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

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"Government cannot love a child, but it can support those who do, parents and family members and neighbors and caring adults who have heard the call."[1]

INTRODUCTION

The passage of the Family and Medical Leave Act (FMLA)[2] and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[3] which created Temporary Aid to Needy Families (TANF),[4] has worked a hardship on children in the United States. This Article argues that courts are in the best position to narrowly apply an extension of the wrongful discharge tort in recognition of the mandatory parenting duty public policy. The FMLA as enacted provides unpaid leave for parents when their children are sick.[5] However, for parents whose employers do not fall within the purview of the act and parents whose children's illnesses fall outside the FMLA, there is no unpaid leave, only unexcused absences. These parents are caught between the devil and the deep blue sea: they can leave their children alone or be fired. The risks inherent in leaving unattended children in cars or at home while parents work are obvious. Likewise, the loss of income and health insurance

* J.D. 1995, University of Michigan Law School; Assistant Professor, Southeast Missouri State University. The author gratefully acknowledges the 2006 Huber Hurst Research Seminar attendees for their scholarly contributions and the Huber Hurst Seminar for its support. The author also thanks Professors Rafael Gely, Nim Razook, Ruth Benander, Beverly Knauper, Victor Garlin, attorneys, Paul Tobias, Randy Freking, Peter Burr, Sheila Smith, Lee Hornberger, and her graduate assistants Jennifer Cross and Gwenda Bennett.

1. President George Bush, Remarks on Signing the Promoting Safe and Stable Families Legislation (Jan. 17, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/20020117-6.html. Interestingly, President Bush's idea of promoting families is "helping children grow up in secure and loving families by encouraging adoption, by helping young adults make their way in life after they leave foster care, and by expanding mentoring for children who have a mom and dad in prison." *Id.*

2. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-2654 (2000).

3. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C).

4. *Id.*

5. 29 U.S.C. § 2612 (2000).

benefits attendant to employment termination is clear. The less evident peril is the TANF dictated loss of work-first government welfare benefits when parents are fired.[6] TANF authorizes states to impose harsh financial sanctions, including cutting off entire families from aid for violating work requirements.[7] The collision of these two federal laws—a policy driven work-first TANF requirement that cuts off funding for children if their parent does not go to work, with the short-term illness gaps in FMLA coverage that allow employers to fire parents for staying home with sick children—combine with the employment-at-will doctrine to jeopardize the well-being of children and families.

Traditionally, multiple statutory and common-law developments have mitigated the harsh effects of the employment-at-will doctrine. This Article examines the importance of narrowly extending a common-law cause of action, wrongful discharge in violation of public policy, to instances where an employee engages in mandatory parenting duty. Part I discusses the changing face of employees as the number of working mothers increases, the importance of the employment relationship, and treatment of parenting leave under the FMLA. Part II reviews the traditional public policy exceptions to employment terminations without cause. Part III justifies extension of the cause of action to mandatory parenting duty based upon fundamental public policy as found in statutory enactments and court decisions. Part IV justifies extension of the tort based upon the third-party effects on children when parents must choose between leaving children alone and being fired. Part V defines mandatory parenting duty.

I. CHANGING DEMOGRAPHICS AND FMLA EFFECTIVENESS

Employees in the United States have changed since the 1800s when the employment-at-will doctrine slipped into this nation's law through Horace Gay Wood's faulty scholarship.[8] The employment-at-will doctrine states that an employee may be fired at any time for any reason, and an employee may quit at any time for any reason.[9] The doctrine appears symmetrical yet is deceptively unequal in effect. When an employee is fired, he or she loses income, the ability to provide food and housing for his or her children, and health insurance coverage. The impact on a business when an employee resigns is not as

6. Vicki Lens, *Work Sanctions Under Welfare Reform: Are They Helping Women Achieve Self-Sufficiency?*, 13 DUKE J. GENDER L. & POL'Y 255, 255 (2006).

7. *Id.* at 259-60.

8. Theodore J. St. Antoine, *You're Fired!*, 10 HUM. RTS. 32, 33 (1982). *See also* H. WOOD, MASTER AND SERVANT § 134 n.5 (1877) (the four American cases cited in footnote 5 do not support the doctrine); J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 & nn.50-54 (1974); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 & n.12 (1976). *But see* Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L. J. 551, 554 (1990).

9. *See, e.g.*, Summers, *supra* note 8, at 484-85.

severe.[10] Scholars criticize Wood's citation to four American cases,[11] because these cases do not hold as Wood claimed—that an employer has a right to fire an employee at any time.[12] An unanswered question surrounding Wood's mistaken citation as authority for the employment-at-will doctrine in the United States is how his treatise came to be so widely followed.[13] Given that the widespread adoption of the doctrine is based upon flawed scholarship, and given the multitude of changes in the American employment arena since the doctrine's inception, this Article argues that courts should adopt the pragmatic approach of legal realists, and consider whether the doctrine should remain sacrosanct.

The most shocking change since Wood's 1877 treatise is the dramatic increase in the number of women working throughout their child-bearing and child-rearing years.[14] The total number of women in the workforce increased almost 200% between 1950 and 1990.[15] The percentage of women in the workforce between the ages of twenty-five and fifty-four increased from 19% in 1900 to 74% in 1993.[16] Sixty-four percent of women with children under six are now employed.[17]

The structure of U.S. families has also changed. Only one quarter of U.S. families are "traditional," that is, married parents with children.[18] In 64% of families that include married couples with children under eighteen, both parents work.[19] By 1996, only 16.7% of U.S. families followed the traditional model of a working husband and a stay-at-home wife.[20] With one of two marriages ending in divorce,[21] the concept of contemporary U.S. employees must include those from single-parent/single-income families as well as those from dual-parent/dual-income families.

In addition to the changing demographics of working people, the relative importance of their employment has also changed since the 1800s. In the 1950s, one author wrote:

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10. The business is merely inconvenienced by the necessity of hiring a replacement.

11. DeBriar v. Minturn, 1 Cal. 450 (1851); Wilder v. United States, 5 Ct. Cl. 462 (1869), *rev'd*, 80 U.S. (1 Wall.) 254 (1871); Tatterson v.Suffolk Mfg. Co., 106 Mass. 56 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871).

12. *See, e.g.*, Summers, *supra* note 9, at 485.

13. Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 126-27 (1976).

14. Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J. L. REFORM 131, 133 (1995-96).

15. *Id.*

16. *Id.*

17. *Id.*

18. TAVIA SIMMONS & GRACE O'NEILL, U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2000, at 2-3, 7 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf.

19. *Id.*

20. Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 55 (1998).

21. *Id.*

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands. [22]

Always significant as a means to provide food and shelter, employment in the United States also provides families with their primary access to medical insurance.[23] By the year 2000, 64% of U.S. families were covered by employer-provided health insurance.[24]

For less financially-advantaged families, while employment wages are crucial, they are simply not enough. For example, a minimum-wage-earning single parent needs to work two and a half full-time jobs in order to provide an apartment for her or his family.[25] Even with two full-time jobs, there is no money for food, let alone childcare or healthcare.[26] This provides the same standard of living a French woman would have enjoyed in the year 1785![27] In 2003, over 14.8%, or 8.8 million, employees lived in poverty,[28] despite their employment earnings.[29] More than half of the 32.5 million people classified as poor lived in a household with someone who was working.[30] About 40% of female heads of poor families worked at least part-time.[31]

Despite the number of parents who are working in poor families, children in the United States are shockingly poor.[32] Nearly one-fourth of children in this

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22. FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).

23. Lois Galluzzo, *Perverse Incentives for Employers: The Sickening Co-Existence of the Employment-At-Will Doctrine, Health Finance Policy, and Labor and Employment Statutes*, 13 DIGEST 51, 53 (2005).

24. *Id.* at 55.

25. Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 559 (2003).

26. *Id.*

27. *Id.*

28. U.S. CENSUS BUREAU, 2006 STATISTICAL ABSTRACT: THE NATIONAL DATA BOOK (2006), *available at* http://www.census.gov/compendia/statab/2006/tables/06s0697.xls (follow "697-Work Experience During 2003 by Poverty Status, Sex, and Age: 2003"). In 2006, the poverty line was defined as $20,000 annual income for a family of four. U.S. Dep't of Health & Human Servs., The 2006 HHS Poverty Guidelines, http://aspe.hhs.gov/poverty/06poverty.shtml (last visited Mar. 18, 2007). However, given the high costs of medical care and housing (in some areas), some argue that the income level should be higher. *See, e.g.*, Catherine S. Chilman, *Working Poor Families: Trends, Causes, Effects, and Suggested Policies*, 40 FAM. REL. 191, 191 (1991).

29. Chilman, *supra* note 28, at 192.

30. *Id.*

31. *Id.*

32. *See* Mary Becker, Commentary, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1498 (2001).

nation live in poverty.[33] Children are more likely to be poor in the United States than in other countries with similar economies, and the poverty rate of women compared to men is higher in the United States than in other similar countries.[34] Single women who head households with children under eighteen are much more likely to be poor than married women whether they are African American, Hispanic, or non-Hispanic white.[35] They are also much more likely to be poor than single African American, Hispanic, or non-Hispanic white men who head households with children under eighteen.[36]

Government-provided welfare benefits do little to alleviate the poverty problem despite employing parents in poor families.[37] For single-parent families, recent changes in the administration of welfare benefits and the Foodshare program can leave a parent who loses a job unable to provide food for her or his children.[38] Especially in a single-income family at the lower end of the wage scale, employment termination has significant negative consequences for children.[39] Employment termination under recent reforms often results in losing welfare benefits.[40]

Not only does employment termination deepen already impoverished conditions for children and deprive them of food and shelter, it can also result in increased child abuse.[41] The unemployment period following job termination is associated with an increased risk for physical and psychological disorders, violence in the family, family breakup, suicide attempts, and criminal convictions.[42] Children exposed to parental unemployment suffer longer periods of hospitalization, lower high school graduation rates, and higher unemployment rates themselves.[43] Reported rates of child abuse and neglect

33. *Id.* at 1537.

34. *Id.*

35. *Id.* at 1536.

36. *Id.*

37. *See id.* at 1536-37 (charting family poverty rates after benefits have been received).

38. *See* Randal S. Jeffrey, *The Importance of Due Process Protections After Welfare Reform: Client Stories From New York City*, MD. L. REV. 123, 160 (2002).

39. Becker, *supra* note 32, at 1495.

40. Christine N. Cimini, *The New Contract: Welfare Reform, Devolution, and Due Process*, 61 MD. L. REV. 246, 246 (2002) ("[E]ach recipient must be engaged in a work-related activity within twenty-four months of receipt of assistance . . . ."); Karen Syma Czapanskiy, *Parents, Children, and Work-First Welfare Reform: Where is the C in TANF?*, 61 MD. L. REV. 308, 311 (2002) ("[W]elfare reform has meant putting work first and connections between mothers and children last, as if the parent-child connections are nearly irrelevant."). According to attachment theory research, a child's long-term success as an adult is based upon the deep original connection, or attachment, with his or her parent. Czapanskiy *supra* at 311 n.8. *See also* attachment theory sources cited *infra* note 252.

41. Laura Ann McCloskey, *The "Medea Complex" Among Men: The Instrumental Abuse of Children to Injure Wives*, 16 VIOLENCE AND VICTIMS 19, 20 (2001).

42. Mogens Nygaard Christoffersen, *Growing up with Unemployment: A Study of Parental Unemployment and Children's Risk of Abuse and Neglect Based on National Longitudinal 1973 Birth Cohorts in Denmark*, 7 CHILDHOOD 421, 436 (2000).

43. *Id.* at 436-37.

are twenty-two times higher for children in families with annual incomes under $15,000 than they are for children in families with annual incomes greater than $30,000.[44] It is well-established that child abuse is related to low income rates.[45] Even child sexual abuse is strongly related to low income rates.[46]

In summary, the gender, work-related parenting issues, and socio-economic reality of employees and their children have changed dramatically over the last forty years. Despite the dramatic increase in the number of mothers in the workforce, women and their children in the U.S. are poorer than women in comparable nations.[47] Employment termination can correspond with termination of government-provided income support, depriving children of basic sustenance.[48] Losing a job and becoming unemployed also correlates with increased child abuse.[49] The risks are especially high for children in lower income families.[50]

II. FEDERAL LAW OVERVIEW

Both the FMLA and PRWORA impact a parent-employee's ability to care for a sick child. However, the states have created an untenable situation for many parents, especially parents faced with financial sanctions under PRWORA. Due to the failure of federal legislation to protect children and place family values first, the courts should extend the wrongful discharge tort in violation of the public policy of engaging in mandatory parenting duty.

A. Parenting Leave under the FMLA

In 1993, proponents of the Family Medical Leave Act emphasized that as a matter of basic policy, U.S. workers should not be forced to choose between caring for their loved ones and their jobs.[51] The FMLA as enacted provides twelve weeks of unpaid leave when a child is born or adopted.[52] The same amount of time can be taken to care for a family member with a serious illness.[53] Scholars argue that the success of the statute in achieving its stated purposes is still being determined through litigated cases.[54] Other scholars

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44. Naomi R. Cahn, *Battered Women, Child Maltreatment, Prison, and Poverty: Issues for Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 355, 362 (2003).

45. Leroy H. Pelton, *The Role of Material Factors in Child Abuse and Neglect*, *in* PROTECTING CHILDREN FROM ABUSE AND NEGLECT: FOUNDATIONS FOR A NEW NATIONAL STRATEGY 131, 131-42 (Gary B. Melton & Frank D. Barry eds., 1994).

46. *Id.* at 135.

47. Keller, *supra* note 25, at 559.

48. Jeffrey, *supra* note 38, at 160.

49. *See infra* Part III.

50. *See infra* Part III.

51. Malin, *supra* note 14, at 132.

52. 29 U.S.C. § 2612(a) (2000).

53. *Id.*

54. *E.g.*, Rafael Gely & Timothy D. Chandler, *Maternity Leave Under the FMLA: An Analysis of the Litigation Experience*, 15 WASH. U. J.L. & POL'Y 143, 145 (2004).

point out the inadequacy of the FMLA in resolving the majority of conflicts between child-rearing or parenting and work and advocate creating discrimination-based treatment to resolve these conflicts.[55] Other authors argue for a "reasonable accommodation" approach for parenting leave.[56]

Studies indicate that many working parents lack the requisite workplace flexibility to attend to routine child care demands such as parent-teacher conferences, staying home with a sick child, taking a child for routine medical and dental visits, and caring for a child when childcare arrangements unexpectedly fail.[57] While the FMLA allows for leave related to child-bearing, it does not assist parents when they need leave for child-rearing.[58] The demographic changes in working populations have left no one at home. Critical problems for working parents arise when their children are too sick to go to group childcare. In a highly mobile society, the mothers, aunts, grandmothers, and other female relatives, once available for help, are often miles away.[59] The 1950s ideal of the always-smiling, always-available mother does not consistently exist today. Therefore, when children are too sick for school or day care and especially when their participation in group care makes them particularly susceptible to contagious illnesses—such as colds, flu, and pinkeye—parents are forced to choose between work and child care.[60] The FMLA provides no leave for any of the aforementioned illnesses.[61] The FMLA as enacted also provides no relief for parents who work second or third shift, cannot place their child into a group care situation, and must rely on babysitters who may not show-up responsibly.[62]

The FMLA was intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.[63] When Congress passed the FMLA, members expected that employers would

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55. *E.g.*, Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 615, 619 (2002).

56. *E.g.*, Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1465 (2001).

57. Smith, *supra* note 55, at 618.

58. Smith, *supra* note 56, at 1444-45.

59. ROSILAND C. BARNETT & CARYL RIVERS, SHE WORKS HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER-OFF 3-4 (1996).

60. In reality, there are often no alternatives to staying home with a child instead of going to work. Even if a parent can rely on a neighbor who does not work, it would take an extraordinarily generous person to take in a vomiting child, a child screaming in pain from an ear infection, a highly contagious child, or one in desperate need of parental monitoring because he or she has an ear-infection-related temperature of 102 degrees.

61. H.R. REP. NO. 103-8, pt. 1, at 40 (1993) ("The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies.")

62. *See* 29 U.S.C. § 2601(a)-(b) (2000). The statute does not mention childcare issues. It only provides leave to care for children with serious medical conditions.

63. 29 C.F.R. § 825.101(a) (2006).

provide short-term sick leave to cover parenting duties such as caring for children with colds, flues, ear infections, and pink eye.[64] However, employer-provided sick leave is not filling in the gaps left by the FMLA. Only 28% of parents who need this type of leave work for employers who provide sick leave.[65] Additionally, instead of reasonably accommodating these parents, especially parents of younger children who cannot be left home alone with a fever, employers fire parents who miss work.[66] Lower-income parents, whose children are at the greatest risk of child abuse and neglect, are more likely to be fired than higher-income parents.[67]

In at least three cases, mothers were fired for staying home to care for young children with ear infections.[68] In *Caldwell v. Holland of Texas, Inc.*, *Brannon v. OshKosh B'Gosh, and Seidle v. Provident Mutual Life Insurance Company*, the courts arrived at three different conclusions when mothers were terminated.[69] In *Caldwell*, the court remanded the case for further determination of whether a three-year-old child's ear infection met the FMLA definition of "serious health condition."[70] In *Brannon*, the court found that an ear infection met the FMLA definition.[71] In *Seidle*, the employer fired Ms. Seidle, a mother who stayed home for four days to care for her son's ear infection.[72] The District Court for the Eastern District of Pennsylvania found

64. H.R. REP. NO. 103-8, pt. 1, at 40 (1993) ("The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies.").

65. *See* S. Jody Heymann et al., *Parental Availability for the Care of Sick Children*, 98 PEDIATRICS, Aug. 1996, at 226, 226.

66. *See, e.g.*, Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238 (E.D. Pa. 1994). *See also* RANY ALBELDA & CAROL COSENZA, PARENTS UNITED FOR CHILD CARE, CHOICES AND TRADEOFFS: THE PARENT SURVEY ON CHILD CARE IN MASSACHUSETTS 12 (2000) (low-income parents are more likely to be fired or forced to quit a job because of childcare concerns); JODY HEYMANN, THE WIDENING GAP: WHY AMERICA'S FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 231 (2000) (76% of the working poor lacked sick leave at least part of the time during a seven-year period, and 45% lacked sick leave throughout all seven years).

67. ALBELDA & COSENZA, *supra* note 66, at 12.

68. Caldwell v. Holland of Tex., Inc., 208 F.3d 671 (8th Cir. 2000); Brannon v. OshKosh B'Gosh, Inc., 897 F. Supp. 1028 (M.D. Tenn. 1995); *Seidle*, 871 F. Supp. 238.

69. *Caldwell*, 208 F.3d at 677 (reversing the lower court's grant of summary judgment for defendant employer and holding plaintiff presented sufficient evidence to create a question of fact as to whether her son's ear infection was a serious medical condition under the FMLA); *Brannon*, 897 F. Supp. at 1029 (ear infection is a serious medical condition under the FMLA); *Seidle*, 871 F. Supp. at 246 (ear infection is not a serious medical condition under the FMLA).

70. *Caldwell*, 208 F.3d at 677.

71. *Brannon*, 897 F. Supp. at 1029.

72. *Seidle*, 871 F. Supp. at 240.

> The facts concerning Terrance's illness are as follows: On October 11th, between 11:30 p.m. and 12:00 a.m., Terrance awoke from his sleep and began to vomit and experience symptoms of fever and a runny nose. . . . His temperature at that time was "about 100 degree". (sic) . . . [Ms. Seidle] gave Terrance "some

that Ms. Seidle's leave was not covered under the FMLA because it was to care for a minor condition.[73] A minor condition is the type of illness Congress believed would be covered under an employer's sick leave policy.[74] Rather than behave as Congress expected and provide sick leave or even unpaid leave, Provident, Ms. Seidle's employer, applied the at-will doctrine to fire Ms. Seidle for staying at home with her sick child.[75]

The *Seidle* court also found that, despite the potential severity of an ear infection, it did not qualify as a serious health condition under the FMLA.[76] Thus, parents can be fired without recourse for missing work to care for a child with an ear infection. It should be noted that one of the primary causes of illness for children under two is ear infections.[77] In 1990, ear infections were the second most common reason people with young children visited doctors.[78] Between 1975 and 1990, visits to the doctor for ear infections increased 224%.[79] Sixty-two percent of children in the U.S. have a significant ear infection before their first birthday; while 81% have one by age three and 91% by age five.[80] The peak incidence of ear infections is between six and eighteen months.[81] As children age, their Eustachian tubes grow, and they no longer get ear infections.[82] Symptoms range from mild fever (precluding group care), irritability, ear-tugging, and insomnia to hearing loss, high fever, and severe pain.[83]

Despite the prevalence of this condition, no relief is in sight through the FMLA for parents of children with ear infections. Senate Bill 320 and House Bill 35 propose changes that specifically exclude ear infections from the

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> Tylenol" which Terrance also vomited. . . . On October 12, 1994, at approximately 2:00 a.m., Terrance's temperature had risen to 102 degree (sic).

Id. (citations omitted).

73. *Id.* at 246.

74. *Id.*

75. *Id.* at 240. The cost of one unexcused absence to an employer is estimated at $100. Joseph R. Meisenheimer II, *Employee Absences in 1989: A New Look at Data from the CPS*, MONTHLY LABOR REVIEW 28-33 (1990). The four days Ms. Seidle was absent thus cost Provident approximately $400. Therefore, the business decision to terminate Ms. Seidle for engaging in the socially desirable activity of caring for her child and consequently paying for litigation through the federal appellate court system is simply not a sound one.

76. *Seidle*, 871 F. Supp. at 246.

77. Betsy A. Lehman, *Earaches: More Trips to Doctor*, ST. LOUIS POST-DISPATCH, Jan. 9, 1993, at 1D.

78. David Brown, *When Children Get an Earful; Ouch! Infections on the Rise; Simple Detection Down the Tube*, WASH. POST, Mar. 12, 1994, at A1.

79. Lehman, *supra* note 77, at 1D.

80. Bob Condor, *An Alert on Ear Infections; Doctors Counsel Sparing Use of Antibiotics to Combat the Common Malady*, CHICAGO TRIBUNE, Oct. 31, 1999, at 3.

81. *Id.*

82. *Id.*

83. *Id.*

qualifying category "serious medical condition."[84] Although ear infections are the most prevalent and painful type of childhood illness not covered under the FMLA, the Department of Labor regulations also ordinarily exclude, "unless complications arise, the common cold, [and] the flu . . . ."[85] Keep in mind that a flu patient may be ill for a week. The regulations do not mention other common childhood illnesses such as diarrhea, chicken pox, and pinkeye,[86] which may require exclusion from childcare, yet not involve treatment by a health care provider. Again, the assumption Congressmembers at the time the bill was debated was that employers would not fire parents who have periodic needs to stay home and care for children with common childhood illnesses.[87] Therefore, the mandatory parenting duty public policy exception should be expanded by the courts because Congressional intent was clear; it is merely employers who are failing to meet Congressional expectations.

B. Work First, Parenting Last under the PRWORA

In 1996, President Clinton signed PRWORA, which substituted the TANF program as the successor to Aid to Families with Dependent Children (AFDC), the primary cash welfare payment program for children.[88] PRWORA established work requirements for recipients and enforced them through work-participation rate requirements.[89] PRWORA was a dramatic change from AFDC, a program that guaranteed federal money to needy children.[90] Much has been written about the harsh effects of PRWORA's state administered financial sanction when work rules are violated.[91] In addition, all but three states have sanctions that are harsher than the minimum required by federal law.[92] Seventeen states impose an immediate full-family sanction when a recipient fails to comply with the work rules, which means the entire family is

84. Kenza Bemis Nelson, *Employer Difficulty in FMLA Implementation: A Look at Eighth Circuit Interpretation of "Serious Health Condition" and Employee Notice Requirements*, 30 J. CORP. L. 609, 622 (2005).

85. 29 C.F.R. § 825.114(c) (2006).

86. *Id.*

87. *See* H.R. REP. NO. 103-8, pt. 1, at 40 (1993) ("The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies.").

88. Brian L. Wilcox et al., *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996: What Will It Mean for Children?*, *in* CHILDREN, SOCIAL SCIENCE, AND THE LAW 15, 15 (Bettie L. Bottoms et al. eds., 2002).

89. Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children when Contradictory Policies Collide*, 9 WM. & MARY J. OF WOMEN & L. 413, 413 (2003).

90. *Id.*

91. *See, e.g.*, Cimini, *supra* note 40; Czapanskiy, *supra* note 40; Kindred, *supra* note 89; Lens, *supra* note 6.

92. Lens, *supra* note 6, at 259.

cut off from aid.[93] Children in sanctioned families are at increased risk for food insecurity and hospitalizations.[94]

III REVIEWING TRADITIONAL PUBLIC POLICY EXCEPTIONS TO THE AT-WILL DOCTRINE

During the same years—roughly from 1960 to 1990—that the number of women in the workforce increased almost 200% and the majority of mothers with children under six became employed, the public policy exception to the doctrine of the at-will employment rule developed in state courts.[95] Beginning with *Petermann v. International Brotherhood of Teamsters* in 1959, which upheld a right to sue for wrongful discharge in violation of public policy,[96] courts carved out three categories of conduct for which an employee could not be fired—refusing to violate a criminal or civil law on the employer's behalf, satisfying a civil obligation, and exercising protected rights.[97] These categories were so desirable and in accord with the nation's fundamental public policies that employers could not terminate employees for this conduct without being subject to a claim for wrongful discharge in violation of public policy.[98] In most states today, if an employer fires an employee for engaging in one or more of these three types of conduct, the employee can bring an action against his or her former employer.[99] The plaintiff must prove the following four elements in a wrongful discharge case: (1) the existence of a public policy; (2) dismissal under circumstances that jeopardize the pubic policy; (3) that the employer was motivated by conduct related to the public policy; and (4) that the employer lacked an overriding legitimate business justification for the discharge.[100]

The first type of protected conduct that might allow a wrongful discharge claim arises when an employee refuses to violate criminal or civil laws on the employer's behalf.[101] In this category, courts have allowed claims when

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93. *Id.* Federal law prohibits sanctioning clients who do not comply with work rules if they can prove they were unable to obtain childcare for a child under six years of age. *Id.*

94. *Id.* at 263-64.

95. Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 656 (2000).

96. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

97. 82 AM. JUR. 2D *Wrongful Discharge* § 53 (2003). In addition, courts have extended the public policy exemption to the at-will employment doctrine to include cases in which an employee is terminated in retaliation for refusing to engage in antisocial behavior. *See, e.g.*, Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025 (Ariz. 1985).

98. *Id.* § 54 (2003).

99. *See* Ballam, *supra* note 98, at n.69. For an extensive discussion of the various state approaches to the tort, see Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 521 n.18 (2004).

100. Painter v. Graley, 639 N.E.2d 51, 57 n.8 (Ohio 1994) (citing Henry H. Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398-99 (1989)).

101. *Id.*

employees were fired for refusing to engage in price-fixing or insisting on compliance with Food and Drug Administration regulations.[102] Second, courts respect employees who satisfy legal or civic obligations such as participating in jury duty, honoring a subpoena, or refusing to violate a code of ethics.[103] Third, courts have allowed claims when employees were fired for applying for worker's compensation, refusing to take polygraph tests,[104] participating in a union,[105] and exercising their First Amendment right not to participate in lobbying efforts.[106] Finally, at least one court has allowed a claim when an employee was fired because a supervisor wanted revenge when his subordinate refused engage in behavior such as group bathing, heavy drinking, and "mooning" fellow employees on a camping trip.[107]

It is important to remember that these traditional public policy exceptions to the at-will doctrine evolved prior to welfare reforms that allow state caseworkers to require parents to be employed in order to receive the welfare benefits necessary to support their children.[108] Furthermore, the public policy exceptions developed prior to increased dependence on group care for pre-school age children.[109]

IV. JUSTIFYING THE EXTENSION OF THE CAUSE OF ACTION TO MANDATORY PARENTING DUTY BASED UPON FUNDAMENTAL PUBLIC POLICY AS FOUND IN STATUTORY ENACTMENTS AND COURT DECISIONS

Multiple federal and state legislative enactments exist to protect children. In the past, courts have attempted to make a distinction between public and private interests by refusing to allow relief for wrongful discharge if a private

102. *See, e.g.*, Garibaldi v. Lucky Food Stores, Inc. 726 F.2d 1367, 1374 (9th Cir. 1984); Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1331 (Cal. 1980); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 389 (Conn. 1980).

103. *See, e.g.*, Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (S.C. 1985).

104. *See, e.g.*, Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1366 (3d Cir. 1979) (holding that Pennsylvania statute probhibiting employer from requiring polygraph test as a condition of employment was a "recognized facet of public policy").

105. *See, e.g.*, Stepanischen v. Merch. Despatch Transp. Corp., 722 F.2d 922, 932 (1st Cir. 1983) (stating that discharge motivated by anti-union animus would violate public policy); Glenn v. Clearman's Golden Cock Inn, Inc., 13 Cal. Rptr. 769, 798 (Cal. Ct. App. 1961) ("It would be a hollow protection indeed that would allow employees to organize and would then permit employers to discharge them for that very reason, unless such protection would afford to the employees the right to recover for this wrongful act.").

106. Novosel v. Nationwide Ins. Co., 721 F.2d 894, 896 (3d Cir. 1983).

107. Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1029 (Ariz. 1985).

108. All of the public policy cases discussed in this section were decided between 1959 and 1994. Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act in 1996.

109. U.S. Census Bureau, Table 223: Preprimary School Enrollment Summary: 1970 to 2004, *available at* http://www.census.gov/compendia/statab/tables/07s0223.xls.

interest, rather than a public one is at stake.[110] At least one notable scholar, Stewart Schwab, argues persuasively that such a distinction is untenable.[111] However, even if an employee's termination must implicate a public, rather than a private interest, for the exception to apply, the issue of children's support and safety is a public matter that legislatures and courts have historically and consistently regulated.

Perhaps the most important federal legislation in this area is the imperfect FMLA; however, state legislatures have also enacted statutes to protect minors. An example is the Uniform Interstate Family Support Act of 1996, which allows for the original establishment and enforcement of spousal, as well as child support, orders.[112] In addition, both the federal and state legislatures have enacted statutes aimed at preventing child abuse.[113] Besides the FMLA, other federal statutes echo the state goals of aiding and protecting children, including PRWORA;[114] the Child Support Recovery Act of 1992, which criminalizes the willful failure to pay a past due support obligation for a child who resides in another state;[115] and the Deadbeat Parents Punishment Act of 1998, which amended the Child Support Recovery Act to categorize offenses by degrees.[116] State courts repeatedly hold that the government must be "particularly solicitous" of the protection of the interests of minors.[117] Common-law duties

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110. Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1944 (1996).

111. *Id.* at 1950.

112. For an example of one state's version of the uniform code as enacted, see GA. CODE ANN. § 19-11-14 (2004).

113. *E.g.*, Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, *amended and reauthorized by* Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800 (codified at 42 U.S.C. §§ 5102-5119 (2000)). Abuse was defined as any "physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen . . . by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby." 42 U.S.C. § 5102 (Supp. V 1981), *amended and renumbered by* The Child Abuse Prevention Challenge Grants Reauthorization Act of 1989, Pub. L. No. 101-126, 103 Stat. 764. Child abuse or neglect is now defined as "at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm." 42 U.S.C. § 5106g (2000). The statute states that the government's purpose is to assist the States in "the intake, assessment, screening, and investigation of reports of abuse and neglect." 42 U.S.C. § 5106a(a)(1).

114. 42 U.S.C. 601(a)(1) (2000) (one purpose of the TANF program is to "provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives.").

115. Pub. L. No. 102-521, 106 Stat. 3403 (codified as amended at 18 U.S.C. § 228 (2000)).

116. Pub. L. No. 105-187, 112 Stat. 618 (codified at 18 U.S.C. § 228) (increasing penalties under the Child Support Recovery Act of 1992 from misdemeanor to felony and providing for mandatory restitution equal to the total support obligation).

117. *See, e.g.*, Peoples-Home Life Ins. Co. v. Haake, 604 S.W.2d 1, 6 (Mo. Ct. App. 1980) ("[C]ourts are and should be particularly solicitous of the protection for and in the interest of minors . . . ." (citation omitted); Wilkes v. Brennan, 52 A.2d 69, 71 (N.J. Ch.

of parents are recognized in most states as including a duty to support and maintain minor children.[118] Desertion and neglect of children are criminal in most states.[119]

State courts traditionally hold that the state is in a position of *parens patriae* to minors.[120] The state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents.[121] Each state has a compelling interest in the welfare of its children.[122] Each state has a duty to assure that the children within its borders receive adequate care and treatment.[123] In exercising its power of protection, most states emphasize that it is paramount that their law and policy reflect the child's best interest.[124]

At least three cases support an extension of the wrongful discharge tort to cover mandatory parenting duty based upon public policy as it is found in federal and state statutory enactments.[125] In the first case, *Hundley v. Dayton Power and Light Co*., the court declined to find a public policy against terminating employees who need leave to care for sick family members.[126] B. Douglas Hundley, a Dayton Power and Light Company employee, was in a serous car accident with his wife and two children.[127] Mr. Hundley's wife was hospitalized, while his two children were allowed to go home.[128] His wife remained in the hospital for months.[129] He asked his supervisor for two months leave to take care of his children who would be left without care while their mother was in the hospital and to take care of his injured wife.[130] Dayton Power fired him, maintaining that it could not keep his job open for the length of time he requested.[131] However, this argument appears specious because his supervisor absorbed his duties and his position was never filled.[132]

1947) ("This court is particularly solicitous to safeguard the interests of infants . . . ."); *In re* Paul H., 365 N.Y.S.2d 900, 903 (N.Y. App. Div. 1975) (holding the minor was denied his right to counsel because "[w]hen dealing with an infant, courts should be particularly solicitous to protect his rights and, in such cases, a '"heavy burden" rests on the state to show a genuine waiver.'") (citation omitted).

118. 59 AM. JUR. 2D *Parent and Child* § 49 (2002).

119. 23 AM. JUR. 2D *Desertion and Nonsupport* § 1 (2002).

120. 42 AM JUR. 2D *Infants* § 13 (2000).

121. *Id.* §§ 13-14.

122. Ridenour v. Ridenour, 901 P.2d 770, 773 (N.M. Ct. App. 1995).

123. 42 AM JUR. 2D *Infants* §§ 13-14.

124. Reuter v. Reuter, 649 A.2d 24, 33 (Md. Ct. Spec. App. 1994).

125. Lloyd v. AMF Bowling Ctrs., Inc., 985 P.2d 629 (Ariz. Ct. App. 1999); Upton v. JWP Businessland, 682 N.E.2d 1357 (Mass. 1997); Hundley v. Dayton Power & Light Co., 148 Ohio App.3d 556, 2002-Ohio-3566, 774 N.E.2d 330.

126. *Hundley*, 774 N.E.2d 330, ¶ 22.

127. *Id.* ¶ 2.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

At the time of the car accident, Hundley had been employed for less than twelve months.[133] If he had been employed for twelve or more months, his leave would have been covered by the FMLA.[134] Since the leave he requested was not covered, Hundley argued that his termination was in violation of public policy as expressed in the FMLA and in multiple Ohio statutes.[135] First, Hundley argued public policy should apply because FMLA shows Congress believes it is important for parents to be able to care for family members who have serious health conditions.[136] The Ohio Court of Appeals did not agree, holding that the FMLA only attempted to balance the parenting interests of "long-term" employees with an employer's needs.[137] Therefore, Hundley's need to parent his children while their mother was in the hospital was outside any policy embodied in the FMLA because the FMLA is only concerned with long-term employees.[138]

Additionally, Hundley asked the court to find that Ohio supported a public policy that individuals should care for sick relatives.[139] He referred to three Ohio statutes that allowed state employees additional leave, beyond the minimum leave provided to all employees, to care for sick relatives.[140] First, he cited the Ohio Revised Code Section 124.38, which afforded employees of various county, municipal, and township offices; state universities; and boards of education the opportunity to use sick leave for absence due to illness, injury, or death in the employee's immediate family.[141] Second, Hundley cited Ohio Revised Code Section 1515.091, which allowed state employees to donate sick leave to cover approved unpaid leave used to care for a sick relative.[142] Third, Hundley pointed to Ohio Revised Code Section 3319.141, which allowed employees of boards of education to use sick leave when a member of their immediate family was ill, was injured, or had died.[143] In addition, Hundley also cited Ohio Code Section 2111.08, which charged husbands and wives with caring for their minor children and each other, and Section 3103.03, which mandated that parents support their minor children.[144]

When the state of Ohio is an employer, it will not terminate employees who need leave to care for injured family members.[145] Ohio provides for employees to use their own leave time to care for sick family members.[146] The

133. *Id.* ¶ 17.
134. *Id.*; 29 U.S.C. § 2611(2) (2000).
135. *Hundley*, 774 N.E.2d 330, ¶ 17.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* ¶ 18.
140. *Id.* ¶ 19.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* ¶ 22.

state even allows employees to donate leave time when a fellow employee needs additional time off.[147] Despite this model of employer conduct provided by the state, the court declined to find a public policy against terminating employees who need leave to care for sick family members.[148]

The Ohio court is not alone in refusing to extend the wrongful discharge tort to situations in which parental duty requires parents to miss work. In the second case, *Upton v. JWP Businessland*,[149] the Supreme Court of Massachusetts refused to extend the tort to cover mandatory parenting duty because the employment-at-will doctrine allowed employers the right to fire employees at any time and for any reason.[150] Ms. Upton, a divorced, single mother, who provided the sole financial support for her young son, argued that her employer's requirement that she work from 8:15 a.m. until 10 p.m., Monday through Saturday, caused her to fail in her responsibilities as a mother.[151] When she requested reasonable hours so she could parent and work, her employer fired her.[152] Interestingly, when she initially took the position, her employer had promised she would only work from 8:15 a.m. until 5:30 p.m.[153] The *Upton* decision, which upheld the sanctity of at-will terminations, contradicts the state of Massachusetts' holdings in matters of unemployment compensation when domestic responsibilities limit an individual's availability to work.[154] Therefore, under state law, Ms. Upton could collect unemployment compensation while she looked for a new job.[155]

In the third case, *Lloyd v. AMF Bowling Ctrs., Inc.*,[156] the court found that Mr. Lloyd's refusal to attend work because he would not leave his children home alone was not covered by Arizona's public policy exception.[157] This public policy exception stated that employers cannot terminate employees who refused to commit wrongful acts.[158] Mr. Lloyd, a bowling alley mechanic, refused to work on a Saturday that he was not regularly scheduled to work because he would not leave his two youngest children home alone.[159] Mr. Lloyd attempted to find a babysitter, but he could not find one.[160] His employer fired him when he came to work on Monday.[161] Lloyd argued that leaving his children unattended would have been a criminal act pursuant to Arizona

147. *Id.* ¶ 19.
148. *Id.* ¶ 22.
149. 682 N.E.2d 1357 (Mass. 1997).
150. *Id.* at 1360.
151. *Id.* at 1358.
152. *Id.*
153. *Id.*
154. *See id.* at 1359-60.
155. *Id.* at 1360.
156. 985 P.2d 629 (Ariz. Ct. App. 1999).
157. *Id.* at 632.
158. *Id.* at 631-32.
159. *Id.* at 630.
160. *Id.*
161. *Id.*

Revised Statutes Annotated Sections 13-3619 (neglect) and 13-3623 (child abuse).[162] These statutes make it a criminal offense for a person with custody of a minor to knowingly cause or permit the minor to be injured; or allow the minor's moral welfare to be imperiled by neglect, abuse, or immoral associations; or permit a child to be placed in a situation where his or her person or health is endangered.[163] In support of its ruling, the appellate court cited the Arizona Supreme Court's decision in *Wagenseller v. Scottsdale Memorial Hospital*.[164] In that case, the court set out a narrow public policy exception to the termination of at-will employment.[165] Following *Wagenseller*, the public policy exception applied only if the employee was fired for refusing to commit a wrongful act or for refusing to condone a wrongful act by the employer.[166]

The *Lloyd* court held that Mr. Lloyd's termination did not fall within the public policy exception because his employer did not ask him to commit a wrongful act.[167] Mr. Lloyd argued leaving his children unattended would have been a wrongful act.[168] However, the court saw the only act as the employer's request that Lloyd work, since he was never asked to leave the children unattended.[169] The *Lloyd* court's rationale is impossible to sustain. Consider a parallel situation in which an employer requests that an employee work rather than participate in jury duty. The employee would be faced with a choice between not performing jury duty or working. The employer, under the *Lloyd* court's reasoning, has not requested that the employee engage in a wrongful act; it has merely requested that the employee go to work. The *Lloyd* court would thus wrongly hold that the employer did not ask the employee not to participate in jury duty, although that is the obvious consequence.

IV. JUSTIFYING EXTENSION OF THE TORT BASED UPON THE THIRD-PARTY EFFECTS ON CHILDREN WHEN PARENTS MUST CHOOSE BETWEEN LEAVING CHILDREN ALONE AND BEING FIRED

A longstanding rationale for allowing the public policy exception to the employment-at-will doctrine is that when strong third-party effects are evident, the tort of wrongful discharge is appropriate.[170] Tort law should intervene in contractual relationships to ensure that the parties consider the costs they impose on nonparties.[171] Thus, the central purpose of the public policy exception should be to control the adverse effect on third-parties created by

162. *Id.* at 631.
163. *Id.*
164. *Id.* (citing, Wagenseller v. Scottsdale Mem'l Hosp, 710 P.2d 1025 (Ariz. 1985)).
165. *Wagenseller*, 710 P.2d 1025, 1032-36.
166. *Id.* at 1032-33.
167. *Lloyd*, 985 P.2d at 662.
168. *Id.* at 630-31.
169. *Id.* at 632.
170. Schwab, *supra* note 110, at 1945.
171. *Id.* at 1950.

contracting parties.[172] The third-party effects of terminating a parent who misses work because he or she is participating in mandatory parenting duty are visited on the children.[173] This Section considers the effects of the employment contract on children. Parents have to make difficult choices between working and staying home with children. First, this Section considers the third-party consequences when parents choose to work rather than be fired despite a lack of adequate childcare. Second, this Section considers the third party consequences when parents stay home with children and are fired as a result.

A. Third-Party Effects When Parents Must Choose to Work Instead of Engage in Mandatory Parenting Duty

When parents choose to come to work and they have no childcare, children are left alone. On a Saturday night in October of 2003, Kim Brathwaite went to work at McDonalds, leaving her two children, nineteen-month-old Justin and nine-year-old Justina, home alone because the babysitter did not arrive.[174] While Kim was at work, her children died in an apartment fire.[175] Similarly, Tanisha Gill left her two-year-old and four-year-old children home alone and went to work after her babysitter did not arrive and the children's father said he would be right over.[176] Ms. Gill's two-year-old son fell from the balcony of their apartment and died.[177] Finally, Ashante Burgess died at age three after being left in a car while her mother went to her first day of work at a new job.[178] Ms. Burgess' employer told her she needed to show up, or she would be fired.[179]

The most frequent form of child abuse is neglect involving the deprivation of necessities or inadequate supervision.[180] Inadequate supervision in a poor family can be much more dangerous than inadequate supervision in a wealthy family.[181] The poorest families live in homes associated with dangerous conditions.[182] The rate of residential fires is greater in low-income areas than in

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172. *See id.*

173. *See* Wendy Patton & Ross Donohue, *Effects on the Family of a Family Member Being Long Term Unemployed*, 3 J. OF APPLIED HEALTH BEHAV. 31, 31 (2001) ("Families can be seen as a psychosocial system with interactions within (between its members) and between the family and the environment.").

174. Nina Bernstein, *Daily Choice Turned Deadly: Children Left on Their Own*, N.Y. TIMES, Oct. 19, 2003, at 1.

175. *Id.*

176. *Id.* at 42.

177. *Id.*

178. *Child Left in Car Dies: Mother Charged*, ST. PETERSBURG TIMES, Oct. 4, 2002, at 3A.

179. Margaret Newkirk & Bill Montgomery, *Mother Sought "Better Life" in Atlanta; Girl Dies as Mom Works*, ATLANTA J. AND CONST., Oct. 4, 2002, at 1A.

180. Pelton, *supra* note 45, at 150.

181. *Id.* at 149-50.

182. *Id.* at 155.

middle-class neighborhoods.[183] Children from impoverished families are five times more likely to die from fire than children from other families.[184] Cases of childhood lead poisoning are also concentrated in the poorest neighborhoods.[185] In poor neighborhoods, children fall from windows more frequently, they are more likely to be hit by motor vehicles, and crime rates are higher.[186] Thus, careful supervision is more important in low-income neighborhoods than in other neighborhoods that present fewer risks.

Surprisingly, children in lower-income families are less likely to be left home alone than children in middle-class families.[187] This fact possibly equalizes the risk between the two socioeconomic groups.[188] However, the injustice of forcing parents to choose between leaving their children unattended or losing their job and likely their welfare benefits cries out for a judicial remedy.[189] The courts, which are already charged with acting in *parens patriae*, are in the best position to protect children. Moreover, the legislature is unlikely to respond to the largely nonexistent lobbying efforts of poor parents who spend their time working and caring for children.

B. Third Party Effects When Employers Terminate Employees Who Choose Mandatory Parenting Duty Instead of Work

When parents lose their employment, the consequences for their children can be devastating.[190] Children suffer, along with the family, when a parent's income plummets. As unemployment degrades and humiliates parents,[191]

183. *Id.*

184. *Id.* (citations omitted).

185. *Id.* (citation omitted).

186. *Id.* (citation omitted).

187. *Id.*

188. *See id.*

189. Schwab, *supra* note 112, at 1943 ("[T]he law protects the weak.") (citation omitted).

190. Patton & Donohue, *supra* note 173, at 31-39. *Compare* Glen H. Elder, Jr., et al., *Linking Family Hardship to Children's Lives*, 56 CHILD DEV. 361 (1985) (examining the effect on children of fathers' rejecting behavior during periods of economic hardship) *with* Robert H. Bradley & Robert F. Corwyn, *Socioeconomic Status and Child Development*, 53 ANN. REV. OF PSYCHOL. 371, 383 (2002) (asserting that socioeconomic status and genetic makeup affect children's development).

191. Arthur H. Goldsmith et al., *The Psychological Impact of Unemployment and Joblessness*, 25 J. OF SOCIO-ECON., 333, 333-34, 349, 350-51 (1996) (discussing psychological scarring from joblessness and unemployment); Sue J. Hepworth, *Moderating Factors of the Psychological Impact of Unemployment*, 53 J. OF OCCUPATIONAL PSYCHOL. 139, 143-145 (1980) (discussing factors that reduce the negative psychological impact of unemployment); Susan Lewis & Cary L. Cooper, *The Stress of Combining Occupational and Parental Roles: A Review of the Literature*, BULL. OF THE BRIT. PSYCHOL. SOC'Y, 341, 342, 344 (1983) (discussing the benefits of employment for single mothers as having psychological as well as economic consequences); Patton & Donohue, *supra* note 173 (explaining that women and men experience the psychological distress of job loss relatively equally). Longer hours at work protect single mothers from depression, unlike married women for whom longer hours at work were correlated with higher rates of depression.

parents tend to degrade and abuse their children.[192] Factory layoffs and men's job losses have been related to subsequent increases in rates of child abuse, presumably perpetrated by fathers.[193] Unemployed fathers reported significantly more conflict with their children and indicated that they were more likely to hit, slap, or spank their children when compared with an employed control group.[194] Large-scale epidemiological child abuse studies suggest that a higher proportion of abused children's parents, especially fathers, are unemployed, compared to the population at large.[195] In an analysis of over 20,000 cases, 50% of abusive fathers were unemployed during the year they perpetrated abuse, and 12% were unemployed at the actual time of the abuse.[196] "In general, male unemployment rates account for two-thirds of the variance in total abuse and neglect rates, while other factors add little or nothing."[197] Mothers' long-term unemployment has also been linked to child abuse, although at lower and more variable correlations.[198]

In a Wisconsin study of the changes in county unemployment and annual child abuse and neglect rates, nine of the ten counties with the largest increases in unemployment also showed rises in child abuse and neglect.[199] Of the ten counties with the greatest decreases in unemployment rates, eight had declining rates of reported child abuse and neglect.[200] Nearly 70% of the fifty-one counties in Wisconsin with increased unemployment rates reported increases in child abuse and neglect.[201] A family's financial resources may cushion the immediate financial consequences of job loss.[202] Therefore, terminating a poorer parent may have the immediate consequence of increased the risk of

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Lewis & Cooper, *supra*. For a complete discussion of the psychological consequences for the terminated employee, including increased rates of depression, suicide, and physical illness see Thomas Keefe, *The Stress of Unemployment*, 29 SOC. WORK 264 (1984).

192. McCloskey, *supra* note 41, at 21, 33, 35.

193. *Id.* at 20.

194. Patton & Donohue, *supra* note 173, at 32, 33 (citing Clifford L. Broman, et al., *Unemployment and its Effects on Families: Evidence from a Plant Closing*, 18 AM. J. COMMUNITY PSYCHOLOGY 643 (1990)).

195. *See* Bill Gillham et al., *Unemployment Rates, Single Parent Diversity, and Indices of Child Poverty: Their Relationship to Different Categories of Child Abuse and Neglect*, 22 CHILD ABUSE & NEGLECT 79, 79 (1998).

196. *Id.*

197. *Id.*

198. One year of unemployment is associated with an increased risk for physical and psychological disorders, violence in the family, family breakup, suicide attempts, and criminal convictions. Christoffersen, *supra* note 42, at 430. Children exposed to parental unemployment suffer longer periods of hospitalization, fewer of them graduate from high school, and more of them are consequently exposed to unemployment themselves. *See id.* at 421-34; Gillham, *supra* note 195, at 84; Patton & Donohue, *supra* note 173.

199. Pelton, *supra* note 45, at 149.

200. *Id.*

201. *Id.*

202. *Id.* at 150.

child abuse, while terminating a parent with greater resources may delay the risk of child abuse until the family's financial resources are exhausted.[203]

The effect of terminating a lower-income parent has additional consequences that are less serious than child abuse but still damaging to children. In general, poverty has serious adverse effects on both father-child and mother-child relationships.[204] "[M]others and fathers suffering from economic deprivation are apt to be depressed, irritable, and explosive in their marital as well as parenting relationships."[205] They are particularly apt to engage in low levels of supportive and affectionate expressiveness with their children while under severe stress.[206] "Many child development theorists report that warm, sensitive, responsive parenting coupled with a rational disciplinary style facilitates security, self-confidence, an internalized conscience, and cognitive competencies in children."[207]

At least one court has recognized the necessity of protecting children when adjudicating employment disputes.[208] A narrow extension of the wrongful discharge tort to cover mandatory parenting duty is analogous to the *Woodson v. AMF Leisureland Centers, Inc*., case. In that case, the court performed an analysis of the externalities and allowed recovery under the tort.[209] In *Woodson*, a bartender was fired for refusing to serve additional drinks to an individual who was about to drive home.[210] The *Woodson* court allowed the wrongful discharge tort in violation of public policy by relying on a law prohibiting serving drinks to intoxicated persons.[211] The parties to the employment relationship were the bar and the bartender.[212]

The *Woodson* court reasoned that nonparties to the contract needed protection from the potential consequences of the transaction between the bar and its patron.[213] The nonparties in this case were the pedestrians and other motorists who the intoxicated driver could have injured while driving home.[214] Certainly, the purpose of the statute that the bartender obeyed was to protect these third-party individuals.[215] The *Woodson* Court recognized that in

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203. *Id.* ("The effects of unemployment rate increases on children are greatest among the poor.").

204. Chilman, *supra* note 28, at 193.

205. *Id.*

206. *Id.* (citation omitted).

207. Arthur B. Elster & Michael E. Lamb, *Adolescent Fathers: The Under Studied Side of Adolescent Pregnancy*, *in* SCHOOL AGE PREGNANCY AND PARENTHOOD BIOSOCIAL DIMENSIONS 177, 178-79 (Jane B. Lancaster & Beatrix A. Hamburg eds., 1986).

208. Woodson v. AMF Leisureland Centers, Inc., 842 F.2d 699 (3d Cir. 1988).

209. *Id.* at 703.

210. *Id.* at 701.

211. *Id.* at 703.

212. *Id.* at 701.

213. *Id.* at 704.

214. *Id.*

215. *Id.*

extending the tort, it was protecting parties outside the contract.[216] Similarly, state laws are designed to protect children from abuse, neglect, abandonment, and hunger. When parents obey these statutes, they are protecting nonparties to the employment contract. Currently, under the employment-at-will doctrine, parents are not protected from terminations. Accordingly, the courts, who are charged with acting in *parens patriae*, are in the best position to protect children, who as nonparties, need protection from the transaction between the employer and the parent-employee.

V. DEFINING MANDATORY PARENTING DUTY

Accepting the arguments presented in the previous sections—first, that caring for children is a fundamental public policy in this nation, and second, that it is unquestionably justified to allow a wrongful discharge tort in violation of public policy because of the third-party effects upon children when a parent is terminated for engaging in parenting duty—this Section asks what types of parenting duty should be considered so important as to be elevated to a status of "mandatory." This Section proposes that "mandatory" parenting duty be narrowly defined as: (1) occasions when a child is ill and in need of parental monitoring, and (2) occasions when despite his or her best efforts, a parent has to leave a child unattended to come to work. Having to leave a child unattended despite a parent's best efforts to obtain childcare could be the result of being called to work at an unusual time either because the employee does not usually work at that time or because childcare is simply unavailable at that time. A parent may have to leave a child unattended when a child is too ill to attend group care, and no alternative childcare is available.

This Article argues that the courts are in the best position to narrowly apply this extension of the wrongful discharge tort in violation of the public policy of engaging in mandatory parenting duty on a case-by-case basis. In fact, courts have already performed this analysis in determining whether a claimant is entitled to unemployment benefits when her or his separation from employment arises from a conflict between parenting and work.[217] The courts

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216. *Id.*

217. Pohlman v. ERTL Co., 374 N.W.2d 253, 255-56 (Iowa 1985) (finding that plaintiff who had made no effort to find a babysitter or make any other arrangements for the care of the children did not have good cause for quitting employment); Friloux v. Adm'r, Div. of Employment Sec., 136 So. 2d 99, 101 (La. Ct. App. 1962) ("To constitute good cause the circumstances attending the final termination of the employment must be compelling and necessitous . . . ."); Randolph v. N.M. Employment Sec. Dep't, 774 P.2d 435, 440 (N.M. 1989) ("Good cause is established when vast compelling and necessitous circumstances exist such that there is no alternative to leaving gainful employment.") (citation omitted); *In re* Monreale, 670 N.Y.S.2d 938, 939 (N.Y. App. Div. 1998) (finding that claimant who "neither requested a leave of absence nor expended sufficient effort in searching for acceptable child care" left her employment without good cause and was ineligible for unemployment benefits); *In re* Ducat, 647 N.Y.S.2d 125 (N.Y. App. Div. 1996) (holding claimant who "failed to undertake reasonable efforts to secure alternative childcare arrangements" was justifiably denied unemployment benefits); Newland v. Job

have made decisions by determining whether an employee's parenting responsibility is "compelling and necessitous."[218] "Compelling and necessitous" parenting circumstances are those that would compel a reasonable person to terminate his or her employment.[219] Courts have found that a parent's refusal to leave children home alone is a "compelling and necessitous" circumstance.[220] The second factor courts consider in unemployment cases is whether the employee made a good faith effort to resolve the conflict between parenting and work.[221] The *King* court considered the availability of suitable childcare, the cost of childcare, and the amount of time the employee had to arrange for such care.[222] If the employee succeeds in showing that the parenting responsibility is compelling and necessitous and that she or he made a good faith effort to resolve the conflict but was unable to do so before resigning or being terminated, unemployment benefits are awarded.[223]

This Article argues that state legislatures, on the other hand, are unlikely to make any substantive changes to the at-will employment doctrine on behalf of individuals who engage in mandatory parenting duty because: (1) it would disadvantage the state as a host for employers because employers may be able to strike a better deal in another state, and (2) employers are better able to organize lobbying efforts than exhausted working-class parents of preschool-age children.

Service N.D., 460 N.W.2d 118 (N.D. 1990) (holding that although difficulty finding childcare may itself be a condition attributable to the employer, this difficulty may in combination with other factors constitute good cause for quitting attributable to the employer for purposes of resolving an unemployment compensation claim; holding also that a change in employee's schedule was substantial for unemployment benefits purposes); Truitt v. Pa. Unemployment Comp. Bd. of Review, 589 A.2d 208, 210 (Pa. Commw. Ct. 1991) (concluding that the "sudden physical disability" of claimant's babysitter and the inability to secure alternative arrangements after two days of searching created both "real and substantial pressure" on claimant leading her to terminate her employment); King v. Pa. Unemployment Comp. Bd. of Review, 414 A.2d 452, 453 (Pa. Commw. Ct. 1980) (holding that because employee's transfer involved a schedule required employee to find childcare for her two small children, and since she tried unsuccessfully to make childcare arrangements with friends, neighbors, relatives and daycare centers, she established good cause for missing work and denial of unemployment compensation benefits was improper); Wolford v. Pa. Unemployment Comp. Bd. of Review, 384 A.2d 1035, 1037 (Pa. Commw. Ct. 1978) (denying benefits to claimant who failed to demonstrate reasonable attempts to find alternate childcare), *appeal dismissed*, 414 A.2d 129 (Pa. 1980); Brink v. Pa. Unemployment Comp. Bd. of Review, 392 A.2d 338, 340 (Pa. Commw. Ct. 1978) (holding the plaintiff failed to show a good faith effort to find baby-sitter thus refusal of employment on childcare grounds was not justified).

218. *E.g.*, *Friloux*, 136 So. 2d at 101 ("To constitute good cause the circumstances attending the final termination of the employment must be compelling and necessitous . . . .").

219. *Randolph*, 774 P.2d at 440 ("Good cause is established when vast compelling and necessitous circumstances exist such that there is no alternative to leaving gainful employment.").

220. *E.g.*, *King*, 414 A.2d at 454.

221. *Id.*

222. *Id.*

223. *Id.* at 455.

Although some of the cases discussed in this Article involve fathers, for the most part, parents who engage in mandatory parenting duty are mothers. Mothers of very young children have a high absence rate from work.[224] Among married mothers, 11.5% of those whose youngest child was preschool-age were absent from work during an average week.[225] The absence rate dropped to 6% when the children were between the ages of six and seventeen.[226] The same pattern of absences occurs among unmarried women with children.[227]

In contrast, fathers have very low absence rates.[228] Only 3.8% of fathers with preschool-age children are absent from work during an average week as are only 3.7% of fathers with older children.[229] When asked whether the reason for their absence is their "own illness" or "other," the primary reason given by fathers for an absence is their own illness, while the primary reason given by mothers is other.[230] Regardless of the parent's gender, resolving conflicts between work and mandatory parenting duty is gender neutral. Determining whether the parenting duty is mandatory does not rest on whether the father or the mother of the child is involved.[231]

If the *Seidle*, *Hundley*, *Upton*, and *Lloyd* courts had extended the wrongful discharge tort in violation of the public policy to allow a parent to provide mandatory care for children, the *Seidle* and *Lloyd* cases would have been decided differently. For example, in *Seidle*, Ms. Seidle, who was home from work caring for her four-year-old son because of an ear infection that made him too ill to attend day care, [232] would have succeeded in her claim of wrongful termination in violation of public policy. The doctors in the *Seidle* case testified about the nature of ear infections and the care required for children who have them.[233]

> [An ear infection is a] "common but serious condition" which "must be treated promptly after diagnosis because of its potential to produce sequelae that become or may be fatal." . . . the symptoms of otitis media include intermittent or continuous pain and, in children, difficulty with sleep and normal childhood activities. . . "the patient's progress must be carefully observed." . . . "if there is not significant

224. Meisenheimer, *supra* note 75, at 28-29.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. The gender-neutral nature of the tort's extension is an advantage over other proposed legal reforms to the problems of work/parenting conflicts. For an extensive treatment of ten proposed resolutions see Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L. J. 77, 78-80, 122-23, 161 (2003).

232. Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238, 240 (E.D. Pa. 1994).

233. *Id.* at 245.

> improvement in fever and pain after seventy two hours, the patient must be reevaluated to determine whether any secondary condition like meningitis is complicating recovery and whether the treatment plan requires modification." . . . "persistent monitoring of otitis media in young children is highly recommended because of the risks associated with the development of meningitis and hearing loss." . . . [Parents should] "keep the child at home if possible, and monitor progress persistently until the child is eating, playing and socializing appropriately." [234]

Although Ms. Seidle did not argue for an extension of the tort to her case,[235] its application is justified under the first prong of the mandatory parenting duty analysis because the child was ill and in need of parental monitoring. Given the relatively recent phenomenon of ear infections[236] and the enormity of the problem for parents of preschoolers, parenting leave under these circumstances is necessary. It is socially desirable that parents take care of sick children so they do not die or lose their hearing. In addition, it is difficult to find a childcare provider who can provide the level of individual care required for this type of illness. Similar illnesses of short duration that have potentially serious consequences for children should also be included under the first prong of the mandatory parenting duty exception. These short-term but potentially serious illnesses, like ear infections, are not specifically discussed in Department of Labor regulations, and at least one court has found that they are not covered by the FMLA.[237] Therefore, a narrow extension of the tort is warranted to cover mandatory parenting duty. Proceeding to the second prong of the analysis is not appropriate when parental monitoring is required.

The *Lloyd* case would also have been decided differently under the second prong of the mandatory parenting duty exception. The second prong requires the court to determine whether the parent had to leave a child alone and unattended after using his or her best effort to find childcare. Lloyd refused to work when he was called in on a Saturday, during a time he was not regularly scheduled to work.[238] He attempted to find childcare, but no babysitter was available to care for his two-year-old son.[239] Because Lloyd attempted to find childcare but could not and chose to remain at home rather than work for two hours while leaving the child at home, he was fired from work.[240]

On the other hand, the wrongful discharge tort in violation of the mandatory parenting public policy would not have been extended in the *Hundley* and *Upton* cases. Hundley requested two months of leave to care for

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234. *Id.*
235. *Id.* at 238-46.
236. Brown, *supra* note 78; Lehman, *supra* note 79.
237. *Seidle*, 871 F. Supp. at 238.
238. Lloyd v. AMF Bowling Ctrs., Inc, 985 P.2d 629, 630 (Ariz. Ct. App. 1999).
239. *Id.*
240. *Id.*

his children—who were not sick—and his wife, who was hospitalized.[241] No evidence that he attempted to find alternative childcare arrangements was presented.[242] Also, despite the obvious emotional stress of having their mother seriously injured and hospitalized, the children were not so physically ill that they required constant monitoring by a parent for two months.[243] Thus, the requirements of neither the first nor the second prong of the mandatory parenting public policy analysis were met.

Likewise, the facts of the *Upton* case would not have justified the public policy exception based on mandatory parenting duty because the child was not in need of parental monitoring and care due to illness, and the employee did not fail to find alternative childcare despite her best efforts.[244] In *Upton*, Ms. Upton asserted that she could not be a good parent and leave her young child in childcare from 8:00 a.m. until 10:00 p.m.[245] Her son was not ill, so no special circumstances required her to be with him, outside of her laudable desire to be a good parent.[246] Furthermore, she did not argue that no childcare could be obtained from 5:00 p.m. until 10:00 p.m., just that she did not want to be absent from her son fourteen hours each day.[247]

CONCLUSION

A mandatory parenting duty public policy exception should be established by the courts in every state. In doing so, courts will place family values first and insure that children's best interests are protected when employment disputes are adjudicated. At-will employment distributes the costs and consequences of engaging in mandatory parenting duty on the children. Failure to extend the tort to cover mandatory parenting duty means that children will continue to bear the costs and consequences through physical abandonment with its attendant risks when they are left alone, including death. Failure to extend the tort also increases the likelihood of child abuse when parents, especially parents with fewer financial resources, are fired.

Ultimately, society bears the costs when children are abused, regardless of whether the behavior is neglect by an absent parent or abuse by a terminated

241. Hundley v. Dayton Power & Light Co., 148 Ohio App.3d 556, 2002-Ohio-3566, 774 N.E.2d 330, at ¶ 2.

242. *Id.*

243. *See id.*

244. Upton v. JWP Businessland, 682 N.E.2d 1357, 1358 (Mass. 1997).

245. *Id.*

246. *Id.*

247. *Id.* The author notes that in the most serious cases of injury to children left home alone discussed in this Article, if Brathwaite's, Tanisha Gil's, and Nakia Burgess' employers had provided mandatory parenting leave, their children might still be alive. Nor are those the only children who have been lost. Paul Hampel et al., *Deaths Here Demonstrate Dangers of Leaving Kids Home Alone, But Many Parents Say They Have No Choice*, ST. LOUIS POST – DISPATCH, Aug. 19, 2001, at A1.

parent.[248] A narrow extension of the tort will re-distribute the costs of employee absenteeism to the employer. The actual costs of absenteeism that employers will bear—should the courts adopt this extension—can be estimated by reviewing the U.S. Bureau of Labor Statistics.[249] The data indicates that on any given day, 3-7% of a company's workforce will be absent.[250] The Research Institute of America estimates that a single day's absence of a clerical worker can cost a company $100 in reduced efficiency, unrealized opportunities, and increased supervisory workload.[251] The cost appears minor in comparison to the long-term costs to society of child abuse.[252] The cost to

248. The time, money, and care that parents devote to the development of children's capabilities create an important public good whose economic benefits are enjoyed by individuals and institutions that pay, at best, a small share of the costs. Becker, *supra* note 32, at 1531 (citing Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 194 (1999)). Economists define a public good as one 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 others' enjoyment of it). *Id.* Individuals who do not contribute to the production of public goods are likely to ride freely on other people's efforts unless their responsibilities are enforced through explicit laws and rules, including taxes. *Id.* Martha Fineman argues that "caretaking labor preserves and perpetuates society and, therefore, collective response and responsibility is warranted. Because of its public value, caretaking labor creates a societal or social debt . . . ." Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT. L. REV. 1403, 1410-11 (2001). Fineman does not view children as simply a consumption choice by parents, equivalent to the decision to purchase a Porsche. Martha Albertson Fineman, *Symposium: Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER, SOC. POL'Y & L. 13, 21 n.15 (2000) ("[T]he society-preserving nature of children helps to distinguish that preference from the whim of the auto fan.").

249. *Absentee Workers*, 160 INCENTIVE MARKETING, Oct. 1986, at 12, 12.

250. *Id.*

251. *Id.*

252. Heather Bacon & Sue Richardson, *Attachment Theory and Child Abuse: An Overview of the Literature for Practitioners*, 10 CHILD ABUSE REV. 377 (2001); Dante Cicchetti et al., *Research on the Consequences of Child Maltreatment and Its Application to Educational Settings*, 9 TOPICS IN EARLY CHILDHOOD SPECIAL EDUC. 33 (1989); M. Ann Easterbrooks & Christine A. Graham, *Security of Attachment and Parenting: Homeless and Low-Income Housed Mothers and Infants*, 69 AM. J. OF ORTHOPSYCHIATRY 337 (1999); Tamara Kotler & Mary Omodei, *Attachment and Emotional Health: A Life Span Approach*, 41 HUM. REL. 619 (1998); Karlen Lyons-Ruth et al., *Infants at Social Risk: Relations Among Infant Maltreatment, Maternal Behavior, and Infant Attachment Behavior*, 23 DEV. PSYCHOL. 223 (1987); W. L. Marshall, et al., *Childhood Attachments, Sexual Abuse, and Their Relationship to Adult Coping in Child Molesters*, 12 SEXUAL ABUSE: J. OF RES. & TREATMENT 17 (2000); Nicola Morton & Kevin D. Browne, *Theory and Observation of Attachment and Its Relation to Child Maltreatment: A Review*, 22 CHILD ABUSE & NEGLECT 1093 (1998); Robert T. Muller et al., *Relationship Between Attachment Style and Posttraumatic Stress Symptomatology Among Adults Who Report the Experience of Childhood Abuse*, 13 J. OF TRAUMATIC STRESS 321, 328 (2000); Timothy Page, *The Attachment Partnership as Conceptual Base for Exploring the Impact of Child Maltreatment*, 16 CHILD & ADOLESCENT SOC. WORK J.,(December, 1999), at 419; Erika Schmidt & Amy Eldridge, *The Attachment Relationship and Child Maltreatment*, 7 INFANT MENTAL HEALTH J. 264 (1986); Kathy Shepherd-Stolley & Maximiliane Szinovacz,

employers may be more than offset by the benefits of offering a family-friendly workplace. Employers who provide a family-friendly workplace save money because of decreased attrition and absenteeism and enhance their recruitment and productivity.[253]

In contrast to allocating this cost to the employer, the current scheme places the cost on those least able to bear it. When parents choose to leave their children home alone in order to earn a living, support them, and possibly retain welfare benefits, some children die.[254] When parents are fired for missing work, the probability that the children will be abused is heightened.[255] Child abuse and neglect have short-term and long-term costs for society. The short-term consequences of child abuse are behavioral problems including noncompliance, tantrums and aggression, poor peer relationships, poor social skills, less empathy, and poor school adjustment and academic performance.[256] In the long-term, society bears the costs of helping individuals who are less likely to succeed at work, need financial support, need more mental health services, are less likely to support their children, are more likely to abuse their children, and are more likely to be in prison. While a narrow extension of the wrongful discharge tort in violation of the mandatory care for children public policy will not resolve all terminations of parents that result in child abuse, nor will it resolve every conflict between parenting and work, it is a small step forward in protecting children.

Caregiving Responsibilities and Child Spanking, 12 J. OF FAM. VIOLENCE 99 (1997); Tony Ward et al., *Attachment Style in Sex Offenders: A Preliminary Study*, 33 J. OF SEX RES. 17, 17-18 (1996); Everett Waters et al., *Attachment Security in Infancy and Early Adulthood: A Twenty-Year Longitudinal Study*, 71 CHILD DEV. 684 (2000).

253. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 69-70 (2000).

254. *See supra* Part IV.A.

255. *See supra* Part IV.B.

256. Schmidt & Eldridge, *supra* note 252, at 271.