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ACTIVE DUTY: AN ESSAY ON DEPENDENCY, NATIONAL DEFENSE,
AND MARTHA FINEMAN'S *CONTRACT AND CARE*
by
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Submitted in partial fulfillment of the requirements of the King Scholar Program
Michigan State University College of Law
under the direction of Professor Cynthia Lee Starnes
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Dear Military Wife,

* * *

I have never had to let go of someone so that they could go fight for people that they didn't know, people that sometimes do not appreciate or understand what they are fighting for.

I have never had a sleepless night of worry because of a report that another bomb has exploded and I still haven't heard from my husband.

I have never had to wait for months on end to hold the one that I loved so.

I have never had to tell my children that daddy wasn't coming home tonight because he was so far away fighting for something that they aren't yet old enough to understand.

* * *

For the reasons listed above, I can not say that you shouldn't be angry, because you "knew what you were getting into when you married a military man."

I will never have to walk in your shoes.

Your husband and his military family hold this nation close, safe from those who wish to hurt us...but you and those like you are the backbone of the American Family.

You keep the wheels in motion and the hearts alive while most would just break completely down. Because of you and your family...I am able to be me.¹

* * *

Introduction

What makes the message above so appealing? Why do we, as Americans, generally hold a special place in our heart for not only those who are serving our country in the military, but also their spouses and families, who are at home keeping their lives going while the soldier is away? President Bush even seemed to share this prospective, when he specifically advocated in

¹ Anonymous post on blog site <http://www.militaryspousesupport.net/boards/forthesoul/poemsandstories> (Oct. 26, 2007).

the 2008 State of the Union address² for increased federal funding and benefits for *wives* of those in the military.

This is obviously in part a result of the social benefit a lot of people feel they receive from those who are serving our country in the military. But it has to be something more than that when we extend public responsibility to the soldier's family as well. Why are military spouses entitled to childcare subsidies, housing allowances, and even government funding for job training and college education? Even though they are mothers and spouses just like any other mother and spouse in this country, military spouses get many public benefits that reformers have been trying to get for years to help fight the economic consequences that disproportionately affect women when there are children involved and the mother is the primary caretaker. Yet many people resist the idea of the State being responsible for childcare and the caretakers themselves. Many people resist adding yet another group to the "list" of people who need federal aid. Public subsidies or public assistance in general has long been associated with a negative stigma in this country.

In this Article I argue that public responsibility for children and caretakers is something that should be supported by society—specifically I argue that Martha Fineman's basic rationale for her article, "Contract and Care,"³ concerning the reasons the State should bear at least some of the responsibility and cost of childcare are appealing when you think about the rationale

² Whitehouse News Release, President Bush Delivers State of the Union Address, 8 (Jan. 28, 2008) ("Our Military families also sacrifice for America. They endure sleepless nights and the daily struggle of providing for children while a loved one is serving far from home. We have a responsibility to provide for them. So I ask you to join me in expanding their access to child care, creating new hiring preferences for military spouses across the federal government, and allowing our troops to transfer their unused education benefits to their spouses or children. Our military families serve our nation, they inspire our nation, and tonight our nation honors them.").

³ Martha Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001). Fineman has written extensively on society's obligation to caretakers. See, e.g. Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (1999) (addressing the argument critics have raised that the preference to have a child is no more deserving of a subsidy than any other preference, including the preference to own a Porsche); FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRADEGIES (1995) (addresses dependency issues and subsidies); MARTHA FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004).

behind benefits given to military families. The government is not just giving the soldier a bigger paycheck or a bonus for serving the country—in this case they are actually giving active support to the spouse at home with the soldier’s children—and at least implicitly sending the message to the rest of the country that society should value the work the military spouse is doing and support them too. While Fineman’s solutions in the article, and the many other articles that she has written on social responsibility for caretakers, may not be practical or even workable, and in reality the real solution may be a mixture of private, public and market responses, I argue that her basic rationale behind public support for dependency makes sense and is the reason behind why the government supports military spouses, even despite the many criticisms of her work.

A lot of people do not agree with the policies of the military. The military is very restrictive, hierarchical and many feel that it is discriminatory. Yet at the same time, those who are in the military enjoy great respect from most of the citizens in this country, even if people do not agree with the objectives they are fighting for or the political choice to go to war. And military families get a great deal of public and private support, since often they sacrifice as well by having to be away from their loved ones and often raising children alone. Specifically military families have government aid to help pay for high-quality childcare, help finding a childcare center in local areas, and help for both reserve and active duty military families with temporary childcare in emergency situations.⁴ In addition, spouses themselves receive benefits from the government as well, including education and training programs to help them develop

⁴ The Family and Medical Leave Act of 1993 was even recently amended to extend leave time for people who need to care for an injured service member. The Department of Labor website states: “On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. 110-181. Among other things, section 585 of the NDAA amends the Family and Medical Leave Act of 1993 (FMLA) to permit a ‘spouse, son, daughter, parent, or next of kin’ to take up to 26 workweeks of leave to care for a ‘member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.’” The full description of these changes can be found at http://www.dol.gov/esa/whd/fmla/NDAA_fmla.htm. In addition, the text of the FMLA as amended can be read at <http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm>.

their market skills while their spouse is away. Society is able to separate the individual from the cause in this situation, which leads to positive responses to public benefits for those who serve in the military and their families.

The same rationale behind why people feel military spouses deserve public support and reinforcement for raising children can be seen in Fineman's argument that *all* caretakers should have public support, except that society is not as supportive of those who just "choose" to raise children and care for them. As Mary Becker explained, at the heart of what has been termed relational feminism is advocating for progressive social programs based on empathy.⁵ In a sense it is a commitment to fairness, despite or even in spite of differences between people.⁶ This does not mean caretakers are needy and so we should pity them. What it does mean is that all caretakers provide valuable service not only to their own children, but to society as well, much like those who serve in the military, except normal caretakers do not enjoy the same social support system as those in the military. Fineman's work has endured great criticism when it is looked at in terms of all caretakers in general, but her model does explain why it is appropriate for the government to give benefits to the spouse of a person serving in the military. If collective social responsibility is the driving force behind public support of military families the question then becomes, why not other caretakers and families? Why so much criticism when her theory is applied to all caretakers?

Part one of this article summarizes the major economic problems women caretakers face today. Part two outlines the major arguments of Fineman in "Contract and Care," where she explains how and why there should be more collective responsibility for the dependency of caretakers. Part three reviews legal commentators' major criticisms of her ideas and their

⁵ Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L. J. 57, 60 (2002).

⁶ *Id.*

proposed alternatives, and part four discusses the major caretaking benefits that military families receive, and attempts to show why Fineman's core ideas are right despite all of the criticisms, especially using the example of benefits for the spouses of our troops.

Fineman's critics have valid concerns about subsidizing caretaking for everyone, and the possible dangers that go with it. I merely argue that Fineman's underlying point that there should be more support for caretakers outside of their own immediate family is based on the idea that even if we personally are not caretakers, we recognize that undertaking the task has huge economic implications for those who perform this labor. It also has huge value for society as a whole, and we should take steps to make caretakers more secure and informed in their choices.

I want to make the disclaimer that while typically the most economically vulnerable caretaker is the one who we usually think of as a full-time homemaker, spending most of the time staying home with the children instead of participating in full-time market labor, this article applies to all caretakers. Whether they are male or female, single, married or divorced, hetero- or homosexual, all people who raise children are implicated in this article. That being said, we cannot ignore the fact that 80-90% of primary caretakers are women,⁷ so a large part of this article does implicate women, but any solution should not be so limited. Any solution to the problems associated with dependency as a result of caretaking would apply equally to male or female caretakers.

I. The Problem

A. Caretaking is Expensive

There are enormous costs involved in raising children today, both for caretakers who stay at home and those who work outside the home. This part of the Article will briefly outline the

⁷ Debbie Kaminer, *The Child Care Crisis and the Work-Family Conflict: A Policy Rationale for Federal Legislation*, 28 BERKELEY J. EMP. & LAB. L. 495, 519 (2007).

basic economic costs associated with caretaking, the difficulties parents face in terms of how they deal with those costs, and also the non-economic costs to the primary caretaker, specifically opportunity costs that result from performing caretaking labor.

1. Basic Financial Costs

Since most families today have dual-income households,⁸ finding adequate childcare is an issue for many parents today. Even with the dramatic increase in the number of mothers in the workforce from previous years, women and their children in this country still remain poorer than women in comparable nations.⁹ As Marleen O'Connor highlighted in her argument for more employer responsibility for childcare costs, studies show that childcare facilities are not always able to provide a high quality of care because the workers receive low wages and have a high rate of turnover.¹⁰ This may be in part because it is hard to attract the “ideal” type of worker to a child care center since most of the employees have child care responsibilities of their own and are often paid hourly and work part-time. The lack of adequate care costs corporations an estimated three billion dollars a year in absenteeism, turnover and lost productivity.¹¹ More importantly, children suffer in terms of achieving cognitive and social skills. Low-income families are particularly hurt by low-quality childcare.¹²

⁸ Pamela Gershuny, *Family Values First When Federal Laws Collide: A Proposal to Create a Public Policy Exception to the Employment-At-Will Doctrine Based Upon Mandatory Parenting Duty*, 21 WIS. WOMEN'S L. J. 195, 197 (2006).

⁹ *Id.* at 200.

¹⁰ Marleen O'Connor, *Corporate Social Responsibility for Work/Family Balance*, 79 ST. JOHN'S L. REV. 1193, 1209-10 (2005).

¹¹ *Id.* See also, Stefan Staicovici, *Respite Care for All Family Caregivers: The Lifespan Respite Care Act*, 20 J. CONTEMP. HEALTH L. & POL'Y 243 (2003) The statistics used here suggest an even higher cost to employers. (“In the US it is estimated that employers spend 900 million dollars a year because of employee absenteeism and almost five billion a year to replace workers that have to quit because of family caregiving demands.”).

¹² O'Connor, *supra* note 10, at 1209.

The lack of significant government funding for childcare has affected American attitudes towards childcare because quality care is very expensive¹³ and difficult to maintain without adequate public funding. By not giving any significant amount of funding, the government is sending a message to the public that group child care is not something that the government values or supports.¹⁴ As a result, caregivers often cannot find affordable quality child care and are left with the “choice” of sending their children to poorly run centers or staying at home to care for them.¹⁵ But staying at home is not without its own costs. Care is not simply a labor of love.¹⁶ It is hard work. As Ann Hubbard points out, human capital accounts for three quarters of the producible forms of wealth in countries like ours, and families are the principal investors in human capital.¹⁷ Since most of a family’s assets are held in the form of human capital, Hubbard highlights that by some estimates, if unpaid work were to be “counted” as economically productive activity, housework and care would constitute a remarkable 25 to 40 percent of the Gross National Product!¹⁸ But because caretaking is not formally valued as an asset, it looks like free labor, when in fact it has enormous costs.

¹³ National Association of Child Care Resource & Referral Agencies, *Parents and the High Price of Child Care: 2007 Update*. This report provides child care price data for families in the context of other common household expenses. The report indicates that a family in the U.S. with a 4 year-old child in a child care center encounters average prices of \$3,794 to \$10,920 per year in fees. Parents of infants face even higher child care prices. Overall, states reported increases in fees from 2005 to 2006, at twice the rate of inflation. The report did indicate care in household facilities is slightly less expensive than in centers, but often unregulated since there may not be a licensing requirement in those facilities. The complete results of the report can be found at <http://www.naccrra.org>.

¹⁴ Kaminer, *The Child Care Crisis*, *supra* note 7, at 519.

¹⁵ *Id.*

¹⁶ Aside from homemaking services that go unpaid, a former economics reporter of the New York Times wrote that by most estimates a stay at home parent who leaves the workforce may lose about \$1 million over the years. MP Dunleavy, “Cost of Being a Stay-at-Home Mom: \$1 Million,” <http://articles.moneycentral.msn.com> (Feb. 2008), citing ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* (2001).

¹⁷ Ann Hubbard, *The Myth of Independence and the Major Life Activity of Caring*, 8 J. GENDER RACE & JUST. 327, 345 (2004).

¹⁸ *Id.*

2. Non-Economic Costs

Even more startling are the non-economic costs associated with caretaking. The person performing the majority of the care work and investment in the home diverts his or her time and energy away from other aspects of life, including education and market employment, cultural, civic and political engagements, and recreation and leisure.¹⁹ This makes the caretaker economically vulnerable. Women perform about 80 percent of the childcare for families and as a result often just cannot work the amount of overtime hours required by many jobs,²⁰ and conversely women (or men for that matter) who devote themselves to unpaid labor of caring for a dependent may personally become dependent on another person for resources.²¹

Even with more women actively and equally participating in the labor market alongside men, Elizabeth Scott rightly points out that less has changed than it might seem—wives are still burdened with responsibility for a majority of caretaking without compensation for the work they do, even when they are working just as hard in the paid-labor market.²² Beyond this, women who have invested in traditional roles are often ill-equipped to succeed in the employment sphere.²³

B. Costs of Caretaking are Disproportionately Born by the Family—and Specifically the Caretaker

The costs that were mentioned in the previous section are almost entirely assigned to the family in which the children are raised, whether it is a two-parent household or single parent household. Many factors today make it harder for the family to shoulder the entire burden for

¹⁹ *Id.* at 333-34.

²⁰ Debbie Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 313 (2004).

²¹ Hubbard, *supra* note 17, at 333-34.

²² Elizabeth Scott, *Marriage, Cohabitation, and the Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 234-35 (2004).

²³ *Id.*

caregiving.²⁴ In today's economy, many households have two incomes, which means both parents are working at least part-time. Yet the workplace remains structured around the "ideal worker," where a worker basically has unlimited availability to the employer as a result of having someone else at home taking care of the children, if any.²⁵ It is not surprising that most Americans would like to address this conflict between work and family, specifically with policies that would help working parents lift some of that burden.²⁶

Additionally, the fact that costs for raising kids are paid primarily by their parents seems a little unfair when you consider how norms have changed over time. For example, a century ago, parents were responsible for much of the costs but also received a lot of economic benefit from caretaking because children often labored from a young age to help support the family directly and later support parents when they got older.²⁷ By contrast, today's children are not expected to do the same and they will be providing for many families other than their own indirectly through taxes, instead of family labor.²⁸

C. Conflicting Social Messages Surrounding Caretaking

Another quite visible problem with caretaking is the fact that society sends two quite inconsistent messages to people faced with how to provide care for their children. On the one hand, about 2/3 of Americans believe that mothers should stay at home and care for their children.²⁹ Debbie Kaminer notes that this is striking because the reality is that the majority of

²⁴ O'Connor, *supra* note 10, at 1209.

²⁵ Kaminer, *The Child Care Crisis*, *supra* note 7, at 528. Joan Williams, "It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate, 102 Columbia L. Rev. 812, 826-27 (Apr. 2002). See also, JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1 (2000) (noting that the idealized worker is someone who works full-time and overtime and takes little or no time off for childbearing or childrearing).

²⁶ *Id.*

²⁷ Kaminer, *The Child Care Crisis*, *supra* note 7, at 516.

²⁸ *Id.*

²⁹ *Id.*

women with young children not only work, but prefer to work at least part-time.³⁰ However, at the same time, a majority of people do support increased funding for child care,³¹ which indicates that they at the least understand that many mothers of young children are working.

Put a different way, Marleen O'Connor argues that society dictates two contradictory ways for women to behave which lead to the so-called “mommy wars.”³² Women are told to surrender their free time to succeed as ideal workers in one breath, yet at the same time are told that mothers should have all the time in the world to give to their children.³³ This leads to working mothers feeling less than adequate both at home, and at work.

D. Tensions Between Parents and Non-Parents, Stay-At-Home Parents and Workers

All these problems are compounded by the tension between those with children and those without, and between those households where one parent stays at home, and those where both work. Many parents believe that non-parents are favored in hiring and promotion decisions, while many childfree employees believe that parents receive unduly favorable employment benefits and more flexible schedules.³⁴ This tension threatens the possibility for change using political means that would help relieve some of these tensions, since there is such a strong division between the two categories. Joan Williams suggests the best way to start the process of looking at how to solve care-work problems is for parents to remember that people without children, especially women in the workplace, suffer because of the societal expectation and

³⁰ *Id.*

³¹ *Id.*

³² O'Connor, *supra* note 10, at 1198.

³³ This is what O'Connor explains as the intensive mothering phenomena, where parenting requires much more than the past. Recent parenting norms reflect this by increases in extracurricular activities for children. She says “women are pressured to measure their worth by how well they fulfill their role as chauffeur to music lessons, soccer practice, or Boy Scouts.” *Id.* at 1206.

³⁴ P.K. Runkles-Pearson, *The Changing Relations of Family and the Workplace: Extending Antidiscrimination Laws to Parents and Nonparents Alike*, 77 N.Y.U. L. REV. 833, 836 (2002).

celebration of parenting.³⁵ Policies should not be limited to mothers or even women.³⁶ At the same time, women without children need to remember that the gender system that leads them to be treated as if they were somehow defective because they are not mothers also channels women who are mothers into marginalization and relative poverty.³⁷

In Williams' view, there is little choice but to take as a given the fact that most people have children, and that most women become mothers because however disfavored, this has proven remarkably persistent.³⁸ A significant goal of this paper is to emphasize that it isn't about 'she [or they] chose to have kids, so it is her [or their] own problem.' O'Connor similarly suggests that they may be a middle ground between seeing care as a virtue and seeing it as nothing but a gender-specific harm.³⁹ If we recognize that caregiving is a large part of people's lives, and that they are profoundly influenced by it—good or bad—we can see it as a practice that many engage in, but it is not their essence⁴⁰ and it does not define who they are. That way, both those with children and those without can learn to better respect the choices each has made, without resorting to a contest to see who works harder. We are all working within the same constraints, and have just made different choices.

II. Fineman's Solution

In "Contract and Care," and other articles Martha Fineman argues for collective or public responsibility for dependency, a status or condition that has historically and still today is largely assigned to the private sphere of the family.⁴¹ The family, she says, is the quintessentially private institution, and therefore dependency is hidden within it. It is only when families "fail"

³⁵ Williams, *It's Snowing Down South*, *supra* note 25, at 817-18.

³⁶ *Id.*

³⁷ *Id.* See also, Carl Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495 (1992).

³⁸ Williams, *It's Snowing Down South*, *supra* note 25, at 828-829.

³⁹ O'Connor, *supra* note 10, at 1214.

⁴⁰ *Id.*

⁴¹ Fineman, *Contract and Care*, *supra* note 3, at 1409.

to meet their responsibility for dependent care that public support is given, which is a naturally stigmatizing occurrence.⁴² She feels dependency warrants a more public, supportive, and positive response to the needs of caretakers,⁴³ rather than a negative and judgmental reaction to the idea that the public should bear some of the responsibility. The rationale for this view lies in the argument that people are all dependent at some point in their lives. Even assuming that designating dependency as private historically was justified, society has drastically changed and today keeping the responsibility for dependency completely within the family seems unrealistic according to Fineman.⁴⁴ She argues that social practices and institutions have evolved so much that caretaking terms should be renegotiated, with the public bearing some of the costs and responsibilities associated with it.⁴⁵ Fineman analogizes this situation to social contract theory, where people structure their lives according to “background principles” and when those background principles change, there is a justification for renegotiation of the terms of the agreement.⁴⁶

Fineman suggests there are two main types of dependency: inevitable and derivative. Inevitable describes the type of dependency we experience as children or as we age, become ill, or suffer disabilities.⁴⁷ Derivative dependency is experienced by the person who assumes responsibility for the care. Basically, those who care for others are usually themselves dependent on resources to undertake that care.⁴⁸ Fineman argues that society must respond to these forms of dependency to reproduce the workers, citizens, consumers, and taxpayers. She suggests that caretaking labor results a social debt—that binds each and every member of

⁴² *Id.* at 1406.

⁴³ *Id.*

⁴⁴ *Id.* at 1407.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Fineman, *Contract & Care*, 76 Chi. Kent L. Rev. 1410 at n. 15-16.

society, not just the individual family members or receivers of care.⁴⁹ The debt is owed generally, to caretakers as a group, and cannot be discharged by merely supporting one's own caretaker (mother or wife, for example).⁵⁰ Fineman argues that presently the market and state "ride free" on families' labor by delegating the work of rearing future citizens and workers to them without compensation.⁵¹

Fineman says that care is neither an exclusively public matter for the state, nor an exclusively private matter for the family.⁵² Caretaking responsibility should be viewed as both a public and private matter in a system in which the family and the state share responsibility. As it stands, dependency is hidden within the private family to be dealt with, when it should really be more of a public concern than it is now.⁵³

Fineman's solution to the dependency problem is surprisingly vague given all the work she has done on public responsibility for caretaking. She argues that the solution should be policies that both subsidize and accommodate caretakers; for example, child allowances, health insurance, childcare, and respite care would all be public responsibility.⁵⁴ She also proposes market solutions so that the workplace would be more accommodating to those who have caretaking responsibilities at home. Despite the lack of specifics, Fineman's core idea that at least some responsibility should be collective for caretaking costs and expenses seems to be on the right track—that society does get at least some benefit from a person raising children and

⁴⁹ *Id.* at 1410.

⁵⁰ *Id.* at 1411.

⁵¹ Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CAL. L. REV. 1285 (2005), quoting MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 263 (2004).

⁵² Fineman, *Contract and Care*, *supra* note 3, at 1417. *See also*, Staicovici, *supra* note 11, at 243.

⁵³ As I will further explain Part Four, in reality Fineman is probably only partially right, since the state, market, and family should all play a role in taking responsibility for caretaking.

⁵⁴ Fineman, *Contract and Care*, *supra* note 3, at 1437. A number of other commentators agree with respect to childcare subsidies. *See, e.g.*, SUSAN OKIN, *JUSTICE, GENDER AND THE FAMILY* 176-77 (1989) ("And the government should be responsible for direct subsidies to make up the cost of high-quality daycare and what less paid parents could reasonably be expected to pay.").

caring for them or for the elderly or sick, and that it does exact great costs on those who do so.

On a basic level Fineman's approach changes the basis of entitlement to benefits from a need to a desert, a far more honorable, and possibly politically palatable form of entitlement in our society.⁵⁵ But so long as society views public assistance in such a need-based, negative light, little can be done to take steps toward valuing caretaking services as a real and legitimate cost to the caretaker, a cost which society should realize confers benefits on the public and deserves to be recognized as such. No where is this point more compelling, and approval of Fineman's theory more clear, than when examining the rationale behind giving public benefits to a military spouse.

III. Criticisms and Alternatives to Fineman's Solution

Many commentators have criticized Fineman's ideas as being unrealistic and possibly threatening—the idea that the government would subsidize caretaking only reinforces traditional gender roles by encouraging women to stay at home with the kids, and encourages “repronormativity.”⁵⁶ This criticism is suggested by some, and their proposed alternative is to encourage women to pursue other options besides raising and rearing children, since it is so closely linked to sex inequality.⁵⁷

Several different alternatives have also been proposed—the main being that the market should be restructured either by creating incentives to accommodate workers who have caretaking responsibilities, or imposing government mandates by the State to accommodate

⁵⁵ Eichner, *supra* note 51, at 1291. See also, THEDA SKOPOL, PROTECTING MOTHERS AND SOLDIERS 5 (1992) (“Down to the present day, the word ‘welfare’ has a pejorative connotation in the U.S. It refers to unearned public assistance, possibly undeserved and certainly demeaning, to be avoided if at all possible by all ‘independent’ self-respecting citizens.”).

⁵⁶ I did not find an explicit definition “repronormativity.” Katherine Franke does explain that she wishes to expose in her proposal the fact that “even thoughtful legal feminists persist in the idea that reproduction is the result of a natural drive not worthy of our critical attention.” Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 at note 14, (2000).

⁵⁷ Mary Anne Case, *How High is the Apple Pie? A Few Troubling Questions About Where, Why and How the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT L. REV. 1753, 1757 (2001).

workers in the market. Another option is to adopt policies that would equalize the caretaking performed by men and women at home.⁵⁸

In terms of mandatory market responses, a lot of commentators may disagree about how things should be restructured to respond to caregiving inequalities, but most agree that there should be greater accommodation of caregiving by employers—which would generally involve legally mandated affirmative behavior by employers.⁵⁹ Among the major types of solutions, some argue for an accommodation of caretaking similar to a bona fide religious accommodation, not just for major events like pregnancy or serious illness but also for day-to-day care responsibilities, like a child who has to stay home from school sick or a parent-teacher conference.⁶⁰ However, some critics argue that limiting the accommodation to parents unfairly limits the range of caretaking that people do, aside from caring for children.⁶¹ Others advocate expanding existing antidiscrimination laws and adding to them the responsibilities of caregiving.⁶² Even though some would respond that accommodations are actually special treatment for parents, a refusal to accommodate could also be seen as discrimination since the

⁵⁸ OKIN, *supra* note 54, at 175. *See also*, ALI PRINCIPLES OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002), § 5.05. Under the ALI model, upon divorce one spouse is entitled to compensation for being the primary caretaker during the marriage if certain circumstances were present during the marriage. Since this proposal deals with a solution upon divorce, it is not implicated by the issues in this paper, but can be seen as an alternative to Fineman’s collective responsibility solution.

⁵⁹ Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX. J. WOMEN & L. 345, 346-47 (2003).

⁶⁰ Kaminer, *The Work-Family Conflict*, *supra* note 20, at 341-42.

⁶¹ *See e.g.* Runkles-Pearson, *supra* note 34, at 834. (“Laws that prohibit discrimination against employees because of their status as parents are incomplete and potentially dangerous solution to the tension between work and family, because they ignore the diverse care work needs of employees who do not parent. Ignoring non-parents leads to inefficient labor markets, leaves all groups with less optimal care, discourages reproductive choice, and provides an unbalanced discrimination remedy that contravenes the very nature of American antidiscrimination laws.”)

⁶² Ann Hubbard, for example, argues that caring for others should be deemed a “major life activity” under the Americans with Disabilities Act. This would mean that an individual with an impairment that substantially limits their ability to care for a loved one could qualify as disabled, thereby being entitled to protection under the ADA. Hubbard, *supra* note 17, at 328.

workplace is structured around the “ideal worker” who is ideally free of childcare responsibilities.⁶³

The second major alternative to a public response is more equal division of labor within the family unit itself. Susan Okin argues for a “parental parity” model in her book, *Justice, Gender and The Family*.⁶⁴ She said that any just and fair solution to the problem of women’s and children’s vulnerability must encourage and facilitate the equal sharing by men and women of paid and unpaid work.⁶⁵ While she does support some public response to the caretaking injustices,⁶⁶ other commentators who fall under this model feel that shifting the burden to the State or the labor market unfairly relieves fathers from the responsibilities they should have assumed when their child was born.⁶⁷

Both Mary Anne Case and Katherine Franke have headed the major criticisms of Fineman’s discussions on caretaking because they feel she simply assumes the relationship between women, caretaking and motherhood without questioning the inevitability of this relationship.⁶⁸ Both feel that this should be questioned, and society should promote alternate life paths for women.⁶⁹ Franke specifically argues that a call for public support of caretakers collapses women’s identities into their roles as mothers, thereby reinforcing the “repronormativity” of motherhood.⁷⁰ Similarly, Case argues that women should be given a

⁶³ WILLIAMS, *UNBENDING GENDER*, *supra* note 25.

⁶⁴ OKIN, *supra* note 54, at 175.

⁶⁵ *Id.* at 176.

⁶⁶ For example, Okin argues that more flexible schedules at work must be available to both women and men, and there should be requirements that large-scale employers provide on-site high quality daycare from infancy until school age. *Id.* at 176-77.

⁶⁷ Case, *supra* note 57, at 1757.

⁶⁸ Franke, *Theorizing Yes*, *supra* note 56, at 186-87. *See also*, Katherine Franke, *Taking Care*, 76 CHI-KENT L. REV. 1541 (2001).

⁶⁹ Franke, *Theorizing Yes*, *supra* note 56, at 183. Case, *supra* note 57, at 1758.

⁷⁰ Kerry Quinn has also raised the concern that there is a certain normalizing power to the childcare debate. She says that “maternalists” naturalize the idea that women are defined by their maternal instincts and reproductive potential. Kerry Quinn, *Mommy Dearest: The Focus on the Family in Legal Feminism*, 37 HARV. C.R.-C.L. L. REV. 447, 448 (2002).

wider range of options for productive work, so that they will have alternative, fulfilling life paths aside from raising children.⁷¹

Franke argues that there is just too much pressure on women to become mothers.⁷² In addition, she completely disagrees with Fineman that children are a type of public good.⁷³ She argues that mothers often have children for selfish reasons and parents have almost unlimited control over the child's upbringing.⁷⁴ Parents could raise the kids with values that are intolerant or inhumane and the public therefore would not get the benefit.⁷⁵ She also says that parenting has become more about consumption than production with all of the toys and fancy clothes that kids get today.⁷⁶

While Franke addresses some legitimate concerns, she falls short of refuting Fineman's point that the State should take some responsibility for the costs associated with caretaking. Yes, women are under too much pressure to become mothers.⁷⁷ But there is also a lot of pressure *not* to become mothers.⁷⁸ There are disadvantages for women who work, and for women who do not work, as explained above in Part One. The point is that yes, the system is channeling women toward the choices they make,⁷⁹ but that does not necessarily mean that we should punish caretakers for making the choices society leads them into. Instead, and Fineman would probably agree, society should legitimize the amount of work and sacrifice that goes into caretaking so that it is no longer stigmatized. That way, caretakers will have resources to pursue other avenues if they wish, but their work will not go un- or under-compensated if they do not wish.

⁷¹ Case, *supra* note 57, at 1781.

⁷² See generally, Franke, *Theorizing Yes*, *supra* note 56.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See generally Schneider, *supra* note 37 at 519.

⁷⁸ Becker, *supra* note 5, at 68.

⁷⁹ Schneider, *supra* note 37 at 503.

Franke's argument that children are not a public good also misses the point. A public good is a good that is difficult to put a price on because it is nonexcludable (someone can enjoy it without paying for it) and nonrival (one person can enjoy it without diminishing someone else's enjoyment of it).⁸⁰ Individuals who do not contribute to the production of a public good are likely to ride free on other people's efforts unless their responsibilities are enforced through explicit laws and rules, including taxes.⁸¹ While Franke is right, a lot of people have children for selfish reasons, a public good by definition is one that can be enjoyed by more than one person. If children do fit the definition of a public good, then it would be fair for taxpayers to contribute since arguably they are contributing to the future generation so that the future generation will contribute to them.⁸² Also all of us were once dependent children, and likely will be dependent as we grow older.

Mary Anne Case's main criticism of Fineman is that increased support for childcare from either the government or employers will be unfair to women without children, and will especially benefit men with wives. In terms of employer responsibility, she feels that if accommodations are given to a caregiver, then the remaining work will be pushed onto childless women and men. She feels if benefits are going to be given at all by the employer, they should be given to everyone, whether they have caretaking responsibilities or not.⁸³ As far as state responsibility, she wonders if there is going to be a type of "quality control" involved, to ensure that taxpayers are getting what they are paying for.⁸⁴

Case has a valid argument that policies should not be limited to women, or women with children. Workplace policies can and should be given to all employees, because the fact is that

⁸⁰ Becker, *supra* note 5, at 75

⁸¹ *Id.*

⁸² *Id.*

⁸³ Case, *supra* note 57, at 1758, 1765-66.

⁸⁴ *Id.* at 1772.

most women will become mothers, but even if they are not now or do not in the future, they and men too will still have different types of caretaking obligations in the future. Fineman probably would not disagree with that proposal. There is no reason to limit policies to women with children just because that is the most common type of caretaking that exists in our culture. These types of policies will help women with children enormously even if others are included in the benefits provided, and there are many other forms of caretaking that should also be recognized if there is going to be greater public responsibility in the future. In fact, accommodations that are available to all employees goes a long way to eliminating those traditionally gendered divisions of labor that families assume because benefits historically have been given to only women who stay home with their children.

In response to Case's "quality assurance" argument, just because society would choose to value and recognize the act of caretaking, does not mean the State would have to intervene in the daily lives of the family to any greater extent than they already do. Yes, some caretakers will not do a good job with their children, but the point is to give everyone the necessary tools to succeed. If the government sends the message that they support quality caretaking for children, it will go a long way to change people's behavior.

A common problem that both of these commentators mention in criticizing the subsidizing or accommodating caretaking is the idea that it might encourage women to have children. Roughly 80% of women become mothers at some time during their lives. When they do so, they confront the economic and social disadvantages that attend caretaking. I understand that it makes sense to adopt measures to increase women's understanding of and ability to withstand cultural pressures to have children, but the failure to adopt public policy measures that accommodate the choices women are already making will likely hurt more than help women's

equality.⁸⁵ Even if women could be convinced that they do not want to become pregnant, sometimes dependency just happens.⁸⁶ People fall ill, and unplanned pregnancies occur.⁸⁷ Case may be closer to my viewpoint when she argues that the benefits, if any, should be given to all people equally. That way, if a caretaking responsibility does come up, benefits would be available to everyone who might need it.

The anti-repronormativity approach really fails to take into account the fact that caregiving does occur outside of the traditional setting of a married couple. Increasingly it occurs in a single-parent household, which may be a minority.⁸⁸ Laura Kessler wrote extensively on this very point, in her article called “Transgressive Caregiving.”⁸⁹ She examines caregiving and notes that the very act of caring for children can often be an affirmative political practice of resistance to a host of discriminatory institutions, and she labels it transgressive caregiving when it fits into that category.⁹⁰ She includes in her definition primarily the care work of racial and ethnic minorities, gays and lesbians, and heterosexual men as being transgressive, but there are instances where even care work by Caucasian men and women, both married or not, can achieve the same political resistance.⁹¹ For example, a married man who seeks a family leave from work may experience the request as a challenge to the “male/breadwinner” ideal, even though his wife may be doing the bulk of the domestic labor.⁹²

⁸⁵ Eichner, *supra* note 51, at 1299.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Laura Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1 (2005).

⁸⁹ *Id.*

⁹⁰ *Id.* at 2-3.

⁹¹ *Id.* at 5. Specifically, she notes that “unmarried parents now make up one-third of households with children less than 18 years old and unmarried parenthood is the predominate family form in the African American community. Somewhere between one million and nine million children have at least one gay or lesbian parent in the United States. In 2003, 4.6 million couples cohabited outside of marriage, and children were present in about forty percent of those households.”

⁹² *Id.*

Similarly, a woman's efforts to convince a judge to value her unpaid domestic labor in a divorce proceeding challenges the class-based subordination of women perpetuated by divorce law.⁹³

Fineman speaks in terms of caregivers, not mothers. I think the critics of her work tend to assume that because most women are usually the primary caretakers, that she wants it to stay that way. But her ideas are far from only applicable to women or mothers. Caretakers can be of either gender, any race, married or not, and have children or not. Sometimes care is for an elderly relative or a disabled partner. Just because she is trying to help the common situation of the homemaker wife who also happens to be the primary caretaker in most instances, does not mean that she is encouraging women to step into that role. She is simply recognizing that it is still fairly common and needs to be addressed—but it can be addressed along with the needs of anyone who is caring for someone in his or her home. And often caregiving is by someone who is single, and head of their household, or someone who belongs to a racial or ethnic minority, as Kessler suggested in her article.

IV. Why Fineman was Right

This part of the paper will outline the reasons I feel that Fineman was on the right track when she proposed that the State contribute to the costs of caretaking. I will also talk a little bit about military benefits and the connection to public responsibility for caretaking and the individual caretaker. Lastly, in this section I will outline some important thoughts to keep in mind for future conversations on this topic.

Since I have already addressed the major counter-arguments to Franke's and Case's arguments against public responsibility for caretaking, I will not readdress them here. What I am advocating is a more humanist discussion about the very real needs of caretakers and their dependents. This is what service men and women generally enjoy. Yes, Fineman's solutions to

⁹³ *Id.*

the problem seem to be an all or nothing response—the state should take most of the responsibility, to the exclusion of the individual family or the marketplace. If we are going to completely address the problem of the costs of caretaking, all three institutions have to play a role and people need to re-think how they characterize the choice to have or not to have children.

A humanist approach would incorporate empathy—and I don't mean pity. Merriam-Webster defines empathy as “the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another of either the past or present *without* having the feelings, thoughts, and experience fully communicated in an objectively explicit manner.”⁹⁴ If we can just think about what result would be fair if we did not know if we would be a parent or not, or a caretaker who works in the market or works at home, the solutions would be more equitable, instead of worrying about which way is the “right” way to live and trying to impose that view on others.⁹⁵

As Mary Becker pointed out, the point is to improve the quality of women's lives as lived in the real world in conjunction with improving the lives of others, particularly children since the well-being of women and children are so closely linked.⁹⁶ Without a doubt, she says, women are under considerable pressure to be or not be mothers.⁹⁷ But in the real world, most women *are* mothers. She feels we should be pushing for changes to improve the situation as it is, before we

⁹⁴ Merriam-Webster's New International Dictionary, (2008) (emphasis added). Empathy comes from the Greek word *empathēia*, literally, passion, from *empathēs* emotional, from *em-* + *pathos* feelings, emotion. The other definition listed for the word is “the imaginative projection of a subjective state into an object so that the object appears to be infused with it.” *Id.*

⁹⁵ John Rawls has written on the potential injustices that go along with wealth and property distribution among individuals. In his argument, he asserts that justice demands that principles which govern society should be those that people would invent from the perspective of the “original position.” The citizens would have all the information they need about society and its functioning, but are prevented by a “veil of ignorance” from knowing what individual characteristics they will possess in society. From this angle, citizens can decide what general rules should govern everyone, and because they are ignorant of the class, social position, and characteristics they will have in the world, there is no incentive to get special advantages for one group over another. Fineman, *Contract and Care*, *supra* note 6, at 1415, fn 27, citing JOHN RAWLS, A THEORY OF JUSTICE (1971).

⁹⁶ Becker, *supra* note 5, at 103.

⁹⁷ *Id.*

can move to how it really should be.⁹⁸ Joan Williams also pointed out that in the context of women as caretakers, we need to respect divergent deals women strike with their gender traditions, and recognize that people have all made some sort of trade-off that they probably would have preferred not to make, but that does not mean that we should ignore a significant portion of the population just because we disagree with whatever choice they did end up making.⁹⁹

Federal funding is important for the expressive effect it has toward changing this from a “need” to a “dessert.” While advocates may disagree on what the funding should go to, if it goes to help absorb even some of the costs of caretaking, that is an important step. Even Susan Okin, who supports restructuring the family to allow totally equal division of labor at home and at work, recognizes that this is the ideal, but far from the reality.¹⁰⁰ As a result, she argues that we need to deal with this reality, that most still live in households that have division of labor and household services which is not equal.¹⁰¹ It is essential, she says, that society respond to this vulnerability, if society is going to continue to allow this unequal division of labor.¹⁰² Laws need not and should not be designated in accordance with sex, but in terms of different roles performed.¹⁰³

Using the law as a teacher will be the beginning of a path toward empathy—showing people how they should relate to each other. Being able to abstract from our own situation and to think about issues from the points of view of others who are different from ourselves is essential to reaching just principles and results.¹⁰⁴

⁹⁸ *Id.*

⁹⁹ Williams, *It's Snowing Down South*, *supra* note 25, at 830.

¹⁰⁰ OKIN, *supra* note 54, at 180.

¹⁰¹ *Id.*

¹⁰² *Id.* at 182-83

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Looking to the public assistance available for families and spouses of people in the military, there is no better example of how Fineman's proposals are in action today. People have strong feelings typically one way or the other about military service, and the goals and objectives that the military seeks to pursue. A lot of citizens disagree with the political decisions that involve using military action overseas—yet surprisingly public support for the troops and their families is relatively uniform and people generally see their service as a positive contribution to society, regardless of any disagreement with the use of military force itself. This is very interesting—people usually don't inquire into whether the benefits are being used in the way they are intended, or whether military spouses are using the support to stay at home with their children or go into the workforce. There is something about those who serve in the military that makes us generally feel like they, and their families, deserve to have support from society as a whole, without scrutinizing their choices.

As was mentioned in the Introduction, usually the benefits military families receive include federal subsidies for high-quality childcare, help finding a childcare center in local areas, and help for both reserve and active duty military families with temporary childcare in emergency situations.¹⁰⁵ In addition, spouses themselves receive benefits from the government as well, including education and training programs to help them develop their market skills while their spouse is away. In his recent State of the Union Address, President Bush called for Congress to create even more programs for military spouses—including hiring preferences for

¹⁰⁵ In researching military family benefits, most of the applications for benefits were password protected, but the overview of benefits available on the website appeared not to be based on the income or need, but the level or amount of benefits changed based on whether the service person was on active duty or reserve. Information is available at <http://www.naccrra.org/MilitaryPrograms/>.

government jobs for spouses as well as the ability to give unused college credits to the soldier's spouse or child if the soldier is not going to use them.¹⁰⁶

The positive response to public assistance has a direct connection to the government stepping in and sending the message that yes, these people are providing a valuable service to our society at large, even if you may not agree with the political decisions that have been made which created the need for the service in the first place. By sending that message, the people more easily put themselves in the shoes of the military spouse, and realize that military families are incurring dependency so that our country can continue to be a free and safe place to live. Essentially the government is placing value on the services of not only the soldier, but also those who are at home taking care of the family. This may be because the government is taking responsibility as the cause of the person's dependency—since the soldier is away from home and the country needs a national defense—but there is an important implication in the way society is “paying back” that social debt. The government is not just giving the soldier a straight salary or a bonus every time they go away on active duty. They are giving more than that, like childcare services, job training, and education assistance for their spouses. And as I mentioned before, society for the most part feels the spouses and children are deserving of those things, without judging them on their “choices” or saying ‘Well, they probably deserve a hard life since they knew what they were getting into when they married someone in the military.’

The largest reason that public support for all caretakers has not been received well is because of all of the negative stigma associated with public assistance, along with judgments and stereotypes about stay-at-home moms. Only in cases where society actually takes responsibility for the dependency problems will we then begin to change our perception of caretakers and recognize all the valuable services that they perform. Fineman's arguments have started the

¹⁰⁶ State of the Union Address, *supra* note 2, at 8.

discussion on how the State should take greater responsibility for caretaking costs *in a positive way*, and her ideas are actually in action in the context of military families since they are given a lot of state support, without all of the stigma.

As was emphasized by the President: “Our military families also sacrifice for America. They endure sleepless nights and the daily struggle of providing for children while a loved one is serving far from home. We have a responsibility to provide for them. So I ask you to join me in expanding access to child care, creating new hiring preferences for military spouses across the federal government and allowing our troops to transfer their unused education benefits to their spouses or children. Our military families serve our nation, they inspire our nation, and tonight, our nation honors them.”¹⁰⁷

Conclusion

This paper was not intended to find a solution to the problems associated with caretaking and who should be responsible for the costs. I simply set out to explain why I think that Martha Fineman’s rationale for collective responsibility for dependency arguments is already in play—in the context of benefits for spouses and children of our troops. We are a long way from conferring the same benefits on all persons who have a caretaking obligation, and this is where Fineman probably falls short. In reality, if problems associated with caretaking are going to be adequately addressed, it cannot be through the state alone, or the market or the family alone, the solution needs to incorporate changes in all three institutions. The next analysis of this area should not focus on whether her theory applies or if it is a good one, because it already does apply at least in this context. The next analysis should focus on how it could or should be extended to all caretakers in society.

¹⁰⁷ *Id.* at 6.

Even if people differ in opinion on whether caretakers, especially women, should be at home with their kids or participating in wage labor, or even having kids at all, this does not change the fact that most women will be caretakers at some point and that it puts them at risk. The same social pressures influence both the decision to have children, and the decision not to. Any fair result will have to respect the choices of others, and hopefully will recognize that caretaking labor is valuable work. But it is not just the work of women, or even parents—so an important component is recognizing that there are many different forms of caretaking, and many types of people who do it, in many different situations.

As Susan Okin put it, for those who think public programs will cost too much, we have to ask, “how much do we care about the injustices involved? Are we ashamed that one quarter of our children live in poverty, when we are one of the richest countries in the world?”¹⁰⁸ Until we are able to empathize, any solution will continue to be only partial.

¹⁰⁸ OKIN, *supra* note 54, at 186.