welfare State*, in REMAKING THE WELFARE STATE, *supra* note 11, at 91 (citing L. Salamon, Foundation News 17, 27 (July-August, 1984)): "There are now 17.3 million employees of social welfare agencies at the federal, state, and local levels and in the nonprofit sector; of these, some 6.5 million work in nonprofit agencies. In all, their numbers are equal to union membership in this country . . . ." On the development of social services providers as an effective lobbying group, see Smith & Stone, *The Unexpected Consequences of Privatization*, in REMAKING THE WELFARE STATE, *supra* note 11, at 244–47.

[105] Modern advocates of universal programs borrow many of their arguments from Professor Richard Titmuss of the London School of Economics. *See, e.g.*, R. TITMUSS, COMMITMENT TO WELFARE (1968). For the Titmuss arguments in the American child

ilies would receive benefits at the appropriation levels likely in early years, the fact that some families at each particular income level receive benefits would make more families ask for such benefits, and ought to make it more likely that appropriations would be expanded in the future.[106]

Third, since government would be authorizing services for many, but appropriating funds for only a few, the program itself would—to an even greater extent than now—become part of the local political process, and would encourage families to participate in community affairs (church affairs, local politics, ethnic organizations) by holding out the program's benefits as a possible reward. Bringing participants to these institutions, therefore, might make their voices louder in the future.

The political consequences of enactment of a child care law of the sort favored in 1988-89 by Republicans are very different. These proposals would transfer funds to families through the tax system, according to substantially non-discretionary criteria of income and family status. Families would get the benefit whether or not they used child care; and if they used child care, whether or not the care met government standards. Thus government would be playing an allegedly more neutral role in the

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care context, see, *e.g.*, Weir, Orloff & Skocpol, *The Future of Social Policy in the United States: Political Constraints and Possibilities*, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES, *supra* note 9, at 444:

> [H]igh on the list of new policies must be adequate, publicly encouraged child care provision to help mothers and fathers who work . . . . [T]he aim of proponents must be to maximize the range of potential recipients and, when possible, to provide assistance in ways that are not at odds with dominant cultural values or with the capacities of the U.S. federal state structure. Universal programs would minimize the over-identification of public social programs with blacks alone, an identification that has bedeviled public intervention since the Great Society. By building broad clienteles, new universal measures could also avoid the political vulnerability of social programs that targeted just the poor.

[106] See Brown, *The Segmented Welfare System: Distributive Conflict and Retrenchment in the United States, 1968–1984*, in REMAKING THE WELFARE STATE, *supra* note 11, at 195:

> Democratic Congresses . . . sought to include more working-class and middle-class families as beneficiaries of social welfare programs. The reasons why were rather obvious: A program with a mixed clientele, one that straddled social classes, was more likely to survive during a time of inflation and increasing budgetary pressures than one with a narrow clientele . . . . The most explicit instance of the Democratic party strategy occurred in connection with the child care program proposed in 1971. . . . Nixon ultimately vetoed the program, though not because he was concerned about the state of the American family, as he said at the time.

Works such as M. DERTHICK, *supra* note 27, and G. STEINER, *supra* note 63, cast doubt on the likelihood that an inclusive child care program would achieve broad political support while providing substantial benefits to poor families.

selection of types of care and in parental decisions about whether both parents should work. The benefit per family would be smaller, so the willingness to change behavior to adapt to this program would be less. No certified subgroup of validated providers would be created, so it is likely that the provider community would remain diverse and poorly organized. There would be no validation of community organizations as the ones in control of this benefit, so no incentive for community cohesiveness. Religious providers, at least some of which would probably be constitutionally barred from giving service in return for the federal certificates to be used under the ABC bill, would gain under the Republican alternatives.

But surely the chief political significance of the Bush-Quayle-Hatch-Tauke proposals for increased federal spending on child care would be that only families of quite low incomes would benefit; and thus (1) general regulatory standards would not be promulgated, and provider interests would have less incentive to enter the debate, (2) the coalition of present and potential beneficiaries would be small and weak, and (3) the program would legitimate child care as an appropriate subject of public expenditure only for families of low income. The significant official statement would be that most families ought to take care of this need on their own.

F. *Compromise*

In early 1989, Senators Dodd and Hatch formed an alliance, each becoming a co-sponsor of the other's child care bill. These bills, which seem to point in such different directions, may ultimately be joined in a single law which would have the federal government do all the things sought by both approaches.[107] That would be a strange animal, half donkey and half elephant. It would do the regulatory work of ABC; would subsidize some slots (though vastly fewer than the demand); and would grant a small tax credit to poor working parents. Enacting a law of that sort would add a degree of legitimacy to each approach. Essen-

[107] The total price tag would be $4.5 billion. *See* Boston Globe, Feb. 26, 1989, § 1 at 12, col. 1.

tially, it would put off to a future day the question of whether the United States is to act systematically on the subject of child care, and if so for which of the many possible reasons now given in public discussion and according to which of the many possible institutional forms. So far, our political process has—on this subject as on so many—been unable to choose.

A LEGISLATIVE APPROACH TO WORK AND FAMILY: TIME FOR A SMART START

EDWARD M. KENNEDY*

In 1962, the High/Scope Educational Research Foundation in Michigan began an experiment that may ultimately change the shape of American education. These researchers set out to test an idea that we accept as a given today: that the seeds of failure in school are planted at an early age. They recognized that some children live in such deprivation that they begin kindergarten below grade level and stand a slim to nonexistent chance of ever catching up with their more fortunate peers.

The Michigan researchers believed that early education could better the lives of the children who run the greatest risk of failure—in school and after. To test this theory, they established an intensive education program for a group of low-income three- and four-year-olds at the Perry Preschool in Ypsilanti. The classes were small, the teachers were well-trained, and the curriculum emphasized the individual development of each child. When compared to a group of similar students who had not benefited from early education, the Perry Preschool students were much more likely to enter college, be literate, and have a job. They were much less likely to drop out of school, receive welfare, or have a run-in with the law.[1]

On the basis of the Perry findings and other studies confirming the benefits of early education, many states and communities have begun to make early education programs more widely available. But we must do more. It is time for the federal government to encourage more states and localities to become involved in early education programs. That is why I introduced the "Smart Start" legislation,[2] which would make high quality early childhood education widely available to preschool-age children.

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* Member, United States Senate (D-Mass.). B.A., Harvard University, 1956; LL.B., University of Virginia, 1959. Senator Kennedy is chairman of the Senate Labor and Human Resources Committee.

[1] *See* J. BERRUETA-CLEMENT, L. SCHWEINHART, W. BARNETT, A. EPSTEIN & D. WEIKART, CHANGED LIVES: THE EFFECTS OF THE PERRY PRESCHOOL PROGRAM ON YOUTHS THROUGH AGE 19, at 1 (1984) [hereinafter PERRY PRESCHOOL PROGRAM].

[2] S. 123, 101st Cong., 1st Sess. (1989), *originally introduced as* S. 2270, 100th Cong., 2d Sess. (1988).

I. THE WORKFORCE OF THE NEXT CENTURY

Smart Start serves both short-term and long-term work and family policy objectives. In the short term, Smart Start will expand the range of child care options available to working families. In the long term, Smart Start can alleviate the potentially serious labor shortage faced by the United States in coming decades, particularly among skilled workers. Additionally, Smart Start provides the tools for "at-risk" children to escape the cycle of poverty.

Today, half of all preschool-age children have mothers in the labor force.[3] Two hundred thousand mothers of young children turn down job offers each month because they cannot find satisfactory child care.[4] The lack of adequate child care is also a leading cause of absenteeism, costing employers $3 billion a year nationally.[5]

Although a comprehensive approach to child care is needed, preschool education programs clearly should be part of the solution. For only a small amount more than is spent on each child in elementary school,[6] early childhood education programs can give children a sound educational foundation while providing working parents with quality child care.

By the year 2000, the United States will be experiencing the lowest labor force growth rate since the 1930's. As the average age of the population climbs, the number of younger workers will drop. Minorities, women, and immigrants will account for 84% of those joining the workforce in the next decade.[7]

Not only do statistics signal a shortage of workers, they also indicate the potential for a shortage of workers with basic skills.[8] Of the new jobs that will be created in the next decade, over 50% will require some education beyond high school, and almost a third will require a college degree. (Today 40% of jobs require

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[3] CHILDREN'S DEFENSE FUND, A CHILDREN'S DEFENSE BUDGET 176 (1988).

[4] *Id.* at 178.

[5] *Hearing on Child Care Quality Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 5 (1989) (statement of Madeleine Kunin, Governor of Vermont).

[6] *See* W. GRUBB, YOUNG CHILDREN FACE THE STATES: ISSUES AND OPTIONS FOR EARLY CHILDHOOD PROGRAMS 48 (1987).

[7] HUDSON INSTITUTE, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY xix–xxi (1987).

[8] *See* Bureau of Labor Statistics, *The Growing Need for Education*, OCCUPATIONAL OUTLOOK Q. 35 (Fall, 1987).

a high school diploma[9] and 22% of new jobs require a college education.)[10]

Policy makers now have an opportunity to improve early education while reducing poverty. In the next decade, employers may become more likely to consider hiring and training individuals they once were too selective to consider: the chronically unemployed poverty population.[11] The predicted labor shortage may be the catalyst we need to reduce the level of poverty. If we can build a system of early education today, the workforce of the twenty-first century is more likely to possess the basic skills our economy will demand. At the same time, we can lift a generation out of poverty.

II. Proven Results Create a Growing Base of Support

While children's advocates have long supported funding for early education, they now have new allies among the business community, which has recently recognized the basic link between today's education and tomorrow's workforce. In 1987, the Committee for Economic Development ("CED"), an organization of over two hundred business executives and educators, advocated universal preschool education for every disadvantaged three- and four-year-old in its landmark report, "Children in Need: Investment Strategies for the Educationally Disadvantaged."[12] Testifying on behalf of the Smart Start legislation before the Senate Committee on Labor and Human Resources, Owen Butler, CED's vice-chairman and the former chairman of Procter & Gamble, stated that "nothing, absolutely nothing this country can do is more important to our future than the issues which are addressed in this legislation."[13]

This unlikely partnership of children's advocates and business would not exist without solid empirical evidence demonstrating the benefits of child development programs. Although the Perry Preschool study is cited most often because of the range of

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[9] Hudson Institute, *supra* note 7, at 98.

[10] Hudson Institute, *supra* note 7, at 97.

[11] *See* L. Legrand, Economic Benefits of Education 15 (Congressional Research Service Report No. 88-753E, Dec. 13, 1988).

[12] Committee for Economic Development, Children in Need: Investment Strategies for the Educationally Disadvantaged 33 (1987).

[13] *Smart Start: The Community Collaborative for Early Childhood Development Act of 1988: Hearings on S. 2270 Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 2d Sess. 156 (1988) [hereinafter *Smart Start hearings*].

benefits it demonstrated, its lengthy follow-up, and its careful cost-benefit analysis, more than a dozen other studies confirm that early education is a good investment.[14]

Researchers at Syracuse University, for example, found significant benefits from a program of early education and family support that started in 1969.[15] Those who received services from the Family Development Research Program ("FDRP") were mainly the children of unemployed single mothers with little education. These children were matched with a control group of similarly disadvantaged children who did not participate in the program. Ten years later, the researchers found that the FDRP children had more positive self-images and were more likely to see school as important than children in the control group.[16] At age fifteen, FDRP children had experienced one-fourth the rate of juvenile delinquency of the control group, and had committed fewer serious criminal offenses.[17]

Even among children of middle-income families, early education yields impressive results. A project conducted over an eleven-year span in Brookline, Massachusetts, involved 285 low-income to affluent families. Researchers found that by second grade, project children experienced half the rate of learning difficulty of control group children and forty percent fewer reading problems.[18] Children of college-educated parents who participated in the program also experienced significantly fewer learning problems than children of similar family backgrounds who did not receive services.[19]

In study after study, children who receive early childhood education have been found to be less likely to repeat a grade,

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[14] *See, e.g.*, C. Ramey, Does Early Intervention Make a Difference? (October 1985) (presented at the National Early Childhood Conference on Children with Special Needs, Denver, Colorado) (describing the Carolina Abecedarian Project); I. LAZAR & R. DARLINGTON, LASTING EFFECTS OF EARLY EDUCATION: A REPORT FROM THE CONSORTIUM FOR LONGITUDINAL STUDIES (1982) (discussing long-term effects of eleven independent studies); Schweinhart & Weikart, *Evidence that Good Early Childhood Programs Work*, PHI DELTA KAPPAN, April 1985, at 545 (discussing positive results of seven independent studies).

[15] J. LALLY, P. MANGIONE & A. HONIG, THE SYRACUSE UNIVERSITY FAMILY DEVELOPMENT RESEARCH PROGRAM: LONG RANGE IMPACT OF AN EARLY INTERVENTION WITH LOW-INCOME CHILDREN AND THEIR FAMILIES 40–41 (1987) [hereinafter THE SYRACUSE UNIVERSITY FAMILY DEVELOPMENT RESEARCH PROGRAM].

[16] *Id.* at 34–35.

[17] *Id.* at 35–39.

[18] *Smart Start hearings*, *supra* note 13, at 309–11 (statement of Donald E. Pierson, Professor of Education and Director of Field Studies, University of Lowell, Lowell, Mass.; former director of the Brookline Early Education Project).

[19] *Id.* at 310.

require special education, drop out of school, or become involved in crime. Such children have more positive self-images and higher expectations for themselves. Just as a pattern of failure begins in the earliest years, studies have found, so does a pattern of positive achievement.[20]

These successful programs shared several characteristics that are indicia of a quality early education program. They employed a "developmentally appropriate" curriculum that did not attempt to force children to read before they were ready and did not define learning in terms of specific subject areas. Rather, the curriculum provided a stimulating environment in which teachers acted as facilitators. Children selected among a range of activities designed to develop intellectual, physical, emotional, social, and communication skills at an individualized pace.[21]

A second important indication of "quality" is the degree of interaction between teachers and children. Educators generally agree that a high teacher-child ratio is essential to a quality program. With four-year-olds, a ratio of at least 1:10 marks a quality program.[22]

The training and experience of the teachers is as important as a high teacher-child ratio. The National Day Care Study found that the only teacher characteristic that accurately predicted program effectiveness was the extent of training in early childhood development.[23] The Perry Preschool and Syracuse programs emphasized in-service training and commitment to the program philosophy.[24]

Tied to the importance of having trained and experienced teachers is the need for higher salaries. Currently, teachers in preschool programs can expect an average salary of less than $13,000 per year. Low teacher salaries lead to high turnover rates, which can destroy program continuity and disrupt student-teacher and teacher-parent relations.[25]

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[20] L. Schweinhart, THE PRESCHOOL CHALLENGE 8 (1985).

[21] *See* NATIONAL ASSOCIATION FOR THE EDUCATION OF YOUNG CHILDREN, DEVELOPMENTALLY APPROPRIATE PRACTICE IN EARLY CHILDHOOD PROGRAMS SERVING CHILDREN FROM BIRTH THROUGH AGE 8, at 54–57 (S. Bredekamp ed. 1987).

[22] *See id.* at 57.

[23] *See* Weikart & Schweinhart, *Early Childhood Development Programs: A Public Investment Opportunity*, EDUC. LEADERSHIP, Nov. 1986, at 11.

[24] PERRY PRESCHOOL PROGRAM, *supra* note 1, at 8; THE SYRACUSE UNIVERSITY FAMILY DEVELOPMENT RESEARCH PROJECT, *supra* note 15, at 5, 8, 10.

[25] B. WILLER, THE GROWING CRISIS IN CHILD CARE: QUALITY, COMPENSATION AND AFFORDABILITY 4–7 (1988).

Finally, a high degree of parental involvement is an essential component of a quality program. Parents bear ultimate responsibility as children's primary teachers and caregivers. High quality programs recognize this fact and arrange for staff to make home visits, encourage parents to spend time at the center, and help parents to reinforce the program's curriculum at home.

III. A Federal, State, and Local Partnership

With solid evidence in hand and years of experience to guide us, the time for experimental programs has passed. We need a national program drawing upon federal, state, and local resources to make early childhood education available to every preschool-age child. This national program need not replace existing state and local programs—it should build on and coordinate existing early childhood programs.

Support for early education is growing without federal involvement, though not quickly enough. In recent years, more than half of the states have invested in early education programs, usually targeted at disadvantaged children.[26] The momentum for state-funded programs, like that for a national effort, is fueled primarily by mounting evidence that early education works. A rising rate of poverty among children, increased demand for child care, and a growing consensus about the need for educational reform also build momentum for early education programs. As a result, state investment in early education was projected to exceed $200 million in 1988.[27]

State programs range in size from Delaware's $189,000 investment in pilot programs to Texas' $46 million commitment to serve every disadvantaged and non-English speaking four-year-old.[28] While most programs are administered by state departments of education, several states run projects through their departments of community development or human services.[29]

At the local level, urban school districts have made major investments in early education. A 1986 survey reported a collective expenditure of $136 million to serve 70,000 pre-kindergarten children in twenty-eight school districts, primarily with

[26] I. Goodman & J. Brady, The Challenge of Coordination iv (1988).
[27] *Id.*
[28] *Id.* at 18.
[29] *Id.*

part-day programs.[30] School districts in Buffalo, Philadelphia, and Rochester reported spending more on preschool programs than on kindergarten.[31] Local programs are based in public schools or community-based agencies and have varying quality standards. Minimum teacher-child ratios, for example, range from 1:15 in New York City to 1:6 in Seattle, Washington.[32]

The federal government has long been involved in early childhood education, primarily through the Head Start program. Head Start began in 1965 as an educational and social services program for disadvantaged preschoolers and now serves approximately 450,000 children through centers in all fifty states and has a budget of $1.2 billion. While all children whose family's income is below the poverty line are eligible for Head Start, the program actually serves only 16% of these children.[33] Because the program has traditionally represented a federal-local partnership that bypasses states, only eight states provide funding.[34] Several other federal initiatives also support early education, including the Education of the Handicapped Act, Even Start, and Chapter 1. Through these programs, the federal government now spends approximately $1.8 billion on early education programs.[35]

Across the country, 1.7 million four-year-olds are enrolled in a range of public and private early education programs.[36] Despite substantial public investment in programs targeted at disadvantaged children, those children whose families earn under $10,000 a year are still far less likely to receive early education than children in families earning over $35,000.[37] An estimated one-half million poor four-year-olds continue to lack early childhood education.[38]

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[30] L. SCHWEINHART & E. MAZAR, PREKINDERGARTEN PROGRAMS IN URBAN SCHOOLS ix (1987).

[31] *Id.*

[32] *Id.* at 15.

[33] W. RIDDLE, EARLY CHILDHOOD EDUCATION AND DEVELOPMENT: FEDERAL POLICY ISSUES 4 (Congressional Research Service Issue Brief IB88048, Oct. 20, 1988).

[34] I. GOODMAN & J. BRADY, *supra* note 26, at 21.

[35] This figure reflects combined appropriations for fiscal year 1989 for the following programs' expenditures on preschool education: Head Start, Chapter 1, Even Start, and Education of the Handicapped Act Preschool Incentive Grant Program. *See* W. RIDDLE, *supra* note 33, at 4–5; DEPARTMENT OF EDUCATION, THE FISCAL YEAR 1990 BUDGET: SUMMARY AND BACKGROUND INFORMATION 7 (1989).

[36] DEPARTMENT OF EDUCATION, DIGEST OF EDUCATION STATISTICS 1988, at 55.

[37] *See* CHILDREN'S DEFENSE FUND, *supra* note 3, at 191.

[38] There are 3.6 million four-year-olds. *See* DEPARTMENT OF EDUCATION, *supra* note 36, at 55. Twenty-two percent of children under five are poor, for a total of 792,000 poor four-year-olds. *See* CHILDREN'S DEFENSE FUND, *supra* note 3, at 249. Thirty-

A national preschool education program should be built upon this existing system of diverse private and public programs. The program should reflect a financial partnership, using federal funds to encourage state and local investment in early education programs. In addition, the program should address the challenges of coordination and quality.

A mechanism is needed to eliminate the historic lack of communication between public schools and community-based early education programs such as Head Start. Head Start and public school preschool programs often end up competing for space, teachers, and children, while in other neighborhoods, children go unserved. Two recent reports—"The Challenge of Coordination,"[39] by the Educational Development Center, and "Right from the Start,"[40] by the National Association of State Boards of Education—call for joint planning at state and local levels between school-based preschool programs and Head Start. Such collaboration could produce greater resource sharing and more efficient provision of teacher training, transportation, and other services.

The final challenge facing a national system is maintaining quality. While research demonstrates clearly that high teacher-child ratios, trained teachers, parental involvement, and a developmental curriculum are essential components of high quality programs, state programs have not always lived up to these ideals. Because good programs are generally expensive, some states have sacrificed quality in order to serve more children. The best way to ensure quality is to condition federal funding on compliance with federal standards. This approach would allow states to use federal dollars either to bring existing programs up to standard or to increase the number of children served in programs that already meet federal guidelines.

IV. The Smart Start Approach

The Smart Start legislation is designed to ensure a coordinated and flexible approach that provides quality early childhood ed-

three percent of these children receive early education, leaving over 500,000 poor four-year-olds unserved. *See id.* at 191.

[39] I. Goodman & J. Brady, The Challenge of Coordination: Head Start's Relationship to State-Funded Preschool Initiatives (1988).

[40] National Association of State Boards of Education, Right from the Start: The Report of the NASBE Task Force on Early Childhood Education (1988).

ucation. Smart Start would provide up to $1 billion in federal grants to build this system.[41] States and localities would be required to match federal funds dollar for dollar and would have broad flexibility to tailor programs to their unique needs.[42] Smart Start would create a mechanism for local coordination among service providers: an eight-member policy group composed of parents, teachers, and representatives of schools, Head Start, and social services agencies would determine how best to meet the needs of the community.[43] At the state level, advisory committees would perform similar functions.[44]

The local policy groups would be empowered to expand or upgrade existing programs in Head Start agencies, public schools, and other non-sectarian, non-profit organizations. Where no such programs exist, policy groups would be authorized to create new ones.[45] Policy groups would also be responsible for devising systems to coordinate services at the local level and smooth the transition from preschool to kindergarten.[46]

The state advisory committees would coordinate the provision of early education services by state agencies.[47] Early education crosses many administrative boundaries. Typically, state education, community development, labor, public health, and housing agencies would each play a role. Interdepartmental task forces are useful in minimizing duplicative effort and facilitating the sharing of expertise. In Massachusetts, for example, an interdepartmental task force was essential to the success of the state's Early Education Initiative, one of the models for Smart Start.[48]

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[41] S. 123, 101st Cong., 1st Sess., 135 CONG. REC. S444 (daily ed. Jan. 25, 1989) § 4(b).

[42] *Id.* § 20(a), § 15.

[43] *Id.* § 12(b) & (c).

[44] *Id.* § 9(b) & (c). The state advisory committee will be selected by the governor from among the state education, social services, and child development agencies, the state Head Start Association, and organizations representing parents.

[45] *Id.* § 15(a).

[46] *Id.* § 13(b)(1)(c) & (f) and § 16(a)(9). The local policy group may expend three percent of the funds the community receives for these functions to develop an application, conduct a needs and resources assessment, and design a service plan for the community. *Id.* § 7(c)(6) and § 12(c).

[47] The State Advisory Committee would receive one percent of state funds. *Id.* § 7(b)(2)(A). The Committee would be responsible for developing the state application, recommending to the governor a head state agency, advising the agency, reviewing local applications, and other functions. *Id.* § 9(c).

[48] *See* F. MARX & M. SELIGMAN, THE PUBLIC SCHOOL EARLY CHILDHOOD STUDY: THE STATE SURVEY 107 (1988); *see also Smart Start Hearings*, *supra* note 13, at 83–84, 87 (statement of Massachusetts Lieutenant Governor Evelyn Murphy).

Smart Start would ensure high quality programs by requiring each classroom receiving funds to have a 1:10 teacher-child ratio, staff trained in early childhood development, active parental involvement, and a developmentally appropriate curriculum.[49] These standards would ensure that each child will receive personal attention from qualified educators. The standards also would promote an environment in which children can learn at a pace appropriate to their age and level of development.

Smart Start funds could be used to improve the quality of an existing program to ensure compliance with these standards. For example, a program operating without trained teachers could use funds to pay for training or to raise salaries to attract more qualified staff. Another program might use funds to reduce class size or develop a parent outreach program.

In order to address the overall needs of children, Smart Start-funded programs must offer comprehensive services, including nutrition, family support, parenting education, and screening for health and handicapping conditions. The programs must ensure that follow-up health services are available, and provide referrals to social services for which the children and their families are eligible.[50]

Because of the growing demand for child care, Smart Start programs will operate for the full work-day and the full calendar year; parents would have the option of part-time attendance for their children. Current part-day programs could be expanded to full-day with federal funds. The day need not be devoted entirely to "education," but could include activities appropriate to the needs of young children, including rest and play.

Services should be available to all children, but federal funds should be targeted at the disadvantaged. Two-thirds of Smart Start funds would be directed toward children whose family earnings are less than 115% of the poverty line. For these children, the services would be free. Other families would pay a fee on a sliding scale, up to 10% of their income.

V. Can We Afford It?

The Smart Start legislation would allocate $1 billion a year in federal funds and require an additional $1 billion in state match-

[49] S. 123, 101st Cong., 1st Sess. 135 Cong. Rec. S444 (daily ed. Jan. 25, 1989) § 16.
[50] *Id.* § 16(a)(6), (7) & (8).

ing funds for early childhood education. When the family fees are included, program funds will be sufficient to cover all 3.5 million four-year-olds in America. The Perry Preschool research indicates that the expenditures will be highly cost-effective—the Perry study concluded that an investment of $4800 per child in early education saved taxpayers $33,800 in later costs for welfare, teenage pregnancy, and other expenses, a return of $7 for every dollar spent.[51]

The Perry results suggest that Smart Start can cut the current school dropout rate by a third.[52] One out of eight students today does not finish high school. The numbers are higher for Blacks and still higher for Hispanics, and the consequences are devastating. Dropouts are less likely to be employed than high school graduates, and dropouts who do work earn lower wages. Society pays for dropouts too—through lost tax revenues, and increased welfare costs, drug abuse and crime.[53] Experts estimate that each year's class of dropouts costs society $240 billion in lost earnings and lost taxes over their lifetimes.[54] This estimate does not include losses resulting from the educational disadvantages passed on to future generations.

Early education may also be our best antidote for poverty. Poverty among children has risen in recent years and is projected to rise sharply by the year 2000.[55] While many Americans have enjoyed a new prosperity, the most vulnerable members of society—young children—have not. There are currently 1.5 million more poor children living in poverty than in 1980. Today, one in five children is impoverished.[56]

Among minorities, the figures are even more shocking. More than one-third of all Hispanic children and nearly half of all Black children live below the poverty line.[57] For minority children in single-parent families headed by females the numbers are overwhelming.[58] Over two-thirds of all Black and Hispanic children in such families are poor.[59] Children who live in poverty

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[51] PERRY PRESCHOOL PROGRAM, *supra* note 1, at 200–01.

[52] Perry Preschool students had a dropout rate of 33%, compared with 51% for the control group. *See* PERRY PRESCHOOL PROGRAM, *supra* note 1, at 2.

[53] UNITED STATES GENERAL ACCOUNTING OFFICE, SCHOOL DROPOUTS: THE EXTENT AND NATURE OF THE PROBLEM 9 (1986).

[54] COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 12, at 3.

[55] CHILDREN'S DEFENSE FUND, A VISION FOR AMERICA'S FUTURE 16 (1989).

[56] *Id.*

[57] DEPARTMENT OF EDUCATION, YOUTH INDICATORS 1988, at 30.

[58] *Id.*

[59] *Id.*

appear to be at risk of educational failure long before they begin kindergarten.[60]

In human terms, these figures are tragic. In economic terms, they threaten to undermine America's future competitiveness. Today's four-year-olds will graduate from high school in the year 2002. If we hope to have a skilled workforce at the beginning of the next century, we must invest in programs now to improve the educational start we give our young children. Smart Start offers that hope for the future by creating a quality early education system available to every child in America.

[60] J. STEDMAN, THE EDUCATIONAL ATTAINMENT OF SELECT GROUPS OF "AT RISK" CHILDREN AND YOUTH 42 (Congressional Research Service Report No. 87-290 EP, April 1, 1987).

FAMILY AND MEDICAL LEAVE LEGISLATION IN THE STATES: TOWARD A COMPREHENSIVE APPROACH*

DONNA R. LENHOFF**
SYLVIA M. BECKER***

I. INTRODUCTION: THE SOCIAL POLICY RESPONSE TO CHANGING AMERICAN WORK FORCE AND FAMILY STRUCTURES

Demographic and economic changes that have taken place in the United States over the past four decades have dramatically transformed the composition of the American work force and the nature of the American family. One of the most important shifts that has occurred stems from the significant influx of women into the labor force.[1] After years of steady increases, more than seventy percent of all American women ages twenty to fifty-four now work outside the home.[2]

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* Much of the research that forms the basis of this Article was conducted by G. Diane Dodson, deputy director for family programs, Women's Legal Defense Fund, with the assistance of law clerk Gayle Bohling, volunteer lawyer Sandy Montgomery, and student intern Sharon Stoneback. The chart in Appendix A was assembled by Ann Pauley and Novella Abrams of the Women's Legal Defense Fund. The sample legislation in Appendix B was developed with the assistance of Claudia A. Withers, Deputy Director for Employment Programs, Women's Legal Defense Fund, and Janet Kohn. The authors are grateful for this extensive assistance. This Article was made possible in part by funds granted by the Ford and Charles H. Revson Foundations. The statements made and the views expressed, however, are solely the responsibilities of the authors.

** Director for legal policy and programs, Women's Legal Defense Fund, Washington, D.C. B.A., University of Chicago, 1972; J.D., University of Pennsylvania, 1976.

*** Associate, Kaye, Scholer, Fierman, Hays & Handler, Washington, D.C. B.S.F.S., 1980, M.S.F.S., 1987, Georgetown University; J.D., Georgetown University Law Center, 1987. Ms. Becker is a former attorney/fellow, Women's Legal Defense Fund, in connection with the Women's Law and Public Policy Fellowship Program, Georgetown University Law Center.

[1] The number of women in the work force increased by 172% from 1954 to 1987; the increase in the number of men was only 49% over the same period. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 159, table 2 (Jan. 1988). This trend is expected to continue, at least through this century; the majority of new entrants into the work force between 1985 and 2000 will be women. U.S. DEP'T OF LABOR, OPPORTUNITY 2000: CREATIVE AFFIRMATIVE ACTION STRATEGIES FOR A CHANGING WORKFORCE 7 (Sept. 1988).

[2] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT IN PERSPECTIVE: WOMEN IN THE LABOR FORCE REP. NO. 747, at 2 (3d qtr. 1987) [hereinafter EMPLOYMENT IN PERSPECTIVE].

These changes in the work force have had a tremendous impact on the American family structure. The traditional family, with one spouse remaining at home—occupied almost exclusively with homemaking responsibilities including caring for children and other dependent relatives—has been eclipsed by other family patterns. Today, most families with children are maintained either by a couple in which both partners are employed[3] or by a single parent who works.[4] In all, only 14.2% of the nation's families conform to the traditional pattern in which the father works outside the home and the mother stays at home to care for the children.[5]

Women who have entered the labor force frequently continue to bear significant family responsibilities. In addition to their extensive child care responsibilities,[6] some American working women must also care for elderly relatives.[7] Thus, a growing proportion of women are becoming members of what has come to be called the "sandwich generation"—those burdened from above and below by caretaking responsibilities—as life expectancies rise, the median ages of the population and the labor force increase, and childbearing is delayed.[8]

One often overlooked result of the substantial increase in the percentage of women in the labor force is their reduced ability to provide the family caretaking services that they traditionally have provided, without compensation, in their roles as wives, mothers, and daughters. The need for these services, such as

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[3] In 1987, 56% of married women who lived with their husbands worked. *Id.* at 3.

[4] In 1987, 62% of women who maintained families were in the labor force. *Id.* In 1983, approximately one in five children in the United States lived with single mothers. I. GARFINKLE & S. MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN 46 (1986).

[5] *American Women Today: A Statistical Portrait*, in THE AMERICAN WOMAN 1988–89: A STATUS REPORT 333, 374, table 14 (S. Rix ed. 1988).

[6] More than 52% of all mothers with children under one year of age now work outside the home. HOUSE COMM. ON EDUC. AND LAB., REPORT ON FAMILY AND MEDICAL LEAVE ACT OF 1988, H.R. REP. NO. 511, 100th Cong., 2d Sess., pt. 2, at 17, [hereinafter HOUSE EDUC. & LAB. REP.]. Moreover, this number is expected to grow significantly. Experts estimate that 80% of women in the work force are of childbearing age and that 93% of these women are expected to have children sometime during their careers. Freedman, *The Changing Composition of the Family and the Workplace*, in THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY 23, 25 (E. Ziegler & M. Frank eds. 1988).

[7] "Approximately 72% of care givers to the functionally impaired aged are female." STAFF OF SUBCOMM. ON HUM. SERVICES OF THE HOUSE SELECT COMM. ON AGING., 100TH CONG., 1ST SESS., EXPLODING THE MYTHS: CAREGIVING IN AMERICA 18 (Comm. Print 1987) [hereinafter EXPLODING THE MYTHS: CAREGIVING IN AMERICA].

[8] Indeed, it is projected that by 2025 the number of elderly persons needing health care will be more than twice the number of children under age five. Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 386 (1984–1985).

nurturing newborn babies, caring for sick children, and taking care of elderly family members, persists; yet our society has not made a concomitant shift in resource allocation to meet the need.[9] In many respects, our society generally continues to operate as if mothers stay at home to care for their children, and fathers' wages are sufficient to support the entire family. Adequate day care is scarce; needed family services are often only available, or easily accessible, during working hours; jobs traditionally held by women often do not offer essential benefits, such as health and disability insurance (benefits traditionally provided to the family as a whole through men's jobs); and jobs are structured to require that employees work all day, and all but a few days (of sick leave and vacation) a year.

Society's failure to respond to the the overwhelming proportion of families that lack a full-time care giver at home inflicts devastating costs on these families, especially in the stress associated with two full-time wage earners maintaining a family.[10] Families in which medical or other emergencies exacerbate the day-to-day pressures of domestic life suffer still more serious losses. In such cases, the lack of societal supports may have immediate economic consequences if one of the wage earners is forced to quit her or his job to take care of the family's needs.

Women's status also suffers from society's failure to accommodate and help reorganize family caretaking responsibilities, roles traditionally borne by women. Most women still assume the greater burden of caring for children, other dependents, and the home, even while employed.[11] Women routinely experience conflict between work and family demands[12] and frequently find it necessary to take time off without pay to fulfill their caretaking

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[9] "[M]ost people, including many policymakers, are beginning to recognize the real changes that have taken place in the modern family; what has not yet happened is a general acknowledgement that the family's needs have changed as well, and that we need new policies that address those needs." P. SCHROEDER, CHAMPION OF THE GREAT AMERICAN FAMILY 26 (1989).

[10] *See generally Joint Hearings on the Family and Medical Leave Act of 1987 Before the Subcommittees on Labor-Management Relations and on Lab. Standards of the House Comm. on Educ. & Lab.*, 100th Cong., 1st Sess. 235, 235–36 (1987) (statement of Donna Lenhoff, associate director for legal policy and programs, Women's Legal Defense Fund).

[11] *See, e.g.*, Blank, *Women's Paid Work, Household Income, and Household Well-Being*, in THE AMERICAN WOMAN 1988–89: A STATUS REPORT, *supra* note 5, at 123, 150, table 3.7 (S. Rix ed. 1988). This study suggests that even working women perform at least twice the household tasks that their (working) husbands do.

[12] *See, e.g.*, SPECIAL REPORT (BNA) No. 9, THE NATIONAL REPORT ON WORK & FAMILY: 82 KEY STATISTICS ON WORK AND FAMILY ISSUES 23 (1988).

responsibilities to care for elderly relatives.[13] In addition, women frequently lose or must quit their jobs when they deliver or adopt a child, or when they encounter a compelling family need that makes them either temporarily unable to work at all or to maintain the hours designated by employers. In fact, women may be forced to take jobs with shorter hours or less responsibility than their male counterparts because most full-time, high-level jobs do not easily accommodate family responsibilities. As a result, women's overall earning capacities and their employment tenures suffer greatly.[14] Thus, employment policies that accommodate the important family responsibilities faced by women are necessary to the achievement of meaningful equality for women in the work force.

Among the social policies that could be implemented to ensure that family care taking services are provided when women no longer provide them for free are day care for both children and dependent elders; universal health care available at schools, day care, and workplaces, or during hours when children can be accompanied by their parents; and flexible or alternative work scheduling and other workplace policies that allow employees the time necessary to care for their children or other family members.[15]

In this Article, we focus on one change that must be made in the workplace to accommodate employees' family responsibilities: the implementation of policies that guarantee employees their jobs when they must leave work because of medical emergencies or other compelling family needs.[16] In Part II, we survey

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[13] *See* EXPLODING THE MYTHS: CAREGIVING IN AMERICA, *supra* note 7, at 28.

[14] A recent study estimates that the annual losses in earnings to American working women who deliver babies total $31 billion. *See* R. SPALTER-ROTH & H. HARTMANN, UNNECESSARY LOSSES: COSTS TO AMERICANS OF THE LACK OF FAMILY AND MEDICAL LEAVE 4 (Inst. for Women's Policy Research 1988).

[15] Other countries' policies suggest these and other programs to support working families. *See generally* Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311 (1989).

[16] Such policies include, but are much broader than, the traditional concept of "maternity leave," which generally is limited to mothers of newborn children and, as used in general parlance, refers to a period of time spanning as much as a few weeks before and several months after childbirth, without regard to whether the mother is physically able to work during that period. Indeed, prior to the enactment of the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, § 1, 92 Stat. 2076 (Oct. 31, 1978) (amending 42 U.S.C. § 2000e (1976)), it was not uncommon for employers to require pregnant women to take "maternity leave," without pay, when they reached a certain point in their pregnancies, even if they remained physically able and willing to work. *See, e.g.*, Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632 (1974) (invalidating, *inter alia*, a school district's mandatory "maternity leave" requirement that pregnant teachers take unpaid "maternity leave" from the fifth month of pregnancy to at least three months

current employer policies regarding such leave and examine the extent to which current federal and state laws regulate these policies, ultimately concluding that existing provisions fail to provide an adequate response to the needs of employees with family responsibilities. We include a chart of existing state laws in Appendix A and demonstrate the need for widespread public policy initiatives that would make job guarantees a universal minimum labor standard. In Part III, after briefly discussing one such public policy initiative, the Family and Medical Leave Act (FMLA) currently being considered at the federal level,[17] we turn to the question of state-level family and medical leave initiatives and propose a comprehensive, multi-pronged approach, modelled on the pending federal leave legislation. In Part IV, we address key legal and policy considerations that deserve careful attention by activists and state legislators advocating such legislation. In doing so, we draw examples from the pending federal legislation, legislation passed by some states, and a sample family and medical leave bill, which appears in Appendix B. Finally, in Part V, we discuss the need for investigation of future legislative options in this area, looking

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after childbirth). Other "maternity leave" policies permit or require employers to allow new mothers to take time off from work only during periods of actual disability due to pregnancy, childbirth, and related medical conditions. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (upholding California law requiring employers to make such pregnancy disability leave available to employees); *see also infra* notes 70–71 and accompanying text.

To avoid confusion, in this Article we will not use the ambiguous term "maternity leave," but instead use: "pregnancy disability leave" to refer to leave during periods of medical inability to work due to pregnancy, childbirth, and related medical conditions; "general disability leave" or "medical leave" to refer to leave during periods of medical inability to work, regardless of the reason for that medical inability; "parental leave" to refer to leave to care for children either when they are newborn or newly adopted, or when they are ill or otherwise need parental care, or both; and "family leave" to refer to leave to care for any specified family members (including children) under specified circumstances. Pursuant to this terminology, "pregnancy disability leave" is a subset of "medical leave," and "parental leave" is a subset of "family leave." Except for "pregnancy disability leave" (which by its terms is for women only) and unless otherwise noted, all these terms refer to leave for either men or women.

It should be noted that the PDA, by requiring employers to treat women "affected by pregnancy . . . the same for all employment-related purposes, . . . as other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k) (1982), effectively demands that the traditional "maternity leave" be divided into several parts: the last days or weeks of pregnancy prior to childbirth when a woman is still able to work; the period just before childbirth, childbirth, and the period of recuperation thereafter, when a woman is physically unable to work (the "pregnancy disability" period); and the period after physical disability has ended, during which a woman might want not to work so that she can devote all her time to caring for her newborn infant, and during which she might wish to take "parental leave" or "family leave."

[17] *See infra* notes 43–44.

toward a time in which the enactment of laws establishing a right to paid leave for family and medical reasons becomes politically feasible.

II. NEED FOR LEGISLATION TO GUARANTEE EMPLOYEES THEIR JOBS DURING TIMES OF COMPELLING FAMILY NEED

A. *Inadequacy of Current Employer Leave Policies and Practices*

Despite the increasing need for employment policies that accommodate the family obligations of workers, few employers have addressed these concerns in their personnel practices. In particular, when some family needs, such as serious medical conditions (either of the employee or of a member of her or his family) or the special circumstances attendant to the birth or adoption of a child, arise, employees require reasonable periods of leave from work with job security.

Yet many employers do not guarantee their employees their jobs at such times.[18] Employees in such cases are therefore subject to the loss of their jobs if they take time off, even if only temporarily and only for compelling family reasons. While a significant number of the country's largest employers do provide some leave benefits, at least for employees' own serious health conditions, smaller firms are unlikely to grant job-guaranteed leave for family or medical reasons. Among companies

[18] While estimates of the incidence of job-guaranteed leave for family and medical reasons vary widely, few American workers are guaranteed their jobs after absences for the lengths and reasons set out in the FMLA. SENATE COMM. ON LAB. & HUM. RESOURCES, REPORT ON THE PARENTAL AND MEDICAL LEAVE ACT OF 1988, S. REP. No. 447, 100th Cong., 2d Sess. 26 [hereinafter SENATE LAB. & HUM. RESOURCES REP.]; *see also id.*, at 26–30. *See also* Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699, 710–13 (1986). A recent survey of Connecticut employers provides perhaps the most detailed estimate of the incidence of family and medical leave policies in the private work force. This survey found that even among firms of over 100 employees, only 13.9% provided parental leave over and above pregnancy disability leave; the level is only 7.3% for firms of 50 to 99 employees. Although some form of medical leave is available at almost 80% of the largest employers and 70% of firms with 50 to 99 employees, the number of weeks available varies greatly with the size of the employer and classification of worker, and is fewer than six for as many as 43% of clerical workers in mid-size companies. In total, 28% of employees in Connecticut have no job-guaranteed leave (of any kind) available for childbirth or parenting. BUSH CENTER IN CHILD DEVELOPMENT & SOCIAL POLICY, YALE UNIV., ISSUES OF PARENTAL LEAVE: ITS PRACTICE, AVAILABILITY, AND FUTURE FEASIBILITY IN THE STATE OF CONNECTICUT 17–25, 35 (Rep. to the Conn. Task Force to Study Work & Family Roles 1988).

that do offer leave, most limit it to unpaid pregnancy disability leave. Parental leave for fathers and for adoptive parents is less common. Family leave policies that allow workers to care for ill family members are extremely rare, and medical leave policies guaranteeing jobs during an absence resulting from an employee's own medical condition vary widely. Even within a given company, family and medical leave policies are often not uniform and are frequently left to the discretion of the employee's supervisor.[19]

B. *Inadequacy of Existing Laws*

Nor do existing laws ensure that employees who have compelling family or medical reasons for taking temporary leaves from work have jobs to return to when they are ready or able to return to work. Current federal law demands only that pregnancy and related conditions in employment be treated the same as other disabilities. Under the Pregnancy Discrimination Act, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."[20]

Thus, under the Act, *if* an employer provides benefits such as leave or health insurance coverage for medical disabilities unrelated to pregnancy, that employer must also extend those benefits for disabilities associated with pregnancy and childbirth. Although this mandate provides important protection for

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[19] *See supra* note 18.

[20] Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (amending 42 U.S.C. § 2000e (1976)). The Pregnancy Discrimination Act was enacted as an amendment to Title VII to overturn the Supreme Court's 1976 ruling in General Electric Co. v. Gilbert, 429 U.S. 125, that discrimination on the basis of pregnancy did not constitute sex discrimination under Title VII. In *Gilbert*, the Court upheld General Electric's disability benefits plan, which covered almost every conceivable medical condition, but excluded pregnancy-related health benefits. Justice Rehnquist, writing for the Court, reasoned that the plan did not involve discrimination based on "gender as such," but rather distinguished between pregnant women and nonpregnant persons and thus discriminated on the basis of special physical disability. 429 U.S. at 135. Until Congress overturned this ruling with the Act, employers were left free to discriminate against pregnant women without fear of sanction under Title VII.

women workers,[21] the protection is limited as the awarding of benefits for any disability is left entirely to the discretion of the employer or to collective bargaining agreements. Thus, even pregnant women receive no protection if the employer does not offer disability leave to workers.[22]

Recognizing the inadequacy of leave policies granted solely at the discretion of employers, a number of states have enacted leave legislation.[23] Only Wisconsin and Maine, however, address the full range of family crises for which employees need job-guaranteed, temporary leave from work. These two states have recently passed laws that would guarantee private employees a right to both family leave to care for a new child or seriously ill family member and medical leave for the employee's own serious health condition (including pregnancy and childbirth).[24] Connecticut also provides both types of leave, but only to state employees.[25]

Laws passed in other states to help protect workers who must take leave significantly limit the circumstances in which employees are entitled to job guarantees. Most such statutes restrict leave to women employees for pregnancy- and childbirth-

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[21] *See, e.g.*, Carney v. Martin Luther Home, 834 F.2d 697 (8th Cir. 1987); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); EEOC v. Red Baron Steak Houses, 47 Fair Empl. Prac. Cas. (BNA) 49 (N.D. Cal. 1988); Suarez v. Illinois Valley Community College, 47 Fair Empl. Cas. (BNA) 59 (N.D. Ill. 1988). The Act's protection also helps male employees and their families, to the extent that they are "affected by pregnancy, childbirth, and related medical conditions." 42 U.S.C. § 2000e(k) (1982). *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (limitation on coverage for pregnancy- and childbirth-related hospitalization expenses to male employees' wives under employer-provided dependent health insurance plan violates the Act where the plan covers all hospitalization expenses incurred by female employees' husbands).

[22] *See also* Dowd, *Work and Family: The Gender Paradox and the Limitations on Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 121 n.135 (1989).

[23] A chart summarizing the provisions of these state laws is provided as Appendix A to this Article. The discussion of state laws is current as of March 1989. Some of the specific provisions of the state laws mentioned in this section are examined in further detail *infra* Part IV, in the discussion of specific policy considerations. *See also* WOMEN'S ECONOMIC JUSTICE CENTER, POLICY CHOICES IN FAMILY AND MEDICAL LEAVE: A LEGISLATIVE CHECKLIST (LEADERSHIP BRIEF) 3 (Mar. 1989) [hereinafter LEGISLATIVE CHECKLIST].

[24] ME. REV. STAT. ANN. tit. 26, §§ 843–849 (1988); WIS. STAT. ANN. § 103.10 (West Supp. 1988).

[25] 1987 Conn. Acts 291 (Reg. Sess.), CONN. GEN. STAT. ANN. (West App. Pamphlet 1988). A bill to extend this coverage to private employers is as of this writing being considered in the Connecticut legislature. *New Measure Would Extend Family Leave*, N.Y. Times, Feb. 20, 1989, at B1, col. 5.

related disabilities. Seven states[26] and Puerto Rico establish some form of pregnancy disability leave by statute.[27] Four more states[28] provide such leave through regulation or guidelines pursuant to state antidiscrimination laws.[29] These laws cover only the period of medical disability associated with pregnancy and childbirth. Three additional states[30] provide, through regulations or guidelines, that failure to offer an adequate leave of absence violates state antidiscrimination laws if it has an adverse impact on women; these states do not, however, explicitly guarantee any specific period of leave.[31]

Far fewer states expand the category of leaves protected by law. Three[32] have passed legislation guaranteeing leave to parents of either sex to care for a newborn or newly adopted child.[33] Of these three, only Rhode Island also allows employees leave to care for a seriously ill child.[34] No state allows employees leave to care for other ill family members; Kentucky guarantees employees family leave only to care for a newly *adopted* child.[35]

Finally, some states, while not mandating any specific amount of leave for family reasons, regulate the way in which employers that choose to give such leave may do so. Hawaii and Pennsylvania provide that any parental leave granted by employers be

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[26] California, Connecticut (in a different law from the one cited *supra* note 25), Iowa, Louisiana, Massachusetts, Montana, and Tennesee.

[27] CAL. GOV'T CODE § 12945(b) (West 1980); CONN. GEN. STAT. ANN. § 46a-60(7) (West 1986); IOWA CODE ANN. § 601A.6(2) (West 1988); LA. REV. STAT. ANN. § 23:1008 (West Supp. 1989); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982 & Supp. 1988); MONT. CODE ANN. § 49-2-310 to -311 (1987); TENN. CODE ANN. § 4-21-408 (Supp. 1988); P.R. LAWS ANN. tit. 29, §§ 467–471 (Supp. 1983). California's pregnancy disability leave statute was challenged in California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987), in which the Court held that Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, did not preempt a California statute that requires employers to provide leave and reinstatement to employees disabled by pregnancy even though such treatment is not required for employees suffering from disabilities unrelated to pregnancy. *See supra* note 16.

[28] Hawaii, Kansas, New Hampshire, and Washington.

[29] Haw. Dep't of Indust. & Lab. Relations, Sex & Marital Status Discrim. Regs., § 12-23-58, 8A Lab. Rel. Rep. (BNA) 453:2328–29 (1983); Kan. Comm'n on Civil Rights, Guidelines on Discrim. Because of Sex, § 21-32-6(d), 8A Lab. Rel. Rep. (BNA) 453:3311 (1977); N.H. CODE ADMIN R. HUM. § 402.03 (1988); WASH. ADMIN. CODE § 162-30-020 (1977).

[30] Missouri, Ohio, and Oklahoma.

[31] MO. CODE REGS. tit. 8, § 60-3.040(16)(B), 8B Lab. Rel. Rep. (BNA) 455:1712 (1981); OHIO ADMIN. CODE § 4112-5-05(G)(2); Okla. Hum. Rights Comm'n Guidelines § VI(I)(3), 8B Lab. Rel. Rep. (BNA) 457:559 (1986).

[32] Minnesota, Oregon, and Rhode Island.

[33] MINN. STAT. ANN. § 181.940 to .944 (West Supp. 1989); OR. REV. STAT. ANN. § 659.360 (1989); R.I. GEN. LAWS § 28-48-1 to -9 (Supp. 1988).

[34] R.I. GEN. LAWS § 28-48-1 (Supp. 1988).

[35] KY. REV. STAT. ANN. § 337.015 (Michie/Bobbs-Merrill 1983).

offered in a gender-neutral manner.[36] Colorado requires that parental leave policies treat adoptive parents the same as natural parents.[37] The State of Washington requires that employers allow their workers to use accrued sick leave to care for a sick child.[38]

As this brief overview of state legislation reveals, most states have not addressed the leave issue at all. Eighteen (including Puerto Rico) mandate that employers provide job-guaranteed leave of any kind or duration. Of these, most have followed California's example of providing only pregnancy disability leave for mothers who are temporarily unable to work due to pregnancy or childbirth. Only a few of the eighteen have enacted legislation—most of it very recently—that allows either parent time off to care for newborn or newly adopted children, and only three recognize the importance of providing job-guaranteed leave to employees who need to care for ill family members or who themselves suffer from a temporarily disabling medical condition other than pregnancy.

III. Public Policy Responses

A. *The Federal Family and Medical Leave Act (FMLA)*

The first major federal legislative proposal to address working families' needs during family and medical crises was the Parental and Disability Leave Act, H.R. 2020, introduced by Representative Patricia Schroeder (D-Colo.) on April 4, 1985.[39] The bill proposed the establishment of a new federal minimum labor standard pursuant to which all employees would be guaranteed their jobs (or equivalent jobs) if they temporarily left work for no more than a specified number of weeks, either for their own serious health conditions or to care for newborn or newly adopted children, or children with serious health conditions.

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[36] Haw. Dep't of Indust. & Lab. Relations, Sex & Marital Status Discrim. Regs., § 12-23-58, 8A Lab. Rel. Rep. (BNA) 453:2328–29 (1983); 16 Pa. Code § 41.104 (1981).

[37] Colo. Rev. Stat. § 19-5-211(1.5) (not yet codified) (Supp. 1988).

[38] Wash. Rev. Code Ann. § 49.12.270 (Supp. 1989).

[39] H.R. 2020, 99th Cong., 1st Sess., 131 Cong. Rec. H1941 (daily ed. Apr. 4, 1985). A predicate was set for the introduction of this legislation at hearings conducted during 1984 by the Select Committee on Children, Youth and Families on issues involving families and child care. As a result of those hearings, the Select Committee unanimously recommended that Congress review the possibilities for improving current leave policies. House Educ. & Lab. Rep., *supra* note 6, at 15.

Schroeder's original bill was actively considered by the House, as was its successor, H.R. 4300,[40] the Parental and Medical Leave Act, introduced jointly by Representative Schroeder and Representative William Clay (D-Mo.), in 1986. Its Senate counterpart, S. 2278,[41] the Parental and Medical Leave Act, introduced by Senator Christopher Dodd (D-Conn.), was stalled in the Republican-controlled Senate.

Since the original bills were introduced, new versions have appeared in each Congress and have received continually increasing support.[42] In the 101st Congress, the Family and Medical Leave Act, H.R. 770[43] and S. 345,[44] was introduced in both chambers on February 2, 1989. On March 8, 1989, H.R. 770, with minor amendments, was approved by the Committee on Education and Labor.[45]

Although Schroeder's bill has been refined and compromised since its initial introduction, and while its successors have varied—primarily on such matters as coverage and length of permissible leave period—each version of the Act incorporates her basic framework and is informed by the same view of the problems faced by working families. The centerpiece provision of all these bills is a job guarantee for covered employees who must be absent from work for a specified, temporary period to attend to various, specific, compelling family or medical needs. None of the bills requires employers to pay employees their salaries during such absences, though all of them require em-

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[40] 99th Cong., 2d Sess., 132 CONG. REC. H803 (daily ed. Mar. 4, 1986).

[41] 99th Cong., 2d Sess., 132 CONG. REC. S3973 (daily ed. Apr. 9, 1986).

[42] In the 100th Congress, virtually identical bills, H.R. 925, 100th Cong., 1st Sess., 133 CONG. REC. H527–28 (daily ed. Feb. 3, 1987), and S. 249, 100th Cong., 1st Sess., 133 CONG. REC. S154 (daily ed. Jan. 6, 1987), were introduced. H.R. 925 garnered the support of 150 cosponsors and, with a bipartisan amendment, was favorably reported for floor action by both committees to which it was referred. HOUSE EDUC. & LAB. REP., *supra* note 6, at 14–15. When S. 249's successor in the Second Session, S. 2488, 100th Cong., 2d Sess., 134 CONG. REC. S7422 (daily ed. June 8, 1988), was brought to *the floor* of the Senate, it was amended to include two other major initiatives: a child pornography bill, 134 CONG. REC. S13,461–62 (daily ed. Sept. 28, 1988), and the Act for Better Child Care, 134 CONG. REC. S14,568 (daily ed. Oct. 5, 1988). The entire package was ultimately defeated when its proponents could not muster the more than sixty votes needed to end a filibuster against it. 134 CONG. REC. S15,069 (daily ed. Oct. 7, 1988).

[43] 101st Cong., 1st Sess., 135 CONG. REC. H165 (daily ed. Feb. 2, 1989).

[44] 101st Cong., 1st Sess., 135 CONG. REC. S1099 (daily ed. Feb. 2, 1989).

[45] *Parental-Leave Bill Passed by Panel*, CONG. Q., Mar. 11, 1989, at 519. The amendments would extend the bill's coverage to employees of the House of Representatives and establish parameters by which public elementary and secondary schools can regulate teachers' return to work after leave in certain circumstances. *Id.*

ployers to continue paying health insurance premiums for employees on leave.[46]

The bills' definitions of "serious health conditions"—for which medical leave is available—include temporary inability to work due to pregnancy, childbirth, and related medical conditions.[47] Thus, a female employee who gives birth to a child would be entitled to a period of medical leave for the period during which she is physically unable to work due to childbirth, followed by and in addition to a period of family leave to care for the newborn child. Similarly, an employee who has another serious health condition, such as cancer or a heart attack, and must subsequently care for a child with a serious health condition would be entitled first to medical leave and then to family leave. In both cases, each of the leave periods would be limited to the number of weeks per year specified in the legislation.[48] As these provisions indicate, the bills do *not*, contrary to popular conception, simply address the problems faced by working mothers of newborn or newly adopted children by providing traditional "maternity leave."[49] Rather, the bills are informed by a broader vision of families' needs and provide a broader range of job protection coverage in reponse to these needs.

Recognizing that most women with families are now part of the work force and therefore no longer at home to meet family needs, the bills' central concern is to protect families from the loss of a breadwinner's job when compelling family needs arise.

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[46] The bills provide two kinds of leave after which employers must restore employees to their previous (or equivalent) jobs:

1. "medical leave" or "temporary disability leave"—when an employee is unable to work due to her or his own serious health condition; and
2. "family leave" or "parental leave"—when an employee is unable to work because he or she must care for a specified family member:
   (a) a newborn or newly adopted child (in all versions of the bills);
   (b) a child under 18 with a serious health condition (in all versions of the bills);
   (c) a handicapped child over 18 who has a serious health condition (in H.R. 925 and both bills introduced in the 101st Congress);
   (d) an employee's parent who has a serious health condition (in H.R. 925 and both bills introduced in the 101st Congress).

The bills also provide administrative and judicial enforcement mechanisms for employees who are denied reinstatement after medical or family leave, or who are otherwise denied, or penalized for asserting, rights thereunder. H.R. 770, *supra* note 43, §§ 107–111; S. 345, *supra* note 44, §§ 107–111.

[47] *See, e.g.*, HOUSE EDUC. & LAB. REP., *supra* note 6, at 38; SENATE LAB. & HUM. RESOURCES, *supra* note 18, at 40.

[48] The House bill provides 15 weeks of medical leave a year, H.R. 770, *supra* note 43, § 104(a)(1), while the Senate bill provides 13. S. 345, *supra* note 44, § 104(a)(2). Both bills provide 10 weeks of family leave every two years. H.R. 770, *supra* note 43, § 103(a)(1); S. 345, *supra* note 44, § 103(a)(1).

[49] For a discussion of "maternity leave," see *supra* note 16.

Compelling family circumstances are not limited to birth or adoption of children; they include, as well, the serious illness of any family member, including the employee herself or himself. Thus, Representative Clay, chief cosponsor of the successor to Representative Schroeder's original bill, explained the provisions regarding medical leave as follows:

> As with family leave, the inclusion of medical leave in the bill was motivated by concern about the family. Workers who become seriously ill and who, as a result, lose their jobs can often precipitate a family crisis. Not only is a family member seriously ill, but the family is without a previous source of income. When the illness is of short duration, so that the worker could have been back on the job after a short absence, much of the hardship is wholly unnecessary. Affording a worker minimal job security under such circumstances is a sensible and practical way to spare a family considerable pain.[50]

The legislation also ensures that no particular condition is singled out for job guarantees while other, equally compelling circumstances are not so recognized. Everyone is a member of a family; everyone depends on her or his own income, or that of a family member, or both, to survive. Broad coverage reduces resentment among employees; it also reduces the incentive for employers to discriminate against those employees entitled to the legislative protections.[51]

B. *A Comprehensive Approach for State Leave Legislation*

Federal legislation like the FMLA would most effectively address the need for family and medical leave by ensuring that a uniform minimum labor standard applies to all American workers. Unless and until leave legislation passes at the federal level, however, state (or, where appropriate, local) legislative action

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[50] Clay & Feinstein, *The Family and Medical Leave Act: A New Federal Labor Standard*, XXV INDUS. & LAB. REL. REP. 28, 32 (Fall 1987) [hereinafter ILR REP.].

[51] *Id.*; HOUSE EDUC. & LAB. REP., *supra* note 6, at 27. In particular, had the bill been limited to pregnancy disability leave or even to parental leave, it would

> likely . . . have been perceived as addressing primarily the needs of younger women workers . . . . [L]abor legislation must not provide special protection to women or [to] any other narrowly defined group. Laws which provide special protection, in addition to being inequitable, run the danger of justifying or causing discriminatory treatment. Employers might be less inclined to hire women or some other category of worker provided special privileges.

ILR REP., *supra* note 50, at 32. *See infra* notes 62–69 and accompanying text.

presents the only way to guarantee that workers retain their jobs during times of family crisis. Furthermore, even if federal legislation is passed, state legislation that goes beyond the baseline requirements of the federal law and that is tailored to meet state-specific needs will remain an important means toward achieving effective work and family policy goals.

In recognition of the increasingly pressing need for such public policies, state legislators have proposed a number of family and medical leave laws. Of the eighteen states that have labor standards that guarantee jobs after temporary leaves for some form of family or medical needs, nine have been passed since January 13, 1987, when the Supreme Court's holding in *California Federal Savings & Loan Association v. Guerra* (*Cal Fed*)[52] spurred state action by upholding California's law granting women leave for pregnancy-related disabilities.[53] Within the past two years, there has been a great deal of legislative activity on the state level: in addition to the eleven states in which some form of legislation was passed,[54] legislation was considered in at least thirty-two states and the District of Columbia.[55] In several states parental leave or FMLA-type laws were the subject of hard-fought and narrowly lost legislative battles.[56] It can be expected that state legislatures will soon be facing proposals to enact job protections for employees in need of temporary leaves of absence due to family or medical needs.[57]

Three major types of legislative proposals can be expected: (a) proposals for pregnancy disability leave only, modelled on the California legislation at issue in *Cal Fed*;[58] (b) proposals for parental leave only, addressing the needs of mothers and fathers

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[52] 479 U.S. 272 (1987); *see supra* note 16.

[53] These state laws are described generally *supra* Part II and are summarized *infra* Appendix A.

[54] Colorado, Connecticut, Iowa, Louisiana, Maine, Minnesota, Oregon, Rhode Island, Tennesee, Washington, and Wisconsin. Information on file at the Women's Legal Defense Fund.

[55] HOUSE EDUC. & LAB. REP., *supra* note 6, at 27.

[56] For example, a parental leave bill passed the Assembly and Senate in California in 1988. However, when the bill was returned to the Assembly for its concurrence in the Senate-passed modifications, it failed to pass on a 39-39 vote. In 1987, the Governor vetoed the bill after it had passed both chambers. Letter from California Assemblywoman Gwen Moore to Donna Lenhoff (Jan. 24, 1989).

[57] Indeed, already in 1989, bills are being considered in at least the following jurisdictions: California, Connecticut, District of Columbia, Florida, Indiana, Iowa, Maryland, Massachusetts, Mississippi, New Hampshire, Missouri, New Jersey, New York, North Dakota, Ohio, and Vermont. LEGISLATIVE CHECKLIST, *supra* note 23, at 3, and information on file at Women's Legal Defense Fund.

[58] *See, e.g.*, IOWA CODE ANN. § 601A.6(2) (West 1988).

to have time off to nurture newborn or newly adopted children;[59] and (c) family and medical leave proposals, modelled on the FMLA.[60] The first two types of proposals, though well intentioned, neither adequately address the full range of needs of working families nor ensure that employment discrimination against women of childbearing age will not inadvertently result.

The more comprehensive approach to the problem of ensuring economic security to working family members taken by the federal family and medical leave legislation does, however, avoid the limitations of parental leave or pregnancy disability leave proposals. This approach provides for two distinct kinds of job-protected leave: (1) family leave, which guarantees that a worker will not lose her or his job because of such important family responsibilities as caring for a seriously ill family member or nurturing a newborn or newly adopted child; and (2) medical leave, which ensures that an employee will not lose her or his job because of a temporary but serious health condition.

This two-pronged approach has several advantages. First, it provides a comprehensive, rather than piecemeal, attempt to balance the competing needs of work and family. It recognizes that the family's need for economic security extends well beyond the period immediately surrounding childbirth, and it therefore covers a broad range of situations that are not addressed by most of the state legislation passed in the wake of *Cal Fed.*

Unlike pregnancy disability laws, the recommended family and medical leave legislation does not focus exclusively on the needs of women of childbearing age. Rather, it addresses the needs of all family members: for example, single heads of household who cannot risk losing their jobs if they are temporarily unable to work for medical reasons; working women and men with older children who occasionally need care due to a serious illness; and those caught in the "sandwich generation," saddled with the responsibility of caring for elderly family members. Indeed, such legislation takes into account the desire and need of many men to take an active role in caring for their children and other family members. The proposed legislation recognizes the needs of the aging as well, not only through its elder care provisions, but also through its medical leave provisions, which

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[59] *See, e.g.*, MINN. STAT. ANN. § 181.940 (West Supp. 1989).
[60] *See, e.g.*, WIS. STAT. ANN. § 103.10 (West Supp. 1988).

would protect the job of an elderly worker who needs time off because of a serious medical problem. Furthermore, the legislation recognizes that even younger workers occasionally face unpredictable medical emergencies, such as heart attacks, cancer, or broken bones, which render them temporarily unable to work, but should not cost them and their families their sources of income. Because the proposed approach addresses the needs of more people, it attracts the support of a wider constituency.[61]

The second, and related, major advantage of the approach endorsed here is that it discourages, rather than encourages, sex discrimination. Because the recommended legislation covers medical leave for *all* employees' "serious health conditions," and includes among such conditions those related to pregnancy and childbirth, it treats a woman's temporary inability to work due to pregnancy- and childbirth-related disabilities the same as any employee's inability to work because of a temporary medical condition—and vice versa. Further, the proposal covers family leave for all employees' family-related needs, on a gender-neutral basis: both male and female employees may need time off from work to care for a seriously ill child or other family member. Thus, each of the two kinds of leave specified—family and medical leave—is available to both women and men; neither pregnant women nor mothers are singled out for treatment that men and other women do not receive.

Employers would be expected to be reluctant to hire women of childbearing age, absent such a structure, because they will perceive them to be more expensive employees who will be entitled to benefits that other employees do not get.[62] Only if all

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[61] This breadth of support from diverse constituencies was instrumental in the successful effort to enact the family and medical leave law in Wisconsin. According to Wisconsin State Senator John Plewa (D-7):

> Another force in favor of passage [of the bill] was the fact that our bill was comprehensive—I like to use the term "intergenerational"—that it was *family* leave and not just *parental* leave. By making the bill apply to the caring for seriously ill family members—including elderly parents—we expanded our coalition to include a powerful constituency: senior citizens and senior citizen groups . . . . We must not forget that people over the age of 85 are the fastest-growing segment of the population.

Address, National Conference of State Legislatures, Reno, Nevada. (July 26, 1988). *See also* Plewa, *The Wisconsin Family Medical and Leave Act: States Resolving the Conflict Between Parenthood and Livelihood in the Modern Economy*, forthcoming in PARENTAL LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA (J. Shibley Hyde ed. 1989).

[62] According to Don Butler, president of the California Merchants and Manufacturers Association, one effect of the *Cal Fed* decision upholding California's pregnancy disability leave statute is that "[m]any employers will be prone to discriminate against

workers are entitled to medical leave will medical leave related to pregnancy not make women seem less desirable as employees.

In fact, if all workers were entitled to medical leave, employers would find women and men taking medical leave approximately equally, and therefore have no incentive to discriminate against women. The common belief that, because pregnancy and childbirth affect them uniquely, women are more likely than men to be out of work[63] is a fallacy. Statistics on the incidence of loss of work due to medical reasons, including pregnancy-related medical reasons, show that men and women are out on medical leave approximately equally: male workers experience an average of 4.9 days of work loss due to illness or injury per year, while women workers experience 5.1 days of work loss per year.[64] The incidence of long-term medical conditions that give rise to medical leave under the recommended approach is also virtually the same for women and men: the percentage of female workers who had an illness of fifty hours or more (including pregnancy- and childbirth-related illnesses) in 1985 was 15.6; the percentage of male workers who had an illness of fifty hours or more was slightly greater, at 17.2.[65]

Similarly, family leave as defined under the recommended approach would not affect female and male employees very differently. While it is true that more mothers than fathers of newborns are likely to take time off from work beyond the post-childbirth period of disability, a greater percentage of working men than working women have newborns in any year. In 1985, 3.7% of working women gave birth, while 4.6% of working men had wives who gave birth.[66] And although more women than men will be affected when other family members have serious health conditions, the number of men affected is not insubstan-

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women in hiring and [will] hire men instead and not face the problem." *The Family and Medical Leave Act of 1987, Joint Hearings on H.R. 925 Before the Subcommittees on Civil Service and on Compensation and Employee Benefits of the Comm. on Post Office & Civil Service*, 100th Cong., 1st Sess. 31, 36 (1987) (statement of Eleanor Holmes Norton, professor of law, Georgetown University, quoting Jan. 13, 1987 National Public Radio interview with correspondent Nina Totenberg).

[63] *See, e.g.*, Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, (D.C. Cir. 1981).

[64] NATIONAL CENTER FOR HEALTH STATISTICS, DISABILITY DAYS, UNITED STATES, 1980 (Series 10, No. 143, DHH8 Pub. No. (PHS) 83-1571) (1983).

[65] Telephone interviews with Roberta Spalter-Roth, Deputy Director for Research, Inst. for Women's Policy Research (Mar. 27 & 29, 1989) (based on special tabulations from the 1979–1984 interview waves of the Panel Study of Income Dynamics, Institute for Social Research, University of Michigan) [hereinafter Spalter-Roth interviews].

[66] *Id.*

tial.[67] Indeed, when the number of hours that women and men lost from their jobs for *all* illnesess—their own and others'—is totalled, the average number of hours lost by women is, surprisingly, *less* than that for men.[68]

Thus, men and women will be almost equally likely to need and take some kind of family or medical leave available under the proposed type of statute—removing any incentive that employers might have to discriminate against one group or the other. Indeed, this approach is completely in harmony with the principles embodied in the Pregnancy Discrimination Act that pregnancy-related disabilities be treated the same as other disabilities.[69]

It is true that the Supreme Court has upheld state legislation that grants leave solely to women who are temporarily disabled by pregnancy or childbirth as not inconsistent with the Pregnancy Discrmination Act.[70] The *Cal Fed* case was limited, however, to the issue of whether California was pre-empted from requiring pregnancy disability leave. The Court did not address the issue of whether California employers also subject to Title VII—and therefore subject to the Pregnancy Discrimination Act's requirement that pregnancy-related conditions be treated the same as other, similar medical conditions—could lawfully provide pregnancy leave *only*. Indeed, some language in the opinion suggests that Title VII may require general disability leave where pregnancy disability leave is provided.[71] Thus, *Cal Fed* does not settle entirely the legal issue of whether a Title

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[67] For example, over one quarter of those who care for the impaired elderly are male. *See supra* note 7.

[68] In 1985, women lost an average of 41.3 hours, and men, 50.3 hours, from their jobs due to their own or others' illnesses. Spalter-Roth interviews, *supra* note 65.

[69] *See supra* note 20 and accompanying text.

[70] *See supra* note 16.

[71] As the Court stated, the California pregnancy disability leave law

> does not prevent employers from complying with both the federal law . . . and the state law. This is not a case where 'compliance with both federal and state regulations is a physical impossibility' . . . . [The California law] does not compel California employers to treat pregnant workers *better* than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers.

California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290-91 (1987) (citation omitted, emphasis in original). *Cf.* 479 U.S. at 296 (Scalia, J., concurring in the judgment) ("[W]hether or not the PDA prohibits discriminatorily favorable disability treatment for pregnant women, [the California law] cannot be pre-empted, since it does not remotely purport to require or permit any refusal to accord federally mandated equal treatment to others similarly situated.")

VII-covered employer can lawfully discriminate in favor of pregnant women.

A third advantage of the proposed approach is that it does not reify stereotypic gender roles for women and men. In contrast, legislation that grants pregnancy disability leave only to women does not allow fathers time to spend with their babies immediately after birth, completely ignoring the responsibility of male family members to participate fully in child rearing and other caretaking. When fathers are guaranteed the right to return to their jobs following family leave, they may begin to accept a more equal division of family care responsibilities without fear of impairing their own employment opportunities. Such a development would in turn allow women to balance their work and family obligations more effectively and would give them the opportunity to play a more equal role in the work force.

In sum, the two-pronged approach outlined above covers a variety of needs, attracts the support of a broad constituency, and discourages sex discrimination. For all of these reasons, legislators and activists attempting to draft leave legislation should structure the legislation to provide for both family leave and medical leave, and to do both in a completely gender-neutral manner.

IV. Key Legal and Policy Considerations Relevant to Shaping Family and Medical Leave Legislation

In addition to general questions involving the structure of leave legislation, more specific legal and policy issues arise as activists and legislators seek to define the parameters of job-guaranteed family and medical leave. The sample state legislation in Appendix B, which was modelled on the proposed federal family and medical leave legislation, suggests ways to deal with such specific policy issues. The discussion below will draw on the sample legislation as well as on the proposed federal legislation. Where appropriate, it will also cite good and bad examples from existing state leave legislation.

A. *Need for and Purposes of the Legislation*

A statement of the need for and purposes of the legislation may prove useful in interpreting specific provisions of the stat-

ute. The findings of fact section of any statute should cite demographic information relevant to the need for the kinds of leave provided by the statute—state-specific if available—as well as any documentation of the usefulness of such leave, including estimates of the costs to employees and taxpayers due to the absence of family and medical leave policies. Additionally, to protect against discriminatory interpretation or application, such a section should state clearly the legislature's desire to minimize the potential for employment discrimination and to promote equal opportunity.

B. *Employer Coverage*

The sample legislation in Appendix B accomplishes broad coverage of employers by defining the term "employer" as "any person who . . . employs 1 or more employees . . . ."[72] Some state leave laws and regulations also apply to employers of one or more employees,[73] but most existing leave legislation exempts *some* small businesses by limiting the definition of "employer" to those that employ more than a threshold number of employees. The specific threshold varies considerably and is often the subject of compromise that occurs between the legislation's introduction and passage. The threshold may depend on the statutory or regulatory framework to which the law refers for its definition of "employer." State antidiscrimination and human rights laws tend to define "employer" more broadly, and thus cover more employers, than do state labor standards laws.

Legislation with the optimal small business exemption would cover a large percentage of employees, thus not undermining the benefits to the jurisdiction's workers, but at the same time exclude from coverage a large percentage of employers, thus responding to the concerns of the business community. The impact of various potential small business exemptions of course varies from state to state.

Nationally, according to estimates by the General Accounting Office (GAO) of the United States Congress, the following thresholds have the following impact:

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[72] *Infra* Appendix B § 101(e)(1). The legislation similarly defines "person" broadly, to include "any individual, firm, . . . corporation, . . . organization, . . . [or] government agency . . . ." *Id.* § 101(i).

[73] *See, e.g.*, HAW. REV. STAT. § 378-1 (1988); MONT. CODE ANN. § 49-2-101(8) (1987); P.R. LAWS ANN. tit. 29, § 151 (Supp. 1983).

Threshold number of employees	Percentage of employees covered	Percentage of employers exempt
15	71	82[74]
20	47	88[75]
35	43	92[76]
50	39	95[77]

Another consideration relevant to employer coverage is treatment of public employees. The applicability of some state laws to public and private employers turns on the same minimum number of employees.[78] But other states apply lower thresholds for public than for private employers.[79] Because even small state agencies have greater flexibility in accommodating their employees' needs than do equivalently small private employers, the sample legislation covers all state agencies, regardless of their size.[80]

A related issue is the treatment of employers that have more than one physical location. The sample legislation in Appendix B contains no worksite limitation; it covers an employer as long as the threshold number of employees works for it anywhere.

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[74] *Parental and Medical Leave Act of 1987, Hearings on S. 249 Before the Subcomm. on Children, Families, Drugs & Alcoholism of the Senate Comm. on Lab. & Hum. Resources*, 100th Cong., 1st Sess. 468, 471 (1987) (statement of William Gainer, associate director, Human Resources Division, General Accounting Office).

[75] SENATE LAB. & HUM. RESOURCES REP., *supra* note 18, at 31, 37. The significant decrease in the percentage of employees covered is the result not only of the 20-employee threshold, but also of two additional limitations on eligibility: the Senate bill's requirement that, to be covered, employees have worked 900 hours and 12 months. *See infra* notes 84–86 and accompanying text.

[76] HOUSE EDUC. & LAB. REP., *supra* note 6, at 32. The percentage of employees excluded here results not only from the 35-employee threshold, but also from the 1000-hour and 12-month eligibility requirements in the House bill. *See infra* notes 84–86 and accompanying text.

[77] *Id.*

[78] For example, leave provisions apply to public and private employers of five or more employees in California and of four or more employees in Kansas. CAL. GOV'T CODE § 12926(c) (West 1980); KAN. STAT. ANN. § 44-1002(b) (1986).

[79] Rhode Island's family leave legislation, for instance, limits its coverage of private employers to those who employ 50 or more, and of city, town, or municipal employers to those who employ 30 or more, but provides no limitation for state agencies. R.I. GEN. LAWS § 28-48-1(c) (Supp. 1988). Similarly, while Maine's family and medical leave statute applies to both private employers and city, town, or municipal agencies that employ 25 or more employees, it applies to every state department or agency regardless of the number of employees. ME. REV. STAT. ANN. tit. 26, § 843(3) (1988). The family and medical leave law of Connecticut exempts private employers altogether, 1987 Conn. Acts 291 (Reg. Sess.) CONN. GEN. STAT. ANN. (West App. Pamphlet 1988), although legislation to expand that law is pending. *New Measure Would Extend Family Leave*, N.Y. Times, Feb. 20, 1989, at B1, col. 5.

[80] *See infra* Appendix B § 101(e)(3).

To address an employer's concerns that employees cannot substitute for one another if they work at far-flung locations, H.R. 770 contains a provision limiting its applicability to employers who have the threshold number of employees at worksites within seventy-five miles of one another.[81]

C. *Employee Coverage*

The sample legislation in Appendix B covers all employees. Under it, employees' eligibility for leave does not turn on full-time status or a specified amount of seniority. Much of the state leave legislation is equally inclusive and does not address the issue of employee eligibility.[82] Indeed, other minimum labor standards are applied equally to all employees, regardless of their seniority or full-time status.[83]

Some state legislation and the compromise versions of both the Senate and House family and medical leave bills do, however, impose eligibility requirements related to the amount of time that an employee has been employed by a given employer or to the amount of hours that the employee works. S. 345 limits the definition of the term "employee" to an employee who has been employed by the employer for at least 900 hours of service during the previous twelve months and for a minimum of twelve months.[84] To fulfill the service requirement of 900 hours per year, an employee would have to work all year approximately 17.5 hours per week, or full-time approximately 5.5 months per year. As noted above,[85] this provision substantially decreases

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[81] H.R. 770, *supra* note 43, § 102.

[82] *See, e.g.*, CAL. GOV'T CODE § 12945(b) (West 1980); 1987 Conn. Acts 291 (Reg. Sess.) CONN. GEN. STAT. ANN. (West App. Pamphlet 1988); IOWA CODE ANN. § 601.A6 (West 1988); KY. REV. STAT. ANN. § 337.015 (Michie/Bobbs-Merrill 1983); LA. REV. STAT. ANN. § 23:1008 (West Supp. 1989); MONT. CODE ANN. § 49-2-310 to -311 (1987); WASH. REV. CODE ANN. § 49.12.270 (Supp. 1989); P.R. LAWS ANN. tit. 29, §§ 467–471 (Supp. 1983).

[83] *See, e.g.*, the minimum wage provision of the Fair Labor Standards Act, codified at 29 U.S.C. § 206(a) (1982), which requires the minimum wage to be paid to each "employee[] who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise [so] engaged . . . ."

[84] S. 345, *supra* note 44, § 102(3)(A).

[85] *See supra* notes 75–76.

the percentage of eligible employees.[86] A number of states also impose a length of service requirement.[87]

Part-time workers—an increasingly large portion of the work force[88] and especially of women workers[89]—should not be excluded from the provisions of leave legislation. The need for leave in certain situations is no less compelling for part-time workers than it is for full-time employees. Job security during a period of serious illness, or to accompany a seriously ill child to a distant hospital for treatment, is as important to a part-time employee as it is to a full-time employee. On the other hand, part-time workers may not need leave to care for a newborn or newly adopted child as much as do full-time workers, because they can presumably spend at least part of their day with their new children.[90]

The approach embodied in the Senate version of the FMLA minimizes the negative impact of the part-time exclusion. First, it is drafted in a way that does not exclude seasonal employees such as school bus drivers and teachers who work regularly, but only during certain months of the year, as long as they work at least 900 hours in a year. Second, it recognizes that many workers work less than even twenty hours per week.[91]

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[86] Similarly, H.R. 770 limits the definition of "eligible employee" to an employee who has been employed by the employer for at least 1000 hours of service during the previous 12-month period, and for at least 12 months. H.R. 770, *supra* note 43, § 101(3)(A). The effect of this limitation is to deny leave benefits to any employee who has worked for her or his current employer for less than one year. Because 1000 hours per year is equivalent to 20 hours per week or six months full-time work per year, this definition also excludes any part-time employee who works less than 20 hours per week and seasonal employees who work for a given employer for less than six months per year, regardless of the number of years that such an employee has worked for that particular employer. This provision is based on the part-time employee exclusion in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1052(a)(1)(A)(ii), (a)(3)(A) (1982 & Supp. IV 1986). HOUSE EDUC. & LAB. REP., *supra* note 6, at 32.

[87] ME. REV. STAT. ANN. tit. 26, § 844 (1988); MASS. GEN. LAWS ANN. ch. 149, § 105D (West Supp. 1988); MINN. STAT. ANN. § 181.941 (West Supp. 1988); OR. REV. STAT. ANN. §§ 659.010 to .121 (1989); R.I. GEN. LAWS § 28-48-2 (Supp. 1988); TENN. CODE ANN. § 4-21-408 (Supp. 1988); WIS. STAT. ANN. § 103.10 (West 1988).

[88] "Since the early 1960's, the part-time workforce has grown nearly three times as fast as the full-time workforce." Barrett, *Women and the Economy*, in THE AMERICAN WOMAN 1987–88: A REPORT IN DEPTH 100, 134 (S. Rix ed. 1987).

[89] "About one-third of employed married women and about one-sixth of employed divorced and separated women with preschool children work part time." *Id.* at 135. For women, part-time employment is particularly attractive because it allows them to earn a paycheck while devoting substantial time to family caretaking. *See id.*

[90] Of course this presumption does not hold true for the many workers who hold more than one part-time job.

[91] Data from the 1988 annual averages of the Current Population Survey show that of 25.3 million part-time workers, 726,000, or 3%, worked between 1 and 4 hours; 4,236,000, or 17%, worked between 5 and 14 hours; 12,567,000, or 50%, worked between

Employers routinely impose length of service requirements as a condition for various forms of benefits, including sick leave. It is not surprising, therefore, that employers demand the inclusion of such provisions in leave legislation. The FMLA is carefully worded so as not to exclude regular seasonal workers. Requirements of consecutive periods of service, however, as contained in the leave legislation of Rhode Island,[92] Maine,[93] and Wisconsin,[94] may exclude employees who work for as much as nine months each year for the same employer, such as many school employees and some agricultural workers.

D. *Issues Concerning Leave to Care for Newborn and Newly Adopted Children*

1. Adopted and Foster Children

Entry of a new child into a family—whether through birth, adoption, or placement for foster care—gives rise to the need to nurture the child, integrate her or him into the family home, and arrange for future child care. This need is no less compelling for an adopted or foster child than for a newborn infant. In fact, the physical and emotional problems suffered by many adopted and foster children make spending the initial period of time with their new parents even more critical; placement of children in foster homes often results from their being victims of abuse, neglect, or some other traumatic experience. Thus, the sample leave legislation in Appendix B makes explicit its coverage of both newly adopted and newly placed foster children.[95]

Nor should the employee's right to family leave turn on the age of the child being adopted or placed. The sample legislation in Appendix B does not include explicit limitations based on the child's age (although it might be interpreted as implicitly limiting

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15 and 29 hours; and 7,730,000, or 30%, worked between 30 and 34 hours per week. Telephone interview with Susan Shank, Economist, U.S. Bureau of Labor Statistics (Mar. 27, 1989).

[92] R.I. GEN. LAWS § 28-48-2 (Supp. 1988).

[93] ME. REV. STAT. ANN. tit. 26, § 844(1) (1988).

[94] WIS. STAT. ANN. § 103.10(2)(c) (West Supp. 1988).

[95] *See infra* Appendix B § 102(a)(1)(B). Similarly, both bills pending in Congress entitle employees to leave because of the placement of a child with the employee for either adoption or foster care. H.R. 770, *supra* note 43, § 103(a)(1)(A); S. 345, *supra* note 44, § 103(a)(1)(A). While most state leave legislation has recognized the needs of adoptive parents, it has neglected the needs of foster parents.

leave to employees adopting minor children). The bills pending in Congress explicitly draw the line at age eighteen, but include adult children over eighteen who are incapable of self-care due to mental or physical disability.[96] Some existing state leave laws impose stringent age limitations, extending as low as Massachusetts's law which grants leave only for adoptions of children under age three.[97]

Such a provision is far too restrictive. Even the parents of school-age adopted and foster children need to spend time integrating them into their new homes. In fact, the need for parental attention during the period immediately following adoption or placement for foster care may be even greater for older children, many of whom are handicapped or have been emotionally traumatized by abuse or neglect.[98] The new parents of such children may need time to address special education needs, medical concerns, school adjustments, counselling appointments, and after-school care arrangements. While not all such parents will use the full amount of leave provided by a given statute, they should not be excluded from having the opportunity to do so.

2. Duration of Leave

Most child development experts suggest a minimum four-month period for newborns and their new parents to adjust to one another. Dr. T. Berry Brazelton, chief of the Child Development Unit at Boston's Children's Hospital, "recommended a minimum of four and one half months, explaining that [those] months involve crucial stages of development that are 'predictable and are necessary for both the baby and . . . the parent before [there is] secure attachment.'"[99] Some experts recommend an even longer period of time.[100]

These recommendations apply with equal force to the period necessary for a newly adopted child and her or his new family

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[96] H.R. 770, *supra* note 43, § 101(11); S. 345, *supra* note 44, § 102(12).

[97] MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982 & Supp. 1988).

[98] *See* HOUSE EDUC. & LAB. REP., *supra* note 6, at 30.

[99] *Id.* (quoting Dr. Brazelton's testimony).

[100] *See, e.g.*, Recommendations of the Yale Bush Center Advisory Committee on Infant Care Leave 3 (Nov. 26, 1985) (advising a minimum of six months). *See also* HOUSE EDUC. & LAB. REP., *supra* note 6, at 20. One aspect of a new parent's task during the period of adjustment is to make safe and adequate day care arrangements for her or his infant or newly adopted child. This task can require a great deal of time, given the inadequacy of existing day care options.

to adjust to one another. Most adoption agencies strongly encourage or even require at least one parent to stay at home with a newly adopted child for six months.[101] Parents adopting disabled children may face even more stringent requirements.

Ideally, family leave legislation should be designed to allow parents to follow these experts' recommendations as closely as possible. Thus, the sample legislation in Appendix B provides employees with up to eighteen workweeks of family leave during any twenty-four-month period.[102] Any or all of this leave can be used to care for a newly arrived child. Earlier versions of both the Senate and House family and medical leave bills provided the same amount of leave as the sample bill.[103] The current compromise versions of the federal bills limit the amount of family leave available to ten weeks over a two-year period.[104]

3. Timing of Leave

Under the sample legisation in Appendix B and the FMLA, the right to family leave to care for a newborn or newly adopted child expires twelve months after the arrival of the child. Some states impose more stringent limitations.[105]

Such short periods of availability of parental leave are problematic for several reasons. First, they prevent parents from taking leave consecutively so as to provide their child with one parent at home for as much time as possible. Second, they fail to take into account a number of potential situations in which a parent may need or prefer to take the leave at a later time. For instance, the infant may suffer from a medical condition that

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[101] SENATE LAB. & HUM. RESOURCES REP., *supra* note 18, at 24.

[102] *See infra* Appendix B § 102(a)(1).

[103] H.R. 4300, *supra* note 40, § 103(a)(1); S. 2278, *supra* note 41, § 103(a)(1).

[104] H.R. 770, *supra* note 43, § 103(a)(1); S. 345, *supra* note 44, § 103(a)(1). The House Committee Report explains that this reduction to 10 weeks was made to accommodate employer concerns that they can more easily adjust to 10-week than to 18-week absences. HOUSE EDUC. & LAB. REP., *supra* note 6, at 30.

[105] Wisconsin's leave law, for instance, requires leave to care for a newborn or newly adopted child to begin within 16 weeks of the child's arrival. WIS. STAT. ANN. § 103.10(3)(b)(1) (West Supp. 1988). Similarly, Minnesota's parental leave statute contains a provision requiring leave to care for a new child to begin within six weeks of its arrival. MINN. STAT. ANN. § 181.941(2) (West Supp. 1989). Oregon's parental leave legislation limits the availability of leave to care for a newly adopted child to a 12-week period following the adoption. OR. REV. STAT. ANN. § 659.360(1) (1989). The same legislation links the availability of leave to care for a newborn child directly to the age of the child by entitling employees to take parental leave only until the newborn reaches 12 weeks of age or, in the case of a premature infant, until the infant has reached the developmental stage equivalent to 12 weeks. *Id.*

requires hospitalization during a certain period after birth, during which the parents are unable to provide the nurturing and integration into the home that is contemplated by the provision of parental leave.

Another problem with linking the period of available leave to the age of a newborn child stems from the fact that a mother will likely be disabled and therefore unable to work for part of the period immediately following the birth of her child. Most women are physically disabled for six to eight weeks after childbirth; indeed, most doctors recommend that women not return to work during this time. This means that as a practical matter under legislation that links the duration of leave to the period immediately following birth, for part of her parental leave a new mother is physically unable to work.[106] In most cases, a mother would be unable to benefit from the full leave entitlement created by such a parental leave statute, while her male counterpart would be.

4. Restrictions on Leave by Both Parents

A restriction that limits the ability of both parents to take leave simultaneously or forces parents to share the available period of leave is also problematic. Oregon's parental leave legislation contains a provision that does both.[107] As mentioned above,[108] the Oregon law entitles employees to take parental leave until a newborn child reaches the developmental equivalent of twelve weeks of age, or, in the case of adoptive children, up to twelve weeks after the child's arrival. However, an employer is not required to grant an employee parental leave that would allow the employee and the other parent of the child, if also employed, parental leave totalling more than the specified period. Nor must an employer grant an employee parental leave for any period of time in which the child's other parent is also taking parental leave from employment.[109]

Such provisions are presumably designed to protect the interests of employers by limiting the total amount of leave that

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[106] Indeed, under the FMLA and under state laws that provide for medical and parental leave, mothers are entitled to medical leave for the childbirth-related medical disability, followed by the specified period of parental leave.

[107] OR. REV. STAT. ANN. § 659.360(2) (1989).

[108] *See supra* note 105.

[109] *Id.*

any employer will be required to give. This level of protection may be justifiable when both parents are employed by the same small employer. Both the House and Senate family and medical leave bills therefore contain a provision allowing employers to limit to ten the aggregate number of weeks of family leave available to spouses who are employed by the same employer.[110] However, unless both parents are employed by the same employer, provisions that either prohibit both parents from taking leave simultaneously or require parents to share the available period of leave are illogical.

In addition, a provision prohibiting both parents from taking parental leave simultaneously prevents parents who may feel that spending time together with their new child is important to the process of family bonding from doing so. Furthermore, the fact that the parental leave provided by legislation like Oregon's is unpaid already provides a disincentive to simultaneous leaves. Most families will need a continued flow of income from at least one parent during the leave period.

Similarly, the minimal advantage to employers of requiring parents to share the available period of parental leave does not outweigh its disadvantages. Even with such a provision, an employer nevertheless faces the possibility of granting the full twelve-week leave when only one parent is employed, or for single parents, or for employees whose spouses, though employed, choose not to take advantage of the available leave. The only employers who will "benefit" from the requirement that parents share the available leave are those whose employees sacrifice all or part of their family leave entitlement to their spouse.

Making one parent's right dependent on the other parent's failure to exercise her or his right is not only inherently unfair but also will most likely have the practical effect of perpetuating the relegation of the role of caring for newborn children to mothers as opposed to fathers. A provision such as Oregon's effectively penalizes a mother for a father's decision to take family leave (and vice versa) by robbing her of part of her entitlement. The penalty is especially harsh when the total amount of leave available is relatively short. In conjunction with a provision that requires parental leave to be taken immediately after the birth of the child, the penalty is even more severe

[110] H.R. 770, *supra* note 43, § 103(f); S. 345, *supra* note 44, § 103(f).

because of the overlap between the mother's period of disability and the period of parental leave.

Moreover, like a provision that makes family leave available only immediately or very soon after the arrival of a new child, a requirement that parents share family leave makes it impossible for them to combine their leave entitlements in order to come as close as possible to meeting recommendations of pediatricians and adoption agencies concerning how much time a new child should spend with her or his parents.

E. *Issues Concerning Leave to Care for Seriously Ill Family Members*

1. Definition of "Family Member"

Making a policy choice that employees should have the right to job guarantees when they must be absent from work to care for seriously ill family members requires delineation of the nature of the family relationship to the employee that will give rise to this right. The sample legislation in Appendix B takes a comprehensive approach to this question, allowing workers to take leave from work to provide necessary care for *any* family member suffering from a serious health condition and defining "family member" broadly as "a child of the employee, or a person to whom the employee is related by blood, legal custody, marriage or with whom the employee shares or has shared within the last year a mutual residence and with whom the employee maintains an intimate relationship."[111]

This broad definition of "family member" is necessary because employees are frequently responsible not only for providing care to minor children, but also to their spouses, parents, and adult children when they are seriously ill. In fact, caretaking is frequently provided to those with whom a worker lives and has a familial relationship, but to whom the worker is related by neither marriage nor blood. Many children do not live in traditional "nuclear" families with their biological fathers and mothers, but rather are cared for by grandparents or other members of their extended families.

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[111] *See infra* Appendix B §§ 101(g), 102(a)(1)(C).

The approach of the pending federal legislation on this issue is more limited than that of the sample legislation. The federal bills extend leave only to care for a seriously ill "son, daughter, or parent."[112] They do, however, define those terms broadly enough to ensure that the employees entitled to family leave to care for an ill child or parent are not limited to those with whom the child or parent has a biological relationship, but also include those who have a legal or practical parent-child relationship.[113]

Neither the House nor Senate bill extends leave to employees who need time off to care for a seriously ill spouse. Nor does either allow employees to take leave to care for other family members with serious medical conditions. These restrictions severely limit the effectiveness of the bills as measures to deal with the need for elder care in an aging population. The failure to recognize that family responsibilities extend beyond the parent-child relationship is unrealistic. The more comprehensive approach taken by the sample legislation in Appendix B is a better effort at accommodating the workplace to the full range of family responsiblities.

Another significant issue in the definition of the term "child" is that of age limit. Both pending federal bills generally limit the term "son or daughter" to children under eighteen, but extend the definition to include individuals over eighteen who are incapable of self-care because of a mental or physical disability.[114] All existing state leave laws, except that of Connecticut,[115] ex-

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[112] H.R. 770, *supra* note 43, § 103(a)(1)(C); S. 345, *supra* note 44, § 103(a)(1)(C). The term "son or daughter" is defined to mean "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age, or 18 years of age or older and incapable of self-care because of mental or physical disability." H.R. 770, *supra* note 43, § 101(11). The Senate version is virtually identical. *See* S. 345, *supra* note 44, § 102(12). The term "parent" is also defined broadly to mean "a biological, foster, or adoptive parent, a parent-in-law, a stepparent, or a legal guardian." H.R. 770, *supra* note 43, § 101(12); S. 345, *supra* note 44, § 102(7).

[113] Similarly, the Wisconsin law defines the terms "child" and "parent" to ensure that they are not interpreted in a way that would limit the availability of leave to parents or children who are biologically related. The definition of "child" in Wisconsin's family and medical leave law includes a natural, adopted, or foster child, a stepchild, or a legal ward who is either under the age of 18 or is 18 years of age or older but cannot care for herself or himself because of a serious health condition. The law defines "parent" to include a natural parent, foster parent, adoptive parent, stepparent, or legal guardian of an employee or an employee's spouse. WIS. STAT. ANN. § 103.10 (West Supp. 1988). These definitions are similar to those found in the pending House Family and Medical Leave Act, but are not quite as broad, since the Wisconsin definitions limit the availability of leave to biologically or legally related parents and children, thereby excluding people with de facto parent-child relationships.

[114] *See supra* note 112.

[115] 1987 Conn. Acts 291 (Reg. Sess.) CONN. GEN. STAT. ANN. (West App. Pamphlet 1988).

plicitly limit the definition of "child" to individuals under the age of eighteen; none makes an exception for disabled adults.

While it is generally reasonable to interpret the term "child" to mean a minor child, such a limitation is not sensible in the context of leave to care for a seriously ill child. Even parents of adult children should not have to fear the loss of their jobs if they need to take time off while their daughters or sons are suffering from a serious disease or are undergoing risky surgery. Indeed, the parent-child relationship is as permanent when adult children are ill as when adult parents are ill. The sample legislation in Appendix B solves this problem by permitting leave to care for any family member, regardless of age, dependency, or other extrinsic factor.

2. Duration

The FMLA allows an employee to take leave to care for certain seriously ill family members as part of "family leave"; thus, the available amount of family leave is shared among the various family reasons for which an employee may need time off, including caring for newborn children, seriously ill children, and seriously ill family members.[116] The sample legislation in Appendix B follows this approach.[117]

Under this approach, the employee can decide how to allocate available family leave according to her or his family's individual needs. There is a nagging unfairness in allowing one employee six weeks leave to care for a healthy newborn while her or his coworker is allowed only two weeks to care for her or his seriously ill toddler.[118]

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[116] *See supra* note 48. Existing state legislation also follows this pattern, with the exception of Wisconsin's family and medical leave statute, which specifically allocates six weeks in a 12-month period to care for a new child and two weeks in a 12-month period to care for a child, spouse, or parent with a serious health condition. WIS. STAT. ANN. § 103.10(3) (West Supp. 1988).

[117] *See infra* Appendix B, § 102(a).

[118] A family leave period as short as Wisconsin's is seriously inadequate. An employee may well require more than two weeks to provide the care and attention needed by family members with serious health conditions. For example, if a child must undergo major surgery, at least one of the child's parents will need to take off a period of time that will encompass both the surgery itself and the subsequent recuperation period during which the child will need full-time care at home. Moreover, parents of children with disabilities also often need significant amounts of time off. For these parents, the choice as to whether to keep the child at home or to place the child in an institution will often depend on whether the parents are able to provide the necessary support and assistance without risking their jobs.

Moreover, the need for leave to care for an ill family member will often arise intermittently. For this reason, the sample legislation and the FMLA allow such leave to be taken intermittently as medically necessary.[119]

F. *Issues Concerning Medical Leave*

The sample legislation in Appendix B and the FMLA apply a two-fold test to determine the availability of medical leave. The twin tests are (1) a serious health condition; and (2) a resulting inability to perform the duties of the employee's job. The language of the sample legislation and the pending federal bills guarantee leave to "any employee who, because of a serious health condition, becomes unable to perform the functions of such employee's position."[120] This language clarifies that employees are entitled to medical leave only for health conditions that render the employee unable to fulfill the duties of her or his job. It thus addresses the fears of employers that they will have to grant medical leave for conditions that do not incapacitate an employee.

The two-fold test is also completely gender-neutral and consistent with the language of the Pregnancy Discrimination Act. The test requires employers to treat employees affected by pregnancy, childbirth, and related medical conditions in the same manner as they treat other employees similar in their ability or inability to work—providing equal job security for all who because of a serious health condition cannot work. This has the virtue of protecting working women from the danger that pregnancy-based distinctions could be extended by some employers to limit women's employment opportunities.[121]

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[119] *See infra* Appendix B § 102(a)(3); H.R. 770, *supra* note 43, § 103(a)(3); S. 345, *supra* note 44, § 103(a)(3). Another issue that concerns leave to care for seriously ill family members is the definition of "seriously ill." Because the sample legislation in Appendix B and the FMLA use the same definition of "serious health condition" to trigger both the right to medical leave and the right to family leave to care for a seriously ill family member, the discussion of the concept of "serious health condition" is found *infra* Part IV(F)(1) in connection with issues concerning medical leave.

[120] *See infra* Appendix B § 103(a)(1); H.R. 770, *supra* note 43, § 104(a)(1); S. 345, *supra* note 44, § 104(a)(1).

[121] *See supra* notes 62–71 and accompanying text.

1. The Definition of "Serious Health Condition"

Both the sample legislation and the pending federal legislation define the term "serious health condition" to mean: "an illness, injury, impairment, or physical or mental condition which involves—(A) inpatient care in a hospital, hospice, or residential health care facility; or (B) continuing treatment or continuing supervision by a health care provider."[122] This definition is intentionally broad to cover various types of physical and mental conditions, such as cancer, heart attacks, broken bones, the need for extensive surgery, and disabilities related to pregnancy and childbirth. The definition does not cover such commonly experienced conditions as the "flu," the common cold, or such minor medical procedures as extraction of wisdom teeth, because these minor matters, although they may require some medical treatment or supervision, do not normally involve *continuing* medical treatment or supervision by a health care provider.[123]

The dangers of too narrow a definition of "serious health condition" are illustrated by the Rhode Island statute, which defines a "seriously ill child" as

> a child under the age of eighteen who by reason of an accident, disease or condition (1) is in imminent danger of death or (2) faces hospitalization involving an organ transplant, limb amputation or such other procedure of similar severity as shall be determined through regulation by the Director of Labor in consultation with the Director of Health.[124]

A child should not have to be dying or experiencing as dramatic an event as an organ transplant or limb amputation before her or his parents can take leave from work without risk of job loss. Children need their parents when they undergo any surgery that requires hospitalization or are sick with diseases such as pneumonia or meningitis. A reasonable interpretation of the term "serious health condition" would encompass any number

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[122] *See infra* Appendix B § 101(k); H.R. 770, *supra* note 43, § 101(10). The Senate version is virtually identical. *See* S. 345, *supra* note 44, § 102(11).

[123] *See* HOUSE EDUC. & LAB. REP., *supra* note 6, at 38–39. Of the four states that have laws allowing some employees to take time off to care for ailing family members, two—Wisconsin and Connecticut—use terms very similar to those used in the sample and the pending federal legislation discussed above. 1987 Conn. Acts 291 § 1(c) CONN. GEN. STAT. ANN. (West App. Pamphlet 1988); WIS. STAT. ANN. § 103.10(1)(g) (West Supp. 1988).

[124] R.I. GEN. LAWS § 28-48-1(e) (Supp. 1988).

of situations that fall short of the definition in the Rhode Island leave law.

2. Definition of "Health Care Provider"

Both the FMLA and the sample legislation define the term "health care provider" to include any person licensed under federal, state, or local law to provide health care services as well as any person determined by the agency in charge of enforcing the family and medical leave legislation to be capable of providing health care services.[125] This definition of "health care provider" ensures that treatment not only by medical doctors, but also by other health professionals (either licensed or approved) will be covered in the definition of "health care provider." This is particularly important to low-income individuals whose health care is often provided by clinics staffed by nurses and paraprofessional medical personnel; to elderly individuals whose health conditions are often treated by private nurses; and to people in rural areas, who similarly rely on clinics staffed by paraprofessionals.

3. Medical Certification Requirements

To assure employers that leave will not be taken unless medically necessary, an employee's right to take medical leave or family leave to care for a seriously ill family member may be conditioned on her or his presentation of medical certification of the need for such leave. The sample legislation in Appendix B permits an employer to require an employee seeking either medical leave because of her or his own health condition, or family leave to care for a seriously ill family member, to present certification of the need for such leave issued by a health care provider of the employee or the family member, whichever is appropriate.[126]

The sample legislation also sets out several criteria for judging the sufficiency of the certification. The certification is to be considered sufficient if it states the date on which the serious

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[125] *See infra* Appendix B § 101(h); H.R. 770, *supra* note 43, § 101(7); S. 345, *supra* note 44, § 102(6). In the case of the pending federal legislation the relevant enforcement agent is the Secretary of Labor; in the case of state legislation it might be the head of the state labor department or the state human rights agency.

[126] *See infra* Appendix B § 104(a).

health condition commenced, the probable duration of the condition, and the medical facts within the health care provider's knowledge regarding the condition. If the employee is seeking medical leave due to her or his own medical condition, the employer may also request that the certification explain the extent to which the employee is unable to perform the functions of the employee's position.[127]

Both family and medical leave bills pending in Congress contain medical certification provisions that are similar to, but more extensive than, those in the sample legislation. The bills permit an employer to demand subsequent recertifications "on a reasonable basis."[128] They also address the situation in which the employer doubts the validity of the employee's certification by permitting an employer to require, at its own expense, that the employee obtain the opinion of a second health care provider designated or approved by the employer.[129] To protect against abuse of this provision by the employer, the bills prohibit the health care provider designated or approved by the employer from being regularly employed by the employer.[130] This limitation is significant because without it an employee could be required to seek certification from the "company doctor," who may feel pressure from the employer to deny certifications.[131] Finally, the bills also contain an additional certification requirement, showing that the employee is able to resume work, as a condition to job restoration after medical leave.[132]

Medical certification requirements should not be too burdensome on the employee. The cost of medical certification must be considered, and an employee should not be required to incur the expense of more than one certification. Any subsequent certifications necessitated by doubts remaining in the employer's mind should be at the employer's expense.[133]

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[127] *See infra* Appendix B § 104.

[128] H.R. 770, *supra* note 43, § 105(e); S. 345, *supra* note 44, § 105(e).

[129] H.R. 770, *supra* note 43, § 105(d)(1); S. 345, *supra* note 44, § 105(c)(1).

[130] H.R. 770, *supra* note 43, § 105(d)(2); S. 345, *supra* note 44, § 105(c)(2).

[131] The medical certification requirements of the Senate bill (but not the House bill) also anticipate and address the potential conflict between the initial certification and the second opinion. In cases in which the second opinion differs from the original certification, the employer may require, at the employer's own expense, that an employee obtain the opinion of a third health care provider. This third health care provider is to be designated or approved jointly by the employer and the employee and the decision rendered by the third health care provider is considered final. S. 345, *supra* note 44, § 105(d).

[132] H.R. 770, *supra* note 43, § 106(a)(4); S. 345, *supra* note 44, § 106(a)(4).

[133] It should also be noted that an employer covered by Title VII may only require

4. Duration of Leave

On occasion, employees' serious health conditions make them able to work only intermittently. For example, some employees who have permanent disabilities may be fully competent and able to work most of the time, but may occasionally require leave to address serious medical complications associated with their conditions. Optimal leave legislation would, for example, permit an employee with arthritis to take leave to participate in periodic physical therapy. Thus, the sample legislation and the FMLA provide explicitly that medical leave can be taken intermittently.[134]

Moreover, the total amount of time permitted for medical leave should be sufficient to ensure that employees will not frequently lose their jobs because of temporary inabilities to work due to medical problems. Precisely those employees who suffer from serious health conditions most need job protection and are the least likely to be covered by existing job protections.[135]

In order to provide these employees with a basic minimum standard of security beyond that already provided by most employers, leave legislation must grant workers an extended period of job-protected medical leave. There is, of course, no formula for determining the exact number of weeks that should be provided. At the very least, the period should be sufficiently long to cover disabilities relating to childbirth as well as other, similar temporary medical conditions that do not completely disable a person. The sample legislation grants twenty-six weeks of medical leave during any twelve-month period.[136]

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medical certification from a woman affected by pregnancy, childbirth, or related medical condition if the employer requires certification from other similarly disabled employees. This condition derives from the mandate of Title VII, as amended by the Pregnancy Discrimination Act. *See supra* note 20.

[134] *See infra* Appendix B § 103(a)(2); H.R.770, *supra* note 43, § 104(a)(2); S. 345, *supra* note 44, § 104(a)(3).

[135] Workers generally are not fired if they are out sick for a short period of time with, say, a cold or the "flu." Indeed, most companies provide paid sick leave for these contingencies. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS 21, table 12 (1983). Leave policies for more serious extended medical reasons, however, are less common, and standards for their provision are often unclear. Therefore, women and men who are temporarily unable to work for serious health reasons frequently are subject to the loss of their jobs.

[136] *See infra* Appendix B § 103(a)(1). Both family and medical leave bills pending in Congress originally provided for 26 weeks of medical leave during any 12-month period. H.R. 2020, *supra* note 39, § 102(a)(1); S. 2278, *supra* note 41, § 201. After 26 weeks, social security benefits for long-term disabilities may begin. SOC. SECURITY ADMIN.,

The foregoing discussion dealt primarily with substantive issues relating to the definition and parameters of family and medical leave. In addition, state family and medical leave laws should address issues of enforcement, including the definition of violations and the establishment of procedures and relief. The sample legislation contains provisions that address these and other relevant issues.[137]

V. Looking to Future Legislative Options: Income Replacement During Family and Medical Leave

The provision of job-guaranteed unpaid leave is only a first, albeit crucial, step toward reconciliation of the competing needs of work and family. Ultimately, legislators and employers will have to recognize that provisions for income replacement during periods of leave for family and medical reasons are necessary if workers are to enjoy meaningful access to such leave.[138]

The only jurisdiction in the United States that requires employers to pay salaries during family or medical leave is Puerto Rico, which requires an employer to pay a new mother on pregnancy disability leave half of her normal compensation.[139] In addition, five states[140] have temporary disability insurance laws that provide income replacement for employees on disability leave, including pregnancy- and childbirth-related disability leave.[141]

Outside the United States, many countries provide some form of income replacement for employees who are absent from work for a family or medical reason. Whether by requiring employers to pay all or some of an employee's regular wage during a period

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U.S. Dep't of Health, Pub. No. 05-10029, If You Become Disabled 18 (Jan. 1984). The amount of medical leave, however, was reduced to 15 weeks and 13 weeks in the House and Senate bills respectively. H.R. 770, *supra* note 43, § 104(a)(1); S. 345, *supra* note 44, § 104(a)(2).

[137] *See infra* Appendix B §§ 106–110. *See also* Legislative Checklist, *supra* note 23, at 6–7.

[138] It is for this reason that the sample leave legislation in Appendix B has not been referred to as "model legislation." The word "model" implies "ideal" and ideal leave legislation would go beyond the sample leave legislation to provide for some form of income replacement during periods of leave.

[139] P.R. Laws Ann. tit. 29, § 467 (Supp. 1983).

[140] New York, New Jersey, California, Rhode Island, and Hawaii.

[141] N.Y. Work. Comp. Law §§ 200–242 (McKinney 1982 & Supp. 1988); N.J. Stat. Ann. § 43:21-25 to -56 (West 1962 & Supp. 1988); Cal. Unemp. Ins. Code §§ 2625–778 (West 1986 & Supp. 1989); R.I. Gen. Laws §§ 28-39-1 to -41-33 (1979 & Supp. 1985); and Haw. Rev. Stat. Ann. § 392-1 to -101 (Michie 1988).

of leave, by providing income replacement through the general social insurance system, or by utilizing the unemployment compensation system, 127 countries provide some form of family or medical leave guarantee with some wage replacement.[142]

One way of developing paid leave options for the future is to establish a commission to study the issue of paid leave. A provision establishing such a commission can be included in legislation that provides unpaid leave.

The sample legislation calls for the establishment of a Commission on Paid Family and Medical Leave.[143] The Commission's duties are to conduct a comprehensive study of existing and proposed methods designed to provide full or partial salary replacement during periods of leave, including temporary disability insurance, and to report on the advisability of the adoption of any particular provision. Within two years of its formation, the Commission is required to submit a report and make recommendations to the state legislature.[144]

Further investigation of how full or partial income replacement during leave could be accomplished may yield exciting ideas about potential future legislation in this area, at both the state and federal levels.[145] In the meantime, legislators will be forced to take whatever steps are politically feasible in the struggle to help workers balance the competing needs of work and family. The passage of legislation that at least provides families with basic economic security by guaranteeing that a worker will not lose her or his job because of a serious health condition or because of an important family responsibility is one important step toward making the American workplace sensitive to the family needs of its workers.

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[142] *See* HOUSE EDUC. & LAB. REP., *supra* note 6, at 27.

[143] *See infra* Appendix B §§ 201–202.

[144] *See infra* Appendix B § 202(b).

[145] In structuring state provisions for paid leave, care must be taken to ensure that they are not pre-empted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001–1461 (1982 & Supp. IV 1986). *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) (holding that ERISA pre-empts state law to the extent that state law prohibits practices lawful under Title VII of the 1964 Civil Rights Act, but does not pre-empt state temporary disability insurance law); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, (1987) (holding that ERISA does not pre-empt state severance pay law because such law does not involve an ERISA-covered "plan"). The question of ERISA pre-emption is beyond the scope of this Article.

APPENDIX A: STATE FAMILY AND MEDICAL LEAVE PROVISIONS[146]

State	Family Leave	Medical Leave	Employers Covered	Eligibility Requirement
California	Not Addressed	Maternity Disability—reasonable leave up to four months.[147]	Employers with five or more employees.	Not addressed.
Colorado	Employer who permits paternity or maternity leave for biological parents following the birth of a child must, upon request, give leave to employees adopting a child.	Not addressed.	Not addressed.	Not addressed.
Connecticut	Stat. 1: 24 weeks within a two year period for birth or adoption of a child, or for serious illness of a child, spouse or parent.	Stat. 1: General Disability—24 weeks. Stat. 2: Maternity Disability—reasonable leave.	Stat. 1: The state and agencies. Stat. 2: Employers with three or more employees.	Not addressed.
Hawaii	Not addressed.	Maternity Disability—reasonable leave.[148]	Employers with one or more employees.	Not addressed.

[146] As of March, 1989.

[147] While the leave statute does not address payment during leave, the state temporary disability insurance program pays benefits during the time an employee is disabled by pregnancy or childbirth.

[148] While the leave regulation does not address payment during leave, the state temporary disability insurance program pays benefits during the time an employee is disabled by pregnancy or childbirth.

APPENDIX A: CONTINUED

Reinstatement Provision	Notice Provision	Leave Benefits	Statutory or Regulatory Provision	Enforcement Agency
Employee must be reinstated to original or substantially similar position unless the job has ceased to exist for legitimate business reasons unrelated to the employee's pregnancy or because such means of preserving the job would undermine the employer's ability to operate the business safely and efficiently.	Employer may require notice; may require medical certification if required of other disabled employees.	Must be the same as those provided for other temporarily disabled workers.	Stat.: CAL. GOV'T CODE §§ 12945(1)–(2), 12960–75 (West 1980 and Supp. 1988). Reg.: CAL. ADMIN. CODE tit. 2, §§ 7286.9, 7420–7466 (1985).	Dist. Administrator Dept. of Fair Employment and Housing 1201 I Street, #214 Sacramento, CA 95814 916/445-9918 One year to file complaint.
Job protection must be available to both adoptive and biological parents on an equal basis.	Not addressed.	Leave benefits must be available to both adoptive and biological parents on an equal basis.	Stat.: COLO. REV. STAT. § 19-5-211 (not yet codified).	Not addressed.
Stat. 1 & 2: Employee must be reinstated to original position or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other services/credits. However, in the case of a private employer, the employer is not required to reinstate the employee if the employer's circumstances have so changed that it is impossible or unreasonable to do so.	Stat. 1: Medical citation required for medical leave, notice required for family leave. Stat. 2: Not addressed.	Stat. 1: The state must pay for the continuation of health insurance benefits for the public employee during the leave of absence.	Stat. 1: 1987 Conn. Acts 87-291 (not yet codified). Stat. 2: CONN. GEN. STAT. §§ 46a-60(a) (7) (B) to (D), 46a-82 to -96 (West 1986 & Supp. 1989).	Commission on Human Rights and Opportunities 90 Washington Street Hartford, CT 06101 203/566-3350 180 days to file complaint.
Female employee must be reinstated to original job or to position of comparable status and pay without loss of accumulated service credits and privileges.	Employer may require medical certification.	Not addressed.	Reg.: Hawaii Dept. of Industrial and Labor Relations; Sex and Marital Status Discrimination Regulations, 12-23-1 to -22, 12-23-58, 8A Lab. Rel. Rep. (BNA) 453:2301 to 2308, 453:2328 (1983).	Dept. of Labor Enforcement Division Fair Empl. Practices 830 Punchbowl Street Room 340 Honolulu, HI 96813 808/548-3976 90 days to file complaint.

APPENDIX A: CONTINUED

State	Family Leave	Medical Leave	Employers Covered	Eligibility Requirement
Iowa	Not addressed.	Maternity Disability—eight weeks.	Employers with four or more employees.	Not addressed.
Kansas	Not addressed.	Maternity Disability—reasonable leave.	Employers with four or more employees.	Not addressed.
Kentucky	Six weeks for adoption of a child.	Not addressed.	Employers with eight or more employees.	Not addressed.
Louisiana	Not addressed.	Maternity Disability—reasonable leave up to four months; only six weeks of disability leave required for normal pregnancy or childbirth.	Employers with 26 or more employees.	Not addressed.
Maine	Eight weeks within a two year period for birth or adoption of a child, or the serious illness of a parent, spouse or child. Total of eight weeks within a two year period for family and medical leave.	General Disabilty—eight weeks within a two year period.	Employers with 25 or more employees.	Employee must be employed by same employer for 12 consecutive months.
Massachusetts	Eight weeks for female employee for birth or adoption of a child under age three.	Not addressed.	Employers with six or more employees.	Completion of initial probationary period of employment by the employer for three consecutive months as a full-time employee.

APPENDIX A: CONTINUED

Reinstatement Provision	Notice Provision	Leave Benefits	Statutory or Regulatory Provision	Enforcement Agency
Must be the same as those provided for other temporarily disabled workers.	Notice required; employer may require medical certification.	Must be the same as those provided for other temporarily disabled workers.	Stat.: IOWA CODE ANN. §§ 601A.6(2), 601A.15–.17 (West 1988).	Iowa Civil Rights Commission 211 E. Maple Street 2nd Floor c/o Grimes State Office Building Des Moines, IA 50319 515/281-4121 800/457-4416 (toll free number, IA only) 180 days to file complaint
Employee must be reinstated to original job or to position of comparable status and pay without loss of service credits, seniority or other benefits.	Employee must signify intent to return to work within a reasonable time.	Must be the same as those provided for other temporarily disabled workers.	Reg.: Kansas Commission on Civil Rights, Guidelines on Discrimination Because of Sex, §§ 21-32-6(d), 21-41-1 to 45-25, 8A Lab. Rel. Rep. (BNA) 453:3311, 453:3318 to 3337 (1977).	Comm. on Civil Rights Landon St. Ofc. Bldg. 8th Floor 9100 S.W. Jackson St. Suite 851 South Topeka, KS 66612-1258 913/296-3206 Six months to file complaint.
Not addressed.	Notice required.	Not addressed.	Stat.: KY. REV. STAT. ANN. § 337.015 (Michie/Bobbs-Merrill (1983)	Kentucky Labor Cabinet Div. of Employment Standards & Mediation U.S. #127 South Frankfort, Ky 40601 502/564-2784
Not addressed.	Employer may require notice.	Must be the same as those provided for other temporarily disabled workers.	Stat.: LA. REV. STAT. ANN. § 23:1008 (West Supp. 1989).	Not addressed.
Employee must be reinstated to original job or to position of comparable status, seniority, employment benefits, pay and other terms and conditions of employment.	Notice required; employers may require medical certification of serious illness.	Employer is required to make available during leave all benefits such as group life, health and disability insurance and pensions with all expenses borne by the employee.	Stat.: ME. REV. STAT. ANN. tit. 26, §§ 843–849 (1988).	Maine Human Rights Commission State House Station 51 Augusta, ME 04333 207/289-2326
Employee must be reinstated to original position or to a similar position with the same status, pay, length of service credit and seniority unless there is a layoff; regains exiting preference for other positions.	Notice required.	Must be the same as those provided for other temporarily disabled workers.	Stat.: MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982 & Supp. 1988) and ch. 151B, §§ 1(5), 4(11A) (West 1982). Reg.: MASS. REGS. CODE tit. 804, §§ 8.01, 1.03–.18 (1983).	Mass. Commission Against Discrimination 1 Ashburton Place Boston, MA 02108 617/727-3990 Six months to file complaint.

APPENDIX A: CONTINUED

State	Family Leave	Medical Leave	Employers Covered	Eligibility Requirement
Minnesota	Six weeks for birth or adoption of a child.	Not addressed.	Employers with 21 or more employees.	12 months employment at 20 or more hours per week.
Montana	Not addressed.	Maternity Disability—reasonable leave.	Employers with one or more employees.	Not addressed.
New Hampshire	Not addressed.	Maternity Disability.	Employers with six or more employees.	Not addressed.
Oregon	12 weeks for birth or adoption of a child.	Not addressed.	Employers with 25 or more employees.	90 days of employment. Employer not required to grant family leave to a worker hired on a seasonable or temporary basis for a period defined at the time of hire to be less than six months.
Pennsylvania	If an employer provides leave for child-rearing and child care, such leave must apply to care for children by adoption as well as children by childbirth.	Not addressed.	Employers with four or more employees.	Not addressed.

APPENDIX A: CONTINUED

Reinstatement Provision	Notice Provision	Leave Benefits	Statutory or Regulatory Provision	Enforcement Agency
Employee must be reinstated to original job or to position of comparable duties, number of hours and pay unless there is a layoff. Employee retains prior pay rate and all accrued pre-leave benefits and seniority. Employee retains all rights under the layoff system.	Employer may require notice.	Employer must continue to make health insurance coverage available to the employee on leave; employer is not required to pay costs of insurance during the leave.	Stat.: MINN. STAT. ANN. §§ 181.93—.98 (West Supp. 1989).	Minnesota Dept. of Human Rights 500 Bremer Tower 7th Place and Minnesota Streets St. Paul, MN 55101 612/296-5663
Employee must be reinstated to original job or to position of comparable pay and accumulated seniority, retirement, fringe benefits, and other service credits. A private employer is exempt from the reinstatement requirement if the employer's circumstances have so changed as to make it impossible or unreasonable to reinstate.	Employee must signify her intent to return at the end of the leave of absence.	Must be the same as those provided for other temporarily disabled workers.	Stat.: MONT. CODE ANN. §§ 49-2-310 to -311, 49-2-501 to -509 (1987). Reg.: Montana Human Rights Commission, Maternity Leave Rules §§ 24.9.202–.264, 24.9.1201–.1207, 8B Lab. Rel. Rep. (BNA) 455:1903–25, 455:1932–34 (1988).	Human Rights Division Montana Dept. of Labor and Industry 1236 6th Avenue Helena, MT 59624 406/444-2884 180 days to file complaint.
Employee must be reinstated to original job or comparable position unless business necessity makes this impossible or unreasonable.	Not addressed.	Must be the same as those provided for other temporarily disabled workers.	Stat.: N.H. REV. STAT. ANN. §§ 354-A:9—:10 (Supp. 1987). Reg.: N.H. CODE ADMIN. R. HUM. 402.03, 201.01–212.06 (1988).	Commission for Human Rights 163 Loudon Road Concord, NH 03301 603/271-2767 180 days to file complaint.
Employee must be reinstated to original job or comparable position. However if circumstances have so changed that the same or equivalent job no longer exists, the employee must be reinstated in any other position that is available and suitable.	Employer may require notice.	Benefits are not required to accrue during leave unless required by an agreement with the employer, a collective bargaining agreement or an employer policy. Employee retains earned seniority, vacation or sick leave, pension benefits and any other employee rights or benefits.	Stat.: OR. REV. STAT. ANN. §§ 659.010–.121, 659.360–.370. (1989).	Commissioner Bureau of Labor & Industries/Technical Assistance Unit Bureau of Labor and Industries Room 407 State Office Building 1400 S.W. 5th Avenue Portland, OR 97201 503/229-5900 (to file a complaint) 503/229-5841 (for employer assistance) One year to file complaint.
Not addressed.	Not addressed.	Family leave shall not include payment of sickness or disability benefits.	Reg.: 16 PA. ADMIN. CODE §§ 41.104, 42.11–.141 (1981).	Human Relations Commission 101 S. 2nd Street Suite 300 P.O. Box 3145 Harrisburg, PA 17105 717/787-4410 90 days to file complaint.

APPENDIX A: CONTINUED

State	Family Leave	Medical Leave	Employers Covered	Eligibility Requirement
Rhode Island	13 weeks within a two year period for birth or adoption of a child, or the serious illness of a child.[149]	Not addressed.	Private employers with 50 or more employees; any city, town, or municipal agency with 30 or more employees; the state and state agencies.	Employee must be employed full-time, for an amount of 30 or more hours per week; must have been employed by same employer for 12 consecutive months.
Tennessee	Not addressed.	Maternity Disability and Nursing—up to four months.	Employers with 100 or more employees.	12 consecutive months as a full-time employee.
Washington	Stat.: Employee may use accrued sick leave to care for sick child.	Reg.: Maternity Disability	Stat.: Employers with one or more employees. Reg.: Employers with eight or more employees.	Not addressed.
Wisconsin	Six weeks in a 12 month period for birth or adoption of a child. Two weeks in a 12 month period for serious illness of a child, spouse or parent. Total of eight weeks in a 12 month period for any combination of these reasons.	General Disability—two weeks in a 12 month period.	Employers with 50 or more employees.	Employee must have been employed by the employer for more than 52 consecutive weeks and must have worked at least 1,000 hours during the preceding 52 weeks.

[149] While the leave statute does not address payment during leave, the state temporary disability insurance program pays benefits during the time an employee is disabled by pregnancy or childbirth.

APPENDIX A: CONTINUED

Reinstatement Provision	Notice Provision	Leave Benefits	Statutory or Regulatory Provision	Enforcement Agency
Employee must be reinstated to original job or to a position with equivalent seniority, status, employment benefits, pay, and other terms and conditions of employment.	Notice required.	Employer must continue to maintain any existing health benefits of the employee for the duration of the leave. Employee pays employment sum equal to premium prior to commencing leave; employer refunds payment on employee's return.	Stat.: R.I. GEN. LAWS §§ 28-48-1 to -9 (Supp. 1988).	Administrator Division of Labor Standards/R.I. Dept. of Labor 220 Elmwood Avenue Providence, RI 02907 401/457-1808
Employee must be reinstated to original job or to position with comparable pay, status, length of service credit and seniority unless the job is so unique that an employer cannot, after reasonable efforts, fill the position temporarily. Employee retains previously earned benefits. Employee may lose reinstatement rights if she works or seeks work elsewhere.	Notice required.	Employer must continue to provide benefits, plans or programs during leave that an employee is eligible for incident to her employment; employee may be required to pay the cost of such programs during leave, unless an employer pays the costs for all employees on leaves of absence.	Stat.: TENN. CODE ANN. § 4-21-408 (Supp. 1988).	Tennessee Human Development Commission Capitol Blvd. Bldg. Suite 602 225 Capitol Blvd. Nashville, TN 37219 615/741-5825
Stat.: Not addressed. Reg.: Employee must be reinstated to same or to similar job with same pay.	Stat.: Not addressed. Reg.: Employer may require notice.	Stat.: Not addressed. Reg.: Must be the same as those provided for other temporarily disabled workers.	Stat.: WASH. REV. CODE ANN. §§ 49.12.005, 49.60.230–.270 (Supp. 1989). Reg. WASH. ADMIN. CODE §§ 162-08-011 to -700, 162-30-020 (1977).	Reg.: Washington State Human Rights Commission 402 Evergreen Plaza Bldg. FJ-41 711 S. Capitol Way Olympia, WA 206/753-6770 Stat.: Washington State Dept. of Labor and Industry 925 Plum Street HC 710 Olympia, WA 98504 206/753-3474 Reg.: Six months to file complaint.
Employee must be reinstated to the same job or to a job equivalent in compensation, benefits, working shift, hours, and other terms of employment.	Notice required; employer may require medical certification regarding a serious health condition.	Employer shall maintain group health insurance coverage during leave under the conditions that applied immediately before the leave began; employee may be required to continue prior contribution; employee may be required to escrow funds for premiums pending return to job.	Stat.: WIS. STAT. ANN. 103.10 (West Supp. 1988).	Dept. of Industry, Labor & Human Relations Equal Rights Division P.O. Box 8928 Madison, WI 53708 608/266-6860 30 days to file complaint.

APPENDIX A: CONTINUED

State	Family Leave	Medical Leave	Employers Covered	Eligibility Requirement
Puerto Rico	Not addressed.	Maternity Disability—eight weeks leave which may be divided as employee desires from four weeks before and four weeks after childbirth to one week before and seven weeks after childbirth; may be extended an additional 12 weeks in the event of complications.[150]	Employers with one or more employees.	Employee need not have become pregnant while employed by her present employer in order to be entitled to these benefits.

[150] The employer must pay half of salary, wages or other compensation during pre- and post-natal leave; however, payment is not required during extended post-natal leave due to complications.

APPENDIX A: CONTINUED

Reinstatement Provision	Notice Provision	Leave Benefits	Statutory or Regulatory Provision	Enforcement Agency
Employer must, notwithstanding any stipulation to the contrary, keep an employee's position open, not only during pre- and postnatal leave, but also during any extended postnatal leave (up to 12 additional weeks).	Medical certification required.	Not addressed.	Stat.: P.R. LAWS ANN. tit. 29, §§ 467–471 (Supp. 1983).	Department of Labor and Human Resources Anti-Discrimination Unit 505 Munoz Rivera Ave. Hato Rey, PR 00918 809/754-5292

APPENDIX B: SAMPLE LEGISLATION

A BILL

To entitle employees to family leave in certain cases involving a birth, an adoption, or a serious health condition, and to temporary medical leave in certain cases involving a serious health condition, with adequate protection of the employee's employment and benefit rights; and to establish a commission to study ways of providing salary replacement for employees who take any such leave.

SEC. 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE. This Act may be cited as the "Family and Medical Leave Act of 1989."

(b) TABLE OF CONTENTS.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. The State Legislature finds that:

(1) the number of single-parent households and two-parent households in which the single parent or both parents work has increased and continues to increase significantly,

(2) it is important to the development of the child and to the family unit that fathers and mothers be able to participate in early child rearing and in the care of family members with serious health conditions,

(3) the lack of employment opportunities to accommodate working parents can force individuals to choose between job security and parenting,

(4) there is inadequate job security for some employees who have serious health conditions that prevent them from working for a temporary period,

(5) the growing number of elderly in the State has created a new social and economic reality, requiring an increasing number of individuals to provide unpaid care to ailing elderly family members,

(6) the lack of employment opportunities to accommodate persons who must provide care to family members with serious health conditions can force individuals to choose between job security and caretaking, and

(7) when families fail to carry out the critical functions of caring for children and providing emotional and physical support to family members in distress, the societal costs are enormous.

(b) PURPOSES. The State Legislature therefore declares that the purposes of this Act are:

(1) to promote stability and economic security in families,

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or placement for foster care or adoption of a child, and for the care of a family member who has a serious health condition,

(3) to accomplish such purposes in a manner which reasonably accommodates the legitimate interests of employers, and

(4) to promote the goal of equal opportunity for women and men.

TITLE I GENERAL REQUIREMENTS FOR FAMILY LEAVE AND MEDICAL LEAVE

SEC. 101. DEFINITIONS.

For purposes of this Act the following terms have the following meanings:

(a) The term "Agency" means the [State] [ ] which is charged with enforcing this law pursuant to section 107.

(b) The term "child" means an individual who is a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person with whom the child lives or has lived and who assumes the obligations and discharges the duties incidental to the parental relationship.

(c) The term "employ" means to suffer or permit to work.

(d) The term "employee" means any individual employed by an employer.

(e) The term "employer":

(1) means any person who employs [1] or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(2) includes

(A) any person who acts directly or indirectly in the interest of an employer with respect to one or more employees, and

(B) any successor in interest of such an employer.

(3) includes, regardless of paragraph (1) of this subsection, the State and all its entities.

(f) The term "employment benefits" means all benefits (other than salary or wages) provided or made available to employees by an employer, and includes group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a policy or practice of an employer or by an employee benefit plan as defined in section 3(3) of the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1002(3) (1982)).

(g) The term "family member" means a child of an employee, or a person to whom the employee is related by blood, legal custody, or marriage, or with whom the employee shares or has shared within the last year a mutual residence and with whom the employee maintains an intimate relationship.

(h) The term "health care provider" means:

(1) any person licensed under federal, State, or local law to provide health care services, or

(2) any other person determined by the Agency to be capable of providing health care services.

(i) The term "person" means any individual, firm, partnership, mutual company, joint stock company, corporation, association, organization, unincorporated organization, labor union, government agency, incorporated society, statutory or common law trust, estate, executor, administrator, receiver, trustee, conservator, liquidator, trustee in bankruptcy, committee, assignee, officer, employee, principal, agent, or legal or personal representative of any of the foregoing.

(j) The term "reduced leave schedule" means leave scheduled for fewer than an employee's usual number of hours per workweek or hours per workday.

(k) The term "serious health condition" means an illness, injury, impairment, or physical or mental condition which involves:

(1) inpatient care in a hospital, hospice, or residential health care facility, or

(2) continuing treatment or continuing supervision by a health care provider.

(*l*) The term "State" means the State of [ ].

SEC. 102. FAMILY LEAVE REQUIREMENT.

(a) IN GENERAL.

(1) An employee shall be entitled to a total of 18 workweeks of family leave during any 24-month period:

(A) in the event of the birth of a child of the employee,

(B) in the event of the placement of a child with the employee for adoption or foster care, or

(C) in order to care for the employee's family member who has a serious health condition.

(2) The entitlement to leave under paragraphs (1)(A) and (1)(B) of this subsection shall expire at the end of the 12-month period beginning after the date of such birth or placement.

(3) In the event a family member has a serious health condition, such leave may be taken intermittently when medically necessary.

(b) REDUCED LEAVE. Such leave may be taken on a reduced leave schedule.

(c) UNPAID LEAVE PERMITTED. Such leave may consist of unpaid leave, except as provided in subsection (d) of this section.

(d) RELATIONSHIP TO PAID LEAVE.

(1) If an employer provides paid family leave to its employees for fewer than 18 workweeks over the 24-month period, the additional weeks of leave added to attain the 18-workweek total may be unpaid.

(2) An employee may elect to substitute any of the employee's earned paid vacation leave, personal leave, or family leave for any part of the 18-week period.

(e) FORESEEABLE LEAVE.

(1) In any case in which the necessity for leave under this section is foreseeable based on an expected birth, adoption, or placement for foster care, the employee shall provide the employer with prior notice of such expected birth, adoption, or placement for foster care in a manner which is reasonable and practicable.

(2) In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee:

(A) shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employer, subject to the approval of the family member's health care provider, and

(B) shall provide the employer with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

SEC. 103. TEMPORARY MEDICAL LEAVE REQUIREMENT.

(a) IN GENERAL.

(1) Any employee who, because of a serious health condition, becomes unable to perform the functions of such employee's position, shall be entitled to temporary medical leave for as long as the employee is unable to perform such functions, except that it shall not exceed 26 workweeks during any 12-month period.

(2) Such leave may be taken intermittently when medically necessary.

(b) UNPAID LEAVE PERMITTED. Such leave may consist of unpaid leave, except as provided in subsection (c) of this section.

(c) RELATIONSHIP TO PAID LEAVE.

(1) If an employer provides paid temporary medical leave or paid sick leave for fewer than 26 weeks, the additional weeks of leave added to attain the 26-week total may be unpaid.

(2) An employee or employer may elect to substitute the employee's accrued paid vacation leave, sick leave, or medical leave for any part of the 26-week period.

(d) FORESEEABLE LEAVE. In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee:

(1) shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employer, subject to the approval of the employee's health care provider, and

(2) shall provide the employer with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

SEC. 104. CERTIFICATION.

(a) IN GENERAL. An employer may require that a claim for family leave under section 102(a)(1)(C), or temporary medical leave under section 103, be supported by certification issued by the health care provider of the family member or of the employee, whichever is appropriate. The employee shall provide a copy of such certification to the employer.

(b) SUFFICIENT CERTIFICATION. Such certification shall be sufficient if it states:

(1) the date on which the serious health condition commenced or was first diagnosed by the health care provider,

(2) the probable duration of the condition, and

(3) the medical facts within the health care provider's knowledge regarding the condition.

(c) EXPLANATION OF INABILITY TO PERFORM JOB FUNCTIONS. In any case involving leave under section 103, the employer may request that (for purposes of section 105(e)) certification under this section include an explanation of the extent to which the employee is unable to perform the functions of the employee's position.

SEC. 105. EMPLOYMENT AND BENEFITS PROTECTION.

(a) RESTORATION TO POSITION. Upon return from leave under section 102 or 103, the employee shall be entitled:

(1) to be restored by the employer to the position of employment held by the employee when the leave commenced, or

(2) to be restored by the employer to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(b) MAINTENANCE OF BENEFITS. The taking of leave under this title shall not result in the loss of any employment benefit accrued before the date on which the leave commenced.

(c) ACCRUAL OF BENEFITS GENERALLY NOT AVAILABLE. Except as provided in subsection (d) of this section, nothing in this section shall be construed to entitle any restored employee to

(1) the accrual of any seniority or employment benefits during any period of leave, or

(2) any right, employment benefit, or position of employment other than any right, employment benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(d) MAINTENANCE OF HEALTH BENEFITS. During any period of employee leave under sections 102 or 103, the employer shall maintain coverage under any group health plan (as defined in section 162(i)(3) of the Internal Revenue Code of 1954) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously from the date the employee commenced the leave until the date the employee is restored under subsection (a) of this section.

(e) NO BAR TO AGREEMENT CONCERNING ALTERNATIVE EMPLOYMENT. Nothing in this title shall be construed to prohibit an employer and an employee with a serious health condition from mutually agreeing to alternative employment for the employee throughout the duration of such condition. Any such period of alternative employment shall not cause a reduction in the period of temporary medical leave to which the employee is entitled under section 103. Upon resumption of the employee's ability to perform the functions of the employee's position, the employee shall be entitled to restoration as provided under subsection (a) of this section.

SEC. 106. PROHIBITED ACTS.

(a) INTERFERENCE WITH RIGHTS. It shall be unlawful for any employer to:

(1) interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this title.

(2) discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.

(b) INTERFERENCE WITH PROCEEDINGS OR INQUIRIES. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual:

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title,

(2) has given or is about to give any information in connection with any inquiry or proceeding relating to any right provided under this title, or

(3) has testified or is about to testify in any inquiry or proceeding relating to any right provided under this title.

SEC. 107. ADMINISTRATIVE ENFORCEMENT.

(a) IN GENERAL. The Agency shall issue such rules and regulations as are necessary to carry out this section, including rules and regulations concerning service of complaints, notice of hearings, answers and amendments to complaints, and copies of orders and records of proceedings.

(b) CHARGES.

(1) Any person or persons, including a class or organization on behalf of any person, alleging an act which violates any provision of this

title may file a charge respecting such violation with the Agency. Charges shall be in such form and contain such information as the Agency shall require by regulation.

(2) Not more than 15 days after the Agency receives notice of the charge, the Agency:

(A) shall serve a notice of the charge on the person charged with the violation, and

(B) shall inform the person charged and the charging party as to the rights and procedures provided under this title.

(3) A charge may not be filed more than 1 year after the last event constituting the alleged violation.

(4) The charging party and the person charged with the violation may enter into a settlement agreement concerning the violation alleged in the charge before any determination is reached by the Agency under subsection (c) of this section. To be effective such an agreement must be determined by the Agency to be consistent, generally, with the purposes of this title.

(c) INVESTIGATION; COMPLAINT.

(1) Within the 60-day period after the Agency receives any charge, the Agency shall investigate the charge and issue a complaint based on the charge or dismiss the charge.

(2) If the Agency determines that there is no reasonable basis for the charge, the Agency shall dismiss the charge and promptly notify the charging party and the person charged with the violation as to the dismissal.

(3) If the Agency determines that there is a reasonable basis for the charge, the Agency shall issue a complaint based on the charge and promptly notify the charging party and the respondent as to the issuance.

(4) After issuance of a complaint, the Agency and the respondent may enter into a settlement agreement concerning a violation alleged in the complaint, except that any such settlement shall not be entered into over the objection of the charging party.

(5) If, at the end of the 60-day period referred to in paragraph (1) of this subsection, the Agency:

(A) has not made a determination under paragraphs (2) or (3) of this subsection, or

(B) has dismissed the charge under paragraph (2) of this subsection, and

(C) has not approved a settlement agreement under subsection (b)(4) or has not entered into a settlement agreement under paragraph (4) of this subsection,

the charging party may elect to bring a civil action under section 108. Such election shall bar further administrative action by the Agency with respect to the violation alleged in the charge.

(6) The Agency may issue and serve a complaint alleging a violation of this title on the basis of information and evidence gathered as a result of an investigation initiated by the Agency pursuant to section 109.

(7) If, at any time after a complaint has been filed, the Agency believes that appropriate civil action to preserve the status quo or to

prevent irreparable harm appears advisable, the Agency shall certify the matter to the [Attorney General], who shall bring in the name of the State any action necessary to preserve such status quo or to prevent such harm, including the seeking of temporary restraining orders and preliminary injunctions. The appropriate parties shall be notified of such certification and the complainant may initiate independently, or in cooperation with the [Attorney General], appropriate civil action to seek a temporary restraining order or preliminary injunction.

(d) RIGHTS OF PARTIES.

(1) In any case in which a complaint is issued under subsection (c) of this section, the Agency shall, not more than 30 days after the complaint is issued, cause to be served on the respondent a copy of the complaint.

(2) Any person filing a charge alleging a violation of this title may elect to be a party to any complaint filed by the Agency alleging such violation. Such election must be made before the commencement of the hearing held under subsection (e)(2) of this section.

(3) The failure of the Agency to comply in a timely manner with any obligation assigned to the Agency under this title shall entitle the employee to elect, at the time of such failure, to bring a civil action under section 108.

(4) Nothing in this section shall be construed to entitle the respondent to interfere with the performance of the function assigned to the Agency under this title, notwithstanding any failure by the Agency strictly to comply with any requirements relating to the exercise of such functions.

(e) CONDUCT OF HEARING.

(1) The Agency shall have the duty to prosecute any complaint issued under subsection (c) of this section.

(2) An administrative law judge shall conduct a hearing or the record with respect to any complaint issued under this title. The hearing shall be commenced within 60 days after the issuance of such complaint, unless the judge, in the judge's discretion, determines that the purpose of this Act would best be furthered by commencement of the action after the expiration of such period.

(f) FINDINGS AND CONCLUSIONS.

(1) After the hearing conducted under subsection (e)(2) of this section, the administrative law judge shall promptly make findings of fact and conclusions of law, and, if appropriate, issue an order for relief as provided in section 110.

(2) The administrative law judge shall inform the parties, in writing, of the reason for any delay in making such findings and conclusions if such findings and conclusions are not made within 60 days after the conclusion of such hearing.

(g) FINALITY OF DECISION; REVIEW.

(1) The decision and order of the administrative law judge shall become the final decision and order of the Agency unless, upon appeal by an aggrieved party taken not more than 30 days after the adminis-

trative law judge issues the decision, the Agency modifies or vacates the decision, in which case the Agency's decision shall be the final decision and order of the Agency.

(2) Not later than 60 days after the entry of a final order under subsection (g)(1) of this section, any person aggrieved by such final order may seek a review of such order in the [appropriate appellate court].

(3) Upon the filing of the record with the [appropriate appellate court], the jurisdiction of the court shall be exclusive and its judgment shall be final, except that the same shall be subject to review by the [appropriate State court of final review].

(h) COURT ENFORCEMENT OF ADMINISTRATIVE ORDERS.

(1) If an order of the agency is not appealed under subsection (g)(2) of this section, the Agency may petition the [appropriate appellate court] for the enforcement of the order of the Agency by filing in such court a written petition praying that such order be enforced.

(2) Upon the filing of such petition, the court shall have jurisdiction to make and enter a decree enforcing the order of the Agency. In such a proceeding, the order of the Agency shall not be subject to review.

(3) If, upon appeal of an order under subsection (g)(2) of this section the [appropriate appellate court] does not reverse such order, such court shall have the jurisdiction to make and enter a decree enforcing the order of the Agency.

SEC. 108. ENFORCEMENT BY CIVIL ACTION.

(a) RIGHT TO BRING CIVIL ACTION.

(1) Subject to the limitations in this section, an employee or the Agency may bring a civil action against any employer to enforce the provisions of this title in the [appropriate trial court].

(2) Subject to paragraph (3) of this subsection, a civil action may be commenced under his subsection without regard to whether a charge has been filed under section 107(b).

(3) If the Agency:

(A) has approved a settlement agreement under section 107(b)(4), no civil action may be filed under this subsection if such action is based upon a violation alleged in the charge and resolved by the agreement, or

(B) has issued a complaint under section 107(c)(3) or 107(c)(6), no civil action may be filed under this subsection if such action is based upon a violation alleged in the complaint.

(4) Notwithstanding paragraph (3)(A) of this subsection, a civil action may be commenced to enforce the terms of any such settlement agreement.

(5) Except as provided in paragraph (6) of this subsection, no civil action may be commenced more than 1 year after the date on which the alleged violation occurred.

(6) In any case in which:

(A) a timely charge is filed under section 107(b), and

(B) the failure of the Agency to issue a complaint or enter into a settlement agreement based on the charge (as provided under section 107(c)(5)) occurs more than 11 months after the date on which any alleged violation occurred,

the employee may commence a civil action not more than 60 days after the date of such failure.

(7) Upon the filing of the complaint with the court, the jurisdiction of the court shall be exclusive.

(b) NOTIFICATION OF THE AGENCY; RIGHT TO INTERVENE. A copy of the complaint in any action by an employee under subsection (a) of this section shall be served upon the Agency by certified mail. The Agency shall have the right to intervene in a civil action brought by an employee under such subsection.

(c) ATTORNEYS FOR THE AGENCY. In any civil action under subsection (a) of this section, the Agency shall certify the matter to the [Attorney General] who may appear for and represent the State.

SEC. 109. INVESTIGATIVE AUTHORITY.

(a) IN GENERAL. To ensure compliance with the provisions of this title, or any regulation or order issued under this title, the Agency may, subject to subsection (c) of this section, investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcripts thereof), question such employees, and investigate such facts, conditions, practices, or matters as the Agency may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act.

(b) OBLIGATION TO KEEP AND PRESERVE RECORDS. Every employer subject to any provision of this Act or of any order issued under this Act shall make such records of the persons employed by the employer and of the wages, hours and other conditions and practices of employment maintained by the employer, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Agency as the Agency shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

(c) REQUIRED SUBMISSIONS GENERALLY LIMITED TO AN ANNUAL BASIS. The Agency may not under the authority of this section require any employer or any plan, fund, or program to submit to the Agency any books or records more than once during any 12-month period, unless the Agency has reasonable cause to believe there may exist a violation of this title or any regulation or order issued pursuant to this title, or is investigating a charge pursuant to section 107.

(d) SUBPOENA POWERS. For the purposes of any investigation provided for in this section, the Agency shall have appropriate subpoena authority.

(e) DISSEMINATION OF INFORMATION. The Agency may make available to any person substantially affected by any matter which is the subject of an investigation under this section, and to any department or agency of the United States, information concerning any matter which may be the subject of such investigation.

SEC. 110. RELIEF.

(a) INJUNCTIVE.

(1) Upon finding a violation under section 106, the Agency shall issue an order requiring such person to cease and desist from any act or practice which violates this title.

(2) In any civil action brought under section 108, the court may grant as relief any permanent or temporary injunction, temporary restraining order, or other equitable relief the court deems appropriate.

(b) MONETARY. Any employer, including the State, that violates any provision of this title shall be liable to the injured party in an amount equal to:

(1) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation, plus interest on the total monetary damages calculated at the prevailing rate, and

(2) an additional amount equal to the greater of

(A) the amount determined under paragraph (1) of this subsection, or

(B) compensatory damages.

(c) ATTORNEYS' FEES. The injured party may be awarded reasonable attorneys' fee as part of the costs, in addition to any relief awarded.

(d) LIMITATION. Damages awarded under subsection (b) of this section may not accrue from a date more than 2 years before the date on which a charge is filed under section 107(b) or a civil action is brought under section 108.

SEC. 111. NOTICE.

(a) IN GENERAL. Each employer shall post and keep posted, in conspicuous places upon its premises where notices to employees and applicants for employment are customarily posted, a notice, to be approved by the Agency, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

(b) PENALTY. Any employer that willfully violates this section shall be assessed a civil money penalty not to exceed $100 for each separate offense.

TITLE II COMMISSION ON PAID FAMILY AND MEDICAL LEAVE

SEC. 201. ESTABLISHMENT

There is established a commission to be known as the Commission on Paid Family and Medical Leave (hereinafter in this title referred to as the "Commission").

SEC. 202. DUTIES.

The Commission shall:

(a) conduct a comprehensive study of existing and proposed methods designed to provide workers with family leave and temporary medical leave and with full or partial salary replacement or other income protection during periods of such leave; this study shall include, but shall not be limited to, a comprehensive study of temporary disability insurance and the advisability of its adoption by the State, and

(b) within 2 years after the date on which the Commission first meets, submit a report to the State Legislature, including legislative recommendations concerning implementation of such a system of salary replacement for family leave and temporary medical leave.

TITLE III MISCELLANEOUS PROVISIONS

SEC. 301. EFFECT ON OTHER LAWS.

Nothing in this act shall be construed to supersede any law which provides greater employee family or medical leave rights than the rights established under this Act.

SEC. 302. EFFECT ON EXISTING EMPLOYMENT BENEFITS.

(a) MORE PROTECTIVE. Nothing in this Act shall be construed to diminish an employer's obligation to comply with any collective bargaining agreement or any employment benefit program or plan which provides greater family or medical leave rights to employees than the rights provided under this Act.

(b) LESS PROTECTIVE. The rights provided to employees under this Act may not be diminished by any collective bargaining agreement or any employment benefit program or plan.

SEC. 303. ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES.

Nothing in this Act shall be construed to discourage employers from adopting leave policies more generous than any policies which comply with the requirements under this Act.

SEC. 304. REGULATIONS.

The Agency shall prescribe such regulations as are necessary to carry out Title I of this Act.

CHOICE—THE ESSENTIAL COMPONENT OF FAMILY LEGISLATION

THOMAS J. TAUKE*

The 100th Congress saw the forceful introduction of work and family issues to the congressional agenda. Substantial momentum was quickly generated for legislative solutions to one aspect of work and family issues in particular—child care.

It is easy to understand this recent surge of interest in work and family issues in general and child care issues specifically. Work force trends have changed dramatically over the last two to three decades. Demographic and work force statistics reveal a typical family of the late 1980's that is vastly different from the traditional family of the 1960's. Over 10 million[1] preschoolers under the age of six and another 26 million[2] school-age children have mothers in the work force. Young children whose mothers participate in the work force are now the norm rather than the exception.

Parents represent a large segment of our work force, and their behavior significantly affects our economy. It has been intensely argued, therefore, that government intervention to solve the day care needs of millions of working women is essential to the preservation and enhancement of American productivity and competitiveness.[3] But what at first blush appeared to be a relatively straightforward economic issue of necessity has become an extremely complex and controversial item on the legislative agenda. As the debate has unfolded, it has become clear that one cannot discuss child care simply as a work force issue.

I. CHILD CARE AND FAMILY POLICY

One must consider child care as an issue that concerns the entire family. It involves some of the most basic decisions af-

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* Member, United States House of Representatives (R-Iowa). B.A., Loras College, 1972; J.D., University of Iowa College of Law, 1974. Representative Tauke is a member of the House Education and Labor Committee. He is also vice chairman of the Human Resources Subcommittee of the House Education and Labor Committee.

[1] Hofferth & Phillips, *Child Care in the United States, 1970 to 1995*, 49 J. MARRIAGE & FAM. 559, 560 table 1 (1987).

[2] *See id.*

[3] *See Act for Better Child Care Service: Hearing on H.R. 3660 Before the Subcomm. on Human Resources of the House Comm. on Education & Labor*, 100th Cong., 2d Sess. 74 (1988).

fecting families—the care and rearing of children. Child care legislation proposed in 1988 that was based on economic needs rather than on family needs stalled and eventually died. The bills' failure to recognize and accommodate the wide range of legitimate family and child care choices was a central reason for inaction in the 100th Congress.[4]

To be successful, child care legislation cannot restrict child care options or serve only a very small group of American families. Rather, legislation must recognize and respond to the diversity found among today's families and must enhance parental choice and involvement in the care of children.

II. Family and Child Care Trends

The stereotypical family portrait of the 1950's is no longer accurate. Today, child care advocates ask Congress to respond to the needs of a new family arrangement—one where mothers participate in the labor force as part of two-career households or as single parents. But lost in the rush to help this particular group of families is the reality that families today are very diverse. Lifestyles and work patterns are extremely varied. It is critical for Congress to be sensitive to this diversity in its response to work and family issues.

Much attention to work and family issues has been prompted by the assertion that the traditional family—father as breadwinner, mother at home raising the children—has all but disappeared from America. The figure of less than 10% is used repeatedly to describe the number of these families.[5]

Yet, this statistic clouds the real picture when it comes to the child care issue. Of families with preschoolers, 37% fit the traditional definition.[6] About 38% of families with the youngest child under age six are two-parent, two-earner households.[7] And another 8% of families with preschoolers are headed by single mothers who are in the labor force.[8]

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[4] *See, e.g.*, 134 Cong. Rec. E764 (1988) (statement of Rep. Philip Crane (R-Ill.)).

[5] *See, e.g.*, Child Care Action Campaign, Child Care: The Bottom Line 9–10 (1988); Dodd, *Quality Child Care—Now*, Wash. Post, Aug. 29, 1988, at A15, col. 4.

[6] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Labor Force Participation Unchanged Among Mothers With Young Children, table 4 (Sept. 7, 1988).

[7] *Id.*

[8] *Id.*

Families that choose to have one parent stay home often do so at significant financial sacrifice. In 1986, the median income of married couples where the wife was not in the paid labor force was $25,803, compared with a $38,346 median income for couples with both the husband and wife in the paid labor force.[9] Thus, the first choice that must be recognized in developing child care policy is the choice of whether or not to remain at home and raise one's own children.

III. CHILD CARE CHOICES

Another issue in the child care debate is what happens to the children while the employed parents are at work. Again, the diversity in child care arrangements chosen by employed parents is an important consideration in constructing a viable federal child care policy. Among preschoolers with employed mothers, the largest group (39.8%) were cared for by relatives—usually the father or a grandparent.[10] Another 22.3% of preschoolers were cared for in the home of someone who was unrelated, often a close friend or neighbor.[11] (Both of these options are largely unregulated forms of child care.) Some preschoolers (23.1%) were cared for in organized child care facilities.[12] Government policy that limits child care choices to regulated, usually center-based care, is therefore biased against some of the most prevalent arrangements currently chosen by employed parents.

The factors that determine these choices—either the choice to stay home or the type of child care arrangement once the decision has been made to enter the work force—are largely financial.[13] The costs of child care are weighed against the potential income from employment. A government policy that provides benefits only if the mother chooses to become employed

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[9] WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACT SHEET NO. 88-2, FACTS ON WOMEN WORKERS 2 (1988).

[10] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., CURRENT POPULATION REP., SERIES P-70, NO. 9, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: WINTER 1984–1985 at 3 table B (May 1987).

[11] *Id.*

[12] *Id.*

[13] *See generally* R. Connelly, Utilizing Market Child Care: An Economic Framework for Considering the Policy Issues (Aug. 1988) (unpublished paper presented at the National Academy of Science's Panel on Child Care Policies, Feb. 25–26, 1988 and Child Care Action Campaign conference on child care, Jan. 1988).

and use substitute care for her children, therefore, results in a government incentive for mothers to work.

Current federal tax credits for child care are already skewed to provide this incentive.[14] Additional legislative solutions that further bias federal policies away from parental care and toward substitute care of children should be studied carefully. The impact on families must be considered. Government policies should not induce parents into the work force and away from the care of their own children.

Another interesting and important aspect of the child care debate is the extent to which parents choose to be involved in "shift" work. Particularly among young couples with children, work schedules are arranged to enable one parent or the other to be home with the children at all times, thus minimizing the need for non-parental care arrangements.[15] Legislative solutions that respond only to families that choose substitute care thus deny benefits to another large segment of American families—those employed in shift work.[16] Government policy should not be biased against these families either.

All of these choices made by parents—whether to stay home, to engage in shift work, to work part-time or full-time—must be respected and supported. To do otherwise would result in a policy that would benefit some families but would harm others.

Choices among non-parental child care arrangements also must remain with parents. Whether parents choose care by a relative, care by a neighbor, care in a secular center, or care provided by a local church, government cannot usurp the right of parents to make that choice. Once government begins subsidizing one form of care over others, it has interfered in that decision-making process. Moreover, if significant amounts of subsidies are provided to one segment of the child care market, it is likely to alter the marketplace, thus restricting the availability of care arrangements that are not subsidized.

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[14] The Dependent Care Tax Credit, I.R.C. § 21 (1988), is available only if dependent care expenses are incurred to enable the taxpayer to be gainfully employed.

[15] *See generally* Presser, *Shift Work and Child Care Among Young Dual-Earner American Parents*, 50 J. MARRIAGE & FAM. 133 (1988).

[16] In 1984, one-fifth of all parents employed full-time worked other than fixed daytime schedules. The figures were higher for parents in the age group 19 to 26. Of young married parents who were employed full-time, had employed spouses, and had preschool age children, 29.4% engaged in shift work; the figure was 39.4% for parents employed part-time. *Id.* at 136–37.

Ironically, low-income families are hurt the most by government intervention that subsidizes only regulated child care, because they are the most likely to use informal child care arrangements. Relatives are the primary care providers chosen by these parents. A much smaller percentage of low-income parents than higher-income families uses formal day care centers.[17]

Although one might argue that parents' choices are limited by a lack of supply of child care, empirical data to verify this claim is scarce and inconclusive. Waiting lists and anecdotal evidence are all that is usually offered as proof of a supply shortage. Other data, however, negate any claim of a serious shortage. Such data reveal that virtually no children under the age of five are without care[18] and that the child care problem of school-age children has been over-dramatized.[19]

Certainly, in some areas demand exceeds supply; but, by and large, the market has responded quite well to the increasing demand for child care. Because so much child care is unregulated, however, comparing the number of slots in licensed child care facilities with the number of children with working mothers—a popular way of demonstrating a shortage—is inconclusive at best and misleading at worst.

Financial ability is clearly much more of a limiting factor in child care choices than is any lack of supply. Among low-income families that pay for child care, average expenditures on child care represent 20% of income.[20] The result for those families that do not have free care available is a restriction of their choice.

The government's response to child care needs, therefore, ought to center on increasing the resources of those families with the lowest income. Providing government assistance directly to families is more efficient than creating a new bureaucracy to administer child care plans, and more important, it ensures parental choice.

For families with higher income, a wide variety of options for child care is available, most of which are affordable. The diversity of the child care market enhances parents' choices and

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[17] T. GABE & S. STEPHEN, CHILD DAY CARE: PATTERNS OF USE AMONG FAMILIES WITH PRESCHOOL CHILDREN 43 (CRS Rep. for Cong. 762, EPW, Dec. 19, 1988).

[18] *See* BUREAU OF THE CENSUS, *supra* note 10.

[19] Cain & Hofferth, *Parental Choice of Self-Care for School Age Children*, 50 J. MARRIAGE & FAM. (forthcoming, 1989).

[20] T. GABE & S. STEPHEN, *supra* note 17.

allows the market to respond to increasing demand. Until conclusive evidence is provided to document a huge market failure in this area, government intervention in the market will undoubtedly do more harm than good.

IV. Legislative Solutions

It has taken nearly two decades for Congress to consider comprehensive child care legislation since the 1971 veto of the Child Development Programs[21] legislation. Among the primary reasons given for that veto was the legislation's "family-weakening implications."[22] In his veto message of the 1971 measure, Richard Nixon refused to "commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against [sic] the family-centered approach."[23] While work force trends continue to change, this nervousness about non-parental care of children, even among working mothers, remains a significant barrier to enactment of child care legislation.

Nonetheless, two general legislative approaches to the child care issue were advanced in the 100th Congress. The first would heavily involve government in the provision of child care and in the choices made by parents;[24] the second would provide additional resources directly to parents in order to expand the options available to them.[25]

The child care debate is now focusing on the issue of choice—whether or not to stay home, whether to use informal or relative child care arrangements, and whether to utilize church-sponsored child care. Each of these options must be treated fairly and equitably. The second approach of providing assistance directly to parents achieves the goal of government neutrality vis-à-vis the alternatives.

Government can most efficiently avoid interference with parental choice by providing tax relief to families with young children. Additionally, the use of vouchers to offset the up-front

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[21] S. 2007, 92d Cong., 1st Sess. (1971).

[22] President's Message to the Senate Returning S. 2007 Without His Approval, 7 Weekly Comp. Pres. Doc. 1634, 1635 (Dec. 13, 1971) [hereinafter President's Message].

[23] *Id.* at 1636.

[24] H.R. 3660, 100th Cong., 1st Sess. (1987); S. 1885, 100th Cong., 1st Sess. (1987).

[25] H.R. 4768, 100th Cong., 2d Sess. (1988); S. 2546, 100th Cong., 2d Sess. (1988).

cost of child care can be a useful tool in aiding lower-income parents who must work to support their families but who cannot afford the full cost of care. Improving and expanding their options, without restricting their freedom of choice, is essential to the development of sound child care policy.

In addition, an appropriate role for government may include helping parents to learn about their options and to make informed choices. Consumer education activities, for example, may be helpful to parents who are searching for quality child care.

It would be misguided, however, to assume that the government is better able than parents to decide which child care arrangements should be subsidized. In addition to being administratively inefficient, such a policy would benefit only those families who choose the subsidized system and would infringe on the decision-making authority and responsibility of parents.

It was true in 1971 and it is still true today that "good public policy requires that we enhance rather than diminish both parental authority and parental involvement with children."[26] Any successful child care legislation must empower parents to make choices, not make choices for them. It is highly unlikely that child care legislation will ever pass unless it is perceived as protecting and enhancing parental choice.

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[26] President's Message, *supra* note 22.

THE ECONOMICS OF CHILD CARE: ITS IMPORTANCE IN FEDERAL LEGISLATION

BARBARA REISMAN*

During the 100th session of Congress, over 100 bills affecting child care were introduced—a record number. This heightened interest by Congress was complemented by the attention that child care issues received during the 1988 Presidential campaign. Each of the candidates proposed that the federal government expand its role in the child care arena.

The debate over the federal role in the provision of child care has shifted from "whether" to "how." When former Secretary of Labor, Ann Dore McLaughlin, appointed a high level task force within her department to examine the federal role in child care and to make recommendations, Congress debated the issue, and although it ultimately failed to pass comprehensive legislation, the tenor of the debate changed dramatically.

The change in the focus of the child care debate can be illustrated by the public positions on the issue taken by Senator Orrin Hatch (R-Utah). In 1984, Senator Hatch, then Chairman of the Senate Committee on Labor and Human Resources, said, in describing the compromise that resulted in the Dependent Care Block grant program, that "the Federal Government should not be in the business of providing day care or even assuring that it is available."[1] Hatch went on to say that the acceptable role for government would be to fund local programs that gathered information and made it available to parents.[2] Three years later, Senator Hatch introduced S. 1678, the Child Care Services Improvement Act, noting that

> greater leadership by the Federal Government is needed to address [the child care] issue. We in government are faced with a choice: . . . . Do we force women to choose between staying at home, dependent on public assistance, or working without child care? Or, do we constructively address our

* Executive director of the Child Care Action Campaign (CCAC). B.A., Brown University, 1971; M.B.A., Harvard University, 1976. A substantial portion of this Article appears in the CCAC's book, CHILD CARE: THE BOTTOM LINE, co-authored by Ms. Reisman, Amy Moore and Karen Fitzgerald. The CCAC was formed in 1983 as a national coalition of leaders from a wide range of American institutions and organizations. Its long range goal is to set in place a national system of child care.

[1] 130 CONG. REC. S13404 (daily ed. Oct. 4, 1984) (statement of Sen. Hatch).

[2] *Id.*

> Nation's child care issue and encourage honest work and economic self-sufficiency?[3]

The increasing acceptance by the federal government of child care as a necessity, and the attention to the means of providing it, may be due to the recognition of three distinct goals that child care can accomplish. First, child care can be crucial in providing children the educational foundation they need. For example, Head Start, the most well-known compensatory preschool education program, has made a measurable difference in the lives of the children and families that have enrolled in it. Second, welfare costs can be reduced by enabling mothers on welfare to work. The recently passed Family Support Act[4] recognizes that in order for women to be able to leave welfare and go to work, they must have help paying for child care during the transition. Third, an investment in child care can help improve the country's productivity growth, increase the overall standard of living, and maintain strong families.

Current child care programs benefit very few people. They comprise a patchwork system that pulls in a few families here, and a few families there, but which, upon final analysis, falls short of meeting the entire population's child care needs. A better option would be to create a national system of comprehensive, coordinated child care that would increase the supply of child care, ensure that quality services are provided, and expand access to a larger portion of the population. Such a system would have to include provisions to aid parents in paying for child care; quality care is expensive. However, in making the child care investment, this country would receive tremendous returns in improved education, lower welfare costs, and increased productivity, as well as increased satisfaction of workers and employers as these returns are realized.

I. Child Care and the Nation's Economy

A. *The Problem: Who Pays for Quality Child Care?*

Estimates of the average cost of full-time care for one child range from $2000[5] to $3000[6] per year. There is little data on how

[3] 133 Cong. Rec. S12019 (daily ed. Sept. 11, 1987) (statement of Sen. Hatch).

[4] Family Support Act of 1988, Pub. L. No. 100-485, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 2343 (to be codified at 42 U.S.C. § 602).

[5] Bureau of the Census, U.S. Dep't of Comm., Current Population Report Series P-7, No. 9, Who's Minding the Kids: Child Care Arrangements (1985).

[6] D. Friedman, Corporate Financial Assistance for Child Care 6 (Conference Board Research Bulletin No. 177, 1985).

much families can afford to pay for care. The Bureau of Labor Statistics estimates that families can spend about 10% of their gross incomes for child care, based on studies showing that families do spend that amount on average.[7] Data from the National Institute of Child Health and Human Development demonstrate that poor families pay a larger proportion of their income for child care than non-poor families (21 to 25%, compared with 8 to 10%) and that poor blacks and Hispanics spend more than poor whites. Single parents with a child under five spend almost twice as high a percentage of their family incomes on child care than do two-parent families.[8]

Families would have to earn $40,000 to $60,000 per year in order to pay for the average cost of care, if they are to limit their spending to only 10% of their incomes. This amount is well above the median income for a family with children in the United States, which, in 1987, was $30,983.[9] For black and Hispanic families, whose median income is $18,098 and $20,306 respectively,[10] the average cost of full-time care is even further out of reach.

Families that cannot afford to pay the $2000 to $3000 per child per year for care make one of several choices. They work fewer hours, they buy lower quality care, they leave their children unattended, or they drop out of the labor force altogether. Each of these choices has a personal as well as a public cost. If families limit their hours, they also limit their incomes and reduce their standards of living. If families leave their children unattended, the children are at greater risk of injury. Moreover, the children's progress in school is also jeopardized. If families, especially disadvantaged families, place their children in lower quality child care, the children are at greater risk both emotionally and educationally and are deprived of the benefits of quality, early childhood experiences.

In an attempt to expand the supply of child care and to make it more affordable, several states have initiated or passed legislation that creates new means of financing child care. Most of these initiatives serve to expand the capital available for creating

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[7] *Child Care in the U.S.: Hearings Before the Select Comm. on Children, Family and Youth*, 100th Cong., 1st Sess. 2 (1987) (testimony of Sandra L. Hofferth, Ph.D.) [hereinafter *Hearings*].

[8] *Id.*

[9] BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., CURRENT POPULATION REPORT SERIES P-60, No. 162, MONEY INCOME OF HOUSEHOLDS, FAMILIES AND PERSONS IN THE UNITED STATES (1987).

[10] *Id.*

new supply. But money is also needed to help subsidize the operating costs of child care in order to make it more affordable to parents.

B. *The Need for Public Investment in Child Care: An Economic Perspective*

Many people believe that those who share in the benefits of a particular good should share in the costs of providing it. While no one can yet precisely quantify the benefits of an investment in child care, all of the evidence in the Child Care Action Campaign's economic research points to substantial benefits of such an investment to federal and state governments, to employers, to families, and to society at large.

The need for supplemental care for the children of working parents is not new, but the extent of the need has intensified and the links between adequate child care and productivity, economic growth, and the development of human capital have become clear. Quality, affordable child care can enable more parents to work without distraction and can attract new workers to the labor force to fill necessary jobs. It can reduce absenteeism and turnover. It can help mothers to become independent of welfare and enable families to maintain their standards of living. Also, it can help children grow and develop.

In the past, arguments for building a comprehensive, coordinated system of child care have been based on the moral imperative of helping America's children, the country's most precious resource. But changes in the economy and the structure of the American family now make child care an economic necessity. Future economic growth and prosperity depend on our ability to attract new workers into the labor force, to improve the productivity of those workers already there, and to prepare future generations for success in school and the work force. Providing quality child care is one essential way to accomplish these three goals.

C. *Changes Affecting the Need for Child Care*

1. The Changing American Economy

A steady stream of economic currents is rapidly reshaping American society. To many informed observers, it is clear that

the American economy is not as strong, prosperous, or globally preeminent as it was some thirty years ago. The United States economy's vital signs are sagging. For example:

> In 1960, the United States accounted for 35% of the world's economic output. By 1980, its share had fallen to 22%.[11]
>
> In 1960, the United States was responsible for 22% of the world's exports; in 1980, the figure was only 11%.[12]
>
> The 1987 federal budget deficit was estimated at $169 billion for fiscal year 1988.[13]

While there are many factors that have contributed to this economic stagnation, it has become increasingly clear that the United States economy has irrevocably changed. The post World War II economic prosperity, fueled by a strong manufacturing base and structured around a male worker and an at-home spouse who raised the children, is not part of the economic or social reality of 1989. The economic base has shifted from manufacturing to services and an increasing number of mothers have entered the labor force. Unfortunately, public policy remains stubbornly stuck in time, as if the manufacturing, male-dominated foundation stood firm.

Policymakers of the 1990's and the next century will confront the implications of these profound economic changes. If America is to regain its competitive edge in the world economy, we *must* confront these changes. Future economic growth depends on our ability to attract more workers into the labor force and increase the productivity of those workers already there. One way to meet these challenges is to provide child care. It is a crucial first step toward revitalizing the productivity of the American work force and the health of the American economy.

2. The Changing American Family

Beginning in the 1960's, scores of women, especially mothers of young children, entered the labor force. They continued to do so through the 1970's and 1980's. The trend is unlikely to reverse itself. Women, especially married women, have been attracted to the labor force by a changing labor market. Many

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[11] R. REICH, TALES OF A NEW AMERICA 44 (1987).

[12] *Id.*

[13] CONGRESSIONAL BUDGET OFFICE, ECONOMIC AND BUDGET OUTLOOK FISCAL YEARS 1988–1992 (1987).

traditionally "male" jobs have been made available, creating new economic opportunities for women. Mothers of young children have been propelled into the labor force by the twin forces of inflation and high unemployment. Jobs in the high-wage manufacturing sector have disappeared, leaving low-paying jobs in their wake. In many families, two incomes have become necessary just to maintain the families' standards of living. In addition to these economic currents, some women have been inspired, by the Women's Movement and other political changes, to look for creative, intellectual, and professional fulfillment in the working world.

Whatever their initial motivations, most mothers who work today do so out of economic necessity. About two-thirds of women in the labor force are either single, widowed, or divorced or have husbands who earn less than $15,000.[14] In fact, during the past two decades, married women with young children have represented the fastest growing segment of the labor force.

> Today, 57% of all women with children younger than six work outside the home; in 1950, only 12% did.[15]

> Today, 51% of married women with children under one year are employed, up from 33% in 1979.[16]

> Today, more than half of all new mothers return to work before their child's first birthday.[17]

The increasing labor force participation rate of mothers with young children shows no sign of abating. Two-parent families need second incomes just to make ends meet. For a single-parent family (almost always headed by a woman), it is imperative that the parent work; she is the sole source of support for her children. Single parents' alternatives are work, welfare, or starvation.

The statistics paint a picture of the future:

> By 1995, two-thirds of all preschool children (approximately 15 million) will have mothers in the work force, an increase of more than 50% over the 1986 figure of 9.6 million.[18]

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[14] U.S. DEP'T OF LAB., NO. 86-1, 20 FACTS ON WOMEN WORKERS 2 (1986).

[15] SECRETARY'S TASK FORCE, U.S. DEP'T OF LAB., CHILD CARE, A WORKFORCE ISSUE 143 (1988).

[16] S. KAMERMAN & A. KAHN, CHILD CARE: FACING THE HARD CHOICES 95 (1987).

[17] *Working Mother is Now Norm, Study Shows*, N.Y. Times, June 16, 1988, at A19, col. 1.

[18] H. BLANK & A. WILKINS, STATE CHILD CARE FACT BOOK 17 (1987).

> By 1995, more than three-quarters of all school age children (approximately 34.4 million) will have mothers in the work force.[19]

Clearly, all of these children will have to be cared for while their mothers (and fathers) work. Child care services will have to be expanded to meet the ever growing demand, so that parents can support their families.

But families are not the only ones who depend on these female workers. The national economy also needs them. The changes that the economy will undergo, from the shifting economic base to the shrinking labor pool and the declining population growth rate, make it absolutely essential that we make productive use of all of our human as well as material resources. We must attract as many new workers into the labor force as we can. Mothers of young children who want to work must have affordable, quality child care made available to them. In order to attract women into the labor force, we must provide compensation and work policies that respond to their family needs, enabling them to be good parents *and* productive workers. The most important of these possible benefits is child care.

3. The Changing Labor Force

The years between 1970 and 1985 were marked by sweeping demographic changes. The surge of women into the labor force coincided with a sharp downturn in United States birth rates, from an average of 3.7 children per woman in 1970 to 1.8 in 1985. By the year 2000, the population will grow 0.7% annually, a rate that will, in turn, mean that the future labor pool will be smaller.[20]

At the same time, the labor force itself is projected to expand at a much slower rate. In the next fifteen years, it is expected to grow at a rate of 1%, compared with the 2.2% annual rate for the years between 1970 and 1985.[21] The segment of the population that will enter the labor force in the next fifteen years

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[19] *Id.*

[20] W. JOHNSTON, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY at xix (1987).

[21] D. Bloom & T. Steen, The Labor Force Implications of Expanding the Child Care Industry 11 (1988) (paper commissioned by the Child Care Action Campaign).

is 11% smaller, in absolute terms, and 37% smaller, relative to the base labor force, than the group that entered in 1970.[22]

Other factors in the chain of demographic dominoes point to a tightening labor market. The number of young workers (age sixteen to twenty-four) declined by about 8% between 1979 and 1986 and is expected to decline still further in the next fifteen years.[23] At the same time, the teenage unemployment rate has dropped.[24] Service employers who have traditionally looked to young workers to fill many low-paying service sector jobs (such as those at fast food restaurants) have to compete for an increasingly scarce number of potential employees. In some states, employers must pay employees well above the minimum wage to draw them into the labor force. The declining national unemployment rate intensifies the squeeze.

a. *A labor shortage looms.* The declining population growth rate and labor force growth rate, taken together with the eroding supply of teenage workers and the low unemployment rate, raise the specter of a labor shortage. The economy desperately needs new workers to fill all of the new jobs that will be created by the growing service sector of the economy, so that economic growth can be maintained. Competition for the shrinking group of potential workers will accelerate. Employers who want to remain competitive will have to look for ways to attract the potential employees of their choice to their firms.

There are theoretically many policy responses, both public and private, to the problem of labor shortages. These include flexible scheduling, increased use of computers and other machinery in place of human labor, and relaxed immigration requirements. However, none of these responses is as well-suited to satisfying the needs of employers and households, and simultaneously promoting a variety of national interests, as policies aimed at expanding the child care industry and improving the quality of care.[25]

b. *The shift from a manufacturing-based to a service-based economy.* The shift away from manufacturing and towards a

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[22] H. Watts & S. Donovan, What Can Child Care Do for Human Capital? 3 (1988) (paper commissioned by the Child Care Action Campaign).

[23] D. Bloom & T. Steen, *supra* note 21, at 12.

[24] *Id.*

[25] *Id.*

service-based economy, which began in the early to mid-1970's, is expected to continue as manufacturing jobs decline, both absolutely and as a percentage of GNP, and jobs in the service sector grow. In 1955, manufacturing produced 30% of all goods and services; by 1985, the percentage dropped to 21%. By the year 2000, manufacturing is expected to account for only 17% of all goods and services produced.[26] Between 1979 and 1985, the United States economy generated nearly eight million new jobs, but actually lost more than 1.7 million jobs in manufacturing.[27] Most of these new service sector jobs were filled by women, most of whom had children. The same will be true for the future; two-thirds of all jobs created between now and the year 2000 are projected to be taken by women.[28] Most of the women of childbearing age are or will become mothers during their working lives.

Today, the service sector employs three out of four American workers. The rise of the service sector has altered, and will continue to alter, the dynamics of the workplace, affecting everything from wages and the length of the work week to the size of the typical business establishment. Without child care, it will be difficult to attract new workers into the labor force. And without new workers, it will be difficult to maintain labor force growth, productivity, and general economic health in the 1990's and beyond the year 2000.

Overall, workers in the service economy receive lower wages than workers in other sectors. Up to half of the eight million jobs created between 1979 and 1985 were low wage and part-time jobs in retail trade and the service sector.[29] In fact, low paying service sector jobs such as waitress and administrative clerk will represent the bottom of the United States jobs skills curve in the 1990's.

Moreover, service sector establishments are often smaller than manufacturing establishments, and as a result, service sector employers offer a smaller number of benefits to their employees. The average manufacturing enterprise employs approximately sixty people, compared with only eleven for the typical service establishment. Between 1978 and 1982, more than half

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[26] W. JOHNSTON, *supra* note 20, at xvii.

[27] G. BERLIN & A. SUM, TOWARD A MORE PERFECT UNION: BASIC SKILLS, POOR FAMILIES AND OUR ECONOMIC FUTURE, 12 (1988).

[28] W. JOHNSTON, *supra* note 20, at xx.

[29] G. BERLIN & A. SUM, *supra* note 27, at 12.

of all new jobs were created by firms with fewer than one hundred employees. The smallest firms, those with fewer than twenty employees, now employ one out of every five workers but are creating two-fifths of all *new* jobs.[30] Service sector employers are less likely to train their employees or offer them a full range of benefits, such as health insurance or child care. Workers will have to depend increasingly on public institutions to fill these vacuums, a fact that will have important implications for workers, public institutions, and the economy in general.

At the same time that the number of low-paying, low-benefit jobs expanded, real income dropped, putting the American family in a precarious economic position.

> A study by the Congressional Budget Office found that the income (after inflation) of a young family with children (headed by a person under twenty-five) fell by 43% between 1973 and 1986. For families headed by someone aged twenty-five to thirty-four, average income rose 3% during the same time period.[31]

> The 1984 mean income level for all families with children was $29,527, 8.3% below the 1973 level.[32]

> The number of people working two or more jobs just to survive increased by 20% since 1980, to 5.7 million people.[33]

Economic survival in America has become a more arduous task. More mothers must work so that families can make ends meet; their children need child care so that their mothers can go to work.

c. *Service industries will employ more part-time workers.* By their very nature, service industries must be located when and where consumers need them, and their hours of operation must be flexible enough to accommodate consumer schedules. Employers have turned to part-time workers as a way to adapt their services to consumers' patterns, and they are expected to continue to do so.

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[30] W. JOHNSTON, *supra* note 20, at 59.

[31] CONGRESSIONAL BUDGET OFFICE, TRENDS IN FAMILY INCOME: 1970–1986, at 95 table A19 (1988).

[32] *Hearings*, *supra* note 7, at 2 (statement of Hon. George Miller).

[33] U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS SURVEY REPORTS ON WORK PATTERNS AND PREFERENCES OF AMERICAN WORKERS 1, table 1 (Aug. 7, 1986).

The economy needs part-time workers just as it needs full-time workers. And part-time workers need child care just as full-time workers do. But because part-time workers earn low wages and work shorter hours, they have less money to spend on child care. They are more likely to need assistance in finding and purchasing child care if they are ever to enter the job force. It is incumbent on public institutions to step in and lead the way in developing child care.

D. *Implications of Demographic Changes on Economic Prosperity*

The changes in the labor force and the declining growth of the population would seem to be on a collision course with the needs of the United States economy. At a time when economic health depends on the ability of employers to attract and keep workers in the labor force to fill a growing number of service sector jobs, a labor shortage looms. To maintain the economic status quo, as well as to encourage economic growth, we must invest in productivity growth. This means treating workers as a resource to be respected and cultivated, not as a cost to be contained. It means creating a work environment in which employees want to work, one in which they will be motivated to work productively. And, it means focusing efforts to improve productivity in all sectors of the work force.

II. The Effect of Child Care on the Labor Force

A. *Expanding the Labor Pool*

Today, 50.8% of all new mothers will return to work before their child's first birthday. In 1986, 49.8% did, and in 1976, the first year that the Census Bureau tracked the figure, 31% did.[34] Although the number of mothers entering the job market continues to climb, the choices that these women face for child care remain too narrow. Without an adequate supply, the search for good, affordable child care can be overwhelming. In fact, for some families, lack of child care is an obstacle to employment

[34] *Working Mother is Now Norm, Study Shows*, *supra* note 17.

searches and, at the very least, limits the number of hours that women can work. For example:

> A 1982 survey conducted by the Census Bureau reported that 26% of mothers who had children under the age of five and who were not in the labor force would enter if they had access to "satisfactory" child care at a reasonable cost. Another 13% of employed mothers would work more hours if they had access to child care.[35]

> A 1986 study in Detroit found that 40% of all mothers surveyed would enter the work force or work more hours if child care were available.[36]

> A similar study in Maine reported that 40% of all Maine families were affected by the inadequate supply of child care.[37]

Women in certain socio-economic groups are likely to be strongly affected by the absence of child care. For instance, 45% of the women who are single heads of households and not already in the labor force said they would enter if child care were available.[38] Women who have never been married and have preschool children are likely to be the most restricted by lack of child care: 48% of women in this group who are not in the labor force said they would work if reasonably priced child care were available.[39]

The most stark differences in labor force participation rates are related to educational backgrounds. Labor force participation and educational attainment are directly related: the higher the level of education, the more likely an individual is to work. Only 35% of high school dropouts who are mothers of preschool age children were part of the labor force in June 1982, approximately twenty percentage points lower than the rate for mothers with college degrees. Slightly more than one-third of these women said they would look for work if affordable child care were available, yielding a potential labor force participation rate for this group of 59%.

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[35] D. Bloom & T. Steen, *supra* note 21, at 2.

[36] K. Mason, Population Studies Center, University of Michigan (1988) (unpublished study).

[37] MAINEPOLL Division of Northwest Research, The Maine Child Care Need Survey (1984) (available at Northwest Research, Orono, Maine).

[38] D. Bloom & T. Steen, *supra* note 21, at 2.

[39] *Id.* at 9.

B. *Are Demographics Destiny?*

Will the availability of child care increase the labor force participation rates as much as the theoretical figures indicate it will? The potential rates are just projections of the maximum level of participation in the labor force under the optimum circumstances. Most likely, they would not be fully realized. But they do indicate the large, untapped labor pool that could be mobilized if affordable child care were widely available.

Are demographics destiny? To a certain extent, yes. More women of childbearing age will continue to enter the labor force in the next fifteen years, the number of two worker couples will continue to grow, and the demand for child care will expand accordingly. As the United States heads into the twenty-first century facing a labor shortage, employers must use every means possible to encourage labor force participation. They must recruit the most productive workers in order to maintain economic growth.

C. *What Role Do Employers Play in Solving the Child Care Crisis?*

Of the six million employers in the United States today, only 3500 offer their employees some form of child care assistance.[40] The enormous amount of media attention that has been focused on these 3500 companies distorts the real nature of corporate involvement: 3500 represents less than .06% of all United States employers. Although employers have sharply increased, by 400%,[41] their support of child care in recent years, their efforts alone cannot fully relieve the child care crisis in this country.

The employers most likely to offer child care assistance are corporations that employ more than one hundred workers, companies that have the resources and the staff to develop and carry out a company child care policy. But, as noted above, most Americans work for smaller employers. Most new jobs are being created by companies that employ fifty or fewer workers. Smaller employers are the least likely to provide any form of child care benefits. Furthermore, company-sponsored efforts

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[40] BUREAU OF NAT'L AFFAIRS, INC., WORK AND FAMILY: A CHANGING DYNAMIC 26 (1986) [hereinafter BNA].

[41] D. FRIEDMAN, *supra* note 6, at 9.

usually benefit only company employees, failing to address the needs of the larger community. Finally, most employer-supported child care, as it presently exists, cannot help those who most desperately need child care assistance, the poor.

III. Poverty: Is Child Care the Key to Welfare Reform?

Few phrases have enjoyed such popularity with 1980's policymakers and advocates as has the "feminization of poverty." In the past ten years, the number of women and children who have lost their grasp on a decent standard of living has increased at a frightening pace.

> One in four American children grows up in poverty.[42]
>
> One in four American children lives in single-parent families.[43]
>
> The median annual income of a household headed by a single mother with children under six is $6400.[44]
>
> The poverty rate for single, female-headed families with children under eighteen is 46%.[45]

As the gap between the "haves" and the "have nots" widens, women and children are increasingly left to scramble for the leftover crumbs. The prospects for single mothers, who constitute a larger share of the poor than ever before, are especially grim. They desperately need to work, but the lack of affordable child care makes it hard for them to find and keep jobs. Without steady employment, it is virtually impossible for them to move out of poverty. And without outside help, there is little hope that they ever will. The implications for their children, America's future labor force, are grave. Without intervention, they are much less likely to become productive members of society.

The burden of poverty has shifted from husband/wife households and the elderly to female-headed households, especially

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[42] Children's Defense Fund, FY 1988: An Analysis of Our Nation's Investment in Children at xi (1988).

[43] G. Berlin & A. Sum, *supra* note 27, at 17–19.

[44] Interview with Amy Wilkins, Children's Defense Fund (Sept. 8, 1988).

[45] Bureau of the Census, U.S. Dep't of Comm., Current Population Report Series P-60, No. 152, Characteristics of the Population Below the Poverty Level 59–62 (1984).

such households with children. A second income, usually from an employed wife, has protected many married couple families from poverty. Many of the elderly are kept above the poverty line by Social Security. But the rising divorce rate, pay inequity, the declining real minimum wage, and the shrinking size of welfare and other benefits for the poor have contributed to the feminization of poverty.

In 1984, 13.5% of the population lived in poverty and 20% of all children were poor.[46] If there is any hope of ending this cycle of poverty, for both women and their children, we must intervene. We must help these women enter the work force and increase their earnings, so that they become economically self-sufficient. Providing child care is the first step toward this goal.

A. *The Two-Tiered System of Child Care*

Some single-parent and low-income families who need child care assistance can get *some* support from the federal government, but there is not enough available to serve all eligible families. Most of the current federal dollars spent on child care come from the Dependent Care Tax Credit,[47] which does not increase the supply of child care and exacerbates the already existing two-tiered system of care, one in which poor families have one standard of care and middle- and upper-income families have another, based on their ability to pay. Any comprehensive, coordinated national system of child care must work toward eliminating this gap in quality. Several steps can be taken in this direction. The tax credit can be made more progressive by making it refundable, setting the credit at higher levels for low-income families and progressively reducing it at higher income levels until it reaches zero at the point of affordability. Publicly subsidized programs that exclusively serve the poor, and often stop serving them when family income rises even marginally, should be restructured. Low-income families should be able to remain in the same program by paying more for child care as their incomes increase. A child care system that segregates poor children from their middle- and upper-income peers perpetuates a damaging division in the American educational system.

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[46] Interview with Diana Lewis, U.S. Bureau of the Census (Sept. 9, 1988).
[47] I.R.C. § 21 (West Supp. 1988).

B. *Child Care: Reinforcing or Reversing Discrimination?*

As with other social issues, child care affects and is affected by racial discrimination. Children's attitudes about themselves and about the world around them are formed during their earliest years. Segregating children by race and class during their most vulnerable years initiates and perpetuates discrimination.

The chaotic, under-financed child care system poses an even greater threat to black and Hispanic children, whose families are more likely to live in poverty, whose parents have fewer job options, and for whom public schools are often a dismal failure. Patterns of racial segregation in housing and education are often replicated in child care programs, which tend to be located near where families live. A child care system, or even a single child care program, that segregates according to race poses a severe threat to the American society and culture.

IV. Current Child Care Programs

A. *Existing Federal Government Subsidies to Low-Income Families*

In both style and substance, the federal government's role in subsidizing child care has changed in the last eight to ten years. Demand-side subsidies (such as the Dependent Care Tax Credit and Dependent Care Assistance Programs) have been added to supply-side subsidies (such as Head Start and the Social Services Block Grant) and have become a much bigger part of federal child care subsidization. Also, actual funding levels have dropped. Between 1977 and 1986, federal spending on child care (excluding the Dependent Care Tax Credit) declined by almost 25% in real dollars.[48]

The federal government sponsors twenty-two separate programs that provide some form of child care assistance.[49] It spends roughly $6.9 billion each year on child care. The Dependent Care Tax Credit accounts for $3.5 billion of the total amount of money spent on subsidized child care. The remaining

[48] P. Robins, Federal Financing of Child Care: Alternative Approaches and Economic Implications 17 (1988) (paper commissioned by the Child Care Action Campaign).

[49] *Id.*

$2 billion supports child care for low-income families through Head Start, part of Title XX of the Social Security Act (the Social Services Block Grant), Aid for Families with Dependent Children (AFDC), and part of the National School Lunch Program. Each of these programs is discussed briefly below to illustrate what is currently being done and to point out some of the gaps in the care being provided.

1. The Dependent Care Tax Credit

The Dependent Care Tax Credit (DCTC) subsidizes child care by allowing parents to subtract between 20% and 30% of their child care expenses from their tax liability (a maximum of $720 for one child and $1,440 for two or more children).[50] More than 60% of all federal child care spending is accounted for by the tax credit. But because most low-income families have limited tax liability and because the credit is not refundable, the Dependent Care Tax Credit does little to help them buy quality child care. Of the 4.6 million families who claimed the DCTC in 1981, 64% were above the median income level.[51] Some changes have been made to make this tax credit more available to those who need it most. For example, in 1983, the DCTC was added to the short income tax form (1040A) in hopes of drawing in low and moderate income taxpayers. With public education, the number of DCTC claims jumped to 6.4 million, 49% of which went to taxpayers with annual gross income of less than $25,000.[52] Despite this outreach, over half of the subsidy still benefits middle and upper-middle income families, who need financial assistance less than low-income families.

Tax reform has meant that even fewer low-income families have been able to take advantage of the tax credit. One critic explains:

> Thanks to the 1986 Tax Reform Act, which increased the personal Federal income tax exemption to nearly $2000 for each adult and child, most poor families, even if they fully utilize the earnings capacity of all available adults, cannot earn enough income to incur substantial tax liabilities. There-

[50] *Id.*
[51] BNA, *supra* note 40, at 274.
[52] S. KAMERMAN & A. KAHN, *supra* note 16, at 96–97.

fore, poor families will not benefit from an increase in the value of the child care tax credit.[53]

2. Other Federally Sponsored Programs

Head Start is the only federal program that directly supplies child care, 85% of it part-time. It was developed in 1964 to provide compensatory education to preschool children (ages three and four), 90% of whom must come from poor families. The program was not designed for families with working mothers. It does not serve children under three.

Although Head Start has had many successes, there are two main drawbacks. First, it is almost universally a half day program, an arrangement that is inconvenient for most working parents. Second, it has never been able to serve more than 16 to 17%[54] of the eligible children. In 1986, Head Start served approximately 430,000 children, at a cost of $1 billion.[55]

Title XX is the major federal funding source available to states who want to subsidize child care for low-income families, but states are not required to use the money for child care.[56] It can also be used for a variety of other crucial social services for low-income families. The states determine how much of the federal block grant, and how much of their own funds, will be put toward each service. To be eligible for Title XX support, most states require the mother to work or to be in a training program, or a child to be at risk of abuse. Not surprisingly, each state has a long waiting list of families who need Title XX assistance.

In 1981, the federal government cut Title XX funding by 20%. Although Congress has restored a small portion of these monies since 1982, the program has not been restored to 1981 funding levels, or even to a level that keeps up with inflation.[57] The $2.7 billion federal Title XX budget for fiscal year 1987, when adjusted for inflation, is approximately 75% of the 1981 budget.[58]

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[53] I. Garfinkel, The Potential of Child Care to Reduce Poverty and Welfare Dependence 11 (1988) (paper commissioned by the Child Care Action Campaign).

[54] Interview with Helen Blank, Children's Defense Fund (Sept. 1988).

[55] I. Garfinkel, *supra* note 53, at 5.

[56] OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: APPENDIX, FISCAL YEAR 1989, at I-K36 (1988).

[57] H. BLANK & A. WILKINS, *supra* note 18, at 3.

[58] *Id.* at 11.

The federal government provides a maximum of $160 per month in child care subsidies for working families receiving AFDC benefits. Families pay their own child care expenses directly to the child care provider. Their child care expenses, up to the $160 monthly limit, are deducted—or disregarded—when their AFDC benefits are calculated. The program does little to help working poor families make ends meet, for the $160 monthly limit does not buy stable child care in most areas. Also, it is limited in scope, only the relatively small number of AFDC recipients who work can use the "disregard."[59] Moreover, the schedule of payment and reimbursement, with parents paying for child care and then waiting for AFDC reimbursement, is a hardship for many families. Requiring families to pay up-front means asking them to pit child care costs against other basic necessities, such as food and clothing.

The National School Lunch Program provides money for lunches to poor children in child care centers. This subsidy costs the federal government $5 billion annually.[60]

Even though the programs described above increase access to child care, they do not comprise a comprehensive, coordinated effort. Such a comprehensive effort has not been possible, because child care has remained a low priority on the federal agenda. "It should be pointed out that in comparison to other social programs, current expenditures on child care are extremely modest."[61] For example, "in 1986, Federal child care expenditures of $5.5 billion represented under 4% of total Federal spending on education, training, employment, social services, and income security (excluding spending on Medicare, other health programs and Old Age, Survivors and Disability Insurance.)"[62]

B. *Child Care and Welfare Reform*

Many states and the federal government have begun to incorporate work programs and job training into their welfare reform packages. It would seem that in discussing such reforms the reformers would pay increased attention to child care, as most

[59] I. Garfinkel, *supra* note 53, at 6.
[60] *Id.* at 5.
[61] P. Robins, *supra* note 48, at 25.
[62] *Id.*

welfare recipients are young women and children. However, many states have failed to recognize that child care must be an essential element of support to help the poor move to self-sufficiency. A General Accounting Office study reports that 60% of AFDC work program respondents said that lack of child care prevented their participation in the program. Yet, the states spend only 6.4% of AFDC work program's median budget on child care.[63]

Welfare reform initiatives in several states have demonstrated that subsidizing child care is more cost effective than paying AFDC benefits and Medicaid. For example:

> The Colorado Department of Social Services estimates that providing child care assistance to low-income families costs only 38% of what it would cost to provide those same families with AFDC and Medicaid if they were unemployed.[64]

> Family income and taxes paid increased six and a half times among California families who used a child care program for two years. Total public funding was offset by 45%; 68% of AFDC families no longer required income assistance.[65]

> Almost half of the participants in a voucher day care program in Massachusetts were able to earn their way off AFDC. Employment levels rose with the length of participation, from 63% at the start, to 93% for those using the child care vouchers for twelve months or more.[66]

The recently enacted federal welfare reform legislation expands these experiments to the national level. The law requires states to develop education programs, training programs, and jobs for "able-bodied adults on welfare," except those with children under three.[67] (States can lower the exemption to those with children under one.) Under the new program, child care will be provided for the first nine months of employment and family Medicaid benefits for up to one year. In order to ensure that the former welfare recipients are able to remain self-sufficient following the transition period, states will have to expand the capacity of programs for children requiring subsidized care.

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[63] H. BLANK & A. WILKINS, *supra* note 18, at 21.
[64] *Id.* at 22.
[65] *Id.* at 37.
[66] *Id.* at 37.
[67] CHILDREN'S DEFENSE FUND, SUMMARY OF THE FAMILY SUPPORT ACT OF 1988, PUBLIC LAW 100-485, at 8 (1988).

Even with a year of experience, most welfare recipients will earn too little to pay the full cost of child care on their own.

Child care may not be *the* agent that transforms the poor, especially single mothers, from economic wallflowers into belles of the job market ball, but it is a necessary support. In the short run, it helps poor, single mothers to be both workers *and* mothers. In the long run, it gives their children, the future labor force, the necessary care and early education, so that they will not be condemned to the same debilitating cycle of poverty.

V. Child Care, Early Education, and the Future Labor Force

Businesses have recognized the dangers that a poorly educated work force poses to future economic health and leadership. They have increased their commitment to improving the public schools and the future labor force by forming business/school partnerships.[68] Their involvement ranges from participating in adopt-a-school programs to advocating educational reforms. The common goal of these programs, and others like them, is to strengthen the public schools, so that young people will be well-prepared to fill future jobs.

Early childhood experts have long known that a child's first five years are the ideal time to lay the educational base that will support lifelong learning.[69] By improving the early education that American children receive, we can produce a better educated, better trained future work force, one that will contribute to future economic growth. If we ignore these important early years, we are likely to move into the twenty-first century with a work force that lacks the skills that employers will need.

A. *The Need for a Well-Educated Work Force*

Employers of the 1990's and the next century will need a more highly skilled labor force than they do today, or did thirty years ago.[70] The expanding service sector of the economy will

[68] *See* Committee for Economic Development, Children in Need: Investment Strategies for the Educationally Disadvantaged 4–5 (1987) [hereinafter Children in Need].

[69] *Id.* at 21.

[70] *Id.* at 5.

require more literate workers with problem-solving skills. Skilled manufacturing jobs will demand workers with the intellectual agility to work on computers and other sophisticated machinery. All sectors of the economy will need a work force that can read and write, one that can switch jobs and learn new skills. Clearly, a well-educated and well-trained population constitutes the base from which such a work force can be drawn.

Before 1950, fewer than 50% of all students graduated from high school. With plenty of manufacturing and manual labor jobs, a high school education was not essential. But, more than half of all the new jobs that will be created between 1984 and the year 2000 will require some education beyond high school. Almost one-third will be filled by college graduates. Today, only 22% are.[71]

Behavior patterns that can lead to school failure and dropping out can be traced to the first five years of life. By providing quality child care during those early educational years, we stand the best chance of instilling in young students the desire and the ability to stay in school and learn. If we do not, we risk being saddled with another generation of educational problems, similar to the ones we have today. Fewer than 50% of high school seniors read at a level adequate for carrying out moderately complex jobs.[72] Approximately 80% have inadequate writing skills.[73] A study released in June 1988 reports that only half of the nation's seventeen-year-olds can solve mathematics problems at the junior high school level; fewer than one in fifteen can handle high-school-level problems that take several steps or involve algebra or geometry.[74] Approximately one in seven American students drops out of high school.[75]

Educational performance for all students has declined. There are many more students with poor writing skills than there are economically disadvantaged students. Therefore, any form of educational intervention, including the provision of quality child care, must be aimed at all students.

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[71] W. JOHNSTON, *supra* note 20, at 97.

[72] CHILDREN IN NEED, *supra* note 68, at 3.

[73] *Id.*

[74] *Schools' Back-to-Basics Drive Found to Be Working in Math*, N.Y. Times, June 8, 1988, at 1, col. 1.

[75] L. SCHORR, WITHIN OUR REACH: BREAKING THE CYCLE OF DISADVANTAGE 8 (1988).

B. *Is Early Educational Intervention Cost Effective?*

Each year's class of dropouts will cost the nation more than $240 billion in lost earnings and foregone taxes.[76] (This figure excludes $1 billion more for crime control, welfare, health care, and other social services.) But, it has been determined that every dollar spent today to prevent educational failure saves about $5 in future costs of remedial education, welfare, and crime.[77] Investing in quality child care is the way not only to prevent these educational failures but to save money as well.

C. *Early Education and the Poor*

Although all students are affected by educational decline, the poor are especially hard hit. Lack of education means a greater likelihood that they will spend their adult lives in poverty. For poor children, the first five years of education are especially important. Many of them have little chance to participate in the quality preschool programs that are much more accessible to their middle and upper-middle class counterparts. Child care experts Sheila Kamerman and Al Kahn calculate that in 1985, fewer than 33% of four-year-olds and 17% of three-year-olds from families with incomes under $10,000 a year were enrolled in preschool programs, as compared with 67% of four-year-olds and 54% of three-year-olds from families with yearly incomes of $35,000 and above.[78] This manifestation of the two-tiered child care system illustrates the importance of providing quality child care to low-income families. Without adequate preschool preparation, these "at risk" children reach kindergarten distinctly disadvantaged.[79] They work to master skills and concepts that other, better prepared students can grasp with relative ease. As they progress through the school system, the current working against these "at risk" children grows stronger each year, until, finally, the struggle seems barely worth the effort, and they drop out. Those who do stay in school often graduate as functional illiterates.

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[76] CHILDREN IN NEED, *supra* note 68, at 1.
[77] *Id.* at 15.
[78] S. KAMERMAN & A. KAHN, *supra* note 16, at 8.
[79] *See* CHILDREN IN NEED, *supra* note 68, at 5–9.

Programs that intervene in these early years, such as federally funded Head Start, some of the state-funded day care programs and school-based programs like the Perry Preschool Project[80] or other quality day care and preschool programs, have the best chance of keeping children, especially those considered to be "at risk," in school, out of trouble and off the streets. Success, however, is only possible in programs of adequate quality.

The emphasis in federal and state funding for education focuses almost entirely on school-aged children, with very little money earmarked for preschool education. For example, in 1986, $264 billion was funneled through the Department of Education for children age six and older. At the same time, only $1 billion went for education for children under the age of five.[81] Even states with small numbers of poor preschoolers and state-funded early childhood education programs can reach only a small percentage, less than 20%, of eligible children.

In the past, arguments supporting early childhood education initiatives have been carried along on the moral imperative of helping children, our most precious resource. But, pressing economic needs now buttress these moral arguments. We are at the economic crossroads; a labor shortage meets a growing service economy. We need more workers and we need better trained, smarter workers. America's competitive edge will come from the intelligence and resilience of its work force, qualities that can, and should, be instilled at an early age.

National policy regarding families remains stuck in the past. Mothers of young children have entered the labor force both because they have to work to support their families and because they want the satisfaction and stimulation that working outside the home provides. The American economy and its standard of living depend on the productive labor of these mothers outside of the home. Our national future depends on the well-being of the children who need supplemental care while their parents work. Yet, the United States remains one of only a handful of countries that has no national family policy.

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[80] The Perry Preschool Project, in Ypsilanti, Michigan, is an exemplary program that has served as a model for compensatory preschool programs. Participants in the program are children at high risk, the poorest of the poor, a fact that makes the program's accomplishments especially noteworthy. *See* CHILDREN IN NEED, *supra* note 68, at 33.

[81] *Id.* at 21–22.

VI. The Child Care Action Campaign's Recommendations for a Comprehensive Child Care Policy for the United States

A. *What the Federal Government Should Do*

The federal government's involvement in child care is itself a patchwork of demand- and supply-side subsidies, with no overriding policy to guide the development of additional supply, to increase access, or to improve quality. Therefore, the federal government should:

1. Establish a National Child Care Office

There is no single federal department or agency to plan or coordinate the government's role in providing child care. The mushrooming demand for child care at *all* income levels makes federal leadership for child care imperative. The federal government's role must be to provide leadership to encourage appropriation of federal, state, local, and private funds to help parents pay for care, to establish minimum regulatory standards, to provide technical assistance to the states, and to collect data on the changing supply of and demand for child care and on parental preferences.

2. Establish a New and Separate Funding Stream for Child Care

The overwhelming requirement for expanding the supply and improving the quality of child care is for significant new investment to make child care more affordable. The administrative anarchy of current child care assistance is exacerbated by the inadequate amount of federal money that is allocated for child care.

The Child Care Action Campaign, in conjunction with other national policy organizations, is continuing research into appropriate financing alternatives for child care. However, at this time some preliminary conclusions regarding financing are possible. First, the financing mechanism must ensure a stable source of funds, safe from the vagaries of politics. The monies could

come, for example, from general tax revenues or a separate Social Security-like trust fund. The National Office of Child Care could administer the funds and monitor their use. Second, the financing for child care must be separate from Title XX, the Social Services Block Grant. Third, the mechanism should provide a basis for states and localities to plan and coordinate the appropriate use of their own resources. By implementing a stable financing mechanism, one that is independent from other programs and signals state and local authorities of the existence of a definitive scheme, the federal government could make child care a comprehensive program.

3. Maintain the Dependent Care Tax Credit

The shifts in the economy and the labor force, coupled with the high cost of quality child care, mean that many families need at least some help with child care. The Dependent Care Tax Credit is one form of such assistance. Child care is an expense incurred in the process of generating income. The Dependent Care Tax Credit recognizes that families who must pay for child care in order to work have less money available to pay taxes than families with the same incomes who do not need to pay for child care. The credit should be higher at lower income levels and should be reduced progressively as income increases until it reaches zero at the point of affordability. The cap on annual expenditures should be raised to reflect current market realities and the need to pay high salaries to care givers. Making the credit refundable, in conjunction with these other adjustments, would also enable low-income families to increase their earnings and help them to move out of poverty.

4. Expand Head Start

The current incarnation of Head Start is inadequate for two reasons. First, it is almost universally a half day program; working parents must make other child care arrangements for their children for the other half of the day. Second, Head Start has never been able to serve more than 16 to 17% of eligible children. The overwhelming majority of poor three- and four-year-olds and *all* younger children are excluded from the program.

5. Establish Federal Regulations on Minimum Standards

Child care standards currently vary from state to state. In some states, the regulations are consistent with what we know about quality. In others, they fail to guarantee even minimal levels of education, safety, and health for the children in care. Moreover, employers interested in providing some form of child care benefit are bewildered by the wide variation in standards from state to state.

There are several components of quality that can be quantified and that are essential to basic levels of education, health, safety, and sound developmental practice. These components include child/staff ratios, group size, training of providers, parental access, and health and safety standards.

The federal government should set minimum standards in these five areas in consultation with national experts and the states. All child care programs should be required to meet these minimum standards. Further, the federal government should build incentives for meeting these standards into the funding stream.[82]

6. Raise Direct Subsidies to Parents

Parents now bear most of the cost of child care. Many cannot afford the average cost of care. Raising standards of child care usually means that the cost of child care increases. This, in turn, may force many parents to move their children into lower quality care, to leave them on their own, or to leave the work force. Therefore, in initiating quality raising provisions, the federal government must help parents pay for that part of child care that they cannot afford.

Subsidies to parents should be based on a sliding fee scale. The top of the scale should be set at the point of affordability, enabling parents to use the same care as their incomes rise.

The Child Care Action Campaign supports the current language of the Act for Better Child Care Services,[83] which would provide moderate-income families earning up to 115% of the

[82] For example, the federal government could require a lower state match from those that meet the standards.

[83] H.R. 3660, 100th Cong., 1st Sess. (1987); S. 1885, 100th Cong., 1st Sess. (1987).

state's median income with child care subsidies on a sliding scale basis.

7. Provide Job-Protected Parental Leave

Family leave is an essential component of a comprehensive child care program. Parents must be able to adjust to their new roles during their first months as parents and need time to learn about their child's needs and to find quality, affordable child care. They should be able to do so without worrying about losing their jobs or their incomes.

8. Encourage Greater Use of Public School Facilities for Child Care Programs

The school day and school year are still based, in most communities, on the needs of an agrarian society. The public schools should house before and after school care, especially for school-age children, and should include pre-kindergarten facilities. The programs should cover longer days and should establish close links, including transportation, with other child care resources in the communities. Public schools should offer developmental education for children from kindergarten through second grade. They should also provide developmental programs for four-year-olds as needed.

The federal government should fund pilot programs to help schools test school-based child care models that involve community-based organizations in the provision of services.

9. Collect and Disseminate Data

The federal government should collect and publish, on a regular basis, information about the supply of child care, the salaries of care givers, the use of child care, and the fees paid. Data collection on consumer demand should be integrated into the Consumer Population Survey. Information on consumer demand can be gathered from resource and referral agencies, which have excellent knowledge of local needs and preferences.

B. *The Prognosis for Federal Legislation*

We can expect Members of Congress to take one of three different approaches to child care legislation: (1) expansion of existing tax credits; (2) increased funding for existing programs serving "at risk" or preschool children; and (3) creation of a new funding stream for child care that will help parents pay for care and expand the supply of licensed care. Each of these approaches should be evaluated in terms of the costs and benefits it provides to families, the overall economy, and the standard of living.

1. Tax Credits

During the 1988 campaign, President Bush proposed a tax credit approach as the basis for his child care plan.[84] Of the $2.2 billion he proposed to spend, $1.5 billion would be in the form of a $1000 refundable tax credit for each child under four in families earning less than $10,000 annually. The credit would go to any family in which at least one wage earner was employed.

The family allowance approach is appealing to conservatives for three reasons. First, it is an off-budget item; while it costs the government money in *foregone* revenue, it is not an expenditure line in the budget. Second, because it can be used by two-parent families where one parent (usually the mother) stays home, it appeals to conservatives who claim that the federal government should not encourage mothers to work by helping them pay for child care. Third, the tax credit approach is also appealing because it appears to be the most efficient means of distributing money to families; it requires no new administrative regulations or staff.

President Bush has also proposed to make the Dependent Care Tax Credit refundable and to appropriate funds to encourage employers to expand the child care benefits they provide to their own employees. Similar tax credit approaches were introduced during the 100th session of Congress, all with the goal of reducing the tax burden on all families with children, usually of preschool age.

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[84] Euben, *Baby Boon or Boondoggle: Politics in 1988*, 5 CHILD CARE ACTIONEWS 5 (1988).

2. Expanding Existing Programs

Some legislation may focus on expanding existing programs, especially Head Start and Title XX of the Social Services Block Grant. Head Start is extremely popular with legislators, who saved the program from massive cuts during the Reagan Administration. However, the program serves only 17% of the children eligible, 90% of whom must be from poor families, and it is overwhelmingly a part-day program.[85] Proposals will also be made to add "wrap-around" funding to extend Head Start to a full day program.

Funding for Title XX was cut by 20% in 1981. Although some of the funds have been restored in the intervening years, Title XX now gets fewer real dollars than in 1981. States are not required to spend their Title XX share for child care; the money can be used for a host of other community services.[86] Many states have been forced to serve fewer children because of the cuts in Title XX.

C. *Invest New Federal Dollars in a Comprehensive Child Care Program*

In 1971, President Nixon vetoed a comprehensive child care bill that had passed both Houses of Congress, saying federal funding for child care would "Sovietize" the American Family.[87] Since then, advocates have worked to expand federal funding for specific projects, including school-age care, training for providers, and food and nutrition programs for children. In 1988, because of the rising national interest in and public attention to the child care issue, members of both the House and Senate sponsored the most comprehensive child care bill since Nixon's veto. The bill, the Act for Better Child Care (ABC), would authorize 2.5 billion new federal dollars for child care.[88] Seventy percent of the money would be used to help families at or below the median income to pay for care. The remainder would go to expand supply and improve quality. The money could be used to improve workers' salaries, make Head Start a full day pro-

[85] *See supra* text accompanying notes 54–55.

[86] *See supra* text accompanying notes 56–58.

[87] *See* BUREAU OF NAT'L AFFAIRS, INC., WORK AND FAMILY: A CHANGING PERSPECTIVE 273 (1986).

[88] *See* H.R. 30, 101st Cong., 1st Sess. (1989); S. 5, 101st Cong., 1st Sess. (1989).

gram, develop resource and referral services, or to improve the quality of existing programs.

VII. Which Approach Makes Sense?

Child care is not a luxury, it is an economic necessity. Future economic growth and prosperity depend on our ability to attract new workers into the work force, improve the productivity of those already there, and prepare future generations for success in school and work. Providing quality child care is one essential way to help accomplish these three goals. An investment in *quality* child care can have dramatic public as well as private benefits. Child care can expand the labor force, enable single women to be self-sufficient, help families improve their standards of living, and improve productivity by reducing turnover, absenteeism, and family-related stress. Children who are enrolled in quality child care programs have a better chance of succeeding in school and of becoming productive adults.

The key word in this projected success story is quality. We know that quality costs more than many families can afford. But simply giving parents more money to spend on child care, while a necessary condition, is not enough. The federal government must help fund the development and expansion of quality programs to help create a comprehensive, coordinated system. Without that much needed support, parents looking for quality care will continue to find it an elusive goal. And, if we, as a nation, continue to avoid clearing this "quality hurdle," not only this generation, but the generations to follow, will surely suffer the consequences.

FIXING THE CHILD CARE CREDIT: HIDDEN POLICIES LEAD TO REGRESSIVE POLICIES*

DOUGLAS J. BESHAROV**

Over the last fifteen years, federal child care assistance has more than doubled. The cost of federal child care assistance rose from $1 billion in 1972 to about $6.2 billion in 1987. Accounting for inflation, these figures represent a real increase of 127%. By 1989, expenditures will approach $8 billion, representing an additional 24% increase in just two years.[1]

Poor and low-income families, however, have not benefited from this increased government spending. Federal child care assistance to poor and low-income families also increased during the 1970's and 1980's, but not nearly as rapidly. Between 1972 and 1987, spending on these programs rose from about $800 million to about $2.7 billion, which is only a 29% increase after inflation.[2]

The federal government should do a better job in meeting the child care and child development needs of disadvantaged children. Low-income children are now served primarily by the Head Start and Social Services Block Grant programs. The Head Start program is one of the few broadly popular remnants from the War on Poverty. But its orientation is badly out-of-date. The program should be improved and modernized to reflect contemporary conditions, and it should be expanded to serve poor children for a longer period of their lives.

To pay for this expansion of Head Start, the Child and Dependent Care Tax Credit[3] should be capped and the resultant savings redirected to a revitalized Head Start program. The first part of this Article reviews current federal child care expenditures. Part II proposes capping the Child and Dependant Care

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** Resident Scholar, American Enterprise Institute for Public Policy Research; Adjunct Professor of Law, Georgetown University Law Center, The American University, Washington College of Law. A.B. Queens College, 1965; J.D. New York University, 1968; LL.M. New York University, 1971. This Article was prepared with the assistance of Paul N. Tramontozzi.

[1] D. BESHAROV & P. TRAMONTOZZI, THE COSTS OF FEDERAL CHILD CARE ASSISTANCE 1 21 table 1 (Am. Enterprise Inst., Apr. 20, 1988).

[2] *Id.*

[3] I.R.C. § 21 (West Supp. 1988).

Tax Credit so that low-income families become the main beneficiaries of federal child care assistance.

I. Programs for Poor and Low-income Families

A. *Child Care and Early Education*

A number of federal programs are devoted exclusively to child care, early education, or related services, at an annual cost of about $1.9 billion. The largest of these programs is Head Start, which spends $1.1 billion per year on local preschool programs for low-income children.[4] The Child Care Food Program[5] ($551 million)[6] and the Special Milk Program[7] ($4 million)[8] provide milk, food, and money to child care providers for an estimated 1.1 million low-income children daily.[9] The Department of Education also supports preschool programs for handicapped children by providing states with approximately $178 million in grants under the Special Education and Rehabilitative Services program.[10]

Another $11 million in federal expenditures provides less direct support for child care programs. Under the Dependent Care Planning and Development Program, the Department of Health and Human Services (HHS) makes grants totaling up to $5 million per year to the states for child care services before and after school, and for the development of local child care information and referral services.[11]

Through the Child Development Associate Scholarship Program, HHS gives up to $1 million in grants to the states.[12] This

[4] Office of Mgmt. & Budget, Budget of the United States Government: Appendix, Fiscal Year 1989, at I-K36 (1988) [hereinafter Budget Appendix, FY 1989].

[5] 42 U.S.C. § 1766 (1982).

[6] Budget Appendix, FY 1989, *supra* note 4, at I-E81.

[7] 42 U.S.C. § 1772 (Supp. IV 1986).

[8] U.S. Dep't of Labor, Child Care: A Workforce Issue 22 (1988) [hereinafter A Workforce Issue].

[9] These figures are for fiscal year 1986. S. Stephan & S. Schillmoeller, Child Day Care: Selected Federal Programs 20–21 (Library of Congress, Cong. Research Serv., Apr. 7, 1987).

[10] Budget Appendix, FY 1989, *supra* note 4, at I-18.

[11] *Id.* at I-K36.

[12] *Id.*

money pays for scholarships to needy candidates for the child development associate credential.[13]

B. *Welfare and Job Training—Child Care Expenses*

The various federal welfare and job training programs are another major source of direct and indirect funding for child care services. The two major federal welfare programs—Aid to Families with Dependent Children (AFDC)[14] and Food Stamps[15]—subsidize child care indirectly by allowing recipients to deduct child care expenses from their income when determining eligibility. These policies, which are designed to encourage work and self-sufficiency, cost the federal government an estimated $94 million in 1987.[16]

Similar child care deductions are also allowed under two federal housing assistance programs: the Public and Indian Housing Program, and the Section VIII Housing Program, which provides rent vouchers to make private housing affordable for low-income families. Both programs deduct child care expenses from family income when determining the participants' rent copayment. For 1988, an estimated 210,000 families with 480,000 children are expected to deduct child care expenses, at a cost of $18 million.[17]

The Work Incentive Program (WIN)[18] seeks to reduce welfare dependency by providing money to states to help AFDC recipients find and retain jobs. States are required to provide child care services to WIN participants who need them. In 1987, these services cost the federal government an estimated $12.6 million.[19]

As part of its overall strategy for training economically disadvantaged individuals and dislocated workers, the federal government provides money to states for child care services and subsidies within broad-based employment programs. Local programs funded under the Job Training Partnership Act (JTPA)[20]

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[13] S. STEPHAN & S. SCHILLMOELLER, *supra* note 9, at 25.
[14] 42 U.S.C. § 601 (1982).
[15] 7 U.S.C. § 2011 (1982).
[16] D. BESHAROV & P. TRAMONTOZZI, *supra* note 1, at 8 n.24.
[17] A WORKFORCE ISSUE, *supra* note 8, at 42.
[18] 42 U.S.C. § 630 (1982).
[19] D. BESHAROV & P. TRAMONTOZZI, *supra* note 1, at 9–10 n.26.
[20] 29 U.S.C. § 1501 (1982).

spend over $9 million for child care supportive services and subsidies.[21]

C. *Student Financial Aid—Child Care Expenses*

A number of federal financial aid programs for students base the size of individual grants upon the cost of school attendance. Beginning in 1988, this cost may include reasonable child care expenses.[22] Data on the costs of this new child care provision are not available for most of these programs, but estimates provided by the Department of Labor indicate that child care will add an estimated $65 million to total expenditures for the Pell Grants program,[23] which provides grants for low-income students.[24]

D. *Social Services and Community Development Funding*

In addition to the programs described above, a portion of an additional $6 billion in social services, child welfare grants, and community development grants[25] is available for child care services. Unfortunately, the structure of these block grants to the states makes it difficult to determine with any degree of certainty precisely how much money is involved.

Consider the largest of these programs—the Social Services Block Grants (Title XX).[26] In 1987, over $2.7 billion[27] was given to the states to provide a full range of social services—at the states' discretion. There are no requirements as to how the states should apportion the money. To enhance states' flexibility further, there are also no detailed record-keeping requirements on how these funds are used or whom they benefit. Thus, little

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[21] A WORKFORCE ISSUE, *supra* note 8, at 44–47.

[22] *See id.* at 27, 29.

[23] 20 U.S.C. § 1070(a) (1982).

[24] A WORKFORCE ISSUE, *supra* note 8, at 27.

[25] Programs include Social Services Block Grants, Community Development Block Grants, Community Services Block Grants, and the Area Economic and Resource Development Program. Child welfare grant programs include Child Welfare Services, the Child Welfare Training Program, Indian Child Welfare Grants, and Child Welfare Research and Demonstration Projects. For a description of child care-related activities, see S. STEPHAN & S. SCHILLMOELLER, *supra* note 9, at 6–26. For budget information, see BUDGET APPENDIX, FY 1989, *supra* note 4, at I-K35 to -K37, I-M22.

[26] 42 U.S.C. § 1397 (1982).

[27] BUDGET APPENDIX, FY 1989, *supra* note 4, at I-K36.

data exist on how much Title XX money is spent by the states on child care.[28]

The Department of Labor estimates that in 1988 $660 million (24%) of Title XX spending supported child care.[29] However, based on a recent survey of state child care spending, HHS estimated that combined state and federal Title XX spending on child care totals $1.1 billion per year.[30] Thus, assuming a standard two-thirds federal share, total federal spending could be as high as $726 million per year, or about 27% of total Title XX spending.

II. A Regressive Tax Break

The largest federal child care program is the Child and Dependent Care Tax Credit.[31] Because it is so poorly targeted and allows for so much abuse, approximately half its benefits provide an unjustified tax break for upper-income families. Targeting the credit to low- and moderate-income families would make available nearly $1 billion a year, money that could be used to help the families who need it most.

Tax benefits under the credit will reach an estimated $4 billion in 1988, with approximately 9.6 million families claiming an average credit of $419.[32] A shocking proportion of these credits goes to middle- and upper-income families. In 1985, nearly half went to families with incomes above the median; less than 1% went to families with adjusted gross incomes below $10,000, and only 13% to families with adjusted gross incomes below

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[28] Ultimately, the extent to which states pay for child care through Title XX (or any other federal block grant) is not terribly relevant. A state has a certain amount of money with which to pay for social services, with funds coming from federal, state, and local sources. How a state chooses to allocate this money (and from what sources it funds particular activities) does not change the *total* amount of funds available for social services.

Like all money, Title XX funds are fungible; if a state chooses to spend all of its federal money on child care, that does not necessarily mean that it is spending more money on child care than other states. It does mean that the state would have to "charge off" all other social services to state and local sources—essentially an accounting decision.

[29] A Workforce Issue, *supra* note 8, at 31.

[30] Personal communication from William Prosser, Assistant Secretary for Planning and Evaluation, Dep't of Health & Human Services (Feb. 17, 1988).

[31] I.R.C. § 21 (West Supp. 1988).

[32] House Comm. on Ways & Means, Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means: 1988 Edition 615 table 12 [hereinafter Ways & Means].

$15,000.[33] So few lower-income families can benefit from the credit that less than half of all mothers in the labor force claim it.[34]

The credit's distributional defects are steadily worsening, while its cost increases by $500 million a year. A recent Urban Institute study found that because of recent tax law changes, for 1988, families with incomes under $12,000 will receive half the benefits they did in 1985, while those with incomes over $32,000 will receive 50% more.[35]

A similar situation exists with the relatively unknown Employer-provided Child or Dependent Care Services Tax Credit,[36] which allows taxpayers to establish $5000 tax shelters for child care expenses. Until last year when taxpayers were precluded from claiming both credits, higher income families (the ones with enough expenses to claim and enough income to shelter) received what amounts to a second credit worth as much as $2000. The cost of this additional credit was $30 million in 1987.[37] Before this change, costs were estimated to rise to $150 million in 1989, and to $1 billion by 1993.[38]

Moreover, there is widespread cheating under the credit. Special IRS audits reveal that two out of five taxpayers inflate their child care expenses, for a cumulative total of 28% of all claims. This is the same rate of overclaiming as for travel and entertainment expenses.[39] Approximately $4.5 billion in such phan-

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[33] *See* STATISTICS OF INCOME DIVISION, INTERNAL REVENUE SERVICE, INDIVIDUAL INCOME TAX RETURNS 1985, at 81 table 3.3 (1988) [hereinafter TAX RETURNS].

[34] Robins, *Federal Support for Child Care: Current Policies and a New Proposed System*, FOCUS, Summer 1988, at 6.

[35] *See Distributional Effects of Alternative Child Care Proposals, Hearings Before the Subcomm. on Pub. Assistance and Unemployment Compensation of the House Comm. on Ways & Means*, 100th Cong., 2d Sess. 3 (1988) (unofficial transcript) (statement of Roberta Ott Barnes, Senior Research Associate, Urban Inst.) According to the study, about 3% of the credit's benefits in 1988 will go to families in the bottom 30% of the income distribution, while almost half will go to families in the top 30%. The top 10% of families will receive 14% of the benefits.

[36] I.R.C. § 129 (West Supp. 1988).

[37] OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: SPECIAL ANALYSES. FISCAL YEAR 1989, at G-43 (1988) [hereinafter BUDGET SPECIAL ANALYSES, FY 1989]. Other estimates are much higher. For instance, for fiscal year 1986 the Joint Committee on Taxation estimated a revenue loss of $110 million. S. STEPHAN & S. SCHILLMOELLER, *supra* note 9, at 13. However, for the same year, OMB placed it at $40 million. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: SPECIAL ANALYSES. FISCAL YEAR 1988, at G-44 (1987).

[38] BUDGET SPECIAL ANALYSES, FY 1989, *supra* note 37, at G-43.

[39] C.E. STEUERLE, WHO SHOULD PAY FOR COLLECTING TAXES? 42 table 4-1 (Am. Enterprise Inst., 1986).

tom child care expenses are claimed, for an annual revenue loss to the Treasury of about $1.3 billion.[40]

A. *Fix the Credit?*

Over the years, Congress has tried to make the credit less regressive. In 1976, the credit was changed to a credit from a deduction, in an attempt to make it as valuable to lower-income families as it is to families with higher incomes.[41] Then, in 1981, the credit was changed from a flat 20% of expenditures for all families to a proportionally higher credit for low-income taxpayers: 30% for incomes under $10,000 and 20% for incomes above $28,000, with a sliding scale in between.[42] Eligible expenses are limited to $2400 for one dependent and $4800 for two or more dependents.

Unfortunately, such provisions are insufficient to counter the realities of child care economics. First, to benefit from a nonrefundable tax credit, one must owe taxes. Lower-income families, by definition, often do not. This is why many observers have suggested making the credit refundable, as President Bush's child care proposal would do.

Second, families that can claim the credit (families where the mother works outside the home) tend to earn more than families in which the mother stays at home. Two-earner families, for example, had a median income of $40,422 in 1987, 52% higher than the median income of "traditional" two-parent/one-earner families, $26,652.[43]

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[40] In 1985, the latest year for which figures are available, taxpayers received about $3.1 billion in credits. TAX RETURNS, *supra* note 33, at 81 table 3.3. Assuming an average credit of 20% of child care expenditures, which is the minimum available (the average is probably somewhat higher), taxpayers claimed that they spent about $16 billion on child care expenses. A 28% rate of overclaiming on this amount would total $4.5 billion (28% of total expenses claimed). Again, assuming an average credit of 20%, the revenue loss would be approximately $900 million. These are 1985 numbers; with the use of the credit having increased an estimated 46% since 1985, we can project revenue losses due to cheating at $1.3 billion in 1989. BUDGET SPECIAL ANALYSES, FY 1989, *supra* note 37, at G-43.

[41] Tax Reform Act of 1976, Pub. L. No. 94-455, § 504(a), 90 Stat. 1563–66. For a brief legislative history of the Child and Dependent Care Tax Credit, see WAYS & MEANS, *supra* note 32, at 613.

[42] Economic Recovery Act of 1981 (ERTA), Pub. L. No. 97-34, § 124(a), 95 Stat. 197–99.

[43] BUREAU OF THE CENSUS, U.S. DEP'T OF COM., CURRENT POPULATION REP., SERIES P-60, NO. 161, MONEY INCOME AND POVERTY STATUS IN THE UNITED STATES: 1987, at 12 table 12 (Aug. 1988).

Third, upper-income mothers are more likely to use child care centers, which are more expensive than family-based care and thus allow more expenses to be claimed. College-educated (and thus wealthier) mothers are twice as likely to use child care centers and preschools as are mothers without a high school education.[44] Conversely, about 60% of the families with incomes under $15,000 use unpaid relatives for child care.[45]

Finally, until 1988, the credit was available for children up to age fifteen. As children reach that age, most low-income families are relying on friends, relatives, or free community services, or the children are home on their own. Middle- and upper-income families, though, continue to use the credit (to help pay for day camp in the summer and for such after-school activities as dance classes and gymnastics). Because there are so many families with older children and because so many mothers work only part-time, the average size of the credit is low. Even families with incomes above $40,000 only claim about $400.[46]

B. *Cap the Credit*

Although upper-income families spend more money on child care, lower-income families spend a higher *percentage* of their incomes on child care for younger children. Families earning under $20,000, for example, spend about 8% of their income on child care, while families earning over $50,000 spend less than 3%.[47] This is a 267% difference, over five times greater than the 50% higher allowance the credit now grants to lower-income families.

Government policy can and should do much more to support all mothers in the labor force—and their children. However, it is ludicrous to think that a $400 credit affects the child care decisions of upper-income families.

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[44] BUREAU OF THE CENSUS, U.S. DEP'T OF COM., CURRENT POPULATION REP., SERIES P-70, No. 9, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: WINTER 1984–1985, at 17 table 4 Part B (May 1987).

[45] WAYS & MEANS, *supra* note 32, at 586.

[46] TAX RETURNS, *supra* note 33, at 81 table 3.3.

[47] L. Brush, Usage of Different Kinds of Child Care: An Analysis of the SIPP Data Base 42 (Oct. 14, 1988) (unpublished paper prepared for William Prosser, Social Services Policy Div., Assistant Secretary for Planning and Evaluation, U.S. Dep't of Health and Human Services) (on file at the HARV. J. ON LEGIS.). According to the study, families with incomes over $70,000 spend only 11% more on child care than do families with incomes under $10,000.

The credit should be capped so that upper-income families do not get an unfair tax break. In fact, the credit should be re-capped. In 1954, when the credit was first established as a deduction, elegibility was capped at $21,556 (1987 dollars). In 1971, the cap was raised to $50,000, with a phase out for higher incomes, and, in 1975, to $73,908 (1987 dollars). Only in 1976, when it was made a credit, was the cap totally removed.[48]

Perhaps it made sense to remove the cap when marginal tax rates were high. However, now that upper-income families have been granted dramatic tax relief, there is little reason to continue this tax break. This is not just an abstract issue of social justice. Although the average benefit for families with incomes above $40,000 is a relatively modest $400, there are nearly two million such families. Capping elegibility for the credit at incomes between $45,000 and $55,000 would generate about $1 billion that could be directed to families who genuinely need help in paying for child care.[49]

Theoretically, the credit could be made more equitable by raising the percentage of child care expenses that is reimbursable from 30% to 60%, for example. However, because more money would be at stake, this would only encourage more cheating, which is now concentrated among families earning between $25,000 and $50,000.[50] Raising the amount reimbursable would also aggravate the tax code's bias against stay-at-home mothers who sacrifice their own careers to care for their children or, as is often the case, for an elderly or sick relative.

The savings from a cap should not be used to start a new federal child care program with greater appeal to the middle class. It would be more efficient—and it would be better social policy—to use the funds to revitalize and expand Head Start, a program that combines elements of child development and child care for families of greatest need.

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[48] Unadjusted figures are: for 1954, $5,100; for 1971, $18,000; and for 1975, $35,000. For a brief legislative history, see WAYS & MEANS, *supra* note 32, at 613.

[49] In 1985, taxpayers with incomes above $40,000 took an estimated $750 million in child care credits. TAX RETURNS, *supra* note 33, at 81 table 3.3. Assuming 46% growth at these income levels, a rate equal to the overall growth of credit use (BUDGET SPECIAL ANALYSES, FY 1989, *supra* note 37, at G-43), revenue losses would exceed $1 billion in 1989.

[50] Estimate based on Taxpayer Compliance Measurement Program data, provided by the Office of the Assistant Commissioner (Planning, Finance and Research), Internal Revenue Serv. (June 1988).

It is often said that only 16% of Head Start eligible children are enrolled in the program.[51] This, however, is a misleading statistic, since it includes both three- and five-year-olds, the former being on the young side for Head Start as presently constituted and the latter able to attend kindergarten, which is now available in every state. In fact, approximately 40% of eligible children already spend at least one year in Head Start. About $1 billion could guarantee one year of Head Start for every eligible child.[52]

C. *Middle-Class Politics*

Although child care received little attention between 1972 and 1987, as this Article describes federal subsidies more than doubled in this period. Simultaneously, a sharp reversal in the beneficiaries of federal child care assistance has occurred. In 1972, nearly 80% of federal expenditures benefited low-income families; now, only about half do. The nature, extent, and targeting of assistance have now moved to the forefront of public debate.

Unfortunately, the major bills before the 100th Congress—Senator Christopher Dodd's (D-Conn.) "Act for Better Child Care Services" ("ABC")[53] and Senator Orrin Hatch's (R-Utah) Child Care Services Improvement Act[54]—would have gone far in ratifying the trend toward greater middle-class subsidies. The ABC bill, for example, would have provided support to families earning up to 115% of the median income.[55] Nationally, that would be about $34,000, but ABC set eligibility by state median incomes, so that many states would have considerably higher caps: for example, $39,530 in Illinois, $41,656 in California, and $44,941 in Massachusetts.[56] Moreover, the bill did not guarantee low-income families a minimum percentage of appropriated funds; it merely required that state plans "give priority for ser-

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[51] CHILDREN'S DEFENSE FUND, A CHILDREN'S DEFENSE BUDGET: FY 1989: AN ANALYSIS OF OUR NATION'S INVESTMENT IN CHILDREN 194 (1988).

[52] Personal communication from Clennie Murphy, Associate Deputy Director, Head Start, U.S. Dep't of Health & Human Services (June 10, 1988).

[53] S. 1885, 100th Cong., 1st Sess., 133 CONG. REC. S16,555 (daily ed. Nov. 19, 1987).

[54] S. 2084, 100th Cong., 2d Sess., 134 CONG. REC. S1,423 (daily ed. Feb. 25, 1988).

[55] S. 1885, *supra* note 53, at § 18.

[56] Henderson, *Federal Day-care Bills: 'You have to start somewhere'*, Christian Sci. Monitor, Jan. 21, 1988, at 23, col. 1.

vices to children with the lowest family incomes."[57] The Hatch bill had no income cap.

Perhaps child care should be universal—available to *all* families, regardless of their income—like public schools. But that is a long-run issue, as is the proper role of the federal government in establishing such a system, which would call for an enormous increase in public spending. In today's world of Gramm-Rudman-Hollings limits, it is simply wrong to funnel scarce federal dollars (in increasing amounts and proportions) to middle-class families who need them less. Priority should be given to families with the greatest need. An expansion of Head Start, for example, could do more for poor and low-income families than any federal child care bill now on the horizon.

Capping the credit, though, might face fierce opposition. More than a million upper-income families would lose a tax break. Also, women's groups strongly support the credit. Thus, politicians seem loath to take away one of the last tax breaks left by the reformers in 1986. In June 1988, for example, when the Senate Finance Committee sought to raise additional revenues to pay for welfare reform by phasing out the credit at the highest income levels,[58] Senator Bill Bradley (D-N.J.) successfully blocked the effort, calling it "insulting to working women."[59] Few male politicians want to face that charge.

For upper-income families, for whom the average credit is only $400, the credit's importance is mainly symbolic. While symbols can be important, in a time of scarce government resources, help should be focused on families that need dollars, not symbols. The credit should be a symbol of our support for working mothers who need financial assistance, not of our inability to achieve a progressive tax code.

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[57] S. 1885, *supra* note 53, at § 7(11)(B)(i).

[58] The proposal would have capped the credit elegibility at between $70,000 and $97,500, which would have generated about $200 million to help pay for welfare reform.

[59] Senator Bill Bradley, Press Release of June 16, 1988, *Bradley Amendment Saves Tax Credit for Child Care* (on file at the HARV. J. ON LEGIS.).

FOURTEEN MYTHS ABOUT FAMILIES AND CHILD CARE

ROBERT RECTOR*

The federal government is currently engaged in a heated debate over national child care policy. Five central questions underlie this controversy:

1. Should a national child care policy discriminate against traditional families who make an economic sacrifice so that one parent may remain at home to care for young children?

2. Should government extend aid only to parents who place their children in formal day care centers, or should informai modes of child care be funded as well?

3. Should child care funds be provided directly to parents through tax relief, or should the funds go to social service institutions and bureaucracies to meet priorities selected by a few members of Congress?

4. Should assistance be targeted to low-income families or should we set in motion a vast new middle-class entitlement?

5. Should the government restrict the ability of parents to raise their children in a religious environment by discriminating against actively religious day care providers in funding?

In answering these questions, we must remember a simple policy rule: any mode of child rearing subsidized by the government will be utilized increasingly. If the government chooses to subsidize a limited range of child care options, the use of these options will inevitably expand, even if parents would have chosen other alternatives in the absence of government intervention.

The recent child care debate has focused on heavily publicized proposals such as the Act for Better Childcare (ABC),[1] which would subsidize formal institutional day care arrangements cur-

* Policy analyst for social welfare and the family, the Heritage Foundation, Washington, D.C. B.A., William and Mary College, 1977; M.A., Johns Hopkins University, 1984. The author is co-editor of STEERING THE ELEPHANT: HOW WASHINGTON WORKS (1987).

[1] S. 1885, 100th Cong., 2d Sess. (1987); H.R. 3660, 100th Cong., 2d Sess. (1987).

rently used by less than one preschool child in ten.[2] The vast majority of families with children would be taxed to finance the flow of resources into government-sponsored day care centers. Such a policy clearly pits the preferences and well-being of most families with children against the financial interests of the institutional day care industry and the "advanced" social vision of certain segments of the child development community.

HELPING FAMILIES WITH CHILDREN: AN ANALOGY

The following analogy contrasts the basic differences between liberal and conservative approaches to helping families with young children. Suppose the government wanted to help parents feed their children. On the one hand, the government could give families greater income through tax cuts and through cash payments to very-low-income families. On the other hand, the government could set up a chain of government restaurants or could subsidize non-profit restaurants in selected communities.

The government restaurants could provide "fed burgers" to the public. If the "fed burgers" were free or if their price were subsidized heavily, families would use these restaurants; there would even be waiting lines. Soon, advocates from the "fed burger" industry would arrive in Washington, claiming that waiting lines at government restaurants showed a pent-up, unsatisfied public demand for "fed burgers." The advocates would tell us that the only way to help parents feed their children would be to spend more money to build more government restaurants. Of course, none of this would indicate that parents actually preferred government cuisine, or that such a policy would be either an efficient or a fair approach to helping families feed themselves.

The situation in child care is an analogous one. Liberals want to channel funds to government-sponsored day care centers. Conservatives want to provide tax relief and cash assistance to families with young children. Conservatives also want to allow

[2] ABC, introduced by Representative Dale Kildee (D-Mich.) and Senator Christopher Dodd (D-Conn.), would provide $10 billion in grants over four years to day care centers. Child care advocates consider this level of funding merely a step in the direction of creating a much larger day care system costing as much as $85 billion per year. *See* R. RECTOR, THE AMERICAN FAMILY AND DAY-CARE (Heritage Foundation Issue Bull. No. 138, Apr. 6, 1988); R. RECTOR, THE "ABC" CHILD CARE BILL (Heritage Foundation Issue Bull. No. 145, Oct. 6, 1988).

parents to choose how the funds should be spent: either on a wide variety of types of day care, or to help the family stay afloat financially while the mother cares for the children at home. While the right policy in our hypothetical about helping to feed children seems obvious, many find the issue of child care confusing. Much of the confusion stems from several basic misconceptions about families and the day care industry. To help eliminate some of these misconceptions, this Article will examine fourteen myths about families and child care.

MYTH #1: THE TRADITIONAL FAMILY IS OBSOLETE

According to supporters of a massive increase in government-sponsored day care, the "traditional family," where the father is employed while the mother remains at home to care for children, is a thing of the past. Congressional child care advocates such as Senator Christopher Dodd (D-Conn.) insist that although a mother's caring for her own preschool children is clearly a social ideal, it has become an antiquated one.[3] Nearly all young children, we are told, either are or soon will be in some form of professional day care. The argument that parental care of young children is outdated in a modern society allows child care proponents to treat the interests of the institutional day care industry and the interests of families with children as if they were identical.

But the traditional family is far from obsolete. A 1987 Census Bureau report shows that only forty-six percent of children under age five have employed mothers.[4] Interestingly, less than

[3] Interview with Senator Christopher Dodd (D-Conn.) during *Hearing of the Subcomm. on Children, Families, Drugs and Alcoholism of the Senate Comm. on Human Resources*, 100th Cong., 2d Sess. (June 28, 1988).

[4] *See generally* BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., HOUSEHOLD ECONOMIC STUDIES SERIES P-70 No. 9, WHO'S MINDING THE KIDS? (1987) [hereinafter WHO'S MINDING THE KIDS?] (data on children with employed mothers from a survey conducted from December 1984 to March 1985). To determine children in different child care arrangements as a percentage of all young children in the population, the children under age five in WHO'S MINDING THE KIDS? have been divided by the total number of children under age five in January 1985. The procedure is consistent with the original process used by the Bureau of the Census to estimate the aggregate number of children in different types of day care from the original survey sample. *See* R. RECTOR, THE AMERICAN FAMILY AND DAY-CARE, *supra* note 2, at 16–17. *See also* BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., CURRENT POPULATION REPORTS SERIES P-20 No. 423, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1987, at 43 (1988) (in 1987, 55% of children under six lived with one or more non-employed parent).

one preschool child in three has a mother employed full-time,[5] and less than one in five has a mother employed full-time throughout the year.[6]

Traditional parental care for young children is not only the most common, it is also the overwhelming preference of parents. More than eighty percent of mothers state that they would prefer to stay at home with their own children if they could afford to do so.[7] And by a ratio of two to one, mothers under age forty-four state that they do not regard the increased enrollment of young children in day care centers in recent years as a positive development.[8]

MYTH #2: TRADITIONAL FAMILIES ARE AFFLUENT

A second myth is that the few remaining traditional families are affluent. We are led to believe that families using day care do so out of "economic necessity," while traditional families have the "luxury" of allowing mothers to remain at home.[9] Again, the argument ignores social reality. While employed single mothers clearly do use day care out of economic necessity, some eighty percent of the preschool children in formal day care come from two-parent, two-earner families.[10] The median income of two-parent, two-earner families in 1986 was $38,346, about fifty percent more than the median income of traditional families.[11]

More striking is the fact that when we compare the average family where both parents are employed with the average traditional family, we find that the husband's salary in both types

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[5] WHO'S MINDING THE KIDS?, *supra* note 4, at 2.

[6] Besharov & Dally, *One Policy for Working Moms Won't Fit All*, Wall St. J., Oct. 29, 1986, at 28, col. 3.

[7] In a 1987 poll, 88% of mothers with children under age 18 agreed with the statement: "If I could afford it, I would rather be at home with my children." *Opinion Roundup*, PUB. OPINION, July–Aug. 1988, at 36.

[8] *Id.*

[9] B. REISMAN, A. MOORE & K. FITZGERALD, CHILD CARE: THE BOTTOM LINE 31 (1988).

[10] WHO'S MINDING THE KIDS?, *supra* note 4, at 15.

[11] BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60 No.159, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1986, at 58 (1988) [hereinafter MONEY INCOME OF HOUSEHOLDS: 1986].

of families is roughly equal.[12] In other words, the average traditional family is not significantly better off than the average two-parent, two-earner family, even when we disregard the earnings of the second spouse in the two-earner family.

The United States does *not* have two types of families, one forced to use day care by economic necessity while the other has the luxury of choice in child rearing. Rather, our society has two types of families with two different sets of family priorities. Some families choose to place a second parent in the work force in order to achieve a higher monetary standard of living. Other families, starting from similar financial circumstances, choose to make an economic sacrifice so that one parent can stay at home to care for young children. A pro-family, pro-child government policy should honor both of these options. It should not exclude or discriminate against parents who choose parental care for their children over institutional arrangements.

Many traditional families are in fact among the least affluent of America's families. Among families with preschool children earning less than $15,000 per year, traditional families outnumber families headed by employed single mothers.[13] Ignored by the media and most social scientists, these low-income, traditional families are "America's forgotten families." Any government policy for families with children should give their needs high priority. But under day care subsidy proposals such as the Act for Better Childcare, these low-income, traditional families would not be helped. Instead, they would be taxed to provide day care subsidies for two-earner families earning up to $47,000 per year.[14]

MYTH #3: IT NOW TAKES TWO SALARIES TO OBTAIN THE SAME STANDARD OF LIVING OZZIE AND HARRIET HAD ON ONE SALARY

Another common argument advanced by day care advocacy groups is that the standard of living that was the norm for

[12] In 1986, among two-parent families where only the husband was employed, the husband's mean salary was $29,556. In two-parent families where both spouses were employed, the husband's mean salary was $27,074. Thus, there was only an eight percent difference in the husbands' incomes. *Id.* at 83. *See also* Bureau of the Census, U.S. Dep't of Comm., Current Population Survey on 1986 Income (Mar. 1987) (unpublished data).

[13] In 1986, among families with incomes below $15,000, there were 839,000 traditional families with at least one child under age six. Bureau of the Census, Current Population Survey on 1986 Income, *supra* note 12.

[14] *See* R. RECTOR, THE AMERICAN FAMILY AND DAY-CARE, *supra* note 2, at 9. *See also* R. RECTOR, THE "ABC" CHILD CARE BILL, *supra* note 2.

traditional families of the 1950's is within reach of today's families only if both parents work. Day care, the argument runs, has become a modern economic necessity in the struggle to hold the line against declining living standards. Again, this simply is not so. Today, the median income of husbands after adjusting for inflation is forty percent higher than the median income of traditional families in 1955.[15] In families where both husband and wife work full-time, the median income equals 270 percent of the median income of traditional families in the 1950's,[16] again after adjusting for inflation. This pattern holds true even for housing costs, correctly regarded as a major burden on today's families. In nominal terms, husbands' incomes increased by 435% between 1955 and 1985.[17] The average nominal cost of a home purchase, holding all changes and improvements in home quality constant, increased only by 264% in the same period.[18]

Over the last thirty years we have experienced not a decline in earnings capacity but a profound upward "revolution of expectations" in living standards. In the process, we have largely forgotten the actual income levels and standards of living of the preceding generations.

As already noted, the overwhelming majority of preschoolers using day care come from two-parent, two-earner families.[19] Today's two-earner families enjoy, on average, a standard of living more than twice that of the "Ozzie and Harriet" generation.[20] Although government assistance is important to families with employed mothers, it is equally important that our government not ignore or discriminate against families that have chosen

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[15] BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 296 (1975) [hereinafter HISTORICAL STATISTICS] (data for 1955); MONEY INCOME OF HOUSEHOLDS: 1986, *supra* note 11, at 58, 83 (data for 1986).

[16] HISTORICAL STATISTICS, *supra* note 15, at 296; MONEY INCOME OF HOUSEHOLDS: 1986, *supra* note 11, at 58, 83.

[17] HISTORICAL STATISTICS, *supra* note 15, at 296; BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., CURRENT POPULATION REPORTS SERIES P-60 NO. 156, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1985, at 118 (1987) [hereinafter MONEY INCOME OF HOUSEHOLDS: 1985].

[18] Bureau of Labor Statistics, U.S. Dep't of Labor (July 23, 1985) (unpublished data from the Consumer Price Index on city housing costs for urban wage earners).

[19] *See supra* note 10 and accompanying text.

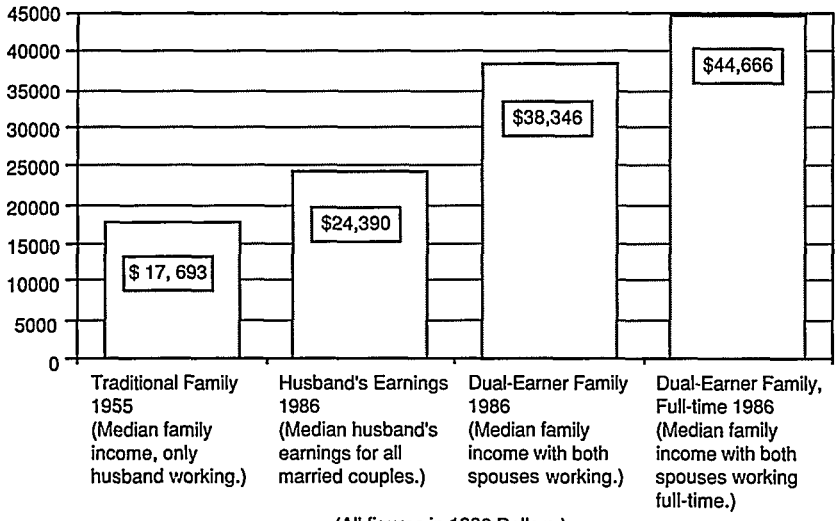
[20] *See* HISTORICAL STATISTICS, *supra* note 15, at 296; MONEY INCOME OF HOUSEHOLDS: 1985, *supra* note 17, at 118.

In each of the comparisons, nominal incomes of families in the 1950's have been adjusted into 1980's dollars using the conventional Consumer Price Index (CPI). Alternatively, CPI-UX, the recently-improved inflation measure, yields 1980's family incomes that appear to be even higher relative to family incomes in the 1950's.

Chart 1

End of the Ozzie and Harriet Family?

Does it take two incomes to give families the standard of living that one used to?



(All figures in 1986 Dollars.)

SOURCE: *See supra* note 15.

to "make do" at a lower level of income so that one parent can remain at home to raise young children.

MYTH #4: THE SHORTAGE OF DAY CARE

The current cry of child care advocates is that the day care industry has not expanded quickly enough to meet demand. These advocates see a chronic economic bottleneck in the day care industry and call for direct government funding for the creation of a new "day care infrastructure." But there is no evidence of a bottleneck in the supply of day care. In fact, the day care industry is expanding rapidly. The capacity of formal group care centers increased from 141,000 to 2.1 million, or

1500%, between 1960 and 1986.[21] The number of centers also grew, from 4400 to 39,929, during this period.[22] At least another 1.6 million small, unlicensed neighborhood providers exist.[23]

Moreover, if the demand for day care truly had exceeded the supply, the price of day care would have increased rapidly. This has not occurred. The constant dollar cost of formal centers and neighborhood providers has remained the same between 1975 and 1985, the last year for which detailed price data are available.[24] More general data show no indication of significant price increases subsequent to 1985. Overall, the evidence shows overwhelmingly that the long-run supply curve for day care is fully elastic.[25]

Day care advocacy groups cite waiting lists at some day care centers as proof of shortages and bottlenecks in supply. However, other centers in the same communities report vacancies. Facilities with waiting lists almost invariably charge below-market rates because they receive government subsidies. Any organization inevitably will develop a "waiting list" if it receives direct government subsidies in order to offer any good or service, from hamburgers to day care, to the public at below-market rates. Such a waiting list, however, clearly should not be interpreted as evidence of an overall supply shortage.

A recent survey by the Labor Department supports this conclusion. The Labor Department found "no evidence in support of the contention that there is a general, national shortage of available care."[26]

Gerber, La Petite, and Kindercare, national day care chains, currently report average vacancy rates of twenty-five percent.[27] A preliminary survey by the National Childcare Association, an

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[21] Rose-Ackerman, *Unintended Consequences: Regulating the Quality of Subsidized Day-Care*, 3 J. POL'Y ANALYSIS & MGMT. 14, 15 (1983); S. Hofferth, Statement before the Congressional Select Comm. on Children, Youth & Families, 100th Cong., 1st Sess. 4 (July 1, 1987).

[22] Rose-Ackerman, *supra* note 21, at 15; S. Hofferth, *supra* note 21, at 4.

[23] Hofferth & Phillips, *Child Care In the United States, 1970 to 1995*, 49 J. MARRIAGE & FAM. 559, 565 (1987).

[24] S. Hofferth, *supra* note 21, at 9.

[25] S. Hofferth, What is the Demand for and Supply of Child Care in the U.S.? 8 (paper presented at the Family Impact Seminar, Washington, D.C., Jan. 13, 1989); interview with Dr. Sandra Hofferth, Senior Research Associate, Urban Inst., Washington, D.C. (Mar. 15, 1989).

[26] SECRETARY'S TASK FORCE, U.S. DEP'T OF LABOR, CHILD CARE: A WORKFORCE ISSUE 10 (1988) [hereinafter A WORKFORCE ISSUE].

[27] Interview with Gordon Martin, representative of Kindercare Corporation, Washington, D.C. (Mar. 15, 1989).

organization of private sector day care providers, found average vacancy rates between fifteen and thirty percent within a variety of states across the country.[28] According to Gary Neugebauer, publisher of *The Childcare Information Exchange*, across the United States there are currently two licensed day care slots for each child in a day care center.[29] In many areas it is more accurate to speak of a day care "glut" instead of a "shortage."

However, many families do face a perceived "shortage" of day care in the sense that they would like to have more options or better-quality care than they feel they can afford on the current family budget. Obviously, though, families face the same "shortage" in varying degrees for all purchased goods and services. The solution is not to establish a government-funded "day care infrastructure;" it would be just as inappropriate for the government to create a "restaurant infrastructure." Instead, our government should provide tax relief. Parents should be allowed to keep a larger share of their incomes, which they may spend on day care if they so choose.

MYTH #5: THE "MAGIC DOLLAR" ARGUMENT

Much of the debate over recent child care legislation has focused on whether funds should be provided directly to parents or whether they should be given to day care centers. The ABC proposal employs a "trickle down" strategy: funds would be passed through multiple layers of bureaucracy and eventually doled out, largely as grants, to day care centers. This cumbersome "trickle down" funding—providing money to virtually everyone but parents—has the following rationale: funds given to day care centers directly by the government will cause supply to increase, while the same funds given to parents will not cause supply to increase. Thus, one dollar given as a direct grant to a day care center assumes a "magic" quality that causes the "child care infrastructure" to expand; however, the same dollar given to parents who spend it in a day care center has no impact on supply, but only increases costs.

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[28] Interview with William J. Tobin, representative of the National Child Care Association, Washington, D.C. (Nov. 30, 1988).

[29] Kelly, *Hands Off Child Care: Further Federal Involvement Would be Counterproductive, Costly*, 69 BARRON'S 9 (Jan. 2, 1989).

No evidence has ever been presented to justify this peculiar chain of reasoning. In fact, both history and economic logic signal the opposite: direct bureaucratic subsidization of a service is the least efficient way of meeting a public need. Direct subsidies virtually guarantee swollen administrative costs, salary escalation, and general inefficiency. For example, public housing units constructed directly with government funds generally cost forty percent more and are of lower quality than similar units constructed in the private sector.[30]

On the other hand, distribution of funds directly to parents introduces an intrinsic quality control mechanism. It insures that funds are properly targeted: monies will go to facilities that parents deem most appropriate to meet the needs of their children, not to a handful of centers adept at pulling political strings and maneuvering through loops of bureaucratic red tape. When funds are given directly to families, parents will direct their dollars towards providers that offer the best-quality care at the lowest cost. Day care providers will be forced to compete for these funds. The key to a sound child care policy is to increase the income of parents, not the income of day care centers.

MYTH #6: THE PREVALENT USE OF DAY CARE CENTERS

Contrary to popular wisdom, the use of day care centers is, at present, quite rare. Over half of American children under age five live in homes where the mother is not employed.[31] But even in families where the mother is employed, the use of formal institutional day care is relatively rare. Seven percent of children under five are tended by "tag team" parents, where the mother and father work different shifts and each cares for the children in the other's absence.[32] Another four percent of these children are attended by "double time" mothers, who earn income at home while caring for their own children. Many of these mothers work as informal day care providers for other children in the neighborhood. Finally, an additional eleven percent of children under five are watched by grandmothers, aunts, or other relatives during the mother's working hours.[33] Overall, this means

[30] S. MOORE & S. BUTLER, PRIVATIZATION: A STRATEGY FOR TAMING THE FEDERAL BUDGET 18 (1987).

[31] Mattox, *Who Will Care for the Children?*, FAM. POL'Y, May-June 1988, at 2.

[32] *Id.*

[33] *Id.*

that three out of four preschool children remain in parental or relative care during the course of the average day.

Only one preschool child in four is typically in non-relative care. And even among these children, care by formal institutions is not the norm. Instead, the majority receive care in neighbors' homes or through other informal arrangements.[34] There is no evidence that parents are dissatisfied with informal child care arrangements.[35] Overall, only eleven percent of children under five are placed in formal day care centers while the mother works.[36]

Despite the relative rarity of institutional child care, recent legislation, such as the ABC proposal, attempts to cope with the day care "crisis" by restricting all assistance to formal, licensed day care facilities. Under ABC, employed mothers who leave young children with relatives and neighbors during work hours would receive no federal assistance. Roughly three out of four preschool children with employed mothers would be denied federal aid.[37]

A child care policy that addresses the genuine needs of parents and children rather than the special interests of the day care industry and the formal child development community would seek to expand, not to restrict, parents' options in child care. Such a policy would not allow bureaucrats to pre-select the types of care that should be subsidized; rather, it would

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[34] *Id.*

[35] 4 U.S. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY DAY CARE IN THE UNITED STATES: FINAL REPORT OF THE NATIONAL DAY CARE HOME STUDY, at table 5.32 (1981) [hereinafter NATIONAL DAY CARE HOME STUDY].

[36] Mattox, *supra* note 31, at 2.

[37] Proponents of ABC claim that the act would promote choice, since it contains a minor day care voucher provision. However, the voucher can be used only in licensed day care facilities, which comprise only a quarter of the day care in use. The hope that the availability of federal funds will entice many more unregulated family day care providers to become licensed has not been borne out by prior experience with the Social Services Block Grant and the Child Care Food Program.

Moreover, the ABC proposal would not even guarantee limited parental choice among licensed facilities. Prior experience shows that only a small part of the funds, if any, would be allocated to vouchers. Most of the monies would be channelled as direct grants to a small fraction of licensed child care facilities. The intent of ABC with respect to parental choice can be recognized from proposed amendments that were not included in the bill. One defeated amendment provided eligible parents with an option either of placing children in centers subsidized by direct grants or of receiving vouchers of equivalent value redeemable in a licensed facility of the parent's choice. The amendment was opposed strenuously by the authors of ABC; it was rejected by a nearly unanimous vote of the Democratic majority on the committee. *Mark-Up Hearing, H.R. 3660, Comm. on Educ. & Labor*, 100th Cong., 2d Sess. (Oct. 3, 1988).

provide funds directly to parents, allowing them to choose the type of care most appropriate for their needs.

MYTH #7: THE LATCH-KEY CRISIS

In recent years, cries of alarm have been sounded about the increasing numbers of "latch-key" children—young school-age children who are left alone without parental supervision for extended periods before and after school. The Children's Defense Fund claims that there are at least seven million latch-key children under age thirteen in the United States.[38]

However, a 1984 Census Bureau survey of child care arrangements shows that both the extent and the character of the latch-key phenomenon have been misrepresented. Census data indicate that only seven percent of children between the ages of five and thirteen spend time without adult supervision, usually only for brief periods before and after school.[39] Most of these children are over age ten; only two percent of school-age children under age ten care for themselves either before or after school.[40] Among children aged five to seven, the figure is even smaller: less than one percent care for themselves either before or after school.[41] Another two percent in this age group are tended by another child under age fourteen, generally an older sibling.[42]

Contrary to popular accounts, latch-key children remain without adult supervision only for short periods of time. Among children under ten who care for themselves or who are attended by a sibling under fourteen, a third are alone for less than one hour each day; eighty-nine percent are alone for less than two hours.[43]

Some have argued that latch-key children are concentrated among low-income families, particularly families headed by single working mothers forced by economic necessity to leave their children unattended. The facts again show otherwise. Latch-

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[38] *See* V. Cain & S. Hofferth, Parental Choice of Self-Care for School Age Children 4 (paper presented at the Annual Meeting of the Population Assoc. of Am., Chicago, Ill., May 1987).

[39] BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., CURRENT POPULATION REPORTS SERIES P-23 NO. 149, AFTER SCHOOL CARE OF SCHOOL AGE CHILDREN 1 (1987).

[40] V. Cain & S. Hofferth, *supra* note 38, at table 3.

[41] *Id.*

[42] *Id.*

[43] *Id.*

key children are found disproportionately among intact two-parent families and among families with higher incomes; moreover, these latch-key children tend to be white, to live in the suburbs, and to have better-educated parents.[44]

TABLE: NUMBERS OF LATCH KEY CHILDREN[45]

Age Level	Children in Self-Care		Children Attended by Another Child under Fourteen	
Five through seven	69,595	(0.75%)	217,923	(2.36%)
Eight	76,637	(2.52%)	111,915	(3.68%)
Nine	160,949	(5.17%)	75,960	(2.44%)

In an in-depth study of latch-key children, Drs. Virginia Cain and Sandra Hofferth of the National Institute of Child Health and Human Development found that parents determine selectively whether or not to have children care for themselves.[46] The maturity of the child and the relative security of the neighborhood, not economic necessity, appear to be the prime factors in the decision.[47]

However, it would be foolhardy to suggest that latch-key children pose no potential problem. In particular, the 307,000 children under age ten who care for themselves (roughly four children for each of the 75,000 elementary schools in the United States)[48] are a cause for some concern. But the problem is limited in scope, and it can be addressed at the local level. The appropriate response by local governments would include modest programs providing before- and after-school supervision inside elementary schools. Such programs should be funded by user fees paid by the relatively small number of benefitted parents; exceptions to the user-fee principle can be incorporated for very-low-income families. The latch-key phenomenon, to the extent it exists, is not a nation-wide "crisis" that requires the establishment of a new federal program costing massive amounts of federal money.

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[44] *Id.* at 5.
[45] *See supra* note 40.
[46] *Id.* at 18.
[47] *Id.*
[48] SNYDER, DIGEST OF EDUCATION STATISTICS, 1987, at 55, 70 (U.S. Dep't of Educ., 1987).

MYTH #8: THE GOVERNMENT SPENDS LITTLE ON DAY CARE

Another common misconception is that the federal government provides scant funding for day care. Yet in 1986, through tax credits and direct outlays, the federal government spent $5.6 billion on day care.[49] This amount represented over thirty-five percent of the total nationwide 1986 spending on day care ($15 billion), both public and private.[50] It is likely that at least part of the recent increase of mothers with young children in the labor force can be attributed to the high degree of federal subsidization of day care use.

Through tax exemptions and credits, the federal government already provides approximately twice as much financial assistance for each young child in a family using formal day care as it does for a young child in a traditional family where one parent remains at home.[51] If the Act for Better Childcare is adopted, this ratio will rise to three-to-one.[52]

MYTH #9: AVAILABILITY OF DAY CARE WILL EASE THE IMPENDING "LABOR SHORTAGE"

One of the arguments advanced in favor of promoting the entry of mothers with toddlers into the labor force is the impending "labor shortage" of the mid-1990's. Certain segments of the business community have developed an interest in erecting a taxpayer-financed "day care infrastructure" to stave off or mitigate this prophesied shortage.[53] But even a cursory understanding of the principles of microeconomics demonstrates that an enduring shortage of any service is impossible in a free

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[49] Direct federal outlays totalled $2.51 billion in 1986. *See generally* A WORKFORCE ISSUE, *supra* note 26 (data on federal child care-related expenditures). Federal reimbursements of private day care expenditures through the Dependent Care Tax Credit were valued at $3.17 billion in 1986. *See id.* Thus, federal outlays and tax credit expenditures together equalled $5.67 billion in 1986. Data on state and local government expenditures are not available.

[50] Data on private and public expenditures on day care are not available for the same base year. Total private expenditures are estimated at $11.1 billion per annum based on a sample taken in the spring of 1985. WHO'S MINDING THE KIDS?, *supra* note 4, at 11. Assuming that private expenditures increased by 15 percent between 1985 and 1986, combined federal and private spending in 1986 would have equalled $15.2 billion. Thus, federal outlays and tax credit expenditures together represented roughly 37% of overall child care spending.

[51] R. RECTOR, THE AMERICAN FAMILY AND DAY-CARE, *supra* note 2, at 12.

[52] *Id.*

[53] B. REISMAN, A. MOORE & K. FITZGERALD, *supra* note 9, at 54.

market. A shortage persists only briefly until the price of the service (in this case, the wage rate) rises and a new equilibrium price matches demand with supply.

In microeconomic terms, the "labor shortage" argument would be rephrased as follows: over the next decade, demand for labor will increase more sharply than supply, and the resulting disequilibrium will cause real wages to rise rapidly. The increase in wages can be forestalled or minimized if an increase in the supply of young mothers in the labor force is stimulated artificially through government subsidies for day care.

This labor shortage argument for day care is little more than camouflage for policies designed to restrain growth in real wages, particularly among female workers. While it is easy to see why such policies would interest some segments of the American business community, it is difficult to see how they serve the interests of workers, families, mothers, or children.

MYTH #10: UNREGULATED FAMILY DAY CARE IS HARMFUL TO CHILDREN

There are two basic types of day care providers: group care centers, which care for more than six children, and family day care providers, which care for six children or fewer. While everyone agrees that group care centers should be licensed—and all states do in fact license such centers[54]—most states do not attempt to license smaller family day care providers. Even in states that do impose licensing and registration requirements, a majority of small family day care providers remain unlicensed and unregulated. Overall, approximately ninety percent of the estimated 1.75 million family day care providers in the United States operate without a license.[55]

For years, advocates of institutional care have tried to argue that unlicensed neighborhood family day care providers are less safe and less healthy than large, regulated day care centers. All available scientific evidence contradicts this claim. Indeed, much of the evidence suggests the opposite. The National Day Care Home Study conducted for the Department of Health and Human Services (HHS)[56] found no indication that unregulated

[54] Hofferth & Phillips, *supra* note 23, at 565.
[55] *Id.*
[56] NATIONAL DAY CARE HOME STUDY, *supra* note 35.

family day care was either harmful or dangerous. According to this study, family care is "stable, warm, and stimulating . . . [it] caters successfully to the developmentally appropriate needs of the children in care; parents who use family daycare report [that] it satisfactorily meets their child care needs."[57] The study's observers were consistently impressed by the care they saw regardless of its regulatory status.[58]

The typical unregulated family day care provider is a mother taking care of her own child as well as one or two other children from the neighborhood. The HHS study found that unregulated day care providers were more likely than licensed providers to comply with state regulations concerning adult/child ratios for children of different ages. According to the study, unregulated providers were governed by a "self-regulating mechanism" concerning the number of children in their care: mothers who cared for more children of their own took in fewer outside children.[59] The average adult/child ratio in unlicensed family care is far lower than in the most strictly regulated child care centers.[60]

The HHS study also found significant differences between regulated and unregulated family day care providers. Regulated providers were less likely to be caring for their own children, had more children under their care, and charged higher prices. These care providers clearly regarded day care as an occupation. In contrast, unregulated providers were primarily engaged in caring for their own children; they took in neighborhood children as a modest means of supplementing the family's income. Often, mothers providing unregulated child care in their homes began doing so at the request of neighbors and relatives, rather than on their own initiative.

According to the HHS study, unregulated family care providers have the following characteristics:

> —Over half of the parents with children in unregulated family day care had known the care giver six months or longer before placing their children in the provider's care.[61]
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> —One-third of parents with children in unregulated family day care state that they have a close personal friendship with

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[57] 1 *id.* at 124.
[58] 1 *id.* at 82.
[59] 2 *id.* at 133, 224.
[60] *Id.*
[61] 4 *id.* at table 6.49A.

> the care giver; another third regard the care giver as a casual friend.[62]
>
> —Over half of the children in unregulated family day care live within a few blocks of the care giver's home.[63]
>
> —Over three-fourths of parents state that their children have a "loving" relationship with the care giver, and twenty-two percent describe the relationship as "friendly."[64]

The HHS study further found that most users of unregulated family day care were satisfied with their child care arrangements; only seventeen percent of the parents stated that they would prefer to place their children in formal day care centers.[65] By comparison, a quarter of the parents with children in regulated family day care stated that they would prefer less formal care by relatives or non-relatives.[66]

The HHS study strongly contested the view that family day care, either regulated or unregulated, was largely "custodial."[67] Family care was found to contain a high level of teaching activities and interactive play; activities such as television viewing were infrequent.[68] Moreover, since unregulated home day care providers tended to have fewer children under their care, the average child in an unregulated home spent more time in direct interaction with adults than the average child in a regulated home.[69] Despite a lack of formal training of care givers, the average non-resident child in an unregulated home child care setting spent more time in constructive teaching and developmental activities with the care giver than did the average child in regulated family care.[70]

Further, unlicensed family day care poses a far lesser threat to children's health than does care in larger group care centers.

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[62] 4 *id.* at table 6.50A.
[63] 4 *id.* at table 6.8A.
[64] 4 *id.* at table 6.46A.
[65] 4 *id.* at table 5.32.
[66] *Id.*
[67] 2 *id.* at 380, table 11.2.
[68] *Id.*
[69] *Id.*
[70] The HHS study correctly noted that care givers in regulated family day care homes spent a greater percentage of their time in constructive interaction with the children in their care than did care givers in unregulated settings. But the care giver's time in a regulated home is divided among more children. The smaller number of children in unregulated homes allows each child in an unregulated home to spend more time in direct positive and developmental interaction with the care giver than an average child in regulated family day care facilities. For correlation coefficients measuring the behavior of individual children and the interactions of care givers with individual children, *see* 3 *id.* at D3–D108.

Researchers at the Centers for Disease Control have found that "large, licensed day care centers . . . are major transmission centers for hepatitis, severe diarrhea and other diseases."[71] Diseases contracted in large day care centers are passed on to parents and siblings; Dr. Stephen Hadler of the Centers for Disease Control estimates that fourteen percent of all infectious hepatitis cases in the United States are acquired through day care facilities.[72] Other "day care diseases" include *haemophilus influenzae* type b infection (which can cause meningitis, pneumonia, arthritis, and blood and skin infections)[73] and cytomegalovirus infection (which does not harm infected children but can be transmitted to pregnant women, resulting in birth defects in the unborn).[74]

Medical research demonstrates unequivocally that day care centers are a primary source of childhood meningitis. In their analysis of meningitis incidence in Monroe County, New York, Drs. Stephen Redmond and Michael Pichichero found that children under one year of age who were placed in day care had a 12.3 times greater chance of contracting a meningitis attack than children who remained at home.[75] For children one and two years old, attendance at a day care center increased the relative risk of contracting meningitis by 7.2 times, and for three- and four-year-olds, it was 3.8 times higher.[76] The Monroe County study found that nearly one percent of children under one in day care centers suffered a meningitis attack each year.[77] Based on the age-specific meningitis attack rates attributable to day care centers in the Redmond and Pichichero study, it is reasonable to conclude that the use of day care centers presently results in 3100 additional meningitis cases per annum nationwide.[78] Meningitis is fatal for approximately

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[71] Ricks, *Researchers Say Day-Care Centers Are Implicated in Spread of Disease*, Wall St. J., Sept. 5, 1984, at 35, col. 3.

[72] *Id.*

[73] Haskins & Kotch, *Day Care and Illness: Evidence, Costs, and Public Policy*, 77 PEDIATRICS 951, 961 (1986).

[74] *Id.* at 965.

[75] Redmond & Pichichero, *Haemophilus Influenzae Type b Disease: An Epidemiologic Study with Special Reference to Day-Care Centers*, 252 J. A.M.A. 2581, 2581–84 (1984).

[76] *Id.* at 2581.

[77] *Id.* at 2581–82.

[78] The Redmond and Pichichero research provides meningitis attack rates per 100,000 for children in day care at specific ages. It also provides meningitis attack rates per 100,000 non-day care children in the same age groups. Applying the net differences in attack rates per age group to the total number of children in each age category in day care centers nationwide yields an estimated total of 3100 meningitis cases per year

one-tenth of its victims; another third suffer long-term neurological damage.[79]

Large, regulated day care centers pose greater health risks than do smaller, generally unregulated facilities because they place more children in contact with each other, raising each child's risk of contracting infectious disease. In particular, the incidence of meningitis is directly proportional to the size of the day care center and decreases dramatically if there are fewer than three children in the day care setting.[80] The larger the day care center or the longer the hours, the greater the chance of contracting infectious disease.[81]

Ironically, the types of day care most likely to be cited as "in short supply"—infant care and part-time care—are the services most likely to be provided by small, unlicensed family care givers. But day care policies such as the ABC proposal would deny any assistance to parents who use informal neighborhood care.[82] Moreover, they would impose a tight web of government regulations, making it much more difficult for small care givers to operate. Such policies clearly would restrict, not expand, parents' child care options. At the same time, they would undermine the health of American children. These policies have nothing to do with the interests of parents and children; they reflect the narrow financial interests of the institutional day care industry.

MYTH #11: REGULATION HAS NO IMPACT ON THE COST OR SUPPLY OF DAY CARE

As a rule, states rather than the federal government have full responsibility for setting standards for primary and secondary schools. State and local authorities have long determined proper classroom size, teacher/pupil ratios, and teacher qualifications. However, although we apparently trust states to regulate

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attributable to day care centers. *See also* WHO'S MINDING THE KIDS?, *supra* note 4, at 5 (specific age breakdown of children in child care centers).

[79] Feldman, Ginsburg, McCracken, Allen, Ahmann, Graham & Graham, *Relation of Concentrations of Haemophilus Influenzae Type b in Cerebrospinal Fluid to Late Sequelae of Patients with Meningitis*, 100 J. PEDIATRICS 209, 209–19 (1982).

[80] Istre, Conner, Broome, Hightower & Hopkins, *Risk Factors for Primary Invasive Haemophilus Influenzae Disease: Increased Risk From Day Care Attendance and School-Aged Household Members*, 106 J. PEDIATRICS 190, 192 (1985).

[81] Ricks, *supra* note 71, at 35, col. 3.

[82] R. RECTOR, THE "ABC" CHILD CARE BILL, *supra* note 2, at 6–9.

schools, we are told that states must be pre-empted by the federal government when it comes to child care. The ABC proposal, for example, would impose federal day care regulations forcing half of the states to raise staff/child ratios in child care centers dramatically. The bill would also prevent states from easing their current day care regulations even if these regulations exceeded federal norms.[83]

While the ABC proposal allegedly intends to expand day care supply, the unavoidable fact is that stringent day care regulation raises care costs and restricts supply. The following chart shows the current relationship between day care regulation and day care supply in states across the nation.[84] Although advocates of stricter regulation vociferously deny this obvious relationship, it is clear that states with more stringent standards for staff/child ratios have less child care relative to their populations.

One study of the regulatory impact of the ABC proposal found that it would raise nationwide child care costs by $1.2 billion and result in the closing of roughly twenty percent of the day care centers in the United States.[85] Ironically, southern states, which have the largest supply of day care per capita, would be hardest hit. In these states, the increases in costs resulting from compliance with federal regulations would exceed the incoming federal subsidies from ABC.[86]

The perceived "shortage" of care is most severe in states such as Connecticut, where excessive regulation has caused day care costs to skyrocket.[87] There is an obvious and delicate trade-off between day care regulatory standards and the costs and availability of such care. For the most part, state legislators have grappled conscientiously with the issue for many years. Recently, however, federal legislators have proposed blanket federal regulation of the day care industry without even the most

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[83] ABC mandates that all states impose statewide staff/child ratios for day care centers equal at minimum to the national median required staff/child ratio extant at the time of the bill's passage. Thus, half the states would be required to raise their staff/child ratio standards. States with staff/child regulatory standards in excess of the national median, on the other hand, would be prohibited from ever reducing those standards. *Id.* at 8.

[84] The simple correlation coefficient of the two variables, regulated child/staff ratio and licensed day care slots per child in the state, was .51.

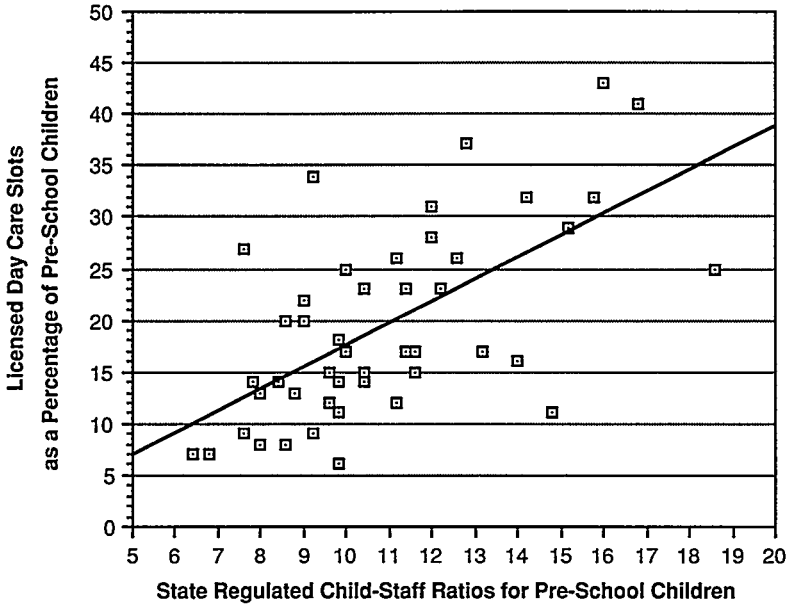
[85] Pierson, *The Impact of the Federal Regulations in the ABC Bill*, CHILD CARE REV., Apr.-May 1988, at 5, 5–8.

[86] *Id.*

[87] Staff costs comprise approximately half of the costs of operating a day care center. Thus, the price of day care rises dramatically when the required staff/child ratio and credential and educational standards for day care workers are raised through regulation.

Chart 2

Effect of Lower Child-Staff Ratios on Day Care Availability



The X-axis represents the average child-staff ratio for children aged one to five set by existing regulation within each state. The Y-axis represents the number of licensed day care slots within a state as a percentage of the number of children under age five within that state. Each dot on the graph shows the current day care situation within a particular state. The line on the graph was calculated by linear regression and shows the average mathematical relationship between the child-staff ratio dictated by state regulations and the number of day care slots available. Data used in the graph were derived from Pierson, *Are State Standards Too High for Child Care?*, CHILD CARE REV., Apr. 1987, at 6-12.

cursory analysis of the impact of their own proposals. The cavalier attitude of federal lawmakers simply demonstrates why there is a need for a legislative division of labor between various levels of government—and why regulatory issues of this sort should be kept at the state level.

MYTH #12: SHORTAGES OF DAY CARE CAUSE WELFARE DEPENDENCE

Day care advocates often argue that a shortage of affordable day care facilities keeps mothers on Aid to Families with Dependent Children (AFDC) from working. Again, the facts do not support the myth. AFDC mothers are already guaranteed day care payments of up to $160 per month per child[88] or the average cost of day care in their locality, whichever is higher.[89] Under the Family Support Act of 1988, in some states it is possible for an AFDC mother to work full-time at the minimum wage, to receive the full day care subsidy, and still to remain eligible for partial Medicaid and AFDC benefits.[90] A mother working at the minimum wage in such circumstances would have an income that exceeds the poverty level even after deducting for the cost of day care.[91]

But despite these provisions, few AFDC mothers work. The reasons for long-term welfare dependence are very complex.[92] The evidence shows, however, that shortages of day care centers and lack of funds to pay for care are not the major determining factors in welfare dependence.[93]

The data on AFDC mothers, day care, and employment from controlled experiments are striking. In Gary, Indiana, an income-maintenance experiment provided free, high-quality day care to AFDC mothers who wished to work or to attend school.[94] The experiment also subsidized day care for other low-income families. Yet, only fifteen percent of the eligible children

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[88] H.R. CONF. REP. No. 998, 100th Cong., 2d Sess. 215, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2878, 3003.

[89] Family Support Act of 1988, Pub. L. No. 100-485, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343 (to be codified in scattered sections of 42 U.S.C.).

[90] *Id.* at 2383–93. Among others, these states include California, Connecticut, Maine, Massachusetts, Michigan, New York, Washington, and Wisconsin.

[91] For example, in California in 1987 (the last year for which data are available), a mother of two children working full-time at the miminum wage and paying day care costs for one child would have a gross income of $13,063. This figure includes post-tax minimum wage earnings, AFDC benefits, the earned income tax credit, and the value of Medicaid benefits, Food Stamps, and school lunch subsidies for one child. After deducting $2000 for day care costs, the family's income would still exceed the official poverty threshold of $9056. All calculations are based on a family of three, the average size of an AFDC family. The same conclusions would be reached if the family spent $4000 on two children in day care. Data from a forthcoming Heritage Foundation Paper (on file with the author).

[92] L. MEAD, BEYOND ENTITLEMENT 73–76 (1986).

[93] *Id.* at 74.

[94] Woolsey, *Pied-Piper Politics and the Child Care Debate*, 106 DAEDALUS 135 (Spring 1977).

were enrolled at the program's height.[95] In similar experiments in Seattle and Denver, only three percent of non-working, low-income mothers cited day care as the reason they were not employed.[96] Despite the availability of heavy subsidies for day care, there was only a six percent increase in the use of licensed day care centers and homes by AFDC mothers during the course of the Seattle experiment.[97] No increase in use of licensed care by AFDC mothers occurred in Denver.[98]

A similar study shows that when day care arrangements are disrupted, low-income mothers are readily able to find alternatives.[99] When a South Carolina day care facility used by a number of low-income women closed, nearly all the women continued working and located new care for their children within a few days.[100]

A recent study of Arkansas workfare programs by the Manpower Demonstration Research Corporation (MDRC)[101] reinforces these conclusions. Over half of the AFDC mothers participating in the Arkansas experiment had children between the ages of three and six. The researchers found no evidence that a lack of day care prevented these women from participating in the highly successful workfare experiment.[102] Women in the Arkansas program were required to arrange for their own day care. Most mothers used, and seemed to prefer, informal care arrangements. Clarence V. Boyd, Manager of Work Programs for the state of Arkansas, stated: "We did not find that a lack of child care inhibited large numbers of AFDC recipients from participating in the program . . . . We tried to encourage mothers to make their own arrangements. The mother is best able to determine what care is most appropriate for her needs and the needs of her child."[103]

The evidence suggests that when AFDC mothers work, they prefer informal care arrangements, particularly with relatives.[104]

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[95] *Id.*
[96] *Id.* at 138.
[97] *Id.* at 135.
[98] *Id.*
[99] *Id.* at 138.
[100] *Id.*
[101] MANPOWER DEMONSTRATION RESEARCH CORP., ARKANSAS: FINAL REPORT ON THE WORK PROGRAM IN TWO COUNTIES (1985).
[102] *See id.* at 110.
[103] Interview with Clarence V. Boyd, Manager of Work Programs for the state of Arkansas, Little Rock, Ark. (Apr. 18, 1988).
[104] Woolsey, *supra* note 94, at 138.

AFDC mothers in the inner city generally have abundant and strong family networks in their neighborhoods; twenty percent of non-employed welfare mothers actually live in a household with another adult female.[105] These informal familial and kinship networks provide an ideal child care resource that can help families escape poverty and welfare dependence. Public policy must find ways to strengthen these networks instead of disparaging them, as most professional day care advocates do.

MYTH #13: DAY CARE AND RELIGION ARE INCOMPATIBLE

Under most day care subsidy schemes, funds would flow from the federal government to day care centers. But nearly one-third of today's day care centers are church-affiliated;[106] many include significant religious instruction in their programs. A very objectionable aspect of direct government subsidization of day care is its negative effect on religious day care centers. In order to maintain the separation of church and state, modern constitutional doctrine would require denial of government funds to any day care center that actively provided religious values to children through prayers, stories, and songs. Such centers would be forced either to purge all religious content from their programs, or to compete without subsidies against heavily-subsidized secular facilities. Many would be driven out of the market.

The negative impact on religious day care could be especially tragic in the inner city, where many parents prefer to raise their children in a religious environment. The churches of the inner city influence the lives of the young and play a crucial role in helping the disadvantaged escape from poverty and despair. One study shows that among today's inner-city black male teenagers, those with religious values are forty-seven percent less likely to drop out of school, fifty-four percent less likely to use drugs, and fifty percent less likely to engage in criminal activities than those without religious values.[107]

It is imperative for public policy not to make it more difficult for poor parents to place their children in religious day care if

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[105] L. Brush, Child Care Used by Working Women in the AFDC Population: An Analysis of the SIPP Data Base 24 (Oct. 15, 1987) (available at the Office of Planning & Evaluation, U.S. Dep't of Health & Human Services).

[106] Morehouse, *Markup of Child-Care Bill Slows as Disputes Develop*, CONG. Q., Aug. 6, 1988, at 2200.

[107] M. NOVAK, THE NEW CONSENSUS ON FAMILY AND WELFARE 34 (1987).

they wish to do so. Yet, the availability of religious day care would decrease under policies that provide direct federal grants to day care centers. Such policies would discriminate against parents who prefer religious care, since they would receive no assistance at all. On the other hand, a general tax credit policy for families with young children would avoid the constitutional problem, allowing some parents to use tax credit funds for religious care. Ironically, conservative proposals of tax credits to parents would also alleviate liberal concerns about direct federal funding of secularized activities of religious institutions.

MYTH #14: CONSERVATIVE TAX CREDIT PROPOSALS ARE A SEXIST PLOT

There is a frequent suspicion, especially among feminists, that behind the child care debate lurks a secret goal of the troglodyte right to keep American women "barefoot, pregnant, and in the kitchen." However, even within conservative ranks there is an almost universal recognition that women do and should play an ever larger and indispensable role throughout the economy and the professions. The conservative movement both in the United States and abroad boasts many brilliant and assertive female leaders.

The question at hand is not whether women should work, but whether women should have the right to step out of the work force temporarily to raise their children. The real question is not whether a woman's place is in the home, but whether a baby's place is in the home. We must ask whether government policy should actively discourage the home rearing of children. This question will be especially important to female blue-collar and service workers, who may find a few years at home with their infant children to be more rewarding than an unremitting "career" on the factory floor or behind the typewriter.

Today, a very large percentage of families follow a "sequencing" strategy of child rearing. Both partners work full-time up to the birth of their first child; then, the mother works either full- or part-time until the birth of the second child. With two preschoolers in the household, day care becomes far less feasible and desirable; the mother leaves the labor force, remaining at home to care for the two children. When the older child

reaches school age, the second child is placed in day care and the mother re-enters the labor force.

A "sequencing" family is most economically vulnerable when the mother is at home with two preschool children. Yet this is precisely the point at which most liberal day care proposals would deny all support to that family. Under conservative tax credit policies, on the other hand, the family will receive support throughout each stage of the sequencing process.

The conservative/liberal battle lines on the child care issue, however, are becoming blurred. In her recent book, *The Second Stage*, Betty Friedan urges "for some very simple aids that make it possible for mothers (or fathers) who want to stay at home and take care of their own children to do so, with some economic compensation that might make a difference."[108] The best way to enable more parents to do this is to reduce the present rapacious confiscation of family income by taxation.

OVERTAXATION: THE REAL PROBLEM FACING AMERICA'S FAMILIES

If the federal government really wants to help families with young children, it should re-focus its attention on the real problem facing families today, overtaxation. Government policy used to protect families with children from excessive taxation, recognizing that such families were the cornerstone of America's future. But that pro-family tax policy has long since disappeared.

In 1948, a family of four at median family income paid two percent of its income to the federal government in taxes. Today that same family pays roughly twenty-four percent.[109] This means, for example, that a family earning $30,000 per year pays between $7000 and $8000 in taxes to the federal government. The average federal tax burden, in fact, nearly equals the average share of the family income contributed by working mothers. Yet, as we know, most mothers state that they would prefer to stay home with their children, at least temporarily, if they thought they could afford to do so. In far too many cases,

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[108] B. FRIEDAN, THE SECOND STAGE 260 (1986).

[109] Tax rates presented in this Article include the income tax, the employee share of social security tax, and the employer share of social security tax. These taxes are generally recognized to be direct taxes on a parent's wages. The combined tax rates are reduced by the value of the earned income tax credit.

mothers with young children are forced to enter the work force to compensate for the loss of family income due to burgeoning tax rates.

Nor is this problem restricted to the middle class. Even low-income families face high tax burdens. A truck driver struggling to support a wife and two small children on $15,000 per year pays an astounding $2335 in federal taxes.[110] Often the government follows the enlightened policy of taxing low-income families back into poverty.

The growth of taxation to finance increasing government spending has affected families with children disproportionately. Between 1960 and 1984, the average income tax rate for singles and married couples without children did not increase; for a married couple with two children, however, it climbed forty-three percent.[111] For a family with four children, tax rates soared 233%.[112]

The primary cause of this growing anti-family distortion in the tax code has been the eroding value of the personal exemption. In 1948, a personal exemption of $600 equalled forty-two percent of the average personal per capita income of $1434.[113] However, over the next three and one-half decades incomes rose and inflation undermined the dollar's value, while the personal exemption lagged far behind. The tax reform legislation of 1986 finally did raise the value of the exemption to $2000,[114] but this increase only partially offsets the decline of the preceding thirty years. To have the same value relative to income as it had in 1948, today's personal exemption would have to be raised to $6468.[115]

In no small measure, the "Great Society" has been funded by an ever larger tax burden on families with children; we have taxed the future to finance the present. The growing use of day care, with its ancillary problems, by millions of families who would prefer other arrangements for their children is a direct consequence of the government's tax policy.

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[110] *See id.*

[111] Carlson, *What Happened to the "Family Wage"?*, PUB. INTEREST, Spring 1986, at 3, 11–12.

[112] *Id.*

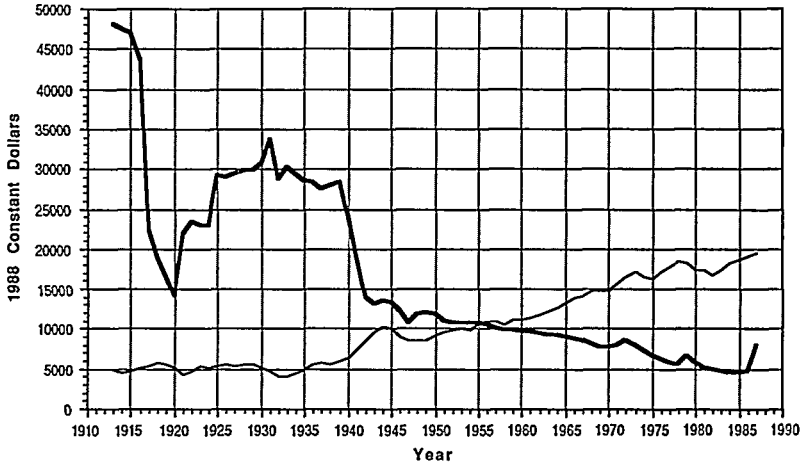
[113] R. Rector, THE AMERICAN FAMILY AND DAY-CARE, *supra* note 2, at 12.

[114] Tax Reform Act of 1986, Pub. L. No. 99-514 (codified at 26 U.S.C. § 151).

[115] R. RECTOR, THE AMERICAN FAMILY AND DAY-CARE, *supra* note 2, at 12.

Chart 3

Value of Personal Income Tax Exemption Measured in Constant Dollars



—— Dollar value of personal exemptions in the federal income tax for a family of four, in constant 1988 dollars.
—— Per capita gross national product, in constant 1988 dollars.

SOURCE: *See supra* notes 113-115 and accompanying text.

TAX CREDIT POLICIES: REAL HELP FOR AMERICAN FAMILIES

President Bush recently has proposed taking the first steps toward reducing the family tax burden by offering tax cuts to families with young children.[116] While the liberal ABC proposal offers day care subsidies to families earning up to $47,000,[117] conservative "toddler tax credit" proposals, such as those introduced by Senator Pete Domenici (R-N.M.)[118] and Representative Richard Schulze (R-Pa.),[119] focus initial assistance on low-income families. In general, the tax credit polices propose a $1000 tax cut per preschool child to families earning less than $20,000. Very-low-income families who pay little in taxes would receive equivalent cash assistance through an expanded earned

[116] The proposal was introduced in the House as The Working Family Child Care Assistance Act of 1989 by Representative Robert Michel (R-Ill.). H.R. 1466, 101st Cong., 1st Sess. (1989).

[117] *See* S. 1885, *supra* note 1; H.R. 3660, *supra* note 1.

[118] S. 159, 101st Cong., 1st Sess. (1989).

[119] H.R. 1448, 101st Cong., 1st Sess. (1989).

income tax credit.[120] The tax cuts would not be restricted to families using day care; parents would be free to use the funds as they choose.

Criticisms of the child tax credit proposals are based on misunderstanding. First, some argue that tax relief will do little to help low-income families since they do not pay taxes. But low income families do pay taxes: a family of three earning $12,000, for example, currently pays $1300 in combined federal taxes.[121] A child tax credit policy could provide significant cash assistance as well. Families would not have to wait for a tax refund at the end of the year; income and social security tax withholding from weekly pay checks can be reduced or eliminated, and government cash supplements can be provided through regular pay checks.[122]

Second, critics point out that families may use the money for purposes other than day care. Precisely! Many low-income families have far more urgent needs than day care. Indeed, many low-income traditional families actively resist the idea of placing their children in day care centers so that the mother may become employed. Yet, these families need immediate tax relief to sustain themselves on the modest wages of one parent. These families will use the $1000 tax credit appropriately to pay for food, shelter, clothing, and medical care.

Third, critics charge that tax credit proposals do not really provide for choice in child care, since $1000 per child would not enable the average mother to quit her job and remain at home with her children. The tax cut, however, may make it more

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[120] The current earned income tax credit provides a refundable tax credit of fourteen percent on earnings up to $7000. The credit is phased out for earnings above $10,000. COMM. ON WAYS AND MEANS, U.S. HOUSE OF REP., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS 796–801 (1989). Child tax credit advocates propose raising the earned income tax credit to 28% of earnings for families with one preschool child and 40% of earnings for families with two or more preschool children. *See, e.g.*, H.R. 1448, 101st Cong., 1st Sess. (1989).

[121] *See supra* note 109.

[122] Families would not need to wait until the end of the tax year to receive the credit, since it would be refundable against income taxes as well as employee and employer social security taxes. Withholding of these three taxes from parents' pay checks would be reduced or eliminated according to the credit owed, resulting in immediate increases in families' weekly net incomes. (The child tax credit proposals do provide, however, that parents would continue to receive full credit toward retirement under the social security system even though their payments decreased.) Cash payments would be made to families whose total tax liability fell short of the value of the expanded earned income tax credit. These payments would be available on a monthly or weekly basis through employers' pay checks, using the same procedures as the current earned income tax credit.

attractive for many mothers earning low wages to remain at home, since net gain from employment for such women may be relatively low after deducting day care costs and other work-related expenses. The tax cut might provide other mothers with the choice of working less and of spending more time with their children. Equally important, the tax credit would give desperately needed tax relief to hundreds of thousands of low-income traditional families—families who struggle to keep their heads above water on one salary while the mother remains at home to care for young children.

Finally, critics contend that a $1000 tax cut per child is not sufficient to pay for the cost of full-time day care in a formal day care center, since such centers average about $3000 per year.[123] But this criticism ignores the $1.5 billion in day care subsidies already provided to low-income families by the federal government through existing programs.[124] Combined with the $1000 per child tax credit, these funds should be sufficient to pay for the full cost of day care for preschool children of low-income families.[125]

CONCLUSION

It is impossible to ignore the trendiness in the current child care debate. It appears that our society can accept only one stereotype of women at a time. In the 1950's, all mothers were supposed to be at home, baking cookies. In the 1980's, all mothers are supposed to have degrees in biochemistry; they are supposed to work full-time from their early twenties until they retire. When they have a child, mothers of the 1980's are supposed to stay with the baby a few weeks, then deposit it in a day care center for forty or more hours each week and get back to things that are really important.

But most mothers today do not fit either this or any other stereotype, nor do they want to. We need a more humane model for helping families with young children meet their needs. We also need a more humane model for helping women integrate careers and motherhood over their lifetimes. That model should

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[123] Interview with Dr. Sandra Hofferth, *supra* note 25.
[124] *See generally* A WORKFORCE ISSUE, *supra* note 26.
[125] *See* R. RECTOR, THE "ABC" CHILD CARE BILL, *supra* note 2.

be rooted in parental choice, not in a one-dimensional policy of subsidizing day care centers.

Much of the political momentum behind the current child care debate stems from the fact that conventional wisdom on this issue is completely inaccurate. Traditional parental care for children has not disappeared; it remains the most common form of preschool care and is overwhelmingly preferred by American parents. Families practicing traditional parental care are not more affluent than the rest of society; in fact, large numbers of very-low-income families follow the traditional pattern.

Lobbying interests in Washington would like to convince us that day care centers are the wave of the future. But use of these centers is far from prevalent. Employed mothers exercise a wide range of child care options, including care by neighbors and relatives. Such informal arrangements provide not only high quality care, but in many respects are healthier for children than large, institutional day care centers. Finally, there is no evidence of market failure or structural bottlenecks in the day care industry that justifies direct government funding of a "day care infrastructure."

At the same time, the basic economic reality underlying much of the child care controversy remains largely unrecognized. Among American households, families with young children have the lowest per capita incomes; yet these families face extremely high tax burdens. Federal taxation on families with children has grown 1200% over the last generation.[126] The key to helping families does not lie in taxing them further while offering them another round of "free" benefits. The solution is to allow families to keep more of their own earnings.

At heart this is a matter of human freedom. The central question is not "who shall care for the children?" Rather, we must ask who will *decide* who shall care for the children. Parents, not bureaucrats, know best how to use their money to meet family needs. Parents, and not political elites, should determine how to raise their children.

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[126] *See supra* text accompanying note 109.

THE ESTABLISHMENT AND FREE EXERCISE CLAUSES OF THE FIRST AMENDMENT AND THEIR IMPACT ON NATIONAL CHILD CARE LEGISLATION

LEE BOOTHBY*

Churches are major providers of child care, and no discussion of child care legislation can ignore this fact. Because churches are so involved in child day care, there are those who want to pour federal dollars into these church-operated programs as part of a comprehensive federal child care initiative. Not only would such a scheme provide tax-derived assistance to religious ministries, but it would also embroil the government in regulation of church activities, thus triggering both establishment and free exercise concerns.

I. ESTABLISHMENT CLAUSE PROBLEMS

A. *Act for Better Child Care Services*

During the 100th session of Congress, legislation known as the Act for Better Child Care Services ("ABC Act") of 1987[1] was proposed. This bill was fraught with substantial church-state hazards which illustrate the many First Amendment problems that may arise from child care legislation. The Act was designed to funnel huge sums of federal dollars to both secular and sectarian child care organizations. The bill proposed substantial federal regulatory provisions which would govern all child care providers throughout the country, including churches.

The ABC Act involved day care for children through the age of fifteen and included programs not only for toddlers and preschoolers but also for school-aged children. The act "include[d] opportunities [for the child] to participate in study-skill sessions, counseling and guidance, in addition to recreational activities."[2] The proposed legislation mandated that grants be made available

* General counsel for Americans United for Separation of Church and State; J.D., Wayne State University, 1957.

[1] H.R. 3660, 100th Cong., 1st Sess. (1987).

[2] H.R. 3660, § 3-13(c).

to *all child care programs* including preschool programs having a definite educational component.

The constitutionality of such a bill is certainly questionable. The First Amendment concerns that accompany federal funding of parochial school education are also present here, as education is a major facet of modern child care.

B. *Church-Affiliated Child Care Providers*

A study sponsored by the National Council of Churches (NCC),[3] listed a number of reasons why local parishes of member churches elected to become involved in the provision of child care services. These included the desire to provide Christian education, pastoral care, and an aspect of evangelism. The parishes were also prompted by the desire to utilize their financial resources for child care as an element of stewardship, community service, and social justice.[4] This amalgam of religious and secular motivations often leads to a prominent role for religion in the day care service these organizations provide.[5] Proponents of federal aid for church-affiliated child care services have attempted to distinguish between government aid to church-affiliated elementary and secondary schools and federal aid to church-affiliated day care programs. However, no valid distinction exists between the two. Both have specific educational components, involve teaching and counseling students of young and tender years, use church-hired personnel, and have

[3] E. LINDNER, M. MATTIS, & J. ROGERS, WHEN CHURCHES MIND THE CHILDREN—A STUDY OF DAY CARE AND LOCAL PARISHES 20–21 (1983). This study was restricted to the parishes of fifteen of the National Council of Churches member denominations or communions that elected to participate in the research. *Id.* at 11. It did not, for example, include day care programs operated by churches affiliated with the Southern Baptist Convention, the Roman Catholic Church, the Jewish Social Welfare institutions, or the numerous fundamentalist churches that operate child care programs as part of the Christian school movement. Even within participating demominations, a low response rate among parishes to the initial questionnaire makes generalization difficult. *Id.* at 12.

[4] *Id.*

[5] The NCC study made repeated reference to the religious aspect of many church sponsored day care programs. The study noted that often "spiritual development will be central to the program." *Id.* at 20. Indeed, many programs even use day care inculcation of children as a means of recruiting entire families: "some programs of child care are viewed within a larger context of evangelism or proclamation of the Christian faith to those outside the congregation. *Thus child care programs may be seen as a way of expanding the fellowship of the parish and ultimately increasing the membership.*" *Id.* (emphasis added).

some religious purpose. In sum, both involve the ministry of the church.

Churches have espoused this position in a number of current court cases. In *City of Richmond Heights, Missouri v. Richmond Heights Presbyterian Church*,[6] the City of Richmond Heights refused to allow a church-sponsored day care center to operate in an area zoned for religious activity. The church contested the city's administrative decision, claiming that

> [t]he operation of the day-care center fell within the mission of the Presbytery to preach the Gospel, to serve the community in the name of Christ, and to provide aid and support to the various churches insofar as fulfilling these aims and goals . . . . [T]he purpose of the day-care center is to offer a sound Christian environment for the children of Richmond Heights and the surrounding areas by developing a program that is based and founded on the Christian faith and by offering a foundation for love and warmth and a search for Christ.[7]

Similar views of religion's role in church sponsored preschool were offered by the Roman Catholic Archdiocese of St. Louis in an *amicus* brief supporting the Presbyterian Church:

> The Archdiocese consists of 245 parishes, most of which have an elementary school on the premises or in the same building with the Church, and some of which have parish day care centers located in the parish buildings. *The basic theology and philosophy on which the policies regarding the care and education of children entrusted to the Archdiocesan schools and day care centers are the same.*[8]

A second case involving a church-run day care program also demonstrates the religious character of church-operated day care centers. *Michigan v. Emmanuel Baptist Pre-school*[9] turns

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[6] No. 52589 (Mo. Ct. App. June 14, 1988) (1988 Mo. App. LEXIS 849), *aff'd on other grounds*, No. 70819 (Mo. Feb. 14, 1989) (1989 Mo. LEXIS 4) (not final until expiration of rehearing period). The Missouri Court of Appeals held in favor of the Richmond Heights Presbyterian Church. After acknowledging that "the day care center has a religious, not secular, purpose," No. 52589 (1988 Mo. App. LEXIS 849, 851), the court held:

> The operation of a day care center on the Church's property is well within the ambit of religious activity and falls within the penumbra of the First Amendment rights of free exercise of religion. The trial court erred in determining that the operation of the day care center was not an activity which fell within "the exercise of the fundamental freedom of religious worship."

Id. at LEXIS 849, 857.

[7] Appellant's Brief at 6, *City of Richmond Heights*, (citing trial transcript 103–04).

[8] *Amicus* brief of the Roman Catholic Archdiocese of St. Louis at 1.

[9] No. 79024 (Mich. 1987).

on the constitutionality of state licensing of a child care center operated by a fundamentalist Baptist Church. Alfred Jenney, President of the American Association of Christian Schools, testified in this case that most schools operated by fundamentalist churches also operated preschool programs. According to Jenney:

> As far as the way we look at it . . . it's all just school whether it be two-year-old children or twelfth grade children. It's all just school. We don't look at it and say now, do you have a high school, a junior high school, a grammar school, a kindergarten, a day-care facility, because it's all an educational operation and it's all school to us.[10]

Jenney further indicated that he considered the operation of the Christian school, including day care, nursery or preschool programs, to be a part of the ministry of the church and concluded that for this reason the state could not claim any right to license the day care program.[11]

In sum, a substantial number of church-affiliated day care programs have a distinct religious, and sometimes sectarian, purpose for their existence.[12] It is also clear that the sponsors of church-affiliated day care centers consider the educational components underlying their programs to be indistinguishable from those introduced in parochial elementary school classes.

C. *"No Aid" Proscription of Establishment Clause*

The inherent religious aspect of church-sponsored child care creates constitutional barriers for federal funding. Child care programs operated by church organizations can not be funded by tax-derived dollars without a resultant violation of the "no aid" prohibition found in the Establishment Clause of the First Amendment.

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[10] *Id.*, trial transcript at 10–11.

[11] *Id.*, trial transcript at 60.

[12] This trend is not limited to traditional Western religions. In February 1988, the Rev. Sun Myung Moon's Unification Church, in its publication Unification News, announced the opening by that church of a child care center in New York. According to the article, "the Center's goal is to help all young blessed children to establish the right kind of foundation to attend Heavenly Father before they start going to public schools." *Jin-A Child Care Center opens in New Jersey*, Unification News, February, 1988, at 1. The article indicated that the children "are to be cared for as sons and daughters of God." *Id.*

In an apparent attempt to circumvent these constitutional restrictions, the authors of the 1987 ABC Act proposed distributing federal vouchers to parents so that they could purchase child care services from either secular or sectarian child care agencies. However, providing aid to the parents rather than directly to the churches cannot save the program's constitutionality.

Government funding of religious inculcation is strictly prohibited by the Constitution. As the Court stated in *Grand Rapids School District v. Ball*,[13] "the [Establishment] Clause absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith . . . . [T]he state is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination."[14]

The ban is one of substance, not merely form. Funneling aid through parents, instead of directly to the religious organizations, would not pass constitutional muster. Noting that such subterfuge had been present in two previous cases, the Court stated: "Nonetheless, these differences in form were insufficient to save programs whose effect was indistinguishable from that of a direct subsidy to the religious school."[15]

The Supreme Court also upheld an absolute prohibition on federal funding of religious indoctrination in *Bowen v. Kendrick*,[16] a case which determined the constitutionality of the Adolescent Family Life Act.[17] Chief Justice Rehnquist, writing for the majority, repeatedly distinguished between "church affiliated" institutions and "pervasively sectarian" institutions.[18] The *Kendrick* majority stated:

> Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions

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[13] 473 U.S. 373 (1985).

[14] *Id.* at 385 (citing Levitt v. Comm. for Public Educ. and Religious Liberty, 413 U.S. 472, 480 (1973)).

[15] Grand Rapids School Dist., 473 U.S. at 385.

[16] 108 S.Ct. 2562 (1988).

[17] 42 U.S.C. § 300(z) (Supp. III 1982). This so-called "Chastity Act" provides federal funding of church-affiliated programs which combat teenage sex and pregnancy.

[18] "Pervasively sectarian" institutions are recipient church-operated elementary and secondary schools such as those involved in Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985). Both Lemon v. Kurtzman, 403 U.S. 602 (1971), and Tilton v. Richardson, 403 U.S. 672 (1971), decided concurrently, suggest that church-affiliated elementary and secondary schools would normally be viewed by the Court as "pervasively sectarian," but church-related colleges and universities would not.

> does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are "pervasively sectarian." . . . The reason for this is that there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's "religious mission." . . . Accordingly, *a relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions.* In *Grand Rapids School District*, for example, the Court began its "effects" inquiry with "a consideration of the nature of the institutions in which the [challenged] programs operate."[19]

It is clear that government sponsorship of programs operating within "pervasively sectarian" institutions can itself be determinative of an unconstitutional advancement of religion. In *Meek v. Pittenger*,[20] the Court stated that "the direct loan of instructional materials and equipment . . . has the unconstitutional primary effect of establishing religion because of the predominantly religious character of the schools benefiting from the Act . . . ."[21] In *Hunt v. McNair*,[22] the Court ruled that even when aid earmarked for secular purposes flows to institutions where a "substantial portion of its functions are subsumed in the religious mission,"[23] such aid has the impermissible effect of advancing religion.

In addition to the nature of the institution, the type of government-sponsored activity that the statute contemplates may also be important in determining the constitutionality of a statute that on its face allows for the involvement of a religious organization in a government program. The Supreme Court has considered a number of factors in determining whether a sponsored activity is the type that creates an impermissible risk of inculcating religion.

The first concerns whether the state has involved religious organizations in ideological activities that are related to the religion-oriented function of the organization. Thus, in *Meek v.*

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[19] *Kendrick* at 2574–75 (emphasis added).
[20] 421 U.S. 349 (1975).
[21] *Id.* at 363.
[22] 413 U.S. 734 (1973).
[23] Id. at 743.

Pittenger,[24] the Court indicated its concern over teaching which involved religious values and beliefs because teaching provides an opportunity for the actor to transmit ideological views. The Court in that case suggested that in a sectarian school "the teaching process, to a large extent, is devoted to the inculcation of religious values and beliefs." In a subsequent case, *Wolman v. Walter*,[25] the Court indicated its concern that a therapist's relationship with a pupil provided "opportunities to transmit ideological views" which created the danger of advancing religion.[26]

The Court has also considered whether religious or secular authorities control those involved in the sponsoring activity. In *Lemon v. Kurtzman*,[27] the Court indicated that it could not "ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education."[28] On the other hand, the Court in *Meek* recognized that in the case of an auxiliary services program where the personnel were not employed by the nonpublic schools, they were "not directly subject to the discipline of a religious authority."[29]

Another relevant factor is the relationship between those carrying out the program and the recipients of the program. The Court has noted that the relationship between counselor and student provides an opportunity for the transmission of sectarian views beyond that provided in the constitutionally permissible relationship between diagnostician and the pupil.

Clearly, the relationship between a day care worker and a preschool child presents the opportunity for just the type of relationship where the caregiver will not only impart the caregiver's own personal values and those of the sponsoring religious organization but will also provide a ready role model for the child to emulate. Such identification of religious day care workers with impressionable children raises constitutional problems when the relationship is subsidized with tax dollars. The Supreme Court in *Edwards v. Aguillard*,[30] struck down the Louisiana Creation-Science and Evolution-Science in Public School

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[24] 421 U.S. at 366.
[25] 433 U.S. 229 (1977).
[26] *Id.* at 247–49.
[27] 403 U.S. 602 (1971).
[28] *Id.* at 617.
[29] 421 U.S. at 371.
[30] ____ U.S. ____, 107 S.Ct. 2573 (1987).

Instruction Act. The Court noted the potential, at elementary and secondary school levels, for the undue influence of teachers on children "because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."[31] In *Meek v. Pittenger*,[32] the Supreme Court held unconstitutional a portion of a Pennsylvania statute that authorized certain auxiliary services, including "remedial and accelerated instruction, guidance counseling and testing, speech and hearing services,"[33] on nonpublic premises. The Court observed that the teacher or guidance counselor might "fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities."[34]

No logical argument exists for prohibiting the use of tax funds in the church-operated elementary school while allowing subsidies for church-run child care programs. Indeed, a stronger argument can be made against the federal funding of a child care program since there is usually a much closer relationship between the caregiver and the child, a lower child-teacher ratio, and a greater susceptibility for the child seeking to emulate the teacher as a role model.

D. *Government Entanglement with and Intrusion into Church Affairs*

When government subsidizes an activity such as counseling or teaching, it must be certain, in light of the Religion Clauses, that subsidized counselors or teachers do not inculcate religion.[35] Some may argue that not all child care programs affiliated with church organizations are pervasively sectarian or religious. The trouble with this argument, however, is that this places the responsibility on the government to determine, on a continuing basis, a given program's degree of religiosity. This itself creates a substantial constitutional problem. As the Court said in *Lemon v. Kurtzman*:[36]

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to insure that . . . the

[31] *Id.* at 2577.
[32] 421 U.S. 349 (1975).
[33] *Id.* at 367.
[34] 421 U.S. at 371.
[35] *See id.*
[36] 403 U.S. 602 (1971).

> First Amendment . . . [is] respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.[37]

The Supreme Court has recognized the First Amendment problems implicit in a case-by-case determination of an institution's religiosity. In *New York v. Cathedral Academy*,[38] the Court assessed a statute that required "a detailed audit in the Court of Claims to establish whether or not the amounts claimed [by the nonpublic school] for mandated services constitute a furtherance of the religious purposes of the claimant."[39] The Court continued:

> [T]his sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claim for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.
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> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once . . . .[40]

In *Aguilar v. Felton*,[41] the Supreme Court described Establishment Clause problems resulting from state agents making judgments concerning "matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations" as both potentially politically divisive and

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[37] *Id.* at 619.
[38] 434 U.S. 125 (1977).
[39] *Id.* at 131–32 (citations omitted).
[40] 434 U.S. at 132–33.
[41] 473 U.S. 402 (1985).

"rais[ing] more than an imagined specter of governmental 'secularization of a creed.'"[42]

Churches contemplating the receipt of federal funds to operate their church-ordained child care ministry should heed the warning of Justice Douglas, who said: "Once these schools become federally funded they become bound by federal standards . . . . That kind of surveillance and control will certainly be obnoxious to the church authorities and if done will radically change the character of parochial schools."[43] Even if an institution is not believed to be a pervasively sectarian institution and falls within a generic "church-affiliated" classification, there is no promise that such a child care program would not be subject to the continuing surveillance of a governmental agency. To the extent that the operators of a church-affiliated child care facility claim that their program is not pervasively sectarian, there would be less of a constitutional basis for the church to oppose government intrusion into its child care program and incursion into its operations.

II. Free Exercise Problems

A. *State Regulation of Church Educational and Child Care Ministries*

Federal funding of religious indoctrination is not the only constitutional difficulty posed by current child care proposals. State regulation of churches, necessitated by such schemes, presents other First Amendment concerns. The proposed ABC Act stated that "all providers of child care assisted under the Act . . . shall be subject to the most comprehensive licensing requirements or regulatory standards made applicable by the State to other providers delivering child care services under the same or similar types of child care arrangements."[44] Moreover,

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[42] *Id.* at 414. A voucher arrangement such as was contained in the ABC Bill cannot be viewed as a device which will free a church from government supervision and control. In Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), a federal district court held that the mere fact that students attending Bob Jones University were receiving federal assistance through the operations of the Veterans Educational Benefit Statute was sufficient to give the government control over certain policies of that institution, even though it conflicted with the school's claimed free exercise rights.

[43] Tilton v. Richardson, 403 U.S. 672, 693–94 (1971) (Douglas, J., dissenting).

[44] H.R. 3660, § 7(c)(3)(A).

the ABC Act required the establishment of a national committee to write standards for child care. These two provisions would literally sound the death knell of state-legislated exemptions and exceptions provided for church-operated child care programs. A recent decision of the Fourth Circuit Court of Appeals referred to such an exemption in Virginia. In *Forest Hills Early Learning Center v. Grace Baptist Church*[45] the court observed:

> The potential for just the sorts of burdens the Court is concerned with is very clear in the present case. Absent the exemption, some church leaders would immediately be forced to violate their convictions against submitting aspects of their ministries to state licensing, or face legal action by the state. This would be an unseemly clash of church and state which the legislature might well wish to avoid.[46]

The *Kendrick* decision[47] will also impact in other ways on religious organizations that provide child care services with the aid of federal funds. Hundreds of lawsuits may be filed across the nation claiming that specific church-operated day care programs are, in fact, "pervasively sectarian." The threat of such actions, coupled with the corresponding desire to receive federal funding, may well pressure religious organizations to secularize their child care programs contrary to the desires of their members.

Church organizations that have over the years united together to fight government intrusion into their religious affairs may, in fact, find all their efforts undermined once they receive federal dollars to operate their child care programs.[48] Public funding may well produce additional government attempts to regulate religiously-affiliated day care programs and their staffs.

Just such an expansion of government regulation followed the NLRB's assertion of jurisdiction over the Head Start and day care centers operated by the Lutheran Welfare Services of Illinois in 1975: "[W]ithin days of the *Lutheran Welfare Services* decision . . . petitions were filed requesting that the Board assert jurisdiction and conduct elections among the employees of vir-

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[45] 846 F.2d 260 (4th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3469 (U.S. Jan. 17, 1989).
[46] *Id.* at 263.
[47] *See supra* notes 16–19 and accompanying text.
[48] The Catholic Church, for example, properly fought an attempt by the National Labor Relations Board to involve itself in the staffing of Catholic elementary and secondary schools in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

tually every Head Start and day care center operated by a nonprofit entity in the Chicago area."[49]

Churches electing to receive government funds to operate such programs should expect various governmental agencies to exercise their authority over these activities. Church-operated day care centers would have a difficult time making a First Amendment argument against the NLRB's claim of jurisdiction over their child care staffs if the centers receive the benefits of the proposed federal child care legislation.

III. Legislative Suggestions

The two previous sections demonstrate that federal funding of sectarian day care programs clearly offends the First Amendment to the United States Constitution. As a practical matter, it is impossible for government to determine the degree of religiosity of the various church-affiliated day care programs. Even if the government could, such a determination would entail an intolerable government intrusion into church affairs. Any program funneling tax-derived funds to church-operated day care centers could, and probably would, result in bureaucratic agents policing the administration of the programs.

Legislative efforts to address parental needs for child care assistance must be accompanied by carefully crafted prohibitions and limitations regarding federal funding of sectarian child care services. An ill-conceived statute would raise First Amendment difficulties and serve to deepen the already existing crisis in child care, jeopardizing the possibility of a sound national program. However, by utilizing the following guidelines, it may be possible to construct a statute that will avoid First Amendment concerns while still allowing community-minded religious organizations to contribute to the solution of the child care problem.

Any national child care legislation should provide certain very specific and carefully worded restrictions which, depending on the details of the legislation, might include the following:

(1) A prohibition against the use of federal funds "for any sectarian purposes or activities" with this phrase defined to mean any program or activity that has the purpose or effect of

[49] Serritella, *The National Labor Relations Board and Nonprofit Charitable, Educational, and Religious Institutions*, 21 Cath. Law. 322, 328 (1975).

advancing or promoting a particular religion or religion generally.

(2) A prohibition against the payment of any federal funds to any sectarian organization, with the additional specific requirement that if the recipient organization is sponsored by, affiliated with, or generally identified with a religious or ecclesiastical organization, that it be separately incorporated and that its governing board operate as a separate and distinct secular entity.[50]

(3) A requirement that federal funds be used only to provide child care services at "religiously neutral sites." The term "religiously neutral site" should be defined as a facility which is neither educationally nor physically identified with a pervasively religious institution or facility such as a church, synagogue, temple, or an elementary or secondary school sponsored by or affiliated with a religious or ecclesiastical organization. It also should be made clear that those facilities must be completely free of religious symbols and artifacts.

(4) A requirement that the control of any congressionally appropriated funds, as well as title to materials, equipment, and property repaired, remodeled, or constructed from such funds, shall be in a designated public agency and that such public agency shall administer such funds and property consistent with the provisions of the legislation.

(5) A requirement that all services provided shall be by employees of a public agency or through contract by such agency with a person, association, agency, or corporation who, or which, in providing such services, is a nonsectarian organization, and further that such employment or contract be under the control or supervision of such public agency.

(6) A prohibition against any public agency entering into a contract with a child care provider or paying over any funds to a child care provider if that child care provider engages in any employment discrimination prohibited by Title VII of the Civil Rights Act of 1964[51] (notwithstanding the exemption in section

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[50] By creating separate legal entities, constitutional entanglement problems will be substantially diminished. By segregating the church organization from a separately incorporated child care program operated in a religiously-neutral setting, governmental agencies would be able to monitor the program on-site and review and audit the internal books and records of the child care agency without involving the church and its internal affairs.

[51] 42 U.S.C. § 2000e–2000h.

703 of such Act)[52] or discriminates in employment on the basis of handicap.[53]

(7) A requirement that any recipient of funds, including a child care provider, execute written assurances that it will maintain a religiously neutral setting and that it will not provide any religious teaching or conduct any religious exercises as part of its program. Additionally, the legislation should direct federal, state, and local agencies which have authority to award such funds to enforce this provision and to investigate any claimed violations of these provisions upon written notification from any resident of the community or area served by the recipient.

(8) A provision that any recipient of federal funds also make written assurances that it will not engage in any discrimination based upon race, religion, color, national origin, sex, or handicap condition in: (a) hiring, promotion, assignment, or termination of employees of child care providers or other personnel for whom the child care provider has any administrative responsibility, or (b) the admission decisions, fees and disciplining of any child receiving child care services. Any federal, state, or local agency which has authority to award such funds or contract with any recipient shall be required to enforce this provision, and such agency shall be further required to investigate any claimed violations of provisions upon written notification by any individual claiming to have been so discriminated against by the provider.

(9) An authorization for any federal taxpayer or any other person or persons who are members of the class intended to be protected by the written assurances, and who reside within the community or area served by recipient, providing a written assurance required under the Act to maintain an action in federal court so as to seek injunctive relief which may include the termination of the payment of funds to the recipient or other remedial relief.[54]

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[52] 42 U.S.C. § 2000e-2(e).

[53] In Lemon v. Kurtzman, 403 U.S. 602 (1971), Justice White wrote that the cases at issue were:

> decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instructions in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.

Id. at 671 n.2 (White, J., concurring).

[54] The misuse of tax-derived funds to aid sectarian education, as contrasted with

(10) A provision for the award of actual attorneys fees by the court to any successful litigant in any court action against a recipient because of the violation of any assurances given by the recipient.

In drafting child care legislation, consideration might be given to the granting of additional income tax exemptions over and above those exemptions now provided a taxpayer for dependents for each preschool age child. If considered, such additional exemptions should take into consideration the additional expense or loss of income that results when parents have children for whom some day care is provided, whether by parent or outside provider. Consideration should also be given to tax incentives for those employers that provide child care assistance to their employees.

Establishment Clause violations which occur within a government-operated facility, generates special and difficult problems regarding the enforcement of the proscriptions of the Establishment Clause. For example, it may be expected that Establishment Clause violations occurring within an early childhood education program operated by a public school would be detected and rooted out by parents or elected school board officials. On the other hand, parents of children enrolled in a church-operated facility or members of the board of that institution can only be expected to be sympathetic to a religiously-permeated program. Only rigorous review of such programs will prevent such abuses.

PARTICIPATION OF RELIGIOUS PROVIDERS IN FEDERAL CHILD CARE LEGISLATION: UNRESTRICTED VOUCHERS ARE A CONSTITUTIONAL ALTERNATIVE

JOHN A. LIEKWEG*

Child care will be a major issue in the 101st Congress, and federal treatment of religiously-sponsored child care will be an important subsidiary concern. Should such child care be subsidized, and if so, must it be completely secularized? This Article demonstrates that the Establishment Clause of the First Amendment does not require either the exclusion of services provided by religious organizations from federal child care legislation or the secularization of these services. Indeed, good public policy dictates the inclusion of such services in any new federal initiative in this important area.

Prohibition or discouragement of participation of religious organizations in federally-funded child care programs will decrease the availability of child care services. The impact will be especially acute for low and moderate-income families. Good public policy calls for legislation that provides real choice for parents; they must be able to exercise their constitutionally protected right to select the type of child care they deem most appropriate for their children. That choice should include religiously-oriented services provided by religious organizations.

Exclusion or discouragement of religious providers from federal programs will not solve the issue of separation of church and state; rather, we must find constitutionally permissible ways to utilize the much needed and valuable services that these organizations can provide. Unrestricted vouchers or certificates that parents may use to pay for child care of their choice provide such a constitutionally permissible alternative.

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* Associate general counsel, United States Catholic Conference. B.A., University of Maryland, 1969; J.D., University of Maryland School of Law, 1974. The views presented in this Article are those of the author and are not intended to reflect any position of his employer.

CHILD CARE LEGISLATION: CURRENT EFFORTS

The Act for Better Child Care Services of 1989[1] (ABC) was introduced by Senator Christopher Dodd (D-Conn.) on January 25, 1989. Section 2 of the Findings and Purposes of the Act states that "a significant number of parents do not have a real choice as they seek adequate child care for their young children."[2] The bill seeks "to promote the availability and diversity of quality child care services [and] to expand child care options available to all families who need such services."[3] This last point is significant. Too often in the heat of the church-state debate, one of the most important purposes of child care legislation—enhancement of real parental choice in decisions concerning the most appropriate care for children—is overlooked. The Supreme Court has long recognized that a "child is not the mere creature of the state," and that parents have a fundamental, constitutionally protected right to direct the upbringing of their children.[4]

CHILD CARE AND THE ESTABLISHMENT CLAUSE

Federal legislation should respect the rights of parents to choose child care services, including services from religious providers. The Supreme Court has never held that religious organizations must be excluded from all government programs that provide direct or indirect financial assistance or relief. On the contrary, in 1988 the Court held that the Establishment Clause does not bar Congress from deciding that religious or-

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[1] S. 5, 101st Cong., 1st Sess., 135 CONG. REC. S191–200 (daily ed. Jan. 25, 1989) [hereinafter ABC bill]. A similar version was also introduced in the House. H.R. 30, 101st Cong., 1st Sess., 135 CONG. REC. HR37 (daily ed. Jan. 3, 1989).

[2] ABC bill, § 2(a)(5). While the ABC bill was prominent in the 100th Congress, the purpose of this Article is not to suggest specific amendments to any particular bill. Instead, the church-state discussion must be more generalized, since several child care bills will receive serious consideration in the 101st Congress. In addition to the ABC bill, which has already been introduced in both the House and Senate, Chairman Augustus Hawkins (D-Cal.) of the House Education and Labor Committee has introduced his own bill, the Child Development and Education Act of 1989. H.R. 3, 101st Cong., 1st Sess., 135 Cong. Rec. HR 36 (daily ed. Jan. 3, 1989). Other bills, including a proposal announced by President Bush in February 1989, and introduced in the House as The Working Family Child Care Assistance Act of 1989 by Representative Robert Michel (R-Ill.), focus on a tax approach. H.R. 1466, 101st Cong., 1st Sess., 135 CONG. REC. HR708 (daily ed. Mar. 16, 1989). The constitutional implications of any of these bills will, of course, depend on their particular provisions. For example, tax benefits may present different constitutional considerations than direct cash grants.

[3] ABC bill, § 2(b)(2).

[4] Pierce v. Society of the Sisters, 268 U.S. 510, 535 (1925).

ganizations, along with others, may play an important role in resolving secular problems.[5] The First Amendment requires neutrality among religions, not hostility toward religious organizations.[6]

Child care is a prime example of a secular problem addressed by religious organizations. These organizations are major providers of services, especially in low-income areas. Congress must find a way to ensure that these much needed services will continue to be a real option for parents who receive assistance under federal legislation. With a shortage of available quality child care, utilization of existing services provided by religious organizations makes both good policy and good sense.

GOVERNMENT ASSISTANCE AND RELIGIOUS ORGANIZATIONS

It has been argued that the First Amendment's Establishment Clause prevents the United States Government from providing any direct or indirect financial assistance to religious organizations.[7] However, the Supreme Court has consistently rejected such an absolutist approach.[8] Indeed the Court has upheld a number of statutes which provide direct or indirect benefits to religious organizations, even if some of those organizations are pervasively sectarian. Benefits upheld by the Supreme Court include property tax exemptions for churches,[9] direct cash payments to religious schools for state-mandated services,[10] tax deductions for tuition paid to religious schools,[11] and financial assistance to students attending religious colleges.[12] Although the Court has struck down some statutes that included religious organizations (mostly elementary and secondary schools),[13] it has declined to adopt an absolutist "no aid" approach in its Establishment Clause jurisprudence.

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[5] Bowen v. Kendrick, ____ U.S. ____, ____, 108 S.Ct. 2562, 2573 (1988).

[6] *See* Walz v. Tax Commission, 397 U.S. 664 (1970).

[7] *See, e.g.*, Boothby, *The Establishment and Free Exercise Clauses of the First Amendment and Their Impact on National Child Care Legislation*, 26 HARV. J. ON LEGIS. 000 (1989).

[8] *See, e.g.*, Bowen v. Kendrick, ____ U.S. at ____, 108 S.Ct. at 2573–74.

[9] *Walz*, 397 U.S. 664.

[10] Comm. for Pub. Educ. v. Regan, 444 U.S. 646 (1980).

[11] Mueller v. Allen, 463 U.S. 388 (1983).

[12] Americans United for Separation of Church & State v. Blanton, 433 F. Supp. 97 (M.D. Tenn. 1977), *aff'd*, 434 U.S. 803 (1977).

[13] *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971).

THE CHURCH-STATE PROVISION OF THE ABC BILL

Last year, a Senate Committee Report interpreted the church-state provision in the ABC bill[14] to require that "*all aspects* of child care services provided by an entity receiving financial assistance under this Act be *completely non-sectarian* in nature and in content."[15] If interpreted as broadly as it was interpreted by the Committee Report, this provision would prohibit prayer before meals, religious pictures, symbols or displays, and carols and Christmas plays with religious overtones in child care facilities receiving federal funds under the Act. In addition, because the church-state provision applies to all ABC funds,[16] family day care provided in private residences would be included. Approximately seventy percent of child care is provided in this manner.[17] Presumably, family providers would have to remove or cover religious pictures or symbols in their own homes and refrain from singing Christmas carols with children under their care.

Legislators will be skeptical of legislation that not only prohibits Christmas plays and caroling in privately owned and operated day care facilities but also limits or prohibits religious activities in private homes. Nor does the Constitution require this result. The results in the Senate Committee Report call to mind Justice Rehnquist's admonition in his dissent in *Meek v. Pittenger*:[18]

> I am disturbed as much by the overtones of the Court's opinion as by its actual holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question, and "[a]ny interpretation of [the Establishment Clause] and the consti-

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[14] S. 1885, 100th Cong., 2d Sess., § 19(a)(1) (1988) ("No financial assistance provided under this Act shall be expended for any sectarian purposes or activities").

[15] S. Rep. No. 484, 100th Cong., 2d Sess. 78 (1988) (emphasis added).

[16] ABC bill, § 19(a)(1).

[17] Trust, *Child Care Bills to Begin Moving in Congress Under Unusually Bipartisan Head of Steam*, Wall St. J., Jan. 25, 1989, at A22, col. 3.

[18] 421 U.S. 349 (1975).

> tutional values it serves must also take account of the free exercise clause and the values it serves."[19]

Congress must weigh the consequences of enacting federal laws that require private individuals and organizations to purge all traces of religion from their child care facilities as a condition of any participation in federal programs. Private actors do not become clones of the state simply because they may receive some direct or indirect financial benefit from the government.

DELEGATION TO THE EXECUTIVE BRANCH: A PRAGMATIC ANSWER

A pragmatic solution to church-state questions raised by including religious providers in child care legislation lies in delegating all restriction decisions to the administering agencies. Congress should give serious consideration to excluding an express church-state provision from child care legislation. The Supreme Court has noted that it has "never stated that a *statutory* restriction is constitutionally required."[20] Instead, constitutionally required limitations may be put in place by the executive agency responsible for administering the legislation.[21]

This approach should appeal to legislators, especially if attempts to draft new church-state provisions persist. This would not be the first instance of Congressional delegation of controversial issues to the Executive Branch. Removal of the church-state issue from Congressional debate may increase the chances of passage for badly needed child care legislation.

UNRESTRICTED VOUCHERS: ANOTHER PRAGMATIC ANSWER

In order to allay Establishment Clause concerns, child care legislation should make funds available to parents through vouchers or certificates unencumbered by church-state restrictions. Parents may then use these vouchers at the child care service of their choice, so long as the service provider meets

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[19] *Id.* at 395 (Rehnquist, J., dissenting) (citations omitted).

[20] Bowen v. Kendrick, ____ U.S. ____, ____, 108 S.Ct. 2562, 2577 (1988) (emphasis in the original).

[21] *See, e.g.*, 24 C.F.R. § 575.21 (1988) (describing the eligible and ineligible activities under the Department of Housing and Urban Development's Emergency Shelter Grants Program).

other applicable requirements. This approach has several advantages. First, real choice for parents, an essential ingredient in any child care legislation, would be preserved. Second, removal of church-state restrictions would decrease greatly the potential for excessive government entanglement in religious matters. The resulting statute would not mandate government inspection of buildings and private residences for traces of religious or sectarian activities.

PUBLIC FUNDING OF INDIVIDUAL PRIVATE CHOICES

Some will argue that the First Amendment prevents government programs from providing financial benefits not only to organizations but to individuals, unless those benefits are restricted solely to secular uses. However, in 1977 the Supreme Court summarily affirmed a unanimous three-judge federal court decision upholding the constitutionality of a Tennessee cash assistance program for needy college students, even though "some, but not all, of the private schools whose students benefited from this program [were] operated for religious purposes, with religious requirements for students and faculty and [were] admittedly permeated with the dogma of the sponsoring organization."[22] The lower court noted that the program provided "needy students with the opportunity to attend the higher education institution of their choice, be it public, private, sectarian or nonsectarian."[23]

In 1983 the Supreme Court upheld a Minnesota statute that allowed an income tax deduction for tuition paid to parochial schools,[24] schools which the Court has described several times as "pervasively sectarian."[25] Significantly, the Court noted that "by channeling whatever assistance it may provide to parochial

[22] Americans United for Separation of Church & State v. Blanton, 433 F. Supp. 97, 100 (M.D. Tenn. 1977), *aff'd*, 434 U.S. 803 (1977). Summary affirmances are decisions on the merits and "without doubt reject the specific challenges presented in the statement of jurisdiction." Mandel v. Bradley, 432 U.S. 173, 176 (1977). Significantly, in its jurisdictional statement in the *Blanton* appeal, Americans United specifically challenged the provision of grants to students to defray the education-related expenses of students (i) "attending pervasively sectarian colleges" and (ii) "without restricting the grants so as to guarantee that the state supports only the secular aspects of their education." *See* appellant's jurisdictional statement in *Blanton*, No. 77-250.

[23] *Blanton*, 433 F. Supp. at 105.

[24] Mueller v. Allen, 463 U.S. 388 (1983).

[25] *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385 (1985); Aguilar v. Felton, 473 U.S. 402, 412 (1985).

schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject."[26] The Court also noted that when aid to parochial schools is available only as a result of decisions of individual parents, no imprimatur of state approval can be deemed to have been conferred, either on any particular religion, or on religion generally.[27]

In 1986, a unanimous Supreme Court found no First Amendment barrier to a state's provision of financial assistance to an individual studying at a Christian bible college to become a pastor, missionary, or youth director.[28] The Court rejected the notion that "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confers any message of state endorsement of religion."[29] In the Court's view, the final use of financial assistance did not result from any state action; thus, it was not attributable to the state. In his concurring opinion, Justice Powell emphasized that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test,[30] because any aid to religion results from the private choices of individual beneficiaries."[31]

VOUCHERS ARE A CONSTITUTIONAL ALTERNATIVE

Two common elements bind these decisions. First, in all cases, financial assistance was offered to a broad class of individuals defined without regard to religion. Second, this financial assistance was not restricted to secular uses even though some of the monies indirectly supported religious education or pervasively sectarian institutions. If the First Amendment permits the funding of a pastor's religious training at a bible college,

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[26] *Mueller*, 463 U.S. at 399.

[27] *Id.*

[28] Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986).

[29] *Id.* at 488–89.

[30] Lemon v. Kurtzman, 403 U.S. 602 (1971). In *Lemon* the Court held that "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and] finally, the statute must not foster 'an excessive government entanglement with religion' . . . ." *Id.* at 612–13 (citations omitted).

[31] *Witters*, 474 U.S. at 490–91 (Powell, J., concurring) (citations omitted). Chief Justice Burger and Justices White, Rehnquist and O'Connor agreed with Justice Powell's analysis of the relevance of *Mueller*.

then surely it permits a program that provides individual assistance to parents of children enrolled in day care programs that include prayers before meals, bible stories, Christmas carols, and other religious activities.

Thus, in this author's view, the present Supreme Court would uphold legislation that provides financial assistance to individual parents through vouchers, certificates or similar arrangements without a secular use restriction.[32] Such legislation would then allow parents to make their own choices on the kind of child care best for their children.

CONCLUSION

Religious organizations are now major providers of child care, particularly for low and moderate-income parents. Congress should ensure that their much needed services remain a viable option for all parents who might benefit from federal child care legislation. A voucher or certificate system would provide constitutionally permissible means to tap these services. Such a system deserves serious consideration by the 101st Congress.

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[32] Ten members of the House Committee on Education and Labor made a similar argument in the Committee's Report on the 100th Congress's ABC bill. The following paragraphs were included in the dissenting views filed by Republican Committee members:

> According to the Committee report, the intent of subsection 118(a) of this bill is that "all funded programs be non-sectarian in nature and in content." Thus, it appears that the Committee intends that church-sponsored child care providers must secularize their programs in order to qualify for benefits under this bill. This violates the long-standing principle that one cannot be forced to give up a First Amendment right, in this case freedom of religion, as a condition of receiving government benefits.
>
> In addition, the prohibition against funding religious day care extends to grants, contracts and vouchers, which are provided with federal funds. This restriction on the use of vouchers goes beyond what is necessary to ensure separation of church and state. Supreme Court decisions, notably *Witters v. Washington Department of Services for the Blind* decided in 1986, have made clear that indirect assistance, such as certificates or vouchers, may be used at pervasively sectarian institutions which are freely chosen by the recipient of the voucher. Thus, the bill's prohibition on the use of child care certificates at church-sponsored child care centers goes beyond constitutional requirements.

H.R. Rep. No. 985, 100th Cong., 2nd Sess. 32 (1988).

ACCOMMODATION AND EQUAL TREATMENT OF RELIGION: FEDERAL FUNDING OF RELIGIOUSLY-AFFILIATED CHILD CARE FACILITIES

JOHN W. WHITEHEAD*

> Our Laws have applied the only antidote to intolerance, protecting all on an equal footing.[1]
>
> —Thomas Jefferson

Nearly one-third of all child day care facilities operated in the U.S. are sponsored or run by religiously-affiliated organizations.[2] Given the prohibitions of the establishment clause of the first amendment,[3] may these centers receive direct[4] federal funding?[5] Serious debate on this church-state issue has erupted in Congress over proposed legislation[6] that would provide subsidies to such child care facilities. I will argue that federal funding for child care facilities linked to religious organizations is not only permissible under the establishment clause, but is required under modern accommodation doctrine. Indeed, I will argue that this is the only course of action that will ensure that reli-

* President, The Rutherford Institute, Manassas, Va; B.A., University of Arkansas, 1969; J.D., University of Arkansas, 1974.

[1] UNITED STATES COMMISSION ON CIVIL RIGHTS, RELIGION IN THE CONSTITUTION 14 (1983) (citing F. SWANCARA, THOMAS JEFFERSON VERSUS RELIGIOUS OPPRESSION 134 (1969)).

[2] Morehouse, *Markup of Child-Care Bill Slows as Disputes Develop*, CONG. Q., Aug. 6, 1988, at 2200.

[3] The first amendment religion clauses provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend I.

[4] This Article does not directly address the constitutionality of indirect federal aid to religiously-affiliated child care centers using a voucher system. Indirect aid to parents—as opposed to direct aid to sectarian institutions—has repeatedly been sustained by the Supreme Court. Indirect aid involves less entanglement, and for symbolic reasons, is less of a concern under the establishment clause. *See* Mueller v. Allen, 463 U.S. 388 (1983) (state tax exemption for tuition, textbooks and transportation for children attending sectarian schools upheld); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemption for real or personal property used exclusively for religious, educational or charitable purposes constitutional); Everson v. Board of Educ., 330 U.S. 1 (1947) (township transportation reimbursement to parents of children attending parochial schools upheld).

[5] This issue is also raised with state funding of religiously-affiliated child care facilities. The religion clauses apply to the states through the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause); Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause).

[6] *See, e.g.*, H.R. 3660, 100th Cong., 1st Sess., 133 CONG. REC. 10,659 (1987).

gious organizations are treated on an equal basis with their secular counterparts.

I. THE RELIGION CLAUSES CLASH—REQUIRED ACCOMMODATION

The religion clauses of the first amendment assure both free exercise and non-establishment. The free exercise clause (freedom *of* religion) envisions a private sphere in which individuals may freely cultivate religious beliefs. The non-establishment clause (freedom *from* religion) envisions a public sphere free from religious involvement. Together, the clauses erect what Jefferson termed "a wall of separation"[7] between the religious and public spheres in an effort to safeguard both religious and secular institutions.

There is an inevitable tension between the two clauses because if either of the clauses is carried to its logical extreme, it conflicts directly with the other:[8]

> Through excessive solicitude for religious exercise, government may run afoul of the establishment clause. Conversely, too stringent application of the nonestablishment mandate may violate the free exercise guarantee.[9]

For example, may the military employ a chaplain to allow a service member to freely exercise her religion?[10] If the religion clauses are read literally, there can be no resolution of this question. The government's decision will arguably violate either the apparent command of the establishment clause or that of the free exercise clause. The only way to avoid this inevitable conflict is to read the clauses together with some flexibility, to accommodate each other. A "total separation is not possible in

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[7] As cited in Reynolds v. United States, 98 U.S. 145, 164 (1879). For a theory of strict separation, see P. KURLAND, RELIGION AND THE LAW 18 (1962); L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION (1975).

[8] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). In this case, the Court sustained a state tax exemption for real or personal property used exclusively for religious purposes. On its face, the free exercise clause conflicts with the establishment clause. An exemption would increase the tax bills of others while reducing the tax burden on the holder of religious property, arguably establishing religion. A denial of the exemption interferes with the free exercise of religion by necessitating state involvement in the assessment of religiously-affiliated property.

[9] Rostain, *Permissible Accomodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147, 1151 (1987).

[10] TRIBE, AMERICAN CONSTITUTIONAL LAW 1157 (1988).

an absolute sense, because some relationship between government and religion is inevitable."[11]

The doctrine of accommodation defines the relationship between government and religion, permitting or requiring state action so as to balance the two religion clauses' conflicting demands.[12] Accommodation is an effort to "find a neutral course between the two Religion Clauses."[13] For instance, accommodation doctrine would be used to resolve the inescapable conflict between the free exercise clause and the establishment clause involved in the hypothetical concerning the military chaplain discussed above: generally, in such situations, the government has been required to accommodate the service member's religious practices.[14]

A. *Accommodation—the Historical Foundation*

Despite an establishment clause cast in commanding and absolute terms—"Congress shall make no law respecting an establishment of religion"—the government has long accommodated religion.[15] No single underlying rational has been decisive throughout accommodation case law.[16] The doctrine has been

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[11] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The standard announced by the Court in *Lemon* is discussed in Section IIIA *infra*.

[12] Police and fire protection are typically cited as the most clearly innocuous forms of such action:

> *Everson* and *Allen* put to rest any argument that the state may never act in such a way that has the incidental effect of facilitating religious activity . . . . . If this were impermissible . . . a church could not be protected by the police and fire department, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 747 (1976) (discussing Everson v. Board of Educ., 330 U.S. 1 (1947); Board Of Educ. v. Allen, 392 U.S. 236 (1968)).

[13] TRIBE, *supra* note 10, at 1157 (1988) (citing Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970)).

[14] *See* Figinski, *Military Chaplains—A Constitutionally Permissible Accommodation between Church and State*, 24 MD. L. REV. 377 (1964). *But cf.* Goldman v. Weinberger, 475 U.S. 503 (1986) (prohibiting a military psychologist from wearing a yarmulke while on duty in uniform at a military hospital).

[15] *See, e.g.*, Witters v. Washington Comm'n for the Blind, 474 U.S. 481 (1986) (benefits to blind individuals at religiously-affiliated universities); Mueller v. Allen, 463 U.S. 388 (1983) (tuition benefits for students attending sectarian schools); Tilton v. Richardson, 403 U.S. 672 (1971) (construction grants to sectarian colleges and universities); Board of Educ. v. Allen, 392 U.S. 236 (1968) (lending state-approved secular textbooks to all secondary school children); Thomas v. Review Bd., 450 U.S. 707 (1981) (unemployment benefits to employee who terminated employment because of religious objection to work involved); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment benefits to employee who refused employment due to conflict with religious beliefs).

[16] Rather, as the majority suggested in *Zorach*, "[it] is the common sense of the matter." Zorach v. Clauson, 343 U.S. 306, 312 (1952).

flexible, with decisions generally turning on one of several factors.

In many cases, the fact that a religious organization is performing a secular function that is severable from traditional religious activity has been given significant weight by the Court.[17] For example, in 1899, in *Bradfield v. Roberts*,[18] the Supreme Court held that congressional funding of a Catholic hospital was entirely consistent with the establishment clause. The fact that the hospital was affiliated with the Catholic Church was "wholly immaterial,"[19] the Court reasoned, because it was performing a traditionally secular function. Similarly, in *Volunteers of America v. NLRB*,[20] the court upheld the NLRB's jurisdiction over a church providing alcoholism services funded by a federal grant. The court reasoned that the services were not pervasively religious in character and were thus severable from the religious activity of the organization. In *Cochran v. Louisiana State Board of Education*,[21] the Court allowed the state to pay for the purchase of secular textbooks for parochial school students despite a state establishment clause provision. The Court viewed the state's interest in advancing literacy as severable from any argument that the state was aiding religion.

In other cases, the crucial question has been whether the state is neutral in its relations between believers and non-believers.[22] Case law in this area often involves the distribution of social welfare benefits. The Court in *Everson v. Board of Education*[23] sustained the reimbursement of parents for transportation costs involved in sending their children to parochial schools. The majority reasoned that all parents should benefit from the subsidy without regard to religious beliefs. The state "cannot exclude [members of any religious faith], because of their faith, or lack or it, from receiving the benefits of public welfare legislation."[24] In *Bowen v. Kendrick*,[25] the constitutionality of the Ad-

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[17] This rationale is embodied in the first prong of the test developed by the Court in Lemon v. Kurtzman, 403 U.S. 602, *reh'g. denied*, 404 U.S. 876 (1971). *See infra* Section IIIA.

[18] 175 U.S. 291 (1899).

[19] *Id.* at 298.

[20] 777 F.2d 1386 (9th Cir. 1985).

[21] 281 U.S. 370 (1930).

[22] This factor corresponds somewhat to the second prong of the *Lemon* test. *See infra* Section IIIA.

[23] 330 U.S. 1 (1947).

[24] *Id.* at 16.

[25] 108 S.Ct. 2562 (1988).

olescent Family Life Act,[26] which provides direct federal aid to religious organizations providing family counselling services, was sustained by the Court. "This Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."[27]

Elsewhere, the Court has focused on the danger of the state becoming too entangled with religion.[28] In *Walz v. Tax Comm'n*,[29] the Court upheld a tax exemption for real or personal property used exclusively for religious purposes because to do otherwise would have resulted in the state having to value, assess and possibly foreclose on religious property.

B. *Required Versus Permissive Accommodation*

"Required accommodation" is governmental action mandated by the free exercise clause.[30] State-provided fire and police protection at a parochial school is an example of accommodation that would be required by the free exercise clause. Parents would be somewhat reluctant to send their children to a school if these vital services were cut off. Thus, denial of protection would prevent the free exercise of religion.[31]

To the extent that the establishment clause is not violated, however, the government may accommodate religion beyond that mandated by the free exercise clause. Such accommodation is termed "permissive."[32] The *Everson* case[33] is an example of permissive accommodation. In that case, the Court allowed government funding of bus transportation to parochial schools.

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[26] Pub.L. 97-35, 95 Stat. 578 (1981).

[27] 108 S.Ct. at 2574.

[28] This factor corresponds to the third prong of the *Lemon* test. *See infra* Section IIIA.

[29] 397 U.S. 664 (1970).

[30] Required accommodation has alternatively been termed "benign neutrality:"

> The approach reflected in [the] doctrine can be characterized as benign neutrality. In situations where government must choose between infringing upon or facilitating religious exercise, the free exercise clause requires that, absent overriding governmental interest, government [must] choose the latter course.

Rostain, *supra* note 9, at 1152.

[31] *See also* Wilder v. Bernstein, 848 F.2d 1338 (2d Cir. 1988). In that case, a New York State statute providing for "religious matching" in connection with publicly-funded child care placements withstood a facial constitutional challenge. Despite the fact that the statute appeared to violate the establishment clause because it did not have a "solely secular purpose," the court held that the act was constitutional because it was necessary to protect the free exercise rights of the children involved.

[32] TRIBE, *supra* note 10, at 1169.

[33] *See supra* note 23.

If the Court had denied reimbursement to parents, it is doubtful that the free exercise clause would have been implicated. Yet, although the state subsidy was not mandated by the free exercise clause, it was permissible because it did not violate the establishment clause. Permissive accommodation is discretionary; the government can either act or refrain from acting without violating the religion clauses.

Accommodation has been widely accepted by both the courts and commentators.[34] The religion clauses do not demand, nor has the Supreme Court accepted, that the government remain "strictly neutral" in dealing with religious organizations:

> The Supreme Court has never espoused a strict neutrality interpretation of the clauses; rather, it has regularly construed the free exercise clause to exempt religious exercise from burdensome legislation even though such exemptions in some sense benefit religion.[35]

To put the issue of federal aid to religiously-affiliated day care centers in doctrinal terms, the question is whether such aid is either "permissive accommodation" or "required accommodation," or is forbidden by the establishment clause. No easy answer is found. Since religiously-affiliated day care centers have not yet been subsidized directly, there is no case law on point. And drawing analogies from other areas of accommodation case law is problematic because of inconsistent decisions, even at the Supreme Court level.

C. *Case Law Inconsistency*

Despite substantial precedent supporting aid to religiously-affiliated organizations, the jurisprudence is too unpredictable to allow for accurate predictions in specific fact situations. Decisions under accommodation doctrine have been far from consistent. As the Court stated in *Lemon*:

> Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of the case.[36]

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[34] *See* Giannella, *Religious Liberty, Non-Establishment, and Doctrinal Development: Part II, The Non-Establishment Principle*, 81 HARV. L. REV. 513 (1968).

[35] Rostain, *supra* note 9, at 1152.

[36] Lemon v. Kurtzman, 403 U.S. 602, 614, *reh'g denied*, 404 U.S. 876 (1971).

For example, in *McCollum v. Board of Education*,[37] the Court prohibited a release-time program for religious education on school property, yet allowed a release time-program for religious classes to be conducted off of school premises in *Zorach v. Clauson*.[38] Dissenting in *Zorach*, Justice Jackson was critical of the Court's lack of consistency.[39] The Supreme Court itself has recognized this problem:

> What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states . . . produces a single, more encompassing construction of the Establishment Clause.[40]

Inconsistency in the case law has resulted in part from the lack of sound theoretical grounding in accommodation doctrine. Rhetoric also perpetuates confusion in this area of the law.[41] Changes in both the nature of the state and of religion also weaken the validity, though not necessarily the effect, of prior decisions.[42] It is no wonder that case law in this area is in a confused state.

There is a strong need to restore order to accommodation doctrine, at least in the context of federal funding of child care facilities. Since religiously-affiliated day centers constitute such a large percentage of total child day care,[43] there is a pressing need to prevent initiating or furthering the crisis in day care availability by disadvantaging religiously-affiliated centers unnecessarily.

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[37] 333 U.S. 203 (1948).

[38] 343 U.S. 306 (1952).

[39] "The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected." 343 U.S. at 325 (Jackson, J., dissenting).

[40] UNITED STATES COMMISSION ON CIVIL RIGHTS, RELIGION IN THE CONSTITUTION: A DELICATE BALANCE 19 (1983) (quoting Committee for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980)).

[41] Rhetoric is found throughout the case law in this area. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947). Despite the Court's strong language in this case, it sustained aid to parents for transporting children to parochial schools: "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18.

[42] *See infra* Section IIA.

[43] *See supra* note 2 and accompanying text.

II. A REEXAMINATION OF THE THEORETICAL BASIS FOR ACCOMMODATION

Despite the central role that accommodation doctrine plays in resolving the tension between the religion clauses, the theory of accommodation lacks deep roots. For the most part, the doctrine relies on intuitive judgments.[44] The lack of a clear theoretical foundation for accommodation doctrine has not only resulted in inconsistent case law, but also in application has prejudiced religious individuals and organizations in the receipt of public benefits.[45]

The most prominent theory which attempts to explain the basis of accommodation doctrine is the *de minimus* theory. The *de minimus* theory suggests that accommodation is permissible only if the aid to religion is "incalculable and negligible."[46] There is disagreement over whether aid should be measured in terms of the cost to the public or the benefit to the religious organization. The *de minimus* theory is supported by the plain language of the First Amendment: "Congress shall make no law respecting an establishment of religion."

There are two difficulties with this theory. First, the theory suggests that deviations are permissible merely because they are minor. But, if state action departs from what is believed to be the clear command of the Constitution, then it should be proscribed. Second, if accommodation were truly peripheral, this theory might help explain existing case law. But, considering the extent and variety of accommodation sanctioned by

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[44] *See, e.g.*, Abraham, *Religion, the Constitution, the Court, and Society: Some Contemporary Reflections on Mandates, Words, Human Beings, and the Art of the Possible*, in GOLDWIN & KAUFMAN, HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 15 (1987).

[45] For example, student-initiated religious expression is not generally being afforded equal treatment in the public schools. This raises serious constitutional questions. *See, e.g.*, Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 PEPPERDINE L. REV. 229 (1989); Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1 (1986); Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 GEO. L.J. 135 (1983); Comment, *The Constitutionality of Student-Initiated Religious Meetings on Public School Grounds*, 50 U. CIN. L. REV. 740 (1981). *But see* Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L.Q. 521 (1985).

[46] W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW 1032 (6th ed. 1986). This view has also been called the "incidental benefit" rule. *See, e.g.*, Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 747 (1976). *See also* Bowen v. Kendrick, 108 S.Ct. 2562 (1988).

the courts over time, this theory fails to explain the basis for the doctrine.

A. *Accommodation Doctrine: Resting on Two False Norms*

Accommodation doctrine rests on certain assumptions as to the scope of religious as well as state activity. In a general sense, the boundaries of permissible government aid or regulation can only rationally be drawn based on contemporary notions of proper state activity. Further, whether or not the government should accommodate a particular religious practice depends to a large degree on whether such practice is defined as religious.

The basic rule in accommodation doctrine—separation—presupposes both that the government's role in society is limited and that religious activity takes place within discrete, traditionally-defined bounds. Increasingly, however, the scope of religious related activity has expanded significantly,[47] while the influence of the administrative state has vastly increased. This change in circumstances calls the basic assumption of separatism into question. But, despite these societal changes, separation rhetoric remains and continually confronts a changed reality.[48]

1. The Administrative State: Neutrality Requires Aid to Religion

The strict separation model was workable given the limited role of the federal government envisioned by the framers. "[T]he concept of strict neutrality in effect would have coincided with the principle of strict no-aid to religion when enforced against the early federal government."[49] The irony, however, of modern establishment clause doctrine, which continues to be heavily influenced by separatism, is that it evolved in a period characterized by a wholesale rejection of limited government. There were only two Supreme Court accommodation cases prior to

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[47] *See infra* note 61.

[48] *See, e.g.*, Rehnquist, *The True Meaning of the Establishment Clause: A Dissent*, in GOLDWIN & KAUFMAN, *supra* note 44, at 99 ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading [wall of separation] metaphor for nearly forty years").

[49] Giannella, *supra* note 34, at 514.

1947.[50] Despite its recent development, modern religion clause theory fails to acknowledge the existence of the administrative state. The result is a gap between the rhetoric in the doctrine and the results of the case law.[51]

Given the reality of modern administrative state, as government increases the scope of its activities, it must increasingly be sensitive to the interests of religious people in order to merely remain neutral.[52] This neutrality is required by the free exercise clause.[53] The degree of appropriate accommodation varies directly with the degree of government involvement in the social order:

> [N]ow that the state has undertaken the more positive role of allocating resources and actively structuring the social order, the question of how to treat religious groups and interests has become a fundamentally different one from that confronting our predecessors. To withhold studiously from religious groups all benefits flowing from governmental structuring of the social order will not only result in deprivations not demanded by the purposes of nonestablishment but in some cases will actually frustrate them.[54]

2. An Example: the Collectivist State

Professor Gianella effectively illustrates this point in his example of a hypothetical collectivist state, which owns and controls all resources.[55] Such a state, he argues, would have to provide religious organizations with the use of property for religious purposes in order to avoid inhibiting the free exercise of religion. Indeed, to deny religious organizations complete access to property would surely impermissibly inhibit religion. Yet this is precisely the result if the concept of separatism is

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[50] Bradfield v. Roberts, 175 U.S. 291 (1899) and Quick Bear v. Leupp, 210 U.S. 50 (1908). W. LOCKHART, Y. KAMISAR, J. CHOPER AND S. SHIFFRIN, CONSTITUTIONAL LAW 1027 (6th ed. 1986).

[51] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. at 671 (quoting *Everson*, 330 U.S. at 19 (Jackson, J., dissenting)) ("The undertones of the opinion, advocating complete and uncompromising separation . . . seem utterly discordant with its conclusion . . . .").

[52] *See, e.g.*, TRIBE, *supra* note 10, at 1204 (movement from government of closely limited powers to affirmative state requires reevaluation of religion clauses; in an affirmative state, religious tolerance may become a "positive commitment that encourages the flourishing of conscience" rather than simply a "negative principle"); Giannella, *supra* note 34, at 514–15.

[53] Neutrality is embodied in the second prong of the Supreme Court's test announced in *Lemon*. *See infra* Section IIIA.

[54] Giannella, *supra* note 34, at 514–15.

[55] *See generally* Giannella, *supra* note 34 and accompanying text.

applied in the extreme case of the hypothetical collectivist state. Religious organizations would be denied equal access to public benefits on the grounds that such aid advances religion, while other groups would not be similarly inhibited by these actions because separatism does not bar non-religious groups from receiving governmental benefits. Religious groups would not participate on a neutral, or equal, basis with other groups. Instead, they would be discriminated against and excluded from benefits available to others. As applied by the collectivist state, the separation concept makes the government a "handicapper," whose role is to assign special disadvantages to religious individuals and groups.

I do not suggest that current state involvement reflects that of a collectivist state. But I do not believe that the level of state involvement reflects that of a pure private property regime. Thus, doctrine based solely on one extreme—the pure private property state—giving rise to a strict separation/no-aid model is outdated and unfair to religious groups.

3. Equal Treatment

The notion that religious individuals should participate on an equal basis with others and should not be specially excluded from government benefits, is a basic principle of modern free exercise clause doctrine.[56] It is naive to think that simply ruling out participation of religious individuals in government programs will maintain the correct balance of neutrality. Government involvement in structuring the social order has already vitiated the possibility of such a world.

Yet, religious individuals and groups continually have had to fight against strong intuition and rhetoric that government benefits flowing directly to religion are *per se* impermissible. If government action happens derivatively to aid religion, that action is understood as unfairly advancing religion. Unfortunately, there is a strong tendency, partly due to the effects of precedent and partly due to the nature of traditional litigation,[57]

[56] This concept is embodied in the second prong of the *Lemon* test. *See infra* Section IIIA2. *See also* Witters v. Washington Comm'n for the Blind, 474 U.S. 481 (1986); Widmar v. Vincent, 454 U.S. 263 (1981).

[57] The traditional concept of adjudication views the purpose of the litigation to decide only the interests of the parties before it. Thus, the court is not prepared to assess scope of governmental influence generally.

to judge accommodation issues in a false light. New aid to religion almost automatically is viewed as an advance. Thus, if today, bus transportation is not provided to parochial students, yet tomorrow it is, one who compares the condition of religious schools tomorrow with their condition today can only conclude that religion has been advanced. No assessment of increased governmental involvement is undertaken when judging increased aid to religion.

4. Toward a Narrower Establishment Clause Definition of Religion

Through the early twentieth century, religions were given legal recognition if considered "civilized by Western standards."[58] The definition of religion underlying the two religion clauses was narrow, protecting only religions addressing "ultimate concerns"[59] such as belief in God, the nature of eternity and the role of man in the universe. Further, this definition only encompassed traditional forms of worship.[60]

During the twentieth century, two opposing pressures operated on this traditional definition. The proliferation of religious organizations required that the definition be expanded.[61] Along with the rising influence of Far Eastern religions, religious practices generally expanded beyond those recognized by traditional Western standards. It became difficult for courts to distinguish between sectarian and secular practices. For example, is Transcendental Meditation a religious or a secular practice?[62] At the same time, expansion of the state necessitated that religion be construed narrowly so as to avoid all state action being considered violative of the establishment clause. Given these two opposing pressures operating at full force during the development of accommodation doctrine, case law in this area is predictably confusing.

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[58] TRIBE, *supra* note 10, at 1179.

[59] Paul Tillich's view was that the essence of religion is an "ultimate concern," and, therefore, religion is itself an "ultimate concern." P. TILLICH, DYNAMICS OF FAITH 1–2 (1957). *Cf.* United States v. Seeger, 380 U.S. 163 (1965).

[60] TRIBE, *supra* note 10, at 1179.

[61] Today in the U.S., some 239 religious groups are "officially" recognized, with some 1300 additional groups operating on the "fringes." GOLDWIN & KAUFMAN, *supra* note 44, at 16.

[62] *See* TRIBE, *supra* note 10, at 1185.

The combination of state expansion and change in the traditional definition of religion has eroded the distinction between secular and religious practices. The government can promote morals and values which happen to coincide with those being advanced by a particular religion.[63] Religion may incidentally benefit if its moral views are also espoused as a result. But that coincidence alone does not violate the establishment clause. Otherwise, "virtually nothing that government does would be acceptable; laws against murder, for example, would be forbidden because they [overlap] the fifth commandment of the Mosaic Decalogue."[64]

Why then should the establishment clause be interpreted to forbid the state from aiding a religious organization in disseminating morals and values which are allowable when promoted by the government? Does the religious affiliation of the organization somehow transform the nature of the espoused morals and values from secular to religious? I think not. The state is disabled from aiding the espousal of religious beliefs and values, but not secular beliefs and values that happen to coincide with those of a religious group.[65]

Thus, if a program run by a religiously-affiliated organization is "severable"—meaning that its primary function is severable from the organization's efforts to promote religious values— the government should be allowed to provide assistance. If government and government-supported organizations can promote morals and values, religious organizations should not be disabled from participating equally in promoting such morals and values.

A growing minority of commentators takes this argument much further. They argue that the founders intended that the religion clauses only prevent the government from establishing a national religion or discrimination among religions.[66] In this

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[63] Laws against abortion or strengthening the traditional family, for example.

[64] TRIBE, *supra* note 10, at 1205.

[65] This view has judicial support. In *Volunteers of America*, for example, the court allowed a religious organization to participate in a state-funded program to rehabilitate alcoholics. *See supra* note 20.

[66] Chief Justice Rehnquist supports this view:

> It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of the government between religion and irreligion.

Rehnquist, *supra* note 48, at 104.

view, as long as the state supports all religion equally, the establishment clause is not implicated, even if state aid supports religious, but not secular, organizations.

However valid, this position has not engendered widespread support. Supreme Court jurisprudence has been consistent in interpreting the establishment clause as preventing the state from preferring religion over non-religion, except as permitted by accommodation doctrine. But, the establishment clause certainly does not mandate preferring non-religion over religion.

Two summarizing points are drawn from the foregoing analysis. First, government aid to a religious group promoting otherwise secular morals and values, if sufficiently severable from conduct resulting in the dissemination of religious morals and values, should not be problematic under the establishment clause. The affiliation of the organization should not affect its ability to compete with non-religious groups.

Second, in close cases, values and morals should be categorized as secular, not religious. The area of overlap between state activity and what today are considered legitimate religious practices has never before been greater. Only by resolving that conflict by construing religion narrowly for establishment clause purposes can we prevent religious organizations from being unduly burdened.[67]

III. Accommodation in the Child Care Context

Accommodation has played an increasingly significant role where governmental social welfare benefits are at stake. When the state forces a choice between pursuing religious beliefs and receiving a government benefit, this indirect coercion is subject to strict scrutiny.[68] In such cases, courts have been more willing to find that accommodation is permissive, if not required.[69]

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[67] Professor Tribe supports this view. He suggests that the definition of religion for free exercise purposes should be expansive. The definition of religion for establishment clause purposes, however, should be more more narrowly limited. Tribe, *supra* note 10, at 1186.

[68] *See, e.g.*, North Valley Baptist Church v. McMahon, 696 F.Supp. 518 (E.D. Cal. 1988) (state licensing requirements of child day care centers forcing a choice between free exercise and receiving the state benefit—licensing—is subject to strict scrutiny by the court); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

[69] *See, e.g.*, Wilder v. Sugarman, 385 F.Supp. 1013 (S.D.N.Y. 1974) (in the context of foster care, government activity that might otherwise overstep the limits of the establishment clause was constitutional because of the need to vindicate the free exercise rights of children).

A. *Federal Funding of Religiously-Affiliated Day Care Satisfies the Lemon Criteria*

In *Lemon v. Kurtzman*,[70] the Court articulated the standard of permissible accommodation:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster "an excessive governmental entanglement with religion."[71]

1. Secular Purpose

Clearly, child day care funding satisfies the first prong of the *Lemon* analysis. Its clear purpose is to increase the availability of day care to all who desire it and to promote the health and safety of young children. Moreover, the Court has not applied this prong of the *Lemon* test with very much rigor.[72]

2. Neutrality

Federal child care legislation providing aid to religiously-affiliated organizations satisfies the second prong of the *Lemon* test. It will neither advance nor inhibit religion. Child day care facilities operated by religiously-affiliated organizations are indistinguishable from those operated by secular organizations.

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[70] 403 U.S. 602, *reh'g. denied*, 404 U.S. 876 (1971).

[71] *Id.* at 612–13. The *Lemon* test has been ignored in a few cases. In Lynch v. Donnelly, 465 U.S. 668 (1984), the Court upheld a city's Christmas display, including the erection of a creche, by relying on an historical argument, not on the *Lemon* criteria. In that case, in her concurring opinion, Justice O'Connor formulated another test, that of "no endorsement." *Id.* at 687–94 (O'Connor, J., concurring). Justice O'Connor's test involves assessing whether the government's intention was to endorse or disapprove of religion. Some courts and scholars favor this approach. *See, e.g.*, American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561, 1563 (6th Cir. 1986); Lowey, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049 (1986). *But see* Tushnet, *The Constitution of Religion*, 18 CONN L. REV. 701 (1986). The "no endorsement" test, however, is at least as problematic as the *Lemon* test:

> Far from eliminating the inconsistencies and defects that have plagued establishment analysis, the "no endorsement" test would introduce further ambiguities and analytical deficiencies into the doctrine. Moreover, the theoretical justifications offerred for the test are unpersuasive.

Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987).

[72] *See* Bowen v. Kendrick, 108 S.Ct. 2562 (1988). *But see* Texas Monthly, Inc. v. Bullock, No. 87-1245, slip op. (Sup. Ct. 1989) (state tax exemption for religious periodicals declared unconstitutional because of lack of secular purpose).

Both secular and religiously-affiliated day care organizations promote certain values and morals. Religiously-affiliated centers do not typically advocate specific religious beliefs. Even if they did, children in day care are just too young to be inculcated. Thus "[t]he risk of serious constitutional questions being raised in these circumstances is simply too insignificant and speculative."[73]

In fact, if funding is not provided to religiously-affiliated centers on an equal basis with secular day care facilities, the second prong of the *Lemon* test would be violated. Neutrality on the part of the government is required by *Lemon*. Since child day care benefits would be available on a wide basis, denial would put religiously-operated centers at a competitive disadvantage. The free exercise clause is implicated. Parents must be allowed to make an unfettered choice between religion and non-religion when it comes to putting their children in day care. If the baseline is state aid, the government is required by the free exercise clause to accommodate parents in this manner to avoid violating the neutrality standard announced in *Lemon*.

3. Entanglement

It is the third prong of the *Lemon* analysis that provokes the most controversy. Will the state become excessively entangled with the church as a result of directly funding religiously-affiliated facilities? Unfortunately, the test provides little practical guidance.[74] Chief Justice Rehnquist agrees that application of the test has been difficult. "The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results."[75]

The entanglement issue arises in two situations. First, if direct aid is provided, religiously-affiliated centers will be subject to state regulation. Presumably, certain standards for child day care centers would be promulgated. But, beyond necessary

[73] NLRB v. Salvation Army of Mass. Dorchester Day Care Center, 763 F.2d 1, 6 (1st Cir. 1985).

[74] As a consequence few in academia have found the test's formulation satisfactory in application. The establishment clause decisions "make distinctions that would glaze the minds of medieval scholastics." L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 128 (1986). The tripartite test is "so elastic in its application that it means everything and nothing." Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 450 (1986).

[75] Rehnquist, *supra* note 48, at 111.

basic regulatory standards, the risk of additional entanglement is not great. Many states already require that religiously-affiliated centers be licensed.[76] The validity of such regulation has withstood free exercise clause scrutiny. Licensing requirements or other regulation should be kept at a minimum, however, because of the risk of "secularizing" religious organizations.[77]

The more potent risk of entanglement arises if either no comprehensive federal legislation in this area is enacted at all or if congressional legislation denies federal funds to religiously-affiliated groups. If no legislation is enacted, there is a significant risk of entanglement. Judging state and local aid to religiously-affiliated organizations by continued application of the third prong of the *Lemon* test risks causing excessive entanglement itself. *Lemon* invites ad hoc adjudication of accommodation issues. The test relies heavily on the circumstances of each case. The independence of religious organizations is diminished as a result of an ad hoc standard that must rely on costly and time-consuming adjudication for answers. Likewise, if comprehensive federal legislation denies federal funds to religiously-affiliated groups, state and local governments would not be precluded from enacting separate legislation. Here again, the third prong of the *Lemon* test invites entanglement.

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[76] *See, e.g.*, Forest Hills Early Learning Center v. Jackson, 846 F.2d 260 (4th Cir. 1988), *aff'd*, 109 S. Ct. 837 (1989); North Valley Baptist Church v. McMahon, 696 F.Supp. 518 (E.D. Cal. 1988).

[77] This concern (voiced initially by Roger Williams)—that state involvement will compromise religious institutions—is of constitutional significance. *See* H.R. 3660, § 19, *supra* note 5. *See also* Knudsen, *Church-Based Centers: A Funding Dilemma*, CONG. Q., Feb. 27, 1988, at 515. As the dissent in *Bowen v. Kendrick* recognized:

> Religion plays an important role to many in our society. By enlisting its aid in combatting certain social ills, while imposing the restrictions required by the First Amendment on the use of public funds to promote religion, we risk secularizing and demeaning the sacred enterprise. Whereas there is undoubtedly a role for churches of all denominations in helping prevent the problems often associated with early sexual activity and unplanned pregnancies, any attempt to confine that role within the strictures of a government-sponsored secular program can only taint the religious mission with a "corrosive secularism."

108 S. Ct. at 2590–91 n.10 (quoting Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385 (1985)).

> The first amendment protects not only the State from being captured by the Church, but also protects the Church from being corrupted by the State and adopted for its purposes. A government program that provides funds for religious organizations to carry out secular tasks inevitably risks promoting the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it.

Roemer v. Board of Pub. Works of Md., 426 U.S. at 775 (Stevens, J., dissenting); *see also* Lynch v. Donnelly, 465 U.S. 668, 726–27 (1984) (Blackmun, J., dissenting).

A bright line legislative rule that provides equal aid to day care centers regardless of affiliation—"required accommodation" under the second prong of the *Lemon* test—would obviate the need for such litigation. Only in this situation would the danger of entanglement be diminished.

Thus, under the third prong of the *Lemon* test, the only approach that minimizes entanglement is the enactment of legislation providing federal aid to religiouly-affiliated child care facilities.

B. *Side Effects*

The *Lemon* test has an unfortunate side effect. Since it is a barrier to overcome, rather than a general balancing test, an analysis of the possible benefits resulting from increased religious-state interaction is never undertaken. The *Lemon* test is an all or nothing rule.

In the child care context, *Lemon* thus obscures the harm to religious individuals and society at large, if the test is interpreted so as to preclude aid to religiously-affiliated child care facilities. Broadly, the harm resulting from such an interpretation would be a loss to society in maintaining diversity. We are all better off by having more than one set of organizations helping to solve societal problems. If *Lemon* is not abandoned in favor of a general balancing test, it should at least be applied with such costs in mind.

IV. Conclusion

The general bias against accommodation of religious persons and organizations is predicated upon false doctrinal norms—dated conceptions of both the role of religion and that of the state. Accommodation should permit the funding of religiously-affiliated child day care centers because of the secular nature of the activity and minimal governmental involvement that is required. Intuitively, this approach has appeal. Religious organizations should be treated equally, but no better than, secular organizations. Permitting federal funding of religiously-affiliated facilities would be an important step in the direction of such equal treatment.

NOTE

CHILD CARE LINKAGE: ADDRESSING CHILD CARE NEEDS THROUGH LAND USE PLANNING

NATALIE M. HANLON*

INTRODUCTION

Communities in the United States are facing a growing child care crisis. As the labor force expands, families in which both parents work outside the home are now the norm.[1] As a result, there is an unprecedented and increasing need for child care to provide support for both the transformed American family and the workplace.[2]

As cities have developed, federal, state, and local governments have developed corresponding regulation to accommodate new uses of land and economic development. At the same time, the focus of this regulatory power has expanded to consider the needs of a more complex society. Whereas community planning was once concerned with preserving individual property rights, the emphasis is now on assuring that the development of land will not conflict with the health and welfare of the community. As development proceeds, local communities must plan for new needs such as child care.

This Note discusses the need to include child care in community planning through a process called child care linkage,

* B.S., University of Colorado, 1986; member, Class of 1989, Harvard Law School. The author would like to thank Professor Lance Liebman for his assistance and encouragement during the drafting of this Note, and Laura Barrett, Kate Mehr, the Massachusetts Public Interest Research Group, and the Century III Leaders program for their support on this project.

[1] REPORT OF THE SECRETARY'S TASK FORCE, U.S. DEPARTMENT OF LABOR, CHILD CARE: A WORKFORCE ISSUE 147–48 (1988) [hereinafter A WORKFORCE ISSUE].

[2] *See* B. REISMAN, A. MOORE & K. FITZGERALD, CHILD CARE: THE BOTTOM LINE 53 (1988) [hereinafter THE BOTTOM LINE] (An Economic and Child Care Policy Paper prepared by the Child Care Action Campaign) (arguing that child care is important for supporting families and also for the national economy). This need for child care is increasing as more and more women enter the workforce. By 1995, two-thirds of all pre-school children (approximately 15 million) will have mothers in the workforce, an increase of more than 50% over the 1986 figure of 9.6 million. *Id.* at 52 (citing H. BLANK & A. WILKINS, STATE CHILD CARE FACT BOOK 1987 at 17 (1987) (published by the Children's Defense Fund)).

which requires commercial developers to provide child care facilities in new or renovated construction. Part I introduces the concept of child care linkage and presents a model of a child care linkage law. Part II provides background about the increased need for child care facilities due to increased economic activity, changed social attitudes about women in the workforce, and the economic necessity for both parents in a household to work outside the home. Part III discusses the foundations for child care linkage in current zoning and land use planning practices. Part IV presents alternative ways in which local governments can include child care in the community planning process. Part V evaluates the legality and feasibility of a child care linkage policy.

I. Child Care Linkage: A Concrete and Effective Way to Include Child Care in the Development Process

Child care linkage laws require commercial developers to provide on-site child care or to pay an in-lieu fee for child care services as a condition to getting a permit necessary for carrying forward a development project.[3] Communities have applied the police power[4] of the state to regulate land use for the general health, safety and welfare of its citizens by requiring land developers to dedicate land or building space to meet the development's need for streets, sidewalks, water and sewer lines, and, more recently, recreation and education.[5] In order to provide for needs generated by smaller developments or for cases in which a development site is not appropriate for the construction of the required facilities, municipalities require payment of an in-lieu fee before the developer may proceed with construction. Contemporary exaction schemes may also require developers to pay impact fees or to provide for marginally related

[3] Regulations that require a developer to make a contribution to a municipality as a condition of carrying forward a project are called exactions. *See* Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 Law & Contemp. Probs. 70 (1987).

[4] "Police power" has been defined as "the exercise of governmental power to limit, regulate or prohibit personal and business activity and property uses without government compensation in order to protect the public health, safety, morality and general welfare." D. McCarthy, Local Government Law 126 (1983).

[5] *See* Connors & High, *supra* note 3, at 70.

social needs such as affordable housing.[6] Child care linkage laws are analogous to traditional forms of exactions because they also require developers to provide for a need generated by commercial development, namely child care.

Because linkage programs extend the police power to provide for unprecedented social and physical needs, such programs represent the cutting edge of the continuum of requirements imposed on developers as conditions to the issuance of building permits.[7] Linkage can be interpreted as being analogous to a user fee, making commercial developers provide for the physical and social needs that they create.[8] Alternatively, linkage may be seen as merely a means available to local governments to provide "a steady local foundation for . . . projects that are not subject to the vagaries of national policy or the budget process."[9]

Forging a connection between office development and social needs, linkage programs provide a politically attractive way for cities to involve the private sector in addressing community needs.[10] Housing linkage programs are well established in the land use planning process throughout the country.[11] Such pro-

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[6] *See* Smith, *From Subdivision Improvements Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5 (1987).

[7] *See* Connors & High, *supra* note 3, at 69, 72 (1987); Sweeney, *The "Impact Fee," An Exciting and Troublesome Concept*, 60 N.Y. ST. B. J. 52 (1988). Linkage is considered the last stage of a progressive expansion of the police power that began with zoning and subdivision regulations and evolved to dedications of capital facilities such as sewers and sidewalks, in-lieu fees, impact fees and now to exactions for social needs marginally related to the development project such as low-income housing. *See generally* Connors & High, *supra*; Smith, *supra* note 6, at 5; Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381 (1985). *See also infra* notes 51–65 and accompanying text. For a discussion of how child care linkage programs could be classified as either "development exactions" or "linkage legislation," see generally Comment, *Child Care Land Use Ordinances—Providing Working Parents With Needed Day Care Facilities*, 135 U. PA. L. REV. 1591, 1606–08 (1987).

[8] *See, e.g.*, PLANNING FOR CHILD CARE V-1 (A. Cohen ed. 1987).

[9] Connors & High, *supra* note 3, at 72 (quoting Tegeler, *Developer Payments and Downtown Housing Trust Funds*, 18 CLEARINGHOUSE REV. 679, 680 (1984)). *See also* Stevenson, *Debate Grows on Development Fees*, N.Y. Times, Feb. 16, 1989, at D6, col. 4 (discussing how development fees are a politically safe option for paying for infrastructure).

[10] *See* Schwartz, *Giving Something Back*, NEWSWEEK, Sept. 5, 1988, at 46 (describing how a growing number of linkage laws force developers to fund public works); Stevenson, *supra* note 9.

[11] Housing linkage programs have been running in Boston for six years and in San Francisco for nine years. For a discussion of housing linkage programs in Boston and San Francisco, see generally Kayden & Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 127 (1987); Diamond, *The San Francisco Office/Housing Program: Social Policy Underwritten by Private Enterprise*, 7 HARV. ENVTL. L. REV. 449 (1983).

grams, which are based on the assumption that development creates a need for low- and moderate-income housing, require developers to construct housing developments or pay a housing linkage fee to the community as a condition to the granting of necessary building permits.[12] Child care linkage programs, however, are relatively new additions to land use planning law. The first major city to adopt a child care linkage ordinance was Concord, California in 1985.[13] Shortly thereafter, San Francisco included child care as part of its comprehensive Downtown Plan.[14] Since that time, nine communities and three counties in California have imposed exactions for child care facilities, and seventeen communities and two counties have adopted policies, regulations or guidelines for the provision of child care by developers.[15] Recently, the city of Boston enacted child care linkage as part of the downtown rezoning plan, creating the Midtown Cultural District.[16] In addition, child care ordinances are currently being considered in many communities including Newton, Massachusetts; Oakland, Irvine, Los Angeles, and Sonoma County, California; New York City; and Philadelphia.[17] The

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[12] For example, Boston's housing linkage laws require "that developers pay $5 for housing and $1 for job training for every square foot of development beyond 100,000 square feet. The developer of a typical 20-story office building in Boston pays about $2 million into the housing trust fund and $300,000 into the job training fund." Schwartz, *supra* note 10, at 46. Since 1984, when the Boston housing linkage went into effect, the program has raised $50 million for housing (1850 affordable units) and $3 million for job training. *Id.*

[13] CONCORD, CAL., MUN. CODE art. IV, ch. 9(3) (effective July 1, 1985), *reprinted in* PLANNING FOR CHILD CARE, *supra* note 8, at V-22 (amending Art. IV of the CONCORD MUNICIPAL CODE entitled "Public Welfare" by the addition of a new chapter 9(3)). For a discussion of the Concord child care linkage plan, see generally Coll & Longshore, *Funding Child Care with Development Fees*, W. CITY, July 1986, at 13, 14, 20.

[14] SAN FRANCISCO PLANNING CODE § 314 (1985). *See also* Alterman, *Evaluating Linkage and Beyond: Letting the Windfall Recapture Genie Out of the Expectations Bottle*, 34 WASH. U. J. URB. & CONTEMP. L. 8, 10–12 (1988) (discussing San Francisco's requirements for child care in its Downtown Plan).

[15] CAL. OFFICE OF PLANNING AND RESEARCH LAND USE, Bulletin, Sept.-Oct. 1988, at 9, col. 2 (identifying the communities and counties imposing exactions for child care as Clayton, Concord, Culver City, Davis, Milpitas, Petaluma, Sacramento, San Ramon, Santa Monica, Contra Costa County, Orange County, and Santa Barbara County, and identifying jurisdictions with policies, regulations or guidelines for the provision of child care by developers as Antioch, Carlsbad, Chula Vista, Clayton, Irvine, Lemoore, Los Angeles, Oakland, Ontario, Orange, Pleasanton, Sacramento, San Mateo, Santa Monica, Thousand Oaks, Wasco, West Covina, Orange County, and Santa Barbara County).

[16] BOSTON ZONING CODE ch. 665, art. 38, § 38-18(4) (1989), (added by Text Amendment No. 117A, effective March 20, 1989).

[17] PLANNING FOR CHILD CARE, *supra* note 8, at V-9. *See also Linkage Option Explored*, Newton Graphic, Jan. 18, 1989, at 1, col. 1 (discussing consideration of child care linkage in Newton, Mass.).

Commonwealth of Massachusetts is currently considering a statewide child care linkage bill first proposed in 1986.[18]

A child care linkage program can take several forms depending on the characteristics of a community and the need for child care. The plan adopted by the community of Concord, California, represents one linkage model. The Concord plan requires that developers of projects valued in excess of $40,000 pay an impact fee equal to 0.5% of development costs into a child care fund.[19] The plan allows exemptions from the impact fee for residential developments, child care centers, projects undertaken by public agencies, projects which are already providing a child care program or facility or contributing to an off-site facility, and projects that do not increase the need for child care.[20]

The San Francisco plan offers an alternative linkage approach. The San Francisco ordinance allows developers of commercial office space or hotels of greater than 50,000 square feet to choose between dedicating space for child care or paying an in-lieu fee.[21] If the developer elects to dedicate space, the developer must lease a minimum of 2000 square feet for a child

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[18] The Massachusetts bill was originally proposed in 1986 by Senator Jack Backman. *See* Mass. S. 1921, 174th General Court, 2nd Annual Sess. (1986). In 1987 and 1988, Representative Saundra Graham and Senator John Olver redrafted and proposed the bill, which passed the House of Representatives. *See* Mass. H. 5851, 175th General Court, 1st Annual Sess. (1987); Mass. H. 5374, 175th General Court, 2nd Annual Sess. (1988). Child care linkage received strong endorsement from the *Boston Globe*, which proclaimed that:

> [a] priority of the incoming Legislature should be the linkage of child-care facilities to the development of commercial or industrial buildings in the state .... A statewide linkage of development and child care has advantages for all—the developers, the businesses they hope to attract, the workers, their children and the state.

Child-care Linkage, Boston Globe, Dec. 5, 1988, at 18, col. 1. The 1989 version, Mass. H. 3793, 176th General Court, 1st Annual Sess. (1989) [hereinafter referred to as Massachusetts Bill], sponsored by Senator Olver and Representative David Cohen, is substantially the same as the 1988 version and is currently under review by the General Court of Massachusetts.

[19] CONCORD, CAL., MUN. CODE art. IV, ch. 9(3) (effective July 1, 1985), *reprinted in* PLANNING FOR CHILD CARE, *supra* note 8, at V-22. The City of Concord is responsible for collecting the fees. Through its Request For Proposal (RFP) process, in which it solicits distribution proposals from eligible agencies, the city chooses an agency whose program it uses to disburse funds derived from impact fee collection. PLANNING FOR CHILD CARE, *supra* note 8, at V-9. Although the ordinance is drafted as an impact fee, the requirements may be waived, reduced, or the fee credited if the developer provides child care for the development. CONCORD, CAL., POLICY AND PROCEDURE NO. 130, THE CITY OF CONCORD CHILD CARE PROGRAM, § 5 [hereinafter POLICY & PROCEDURE NO. 130], *reprinted in* PLANNING FOR CHILD CARE, *supra* note 8, at V-25.

[20] POLICY & PROCEDURE NO. 130, *supra* note 19, at § 4.

[21] SAN FRANCISCO, CAL., PLANNING CODE § 314.3(a) (1985).

care center to a non-profit child care provider for a minimum of three years.[22] The developer must provide space for the child care facility for the life of the building.[23] Developers electing to provide the in-lieu fee must pay $1 per square foot of new office or hotel space before the city will issue the Certificate of Occupancy.[24] Fees collected for child care linkage are deposited into an "Affordable Child Care Fund" that the city uses to increase the supply of child care facilities available to low- and moderate-income households.[25] Developers can satisfy the child care requirement in conjunction with other developers or by providing a near-site facility. Alternatively, developers may combine the dedication and fee options by providing a smaller child care center and making up the difference by paying a proportion of the in-lieu fee.[26]

The child care provisions in Boston's downtown rezoning plan apply only to proposed projects within the boundaries of the newly created Midtown Cultural District that exceed a building height of 125 feet, an FAR of eight, or both.[27] Proposed projects subject to the child care requirements must provide a child care facility on-site or within the Midtown Cultural District or the nearby neighborhoods of Chinatown or Bay Village.[28] The Midtown Cultural District child care provisions do not include a fee option, and require dedication of child care facilities based on the size of the building, with minimum sizes for different categories of buildings.[29]

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[22] *See* SAN FRANCISCO, CAL., PROPOSED REGULATIONS, July 28, 1986, at 11, 12 [hereinafter PROPOSED REGULATIONS]. In order to designate a nonprofit child care provider, the developer should advertise "Requests for Proposals" (RFPs) approximately three months before commencing preparation of construction documents (working drawings) of a child care facility. In cooperation and consultation with the Executive Director of the Mayor's Office of Community Development, the developer will screen the proposals and designate a provider who will be subject to licensing requirements of the California Department of Social Service pursuant to CAL. HEALTH & SAFETY CODE §§ 1596.80–1596.875, 1596.95–1597.09, or 1597.30–1597.61. *Id.* at 4, 14.

[23] SAN FRANCISCO, CAL., PLANNING CODE § 314.4(b) (1985).

[24] *See* PROPOSED REGULATIONS, *supra* note 22, at 25.

[25] *See* SAN FRANCISCO, CAL., PLANNING CODE, § 314.5 (1985).

[26] *Id.* at § 314.4(b)(5).

[27] BOSTON ZONING CODE, ch. 665, art. 38, §§ 38-4, 38-18(4) (1989).

[28] *Id.* at § 38-18(4).

[29] *Id.* Specifically, projects between 100,000 and 200,000 square feet must devote two percent of gross floor area for child care facilities, projects from 200,000 to 500,000 square feet must devote a minimum of 4000 square feet, projects from 500,000 to 1,000,000 square feet must devote 8000 square feet, and projects which equal or exceed 1,000,000 square feet must devote a minimum of 12,000 square feet. *Id.*

The Massachusetts bill, based upon the San Francisco child care linkage plan, proposes child care linkage on a statewide basis. The Massachusetts plan expands the linkage requirement to include not only development of office space and hotels, but also industrial, retail, and large non-profit developments and state buildings. According to the Massachusetts plan, developers of buildings over 50,000 square feet must either dedicate two percent of their space for ten years for an on-site child care center or pay an in-lieu fee of two percent of the gross rental value of the building for ten years. Unlike the San Francisco plan, which requires the payment of a one-time flat fee, the Massachusetts plan allows the in-lieu fee to be prorated over ten years.[30] Like the San Francisco plan, the Massachusetts Bill allows developers flexibility so that they can include near-site centers, provide combinations of space and the fee, or act in consortium with other developers. Although most of the bill's measures for implementation of child care linkage, such as enforcement, fee collection, and fee usage, remain at the local level, the Massachusetts Bill includes a coordinating state board that will issue regulations and monitor the linkage program.

In discussing the merits and construction of a child care linkage policy, this Note will assume a simple model of a child care linkage law. Featuring the flexibility provisions included in the San Francisco and Massachusetts plans, this model child care linkage law requires developers to provide for any increased child care needs created by development by providing on-site or near-site child care space, either alone or in consortium with other developers, or by paying an in-lieu fee, or by providing some combination of these options. This model assumes that space and in-lieu fee requirements are proportionate to the need for additional child care created by the development, as determined through a community study. In addition, the model assumes that funds collected will be distributed through an affordable child care fund administered by the local government. Finally, the model assumes that provisions for child care required by the model linkage law are available primarily to low- and moderate-income employees of the affected development,

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[30] *See infra* notes 208–215 and accompanying text for a discussion of the merits of each of these provisions.

with some limited access available to upper-income employees and members of the community.

II. Economic Development and the Need for Child Care

The current need for child care has resulted to a large extent from the changing role of women and the increased development of land. The majority of working-age women in the United States now work outside the home.[31] In 1986 there were 55 million women in the workforce, three times the number just after World War II, constituting 44% of the civilian labor force.[32] Women are expected to comprise three-fifths of the annual number of new entrants into, and nearly 50% of, the workforce by the year 2000.[33] U.S. Department of Labor statistics show that in 1950, only 12% of women with children under the age of six worked. In 1988, 57% of women with children under the age of six and 63% of women with children under the age of fourteen were working outside the home.[34] More and more mothers are returning to the workforce and increasing the already substantial need for child care.[35]

With the increasing proportion of women, particularly mothers, in the workforce, the nation is experiencing a shortage of affordable, quality child care.[36] According to the Children's Defense Fund, there are only about 2.5 million licensed day-care-center slots available for the 10.4 million children under six

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[31] A Workforce Issue, *supra* note 1, at 143.

[32] O'Connell & Bloom, *Juggling Jobs and Babies: America's Child Care Challenge*, 12 Population Trends and Pub. Pol. 1, 2 (1987). *See also* A Workforce Issue, *supra* note 1, at 145 (finding that 45% of all workers are women, up from 30% in 1950).

[33] A Workforce Issue, *supra* note 1, at 143, 145.

[34] *Id.* at 143, 144.

[35] *Working Mother Is Now Norm, Study Shows*, N.Y Times, June 16, 1988, at A19, col. 1 (quoting a U.S. Census Bureau report that in 1987, 50.8% of new mothers returned to the job market within a year of giving birth). Commenting on this data, Martin O'Connell, chief of the Bureau's Fertility Statistics Branch, said "every time a statistic approaches the 50% mark . . . it's not an oddity anymore, it's a way of life." *Id.* The 1987 figure was the first time over 50% of mothers remained in the workforce after giving birth. This figure was an increase from 49.8% in 1986 and only 31% in 1976. *Id.*

[36] According to the Department of Labor, there are 12.8 million families with children under the age of fourteen in which both parents work outside the home. In addition, 3.5 million single mothers, with 1.8 million children under age six and 3.4 million children between six and thirteen, are members of the workforce. There are also 3.7 million welfare mothers with 3.1 million children under six and 12.9 million children between six and thirteen. A Workforce Issue, *supra* note 1, at 147–48.

whose mothers are in the workforce.[37] Some economists and the U.S. Department of Labor conclude that there is no general shortage of child care. In support of this conclusion, these economists observe that nearly all children have some kind of care and that some parents choose not to put their children in child care centers.[38] However, these observations merely demonstrate that there is a shortage of quality affordable child care options since many low- and moderate-income parents must, due to economic considerations, place their children in sub-standard settings or with relatives.[39]

The child care crisis is largely a class issue because access to quality child care[40] depends on the income of the parents. While the wealthy can choose among many options of child care, including having one spouse at home, lower- and middle-class families may not be financially able to choose most quality child care alternatives.[41] Instead, these parents face a constrained set of alternatives that is based more upon cost than quality. Arguably, what is needed is redistribution, so that all working families may have access to quality child care.[42]

Problems of availability, affordability and quality of child care are also significant in their relation to the welfare of women and

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[37] *See* CONG. Q. 514 (Feb. 27, 1988); *Labor Letter*, Wall St. J., Nov. 15, 1988 at 1, col. 5 (noting that the supply of child care meets just half of the demand). *See also* THE BOTTOM LINE, *supra* note 2, at 33 (arguing that the "child care squeeze" is likely to increase as the baby boom generation has children, while the number of potential child care providers decreases).

[38] *See, e.g.*, A WORKFORCE ISSUE, *supra* note 1, at 10, 155; THE BOTTOM LINE, *supra* note 2, at 31.

[39] *See* THE BOTTOM LINE, *supra* note 2, at 31. *See also* Liebman, *Evaluating Child Care Legislation: Program Structures and Political Consequences*, 26 HARV. J. LEGIS. 357, 362–64 nn.15–16 (1989).

[40] *See* R. RUOPP, J. TRAVERS, F. GLANTZ & C. COELEN, CHILDREN AT THE CENTER: SUMMARY FINDINGS AND THEIR IMPLICATIONS 61 (1978) [hereinafter NATIONAL DAY CARE STUDY] (elaborating on the Final Report of the National Day Care Study). The National Day Care Study described its concept of quality child care as including such characteristics as "a loving, home-like environment in which the child is safe, adequately fed, active and happy," care providing developmental benefits to the child, and care which is "part of a broader range of services to children and families." *Id.* at 61–62. The study's findings associated quality with low child to care-giver ratios, small groups, high education/training level of care-givers, a focus on the child's cognitive development, and adequate indoor and outdoor space. *Id.* at 77–78.

[41] *See* Liebman, *supra* note 39. *See also* NATIONAL DAY CARE STUDY, *supra* note 40, at 152–54 (discussing how "real and serious trade-offs" must be made between quality and cost, because options that promote the development and protect the welfare of children will likely increase costs and thus reduce the number of children who can receive care); M. BLUM, THE DAY-CARE DILEMMA 62 (1983) (describing how budget restrictions can have a serious impact on the program and environment of a child care center).

[42] Liebman, *supra* note 39, at 360–61, nn.9–11.

children, and the functioning of the contemporary workplace. Some critics of existing child care have linked child care quality and availability problems with restricted opportunities for women in the workforce.[43] Inadequate child care can also be a source of stress on families in which either the single parent or both parents must work.[44] In addition, quality child care is important for the healthy development of small children. Quality education in early childhood provides an important foundation that will help prevent delinquency, and help children to become productive members of society.[45]

These problems not only affect equal opportunity for women and the stability of families, but they are also critical to the functioning of the contemporary workplace and the productivity of the U.S. economy. The economic base has shifted from an industrial economy to a service economy.[46] Wages of many service workers, who are most likely to be women,[47] are lower, and the need for affordable child care is more acute in the service sector.[48] At the same time, a labor shortage looms and employers will need to attract as many workers as possible into the workforce in order to maintain and increase levels of productivity.[49] Therefore, child care is not merely a luxury. Rather, it is a necessity which results directly from economic development. Future economic development depends on the ability to

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[43] *See* V. FUCHS, WOMEN'S QUEST FOR EQUALITY 60 (1988). *See also* U.S. Commission on Civil Rights, *Equal Opportunity and the Need for Child Care*, in FAMILIES AND CHANGE 95–99 (R. Genovese ed. 1984) (discussing how the lack of child care or inadequate child care acts as a constraint on equal opportunity for women).

[44] FAMILY POLICY PANEL, ECONOMIC POLICY COUNCIL OF THE UNA-USA, WORK AND FAMILY IN THE UNITED STATES: A POLICY INITIATIVE 51–52 (1985) [hereinafter FAMILY POLICY PANEL] (citing studies showing that the inability to find child care increases employee absenteeism and turnover, and decreases employee energy and productivity).

[45] *See* THE BOTTOM LINE, *supra* note 2, at 78; W. RIDDLE, EARLY CHILDHOOD EDUCATION AND DEVELOPMENT: FEDERAL POLICY ISSUES 7, (Congressional Research Service Issue Brief IB88048, Oct. 20, 1988) (citing studies showing positive effects of pre-kindergarten education on achievement in education and other areas of life such as employment, welfare dependence, and incidence of arrest); CHILDREN'S DEFENSE FUND, A CHILDREN'S DEFENSE BUDGET 177 (1988) (describing how quality pre-school programs are a key to self-sufficiency for members of low-income families).

[46] W. JOHNSTON, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY, 112–14 (1987).

[47] THE BOTTOM LINE, *supra* note 2, at 49.

[48] *Id.*

[49] *See* A WORKFORCE ISSUE, *supra* note 1, at 127 ("An important factor quickening employers' interest in child care may well be the widespread agreement in the business, industry, and financial worlds that a labor shortage is likely in the 1990s."); FAMILY POLICY PANEL, *supra* note 44, at 58 (describing the impending labor shortage and the need to attract more women into the workforce).

attract workers to the workforce and to improve the productivity of workers already there. Providing child care is one important part of assuring that there will be an adequate supply of labor and that American industry will remain competitive in the world economy.[50]

III. PLANNING FOR CHILD CARE THROUGH THE DEVELOPMENT PROCESS

Because the local planning process reflects both the needs of a community and a vision for what a community should be, affordable child care should be included in this process as a value in the development of a changing American society. In a sense, child care represents the intersection of the two major forces in a complex society—the workplace and the family. With the decrease of government involvement and the new dependence on the private sector, the family and the workplace will provide social support, financial coverage and "community" for most of the American workforce. Because child care enables both of these institutions to keep functioning—the workplace with workers who might be parents and the family with parents who work—it is an essential element to include in the planning of the communities of the future.

A. *The Evolution of Development Exactions as a Means to Address Community Needs*

Originally private property lay at the heart of the American legal system, and community planning in the United States was in large part organized around stabilizing and preserving property values.[51] However, as early as colonial times, the need for the land to be economically useful justified municipalities in taking undeveloped land without compensation and developed land with, and sometimes without, compensation in order to provide for elements of a common infrastructure, such as road-

[50] *See* THE BOTTOM LINE, *supra* note 2, at 50. *See also* S. KAMMERMAN & A. KAHN, THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE 18 (1987).

[51] *See generally* R. LAI, LAW IN URBAN DESIGN AND PLANNING 40–47 (1988) (discussing the importance of private property and the impact of concepts such as John Locke's natural rights theories and Adam Smith's *The Wealth of Nations* on the development of American jurisprudence).

ways or thoroughfares.[52] Municipalities began to require that developers provide, as well as dedicate land for, needed facilities and services.[53] Local governments also extended the exercise of police power to require that developers provide land for on-site school and park purposes when they subdivide and develop large plots of previously undeveloped land.[54] As an alternative to land dedication, governments adopted the in-lieu fee, allowing small subdivisions to contribute to the increased need for educational facilities without being wholly responsible.[55]

Concurrent with these developments in governmental exactions on private developers, communities began to expand the scope of private property regulation. The Supreme Court in the landmark case of *Euclid v. Ambler*[56] recognized municipal zoning as a constitutional extension of a state's police power.[57] The *Euclid* decision triggered the rapid adoption of community planning and zoning in virtually all states.[58] Zoning was originally

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[52] *See* Bosselman & Stroud, *Legal Aspects of Development Exactions*, in DEVELOPMENT EXACTIONS 70 (J. Frank & R. Rhodes eds. 1987); *see also* Jurgensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415, 418 (1981) (discussing how land dedication was the first device used by local governments to shift improvement costs to new residents and developers).

[53] Delaney, Gordon & Hess, *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 141 (1987).

[54] *See id.* at 142. This type of dedication requirement is called a subdivision exaction. Originally, state courts invalidated these dedication requirements. *See* Jurgensmeyer & Blake, *supra* note 52, at 416 n.4. However, courts increasingly approved these regulations, reasoning that the facilities would benefit and attract new residents and that the dedication requirements might therefore allow developers to reap larger profits from the subdivision. *See id.* at 418 n.16.

[55] Delaney, Gordon & Hess, *supra* note 53, at 142.

[56] 272 U.S. 365 (1926).

[57] *See* Euclid v. Ambler, 272 U.S. 365, 387 (1926) ("The [zoning] ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.").

[58] Every state has a zoning act or a zoning enabling act which authorizes cities, towns or counties to adopt zoning codes. Although most zoning laws are enacted on a local level, separate state laws may cover connected activities such as building codes, sign controls, and regulation of local roads. *See* A. DAWSON, LAND USE PLANNING AND THE LAW 38, 42 (1982). In addition, states may resume some of the zoning power delegated to cities by enacting specific state-wide legislation. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 40B, §§ 20–23 (West 1979) (The Massachusetts "Anti-snob Zoning Act" was enacted to address the exclusionary zoning practices of local governments, and was held constitutional as a legitimate resumption of state zoning power previously delegated to local governments in Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 294 N.E.2d 393 (1973)); A. DAWSON, *supra*, at 82–83.

Local zoning plans typically are enacted to reflect values in a city's comprehensive plan. A "typical, simple, old-fashioned" zoning law divides the town into a limited number of districts and allows "higher valued" interests such as agricultural and residential uses (including schools, churches, and hospitals) for all districts and allocates some interests such as business or industrial uses only for selected districts in the town. Intensity regulations accompany each type of district and include requirements such as

limited to the physical conditions of development, such as building height and access to light and air. However, as communities became more complex, the courts used a broader reading of the police power to justify a large variety of regulations enacted to ensure the health, values, and needs of communities.[59] Such regulations included requiring developers to provide internal streets, sewers, and water systems.[60] The scope of such community-need exactions subsequently expanded to include requirements that developers provide schools and parks to service the needs created by their developments.[61] In addition, communities enacted zoning ordinances, designed to preserve community character and family values, which the Supreme Court upheld as constitutional in *Village of Belle Terre v. Boraas*.[62]

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minimum lot dimensions, minimum yard dimensions, and maximum heights of buildings. In addition, the zoning ordinance may include general regulations such as limits on nonconforming uses, parking requirements, sign controls, and earth removal permits. Exemptions and variances may be set out or simply referenced to state law. The decision of the building official who enforces this ordinance can be appealed to a local appeals board. *See* A. DAWSON, *supra*, at 42–43.

Although this type of ordinance is still typical of smaller communities, it has never been typical of large cities. Large cities usually have long and complex ordinances that cover the same basic goals with a lot more detail and variety. Sophisticated modern ordinances also include many features such as subdivision exactions, special permits (allowing developers to bargain with cities in order to build development projects exceeding zoning restrictions, often in exchange for amenities or other concessions to the city), density bonuses (allowing developers extra density or floor space in exchange for providing certain features or standards in their buildings), transfers of development rights (developers that preserve open space or historic landmarks are able to "transfer" development rights such as building height to another development), and planned-unit development (PUD) (mixed uses are permitted in a large plot of land according to a special formula contained in the local planning code). *See* A. DAWSON, *supra*, at 44–72.

[59] Berman v. Parker, 348 U.S. 26 (1954). *See also* Euclid v. Ambler, 272 U.S. at 386–87. The dicta in *Euclid* recognized the need for different regulations in a changing society:

> . . . with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities . . . . And [in this there is no inconsistency, for] while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Id.

[60] *See* Weschler, Mushkatel & Frank, *Politics and Administration of Development Exactions*, in DEVELOPMENT EXACTIONS 17 (J. Frank & R. Rhodes eds. 1987).

[61] Connors & High, *supra* note 3, at 70.

[62] 416 U.S. 1 (1974). In *Belle Terre*, the Court upheld a local zoning ordinance that restricted land use to one-family dwellings with a narrow definition of "family," in effect banning households exceeding two persons not related by blood, adoption, or marriage. Justice Douglas, addressing the appropriateness of the ordinance, explained:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . .

In addition to the development and application of city planning in the middle and latter part of this century, the United States has also undergone what Fred Bosselman and David Callies refer to as a "quiet revolution" in concepts of land value and development regulation.[63] Our concept of land has changed from one of land as a commodity to be bought and sold to that of land as a scarce commodity to be regulated in ways to meet important social and environmental goals.[64] In addition, the regulation of land is no longer a piecemeal, decentralized process controlled by thousands of individual local governments. Instead, land use has taken on a regional and state dimension as "it has become increasingly apparent that the local zoning ordinance . . . has proved woefully inadequate to combat a host of problems of statewide significance, social problems as well as problems involving environmental pollution and destruction of vital ecological systems, which threaten our very existence."[65] In essence, land development is now considered in the context of the physical and social needs of a whole community.

In light of this new concept of land use planning, communities can and should consider child care as an important part of the planning process, just like solidly constructed buildings, affordable housing, public transportation, and the provision of roads, sewers, schools, and electricity. Similar to regulations that address other community health and welfare needs, land use regulations that require developers to provide for the increased need for affordable child care are consistent with the purposes of zoning and community planning.

B. *Options for Including Child Care in the Planning Process*

Depending on the nature of the planning process in a community, local governments can employ both general and specific

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> The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9. *But see* Southern Burlington Co. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (striking down a New Jersey town's exclusionary zoning laws). Commentators have reconciled these cases suggesting that "the attitude of the Court [in *Belle Terre*] . . . definitely appears to favor the community in exercising exclusionary powers so long as the motive is not clearly racial." A. DAWSON, *supra* note 58, at 78.

[63] F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 1 (1971).

[64] *Id.* at 317.

[65] *Id.* at 3.

approaches to including the issue of child care in the land use planning process. These options range from simple policy statements to more specific proposals, such as linkage, that require land developers to provide for increased child care needs.

On the most general and philosophical level, child care planning can be included in the community's comprehensive plan.[66] When city planners and lawmakers are formulating a comprehensive community plan, they must include in the plan certain elements that are mandated by the state such as provisions for housing, conservation, open space, noise, and safety. In addition, the state may allow for optional elements such as recreation, transportation, public transit, and community design, including sites for schools, parks, and playgrounds. State or local governments could make strong policy statements about the importance of child care by including provisions for child care as a separate element (mandatory or optional) of the plan, or by amending and redefining existing elements of the plan to include or coordinate with child care needs.[67] Alternatively, child care could be considered in a specific portion of the plan covering particular geographic areas such as downtown redevelopment or suburban development.[68] Including child care provisions in a

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[66] Comprehensive plans form the basis of zoning laws, as most state courts and legislatures require that zoning be in accordance with a comprehensive plan. *See* Mandelker & Netter, *Comprehensive Plans and the Law*, in A PLANNER'S GUIDE TO LAND USE LAW 17 (1983). Some courts have held that comprehensive policies expressed in a zoning ordinance satisfy the comprehensive plan requirement. *See, e.g.*, Dawson Enterprises, Inc. v. Blaine County, 98 Id. 506, 567 P.2d 1257 (1977) (cited in Mandelker & Netter, *supra*, at 17). State courts have also required the adoption of comprehensive plans as separate documents. *See* Fasano v. Board of County Commissioners, 264 Ore. 574, 507 P.2d 23 (1973) (cited in Mandelker & Netter, *supra*, at 18).

Several states mandate local comprehensive planning and require that comprehensive plans be up to date. *See, e.g.*, Bedford v. Village of Mount Kisco, 33 N.Y.2d 178, 306 N.E.2d 155 (1973) (the court held the village could not rely on an outdated plan in rejecting a multi-family zoning request); Mandelker & Netter, *supra*, at 19.

[67] *See* PLANNING FOR CHILD CARE, *supra* note 8, at II-3. For example, child care could be part of the elements of open space, recreation, and circulation because child care centers need outdoor space and playgrounds (open space and recreation) and should be located near offices and/or public transportation (circulation and transportation). *Id.* at II-5. The city of Los Angeles recently passed a child care policy which states:

> The city of Los Angeles shall integrate the child care needs of those who live or work in Los Angeles into the city's land use planning process. This shall be accomplished, in part, through the inclusion of child care objectives and goals, where appropriate, in the elements of the Citywide Plan and the various Community Plans and Specific Plans.

LOS ANGELES, CAL., CITY OF LOS ANGELES POLICY ON CHILD CARE 4 (Feb. 24, 1987). *See generally California Going for Child Care in Transit*, WOMEN & ENV'TS 19 (1988) (describing the need for, and planning to include, child care located near mass transit facilities).

[68] PLANNING FOR CHILD CARE, *supra* note 8, at II-5.

comprehensive plan will ensure that child care is considered along with other important services in long range community planning. Such provisions will also give advocates a legal basis for requesting that child care needs be addressed before a community authorizes land development, and that zoning ordinances encourage development of child care facilities.[69]

Child care planning could also be included in the environmental review process or as a required consideration in an environmental impact statement. In the case of a federally financed project, the responsible agency is required by the National Environmental Policy Act (NEPA) to analyze the environmental effects of the project and make its analysis available to community officials and the public.[70] Many states have passed similar legislation.[71] Because these statutes may require more than just a review of the physical environment,[72] child care could be included in this review procedure if community advocates pressed for its consideration. Traditionally, environmental reviews have looked at the impact of new residential development

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[69] *See id.* at II-3. Child care also should be included in a comprehensive plan for the community to provide a foundation for impact fees and a measurement of the relation between development and the need for child care. *See* Currier, *Legal and Practical Problems Associated with Drafting Impact Fee Ordinances*, in PROC. INST. PLAN. ZON. & EM. DOM. 273, 294 (1984). *See also* Sweeney, *supra* note 7, at 54 (discussing how community plans can provide a baseline study to determine what facilities are necessary). Including child care in a community plan can also serve as a basis for local communities to change exclusionary land use practices such as local zoning ordinances, restrictive covenants, and building codes which often inhibit the growth and operation of home-based child care centers. For a discussion of these barriers, see generally Comment, *Family Day-Care Homes: Local Barriers Demonstrate Needed Change*, 25 SANTA CLARA L. REV. 481 (1985); Note, *Obstacles to Family Day Care Homes in Michigan*, 34 WAYNE L. REV. 1445 (1988).

[70] National Environmental Policy Act of 1969, *as amended*, 42 U.S.C. §§ 4321–61 (1982). For a general discussion of environmental impact statements, see generally Magee, *Environmental Impact Statements: Applications in Land Use Control*, 10 ZON. & PLAN. L. REP. 113 (1987).

[71] PLANNING FOR CHILD CARE, *supra* note 8, at III-1, (identifying states with comprehensive statutory requirements as: California, Connecticut, Hawaii, Montana, New York, North Carolina, South Dakota, Virginia, Washington, Wisconsin, and Puerto Rico).

[72] *See id.* at III-3 (citing a New York Times article, November 19, 1986 in which Judge Fritz Alexander described the effect of development on population patterns and neighborhood character). *Cf.* Case Note, *Psychological Health Damage as an Environmental Effect: Metropolitan Edison Co. v. People Against Nuclear Energy*, 26 ARIZ. L. REV. 497–505 (1984) (discussing limited circumstances in which environmental reviews under NEPA may consider psychological harms that are closely related to physical conditions); Friesema & Culhane, *Social Impacts, Politics and the Environmental Impact Statement Process, reprinted in* 16 NAT. RESOURCES J. 339 (1976) (a paper originally presented at the Meeting of the Society for the Study of Social Problems in Montreal, August 1974) (describing and evaluating the use of social impact analysis in environmental impact statements).

on the need for additional school facilities. Child care is a logical extension of this consideration because schools often operate child care facilities and because early childhood education is becoming more and more important in American society.[73]

Child care can also be included in the development process as part of development agreements or other negotiations between developers and communities. These agreements are generally used for large multi-acre or multi-site developments where numerous structures or planned development is expected and a developer seeks a waiver of certain zoning requirements.[74] As part of negotiations with developers, communities such as Seattle and Vancouver, Washington, Irvine, California, and Hartford, Connecticut have also considered or adopted incentive programs to include child care in the development process.[75] The Massachusetts legislature is currently considering a bill which was proposed by developers who argue that incentives are necessary because "[u]nduly restrictive governmental policies hindering the establishment of child care facilities have contributed significantly to the shortage [of quality affordable child care]."[76] While more palatable to developers than a man-

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[73] PLANNING FOR CHILD CARE, *supra* note 8, at III-3. *See also* Comment, *supra* note 7, at 1615 (arguing that child care ordinances should be categorized as school exactions).

[74] PLANNING FOR CHILD CARE, *supra* note 8, at IV-1. Developers that seek waivers of certain zoning requirements apply to the local zoning board for exemptions, commonly called zoning variances or special permits. Although originally expected to serve only as a means to correct errors or deal with unusual, unforeseen situations, these processes have become common, and communities frequently respond to development proposals on a one by one basis. *See* Meshenberg, *The Administration of Flexible Zoning Techniques*, in A PLANNERS GUIDE TO LAND USE LAW 105–07 (S. Meck & E. Netter eds. 1983). Honolulu, Hawaii has a program that is a "hybrid of a development agreement and a dedication ordinance." The Honolulu Office of Human Resources objectively reviews developers' requests for variances from the child care requirements in the zoning ordinance, and recommends an appropriate amount of land which developers should deed to the city to meet increased child care needs resulting from the development. PLANNING FOR CHILD CARE, *supra* note 8, at IV-3.

[75] *See* PLANNING FOR CHILD CARE, *supra* note 8, at VI-1 to VI-6. For example, Seattle allows developers to build additional square footage in exchange for space dedicated for a child care center. The bonuses vary depending on the zone in which the building is located. The developer is required to grant a five-year lease to a child care provider before the certificate of occupancy is issued. SEATTLE, WASH., LAND USE AND ZONING CODE § 23.49.050 (1987); Seattle, Wash., Director's Rule 11-85, 13–15 (1985). Developers in downtown Vancouver can exclude the area of a day care center from the total square footage calculation, up to 20% of the allowable floor space ratio or 10,000 square feet. PLANNING FOR CHILD CARE, *supra* note 8, at VI-4. Hartford allows a bonus ratio for the provision of child care centers that allows developers of commercial office space an additional six square feet of office space for every one square foot of child care space. *Id.*

[76] Mass. H. 3413, 176th General Court, 1st Sess. § 1 (1989) [hereinafter BOMA Bill]. The BOMA Bill was submitted on behalf of the Public/Private Initiative for Child Care (PPICC), a task force organized and funded by the Building Owners and Managers

datory program of child care provision, an incentive program may be an "insufficient catalyst for a developer to consider inclusion of new child care facilities."[77] In addition, the overuse of incentives may conflict with the purposes behind the original restrictions and may encourage provisions for child care at the expense of other social and environmental needs such as open space or sunlight.[78]

Association (BOMA) (a division of the Greater Boston Real Estate Board) which opposed the mandatory child care requirement for the Midtown Cultural District of the proposed downtown Boston revitalization plan. *See Day-care advocates see bills as 'turning point'*, Boston Globe, March 19, 1989, at 46, col. 5. The BOMA Bill excludes the floor space of child care facilities from the cap of allowable floor space and offers developers a "bonus" of additional allowable floor space equal to the size of the child care center. BOMA Bill § 3. The bill requires developers to provide space to child care providers at a rent equal to the operating cost and proportionate property tax for the space for the child care center, plus the cost of any special services (i.e. not mandatory under the provisions of the bill) which a developer provides for the child care provider. The BOMA Bill also includes provisions to amend zoning laws so that child care centers can be established in residential areas, and to amend state licensing requirements so that child care centers are not restricted to space on the first floor.

The BOMA Bill also provides that child care facilities be taxed at the residential rate rather than the higher commercial rate, and that child care providers be allowed access to low-cost funds for start-up and operating costs. Further, the BOMA Bill limits tort liability of child care facility landlords, requires employers to establish dependant care assistance programs as a condition to getting state contracts, and makes permanent an office for the Children Affordability Program.

The BOMA Bill and the mandatory linkage programs discussed in this Note represent differing views regarding how to expand the supply of child care. While advocates of mandatory linkage believe government should compel developers to create child care space, others, such as the sponsors of the BOMA Bill, argue that developer-provided child care should be voluntary. *See* Boston Globe, *supra*. Some child care linkage advocates also oppose voluntary measures such as the BOMA Bill because such measures may prevent Boston and other communities from adopting mandatory child care requirements. *Id.*

[77] PLANNING FOR CHILD CARE, *supra* note 8, at VI-6. In cases where incentives or negotiated agreements result in the provision of a public service such as child care, low-income housing, or parking spaces, it is unclear whether the city government or the developers have the upper hand. Some commentators suggest that development exactions and bargaining for amenities are really extortion by local governments and planning authorities. *See* Babcock, *Foreword*, 50 LAW & CONTEMP. PROBS. 1 (1987); Stevenson, *supra* note 9, at D6 (reporting that "developers say that they . . . are being asked in some instances to pay for more than [what they consider] their fair share."). However, some civic leaders feel the bonuses given by cities exceed the costs. *See* Schwartz, *supra* note 10, at 47 (quoting Tucker Gibbs, a leader of the Coconut Grove Civic Club in Miami, Florida, commenting on a development agreement allowing the developer to build 40% additional square footage in exchange for building a 500-space parking garage, who said "[t]he developers make out like bandits, and the city gets thrown a bone.").

[78] PLANNING FOR CHILD CARE, *supra* note 8, at VI-6. *See also* Keating, *Linking Downtown Development to Broader Community Goals*, AM. PLAN. A. J. 133, 140 (Spring 1986) (noting that incentive zoning may allow developers to circumvent guidelines for building height, size, and shape). In addition, Keating notes that incentive zoning often offers incentives of great value to developers in exchange for the provision of lesser valued public amenities. *Id.* An incentives approach to including child care in the development process is especially troublesome if enacted as part of a state level

In addition to these methods of planning for child care, communities can also enact zoning ordinances that require developers to provide for increased child care needs.[79] Known by a variety of names such as "exactions," "impact fees," "dedications and in-lieu fees," or "linkage," these ordinances require developers to dedicate space for a child care center and/or pay a child care fee to the community in order to obtain government approval at some stage in the development process, such as subdivision approval, or the issuance of a building permit or certificate of occupancy.[80] This approach to including child care in land use planning could provide a powerful way for communities to require that developers provide for increased child care needs.

IV. Overcoming Legal and Practical Objections to Child Care Linkage

A successful child care linkage program must be able to withstand the likely objections challenging its legality and feasibility.[81] Linkage proponents must provide support for the basic premises that development causes an increased need for child care and that on-site child care centers are a valuable and workable answer to a community's child care needs. In order for a program to withstand a legal challenge, linkage proponents must ensure that the municipality has the authority to enact a linkage plan and that it considers constitutional limits based upon the takings, due process, and equal protection clauses. Linkage advocates must be able to respond to commercial developers who argue that they should not have to bear the burden for child care and that a linkage program will negatively affect development and the community. Finally, governments that adopt child care linkage programs must carefully consider the

program, since these state incentives will create conflicts with local communities that enact zoning restrictions to preserve certain characteristics and values of the community.

[79] Although these laws affect the construction of a development, they should be enacted as zoning ordinances rather than as part of the state building code. *See generally* W. Goodman & E. Freund, Principles and Practices of Urban Planning 405 (1968) (discussing how building codes focus on the materials and construction of a building, while zoning laws focus prospectively on the need to plan for the community welfare and stabilize and preserve property values). *But see infra* text accompanying notes 107–110, 155–157.

[80] Planning for Child Care, *supra* note 8, at V-1.

[81] *See generally* Keating, *supra* note 78, at 134 (listing objections raised against housing linkage programs).

actual details of a child care linkage plan so that the plan addresses child care needs in a way that is functional and equitable.

This Part addresses these major issues and objections to child care linkage policies. Section A addresses the basic premises of child care linkage: that there is a link between commercial development and a need for child care and that on-site child care is a desirable way of addressing child care needs. Section B addresses legal challenges based upon municipal authority to enact child care linkage, and constitutional arguments based upon takings, due process, and equal protection. Section C explains the distributional effects of child care linkage, and Section D addresses technical requirements of a functional and equitable child care linkage policy.

A. *The Nexus: The Premises and Concept of Child Care Linkage*

A child care linkage policy rests on two critical assumptions: that there is a logical link between commercial development and the need for child care and that on-site child care will help alleviate community needs for child care.

1. The Link Between Development and the Need for Child Care

One major premise of child care linkage is that the crisis of child care availability and affordability is reasonably related to the increased number of employees working in new commercial developments and that developers who create these new workplaces should help alleviate this crisis. By its very operation, a child care linkage policy forges a link between commercial development and child care, but this connection begs the important question of whether there is an independent underlying link.[82] The link between development and the need for child care is important both as a response to legal challenges and as a political argument that child care linkage is an appropriate government mandate for the private sector.

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[82] Kayden & Pollard, *supra* note 11, at 125, 126.

State and local governments should undertake necessary "nexus" studies to provide the underlying factual support for linking child care and development.[83] Usually the findings, or at least a general assertion of this link, are included in the proposed legislaton itself.[84] Background studies could be undertaken by the city's planning department or an independent consultant.[85] These detailed findings should demonstrate that the type of development to be covered by child care linkage will increase the need for child care and should determine the fee or amount of space and facilities which will accurately correspond to the need created by the development.[86] These nexus reports should include employment projections and statistics on current and expected shortages of child care.[87] These studies should also consider the different types of development and formulae for determining the probable increased need for child care in each development.[88] In *Russ Building*

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[83] *See* A. COHEN, CHILD CARE AND DEVELOPMENT FEES: AN OVERVIEW Appendix C (1988).

[84] *See, e.g.*, SAN FRANCISCO PLANNING CODE § 314.2 (1985) (findings declaring a "causal connection between [large scale office and hotel] developments and the need for additional child care facilities"); Massachusetts Bill, *supra* note 18, at § 1 (declaring a serious emergency with respect to child care and the need for a comprehensive plan for addressing the need).

[85] For an example of a background report prepared by an independent consultant evaluating ways to generate resources for child care needs created by development, see BERKELEY PLANNING ASSOCIATES & CHILD CARE LAW CENTER, THE NEXUS BETWEEN URBAN DEVELOPMENT AND THE NEED FOR CHILD CARE SERVICES: A REPORT TO THE CITY OF SACRAMENTO (1988). This report provides an assessment of the child care situation in Sacramento, California, including data on the supply of licensed child care, estimates of parents' demand for child care, and an analysis of means of expanding the supply of child care. The report also analyzes growth projections and the implications for child care needs by looking at population and housing increases, the population of children, employment growth, mothers in the labor force, low-income employees, and estimates of the number of children in need of child care services. The report concluded that the "nexus between new development and child care needs of new residents and employees justifies a mitigation fee of $1.14 per square foot for office space and $1024 for a residence of three or more bedrooms." *Id.* at 2.

[86] *See* A. COHEN, *supra* note 83, at Appendix C. These studies should develop a formula which establishes this set-aside or contribution based upon an assessment of need generated. For a discussion of alternative ways to assess space and fee obligations, see *infra* text accompanying notes 208–215.

[87] Pre-existing shortages are useful because in some instances, even if a need is generated by the development, current supplies of child care can meet the need and a child care linkage requirement would be less appropriate. A. COHEN, *supra* note 83, at Appendix C.

[88] *See* L. BARRETT & P. ENGLE, RAISING MASSACHUSETTS: BUILDING A CHILD CARE LINKAGE POLICY 22–28 (1987) (giving projection of additional employees and child care needs for eight Massachusetts cities). Employment projections were based on research from the Boston Redevelopment Authority which uses a conversion ratio of 220 square feet/industrial office worker, 400 square feet/retail workers; 1051 square feet/industrial worker; and 1000 square feet/exhibition worker. *Id.* at 44 n.67. Child care needs were

v. San Francisco,[89] the court approved such a nexus report in upholding San Francisco's mass transit linkage ordinance. The decision indicated that a nexus report's projections of increased social need due to development, and the requirement that the developer provide for such need, need not exactly match the actual need found to exist upon completion of the development; rather, if the actual need created by the development equals or exceeds the projected need for which the linkage ordinance requires the developer to provide, the ordinance will be upheld.[90] The court also ruled that it was acceptable to vary the requirements for different types of development if this was shown to be reasonable in the study.[91]

Although cities may provide factual findings about the increased need for child care, opponents of child care linkage still may dispute that development causes this need for child care. Opponents of housing linkage programs have disputed on several grounds the cause and effect relationship between office development and housing.[92] Many of these arguments could also be applied against child care linkage.

First, developers have contended that new office space does not create new employment and therefore does not generate housing demand. They argue that new office space is built to accommodate the increased employment that results from local population growth and economic expansion.[93] While similar arguments could be made against the cause-and-effect relationship between development and increased child care needs, the argument as applied against child care linkage seems much less compelling. Linkage opponents might argue that additional office space only accommodates an already existing workforce that has child care needs independent of employment location. Therefore developers arguably should not have to provide for these previously existing needs just because the developers build office or industrial space. However, because on-site or near-site child care is a need that is directly related to the use

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projected based on an estimate that six percent of new employees would need child care. *Id.* at 24.

[89] 188 Cal. App. 3d 977, *modified on other grounds*, 44 Cal. 3d 839, 750 P.2d 324, 244 Cal. Rptr. 682 (1988), *appeal dismissed*, 108 S. Ct. 253 (1987).

[90] 188 Cal. App. 3d at 1001.

[91] *Id.* at 990.

[92] *See* Porter, *The Linkage Issue: Introduction and Summary of Discussion*, in DOWNTOWN LINKAGES 14 (D. Porter ed. 1985).

[93] *Id.*

of the office building, unlike the need for housing, the causation link is much clearer. An increased need for child care results not from the local population growth, as does the need for housing, but from the need for particular workers to work in a particular building. Especially with an increasing labor shortage,[94] the workforce in new office and industrial buildings will include not only new workers resulting from a population growth, but also an existing segment of the population which will enter the workforce because of increased jobs created by development.[95] Because most of these new entrants into the workforce will be women,[96] many of whom have children, there will be an increased need for child care. Unlike housing, which is for the most part independent of whether and where individuals work, child care needs are directly related to the workforce expansion which will be necessary to fill new office buildings.[97]

Opponents of housing linkage programs also argue that downtown office buildings contain firms that serve a regional market and that housing demand problems should therefore be addressed on a regional rather than local level.[98] Similarly, developers could argue that child care is also a regional problem since employees may prefer child care near their homes, which may not be near the development. However, unlike housing, child care needs are directly related to the workplace and a regional dispersion of housing does not necessarily affect the provision of child care. While some employees may prefer child care

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[94] *See* THE BOTTOM LINE, *supra* note 2, at 54; FAMILY POLICY PANEL, *supra* note 44, at 58.

[95] *See* FAMILY POLICY PANEL, *supra* note 44, at 58.

[96] *See* THE BOTTOM LINE, *supra* note 2, at 55 (projecting that recent trends will continue into the future and that two-thirds of new service sector job positions will be filled by women). Between 1979 and 1985, the U.S. economy generated eight million new jobs, mostly in the service sector. Most of these new service sector jobs were filled by women, most of whom have children. *Id.*

[97] *See id.* at 54. David Bloom and Todd Steen write in a paper commissioned by the Child Care Action Campaign, "The Labor Force Implications of Expanding the Child Care Industry":

> There are potentially many policy responses—both public and private—to the problem of labor shortages. These include flexible scheduling, increasing use of computers and other machinery in place of human labor, and relaxing immigration requirements. However, none of these responses is as well suited to satisfying the needs of employers and households, and simultaneously promoting a variety of national interests, as policies aimed at expanding the child care industry and improving the quality of care.

Id. See also Dowall, *Planners and Office Overbuilding*, AM. PLAN. A. J. 131 (Spring 1986) (discussing overbuilding of office space and the increasing vacancy rates in major cities). In order to eventually fill these buildings, arguably the workforce will need to expand, which will increase the need for child care.

[98] *See* Porter, *supra* note 92, at 14.

arrangements that are separate from the workplace, the demand for child care and the provision of on- or near-site child care does not need to be addressed on a regional level if it is provided near the workplace. Even so, child care linkage programs could be undertaken on a county, regional/metropolitan, or statewide basis in order to alleviate these concerns.[99]

Child care linkage opponents may acknowledge the increased child care need, but contend that this need, like the need for housing, is caused by many factors, such as overly strict governmental regulations, high housing costs, and low inner-city wages, and that development is only one contributing cause.[100] Therefore, it would arguably be unfair to single out development as the cause of and source of solution to the problem because this is a "general and complex problem[] that require[s] public responses."[101] Similarly, opponents to child care linkage might argue that while new employees may need child care, this need results from complex social and demographic changes. Because the need for child care reflects the intersection of many social needs, it requires a complex response from government and all citizens rather than solely, and unfairly, from commercial developers.

Child care linkage does not single out developers to provide for all of the child care needs of the general community. Both the state and parents already play an important role in supporting child care needs and will continue to share the burden under a linkage plan.[102] Child care linkage just adds the business sector to the equation by requiring developers to share the burden and begin to pay for additional child care needs as they are created, instead of forcing the public and private individuals to bear these costs related to development.[103]

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[99] *See infra* text accompanying notes 274–276.

[100] Keating, *supra* note 78, at 134; Porter, *supra* note 92, at 14, 15 ("housing relief for low- and moderate-income families constitutes a general public problem requiring public support rather than tapping the resources of private office developers.").

[101] Keating, *supra* note 78, at 134.

[102] Already, the largest portion of the burden of child care falls on parents who pay from $25 to $36 or more weekly for child care. This amount constitutes 21–25% of the income of poor families, and an average of 8% of the income of non-poor families. A WORKFORCE ISSUE, *supra* note 1, at 161. In addition, all states have one or more elements of a child care infrastructure to help alleviate the child care crisis. *Id.* at 3.

[103] Requiring developers to provide space for child care is a fair allocation of burdens since the developer will reap the benefits of on-site child care. *See infra* text accompanying notes 115–117; *c.f.* Jurgensmeyer & Blake, *supra* note 52, at 416 (arguing that without capital shifting devices such as linkage a developer will reap windfall profits when he "sells" community facilities to customers).

Private sector mandates are an important part of the assignment of social protection functions between government, families, and business.[104] Especially as governmental provision of services decreases, the private sector must play an increasing role in the provision of social services, such as employer-provided health insurance and retirement benefits.[105] Employee benefits are increasingly important as most families meet the needs that various social programs are designed to address through the rights and rewards conferred on employees by virtue of their work.[106] Therefore, requiring business to contribute to the provision of child care through the workplace is an appropriate and reasonable way to allocate the burden for this social and economic need.

Similarly, government requirements for the construction of buildings also extend to provision for social needs. Early zoning laws and building and housing codes were initially adopted to protect private property rights between land owners. As the population of cities grew and urban needs changed, local governments began passing housing and building code provisions such as mandatory fire escapes and occupancy limits to address not only structural concerns but also the social problems associated with tenements.[107] In the twentieth century, the zoning power has been extended to accomodate more and more social needs by requiring minimum warranties of habitability for housing and requiring developers to provide for infrastructure needs that would traditionally be provided by local government.[108] Government regulation of the physical facilities of the commer-

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[104] *See* L. BARRETT & P. ENGLE, *supra* note 88, at 12–13; Martin Rein and Lee Rainwater have explored patterns of assigning the social protection function among families, employers and government. *See* Rein & Rainwater, *The Public/Private Mix*, in PUBLIC/PRIVATE INTERPLAY IN SOCIAL PROTECTION 14–24 (1986). They observe that "[i]f one asks how most people meet the needs that various public social programs are designed to cover, one discovers that for most families, even today, claims to have those needs met operate principally through the rights and rewards conferred on their employed members by virtue of their work . . . ." *Id.* at 14–15.

[105] *See* Liebman, *Too Much Information: Predictions of Employee Disease and the Fringe Benefit System*, 1988 U. CHI. L. FOR. 57, 84. (Liebman describes the growth of employer participation in medical insurance and other "so-called fringe benefits" and how employer-provided benefits for non-poor citizens of working age is the American alternative to a program of national health insurance).

[106] Rein & Rainwater, *supra* note 104, at 14–15. *See also* M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 169–70 (1981) (discussing how new property rights are in job security and employee benefits because these, along with social insurance, provide the foundation for the security of individuals).

[107] *See* C. GREEN, THE RISE OF URBAN AMERICA 116 (1965).

[108] *See supra* text accompanying notes 51–65.

cial and industrial workplace is now generally accepted.[109] Rather than being an unfair and unprecedented mandate, linkage requirements on developers to provide on-site child care are a logical next step in sharing the burden of social needs among government, business, and families.[110]

Child care linkage also allows communities to plan and provide for child care needs before the fact, rather than reacting after the fact through remedial programs. Planning and providing for child care needs for the future will come only if we match the provision of these services with the economic growth and development which create these needs.

2. The Benefits of On-Site Child Care

In addition to relying on the nexus with development, a child care linkage policy rests on the premise that the creation of additional child care at or near the workplace is a worthwhile way of approaching the child care crisis. Although other forms of child care are preferred by some workers and will remain an important part of the choices in child care for parents, there are unique and tangible benefits that come from child care located at or near the workplace.[111] In addition, because child care linkage allows for early planning for, and a wider cost distribution of, an on-site child care center, such linkage offsets many of the traditional barriers to the provision of on-site child care.[112]

Employees with children, a group which consistently favors on-site child care centers,[113] will benefit from the provision of

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[109] Through comprehensive legislation such as the Occupational Health and Safety Act of 1970, 29 U.S.C. §§ 651–78 (1982), government regulates both physical facilities and working conditions in order to protect the safety of the workplace.

[110] Employer-provided health and dental insurance provides coverage for employee ills, regardless of whether the injuries occur on the job, or whether the employment causes the injuries.

[111] *See infra* text accompanying notes 113–119. For a general discussion of the benefits of on-site child care in New York state, see generally Berry, *On-Site Child Care: New York State's Experience*, in INNOVATIONS 1–7 (Sept. 1985) (published by the Council of State Governments).

[112] *See infra* notes 122–123 and accompanying text.

[113] *See, e.g.*, J. FERNANDEZ, CHILD CARE AND CORPORATE PRODUCTIVITY 161 (1986). Fernandez reports the results of a survey of over 1000 employees regarding how companies should fund child care needs. Fifty-five percent preferred on-site child care run as a profit center, 37% favored a partially subsidized center, and 13% supported a fully-subsized center. Fernandez also cites a recent study of over 800 working parents with children under six that revealed that 53% of these parents believed that on-site child care was an excellent solution to child care problems and an additional 30% thought it was a good idea. J. FERNANDEZ, *supra* (citing Immerwahr, *Building a Consensus on the Child Care Problem*, in PERSONNEL ADMINISTRATOR 31, 36 (February 1984)). *See*

child care through linkage. In addition to the benefits of availability and convenience, on-site child care centers provide parents the opportunity to spend time with their children during break time and allows them to respond quickly to child care emergencies.[114] These on- or near-site child care centers may also facilitate more parent involvement with the operation of the center and support networks among working parents in the development.

On- or near-site child care also provides tangible benefits for employers.[115] On- or near-site child care centers provide opportunities to build employee loyalty and morale, and enhance the image of developers and employers, which will aid public relations, sales, and employee recruitment.[116] In addition, these advantages will result in increased productivity through decreased absenteeism, turnover, tardiness, and distraction due to family problems.[117] On the other hand, there may be some employers who find the possible lack of concentration and time spent with children at the workplace to be a reason *not* to have an on-site child care center.

Advantages from on- or near-site child care will also accrue to developers and to the community at large. In an increasingly

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also A WORKFORCE ISSUE, *supra* note 1, at 128 (citing a 1987 survey, conducted by LAR/Decision Research, of 600 adults with incomes over $25,000 that revealed that 73% of adults felt that child care accomodations at work would have a positive impact on work). *But see* S. KAMMERMAN & A. KAHN, *supra* note 50, at 199 (citing parent objections to on-site child care because of the potential for disruption of care if they change jobs, problems of transporting children long distances during peak commuter hours, and preferences for neighborhood-based care).

[114] J. FERNANDEZ, *supra* note 113, at 162.

[115] For the purposes of this discussion, a distinction is made between employers and developers. The land developers/owners construct and manage the buildings. The developer then leases the building to the employers/tenants.

[116] J. FERNANDEZ, *supra* note 113, at 162. *See also* A WORKFORCE ISSUE, *supra* note 1, at 129 (citing a 1982 survey, conducted by Catalyst Career and Family Center, of Fortune 500 companies who provided child care for their employees, which revealed that 60% of companies polled reported an increase in favorable publicity); S. BURUD, P. ASHBACHER & J. MCCROSKEY, EMPLOYER-SUPPORTED CHILD CARE: INVESTING IN HUMAN RESOURCES 5 (1983) (citing a U.S. Department of Health and Human Services survey which revealed that nine out of ten employers responding said that "public relations, publicity, and corporate image had improved as a result of their child care activities.").

[117] J. FERNANDEZ, *supra* note 113, at 162. The 1978 National Employer Supported Child Care Study found that 85% of employers surveyed reported a positive impact on recruitment, 49% reported a positive effect on productivity, 65% reported a positive effect on turnover, 53% reported a positive impact on absenteeism, and 90% reported a positive impact on morale. A WORKFORCE ISSUE, *supra* note 1, at 128–30. *But see* S. KAMMERMAN & A. KAHN, *supra* note 50, at 194–95 (citing the experience of American Telephone and Telegraph which operated two day care centers for its employees at which the occupancy rate averaged only 65–70% capacity).

competitive rental market,[118] on-site child care centers will help developers attract and retain tenants.[119] The centers will prevent communities from having to absorb any new demand for child care services and will also help the public image of the developers, especially if the center is large enough to accommodate at least some percentage of children from the community.[120] By providing new on- or near-site centers gradually with each development project, child care linkage allows for early planning for child care so that future crises will be avoided.

Although on-site child care offers many advantages, few employers actually provide this benefit for their employees.[121] The major reasons employers do not sponsor on-site child care centers include the costs of opening and operating centers, the complexities of operating an unfamiliar business such as a child care center, fears of liability if accidents occur, siting and transportation problems, and administrative problems for companies with few employees.[122] Child care linkage alleviates many of these problems because it includes the child care center in the initial planning of the development. Including the child care center at the outset is significantly cheaper than retrofitting existing space to accommodate a child care center. In addition, the developer will be able to plan a site that can meet state licensing requirements and include the costs in the original financing for the building.

Child care linkage should also alleviate fears of employers and developers about the operation and possible liability of a child care center because the space will be leased to a licensed independent child care provider. While employers could participate in the operation of the child care centers through administration or subsidies for employees, the child care linkage bills do not mandate employer involvement. By either paying a fee

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[118] *See generally* Dowall, *supra* note 97, at 131–32 (discussing recent trends of office overbuilding and increasing vacancy rates).

[119] *See* L. BARRETT & P. ENGLE, *supra* note 88, at 33 (citing interviews with developers who commented how child care leads to quicker rentals and longer retention of tenants).

[120] *Id.* at 33, 34.

[121] According to The Work and Family Information Center of The Conference Board, approximately 120 corporations and 400 hospitals were sponsoring child care services on or near the workplace in 1985. In 1988, The Conference Board reported that 22% of the 3500 corporations with 100 employees or more who offer child care assistance were sponsoring on- or near-site child care centers. D. FRIEDMAN, CORPORATE FINANCIAL ASSISTANCE FOR CHILD CARE 33 (1985).

[122] *See* J. FERNANDEZ, *supra* note 113, at 162–63; S. KAMMERMAN & A. KAHN, *supra* note 50, at 197.

or leasing space, developers have only minimal participation in the actual business of child care and hence minimal exposure to potential liability.[123]

By providing for child care centers that will serve a whole development, child care linkage enables small employers to reap the benefits of on- or near- site child care. Small companies with few employees cannot afford the costs of, nor can they consistently fill, a child care center. However, with child care linkage, small companies can offer child care near the workplace since child care centers will be located within their buildings. Many large commercial developments house many small offices with under 100 employees. By sharing a child care center, these companies can fill the center and share what would otherwise be prohibitive costs.

B. *Legal Challenges to Child Care Linkage*

Because child care linkage is an innovative application of land use law, linkage programs will likely face several types of legal challenges. First, a municipality must have the authority to enact child care linkage regulations. In addition, child care linkage programs must be able to withstand constitutional challenges claiming generally that municipal governments, through linkage, deprive individual developers of their property rights and illegally impose such regulations on one class of citizens. These constitutional arguments fall into three categories: due process claims, takings claims, and equal protection claims.

1. Authority to Enact a Child Care Linkage Program

The threshold legal issue is whether the governmental body has the authority to enact a child care linkage program. The state must authorize both taxes and police power regulations enacted for the general welfare of citizens. Therefore, municipalities that enact child care linkage ordinances must have been delegated the authority to enact such ordinances. The state usually delegates its own general police powers to municipalities through broad delegations to regulate for the "general welfare"

[123] However, developers could still be liable for any structural defects that would cause injury in the child care center just as they would for building defects in other parts of the building.

or through more specific enabling legislation.[124] Statewide linkage plans such as the Massachusetts linkage bill would altogether avoid this challenge. Statewide linkage requirements, or a state child care linkage enabling act that specifically extends the police power to address child care needs, are express delegations of authority to regulate in the child care area.

Because the authority to legislate for the general welfare of citizens is broader than the specific authority to impose a tax,[125] most legal challenges to municipal linkage programs will involve determining whether a linkage program is a regulation/fee or a tax, and whether the municipality has acted within its delegated authority.[126] In determining whether a challenged ordinance is a

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[124] *See* W. VALENTE, LOCAL GOVERNMENT LAW 343 (1987) (explaining that local governments do not have independent sovereignty and possess only those police powers delegated by the state), *citing* Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970); City of Chicago v. Bethlehem Healing Temple Church, 93 Ill. App.2d 303, 236 N.E.2d 357 (1968). Municipal police power authority may be based upon "general welfare" clauses or upon the implication that such authority is inherent in the creation of a local government. Adams v. New Kensington, 357 Pa. 557, 55 A.2d 392 (1947), *cited in* W. VALENTE, *supra*, at 343. However, in other cases, courts have invalidated municipal ordinances not expressly authorized by state constitution or statute. *See, e.g.*, Riegert Apartments Corp. v. Planning Bd., 57 N.Y.2d 206, 208–12, 441 N.E.2d 1076, 1077–79, 455 N.Y.S.2d 558, 559–61 (1982). In addition, the authority of a city to enact a linkage ordinance may be derived through home rule authority of the municipality, which will vary from state to state. However, even if the delegation of home rule authority appears sufficiently broad, there may be problems if child care linkage ordinances fall within the private law exception which many states include as part of home rule delegations. A private law exception prohibits a home rule city from passing laws that affect private law relations such as private contract, property, and tort rights. For example, the private law exception prohibits a local power of condemnation. For a discussion of home rule authority and the private law exception, see generally Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 U.C.L.A. L. REV. 670, 687–90, 747–56 (1973), *reprinted in* G. FRUG, LOCAL GOVERNMENT LAW 101–07 (1988).

In Massachusetts, the private law exception has been applied to rent control, which cannot be passed by municipalities without specific enabling legislation from the state. Marshall House, Inc. v. Rent Review and Grievance Board of Brookline, 357 Mass. 709, 260 N.E.2d 200 (1970). The application of the private law exception is relevant because both rent control and child care linkage ordinances require dedication of property rights of the land owner. Rent control falls within the private right exception because it affects the contractual relationship between landlord and tenant, and because it infringes upon the landlord's property interest in the apartment. Similarly, child care linkage ordinances may infringe upon the property rights of developers and therefore fall within the private rights exception.

[125] *See, e.g.*, Contractors & Builders Ass'n v. City of Dunedin, 329 So.2d 314, 317–20 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979) (holding that if the fee would have been characterized as a tax then it would be void for lack of statutory authorization, but because it is a regulation, the broader delegation suffices).

[126] *See, e.g.*, Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (in-lieu fees for flood control, park, and recreational purposes attacked as ultra vires, an unreasonable regulation, and an unconstitutional tax); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d. 442 (1965), *cert. dismissed*, 385 U.S. 4 (1966) (in-lieu fees for school, park, and recreational purposes attacked as ultra vires, an unreasonable regulation, and an unconstitutional tax). For more on the theory of the tax/regulation

tax or a fee, a court will usually look at the municipality's intent in enacting the ordinance and the actual operative effect of the program.[127] If the court determines that the exaction is for general revenues or will be used to fund non-specific facilities and improvements, and the state has delegated to the municipality only the power to regulate for the general welfare of its citizens, then the court will likely strike down the ordinance as an invalid tax.[128] If the municipality segregates the funds and designates them for specific improvements clearly linked to the new development, a court could uphold the collection of funds as a valid exercise of the police power. If the child care linkage program requires that mandatory child care provisions benefit the employees in the development, the linkage program likely will be classified as a police power regulation and not a tax.[129] If a municipality is without the authority to tax, it should carefully draft the child care linkage ordinance to ensure that courts

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distinction, see Juergensmeyer & Blake, *supra* note 52, at 426. Jurgensmeyer and Blake comment that the policy issue underlying the tax/fee distinction is the balance of the public policy favoring local government flexibility in land use planning against the policy of restricting local government's taxing authority to those specific appropriations authorized by the legislature. *Id.*

[127] *See* Andrews & Merriam, *Defensible Linkage*, AM. PLAN. A. J. 199, 201 (Spring 1988). Jurgensmeyer and Blake suggest a multi-factor test for determining whether a monetary exaction is a tax or a fee. This test would include consideration of the relative specificity of the statute upon which the exaction is predicated, whether a statute confers home rule powers on local governments, limitations imposed on the exaction by the particular ordinance, whether the exaction is being used to complement other land use control devices, types of capital improvements funded by the exaction, legislative policy indications in the area, and particular problems of growth management faced by municipalities in the jurisdiction. Jurgensmeyer & Blake, *supra* note 52, at 426. In Emerson College v. City of Boston, 391 Mass. 415, 462 N.E.2d 1098 (1984), the Supreme Judicial Court of Massachusetts set out a clear test of the difference between a tax and a fee. Holding that a "fee" for augmented fire protection was a tax rather than a fee, the court clarified that:

> . . . fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society' [cites omitted]; they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge [cites omitted], and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.

462 N.E.2d at 1105.

[128] *See, e.g.*, Daniels v. Borough of Point Pleasant, 23 N.J. 357, 359–60, 129 A.2d 265, 267–68 (1957) (early tax/fee case in which money used to pay for schools was considered a tax that went into general revenues rather than an appropriate use of the police power).

[129] *See* Jurgensmeyer & Blake, *supra* note 52, at 422. (discussing how required dedications are acknowledged police power regulations and that impact fees arguably have the same functional treatment). *But see* Note, *Subdivision Exactions: Where is the Limit?*, 42 NOTRE DAME L. REV. 400, 404, 408–09 (1967) (arguing that required dedications are taxes and not regulations because fees, regardless of whether they are earmarked for use inside the development, are primarily a revenue-raising device).

will classify the exaction imposed by the ordinance as a fee and not a tax. Specifically, the ordinance should not refer to the in-lieu fee as a tax. The ordinance should also make it clear that payment of the fee is a prerequisite to a developer's exercising the privilege of developing within the city's jurisdiction,[130] and "should state explicitly that the intent of the law is not to raise general revenues but is directly related and limited to the cost of increased child care services engendered by particular developments."[131]

2. Constitutional Objections—Due Process

Challenges based upon the Due Process Clause of the Fifth Amendment are generally concerned with whether a municipality has acted in a manner that is arbitrary and capricious.[132] When reviewing due process challenges to land use regulations, state courts apply one of three tests to determine whether an ordinance deprives a developer of due process.[133]

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[130] *See, e.g.*, A. COHEN, *supra* note 83, at Appendix C. Cohen observes that in California, courts have consistently held that development is a "privilege and not a right, thereby giving the developer the 'choice' of developing or not developing." *Id.* (citing Terminal Plaza Corp. v. City and County of San Francisco, 177 Cal. App. 3d 892, 907 (1986)).

[131] A. COHEN, *supra* note 83, at Appendix C (citing Russ Bldg. Partnership v. San Francisco, 188 Cal. App. 3d. 977, 986 (1987), and J.W. Jones Companies v. City of San Diego, 157 Cal. App. 3d. 745, 748 (1984)).

[132] *See* Andrews & Merriam, *supra* note 127, at 203. The constitutional issues address the follow-up question to the determination of whether a linkage requirement is a police power regulation or a tax. (Assuming that linkage is a police power regulation, constitutional challenges based on the fifth amendment consider whether the exercise is reasonable and valid. Although separated for purposes of this Note into the categories of due process and takings, the consitutional limits may indeed be the same.

[133] *See infra* notes 134–148 and accompanying text. Although states have relied on these varying standards in the absence of Supreme Court guidance, the strong words by the Supreme Court in *Nollan* may collapse these tests into a test somewhat stronger than the rational nexus test. *See* Note, *The Future of Municipal Parks in a Post-Nollan World, A Survey of Takings Tests as Applied to Subdivision Exactions*, 8 VA. J. NAT. RESOURCES L. 141, 162–64 (1988) (authored by Patricia A. Brooks). However, the court itself in *Nollan* expressed doubts as to whether the stricter rational nexus test would apply to due process and equal protection claims. 107 S. Ct. at 3141 n.3 ("But there is no reason to believe . . . that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical . . . ."). *See also* Netter, *Legal Foundations for Municipal Affordable Housing Programs: Inclusionary Zoning, Linkage, and Housing Preservation*, 10 ZON. & PLAN. L. REP. 161, 164–65 (1987). For an argument that the state rational nexus test differs from the "nexus" test in *Nollan*, and that these tests should not be incorporated into federal constitutional review of development exactions, see generally Note, *Municipal Development Exactions, The Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992 (1989) [hereinafter Note, *Municipal Development Exactions*].

a. *The specifically attributable test.* The specifically attributable test, the strictest of the three tests applied to land use regulations, allows municipalities to require developers to pay only those costs or other obligations that are specifically and uniquely attributable to the development.[134] Under this test, a municipality facing a developer's constitutional challenge to its child care linkage ordinance must show that the development creates a specific need for additional child care and that child care linkage will directly address this need.[135] Because the need for child care depends to a large extent upon the tenant businesses of the commercial building, who are unknown at the time of construction, it may be difficult for municipalities to show how much additional child care need is specifically attributable to the development.[136]

b. *The reasonable relationship test.* At the other end of the spectrum, some courts have taken a broad reading of the police power and have upheld an exaction if it bears a reasonable relationship to present or future inhabitants' use of the development.[137] In contrast to the hardship that the "specifically at-

[134] Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d. 799 (1961). In *Pioneer Trust*, a developer challenged the validity of an ordinance requiring subdividers to dedicate an acre per every sixty residential lots for schools, parks, and other public purposes. Focusing on the origin of the need for the new facilities, the court struck down the regulation as exceeding the breadth of the police power since the village could not prove that the demand for additional facilities was specifically and uniquely attributable to the particular subdivision. 176 N.E.2d at 802. *See also* Aunt Hack Ridge Estates, Inc. v. Planning Commission, 160 Conn. 109, 273 A.2d. 880 (1970) (applying the test used in *Pioneer Trust* but reaching opposite conclusion on similar facts).

[135] As applied, the "specifically and uniquely attributable" test is similar to the now overruled "direct benefit test" which required that the funds collected from required payments for capital expenditures be specifically tied to a benefit directly conferred on the development that was charged. *See* Gulest Assoc., Inc. v. Town of Newburgh, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 225 N.Y.S.2d 538 (N.Y. App. Div. 1962). The *Gulest* decision was overruled in Jenad, Inc. v. Village of Scarsdale, 271 N.Y.S.2d 955, 957–58 (N.Y. 1966) when the court ruled that these exactions were valid under a more relaxed rational nexus test.

[136] *See* Andrews & Merriam, *supra* note 127, at 203. "There is little likelihood that the municipality will prevail if the court applies the 'specifically and uniquely attributable' test. As one commentator has noted, it 'is virtually impossible' to prove that the need for any public facility is specifically and uniquely attributable to the people in a given subdivision." *Id.* (citing Karp, *Subdivision Exactions for Park and Open Space*, 16 AM. BUS. L. J. 227, 284 (1979)).

[137] *See, e.g.*, Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949) (holding that required dedications for roads outside a development were not unreasonable even though they also benefitted the general public); Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1971) (upholding a greenspace dedication on the basis of a general public need for recreational spaces caused by present and future development).

tributable" test imposes on municipalities, this test is deferential to local governments and requires developers challenging the validity of a linkage ordinance to prove that there is no reasonable connection between the proposed project and the exaction. Under this test, nearly every municipal ordinance imposed upon developers is considered a valid exercise of the police power. In *Russ Building Partnership v. San Francisco*,[138] the California Court of Appeals upheld the City of San Francisco's Transit Impact Development Fee Ordinance under this reasonable relationship test. The court described this due process analysis: "a law regulating or limiting the use of real property for the public welfare does not violate . . . due process as long as it is reasonably related to the accomplishment of a legitimate governmental interest."[139] The court upheld the requirement that developers pay a $5 per square foot fee for mass transportation costs over the estimated forty-five-year life of the building based upon the trial court's finding that the development was reasonably related to the legitimate governmental goal of providing public transportation.[140] A child care linkage ordinance would be considered reasonable if the development could reasonably be expected to cause an increased need for child care and the linkage program helps address the legitimate governmental interest of ensuring an adequate supply of child care. A child care linkage ordinance which requires the developer to provide on-site space or pay an in-lieu fee for child care will likely help accomplish the governmental goal of easing the child care crisis. The fact that the community will benefit from the increased provision of child care is irrelevant under this test, because the focus is on whether child care linkage will protect the "safety and general welfare of the lot owners in the [development] and the general public."[141]

c. *The rational nexus test.* Most courts rely upon a test that falls between the narrow "specifically attributable" test and the broad "reasonable relationship" test. Originally proposed by

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[138] 188 Cal. App. 3d 977 (1987) *modified on other grounds*, 44 Cal. 3d 839, 750 P.2d 324, 244 Cal. Rptr. 682 (1988), *appeal dismissed*, 108 S. Ct. 253 (1987).

[139] 188 Cal. App. 3d at 990–91.

[140] *Id.*

[141] *Ayres*, 34 Cal. 2d. at 42, 207 P.2d at 7.

Heyman and Gilhool[142] and first applied in *Jordan v. Menomonee Falls*,[143] the rational nexus test requires that there be a rational connection between the exaction and the project.[144] This test essentially balances developers' property rights with prospective community needs.[145]

For a child care linkage law to meet the rational nexus test, the municipality must show that the development is "expected to cause a substantial influx of new employees who will need child care facilities in order to live and work successfully."[146] For the San Francisco program, the municipality wrote into the actual ordinance projections of the anticipated level of new employment and need for child care.[147] Similar data has been assembled by advocates of the Massachusetts child care linkage bill, and the preamble and first section of the bill include a forceful statement of the nexus between development and increased child care need.[148] With this kind of data on the record, it is likely that these child care linkage programs will withstand challenge under the rational nexus test.

3. Constitutional Objections—Takings

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[149] Using the same basic balancing between legitimate state interests in regulation and rights of private prop-

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[142] *See* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

[143] 137 N.W.2d. 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

[144] *See, e.g.*, Longridge Builders v. Planning Board, 52 N.J. 348, 245 A.2d 336 (1968). For a description of the rational nexus test as applied in state courts, see Note, *Municipal Development Exactions*, *supra* note 133, at 993–95.

[145] *See* Wald Corp. v. Metropolitan Dade County, 338 So. 2d. 863, 868 (Fla. Dist. Ct. App. 1976), *cert. denied*, 348 So.2d 955 (1977). In *Wald*, the court described the rational nexus test as:

> a balancing of the prospective needs of the community and the property rights of developer[s] . . . . [I]t treats the business of subdividing as a profit-making enterprise, thus drawing proper distinctions between the individual property-holder and the subdivider. While the [individual] may not ordinarily have his property appropriated without an eminent domain proceeding, the [developer] may be required to dedicate land where the requirement is part of a valid regulatory scheme.

338 So.2d at 868.

[146] Comment, *supra* note 7, at 1612.

[147] SAN FRANCISCO, CAL., PLANNING CODE § 314.2 (1985).

[148] *See* L. BARRETT & P. ENGLE, *supra* note 88, at 22–27.

[149] U.S. CONST. amend. V.

erty owners under the Due Process Clause, takings analysis focuses on regulations that so exceed the police power and deny the property owner of the "economically viable use of his land" that the owner must be compensated.[150] Developers making this kind of challenge against child care linkage will argue that the required dedication of space for an on-site child care center, or payment of an in-lieu fee, is an unconstitutional taking of the developer's property.

Since the landmark decision of *Pennsylvania Coal Co. v. Mahon*,[151] courts have struggled to identify the point at which government action has gone so far as to be a taking of private property.[152] In assessing whether a challenged regulation is a taking, courts distinguish between permanent physical occupations imposed on existing buildings and regulations imposed as a condition to the development of new buildings on the land through the permitting process. Because regulation of existing buildings affects existing property rights and value, courts carefully scrutinize these regulations and find even the smallest intrusion to be a taking.[153]

In evaluating regulations such as child care linkage, which apply only to new buildings or to large-scale renovations for which a city building permit is required, the courts have balanced the police power objective the regulation promotes against many factors including the economic effect of the regulation on the property owner, the extent to which the regulation has interfered with investment-backed expectations, and the character of the government action involved.[154] In this context,

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[150] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[151] 260 U.S. 393 (1922). In *Pennsylvania Coal*, Justice Holmes stated that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

[152] *See, e.g.*, Pamel Corp. v. The Puerto Rico Highway Authority, 621 F.2d 33 (1st Cir. 1980) (discussing the wavering line between exercises of the police power and eminent domain); Park Ave. Tower Assoc. v. City of New York, 746 F.2d 135 (2d Cir. 1984) (discussing takings and impact of zoning changes).

[153] *See* Loretto v. Manhattan Teleprompter, 458 U.S. 419 (1982). In *Loretto*, the Court ruled that where there is an actual, permanent, physical invasion, such as a wire for cable service, "without regard to whether the action acheives an important public benefit or has a minimal economic impact on the owner," a taking has occurred for which the government must pay compensation. 458 U.S. at 434–35.

[154] *See* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). *See also* Andrews & Merriam, *supra* note 127, at 202; Bosselman & Stroud, *supra* note 52, at 88 (observing that for cases not involving the physical invasion of property, the Court continues to use the more complex analysis, which emphasizes interference with "reasonable investment-backed expectations"). For illustrations of differing judicial balancing in takings cases, see *Penn Central*, 438 U.S. at 131–35 (considering historic character of Penn Central station in takings analysis) and Agins v. City of Tiburon, 447

regulations which require on-site child care centers are comparable to building code regulations that require sidewalks, toilets, parking lots or fire exits.[155] Many housing codes go so far as to require a minimum "warranty of habitability" for low-income housing and rent-control to redistribute the costs of such housing.[156] Like child care linkage, most such regulations are based upon concern for the welfare of the building users. Most housing and building codes will survive even the strictest scrutiny and it is unlikely that requirements on large commercial development, e.g., to provide on-site gymnasiums or parking lots, would undergo vigorous challenge.[157] However, when such requirements are expressed as conditions to the development process, they meet with much more vigorous challenge.

In *Nollan v. California Coastal Commission*,[158] the Supreme Court addressed the appropriate takings analysis for development exactions, such as child care linkage, which condition issuance of development permits on the provision of facilities or services.[159] In *Nollan*, the Court found a California Coastal Commission requirement, that property owners provide lateral access to the beach as a condition to the issuance of a coastal construction permit, to be a taking without just compensation. In evaluating the validity of the condition, the Court rejected the loose "reasonable relationship" standard applied by the California courts and required application of the stricter rational nexus test such that the development exaction must "substantial[ly] advanc[e] a legitimate state interest."[160] By striking down

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U.S. 255, 261–62 (1980) (balancing the state interest in controlling urbanization with alleged interference with reasonable investment expectations). Challenges based upon "temporary takings" have taken on increased meaning following First English Evangelical Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987). In *First English*, the Court ruled that municipalities must compensate developers for temporary takings. This is significant for child care linkage programs since municipalities would have to compensate developers for the dedicated space if the policy were later held to be a taking. *See* Netter, *supra* note 133, at 164.

[155] For a discussion of building and housing codes, see generally R. LAI, *supra* note 51, at 143–51.

[156] *See* C. HAAR & L. LIEBMAN, PROPERTY AND LAW 301–09, 389–410 (1985) (citing D.C. housing code and describing cases involving, and examples of, rent control laws).

[157] *See, e.g.*, Paquette v. City of Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959); Boden v. City of Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959); Queenside Hills Realty Co. v. Saxi, 328 U.S. 80 (1946) (upholding the constitutionality of retroactive application of building codes).

[158] 107 S. Ct. 3141 (1987).

[159] For a general discussion of the jurisprudence of takings after *Nollan*, see generally *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1581–1794 (1988).

[160] 107 S. Ct. at 3150. Although the majority insists it was not articulating a new standard for land use law, 107 S. Ct at 3147 n.3, several commentators have considered

the California Coastal Commission's development condition, the Court placed a limit on the type of such development conditions governments can impose. However, the scope of that limit and the limit's impact on regulatory programs such as linkage remain unclear.

In its broadest reading, *Nollan* stands for heightened scrutiny of development exactions under the Takings Clause. Clarifying the requirement that development exactions "substantially advance state interests," Justice Scalia elaborated in his dissent in *Pennell v. City of San Jose*[161] that this requirement demands a "cause and effect relationship between the property use restricted by the regulation and the social evil that the regulation seems to remedy."[162] This reading of *Nollan* would suggest that a child care linkage ordinance would fail the takings test unless the Court finds that the owner's use of her property caused the increased need for child care that linkage is designed to address. This broad reading seems to be a retreat back to the "specifically and uniquely attributable test" of due process originally applied to development exactions.

On the other hand, *Nollan* may be read much more narrowly as an exception to the rule, expressed in *Loretto v. Manhattan Teleprompter CATV*, that permanent occupation of property by the government is a taking per se.[163] Because the easement in *Nollan* was imposed as a permit condition, the Court determined that the per se rule did not apply.[164] Instead, the Court applied a "greater power includes the lesser" analysis and reasoned that the government's power to deny a building permit altogether justified the lesser power of conditioning the granting of development permits on the fulfillment of certain conditions.[165] At the same time, however, perhaps based upon fears that permit conditions would evolve into a form of extortion, the Court seems to have limited imposition of such permit conditions to situations in which the adverse effects of the project are significant enough

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this to be the rule to be derived from *Nollan*. *See, e.g.*, Andrews & Merriam, *supra* note 127, at 203; Netter, *supra* note 133, at 164.

[161] 108 S. Ct. 849 (1988).

[162] 108 S. Ct at 862. *See also* Note, *Taking a Step Back: A Reconsideration of the Taking Test of Nollan v. California Coastal Commission*, 102 HARV. L. REV. 448, 449–51 (1988) (describing a broad reading of *Nollan* based upon this "cause/effect test").

[163] *See* Note, *supra* note 162, at 465–66. This Note sets forth an alternative reading of *Nollan* that would suggest that *Nollan* is a limited exception to the *Loretto* rule which reconciles *Loretto* with traditional land use exactions.

[164] Note, *supra* note 162, at 466.

[165] 107 S. Ct. at 3147–48.

to justify exercise of the police power "to forbid the construction of the house altogether."[166] The Court imposed this limitation through the requirement that the development condition substantially advance a legitimate state interest. According to this reading, the "*Nollan* nexus test . . . can be characterized as a more systematic device for distinguishing valid conditions from invalid ones,"[167] and thus *Nollan* provides a way out of the strict takings analysis of *Loretto*. Therefore, *Nollan* does not necessarily invalidate programs such as child care linkage. Instead, it reconciles *Loretto* with the traditional land use exaction cases[168] and provides a unified test for the validity of such land use laws as child care linkage. Thus, child care linkage would be subject to a stricter rational nexus test, but would not be per se invalid.[169]

Because the condition of lateral access to the beach in *Nollan* was considered invalid even under the "most untailored standards,"[170] it is unclear exactly how precise the match between the need and the exaction must be. At the least, *Nollan* seems to indicate that local government regulations challenged as takings will not be presumed valid. Instead, municipalities will bear the burden to show that their regulations bear a substantial relationship to the goals sought to be achieved.[171] In the child care context, this means that communities adopting child care linkage ordinances must show sufficient evidence of the increased need for child care that will result from commercial development in the area and that child care linkage is the appropriate means to meet that increased need.[172] As Bosselman and Stroud comment, "the case cautions against the use of the 'wait and see' land use regulation in which restrictive regulations

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[166] *See* Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions*, 10 ZON. & PLAN. L. REP. 153 (1987). *See also* Andrews & Merriam, *supra* note 127, at 203 ("In short, a permit condition serving the same legitimate police power purpose as a refusal to permit the development would not consitute a taking if the refusal to allow the development would not itself constitute a taking.").

[167] Note, *supra* note 162, at 467.

[168] *Id.* For a discussion of traditional exaction cases, see *supra* notes 132–147 and accompanying text.

[169] Although the court's stricter standards for evaluating development exactions will not necessarily invalidate child care linkage ordinances, the guidelines given in *Nollan* should receive strong consideration from municipalities drafting these policies.

[170] 107 S. Ct. at 3148.

[171] *See* Netter, *supra* note 133, at 164; Bosselman & Stroud, *Development Exactions Addendum*, in DEVELOPMENT EXACTIONS at 102c (J. Frank & R. Rhodes eds. 1987).

[172] *See* Bosselman & Stroud, *supra* note 171, at 102b (". . . the purpose of the exaction must be supported by specific language in an ordinance or other official document."). *See also supra* notes 82–123 and accompanying text about the premises of linkage.

are adopted but then waived or varied when a developer makes an attractive offer unrelated to the regulation . . . . Instead, the decision supports a land use system that clearly relates the conditions of a land use permit to the police power purposes of the regulation."[173]

Nollan suggests that a municipality must have considered the cumulative impact of development in the design of its exaction regulation before that regulation can meet the rational nexus test and be deemed to substantially advance a legitimate state interest. In *Nollan*, the Court found that the Coastal Commission could deny the coastal permit if the Nollans' home "alone or by reason of the cumulative impact produced in conjunction with other construction" would substantially impede a goal which is a legitimate expression of a state's police power.[174] Although it is unclear whether "cumulative impact" applies to social needs,[175] this broader reading of the impact of development will allow advocates to build a stronger case for child care linkage. It will be much easier for municipalities to show an increased need for child care from all commercial development in a region than it will be to specifically identify the additional need for child care slots created by each development.

In addition, *Nollan* implies that the courts in takings cases will consider the ultimate use of development exactions. By citing with approval the Solicitor General's amicus brief filed on behalf of the United States, in which he argued that exactions should be tested by the standards applicable to user charges, the Court seems to require earmarking of all funds collected by linkage.[176] Therefore, it will be important for all in-lieu fees collected for child care linkage to be segregated from general revenues and used only to provide additional child care services for people who work in the building. Similarly, on- or near-site child care facilities provided by developers would also have to benefit primarily the occupants of the building.

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[173] Bosselman & Stroud, *supra* note 171, at 102d.

[174] 107 S. Ct. at 3147 n.4. *See also* Sweeney, *supra* note 7, at 54; Bosselman & Stroud, *supra* note 171, at 102c.

[175] *See* Sweeney, *supra* note 7, at 54–55 (questioning whether "cumulative *social* impact that is produced by new construction" such as the impact on housing or mass transit can be properly considered) [emphasis added]. *But see* Russ Bldg. v. San Francisco, 188 Cal. App. 3d 977 (1987), *modified on other grounds*, 44 Cal. 3d 839 (1988), *appeal dismissed*, 108 S. Ct. 253 (1987) (the Court had an opportunity to discuss whether the cumulative impact on needs for mass transit constituted a legitimate state interest, but denied certiorari).

[176] *See* 107 S. Ct. at 3148. *See also* Bosselman & Stroud, *supra* note 171, at 102c.

4. Constitutional Objections—Equal Protection

Developers also may challenge child care linkage programs based upon the Equal Protection Clause of the Fourteenth Amendment. In challenging the ordinance on its face or as applied, opponents would argue that the challenged linkage ordinance does not treat similarly situated persons equally since only developers of new commercial buildings must provide for child care.[177] However, these claims have little weight since commercial developers are not considered a protected class.[178] Because child care linkage laws at a minimum bear a reasonable relationship to commercial development,[179] these laws will likely survive facial equal protection challenges if, as with the model presented, they treat all commercial developers in a given region equally.[180] However, a developer could successfully challenge a linkage program as applied if the program requirements were not exacted in a consistent manner among developers, as in linkage programs allowing for negotiations with individual developers.[181]

C. *Distributional Concerns Regarding Child Care Linkage*

Many arguments against child care linkage focus on how a linkage ordinance will affect development in a community and who will really pay for the mandated services. Assuming that any such regulation will have a negative effect on development, the burden of linkage may shift from developers to the general community.

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[177] *See* Andrews & Merriam, *supra* note 127, at 204.

[178] *See id.* (citing Candid Enterprises, Inc. v. Grossmont Union High School District, 39 Cal. 3d 878, 218 Cal. Rptr. 303 (1985)); Lassar, *Linkage Law*, URB. LAND 34, 35 (March 1987) (arguing that "[c]ommercial developers, unlike Blacks or Native Americans, do not qualify as a distinct minority deserving heightened protection, and the right to develop office buildings is not protected by the Constitution.").

[179] *See supra* notes 82–110 and accompanying text.

[180] *See* Andrews & Merriam, *supra* note 127, at 204. *See also* Connors & High, *supra* note 3, at 75. Connors & High did not discuss equal protection claims in any detail "because an exaction program need only avoid the label 'palpably arbitrary' in order to avoid an equal protection challenge." (citing Norsco Ent. v. Fremont, 54 Cal. App. 3d 488, 498, 126 Cal. Rptr. 659, 665 (1976)). *Id.* at 75 n.28.

[181] *See* Andrews & Merriam, *supra* note 127, at 204, 208 n.20. (citing Parks v. Watson, 716 F.2d 646, 654–55 (9th Cir. 1983)). *See also* 107 S. Ct. at 3147 n.4 ("If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.").

It is difficult to determine whether the additional regulatory controls and development costs of child care linkage will deter development since so few communities have adopted these laws and those that have child care linkage have other external caps on development.[182] Housing linkage programs similarly do not give concrete data on this issue since these programs are also new.[183] Despite the lack of factual data, municipalities considering adopting linkage proposals may be justifiably concerned that a developer considering two equivalent suburban communities might not develop in the community with burdensome linkage requirements. Because neighboring communities in a metropolitan area compete for commercial developments, communities fear that child care linkage will send a developer a few miles away to other communities. In order to alleviate these fears, child care linkage programs should be adopted on a regional or state level so that all communities could benefit from child care linkage without fear of losing economic development.[184]

The available data suggests that the developer's decision-making process is complex and that child care linkage alone will not deter development in a community. In a survey of commercial developers affected by San Francisco's Office/Housing Production Program (a part of San Francisco's comprehensive linkage program), W. Dennis Keating found that linkage exactions apparently did not deter commercial development and were not as critical as other factors in developers' location decisions.[185] Even if a community or region child care linkage requirement

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[182] *See* SAN FRANCISCO, CAL., PLANNING CODE §§ 320–25 (1986) (limiting approvals for new development to 975,000 additional square feet per year). In 1986, San Francisco voters approved Proposition M, which amended these sections by limiting new development approvals to 475,000 square feet annually until a series of projects, which were approved prior to the Comprehensive Downtown Plan, are amortized at the rate of 475,000 square feet per year. Therefore, since 1986, San Francisco has had, and for the next several years may continue to have, a development cap of 475,000 additional square feet per year. *Id.* In addition, reports of buildings under linkage requirements may underestimate the impact of the ordinances on the creation of child care facilities. Current property owners as well as developers not subject to the requirements may include child care centers because on-site centers are an attractive and desirable improvement. *See id.* at 3, 7–8 (describing voluntary contributions to the Affordable Child Care Fund and other special child care proposals).

[183] *See* Keating, *supra* note 78, at 137 (describing the difficulty in determining whether housing linkage deters downtown development).

[184] *See* Downing & McCaleb, *The Economics of Development Exactions*, in DEVELOPMENT EXACTIONS 57 (J. Frank & R. Rhodes eds. 1987) (commenting that "if all jurisdictions in the area shift from the property tax to a similar set of exactions, little change in the locational pattern of development may occur").

[185] Keating, *supra* note 78, at 138.

is a factor in the decision of a developer, it will not necessarily eliminate a given development, but may merely affect the location of the development within the community, the timing of the development, and the density and composition of the development.

Within a jurisdiction, the adoption of a child care linkage policy may shift the development patterns between high-cost and low-cost property. If the child care linkage fee is proportionate to the value of the building, then lower cost development sites may be more attractive.[186] On the other hand, if the child care requirement is independent of the value of the development project, developers will have an incentive to develop on higher value lands where the fee is a smaller percentage of the gross rental returns.

In addition, the timing of the development may be affected if the exaction does not increase with the value of the land, such as with a flat fee for each square foot. By delaying the project, the developer will be able to reduce the cost of child care linkage relative to the value of the land. Assuming that the land value and expected rental value will rise, the cost of including a child care center will be a smaller portion of the development costs. On the other hand, on-site centers or in-lieu fee payments based on the final value of the project and due at the time of sale would not affect the timing of the development. Similarly, if the child care requirement or in-lieu fee is levied at the time of the approval of the development plan, the requirement should not alter the timing of the development.[187]

Child care linkage may also result in higher density buildings within developments. Because a developer will lose valuable space for a child care center or suffer an in-lieu fee, the developer may attempt to increase the density of the building to compensate for lost rental receipts. Similarly, if the cost of the child care requirement is passed back to the landowner, then the landowner may hesitate in selling land for development, and thereby decrease the supply of available land. As a result, there may be a shortage of the development product. This shortage may cause developers to increase density whenever possible. In addition, if the linkage requirement is not proportionate to

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[186] *See* Downing & McCaleb, *supra* note 184, at 57.

[187] *See id.* For more on the timing of exactions, see *infra* text accompanying notes 216–226.

the value of the development product, such as with a flat fee requirement, developers will have incentives not only to increase the density, but also to develop higher valued projects.[188] Therefore, there is a danger that child care linkage will push the market toward more dense and higher valued developments.

Municipalities and opponents of linkage have concerns about who will really pay for the increased child care in the community and whether the distribution of these costs is desirable.[189] The cost of meeting a child care linkage requirement can be passed to the owner of the land through a decreased price for the land, to the users of the building through higher rents, or to the developer through a lower net return on the development.[190] Which of these alternatives is the most desirable and equitable will depend on the reasoning behind the adoption of child care linkage. It has been argued that exactions such as child care linkage exist primarily to protect existing property owners from either a loss in the quality of public services or an increase in taxes as a consequence of growth.[191] In this case, the costs of the exaction should fall on the protected property owners. Alternatively, child care linkage might be adopted to recover the cost of serving the needs of employees in these development projects. In this case, the costs should be passed to the recipients of the benefit from the on-site child care centers.[192] Finally child care linkage might be based on the premise that development causes the increased need for child care. In this case, the developer should pay for the increased costs to the community.[193]

If the developer knows the cost of meeting the child care linkage requirement, then she may pass the cost to the land-

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[188] *See* Downing & McCaleb, *supra* note 184, at 57–58.

[189] According to some observers, this kind of redistribution is the goal of linkage and other development exactions. As discussed by Wechsler, Mushkatel & Frank, "[e]xactions represent an attempt by localities to have it both ways: expand the service area and transfer as much of the initial cost of infrastructure as possible onto the developers and the final buyers or renters of the development." Weschler, Mushkatel, & Frank, *supra* note 60, at 16–17 (1987).

[190] *See* Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 86, 96 (1987).

[191] Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 LAW & CONTEMP. PROBS. 101, 101–02 (1987).

[192] *See* Nicholas, *supra* note 190, at 96.

[193] Regarding the extent of the easy mark mentality, Taub comments that developers "are frequently thought of by those who use their productivity almost as badly as Shakespeare thought of the lawyers." Taub, *Exactions, Linkages and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 595 (1988).

owner by offering a lower price for the land. In essence, the costs of child care would be capitalized into the original price paid for the undeveloped land. Because the addition of the child care center will support new development and increase the value of the property, the landowner should bear the costs of this improvement.[194] Ideally, this type of burden shifting lifts the burden from the developer and the tenants, but not all developers would be able to bargain for the lower price to cover the costs of providing free space for child care. Developers who have already acquired land at the time a community adopts a linkage policy would be unable to offset their increased costs through negotiating a lower purchase price for the land. Furthermore, if the costs of meeting the child care linkage requirement are not fixed, but open to negotiation and adjustment during the development approval process, then the developer may not be able to estimate accurately the additional cost of child care linkage in order to offer a correspondingly lower price.[195] Therefore, while some developers may be able to capitalize the cost of child care, a large number may also shift the cost to tenants or absorb the costs in lower profits.

Developers could also pass the costs on to the tenants of the development through higher rents. A valuable service such as a child care center may increase the value of the occupancy to the tenant by more than the costs of providing the center. In fact, one of the reasons for including child care in the development process is that including a child care center in the original plans of a development is much less expensive than retrofitting the equivalent space when tenants demand the service. Therefore, although mandating on-site or near-site child care through the development process may increase the developer's costs, developers can raise their prices to recover those costs. In the long run, the consumers of the development product, not the developer, may bear the burden of child care linkage.

Although critics may fear that the higher rents faced by tenants will hurt those whom linkage is supposed to help, this distribution may be the fairest way to apportion the cost of child care facilities. A child care linkage requirement that trickles

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[194] *See* Nicholas, *supra* note 190, at 96. If the child care linkage requirement is shifted backward through a decreased value for the land, the general community will also be affected since a lower valued land means lower property taxes and a shift to other taxpayers to cover the same social costs.

[195] *See* Downing & McCaleb, *supra* note 184, at 55.

down to tenant/employers (through higher rents) and employees (through lower salaries) is like a user fee which places the burden on those who benefit from the service. Although not all employees of the development project will need child care facilities, this distribution is more equitable than a general property tax. All citizens would pay property tax to benefit only the new employees of a development project.[196] Furthermore, by spreading the costs among employees of all ages, the cost of child care is in essence spread over the lifetime of the employees, which may serve a better social purpose than burdening a young employee with all of these costs at an early point in his or her career.

However, the redistribution of child care costs among employees will not be socially beneficial unless there are rules to assure that the child care benefit accrues to the low- and moderate-income employees in the development. Clerical and technical workers, those who face the shortage of affordable, quality care, should be subsidized through reduced wages for the higher paid workers in the development.[197] From this perspective, child care linkage is a paternalistic redistribution of the costs of child care. However, such paternalism may be one of the only ways to assure that all employees have access to quality affordable child care.[198]

Although the most equitable way for shifting child care costs may be to shift them to the end user, many developers may not be able to shift the costs forward through higher rents. Because rental prices are set by competition, developers will only be able to shift the prices forward where all developers must incur similar exaction costs and where demand for new construction

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[196] *But see* V. FUCHS, *supra* note 43, at 149 (arguing that ". . . attempts to finance child-centered programs through 'employer provided' benefits such as parental leave or subsidized day care are likely to be more inequitable and induce more inefficiency."). Fuchs notes that if the potential utilization of child care services were more or less equal across industries, the distinction between a broad based tax and one focused on employers would not be critical. However, he also noted that the relative importance of employed women with a child under six is very uneven across firms and industries. *Id.* at 136–37. Therefore a child care linkage policy may unfairly burden developers of certain types of projects where most employees will not use the child care facilities. However, this inequity may be handled by the inclusion of exemptions for inappropriate buildings. *See infra* text accompanying notes 270–272.

[197] *See generally* Liebman, *supra* note 39, at 374 nn.48–50.

[198] Compare this with the Massachusets universal health care plan, which requires employers to provide health insurance, thus, in essence, reducing wages and redistributing health care costs in an effort to insure universal access to health care services.

is sufficiently inelastic to actually allow the price increases.[199] The fairness of requiring a developer to provide child care for the occupants of a building can be justified by the argument that development of land is a privilege and developers are willing participants in the development of land and the linkage requirements. Developers who want to construct development projects in a community are always subject to costly requirements such as state building codes and exactions for sewers, roads, and other infrastructure that will be required to support the development.[200] Accordingly, child care linkage requirements are a price paid to a community for the right to develop and should not be considered any more burdensome than other exactions.

Developers may respond that they are just easy targets because they lack any political base within the community.[201] However, the fact that developers and some users do not reside in the community justifies taxing them since they will not be subject to the community's property taxes that would otherwise be used to provide services such as child care.[202] More plausible is the objection that this "easy mark" mentality is particularly unfair to socially responsible developers who have contributed to sound growth management. If linkage policies have benefits that extend to the community at large, these developers may be unjustly required to shoulder an inordinate share of the burden to provide benefits enjoyed by all.[203] Therefore, while linkage policies may place the burden on prospering developers to share their profits and help satisfy the needs that result from new community growth,[204] the burden should not be greater than the

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[199] *See* Nicholas, *supra* note 190, at 96.

[200] *See* Downing & McCaleb, *supra* note 184, at 42 (citing Fischel, *supra* note 191, at 101).

[201] Andrews & Merriam, *supra* note 127, at 200 (noting that linkage programs place the cost of improvements on commercial developers who may come from outside the city and do not have a political power base within the community). This argument may not be very compelling since most developers can have an impact on government affairs through lobbying, campaign contributions, and large contributions to a community.

[202] *But see* Nicholas, *supra* note 190, at 87–88. Nicholas discusses the problem of linking infrastructure to residential growth. He comments that commuters and shoppers create needs while they are present in the community that are similar to those created by residents. He argues that police and fire protection, road improvements and similar facilities are needed "irrespective of whether any of the shoppers or employees reside within the community. The same is true for office buildings and factories. It is activity that must be served, and it is the service of such activity that imposed the infrastructure improvement costs on local governments." *Id.* at 88.

[203] *See* Taub, *supra* note 193.

[204] *See* Andrews & Merriman, *supra* note 127, at 200.

increased need for child care and should fit the legal rational nexus requirements.

Another distributive problem is the fairness of requiring new developers to provide for child care needs when existing buildings have no such requirement. Unless child care is restricted to employees in the building, child care centers built under child care linkage may support the child care needs of the employees in the old buildings. At the minimum, child care facilities created by child care linkage will benefit the employees in the old buildings and the community by opening up other spaces and relieving community needs. Other than the fact that it is less expensive to include an on-site child care facility in the original plans for the building, no apparent characteristics of new buildings justify the requirement that new buildings include provisions for child care needs while old buildings have no such requirement. Therefore, child care linkage could also apply to existing buildings with workers who need child care. In order to make this economically feasible, a phase-in plan could be designed so that existing buildings would have to provide child care upon a major renovation or within a certain time period. This phase-in plan is analogous to retrofitting buildings for handicapped access or for new structural requirements. The phase-in plan would eventually lead to child care centers in every building. In the meantime, owners of existing buildings could be required to pay an in-lieu fee.

While such a plan is attractive because of the apparent equity among all commercial property owners, this kind of requirement creates problems and goes beyond the concept of linkage. First, a phase-in plan is inconsistent with the premises and theory of child care linkage. One of the premises of linkage is that new commercial development creates an increased need for child care and that child care linkage is a prospective way to provide for increased child care needs.[205] This rationale will not apply to existing buildings because no new child care need is being created. Instead, child care requirements for old buildings will be remedial measures to address already existing needs. In addition to this inconsistency, there may be constitutional problems with requirements for on-site child care centers to be included on existing buildings. The imposition of an on-site child care center is likely to be a taking under *Loretto v. Manhattan*

[205] *See supra* text accompanying notes 82–110.

Teleprompter CATV,[206] which held that permananent physical occupation of property by the government, such as a requirement for an on-site child care center, is a per se taking. Although *Nollan* may stand for an exception to *Loretto* when governments impose conditions on granting development permits,[207] this exception would not apply to conditions imposed on existing buildings where there is no permit involved. *Loretto* and *Nollan* seem to affirm a distinction between impositions on property interests in existing developments and conditions imposed on the privilege of constructing future developments.

D. *Concerns Regarding the Administration of a Linkage Program*

Linkage advocates must, as a prerequisite to drafting a successful linkage program, conduct a thorough analysis of the development process and consider the special characteristics of child care, to ensure that developers can comply with the proposed linkage ordinance and that the ordinance will serve its intended purpose.

1. Assessment of a Child Care Requirement/Linkage Fee

The form and content of the linkage obligation provide challenges to legislative drafters. In order to meet the legal challenges to linkage, the required dedication must be commensurate with the need generated by the development.[208] However, because a linkage requirement must apply to a great variety of developers and is usually imposed early in the development process,[209] it is difficult to impose a requirement that will fit precisely with the child care needs of the developed building in the future. Most municipalities adopting linkage fees settle for tying the need assessment to the square footage of the building and requiring larger buildings to provide larger child care centers than smaller buildings. For example, the San Francisco child care linkage ordinance requires developers of buildings over 300,000 square feet to build a child care center that is the greater

[206] 458 U.S. 419 (1982).
[207] *See supra* text accompanying notes 163–169.
[208] *See supra* text accompanying notes 125–131, 170–173.
[209] *See infra* text accompanying notes 216–226.

of 3000 square feet or one percent of the net additional space created. Buildings under 300,000 square feet must have a child care center that is a minimum of 2000 square feet or one percent of the net additional space created, whichever is greater.[210]

Although this system of exaction is equitable for very similar buildings in a dense urban area, it does not allow for differences in rental values of buildings, and it places a much greater relative burden on lower-value property. The costs imposed on developers by land use regulations are regressive in nature and are much more easily absorbed by high-income property owners.[211] An in-lieu fee of $2 per square foot will hit a building with an average rental rate of $8 per square foot much harder than a high density office building that will rent for as much as $30 per square foot. In terms of the required dedication, the rental rate differentials will provide incentives for lower rent buildings to include on-site centers because the fee will be so prohibitive, and higher rent buildings will be encouraged to simply "buy out" of the requirements because the costs of operating a center would be greater than the fee. Although easier to administer because of its objective standard, tying child care to square footage does not impose an equal burden on developers of different value properties. Furthermore, if the costs are passed to the tenants and employees of the building, the linkage fee is unfairly regressive because it imposes a greater financial burden on those with less ability to pay.[212]

Instead of imposing a straight square footage requirement, the Massachusetts linkage bill requires developers to pay two percent of the rental value of the building.[213] This scheme attempts to equalize the burden placed on developers of skyscrapers in downtown Boston and office parks in Springfield. Because the percentage of rental income can be set at the same percentage of square footage required for dedication, the in-lieu fee can closely match the dedication requirement.[214] Thus, a percentage

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[210] SAN FRANCISCO, CAL., PLANNING CODE § 314.4(b)(C) (1985). The in-lieu fee is assessed in relation to the square footage of the building/additional new space created. The amount of the in-lieu fee is calculated as follows:

Net add. gross sq.ft. office or hotel space X $1.00 = Total Fee

SAN FRANCISCO, CAL., PLANNING CODE § 314.4(b)(4) (1985).

[211] *See* F. BOSSELMAN & D. CALLIES, *supra* note 63, at 319.

[212] *See* Nicholas, *supra* note 190, at 98.

[213] Massachusetts Bill, § 2.

[214] For example, the Massachusetts Bill would require that developers dedicate two percent of rental space or pay two percent of rental income as an in-lieu fee. Massachusetts Bill, §§ 1, 2.

exaction can provide equal incentives to build or pay the in-lieu fee and minimize the disparity in effects on different types of developers.

While this system may have the advantage of equalizing the burden on developers and counteracting regressive land development costs, it strays from the strict relation to need that justifies the imposition of the exaction. Although it seems fair to tax developers of high rent property more than developers of low cost office space, it is difficult to argue that luxury buildings with high rents cause more need than a lower rent building of the same size. Therefore, a percentage requirement may make more practical sense, but may extend beyond permissible legal limits.[215]

2. Timing of Linkage Requirements

Linkage ordinances must be drafted to fit the time line of a development project. It is important to consider the appropriate time in the development process[216] to determine the amount of the linkage obligation, the length of the linkage obligation, and whether an in-lieu fee should be paid in a lump sum or on an

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[215] *See* Connors & High, *supra* note 3, at 70 (arguing that acute legal problems may arise where dedication requirements are stated as a percentage of the area of land developed), *citing* J.E.D. Assoc. v. Town of Atkinson, 121 N.H. 581, 583, 432 A.2d. 12, 14–15 (1981), Frank Asuini, Inc. v. City of Cranston, 107 R.I. 63, 71–72, 264 A.2d 910, 914–15 (1970).

In contrast to the fixed schedule formulae used by the San Francisco and Massachusetts linkage programs, child care linkage could be assessed as a negotiable exaction. The specific outcome of a negotiable exaction is uncertain because all that is fixed is a process for negotiation over what and how much will be exacted. *See* Frank & Rhodes, *Introduction*, in DEVELOPMENT EXACTIONS 9 (J. Frank & R. Rhodes eds. 1987). Negotiable exactions lend uncertainty to the cost of the development project and the local government revenue flow. Because they are more unpredictable, negotiable exactions may also make it more difficult for the developer to shift the cost of the exaction. Unlike fixed linkage requirements, negotiable exactions may not even be formalized but may just take place when developers seek a zoning variance. They are more likely where the local government has a fair amount of discretionary authority. *See* Frank & Rhodes, *supra*, at 9–11.

[216] The development/building process is characterized by entrepreneurs who buy raw land, install site improvements, divide the land into building sites, and either market vacant sites or erect buildings on them and sell the fully developed sites. *See* Frank & Rhodes, *supra* note 215, at 5–9. For a thorough discussion of the development process, see Porter, *supra* note 92, at 104.

Local governments regulate the development process through a variety of permits and approvals which can take the form of subdivision regulations, zoning ordinances, drainage ordinances, and landscaping ordinances. *Id.* at 6. Commonly, local governments review plans prior to issuing a building permit, review projects in order to grant zoning variances, and inspect the site following construction before granting a certificate of occupancy. *See id.* at 109.

installment basis. Assuming a child care linkage ordinance that allows developers to build on-site child care facilities, it will be important to impose the linkage obligation at the very beginning of the planning process. Because one of the advantages of child care linkage is that it includes on-site child care at the most cost-effective part of the planning process, it is important that developers opting for the on-site centers include child care in the original plans submitted to the building inspector.[217] For developers electing either to build on-site centers or to pay an in-lieu fee, assessment of the linkage obligation at an early stage will enable them to include the obligations in the financing arrangements and overall accounting of the project.[218]

The certainty and the timing of the linkage obligation will also affect who bears the ultimate burden of the requirement. If the linkage obligation is predictable and occurs early in the process, the developer will be more likely to pass the burden back to the landowner.[219] However, if the linkage obligation comes at the completion of the building as a requirement for granting the certificate of occupancy, the burden is more likely to be shifted forward to the buyer.[220] Thus, if a community desires that the end users pay for child care facilities, the linkage requirement should be structured so that the payments are predictable and due when these recipients occupy the building. If the linkage requirement is so structured, developers will be more likely to shift the costs of providing for child care to the tenants, although the start-up costs of constructing the center might be shifted back to the landowner or be borne by the developer.[221]

A municipality must make decisions regarding whether an in-lieu fee is assessed as a lump sum or on an installment basis, and at what point in the development process a developer will have to pay this fee. Because of the time value of money, the

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[217] *See, e.g.*, L. BARRETT & P. ENGLE, *supra* note 88, at 40 (arguing that installing new child care centers into existing buildings is often a feasible and rational way to expand the supply of child care).

[218] *See, e.g*, Keating, *supra* note 78, at 138 (reporting that surveyed developers preferred fixed formulae so that they could include the linkage costs with other development costs in obtaining project financing and calculating the likely rents).

[219] Nicholas, *supra* note 190, at 96.

[220] *Id.* at 97. For a discussion of burden shifting and the economic effects of legal transitions, see generally Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986).

[221] If the desire is to completely pass on the costs of child care to the occupants of the building, then the linkage requirement could take the form of a special assessment imposed at occupancy, in which case neither the landowner nor the developers would make the payment. *See* Nicholas, *supra* note 190, at 96.

timing of an in-lieu payment may also affect the amount of money collected by the municipality for the child care development fund.[222] It is obviously in the city's interest to obtain full payment at the earliest possible date (issuance of the building permit). However, developers may want to defer payments until after completion of construction and pay in installments comparable to yearly dedication of space for a child care center. Although a lump sum payment has the advantage of satisfying the linkage obligation in one step, deferral of payments will allow developers to match payments of the fee with the rental income on the property. If the in-lieu fee is too low, developers will have a great incentive to pay an early fee instead of getting caught up with the intricacies of running an on-site child care center.[223]

While it is important to include a proposed child care center early in the planning process, the actual opening of the center presents a wholly different timing issue. The opening of the center should be tied to occupancy. The child care center should be required to open after a majority of the space is occupied. Because office buildings are often vacant for several months after opening, actual office interiors may not be completed and tenants may not move into the building for months or even years after the opening. Correlating the linkage obligation period with building occupancy will ensure that there will be a sufficient number of employees with children in the development to fill the child care center.

The plans vary in the length of time over which a developer would be required to provide child care in an on-site center. Under the San Francisco ordinance, developers are required to maintain the center for the life of the building.[224] Under the Massachusetts Bill, developers are required to maintain the centers for ten years and a covenant goes on the title deed to bind subsequent owners to this obligation.[225] It is difficult to discern

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[222] In a dissent to the Boston advisory group recommendation favoring twelve annual installment payments for Boston housing linkage, two community housing advocates noted that such an arrangement would reduce the real value of the $5-per-square-foot fee by half. Since then, as noted above, Boston's mayor has proposed increasing the fee to $6 payable over seven years. Keating, *supra* note 78, at 139. Concerns about the time value of money could also be addressed by requiring payments with interest.

[223] However, the municipality may benefit by receiving more money for the development of child care centers if the in-lieu fee is paid up front and early in the development process rather than in installments. *See supra* note 222.

[224] SAN FRANCISCO, CAL., PLANNING CODE, § 314.4(b) (1985).

[225] Massachusetts Bill, § 4(c).

a standard time limit. It is not clear that the obligation should automatically cease at all since the need for child care will not magically abate twenty years after the development project is completed. In theory, the child care obligation should remain with the building for the life of the building and the ordinance itself should be changed by the municipality if the need for child care abates.[226] However, such a requirement would make the provision of on-site child care less attractive than a one-time fee. Perhaps to make linkage more palatable to developers and because of the earlier tradition of one-time dedications or payments, a child care linkage policy should include a set time period after which the obligation ceases.

3. The Implementation and Enforcement of a Child Care Linkage Ordinance

Because child care linkage programs involve the overlap of community development and social services, the implementation of these programs presents difficulties on both the state and local levels. While child care and licensing of child care centers is a human service function that usually comes under a state or locality's human or social services department,[227] the development process involves zoning boards, city planners, and local building inspectors.[228]

Although linkage programs place the cost of new child care space on developers (who may shift the costs backward to landowners or forward to tenants), child care linkage is not cost-free to state and local governments. A child care linkage program must be enforced and implemented by state and local governments which will incur administrative costs for staff and resources.[229] Therefore, a percentage of the linkage fees collected or an appropriation from state or local funds will be

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[226] An argument could be made that the child care linkage requirement expires when these new buildings become like old buildings, which are not subject to child care linkage. For a discussion of whether a child care requirement should apply to existing buildings, see *supra* page 000.

[227] In Massachusetts, the Office for Children, under the Executive Office of Human Services, is responsible for the licensing of child care centers.

[228] In Massachusetts, the appropriate state agency would be the Executive Office of Communities and Development.

[229] Although the increased regulation of a linkage program will elevate the transaction costs of all parties involved in the process, most literature does not detail these types of costs for local governments. *See* Weschler, Mushkatel & Frank, *supra* note 60, at 30.

required to cover these administrative costs. If the administrative costs are covered as a percentage of the linkage fees, state or local governments could face difficulties if all developers opt for on-site child care facilities and the fund is empty. However, the limited empirical data available on this issue indicates that local governments will not have to confront such difficulties.[230]

In designating the enforcement authority, both the routines of the development process and the special characteristics of child care centers must be considered. Because child care linkage requirements are conditions precedent to the granting of development permits, the requirements should be enforced by local government agents who enforce similar requirements such as the state building code and local zoning ordinances. Usually, the local building inspector is responsible for checking the original design specifications before granting a building permit and for inspecting the finished building before granting a certificate of occupancy. Because developers are familiar with this system, it makes sense for the building inspector to include an inspection of plans for an on-site child care center in the existing inspection process, and to inspect the child care center during the currently-required inspection of the completed building, rather than to create an entirely new procedure. Similarly, all in-lieu fees should be collected by the municipal tax collector who would be the normal collector of fees and property taxes. However, these fees should be segregated into an "affordable child care fund" separate from the general revenues of the municipality.

In addition to inspection procedures at the time of issuance of a permit, municipalities should design enforcement provisions to ensure that child care centers continue to operate and that in-lieu fees are paid after the permits are granted. The Massachusetts Bill requires developers to submit a plan for fulfilling

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[230] Because of the cap on development in San Francisco, *see supra* note 182 and accompanying text, it is difficult to isolate the effects of child care linkage on the real estate development market. However, there is information available on the few projects that have been approved subject to the child care requirements. According to the San Francisco Mayor's Office of Community Development, four projects approved prior to the adoption of Planning Code Section 314 have pre-existing child care requirements, and five projects have been approved subject to the Section 314 requirements. Among the developers of these nine projects, three plan to provide on- or near-site child care centers, five plan to contribute to the Affordable Child Care Fund, and one developer has been indefinitely stalled, in part because of the passage of Proposition M. SAN FRANCISCO MAYOR'S OFFICE OF COMMUNITY DEVELOPMENT, STATUS OF COMPLIANCE WITH THE CHILD CARE REQUIREMENTS IN APPROVED OFFICE/HOTEL DEVELOPMENTS AND OTHER SPECIAL PROJECTS 1–8 (March 1989).

the child care linkage requirement prior to obtaining a building permit.[231] In order to assure that the linkage requirement remains in force, regardless of whether the building is sold, this plan requires the registry of a covenant on the title deed of the land obligating the developer to fulfill the selected linkage requirement prior to receiving a certificate of occupancy.[232] Prior to the granting of the certificate of occupancy, developers electing to provide on-site child care centers, either alone or in consortium, must have a completed child care center licensed in accordance with state law. Developers electing to pay the in-lieu fee, to build near-site centers, or to employ any combination of near-site centers and the fee, must post a bond with the municipal tax collector prior to the issuance of the certificate of occupancy. The amount of the bond must be equal to the estimated cost of the total linkage obligation and will be partially released each year as the linkage obligation is fulfilled. Developers that neglect to fulfill their obligations within two years will forfeit the appropriate portion of the bond.[233]

A child care linkage program should involve government officials and community members who are familiar with the special characteristics of child care. Their expertise should be incorporated into the program. These child care experts should play an important role on all advisory panels on both the state and local levels. In addition, local child care providers and parents should sit on the community board that awards grants from the "affordable child care fund." While it is also important to involve developers, child care experts and social services officials should make decisions regarding how to spend money collected from the in-lieu fees.

The goal in allocating enforcement authority between municipal departments and state agencies is to allow each specialized agency to apply its expertise. In addition, it is important to consider the politics of the zoning process and whether state or local governments, planning commissions, or administrative

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[231] Massachusetts Bill, § 5.

[232] *Id.* A covenant is a contractual obligation that creates certain rights and duties between two or more parties. If certain requirements are met, either the benefit or the burden will "run with the land" to benefit or bind subsequent owners. For a complete discussion of covenants, see R. POWELL & P. ROHAN, 5 POWELL ON REAL PROPERTY ¶¶ 670–79 (1949).

[233] Massachusetts Bill, § 5.

staff should be making the decisions.[234] Because child care linkage is primarily a land use law, land development officials, rather than social service officials or a state office for children, should have primary enforcement authority. On the other hand, community planners must consider the special characteristics of child care and should incorporate the work of agencies concerned with the quality of child care as well as involve those officials in the implementation of the program.

4. The Operation of the Child Care Center

For developers opting to provide an on-site child care center, child care linkage ordinances ordinarily require the developer to dedicate a set amount of space in the building or at a near-site location to meet state licensing requirements. Important related issues include deciding who should actually operate the space and whose children should be admitted to the new facility.

Both the San Francisco ordinance and the Massachusetts plan specify that the child care center should be leased to a licensed non-profit child care provider chosen by the developer. In San Francisco, developers are required to enter into a three-year lease with a non-profit child care provider prior to obtaining a certificate of occupancy.[235] In Massachusetts, the proposed legislation gives a preference to non-profit child care providers unless a non-profit provider is not available.[236]

The preference for non-profit child care providers is based on concerns about quality, the cost of child care to parents, and the legality of requiring one private business to provide rent-free space for another for-profit enterprise.[237] Citing studies such

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[234] For a discussion of the politics of exaction decisions, see Weschler, Muskatel & Frank, *supra* note 60, at 40.

[235] SAN FRANCISCO, CAL., CHILD CARE REGULATIONS § 4.2 (proposed July 28, 1986).

[236] Massachusetts Bill, § 4.

[237] According to a study for Scholastic, Inc., child care, a $15.3 billion industry, is expected to grow at an annual rate of 21% until 1995 when it will be a $48 billion market. *Labor Letter*, Wall St. J., November 15, 1988, at col. 1. For a discussion of the role of non-profit institutions, see generally Hansmann, *The Role of Non Profit Enterprise*, 89. YALE L.J. 835 (1980). Hansmann argues in favor of a role for nonprofit firms for industries where private contract fails and patrons would find it difficult to draw up a contract with a profit-seeking firm that would give them adequate assurance that the firm would produce the desired services in return for their payment. *Id.* at 868–69. He also argues for non-profits where the social service would be inappropriate for government provision because the service is demanded by only a small portion of the populace or if the distribution of individuals' demand for the service bears no relation to the

as the *Mother Jones* expose of Kindercare for-profit child care centers,[238] child care advocates argue that profit-oriented child care centers do not provide the same quality of care as non-profit providers.[239] They maintain that the best kind of child care comes from non-profit centers with a community-based managing board and substantial parental involvement. While this argument has some appeal, a preference for non-profit child care centers may not be the best way to address concerns about quality. Currently, quality is determined by the marketplace. Parents with higher incomes can afford high quality child care. However, low- and moderate-income parents must often sacri-

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incidence of the taxes used to support it. *Id.* at 895. Specifically with child care, Hansmann notes that non-profit child care centers are a substantial part of the existing facilities. Hansmann argues that non-profits have a logical role here because

> while it is the parent who pays for the services rendered by a day care center, it is the child to whom these services are immediately rendered. Children typically are not discriminating consumers, nor even, in many cases, good sources of information about the nature of the services they receive. In such circumstances it is natural for a parent to turn to a nonprofit provider on the assumption that such an institution will be less likely to abuse the trust that must necessarily be placed in it.

Id. at 865. *But see* Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 HARV. L. REV. 1417 (1980) (arguing in the context of hospitals that legal favoritism for the non-profit form is not based on sound reasoning or hard data, but on intuition). Clark advocates neutral legal rules with respect to the choice of organizational form, absent special consequences. Clark argues that the law should not make distinctions, such as those made by the San Francisco and Massachusetts linkage plans, where there are no relevant differences, and that subsidization should not be given directly, or indirectly through favorable regulatory and judicial treatment, to activities and entities that are not socially superior to non-subsidized activities. *See also* Permut, *Consumer Perceptions of Nonprofit Enterprise: A Comment on Hansmann*, 90 YALE L.J. 1623, 1628 (1981) (disputing the normative assumptions of Hansmann's model and reporting that "the differences between non-profits and for-profits are not obvious to everyone, and that it is not clear that non-profits are generally perceived as more trustworthy or honest.").

[238] Bellm, *The McChild-Care Empire*, MOTHER JONES 32 (April 1987). Using Kindercare as a model, Bellm discusses the problems of the for-profit child care industry including low wages, low quality, and a focus on profit rather than children. For a discussion of the difference between profit and non-profit hospitals, see Clark, *supra* note 237, at 1417.

[239] *See* Hansmann, *supra* note 237, at 865; Hansmann, *Consumer Perceptions of Nonprofit Enterprise: Reply*, 90 YALE L.J. 1632, 1637 n.12 (1981) (noting a study by Professor James Newton which suggests "in general that in choosing a day care center parents are sensitive to the nonprofit/for-profit distinction; they tend to place somewhat greater trust in nonprofit providers, but are primarily guided by observable differences in price and quality."). *See also* Liebman, *Political and Economic Markets: The Public, Private and Not-for-Profit Sectors*, in PUBLIC-PRIVATE PARTNERSHIP 341 (H. Brooks, L. Liebman & C. Schelling eds. 1984). Liebman discusses how "the major limit to for-profit participation of private companies in provision of public services is the degree to which it seems wrong to pursue value-laden and unquantifiable public goals through profit maximizing entities." *Id.* at 348. He presents the difficulty of the profit motive for services such as child care, where "government cannot describe in bid documents a day care center that has tender loving care along with the peanut butter sandwiches at lunch." *Id.* at 355.

fice quality in order to afford child care. For these people, the most common type of care is home care. Home care has very few, if any, licensing requirements, and is considered the lowest quality and most undependable type of care.[240] These users are not concerned with the profit or non-profit motives of the providers, but with their ability to afford quality child care at all.[241]

Licensing requirements established by the state establish a minimum quality of care. Most states currently have licensing requirements for child care centers which are designed to provide minimum standards for physical facilities and the operation of the center.[242] Since the child care linkage proposals require licensed providers, it is hard to argue that linkage-created centers would have to meet a different, higher standard that would be accomplished by eliminating for-profit centers.[243] Even if a higher standard of quality is to be required for linkage-related spaces, this goal might be better accomplished through regulations which require community-based boards or parental involvement rather than non-profit providers.[244] Furthermore, if a higher standard of quality is required without a corresponding provision of subsidies, low- and moderate-income employees may be priced out of the newly-created child care service.

The preference for non-profit child care centers is also based upon concerns about the affordability of spaces created by child care linkage. Because child care linkage is designed to address a crisis of availability *and* affordability, child care linkage plans should not create child care that only professionals and executives can afford, leaving clerical and blue-collar workers to find lower-quality care far from the workplace. Because a profit motive may encourage providers to charge higher fees, advocates fear that many workers would be unable to afford the

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[240] THE BOTTOM LINE, *supra* note 2, at 31.

[241] *See* Liebman, *supra* note 239, at 355.

[242] *See* A WORKFORCE ISSUE, *supra* note 1, at 168.

[243] *See* Liebman, *supra* note 239, at 355 (arguing that if the publicly responsible purchaser could specify goals, both non-profit and for-profit contractors could provide the required quality).

[244] Most studies on quality of child care do not focus on the profit or non-profit status of the provider. *See, e.g.*, CHILDREN'S DEFENSE FUND, *supra* note 45, at 176 (stating that "child development experts agree on the key contributors to quality child care: small group size and adequate adult supervision; continuity of care; a staff that has received specialized training in child development and early education; cooperation between care-givers and parents; and activities geared to a child's age that encourage optimal physical and mental as well as emotional development.").

newly-created child care slots.[245] While this is an important concern, the profit or non-profit status of a child care center does not necessarily determine its relative affordability.[246] Affordability may be accomplished by requiring sliding scale fees based on the income of the parents or by state subsidies for low- and moderate-income families.

Concerns about government action that requires one private business to allocate space rent-free to another business may justify the preference for non-profit child care. However, government frequently turns to private profit-making firms to provide facilities and services such as buildings, roads, and other public works, as well as airport operation or services.[247] For-profit child care providers who pay no rent might receive a windfall at the expense of a developer.[248] This windfall problem may be mitigated by requiring profit-seeking child care providers to charge proportionately lower fees (to compensate for the lower rent) or to pay rent for the dedicated space. Regardless of whether these centers are non-profit or for-profit, there must be rules to determine who will receive the rent-free space. For example, both for-profit and non-profit centers could be required to include subsidies for low- and moderate-income families. In addition, communities may need to consider whether non-profit child care providers are available to operate the facilities,[249] and whether developers would prefer to work with for-profit providers.[250]

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[245] *See* Hansmann, *supra* note 237, at 868–69 (arguing that non-profits are justified where there is a contract failure and consumers will be unable to contract for desired services at a fair price). However, Hansmann argues that the advantages of nonprofits may not work as efficiently where the scale of enterpise is small such as for a child care center. *Id.* at 871. Noting that a small day care center run out of the home might look the same whether the organization is formally created as a non-profit or a for-profit entity, he reasons that the nondistribution constraint that characterizes the non-profit form has real meaning only when an enterprise is of sufficient scale to develop large earnings that cannot easily be paid out in reasonable salaries to the individuals in control of the enterprise. *Id.* at 870–71.

[246] *See generally* Liebman, *supra* note 39, for a discussion of alternatives for addressing affordability concerns. Professor Liebman's analysis of the child care problem includes alternatives such as goverment operated child care centers, government entitlements to low-income families, tax credits, and subsidized federal loans.

[247] *See* Kolderie, *Business Opportunities in the Changing Conceptions of the Public Sector Role*, in PUBLIC-PRIVATE PARTNERSHIP 92 (H. Brooks, L. Liebman & C. Schelling eds. 1984).

[248] While the rental costs of prime space could be expensive, the windfall may not be that great since rental costs are a small percentage of the operating expenses of child care centers. The largest percentage goes to pay staff salaries.

[249] *See* Kolderie, *supra* note 247, at 94 (discussing the importance of choice and competition including the private sector for quality provision of services).

[250] It is not clear that developers have preferences for or against working with "for-

In addition to determining who should be running the child care centers, a child care linkage policy must determine whose children may use the additional child care space that is created. In order to satisfy legal criteria governing linkage policies, the benefits generated by the regulation must accrue to occupants of the development.[251] Therefore, the child care spaces created must be offered to employees of the development. Beyond this limit, the child care linkage law must address the problem of affordability and class differences.[252] Child care linkage should not be used to provide plush child care for young professionals. Instead, rules must be drafted to give priority to those employees who have the most difficulty finding quality, affordable child care.

The Massachusetts Bill responds to these concerns by giving priority to low- and moderate-income employees of a development.[253] However, such a simply stated preference may not be an adequate way to address the allocation issue. First, the problem of defining low- and moderate-income employees must be

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profit" child care centers. In a report prepared by students at the John F. Kennedy School, developers who were interviewed reported choosing for-profit centers for various reasons including perceptions that they are "better run and more credible," desires to limit involvement, and concerns about liability. MILLER & STURGIS, CHILD CARE LINKAGE: WHAT ARE THE IMPLICATIONS FOR DEVELOPERS AND EMPLOYERS 13 (1987) (Report prepared for the John F. Kennedy School of Government, Harvard University) (on file at the Harvard Journal on Legislation). However, the idea of on-site child care operated as a profit center is a favored option for many employees. *See* J. FERNANDEZ, *supra* note 113, at 153 (noting that of over 1000 employees surveyed concerning what companies should do about child care, 55% favored company-operated on-site child care run as a profit center).

[251] *See supra* text accompanying notes 125–131, 135, 172–176.

[252] The child care crisis is largely defined as a crisis of affordability, where workers below a certain wage level cannot afford quality care. *See* Liebman, *supra* note 39, at 362–64 nn.15–16. In addition, the child care crisis is largely a class issue where low-income families and minorities have a greater need and sense of crisis than middle- and upper-class white families. *See* CHILDREN'S DEFENSE FUND, *supra* note 45, at 191 (describing how quality early childhood education programs are out of reach for low-income families); *SMART START: The Community Collaborative for Early Childhood Development Act of 1988: Hearings Before the Senate Labor and Human Resources Committee*, 100th Cong., 2d Sess. 259 (1988) (statement of Barbara A. Willer, National Association for the Education of Young Children) (describing unequal access to childhood development programs).

[253] The Massachusetts Bill provides:

> Enrollment priority for the child care center shall be granted in the following order to:
>
> (1) low and moderate income employees working at the development project;
> (2) other employees working at the development project;
> (3) low and moderate income families of the communities;
> (4) other families of the community.

Massachusetts Bill, § 4.

resolved. The Massachusetts plan defines "low or moderate income" families as

> families or persons whose gross monthly income is equal to or less than one hundred and fifteen percent of the state median income, as determined by the United States census bureau and adjusted annually by a percentage amount equal to the percentage rise in the United States consumer price index.[254]

However, such a definition fails to distinguish between family income and the personal income of the employee. Low-salary clercial workers whose spouses are highly paid professionals should not receive priority over single parents with low incomes.

A second problem with a strict preference for lower-income families is that a two-tiered child care system might be created, whereby children from higher-income families attend privately-created child care centers, and linkage-created centers are attended exclusively by children from lower-income families.[255] One reason that employers do not pay more attention to child care is that few executives face problems obtaining child care.[256] By having their children excluded from these on-site centers, managers may be less likely to become involved with the operation of the centers. Therefore, child care spaces should be available to higher-income employees/employers in order to provide diversity and to increase the employers' attention to child care centers.

If employees in a development cannot fill the available child care spaces, the center may be opened to the community. Community spaces should be allocated using economic guidelines similar to those for employees of the development. While this should not present any legal problem if the majority of spaces are taken by employees, a developer may have a valid due process or equal protection claim, if the child care center be-

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[254] Massachusetts Bill, § 2.

[255] *See* Liebman, *supra* note 39, at 362–64 nn.15–16. The likelihood of a center completely filled with poor children is unclear. Child care linkage requirements are based upon the total employment level of the development, so arguably spaces should also be available for higher-income employees who need child care. However, some system of preferred access and sliding scale fees should be included to assure that the higher-income employees do not monopolize the centers.

[256] S. KAMMERMAN & A. KAHN, *supra* note 50, at 105 (noting that child care is more of an issue for non-management women than for managers).

comes a community center filled with a majority of children not affiliated with the development.[257]

5. The Administration of the In-lieu Fund

Once collected and deposited into a separate fund, the fees generated by child care linkage should be spent to meet the child care needs created by a development.[258] The local government or the state advisory board must establish guidelines for expenditure of the fund so that it will be spent within a reasonable time period and will bear a reasonable relationship to the new construction.[259] In San Francisco, the fee is put into an "Affordable Child Care Fund" which is used to increase the supply of child care for low- and moderate-income families.

Because the Massachusetts proposal is for state-wide linkage, it creates a more comprehensive system. The proposal keeps the funds at the local level and distributes them through local grants administered by community boards. The community boards accept grant proposals from licensed child care providers twice a year and award grants based upon criteria included in the ordinance.[260] Because the justification for child care linkage in the Massachusetts Bill is that new development increases the need for child care, the Massachusetts grants must be spent for physical improvements and expansion of slots. However, the bill recognizes the importance of affordability by allowing for sliding scale fees for the additional slots created by the grant money. In distributing the funding, additional capacity is allocated in the same way as space for on-site centers.[261] The Mas-

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[257] *See supra* notes 132–148, 177–181 and accompanying text for a discussion of these legal challenges to child care linkage.

[258] *See* Sweeney, *supra* note 7, at 54 (noting that impact fees that may be assessed legitimately in one area of service cannot be used to offset the cost of a deficiency in another area of service).

[259] Currier, *supra* note 69, at 295.

[260] Massachusetts Bill, § 13. The Massachusetts plan limits funding to "projects, programs, or capital improvements that will aid in the creation of a new child care center, or increase the number of children served at an existing center, or establish a sliding scale to help low or moderate income families utilize the additional capacity created . . . ." *Id.* § 13(b). "Direct subsidies for salaries of providers or employees of child care centers" are specifically excluded. *Id.* § 13(c).

[261] Massachusetts Bill, § 13(e). For a discussion of the allocation of child care slots, see *supra* text accompanying notes 251–257. This treatment of the development is consistent with traditional impact fee expenditures for schools and parks which primarily, but not exclusively, benefit the residents of a new development. Sweeney, *supra* note 7, at 71. However, it remains unclear how close the connection between the use of the fees and the generating development must be. While the facts in Russ Building

sachusetts plan also allows developers to comment on grant proposals and make non-binding suggestions to the local board.[262]

The Massachusetts Bill strikes a compromise between tying child-care funds to a given development and allowing expenditures that will meet the child care needs of the community. However, other distributions are possible. Instead of allocating fees through a grant program, the developer could designate how the fees should be spent among options such as subsidies for employees of the development, contributions to near-site centers, or vouchers for low-income employees.[263] Because these options would directly aid the child care needs of the designated employees in the building, the funds are effectively tied to the new development. However, developers may not be qualified to decide among these options. In addition, expenditure of linkage fees in this way makes child care linkage resemble a subsidized social service.

6. Adapting a Linkage Program to Community Needs

In order to make child care linkage programs work, communities need to make the plans flexible in order to accommodate a wide variety of development projects. Although developers will oppose any additional requirements, they will prefer flexible child care linkage programs to inflexible programs.

Both the San Francisco ordinance and the Massachusetts Bill allow developers to choose how to fulfill their linkage requirements. A developer may dedicate space for an on-site child care center, provide near-site space for a child care center, provide either on- or near-site space in consortium with other developers, pay an in-lieu fee, or provide some combination of space

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v. San Francisco, 44 Cal. 3d 839, 750 P.2d 324, 244 Cal. Rptr. 682 (1988), indicated that the services provided through linkage requirements on the new developments secondarily benefitted developments not subject to the linkage ordinance, the court did not find this to be sufficient grounds to invalidate the ordinance, and limited its review of the case to other unrelated issues. 44 Cal. 3d at 840. However, the U.S. Supreme Court seems to require that expenditures of linkage funds be tied to the developments affected by the linkage ordinance, although the extent of this required tie remains unclear. BERKELEY PLANNING ASSOCIATION, *supra* note 85, at A-3.

[262] Massachusetts Bill, § 13(d).

[263] Because affordability of child care is at the heart of the crisis, cash subsidies may be the most effective way to help employees meet child care needs and may be preferable to a grant for additional space. *See* Liebman, *supra* note 39, at 359–60 nn.8–9.

and a fee.[264] By allowing this kind of flexibility, a developer can meet the child care requirement in the most appropriate way for a particular development project. For example, a near-site center provided by several developers in consortium might be appropriate for an outlying office park, while a small on-site center and/or an in-lieu fee payment might make more sense for a small, isolated office building.

Near-site, consortium, and combination options require special regulations. Municipalities allowing developers to provide near-site child care centers must identify how near to the development a "near-site" center has to be for it to qualify. In addition, the community may consider whether developers would have to provide transportation from the development to the child care center.[265]

Consortium options allow developers of neighboring buildings to combine and provide centralized child care centers. Building a child care center in consortium is especially attractive for smaller developers. Small developers working together can build larger centers, allowing for economies of scale. In drafting regulations to allow for consortium, local governments need to establish procedures that allow developers on different timetables to work together, while at the same time requiring the child care centers to be built within a reasonable time after the first building is completed. In addition, regulations should specify how developers should allocate the costs among themselves and how to determine the appropriate size for a center.[266]

By allowing for combinations of the on- or near-site centers and the in-lieu fees, municipalities enable developers to provide child care space even when the exact required space is not available in a particular building. For example, a developer may want to use a space in a nearby church for a near-site child care

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[264] *See* SAN FRANCISCO, CAL., PLANNING CODE § 314.4 (1985); Massachusetts Bill, § 3.

[265] Although developer-provided transportation between the development and the child care center would be a valuable service to the employees, such a service may be an excessive burden on developers. This would not only require developers to take an active and continuing role in the operation of the child care center, but it also would subject them to additional liability.

[266] Allocation among developers is usually covered by developer agreements in which the details of a child care center and each developer's respective contribution are specified. These agreements would be required to be completed before a certificate of occupancy could be granted. The size of the center (and how much would have to be offset by an in-lieu payment) would be calculated based upon the square footage of each building and the relevant formula for child care linkage (e.g., a requirement that developers dedicate two percent of their space for child care).

center. Although this space may be a thousand square feet less than the amount of total space required, the combination option allows the developer to provide the near-site center and make up the rest of the requirement through payment of an in-lieu fee. In order to make such a combination work, the local government must develop a formula to calculate the fee that would be required to provide the necessary care.[267] In addition, minimum square footage requirements should be established for newly-created child care centers so that developers using the combination option provide child care centers of an adequate size.[268]

Although they are not considered commercial, industrial, or retail developments, large non-profit developments such as universities and hospitals should be required to provide for child care. Similarly, new government buildings that will be used for offices or similar purposes should also be required to meet child care linkage requirements.[269]

On the other hand, certain types of development do not generate a need for child care and certain types of buildings are inappropriate for on-site child care centers. Examples of these inappropriate development projects that are exempted from linkage requirements under the Massachusetts Bill include houses of religious worship, industrial waste facilities, development projects to benefit veterans, and military buildings.[270]

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[267] *See, e.g.*, SAN FRANCISCO, CAL., PLANNING CODE § 314.4(b)(5) (1987). The formula for calculating the amount of the in-lieu fee is:

$$\left[\left(\text{Net add. gross sq. ft. space subject project}\right) - \left(\frac{\text{Net add. gross sq. ft. space subject project}}{\text{Net add. gross sq. ft. space all participating projects}}\right)\left(\text{Sq. ft. child care facility}\right)\left(100\right)\right] \times \$1.00 = \text{Total fee for subject project}$$

[268] *See, e.g.*, SAN FRANCISCO, CAL., PLANNING CODE § 314(b)(3)(c) (1985) (requiring minimum square footage of 3000 square feet or one percent of the total additional square feet of the participating projects); Massachusetts Bill, § 9 (requiring a minimum square footage of 2000 square feet).

[269] Because the fee option would not be possible with a government entity, the government would have to provide an on-site child care center or contribute to a near-site child care space.

[270] *See* Massachusetts Bill, §§ 14(a)–(e).

In addition to these statutory exemptions, municipalities should allow discretionary exemptions for developments that do not generate an additional need for child care.[271] Exemptions should be granted to developers who can show that a given building will have a small number of employees or that the child care needs of the building are sufficiently met by an existing on- or near-site center or by an excess supply of child care in the community. Because the local zoning process is characterized by bargaining between the city and developers, it is possible that local zoning boards will use these exemptions as bargaining chips for other desired amenities. Therefore, if linkage is coordinated by a state governmental body, the state board should grant the exemptions using more objective criteria. If no state board is available, local governments should design discretionary exemptions so that they are applied objectively and sparingly.

A child care linkage plan should also include provisions to adjust linkage formulae and exemptions for future years. Because the nature of the community and the economy may change, the formula used to calculate the linkage obligation should be periodically reviewed and adjusted.[272] In addition, a child care linkage program should allow exemptions for buildings that no longer have a need for child care. Similar to the provisions for discretionary exemptions, this provision would allow the developer to petition for a cancellation of the linkage requirement if the needs of the development or the community subside.

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[271] The Massachusetts Bill allows these discretionary exemptions in three circumstances:

> [if]
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> (a) the developer demonstrates that the development project will employ fewer than twenty individuals during any single eight-hour working shift and will continue to do so for the reasonably foreseeable future;
>
> (b) the developer demonstrates that the development project already is served by an on-site or near-site child care center that has sufficient capacity to serve the child care needs of all additional employees working in the new development project;
>
> (c) the developer demonstrates that sufficient excess child care capacity exists in the community presently, and will continue to exist for the reasonably foreseeable future, to meet the additional demand for child care created by the development project.

Massachusetts Bill, §§ 14(a)–(e).

[272] *Compare* Netter, *supra* note 133, at 167 (suggesting that linkage plans for affordable housing programs should include periodic review and revision of formulae).

IV. Conclusion: Linkage as a Partial Response to the Child Care Crisis

Child care linkage provides an innovative way for financially-strapped governments to plan for the increased child care needs that will result from commercial development. Just like other social service areas suffering cutbacks during the Reagan Administration, the child care area is in a worsening crisis while the federal government thrusts the responsibility and the burden of addressing this crisis on state and local governments.[273] Politically, child care linkage makes sense because it allows financially pressed state and local governments to create new child care without raising taxes.

Local governments have the power and the responsibility to include child care as part of basic community planning. Through the local zoning and planning process, community governments can anticipate and provide for the increased need for affordable child care, rather than wait to remedy the problems after they occur. Just as communities can assure that other physical and aesthetic needs of the community are met by new development, local governments should link child care to commercial and industrial development that will change the nature of the community, of the workforce, and of the need for child care. By including child care at the most basic level of city and regional planning, government and the private sector can work together to plan for the future needs of child care instead of awaiting remedial action at the state and national levels.

In order to consider the merits and effects of child care linkage, this Note has explicitly reserved addressing whether child care linkage should be enacted on a local, regional, or state level. Most of the benefits of a linkage program apply at each of these levels. Traditionally, exactions such as linkage have followed the path of zoning ordinances and have been passed by local government to meet local needs. Local governments

[273] *See* J. Fernandez, *supra* note 113, at 20–21 (citing a survey by the Children's Defense Fund revealing that 33 of 46 states surveyed were serving fewer children in 1983 than in 1981 due to Reagan Administration cuts in child care); The Bottom Line, *supra* note 2, at 44 (noting that the federal government's lethargic response has encouraged states to take a more active role); *see also* Weschler, Mushkatel & Frank, *supra* note 60, at 16 (discussing how the new federalism of Presidents Carter and Reagan has cut federal programs and reduced support for state and local programs such that "localities have been confronted with that strange world of locally rising demands for services but reduced outside funds").

are the fundamental building blocks of community planning and a logical place for child care linkage programs to be enacted.

At the same time, community planning is taking on a more regional approach, which suggests that larger-scale land use regulations may be more desirable.[274] Because the police power which justifies linkage programs comes from the state, state-level linkage laws avoid questions as to whether a municipality has the authority to enact such a scheme. State or regional linkage requirements also obviate fears that developers will flee to neighboring communities that do not have child care linkage.[275] On the other hand, state child care linkage laws have some inherent difficulties. Since the nature of development and the resulting child care needs varies among communities, it may be quite difficult to develop state requirements that accurately match the obligation with the need created. Although there may be some communities for which child care linkage is not appropriate, these communities could be exempted through square footage thresholds or other exemptions. In order to equalize the obligation for properties with differing values, a state could also assess the in-lieu fee as a percentage of the rental value of a building. In these and other ways, state legislatures may be able to overcome the uniquely local characteristics of linkage and pass child care linkage laws that would benefit citizens statewide.

Even if a state does not enact a comprehensive child care linkage plan, state legislatures can authorize and facilitate the passage of child care linkage ordinances by local governments. By passing enabling acts for child care linkage, state legislatures can pave the way for local governments and preempt challenges

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[274] Bosselman & Stroud, *supra* note 7, at 3 (arguing that the local zoning ordinance has proven woefully inadequate to combat problems of statewide significance and that "states, not local governments are the only existing political entitites capable of devising innovative techniques and governmental structures to solve problems such as pollution, destruction of fragile resouces, the shortage of decent housing and other problems . . . ."). *See also id.* at 321. ("[I]t will be increasingly necessary to merge both state and local regulations into a single system with specific roles for both state and local governments in order to reduce the cost to the consumer and taxpayer of duplicate mechanisms."); R. LAI, *supra* note 51, at 178–81 (discussing reforms creating regional planning authorities).

[275] *See, e.g.*, Gruen, *The Economics of Requiring Office-Space Development to Contribute to the Production and/or Rehabilitation of Housing*, in DOWNTOWN LINKAGES 34, 37 (D. Porter ed. 1985) (discussing how rising costs of office spaces in linkage cities may drive businesses to suburban locations).

to the effect that the municipalities are acting beyond the scope of their authority.[276]

While child care linkage provides an innovative way to address child care needs at their source, it should not be seen as a panacea for the child care crisis. Providing a promising response to this pressing social need, child care linkage must be considered in the context of other governmental approaches to the child care crisis and other land use regulations.

The current governmental response to the child care crisis consists of a puzzle of unconnected pieces at all levels of government. Although child care advocates pushed for a national policy proposed in the Act for Better Child Care (the "ABC Bill")[277] in the 100th Congress, child care is currently addressed on the federal level only as part of larger social welfare programs and block grants,[278] or through tax credits and subsidies in the Internal Revenue Code.[279] Because the federal government does so little in addressing the child care crisis, state governments play an important role in this area. According to the United States Department of Labor, all states have one or more elements of a child care infrastructure in the form of subsidies for low-income families, training for child care providers, child care resource and referral systems, health and safety regulations, or defining standards for care providers.[280] In addition, local gov-

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[276] *See* notes 124–131 and accompanying text.

[277] S.1885, H.R.3660, 100th Cong., 1st Sess. (1988).

[278] The federal budget in FY 1988 for the Head Start program and other child care assistance programs totals $6.9 billion. *See* A WORKFORCE ISSUE, *supra* note 1, at 17. Examples of these expenditures include Head Start ($1.2 billion), Department of Agriculture food programs (child care food program, summer food service program for children, food stamp program, special milk program) ($0.8 billion), and inclusion of child care expenses in Pell Grant "living allowances" ($65.0 million). Aid to states for programs such as social services block grants, Dependent Planning and Development, and Aid to Families with Dependent Children (AFDC) exceeded $0.6 billion in FY 1988. *Id.* at 17–26.

[279] I.R.C. Section 21 (1987).

[280] A WORKFORCE ISSUE, *supra* note 1, at 57. However, because state involvement may depend on the strength of state economies, the ability of states to respond to child care needs will vary, as states with struggling economies will be less inclined to allocate already strapped state resources or block grant funds for child care. *See* THE BOTTOM LINE, *supra* note 2, at 45. In the Child Care Action Campaign report, the following shortfalls of state programs were reported:

> —Nearly half of all the counties in Kentucky provide no child care assistance to low-income families;
>
> —In Seattle, only 2,200 of 10,000 eligible children from low-income families are served.
>
> —In New York City, publicly-funded child care is available for only one out of every five eligible children.

Id. at 44–45 (citing H. BLANK & A. WILKINS, *supra* note 2, at 5–6).

ernments play an important role in federal and state programs that address the child care crisis.[281] Similar to the direction of funds at the federal and state levels of government, communities meet child care needs through the allocation of state and federal monies which can be directed toward certain types of care and needy families. Together, these programs provide remedial help to families in need of child care, but do very little to address the child care needs of the future.

The problems of availability, affordability, and quality of child care will require action at all levels of government. Child care linkage provides an important way for states and communities to look forward and plan for the increasing child care needs of American society. Linkage is not designed as a replacement for necessary programs on the local, state, and national levels, and this approach will neither be more coordinated nor more uniform than the current government approaches to the child care crisis. However, by planning and providing for increased child care needs before they happen, other more remedial government programs can better respond to the existing child care crisis, and the burden of child care may be more evenly distributed than under the current system.[282]

Although child care linkage provides the most comprehensive way to involve child care in city planning, it is not the only way that communities can plan for child care.[283] Moreover, land use planning regulations for child care cannot be viewed apart from other zoning and planning programs. As Abby Cohen of the Child Care Law Center commented,

> [i]f we gain child care at the expense of open space or affordable housing, we will have gained little . . . . "[T]he finest child care possible may not make up for growing up in a place that does not provide for the aesthetic qualities in life that we all need for personal fulfillment." In sum, we must advocate and plan for child care as an essential community service integral to, not isolated from, the broader goals of developing liveable communities.[284]

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[281] THE BOTTOM LINE, *supra* note 2, at 57 (describing how decisions about the amounts and types of child care to be created are generally made by local government, local agencies, community organizations, and the private sector).

[282] *See supra* text accompanying notes 196–198.

[283] For a discussion of other ways to include child care in the planning process, see *supra* text accompanying notes 66–80.

[284] PLANNING FOR CHILD CARE, *supra* note 8, at I-3 (citations omitted).

Child care linkage presents an innovative way to integrate the way society looks at development, city and regional planning, the workplace, and the care of children. As Churchill once said, "We shape our buildings and afterwards our buildings shape us."[285] By including child care in new buildings and the development process, communities will be making an important statement about the role of working families and the care of children for the general welfare of the community.[286]

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[285] 393 H.C. Deb. (5th ser.) 403 (1943). Cited in R. LAI, *supra* note 51, at 1.

[286] This enlarged concept of the public welfare is consistent with broad language in Berman v. Parker, which announced that

> [t]he concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully controlled.

348 U.S. 26, 33 (1954).

Legislative Research Bureau Report

MODEL TAX INCENTIVE AND CHILD CARE LINKAGE ACTS

HARVARD LEGISLATIVE RESEARCH BUREAU*

State legislatures have recently devoted much attention to the subject of child care. Recognizing that the need for affordable and accessible child care must be met, states have designed and implemented legislation which increases the availability of child care in a variety of ways. Current laws, for example, offer tax credits for employers who assist their employees in obtaining child care,[1] set up loan guarantee funds to facilitate the financing of child care centers,[2] and reserve space for child care centers in state buildings.[3]

Many states, nevertheless, are still searching for appropriate ways to address this issue. The following Model Statutes suggest legislative approaches that such states might consider in formulating child care policies. The first statute would give a tax credit to employers who provide child care benefits to their employees. The second would require developers to construct child care centers in conjunction with any new commercial or industrial developments. Since they address the problem from different angles, one aimed at employers and one at developers, the statutes could be implemented together as complementary components of a child care policy. Alternatively, states may prefer to locate the responsibility for helping to increase child care availability primarily in one or the other of these sectors. The adoption of either type of statute would provide increased

* The Model Tax Incentive Act was drafted by three members of the Harvard Legislative Research Bureau: Jon Ferrando, B.A., University of Michigan, 1988, member, Class of 1991, Harvard Law School; Kevin Downey, A.B., Dartmouth College, 1988, member, Class of 1991, Harvard Law School; and David Jacobs, A.B., Dartmouth College, 1987, member, Class of 1991, Harvard Law School and John F. Kennedy School of Government.

The Model Child Care Linkage Act was drafted by five members of the Harvard Legislative Research Bureau: Adrienne Koch, B.A., Cornell University, 1987, member, Class of 1990, Harvard Law School; Catherine Crystal, B.A., Yale University, 1987, member, Class of 1991, Harvard Law School; Cynthia Domer, B.A., Millsaps College, 1988, member, Class of 1991, Harvard Law School; Norris Nissim, B.A., Yale University, 1988, member, Class of 1991, Harvard Law School; Scott Siff, A.B., Harvard University, 1986, member, Class of 1991, Harvard Law School.

[1] *See, e.g.*, N.M. STAT. ANN. § 7-2A-14 (1988).

[2] *See, e.g.*, MD. ANN. CODE art. 83A, § 6-201 (1988).

[3] *See, e.g.*, MD. FAM. LAW CODE ANN. §§ 5-586 to -589 (Supp.1988).

accommodation for individuals in their dual roles as workers and parents, and would acknowledge the reality of modern societal patterns.

I. Model Tax Incentive Statute

The first proposed statute establishes state tax incentives which will encourage corporations to provide day care benefits, preferably on-site day care facilities, for their employees. It focuses on corporations because they represent a significant and largely untapped pool of resources with a great deal to gain from improved day care. The statute is intended for implementation by states that have yet to pass such corporate day care credits or for amendment to state legislation that has established credits but has not targeted the establishment of day care facilities by corporations.

ACT TO PROVIDE TAX INCENTIVES FOR CORPORATE SPONSORED ON-SITE DAY CARE FACILITIES AND FOR CORPORATIONS THAT SHARE IN THE COSTS OF THEIR EMPLOYEES' DAY CARE

The state tax code shall be amended by adding the following sections:

Section (a). (Definitions.) For the purpose of this Act:

1. "Child" or "dependent" means any person under the age of twelve who is claimed as a dependent under the state tax code.

2. An "employee" means any person employed by a corporation or by the commercial tenants of a corporation.

3. An "employer-run day care facility" means any day care facility owned and operated wholly by the corporation or in conjunction with other corporations.

Comment: The Act limits these benefits to children under twelve in order to target the group with the most pressing need for day care. The remaining terms in Subsection (1) are self-defining.

Subsection (2) provides access to the programs to both those workers who work for the corporation offering the programs and for those tenants of buildings owned by the same corporation. In this way, employees of several different corporations

can pool their resources to provide one or a few adequate day care centers for several businesses that are too small to afford their own facilities.

In Subsection (3), the Act intends to limit tax benefits to those corporations that actually pay for and operate the facility. Corporations in this way are encouraged to actually create new day care facilities as opposed to merely using those centers already in existence. The intent of this Act is to encourage the creation of new spaces and centers for day care rather than to have the mere subsidization of already existing facilities not operated by the corporation.

Section (b). (Tax Credit.) A corporation that pays for or provides day care services for its employees or to the employees of its commercial tenants shall be allowed a credit against the state corporate income tax. In the taxable year, the amount of the credit shall be:

1. fifteen percent (15%) of the amount spent in the state by the corporation for the purpose of reducing the child care expenses of its employees whose children use day care facilities not owned or operated by the employer, and

2. twenty-five percent (25%) of the capital expenditures of the corporation, either alone or in conjunction with other corporations, to construct or renovate an employer-run day care facility, and

3. twenty-five percent (25%) of the operating expenditures of the corporation for employer-operated day care facilities.

COMMENT: Section (b) presents the amount and form of the tax credit. The credit is designed to encourage contributions by employers to the day care expenses of their workers but especially to encourage the establishment of employer-operated facilities. This emphasis arises from two major concerns: (1) the insufficient supply of day care facilities, and (2) the added benefits of on-site day care which allows employees to visit their children and thus to worry less about their children's well-being. As a result, the Act provides a greater credit for employer-operated facilities. In addition, to facilitate the participation of smaller firms in the establishment of day care facilities, this section explicitly allows credits for cooperative efforts among corporations.

The specific percentages for the tax credit must vary with the needs of particular states. The fifteen and twenty-five percent

figures included in this Model Act reflect the thirty percent credit existing currently in two states, New Mexico and Rhode Island,[4] tempered by the budget realities in many states where any potential reduction in revenue may not be looked upon favorably.[5] Other considerations affecting the final percentages and the spread between the two rates include the nature of a state's work force and the commercial development patterns of that particular state.

In addition, the credits provided in Subsection (1) and in Subsections (2) and (3) are not mutually exclusive. Therefore, an employee who works for a firm which operates its own day care facilities can still receive subsidized benefits if he or she chooses to use some other facility instead.

Section (c). (Qualifications.) To qualify for the tax credits as stated in Section (b):

1. no more than twenty-five percent (25%) of the amount paid or incurred annually by a corporation for dependent care assistance may be provided to any person who is a shareholder or owner of the corporation and who owns more than five percent (5%) of the stock, capital, or profit interest of the corporation.

2. corporations shall provide notification of the availability and terms of the programs to employees at least once every three months along with the employees' pay.

COMMENT: This section ensures that employees other than persons who own a substantial share of the corporation or have a substantial profit interest in the corporation receive the benefits from the dependent care assistance plan under this Act. Subsection (c)(1) limits owners of more than five percent of the company from receiving more than twenty-five percent of the annual dependent care assistance. The percentages can be varied, and although the twenty-five percent limit may appear high, it may be necessary and justified in order to allow small corporations to take the tax credit.[6]

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[4] N.M. STAT. ANN. § 7-2A-14 (Supp.1988); R.I. GEN. LAWS § 44-47-1 (1956).

[5] Considering the economic benefits of improved child care, however, such as an expanded work force, reduced employee absenteeism, and a decrease in the need for direct state action, the actual revenue loss to a state adopting this Act may be quite small.

[6] An example is a small corporation providing day care for four dependent children. If one is the dependent of an employee owning more than five percent of the stock, then the employee is being provided with twenty-five percent of the day care assistance. If the limit were any lower, this corporation would not qualify.

The purpose of Subsection (c)(2) is to force corporations to inform all of their employees about any day care assistance plan they operate.

Section (d). (Requirements for Employer-run Facilities.) To qualify for the tax credits as stated in Subsections (b)(2) and (b)(3), an employer-run day care facility must comply with the following requirements:

1. The facilities must comply with all the governing regulations of day care for the state, as outlined by the state public welfare laws.

2. The facility cannot be operated for profit.

3. The facility must be located within ten miles of the workplace of the employees whose children use the facilities.

COMMENT: The governing rules of day care in the state shall not be abridged in any way by this Act. All new facilities created because of this Act must meet the standards mandated by the appropriate state authority.

The Act limits the geographical area within which the facility may be located for two reasons. First, it allows parents convenience in taking their children to the center. Second, it allows for the possibility of parental visits during the work day which would be impossible if the corporation placed the facility at too great a distance from the workplace.

The distance is as great as ten miles to allow a company with offices in two or more nearby locations to create a central day care facility and hence reduce its costs.

II. MODEL CHILD CARE LINKAGE STATUTE

While tax incentives for employers who provide child care benefits are becoming increasingly common, such incentives often fail to attract employers who would not otherwise have provided these benefits.[7] In addition, employer-provided child

[7] Only 3500 of the six million employers in America give their employees any type of child care benefit, and most of those employers are among those that provide the broadest array of benefits in a variety of areas. CHILD CARE ACTION CAMPAIGN, CHILD CARE: THE BOTTOM LINE 21 (1988). The majority of American workers are employed by small companies, which are the least likely to offer such benefits. *Id.* at 22.

care benefits often make use of existing child care space.[8] Thus, while such benefits are useful, this type of solution does not always focus on increasing the amount of child care available in a community.

Recognizing this problem, some municipalities have considered passing ordinances to encourage or require developers to include child care centers in new commercial or industrial development projects. Such an ordinance exists, for example, in San Francisco, California.[9]

On the state level, only Maryland imposes such a requirement, and it applies only to state buildings.[10] A statute that would impose this requirement on most developers is pending in Massachusetts.[11] Thus, while this type of solution is a recent phenomenon, it has gained some support in state legislatures. The following statute, modelled on the Massachusetts Bill, illustrates how states might help meet child care needs by linking commercial and industrial expansion to the creation of new child care space.

ACT TO PROVIDE CHILD CARE LINKAGE

Section (a). (Findings.) The legislature finds that recent trends in workforce participation have precipitated an overwhelming need for child care. The legislature further finds that the unavailability of such care impedes the expansion of the productive workforce, burdens the family choices of current workers, and places the well being of this state's children in jeopardy.

The legislature recognizes that when child care is easily available, employers benefit from both an increase in employee morale and productivity, and a decrease in absenteeism and attrition.

It is the intent of the legislature to make child care more available by guaranteeing that any increase in business or industrial space in a community will be accompanied by a corresponding increase in child care space or by an allocation of funds for child care.

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[8] For example, Section (b)(1) of the Model Tax Incentive Statute, *supra* Section I, allows employers to obtain such credit without contributing to the amount of available child care space.

[9] SAN FRANCISCO, CAL., MUNICIPAL CODE § 315 (1986); SAN FRANCISCO, CAL., PLANNING CODE §§ 314–314.4 (1987).

[10] MD. FAM. LAW CODE ANN. §§ 5-586 to -589 (Supp.1988).

[11] Mass. H. 3793, 176th General Court, 1st Annual Sess. (1989) (introduced by Rep. David Cohen (D-Newton)).

COMMENT: The supply of child care currently falls short of a growing demand. The inability to obtain satisfactory child care serves to keep many people out of the work force.[12] In addition, the availability of child care, especially on-site or near-site child care, is associated with reduced stress and lower rates of absense, lateness, and turnover in workers.[13] Thus, both employers and employees benefit from a widening of child care possibilities.

Section (b). (Definitions.) In this Act, the following words shall have the following meanings:

1. "Child care center" or "center" shall mean a facility that provides daytime care for the children of working parents.

2. "Child care provider" or "provider" shall mean an entity licensed by the state to maintain a child care facility.

3. "Community" shall mean the city or town in which a development is constructed. If that city or town contains fewer than thirty thousand residents, "community" may also include cities or towns bordering on that city or town.

4. "Department" shall mean the state Department of Labor and Industry.

5. "Development" shall mean any new construction of commercial or industrial space, including, but not limited to, enlargements of existing commercial or industrial space.

6. "Developer" shall mean any entity seeking to construct such a development, and such entity's successors.

7. "Low or moderate income" shall mean a gross income that is less than the state median income.

8. "Near-site" shall mean within the same community as the development and, where reasonable, not less than three miles away from the development.

9. "On-site" shall mean within the development.

Section (c). (Developer Requirements.) The licensing and permit procedures for commercial and industrial developers shall be ex-

[12] *See* Bloom & Steen, *Why Child is Good for Business*, AMERICAN DEMOGRAPHICS, August, 1988, at 22, 26. (Fourteen percent of nonworking women with preschool age children "said they would look for work if better child care were available").

[13] *See* Caplan, *Child Care Land Use Ordinances—Providing Working Parents With Needed Facilities*, 135 U. PA. L. REV. 1591, 1597 (1987) ("companies can alleviate employee stress and enhance employee productivity simultaneously by ensuring that proper child care facilities are available to their workers").

panded to include a requirement that the developer do one of the following:

1. provide for the construction of an on-site or near-site child care center,

2. contribute to a child care fund, or

3. obtain an exemption under Section (f) of this Act.

COMMENT: This section amends the requirements that are ordinarily imposed upon developers. Such an exaction mirrors existing requirements for developers to provide, for example, sidewalks, schools, and parks.[14]

Section (d). (Construction of Center.)

1. To comply with Subsection (c)(1) above, a developer shall either:

A. construct a center with a floor area of at least two percent (2%) of the total square footage of the new commercial or industrial development, or

B. combine with one or more developers in the community to provide a single center, having a floor area of at least two percent (2%) of the combined square footage of the developments.

2. Such a center shall be provided to a licensed child care provider, free of all rent, utilities, tax, and service maintenance charges, for a minimum of ten years. Non-profit providers shall receive priority in the allocation of such space.

3. The services of such centers shall be provided according to the following order of decreasing priority:

A. low and moderate income employees working in the development,

B. other employees working in the development,

C. other low and moderate income members of the community, and

D. other members of the community.

COMMENT: The regulation of the use of space in a commercial or industrial development is commonplace, and such regulations

[14] *See* Caplan, *supra* note 13, at 1607 (arguing that just as developers must help to meet the needs that they create in other areas, so they should provide "space or money for newly-needed child care"). Moreover, since child care facilities are analogous to schools, the presumption of the validity of exactions for schools should extend to child care facilities. *Id.* at 1614–16.

have been upheld as valid exercises of the police power.[15] By keying the amount of child care space the developer must provide to the amount of new commercial space it generates, the statute requires only that developers help meet increased child care needs that are directly associated with them. The order of priority for usage of the centers reinforces this link between the need and the exaction.[16] In turn, developers will pass this cost on to business and industry, which benefit from the increase in child care space.

Although users of the centers will have to pay for the services they receive, decreased operating costs resulting from the elimination of rent and other fees will enable the centers to charge less for such services. In addition, employers may be inclined to pick up some of the costs of this care in their benefit packages, especially if they have separate tax incentives to do so.[17]

Section (e). (Contribution to the Fund.) To comply with Subsection (c)(2), a developer shall contribute a total dollar amount equal to two percent (2%) of the ten year rental value of the development. This payment may be made over a period of ten years or up front in a lump sum, and shall be made to the Department of Labor and Industry.

COMMENT: This provision enables developers to choose an alternative mode of compliance similarly keyed to their share of the increase in the demand for child care.

Section (f). (Exemptions.)

1. Developers may obtain an exemption from the requirements of this statute if the Department determines that the development in question will not effect an increase in the need for child care. Such developers shall apply to the Department for this exemption.

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[15] *See, e.g.*, Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) (stating that the constitutional prohibitions on the taking of property do not forbid legislative interference that "arises from some public program adjusting the benefits and burdens of economic life to promote the common good").

[16] This keying may be essential to the validity of the statute. *See* Caplan, *supra* note 13, at 1608–14 (discussing the requirements that, at least for municipal ordinances, there must be a sufficient nexus between the need created by the development and the burden placed on the developer). *But cf.* Comment, *Subdivision Exactions: The Constitutional Issues, The Judicial Responses, and the Pennsylvania Situation*, 19 VILL. L. REV. 782, 786–87 (1974) (suggesting greater judicial deference toward determinations made by the state legislature in considering developer requirements).

[17] *See, e.g.*, Model Tax Incentive Statute, *supra* Section I.

The Department shall make its determinations based on factors including, but not limited to, the supply of child care in the community, the number of jobs the development will create, and any health or safety hazards the development will contain.

2. Developments constructed by the federal government or by religious organizations shall be exempt from the requirements of this Act.

COMMENT: This section exempts developers who can prove that their developments will not increase the need for child care or whose developments may not be appropriate targets for such state intervention. Without such exemptions, the statute could fail to meet the constitutionally mandated nexus requirement.[18] The exemption in Subsection (2) will avoid a potential entanglement between church and state, and a potential conflict between state and federal sovereignty.

Section (g). (Disbursement of Funds.)

1. The funds accumulated under Section (e) shall be disbursed by the Department to child care providers. Child care providers shall submit proposals to the Department, outlining their intended use of the funds to provide child care in the community where the development is constructed. The Department shall issue grants to the providers whose proposals best meet community child care needs.

2. The funds shall be used to finance programs or projects that will create new centers, expand on old centers, or lower the cost of child care.

3. In reviewing proposals, the Department shall consider the recommendations of the local business community, the municipal government, the developer, and the Department of Social Services.

4. Priority for access to child care funded in this way shall be in the order listed in Subsection (d)(3) of this Act.

COMMENT: The focus on the community where the development is constructed channels the child care benefits to the area where employment will be most directly affected by the development. This will enable employees to obtain child care near the place where they work.

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[18] *See supra* note 16 and accompanying text.

Section (h). (Compliance.) To ensure compliance with the provisions of this Act, each developer shall post a bond with the municipal tax collector before a permit can be issued. The amount of the bond shall be three percent (3%) of the estimated ten year rental value of the development.

1. For developers choosing, under Subsection (c)(1), to provide for construction of a child care center, the amount of the bond will be partially refunded each year, over the ten year period. If in any year the developer does not comply with its obligations under Subsection (c)(1) and Section (d), it will forfeit the remaining amount of the bond, which will be turned over to the Department for disbursement to child care providers in accordance with Section (g).

2. For developers choosing, under Subsection (c)(2), to contribute annually to a child care fund, the amount of the bond will be partially refunded each year, over the ten year period. If in any year the developer does not comply with its obligations under Subsection (c)(2) and Section (e), it will forfeit the remaining amount of the bond, which will be turned over to the Department for disbursement to child care providers in accordance with Section (g).

3. For developers choosing, under Subsection (c)(2), to contribute to a child care fund up front in one lump sum, for the entire amount due, the bond requirement will be waived.

Section (i). (Effective Date.) This Act shall take effect immediately, and its provisions shall apply to all developers who request building permits after the date of enactment.

RECENT PUBLICATIONS

THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY. Edited by *Edward F. Zigler and Meryl Frank.* New Haven, Conn.: Yale University Press, 1988. Pp. xxv, 352, index. $30.00, cloth.

As the articles which preceded this section of the *Journal* indicate, child care and parental leave are popular political issues. The Congress and many state legislatures have been flooded with legislative proposals aimed at various aspects of the work and family problem. The articles also indicate that these are not simple issues. There are numerous competing concerns involved, many of which simply cannot be handled without conflict. One of the most difficult issues to resolve when considering parental leave and child care is the potential for conflicts between the interests of children and the interests of their parents, usually their mothers.

It is this concern—the balancing of interests between parent and child—that is the focus of much of Zigler and Frank's book. The title of the book is at once informative and misleading. It implies that this book will put forward a proposal for a national policy in parental leave. There are, particularly towards the end of the book, some suggestions about possible policy alternatives. But the proposals are not the focus of the book and are far from being the most interesting or useful work presented here.

The real strength of this book is as a primer for those interested in issues of child care, particularly parental leave. Zigler is a professor of psychology and director of the Bush Center in Child Development and Social Policy at Yale University, and Frank is director of the Infant Care Leave Project at the Bush Center. As a result of their studies of children and the effects of day care and the lack thereof on children and their parents who work outside the home, Zigler and Frank have come to the conclusion that the United States must have a comprehensive national policy of providing leave for parents of very young children (pp. xix, xxv). To many of us this sounds, in the abstract, like a good idea. But when pressed, we have difficulty explaining coherently why such a policy is necessary: what effect the lack of leave has on our children, what effect that has

on working parents, and what the costs of not having leave are for our society.

These are the questions this book helps answer. Zigler and Frank have gathered an impressive collection of essays on various aspects of this topic rather than merely presenting their views of why we need a national parental leave policy. The book is arranged so that the novice in the field can get a basic understanding of the problem and its history, and can then learn what experts in child development say about the needs of young children and the impact of those needs on parental leave policy. Next, the reader can learn what the current state of parental leave policy is in the United States and how it compares with the practice in other countries. Finally, the editors have included some concerns for public policy which are outlined in the book.

The list of authors in this book is impressive. Dr. T. Berry Brazelton, of the Harvard Medical School and recent author of a *Newsweek*[1] cover story on child development, writes about issues and concerns for working parents with very small children. Professor Sheila Kammerman presents her research on the child care and parental leave policies in other industrial and developing countries. And, two authors who appear in this issue of *Harvard Journal on Legislation*, Representative Patricia Schroeder (D-Colo.) and Governor Thomas Kean (R-N.J.) suggest policy alternatives at the federal and state levels respectively.

For those with little or no knowledge of the issues surrounding parental leave, the first section of the book should prove fascinating. Meryl Frank and Robin Lipner provide a brief history of women in the workforce and of the provisions made for leave and child care by their employers. The chapter recounts a sordid history of societal discrimination against working mothers up to the present and sets the historical stage for discussion of the issue today. Johanna Freedman then presents some disturbing figures. In 1982, 49% of all mothers with children under age six worked outside the home, and 54% of single mothers with children under age six worked outside the home (p. 25). In 1984, one out of every four mothers in the United States was single; it is this group of mothers, regardless of the child's age, that has the highest rate labor-force participation (p. 27). Since 1970, the number of children with working mothers has grown by 6.2

[1] Brazelton, *Working Parents*, NEWSWEEK, Feb. 13, 1989, at 66.

million despite an overall decrease in the population of children by 6.6 million (p. 26). Perhaps most indicative of the need to address the issues raised in this book, Freedman notes that an estimated 80% of the women currently in the workforce are of childbearing age, and that 93% of these women will become pregnant at some point in their working lives (p. 25). In addition, Freedman provides some important background on child care alternatives.

Following this background is a series of in-depth discussions on the need for parental leave. The most impassioned plea comes from Dr. Brazelton who argues that infants and their parents, particularly mothers, need to be together during the first few months of life. This time together, Dr. Brazelton argues, is crucial for the current and future stability of the family and for the emotional well-being of the child. While Brazelton does not believe that substitute child care is necessarily bad for infants or toddlers (p. 49), he views it as less attractive than parental care (p. 48). Brazelton and other authors in the book admit that the evidence on the effect of substitute child care on young children is not conclusive (pp. 48, 82) and there is a general admission that good, well-supervised day care not only will do little harm, but may even be beneficial, though this may vary depending on the emotional and physical stability of the child (p. 60). Casual observers will be interested to learn that there is some evidence indicating boys are more likely to suffer emotional harm by being placed in child care (p. 61).

Most group child care in this country, however, particularly that available to the working class, cannot be described as good or well-supervised (p. 135). One reason may be that the states and the federal government have not played a strong enough role in regulating and supervising the provision of day care services. Dr. Zigler and Katheryn Young present a survey of existing state and federal regulations of day care facilities. The results are "bleak" (p. 135). A federal inter-agency task force has recommended guidelines for conditions in group child care. However, the federal government to date has played no role in the actual regulation of day care centers. Instead, this task has been left to the states. Very few states meet the guidelines suggested by the federal task force, and in many states the requirements placed on licensed centers are shockingly low (pp. 125–31). For example, South Carolina allows day care centers to have a one-to-eight staff-to-child ratio for infants. This

is almost three times the ratio of one-to-three suggested by the federal panel (p. 124).

Despite these disturbing numbers which indicate the increasing importance of understanding and reacting to the needs of working parents, the current trends in the country are not encouraging. There are a few large companies that provide liberal maternal or parental leave, and many departments of the federal government provide viable options for employees who wish or need to take leave (p. 198). However, those parents who work for state and local governments will find a hodge-podge of leave possibilities, and at least seven states do not provide job guarantees for those who do choose to take leaves (pp. 202–03).

Most Americans, though, do not work for large corporations or for the government. As of 1983, 58% of Americans worked for companies with fewer than five hundred employees, and 30.3% of those in the workforce worked for companies with fewer than twenty-five employees (p. 223). These smaller companies in general do not have leave policies, and many simply do not allow for parental leave (pp. 223–24). Often this is not due to a lack of caring, but due to the expense of providing paid leave and of finding temporary personnel, or of the inability to hold positions open for critical employees who will be absent for an extended period (pp. 229–31). These small firms may need government assistance to provide any type of comprehensive leave, and they certainly need guidance from government policymakers as to their obligations (p. 230).

The United States is alone among developed nations in failing to have a national maternal or parental leave policy (p. 245). A number of European countries, most notably Sweden, have elaborate leave policies. In Sweden a parent taking leave receives 90% of his or her salary for the first nine months of leave and $150 a month for the next three months. The parent's job is guaranteed for a minimum of eighteen months, and unpaid leave may be taken in increments up to the total leave period of eighteen months until the child reaches his or her eighth birthday (p. 251). While Sweden's plan is the most extensive in the world, most European countries do have very generous leave plans. And even in many developing countries, providing some maternal or parental leave is mandated by the government. Eighty-one developing nations have a minimum paid leave period for working women (p. 277).

Zigler and Frank have presented a rather disturbing picture of the plight of working parents in this country. Parents who wish to take leave are left to the mercy of their employers, the vast majority of whom do not provide any paid leave, and many of whom do not even offer unpaid leave. The attention paid to this issue over the last couple of years has spurred some government action and substantial government interest from both major political parties as evidenced by the articles from Representatives Schroeder and Tauke in this *Journal* and by the extensive discussion of child care and parental leave in the last presidential campaign. Yet the solutions are not obvious, and Zigler and Frank's book does not pretend to present definitive solutions. Although most of the authors want some sort of government action, it is not clear what action would be best.

Because the book does not pretend to have all the answers, the lack of any comprehensive plan is not overly disturbing. The editors do imply, however, that the book presents most of the problems, but here they overstep. This is clearly a book with a mission: to advocate government intervention in support of maternal or, preferably, parental leave. There are some, however, who argue that government has no place mandating companies to provide paid leave, or even unpaid leave, and that government-financed leave programs will be extraordinarily expensive and inevitably badly managed.[2] This point of view is almost entirely absent from this book, and the reader should read the articles with an eye toward their bias.

On the whole, though, this is a remarkably useful book, one which all who are interested in the issues of parental leave and child care should read. It is at once a great primer for those wanting an overview of the issues and a great resource for those with a foundation of knowledge who wish to know more. Most of the articles include substantial bibliographies which can be of great aid to researchers. The book may be best as a resource for the casual reader who wants some background, which is nicely provided by part one, and who then have specific concerns they wish to pursue through reading one or two more of the articles. A straight read through is occasionally tedious since successive articles on the same topic sometimes recite the same

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[2] *See, e.g.*, Rector, *Fourteen Myths about Families and Child Care*, 26 HARV. J. ON LEGIS. 517 (1989).

facts. Similarly, there is at least one study that is cited so many times that a careful reader will come to know its findings by heart.

This book should be on the shelf of anyone interested in children, women, families, and/or the workplace. It is an important and useful source.

—*James W. Lowe*

LABORATORIES OF DEMOCRARY: A NEW BREED OF GOVERNOR CREATES MODELS FOR NATIONAL GROWTH. By *David Osborne*. Boston, Mass.: Harvard Business School Press, 1988. Pp. 380, notes, list of abbreviations, index. $24.95, cloth.

Disappointed Democrats can point to the Dukakis campaign's failure to understand the lessons that David Osborne draws from the work of six recent or current governors, including Governor Dukakis himself, as one reason for their party's defeat in 1988. Beyond simply evaluating the efforts of six governors—Richard Thornburgh of Pennsylvania, Bill Clinton of Arkansas, Bruce Babbitt of Arizona, James Blanchard of Michigan, Michael Dukakis of Massachusetts, and Mario Cuomo of New York—to address the "core problems" of their states (p. 16), *Laboratories of Democracy* outlines an "emerging political paradigm" (p. 14) of goals and approaches developed by these governors. The paradigm "defines the problem as [America's] changing role in the international marketplace" and responds to the challenge with "new roles for and new relationships between our national institutions—public sector and private, labor and management, education and business" (p. 327).

Osborne articulates two agendas for the emerging paradigm. The first involves transforming the government's role to that of a catalyst for economic growth. Government should provide quality secondary and advanced education; broker partnerships between businesses and government and between businesses and universities; and use public funds to spark changes in investment patterns. The target should be the *process* of economic growth, not regulation of specific industries. The second agenda brings the poor into this economic expansion by changing social welfare programs into a social adjustment system. Osborne's

metaphor is "a ladder out of poverty" (p. 295). A growth dynamic can be created in impoverished communities through what Osborne calls "third sector" agencies that combine public goals with private enterprise methods. He cites, for example, the Bedford-Stuyvesant Restoration Corporation and the Shorebank Corporation, a Chicago development bank (p. 13).

These two agendas offer a vision and program to win the race between the Democratic and Republican parties for the allegiance of swing voters (p. 336). Osborne describes these voters as "socially liberal; economically pragmatic; skeptical of big government, big labor, and big business; supportive of entrepreneurship; extremely change oriented; environmentalist; and very individualistic" (p. 336). Osborne views Gary Hart's 1984 campaign as beset by the problem facing emerging paradigm candidates—a problem many saw with the Dukakis campaign as well—an inability to "offer a clear enough philosophy, a vision that makes sense of . . . different positions and proposals" (p. 337). *Laboratories of Democracy*, full of concepts supported with specific successes and failures of the six governors' approaches, just may be the platform of the future for discouraged Democrats.

The title is a paraphrase of Justice Brandeis' metaphor of states as laboratories for policy experimentation.[1] Osborne sees the "enormous innovation" (p. 1) of the six governors as analogous to the state and local experimentation of the Progressive Era that preceded the New Deal. He begins *Laboratories of Democracy* by observing that "Franklin Roosevelt once said of the New Deal, 'Practically all the things we've done in the federal government are like things Al Smith did as governor of New York'" (p. 1). Just as the Progressive reforms responded to the emerging industrial age, the recent state legislation responds to two forces that have "transformed our economy: technological advance and global competition" (p. 3). Similar to the evolution of the Progressive reforms, Osborne envisions expansion of the governors' innovations to a national scale.

Although the historical analogy is powerful, it is incomplete. Less well remembered from the Progressive Era are the powerful racial and ethnic prejudices of many "progressive" reformers. With increasing racial tension in major urban areas and a continuing gap between minority and white American education

[1] New State Ice v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

and income levels, a repetition of history may be undesirable. Unfortunately, Osborne ignores racial intolerance and civil rights, perhaps because the emerging paradigm governors have been unable or unwilling to address these issues.

While the reader can be numbed by the alphabet soup of agency acronyms that pepper the text (a three page appendix of abbreviations is included), *Laboratories of Democracy* is more than an academic public policy tome. Osborne uses pithy portraits of his six focus governors to enliven the text. Especially useful are the descriptions of the governors who have not been in the national spotlight as much as Dukakis and Cuomo. Osborne, a political writer who has published widely, adeptly recounts the politics of Dukakis' first term failures and 1978 defeat (pp. 22–32); the battle Governor Clinton waged for tax increases to improve Arkansas' education system (pp. 87–91); and Arizona Governor Babbitt's leadership in establishing strong state environmental laws (pp. 116–22). Some of these political battles, in fact, shaped the emerging paradigm as traditional liberal governors were forced to "mov[e] from a focus on poor, urban communities to a broader concern for economic growth" (p. 25).

Although five of the six governors Osborne highlights are Democrats, he touts the Ben Franklin Partnership program of Republican Richard Thornburgh, former Governor of Pennsylvania and now Attorney General, as "the most comprehensive economic development institution in the country" (p. 56). The program offers "challenge grants" to stimulate commercial development of university research in a variety of high-tech fields (p. 48). Seed grants are also provided to entrepreneurs. In connection with the Ben Franklin program, over thirty business "incubators" provide office and research facilities, as well as technical assistance, to start-up businesses at below market cost (p. 56). The program is administered through four regional Advanced Technology Centers that provide decentralized sensitivity to local economic problems and possibilities.

The criticism Osborne levels at Thornburgh may be endemic to the whole process of focusing on high-tech development. According to Osborne, opposition to Thornburgh's programs resulted from a failure to create programs to bring in the poor, disadvantaged, and displaced and his "deliberate cultivat[ion] [of] an image which alienated these constituencies" (p. 80) with Reagan-style, anti-government rhetoric. No doubt rhetoric can make a difference in perception, but Osborne addresses ex-

plicitly only one real solution: programs aimed specifically at these constituencies, such as Massachusetts' Employment and Training Choices program (pp. 200–06) or comprehensive retraining programs for dislocated workers (pp. 270–71). Implicitly, he touches another answer: forthright advocacy by politicians that, in the long-run, these groups' interests lie with the developing technologies, not in "smoke-stack chasing" efforts that turn into tax-break bidding wars among states for plants of dying industries (p. 27).

Laboratories of Democracy finds the Democratic Party's rising star in Arkansas Governor Bill Clinton. Osborne calls him the "most natural bridge candidate" between the traditional liberal constituency groups and the emerging paradigm (p. 334). Clinton fits Osborne's new paradigm because of the lessons he learned at the ballot box. After election in 1978, Clinton, "a crusading liberal reformer," (p. 108) bombarded Arkansas with new (and costly) education and economic development programs. As a consequence, "he had managed to offend virtually every major business interest in the state" (p. 89) and was defeated for reelection in 1980. In 1982, a humbled Clinton reclaimed the governorship.

Clinton's education reforms started in a state which had the lowest teacher salaries, smallest percentage of college graduates, and least per capita spending on education. Clinton tied increased teacher salaries to competency tests, despite strenuous opposition by the teacher's union. His legislation expanded public school curricula, reduced class sizes, lengthened the school day and year, and toughened high school graduation requirements. Adult illiteracy and inadequate vocational-technical education were also attacked (pp. 88, 92–102).

Most remarkable, however, is what Osborne describes as Clinton's "enormous impact on how seriously Arkansans take education" (p. 99). Communities in Arkansas voted to *increase* their taxes to fund education. In extensive quotations from Clinton's stump speeches, Osborne finds what the Democratic Party has been lacking: leadership inspired by a unified vision of government's role, backed by specific programs, that moves voters to pay for programs in the interests of themselves and the nation (p. 109).

Third-sector agencies, community development corporations and development banks, offer the means for Osborne's second agenda—the integration of the disadvantaged into the economic

growth process. This second agenda, however, is more a creation of *Laboratories of Democracy* than a discovery. Each of the six states discussed has some type of economic development program for business, but only Massachusetts' Community Development Finance Corporation and New York's various community development organizations focus on the disadvantaged. Osborne summarizes the reasons for the success of third-sector institutions as follows:

> They do not exist to make a profit; they exist to solve social problems. They use the methodology of the private sector to achieve public goals. Their funding base comes from government . . . or philanthropy . . . . It is the creative tension between their social goals and the bottom line that makes them so effective. If they did not have the social goals, they would not be investing in [these areas]; if they did not have a bottom line, they would not be driven to find the potential entrepreneurs within their communities (p. 310).

The initially disastrous Health Maintenance Organization ("HMO") system for Arizona Medicaid recipients, however, provides a cautionary note for those enamoured of privitization. A payment per patient system (rather than the normal payment per service system) significantly reduced the quality of health care available to the disadvantaged and fell victim to a variety of scams that enriched the HMOs. Osborne's solution is better regulation and incentives to HMOs to provide services to Medicaid recipients by placing state employees, a relatively healthy and well-off group, under HMO coverage (pp. 129–35).

Laboratories of Democracy analyzes state programs that cut across the traditional liberal agenda: Arizona's tough environmental quality legislation (pp. 116–22); New York's low-income housing programs (pp. 227–35); Massachusetts E.T. welfare reform (pp. 200–06). Osborne ties each to economic growth. Perhaps most intriguing is the argument that Arizona's tough environmental laws are essential to prevent the destruction of Arizona's fragile ecosystem and, ultimately, economic development. Even if one does not accept the paradigm that Osborne envisions, there are valuable policy nuggets embedded in each chapter: Arizona and California's use of a welfare recepient's grant as a subsidy to a company that hires the individual (pp. 127, 239); Pennsylvania's labor-management committees (pp. 73–75); Michigan Venture Capital Fund's use of state pension funds for investment (p. 155); development of an overall

state economic plan to prevent ad-hoc expenditures on the basis of political power instead of growth potential—done by Michigan and Pennslyvania, but not Massachusetts and New York (p. 259); the notion that it is not company size that is important, but potential for growth and innovation (pp. 253–54).

Laboratories of Democracy responds inadequately to two obvious criticisms: the emerging paradigm is too costly and will be administered by an inept and evergrowing federal bureaucracy. Osborne acknowledges that the objective is not to replicate state programs at a national level. For economic development, Osborne suggests that the federal government focus on problems that stretch across regional economies, but provide financial incentives, evaluation, leadership and funds (particularly for poorer states) when the "appropriate model" differs from region to region (p. 285). For the second agenda, the federal government would establish challenge grants for various types of projects (community development, employment and training for welfare recipients, economic development, job training, and social adjustment systems). According to Osborne, "[u]nder this approach, state and local governments would have to compete with one another for block grants, based largely on the quality of their programs" (p. 316). Although a credible distinction between the federal and state roles is proposed, it seems disingenuous not to admit, or advocate, a significant increase in federal involvement.

Tied to this increased federal involvement is cost. *Laboratories of Democracy* rarely discusses the costs of programs on a national level or the means to fund them. Implicitly, however, in analyzing the success of Governor Clinton, Osborne has hit upon the answer. Politicians must lead rather than follow the opinion polls. A victorious emerging paradigm candidate will generate support for spending, even increased taxes, if he or she can combine concrete programs of proven success with a unified vision for the direction of the nation.

Ultimately, the greatest significance of *Laboratories of Democracy* may not be as an index of programs or the articulation of a vision, but rather as a challenge to aspiring leaders to find persuasive answers to voters' hard questions. Why should the taxpayer pay for this program? In what direction does this set of programs lead the country? For a thoughtful beginning in answering these questions, *Laboratories of Democracy* should be read—and digested—by all gubernatorial or presidential as-

pirants, or for that matter, anyone interested in creative responses to the economic and social challenges America faces.

—Benjamin B. Klubes

WOMEN'S QUEST FOR ECONOMIC EQUALITY. By *Victor R. Fuchs*. Cambridge, Mass.: Harvard University Press, 1988. Pp. ix, 152, index. $18.95, cloth.

To attain success in any quest, one should consider carefully two important pieces of advice. The first is to always keep one's eyes on the ultimate goal. One should continuously have in mind a clear and focused understanding of exactly what is hoped to be achieved. The second piece of advice is to be persistent in evaluating and re-evaluating the efficacy and efficiency of the various means chosen to accomplish the final goal. Through repeated analysis of one's progress, one is able to insure that current efforts are not misdirected, but rather are serving to bring the ultimate goal closer to realization.

The quest for economic equality for women is no exception to this fundamental formula for success. In the recent publication entitled *Women's Quest for Economic Equality*, it is obvious that economist Victor Fuchs respects the significance of this advice. In response, he provides a careful and reflective analysis of where we stand as a nation in our pursuit of gender equality and what remains to be done to move closer to true realization of the ultimate goal. Through a combination of authoritative documentation and thoughtful interpretation, Professor Fuchs creates a fresh and much needed perspective from which to consider the economic impact of gender.

Not surprisingly, Fuchs begins with the conclusion that "[w]omen's goal of economic equality is far from realization" (p. 2). Fuchs does acknowledge that women are in a radically different position today than they were in 1960; traditional gender roles have undergone revolutionary changes. According to Fuchs, there are three major components of the gender role revolution which are significant in understanding the current complexities of women's quest for economic equality. The most significant change has been the "surge of women into the paid workforce" (p. 11). Fuchs notes that in 1960 only 35% of women over age fifteen held paid jobs as compared with 51% in 1986

(pp. 11–12). In addition, women have recently begun to make great strides in entering managerial and higher-level jobs (p. 14).

A second facet of the gender role revolution has been the rapid decline in the fertility rate. Fuchs alarmingly proclaims that "Americans are not replacing themselves" (p. 15). To illustrate his point, he notes that the fertility rate in 1986—sixty-five births per 1000 women ages fifteen through forty-four—was lower than the fertility rate of the worst year of the Great Depression (p. 15). Much of the decline in the national fertility rate can be explained by a general trend toward smaller families, but Fuchs stresses that the drop in the fertility rate is also reflective of a significant increase in childlessness (p. 16).

The third aspect of gender roles that has undergone radical change is the number of married couples, which has decreased significantly during the last twenty-five years. Between 1960 and 1986, the proportion of women ages twenty-five through forty-four who were not married rose from 17% to 31% (p. 16). Fuchs attributes the decline in the number of married couples to significant increases both in the number of individuals who are divorcing and in the number of individuals who are foregoing marriage altogether (p. 18).

Fuchs utilizes countless statistics, charts, and graphs to demonstrate and emphasize each of his points. However, he is not satisfied with simply documenting the developments; he also seeks to identify and explain their underlying causes. Fuchs suggests several factors as potential causes of the radical social changes women have experienced over the past quarter-century. He discusses such factors as the rise in real wages, growth of a service economy, vast improvements in contraception, enactment of anti-discrimination legislation, and general changes in ideology and preferences. Essentially, he concludes that the complex interaction between these various developments coupled with a basic decision on the part of women to take a paid job and have fewer children have combined to produce a much different set of relationships between women and men in 1986 than existed in 1960 (p. 31).

Yet, perhaps Fuchs' most important conclusion is that in spite of these significant social changes, economic equality between the sexes has yet to be achieved. In fact, Fuchs suggests that even though traditional gender roles have undergone revolutionary changes, women are no closer to the goal of economic equality today than they were in 1960 (p. 3). Fuchs documents

three persisting inequities faced by women in the workplace. First, occupational gender-based segregation "continues at a very high level" (p. 33). There are still many jobs which are considered "men's work" and others which are believed to be "women's work." Second, women, on average, continue to work fewer hours than men do. Further, the proportion of employed women who work part time shows no sign of declining (p. 44). A final source of inequality lies in the existence of a disturbing gap between the wages earned by women and those earned by men. Fuchs cites this as the most obvious evidence that economic disparity still exists (p. 49).

Again, Fuchs is not satisfied in simply documenting his conclusion, and consequently, he proceeds to explain why he feels these inequities persist. In possibly his most controversial assertion, Fuchs rejects the traditional explanation of why these inequities remain—employer prejudice towards women—and offers a brash alternative. By directing the reader to the fact that an employer would increase profits by hiring women because they represent a cheaper source of labor than men, he makes his claim rather convincingly. Why would an employer pay more for the labor of men, when women's labor can be purchased much cheaper? Fuchs feels that simple bigotry would not be sufficient to overcome the lust for profits. The explanation for these persisting inequities must lie elsewhere (p. 54). He also supports his claim with an interesting comparison of racial and gender-based discrimination. It would seem that if bigotry were the issue, then people of color would suffer at least as much as women. Yet, people of color have made great strides in pursuit of economic equality. Therefore, while acknowledging the existence of gender-based bigotry and its effect on women, Fuchs believes there is an alternative explanation as to why women have yet to achieve greater ecomonic equality.

Fuchs courageously suggests that the true source of gender inequities is the powerful tension which women experience between wanting to work and wanting a family (p. 58). Fuchs carefully explains how both marriage and the decision to have children frustrate women's employment options to a much greater degree than they they do men's. Women have to make great sacrifices in order to enter the workplace. Statistics reveal that the wages of married women are much lower than those of unmarried women (p. 59). With respect to children, Fuchs suggests that women generally feel a stronger need to have children

and a stronger concern for a child's well-being than do men (p. 68). In addition to bearing the actual costs of raising children, women ultimately must accept lower wages due to both the need to take time off from work and lowered initial expectations in setting educational goals (p. 61). Consequently, women face choices and limitations which men do not. It is these choices and limitations that Fuchs believes are the true source of economic disparity between men and women.

Given this model, it becomes necessary for women to make trade-offs in order to enter the workforce. Fuchs indicates that these trade-offs must be accounted for in calculating what economists regard as true economic well-being. He defines the notion of "economic well-being" as "access to goods, services, and leisure" (p. 76). Looking at overall economic well-being, Fuchs concludes that only one subgroup of women has significantly improved its economic well-being, namely young, well-educated, white, single women (p. 82). All other subgroups have made negligible progress.

Fuchs adds a brief but interesting note on the feminization of poverty. Fortunately, its occurrence has all but disappeared as of 1960 (p. 87). Fuchs does note that significant losses have been experienced by women of color, but his conclusion is that in general, women—though no better off economically today—are no worse off in terms of increased incidence of poverty (pp. 88–89).

Fuch's discussion of the meaning of economic well-being helps clarify the ultimate goal society should be striving to attain in its quest for economic equality for women. In addition, he provides the much needed service of pointing out that the goal is not solely a women's goal. Everyone in society has a stake in the outcome of this quest. First, we should all be concerned about the rapid decline in the fertility rate. Although not a pronatalist, Fuchs does feel that the fertility rate needs to be raised to replacement level (pp. 147–48). More importantly, Fuchs contends that recent decades have been increasingly difficult ones for children. He identifies phenomena such as an increased teen suicide rate and poorer performances in school to demonstrate his point (p. 94). Indeed, one by-product of the pursuit of gender equality has been a significant reduction in the time available for parent-child interaction, which Fuchs is quick to stress, is not women's fault (p. 115). He notes that fathers have failed to fill the gaps in child care resulting from women

entering the workplace (p. 112). Rather than assessing blame, Fuchs concentrates on insisting that something must be done and that everyone has a stake in the ultimate outcome.

Instead of ending his book with a simple plea that these issues be considered by everyone, Fuchs takes a bolder step by suggesting just what action should be taken. He explains that most attempts in the past have focused on policies which were labor-market oriented. Policies such as affirmative action and comparable worth were based on the premise that the inequities in society were the result of employer prejudice. Such labor-market policies were designed to solve women's equality concerns by disarming employer prejudice (p. 120). Fuchs, however, points out that these policies are not sufficient. In fact, he provides a detailed critique of the ramifications of pursuing the popularly proposed policy of comparable pay and concludes that there are valid arguments on both sides of the debate (p. 129). In sum, Fuchs does not feel a labor-market approach is enough.

In line with his conclusion that the root of the problem lies in the tension women feel in choosing between family and career, Fuchs proposes that we must pursue policies which are oriented towards children. He calls for a renewed emphasis on children's issues (p. 130). He then proceeds to provide an in-depth analysis of specific child-oriented policies such as parental leave, child allowances, and subsidized child care. Each of these policies entail numerous questions and problems, which according to Fuchs, must be explored. At the conclusion of his book, Fuchs summarizes his personal policy recommendations in the form of three general principles which he feels should guide the legislative debate:

> 1. Child-centered policies are preferable to labor market interventions.
>
> 2. The child-centered benefits should be widely available: not conditioned on marital status, employment status, or income.
>
> 3. The cost of the programs should be borne by the entire society through broad-based progressive taxes, not distributed through arbitrary methods with euphemistic names like "employer-provided daycare" (pp. 145–46).

In *Women's Quest for Economic Equality*, Victor Fuchs provides an important evaluation of our nation's pursuit of gender

equality. He clarifies the ultimate goal and scrutinizes what has been done and what potentially can be done in order to achieve this goal. In addition, Fuchs demonstrates that these issues are not "women's" issues. They involve concerns which touch the lives of everyone in our society. Most importantly, these issues will impact upon future generations. The quest for gender equality will and should continue. Fuchs' insightful and honest treatment of the subject provides hope that the quest will ultimately be successful.

—*John C. McGranahan*

LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP. By *Richard A. Posner*. Cambridge, Mass. and London, Eng.: Harvard University Press, 1987. Pp. xi, 364, index. $25.00, cloth.

Why has Richard Posner, the most famous practitioner of law and economics, turned his attention to law and literature? As the book's subtitle suggests, one of Posner's aims is to question the legitimacy of legal scholarship, such as that of the Critical Legal Studies Movement, which applies contemporary literary theory to law. This polemical purpose, however, is only a small part of Posner's greater goal: a comprehensive study of the ways in which legal and literary scholarship might and do overlap. Posner's subject is large, and he rarely focuses on any aspect of it long enough to provide satisfying answers to the provocative questions which he raises. By keeping his goals modest, however, Posner charts a helpful road map through the burgeoning field of law and literature, and suggests a number of alternate routes for legal scholars, judges, and law schools to take in the future.

LITERATURE ON LEGAL THEMES

Chapter I studies the theme of revenge in Greek and Shakespearean tragedy. Posner argues that all these tragedies show the need for a legal order to curtail the inefficiencies of an order based solely on revenge (p. 27). Such "inefficiencies" include a ten year war to settle a simple case of marital infidelity (*The Iliad*) and the deaths of two innocent lovers because of an

ancient feud whose origin everyone has forgotten (*Romeo and Juliet*) (pp. 34 & 62–63).

Posner argues that a primitive legal order, which still carries the vestiges of a morality based on revenge, imposes a form of strict liability. An example is the world of Sophocles' *Oedipus Rex*. The gods punish Oedipus for parricide and incest even though his behavior was reasonable for a man in his situation (p. 35). A more civilized legal order, Posner argues, imposes liability only for fault. Thus in Aeschylus' *Eumenides*, Orestes appeals to Apollo for relief from impending punishment by the Furies. Apollo awards Orestes a trial to determine his moral blameworthiness (pp. 36–37).

Posner's use of the classics to attack strict liability is amusing. More noteworthy is his implicit observation that a lawyer who focuses on the technical aspects of law will find little of interest in the above-mentioned tragedies. The aspects of the civil government portrayed in these tragedies either no longer exist or are significantly different from the modern common law system. A lawyer who is more attuned to the theoretical underpinnings of a legal system, however, will find that the tragedies enlighten his or her understanding of it (p. 70).

Chapter II, which studies the portrayal of law in novels and plays, is considerably more uneven than Chapter I. Posner marshalls discussions of Cozzen's *The Just and the Unjust*, Twain's *Pudd'nhead Wilson*, Camus' *The Stranger*, Shakespeare's *Measure for Measure* and *The Merchant of Venice*, Marlowe's *Doctor Faustus*, Kafka's *The Trial* and *In the Penal Colony*, and Dickens' *Bleak House*, in support of two fairly basic points. The first is that while the study of law can help one understand some literature a little better than someone who has had no legal training, the added understanding is minimal (pp. 74–79). The reasons are both that authors often manipulate existing legal rules for dramatic effect and also that technical aspects of the law change over time and vary widely from country to country (pp. 75 & 111). The second point is that literature often portrays the conflict between strict adherence to formal rules and substantive justice (p. 108).

The low point of this chapter is the discussion of *The Stranger*. Posner clearly dislikes *The Stranger* and asserts that a lawyer "is not likely to approve" of it (p. 90). This distaste leads him to trivialize *The Stranger* as an expression of a "neo-

romanticism in which criminals are made heroes" and of "hostility to law" (p. 90).

By contrast, Posner's discussion of *The Merchant of Venice* is entertaining. Posner begins by noting that no court of equity in Shakespeare's time would have enforced the pound of flesh provision in Shylock's bond (p. 93). The provision exemplifies the inability of a strict rule of law—in this case freedom of contract—to deliver justice by itself, while Portia's performance as a judge personifies the spirit of equity in law. Posner takes this conventional view a step further by noting a crucial irony: Portia does not achieve justice by appealing to the spirit of justice, but by resorting to hypertechnical legalities (p. 97). Posner then uses his own hairsplitting legal argument to assert that Shylock could conceivably have rebutted Portia's interpretation, but only by admitting that there is a spirit to the bond which transcends its plain words (p. 97).

In Chapters III and IV Posner argues that though literature portrays tensions between formalism and substantive justice, literary texts cannot be read as indictments of the legal order.

The centerpiece of Chapter III is a defense of Captain Vere's execution of Billy in Melville's *Billy Budd*. Posner advances the thesis that the "execution of Billy Budd is presented as a justifiable act within the . . . moral universe of the novella" (p. 164). Vere's approach, Posner argues, is distinctly Holmesian (p. 161). A legal positivist, "Vere refuses to allow the positive law of naval discipline to be trumped by the 'higher law' under which Claggart's death was well deserved," and, though Posner does not mention it, under which Billy's wrongful act was without moral blame (pp. 161–62). Furthermore, strict adherence to this positive law is justified under a Holmesian balancing test. In law and economics terms, the probability of mutiny and the danger which it would cause, outweighs the harm in killing Billy (pp. 162–64). Though cleverly argued, Posner's thesis is problematic. Within the moral context of the novel, Vere's execution of Billy is an act at which nature rebels; nature punishes Vere with an untimely death. If this sharp conflict between law and morality is not a critique of the legal rules and duties under which Vere operates, then it is hard to imagine what would be.

In Chapter IV, Posner takes issue with scholar Robin West, who has argued that some Kafka works implicitly critique the economic model of human behavior which underlies law and

economics (pp. 177–78).[1] Posner not only criticizes West's reading of Kafka, but he also asserts that Kafka's works are so ambiguous that they can never be properly read as critical of classical liberalism (pp. 179–80). Posner mars this chapter considerably by spending too little time on Kafka and too much time either defending the theoretical bases of classical liberalism (pp. 187–96) or attacking modern legal radicalism (pp. 196–205). By illustrating how an esoteric reading of Kafka can have profound political implications, Posner illuminates the importance of studies in law and literature. Posner's contribution to this particular debate, however, is not very satisfying.

Law as a Form of Literature

Chapter V assesses the relevance of literary theory to constitutional and statutory interpretation. Posner insists that one can and should be a New Critic when interpreting literature, but an intentionalist when interpreting statutes and constitutions (p. 211). Posner's reason is straightforward: literary and legal texts are different. Posner spends a great deal of time cataloging these differences (pp. 249–51); but his most cogent reason is this:

> A poet tries to create a work of art, a thing of beauty and pleasure. He either succeeds or fails. If he succeds, we do not care how banal his intentions were, and if he fails, we do not care how elevated they were. A legislator, however, is trying to give commands to its subordinates in our government system, the judges who apply legislation in specific cases. A command is designed to set up a direct channel between the user's mind and the recipient's; it is a communication, to be decoded in accordance with the sender's intentions (p. 240).

The problem with this theory is that it underestimates the problematic nature of determining intention. The function of a judge, Posner states, is "to figure out . . . how the legislators whose votes were necessary for enactment would probably have answered [the] question of statutory interpretation if it had occurred to them" (p. 218). This implies that there is one true intention which can be deduced through formal analysis.

[1] West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 384 (1985).

Holmes, whom Posner quotes throughout his book, sharply criticized such a view almost one hundred years ago. "You can give any conclusion a logical form . . . . But why do you . . . ? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or in short, because of some attitude of yours . . . ."[2] If Holmes is correct in asserting that a judge's opinions and experiences inevitably influence their judgments, then modern literary criticism might help make judges more conscious of the process by which they read and interpret legal texts. In his conclusion, Posner finally appears to embrace such a view himself. Acknowledging that many scholars will disagree with his intentionalist theory, Posner recommends that lawyers and judges become acquainted "with current controversies in literary theory and their potential bearing on legal interpretation" (p. 355).

Posner is at his best in Chapter VI, where he studies judicial opinions as literature. Posner closely analyzes selected opinions of five of the most famous judicial stylists: Marshall, Holmes, Brandeis, Cardozo and Jackson. He demonstrates that some of the better known pronouncements of Marshall, Holmes and Jackson owe more to their rhetorical power than to their logical consistency or command of legal authority (pp. 281–93).[3] Using examples from Brandeis and Cardozo, Posner also shows how inattention to rhetorical effect or a sloppy use of metaphor can spoil what might otherwise be a logically compelling opinion (pp. 292–94).[4]

Such is the problem of the day. Though Posner analyzes few contemporary judicial opinions, his recommendation that judges and law clerks "pay more attention to the style of their opinions" rings true (p. 297). "It is not possible to learn to write greatly," he observes, "but it is possible to learn not to write poorly" (p. 297). Posner points out some particularly bad writing in Supreme Court opinions which expanded rights of privacy and free expression.[5] Better attention to style, Posner suggests,

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[2] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

[3] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Buck v. Bell, 274 U.S. 200, 207 (1927); Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[4] Olmstead v. United States, 277 U.S. 438, 478–49 (1928) (Brandeis, J., dissenting); Palko v. Connecticut, 302 U.S. 319, 328 (1937).

[5] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 471 (1975); Harris v. McRae, 448 U.S. 297, 312 (1980); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420 n.1 (1983).

might have decreased the likelihood of future criticism of these decisions (pp. 305 & 309). To improve the sensitivity of lawyers to style, Posner recommends that law schools teach legal advocacy and writing by reference to great literary examples. Why not use the funeral orations in *Julius Ceasar* as a vehicle for studying techniques in oral argument, Posner queries (pp. 359–60). Why not indeed?

The Regulation of Literature by Law

In Chapter VII, the only chapter of Part III, Posner is particularly skeptical of the benefits of censorship. His skepticism does not rest on any explicit theory of fundamental rights, but rather on a modified utilitarian analysis. The loss to society of censoring literature would be great, and since we can rarely determine which contemporary works may later be deemed literature, we should hesitate to censor anything (p. 333). Because of this attitude, Posner is critical of the efforts of some feminists and religious fundamentalists to censor material which portrays women enjoying forcible submission to men (p. 334). Would Yeats' "Leda and the Swan" pass such a standard? (p. 336).

Chapter VII also contains an enlightening discussion of the implications of modern copyright law. A contemporary playwright, for example, cannot borrow plots and language as freely as Shakespeare did (pp. 346–47). Posner also suggests that modern copyright law reflects a peculiarly Romantic emphasis on originality. Eliot and other modern writers view "creativity as imitation with enrichment." Perhaps copyright law will eventually change accordingly (pp. 348–49).

The great strength of Posner's *Law and Literature* is its caution and evenhandedness. Posner deals with fundamental controversies which lie at the heart of both legal and political theory. He does not hesitate to make his own, often controversial, views apparent; but he wisely avoids any implication that his analysis is dispositive. This scholarly approach makes Posner's book a must for any lawyer with a strong interest in literature. It also makes the book a powerful exhibit in the case for greater interdisciplinary study by law students, lawyers and judges.

—Timothy J. Moran

THE FOURTEENTH AMENDMENT. By *William E. Nelson.* Cambridge, Mass.: Harvard University Press, 1988. Pp. ix, 253, notes, index. $25.00, cloth.

Section one of the fourteenth amendment[1] seems to acquire more importance in constitutional adjudication as the years pass, and at the same time it continues to be most elusive of precise meaning. What was the framers' intent? Does the fourteenth amendment protect absolutely certain fundamental rights? To what extent may it infringe on states' rights to enact and enforce their own laws? The amendment does not directly answer these questions. And, except for adjudicated cases limited to their facts, there are no definitive answers to many other questions. Perhaps what is undisputed is that of all the sections of the Constitution, the fourteenth amendment generates the most debate and disagreement. *The Fourteenth Amendment* sheds light on the historical development of the amendment from the time of its introduction and ratification to the beginning of the twentieth century. After reading the book, one is better able to understand why these questions persist and continue to spur debate.

When the fourteenth amendment was finally ratified and made part of the Constitution by the Fortieth Congress in 1868, neither its framers nor its ratifiers thought that the amendment would be critical in deciding significant cases in the twentieth century, dealing with abortion, homosexuality, or voting rights (p. 6). Today, there exists fundamental disagreements even among judges as to how much of the imperative of "due process" embodied in the fourteenth amendment should be applied to everyday situations in the lives of the average American. Beginning towards the end of the nineteenth century and extending throughout the twentieth century, the fourteenth amendment has become more and more a multipurpose remedy for the vindication of individual rights. The transformation of the fourteenth amendment from political principle into judicial doctrine is the historical tale that Nelson tells in *The Fourteenth Amendment.*

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[1] Section one of the fourteenth amendment reads:
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the first chapter, Nelson outlines what he intends to accomplish in his work. He proposes that his book be regarded as a tool "for thinking anew about contemporary Fourteenth Amendment adjudication" (p. 11). To enable the reader to form a more accurate understanding of what the amendment stands for, Nelson wants to intimately acquaint the reader with its rich history. He does this by "examining primary source materials that most previous historians have ignored, and by asking questions about the sources that previous historians have not asked" (p. 5). Nelson makes clear that he does not want to add to the debate among legal historians about the intentions of the framers in drafting the amendment (p. 5). He argues (pp. 3–5) that this debate has presently turned fruitless since the framers were not interested in crafting legal doctrine, but rather "were acting primarily as statesmen and political leaders" (p. 143). They only sought to embody the nation's high ideals and principles into the Constitution. Nelson painstakingly demonstrates to the reader through the use of historical evidence that the framers had no clear vision of the large number of doctrinal issues that later would turn on the interpretation of the amendment. In his words, "the framing generation understood constitutional politics as a rhetorical venture designed to persuade people to do good, rather than a bureaucratic venture intended to establish precise legal rules and enforcement mechanisms" (p. 9).

Nelson contends not only that the fourteenth amendment is based on ambiguous principles, but he finds the amendment itself ambiguous (pp. 60–63). Although the ratification debates and newspapers of the time addressed some of the issues that would later be brought to the courts, "no agreement [was reached] on the issues they did consider" (p. 61). Why then, one asks, was the amendment passed at all? In a nutshell, it was passed as a result of the South's defeat in the Civil War. Nelson explains that:

> the vagueness and ambiguity of section one's language and the failure of the framing generation to settle how it would apply to a variety of specific issues should not lead those who must interpret the Fourteenth Amendment to conclude that the section has no meaning. Meaning can be found once interpreters of section one recognize that the resolution of specific legal issues, such as who should possess the right to vote, was not the *raison d'être* of the Fourteenth Amendment . . . . What was politically essential was that the North's victory in the Civil War be rendered permanent and

> the principles for the war had been fought rendered secure, so that the South, upon readmission to full participation in the Union, could not undo them (p. 61).

The second chapter movingly sketches "Ideas of Liberty and Equality in Antebellum America," as it is entitled. Nelson beautifully paints the background for the introduction of the amendment after the Civil War in the chapters entitled "The Drafting and Adoption of the Amendment," "Objections to the Amendment," and "The Republican Rebuttal." This history of the early years of the fourteenth amendment is the sum and substance of the book and is recommended reading.

Throughout his work, Nelson provides the reader with colorful and revealing glimpses of the American psyche on varied issues such as equality for blacks and infringement on local self-rule. For example, the *Little Rock Daily Gazette*, which supported ratification of the fourteenth amendment, was "in favor of the protection of the civil rights of the negroes, and of giving them fair play in all things" (p. 92);[2] in contrast, the *Newark Daily Advertiser* was against the amendment and argued that "careful anatomical studies of his brain . . . show that he [the black] has a much smaller average brain than the white" (p. 97).[3] The *Chicago Republican*, the *New York Daily News*, and the *Weekly North-Carolina Standard* are also among the numerous and varied publications which Nelson cites to make his book truly distinctive among other works in legal history.

Throughout the text, Nelson acquaints us with the views of state legislators, congressmen, numerous other public officials, and even the draftsman of section one of the fourteenth amendment, John A. Bingham. Divergent points of view are well organized and make the book easy to read and an outstanding source for the student who is interested in history, as well the professor of constitutional law.

According to Nelson, the last two chapters form "[t]he heart of the book" (p. 9). These chapters sketch the transformation of the fourteenth amendment from its birth as a hortatory, moral and political principle, to judicial doctrine. The gist of Nelson's argument is that the courts, with an admittedly difficult task before them, started out rather well applying the fourteenth

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[2] Quoting *The Civil Rights Bill*, Little Rock Daily Gazette, April 3, 1866, at 1, col. 1.
[3] *Negro Equality*, Newark Daily Advertiser, May 21, 1866, at 2, col. 1.

amendment, but beginning with *Lochner v. New York*,[4] the Supreme Court's analysis deviates from the amendment's legislative and prior judicial history. In this regard, Nelson may have subtitled his book, "The Death of a Tradition."

The concluding chapters of *The Fourteenth Amendment* are disappointing for three reasons. First, the historical excursion into the development of the amendment ends with the beginning of the twentieth century. Many would agree that much of the transformation of the amendment continues even today. Cases such as *Roe v. Wade*[5] and *Brown v. Board of Education*[6] are mentioned merely to highlight Nelson's arguments regarding earlier periods. Nelson's analysis should have included more discussion of these as well as the numerous other important fourteenth amendment cases of the middle and latter half of the twentieth century.

Second, Nelson's depiction and analysis of what he terms "the transformation of the amendment" (p. 197) is given short shrift. To give his thesis more force, more time should have been spent elaborating his arguments and articulating his conclusions. Nelson fails to address what many would view as fundamental issues that should be included in a book entitled "The Fourteenth Amendment." He mentions only indirectly that the changing moral and social consciousness of the nation has an impact on fourteenth amendment adjudication (pp. 185–86). For whatever reasons, Nelson never even alludes to various methods of judicial analysis to which other legal historians routinely refer. Two that are frequently mentioned are formalism and realism. Under the formal approach, a court examines a statute to determine whether certain objective criteria are satisfied; whereas under the realist approach, the court looks more closely at the impact of a particular statute and the actual motivation for its enactment. Many times fourteenth amendment controversies involve the interpretation of state statutes and these divergent approaches often will determine the outcome of a particular controversy. Nelson should have pointed out the potential effects of these different modes of adjudication in cases involving the fourteenth amendment.

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[4] 198 U.S. 45 (1905).
[5] 410 U.S. 113 (1973).
[6] 347 U.S. 483 (1954).

Finally, although Nelson refers to the amendment as "the single most important text in constitutional adjudication" (p. 90), he fails to convey this importance to the reader. The reader, to a large measure, is left to his or her own imagination to appreciate the omnipresence of the fourteenth amendment in cases that come before the Supreme Court and how the fourteenth amendment today forms a part of what America stands for.

—*Gary Gauthier*

CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW. By *Robert E. Mutch*. New York, N.Y.: Praeger Publishers, 1988. Pp. xx, 192, index. $42.95, cloth.

Who should pay for our politics? During the 1904 presidential campaign, Democrats sought to tarnish Theodore Roosevelt by charging that the popular Republican's election bid was being underwritten by secret corporate sponsors. Allegations of undue corporate influence were temporarily submerged by the Roosevelt landslide, but resurfaced the following year when insurance giant New York Life acknowledged having concealed a $48,000 campaign contribution to the Republican National Committee. Roosevelt, seeking to preempt his critics, called for an outright ban on corporate political contributions, and in 1907 Congress obliged by enacting the first in a series of campaign finance reforms (pp. 1–4).

Author Robert E. Mutch uses this episode as the lead for *Campaigns, Congress, and Courts*, a meticulous and provocative analysis of federal campaign finance law. The incident is an apt beginning not so much because it represents the impetus behind campaign finance legislation (Mutch has unearthed a 1901 forerunner of the 1907 law), but because it illustrates the "interplay between ideology and practical politics" (p. 189) that has characterized election finance reform ever since. Where Mutch explores this tension between theory and pragmatism, his writing is lucid and insightful; where he pursues each element separately, his book is either too detached or too mundane.

The discussion of *Buckley v. Valeo*,[1] a 1975 suit challenging the constitutionality of the sweeping 1974 Amendments to the Federal Election Campaign Act (FECA), is easily the most absorbing section of the book. The Amendments were enacted in response to the Watergate disclosure that President Nixon's 1972 campaign committee had accepted illicit corporate donations (p. 49). They established, *inter alia*, campaign contribution and expenditure limits, partial public financing of presidential campaigns, and the Federal Elections Commission (FEC) (p. 32). These provisions had deep historical roots, as did their partisan opposition. But in *Buckley*, conservatives and civil libertarians joined forces for the first time to attack the law as an infringement on constitutionally protected speech.

Mutch frames the debate as one "between liberty and equality: between those who wanted no restrictions on the political use of wealth and those who wanted to retard the tendency of unequally distributed wealth to become the basis for a similarly unequal distribution of political influence" (p. 53). The author's dissection of *Buckley* goes on to probe much deeper.

The plaintiffs, including then Senator James Buckley and the New York Civil Liberties Union, argued that money was instrumental to meaningful speech in the television age, and that to restrict the political use of money was tantamount to stifling the speech of those who possess it. The defendants, including Common Cause and the League of Women Voters, met this libertarian argument head on, charging that unlimited spending would allow the wealthy to "drown out" others' political speech through the use of mass media (p. 55). The defendants buttressed their argument with traditional egalitarian notions, asserting that unchecked campaign contributions effectively violated the principle of "one man one vote" (p. 54). To the plaintiffs, however, money was "fungible with other resources suitable for political use" such as time and labor (p. 57). Limitations on spending, therefore, served not to promote equality but to "discriminate against people with little free time who must limit their campaign activities to monetary contributions" (p. 57).

This tight weave of argument and counter-argument, carefully laid out by Mutch, at once suggests both the depth of campaign finance reform ideology and its adaptability to practical political

[1] 424 U.S. 1 (1976).

ends. But elsewhere the author lets these strands unravel, rendering neither a complete historical portrayal nor a valuable predictive model of campaign finance reform.

The creativity of Mutch's *Buckley* analysis is conspicuously absent from the preceding chapters on the history of campaign finance reform. The author observes that "[w]hat makes this body of law unusual is its generation by recurring scandal" (p. 186) but he never offers a satisfying explanation of why this is so. Rather, he takes the reader on an odyssey from Teddy Roosevelt to Teapot Dome to Watergate, pausing along the way to scrutinize each successive legislative proposal. While tales of debt ceiling riders and rare Sunday sessions (pp. 125–27) may have a certain twisted appeal to the Capitol Hill junkie, others will be tempted to skim these painstaking accounts of legislative history. The problem is that these digressions tend to camouflage vital passages on the enactment and content of landmark campaign finance reforms.

Though Mutch's technocratic approach is most apparent in the chapters on the history of campaign finance legislation, it is in no way confined to that section. A bureaucratic flow-chart of the FEC (pp. 103–04) interrupts an otherwise amusing discussion of the Commission's Frankenstein-like relationship with its congressional creator. And a chapter addressing the public financing law, the "most dramatic departure from previous campaign finance law" (p. 118), devotes as much attention to congressional posturing as it does to the fundamental question of whether such a system can be administered in a manner that is not biased in favor of the major political parties.

At times, Mutch shifts abruptly from detailed statutory or case history to abstract political theory. This is most noticeable when he seeks to ground the *Buckley* "liberty versus equality" debate in the writings of John Stuart Mill, Edmund Burke and John Rawls (pp. 60–63). Standing alone, this passage reads more like lecture notes for an introductory political science class than as an integral part of a work on campaign finance reform. Taken with the author's skillful treatment of the arguments in *Buckley*, it distracts far more than it informs.

Despite these lapses, *Campaigns, Congress, and Courts* is a thoughtful and thought provoking book on a vital subject. With campaign costs prohibitively high and public financing an unlikely beneficiary of the "read my lips" administration, the issues of proper spending limits and disclosure requirements have

taken on a new urgency. While Mutch poses these important normative questions, he is unable or unwilling to answer them. He begins by asking "who *should* pay for our politics" (p. xv, emphasis added), but ends by telling the reader only who has paid, how much, and by what device.

—*Theodore M. Hirsch*