THE POLITICS OF CARE*

Laura T. Kessler

INTRODUCTION

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

Feminist and queer theorists within law have, for the most part, overlooked this aspect of caregiving, regarding unpaid family labor as a source of gender-based oppression or as an undervalued public commodity. Consequently, prominent feminist and queer legal theorists have set their sights on wage work[1] or sexual liberation[2] as more promising sources of emancipation for women. Although other legal feminists continue to focus on the problem of devalued family labor, these theorists tend to justify increased support for care work primarily on the benefits it confers on children and society, on liberal theories of societal obligation, on ending gender oppression, or on simple human needs.[3]

This article examines a less well-explored conception of family caregiving within the feminist and queer legal theory literature, revealing the way that family caregiving can be a liberating practice for caregivers qua caregivers. Specifically, care work can constitute an affirmative political practice of resistance to a host of discriminatory institutions and ideologies, including the family, workplace, and state, as well as patriarchy, racism, and homophobia. I label such political work "transgressive caregiving" and locate it most centrally—

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* Professor of Law, University of Utah; email: *kesslerl@law.utah.edu*. Many thanks to Martha Fineman and Victoria Nourse for inviting me to share this work as part of this celebration of the 25th Anniversary of the Feminism and Legal Theory Project and to Mary Ann Call for research assistance. A longer version of this article was published as *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1 (2005).

1. *See* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000).

2. *See* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 60-76 (2006); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 182 (2001).

3. *See, e.g.*, ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 49-72 (2004); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 48 (2003) [hereinafter FINEMAN, MYTH]; LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 88-113 (2006); JOAN WILLIAMS, *UNBENDING GENDER* 13-39 (2000); Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 62-63 (2002); Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1403-08 (2001).

although not exclusively—in the care work of ethnic and racial minorities, gays and lesbians, and heterosexual men.

Adopting this methodology of thinking from multiple lives leads, at least tentatively, to a new insight about care within feminist and queer legal theory: Although family caregiving may simply seem to support patriarchy, closer examination reveals that it can also be a deeply and complexly subversive practice. Specifically, when practiced by individuals whom the state has historically denied the privilege of family privacy, caregiving work may constitute a positive political practice of resistance to oppression.

I. TRANSGRESSIVE CAREGIVING AS POLITICS

A. African-American Care Practices

The state has heavily regulated black women's sexuality, reproduction, and family caregiving work from slavery to the present. Black women resisted and sought refuge from this discrimination in part through family and community relationships. Caregiving work within black families and communities is thus imbued with significant political meaning that derives from blacks' historical experience of oppression. This pattern is borne out by historical materials tracing black women's activism, as well as by contemporary social science research.

Controlling black women's reproduction was central to slavery.[4] Slave owners owned black women's labor and commodified their biological reproduction. This was enforced through the Roman property doctrine of *partus sequitur ventrem*, establishing that the issue of a female slave is born in the condition of the mother.[5] Put simply, black women's fertility produced their owners' labor force. In addition, enslaved people could not form legally recognized marriages; intimate partnerships were regularly disrupted by sale, hiring out, and apprenticeships; and children were regularly and permanently separated from their mothers, often without notice.[6]

Although a comprehensive review of black women's resistance to their unique place within slavery is not possible here, one helpful example pertains to black feminist abolitionist ideology. Black feminist abolitionists identified the commodification of enslaved women's reproduction as central to the system

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4. *See* JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW 34-35 (Vintage Books ed. 1986) (1985); DEBORAH GRAY WHITE, AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 98 (1985); Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 11 *passim* (2001).

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

6. *See* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 90-108, 237 (1997).

of slavery.[7] This vision was an alternative to mainstream abolitionist movements which defined the sine qua non of freedom as the right to sell one's labor in the free market and which aimed to emancipate black women from their slave masters so they could come under the aegis of black patriarchs.[8] In contrast, black women equated freedom primarily with the right to own their bodies unqualified by gender relations or capitalist exploitation.

This "recessive" strain of abolitionism developed by black women activists is evident, for example, in a lecture delivered by free black abolitionist Sarah Parker Remond. On a speaking tour of England for the American Antislavery Society in 1859, Remond defined property in the sexual body, as opposed to the laboring body, as the essential difference between slavery and freedom.[9] Similarly, reflecting on her newly emancipated status, ex-slave Bethany Veney stated, "A new life had come to me. I was in a land where, by its laws, I had the same right to myself that any other woman had . . . . My boy was my own, and no one could take him from me."[10] This conception of freedom demonstrates the way in which black women transformed intimacy, reproduction, and mothering into practices of political resistance by reclaiming them for themselves in the face of oppression by white slave masters and more tangentially by black men.

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

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

8. *See* STANLEY, *supra* note 7, at 30-34.

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

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

Id.

10. BETHANY VENEY, THE NARRATIVE OF BETHANY VENEY, A SLAVE WOMAN (Worcester, Mass. 1889), *reprinted in* COLLECTED BLACK WOMEN'S NARRATIVES 38 (1988), *available at* http://docsouth.unc.edu/fpn/veney/veney.html.

welfare reforms aimed at eliminating supposed financial incentives to poor, black women's childbearing.[11]

In the modern era, black women have been accused of failing to discipline their children, of abusing their children, of retarding their children's academic achievement, and of emasculating their sons and husbands.[12] The alleged failure of black women's caregiving and the expectation that black women should work were central themes in the major welfare reforms of the last decade.[13] The construction of black women's mothering as deviant has similarly been the basis for the heavy involvement of the state in black families through the child welfare system. Today, 42% of all children in foster care nationwide are black, even though black children constitute only 17% of the nation's youth.[14]

In response, black women activists, beginning in the 1960s, focused considerable energy on defending black motherhood and the black family. *The Negro Family: The Case for National Action* ("The Moynihan Report"), published in 1965, served as a catalyst for this defense.[15] In the report, Assistant Secretary of Labor Daniel Patrick Moynihan drew heavily from the work of black sociologist Edward Franklin Frazier[16] to depict the black family as a "tangle of pathology,"[17] an intergenerational morass of welfare dependency, criminality, and illegitimacy. Moynihan held the uniquely matriarchal structure of the black family responsible for this pathology. According to the report, "matriarchal"[18] upbringing left boys morally weakened and lacking the strong work ethic that would enable them to succeed in American society. It also reasoned that black boys needed strong male role models, and that if the black family did not provide them, the military would; there, they would be properly socialized by male authority figures.

Black women's resistance to such depictions was complicated by their allegiance with black men in the black liberation struggle.[19] The black commu-

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11. DOROTHY ROBERTS, KILLING THE BLACK BODY 56-81, 89-116, 144-149 (Vintage Books ed. 1999) (1997); Laura T. Kessler, *PPI, Patriarchy, and the Schizophrenic View of Women: A Feminist Analysis of Welfare Reform in Maryland*, 6 MD. J. CONTEMP. LEGAL ISSUES 317, 336-38 (1995).

12. *See, e.g.*, DANIEL PATRICK MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), *reprinted in* THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 39-124 (Lee Rainwater & William L. Yancey eds., 1967).

13. *See* Kessler, *supra* note 11, at 365-68; *cf.* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 277-89 (discussing the explicit expectation of welfare reforms that poor, single mothers of all races work).

14. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 8 (2002).

15. *See* MOYNIHAN, *supra* note 12.

16. EDWARD FRANKLIN FRAZIER, THE NEGRO FAMILY IN THE UNITED STATES 125-45 (1939) (dubbing the predominance of female-headed households in the black community as "the matriarchate" responsible for blacks' poverty and family "disorganization").

17. *See* MOYNIHAN, *supra* note 12, at 75.

18. *Id.*

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

nity saw the report as an example of a covert governmental policy of genocide against African-American people, along with sterilization abuse and black men's disproportionate representation in the war against Vietnam. This perception moved certain segments of the civil rights movement toward a nationalist and pronatalist perspective. As explained by historian Lauri Umansky:

> [M]any black nationalists asserted that the black nation needed to fortify itself with numbers. On the most basic level this meant that blacks must have more babies. . . . [B]lacks were enjoined to resist by drawing themselves into father-dominated families and having many babies, for "procreation is beautiful, especially if we are devoted to the Revolution."[20]

Consistent with this ideology, black male activists urged black women to stop using birth control.[21]

Thus, black feminists' efforts to reclaim the black family and black motherhood occurred against the backdrop of both racist, antinatalist policies of the white majority and sexist, pronatalist ideology within the black nationalist movement. In response, black activists and feminist writers reconceptualized black motherhood as a positive politics of resistance to both racial and gender oppression. For example, black feminist writers recast the black matriarch as a symbol not of emasculation but of "maternal fortitude."[22] Distinct from black matriarchy, which wrongly conceptualized black women as having actual material power to govern the family or society, maternal fortitude reversed the logic of the castrating black matriarch, but it retained an emphasis on the family as the key to liberation. For example, black feminist writers such as Toni Cade Bambara pointed out that women's strength had benefited entire African societies without emasculating their men.[23] This focus on the strong African mother challenged Moynihan's claim about black women's emasculation of black men.

Angela Davis, in a famous essay she wrote from prison, refuted the notion of black matriarchy through a detailed historical analysis of slavery that demonstrated how society had misinterpreted as female dominance the "deformed equality of equal oppression."[24] Like black men, black women were expected to bear the burdens of slavery and the lash. As such, their "virtue" as women was never protected. Even motherhood did not improve their position. Yet, Davis argued, as mothers and nurturers inside slave quarters, enslaved black women enabled enslaved people to endure materially and spiritually. Significantly, "in

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20. *Id.* at 22-23 (quoting The Black Unity Party, *Birth Control Pills and Black Children*, *in* POOR BLACK WOMEN (1968), *available at* http://scriptorium.lib.duke.edu/wlm/poor/#Birth).

21. *Id.* at 23.

22. *Id.* at 27-28.

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

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

the infinite anguish of ministering to the needs of the men and children around her (who were not necessarily members of her immediate family), she was performing the *only* labor of the slave community which could not be directly and immediately claimed by the oppressor."[25] Thus, the slave woman and black women more generally were not to be faulted for their power, which never really existed in the sense implied by Moynihan's "black matriarchy," but were to be recognized as revolutionaries.[26]

This black feminist ideology recognizing the central role of black motherhood to racial resistance was distinguished from the pronatalist cultural position of black nationalism. It was achieved through a simultaneous assertion of the right of black women to control their fertility and to control their vision and practice of motherhood.[27] In sum, although the tension between antiracism and pronatalism was present within black feminist ideology, it represented an acknowledgment of the agentic potential of black motherhood.

Resistance to dominant conceptions of black motherhood can also be found in the practice of "othermothering" in the black community.[28] Othermothers are women who assist blood mothers by sharing mothering responsibilities. They can be but are not confined to such blood relatives as grandmothers, sisters, aunts, cousins, or supportive fictive kin. Historically, othermothering has operated not only informally, but also through well-developed institutions and movements such as black churches,[29] black women's clubs,[30] black community service organizations,[31] and the black civil rights movement.[32] According to black feminist writers, othermothers have formed one of the important bases of power within black civil society.[33]

Othermothering is credited with contributing to black survival, but its significance for women's liberation is just as great. As a practice, othermothering

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25. *Id.* at 7.

26. Davis, *supra* note 24, at 7-8; *see also* WHITE, *supra* note 4, at 159-60 ("When Frazier wrote that slave women were self-reliant and that they were strangers to male slave authority he evoked an image of a domineering woman. . . . [Yet] [s]lave women did not dominate slave marriage and family relationships . . . . Acting out of a very traditional role, they made themselves a real bulwark against the destruction of the slave family's integrity.").

27. *See, e.g.*, Patricia Harden et al., *The Sisters Reply*, *in* POOR BLACK WOMAN (1968), *available at* http://scriptorium.lib.duke.edu/wlm/poor/#reply.

28. *See* Patricia Hill Collins, *The Meaning of Motherhood in Black Culture and Black Mother/Daughter Relationships*, 4 SAGE 3, 4-5 (1987).

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

30. *See* Gerda Lerner, *Early Community Work of Black Club Women*, 59 J. NEGRO HIST. 158, 158-59 (1974); Stephanie J. Shaw, *Black Club Women and the Creation of the National Association of Colored Women*, 3 J. WOMEN'S HIST. 10, 18-19 (1991).

31. Arlene E. Edwards, *Community Mothering: The Relationship Between Mothering and the Community Work of Black Women*, 2 J. ASSOC. RES. MOTHERING 87, 88-89 (2000) (summarizing literature on community mothers).

32. *Id.* at 90-91.

33. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 178-83 (2d ed. 2000).

threatens both patriarchal and capitalist norms. Most obviously, to the extent that othermothering is defined by women-centered, fluid, family-like networks that have different purposes—for example, socialization, reproduction, consumption, emotional support, economic cooperation, and sexuality, which may overlap but are not coterminous[34] —othermothering undermines the patriarchal family, the male-breadwinner ideal, and the notion of biological motherhood. Perhaps less obviously, it also threatens capitalist norms, for it moves away from the concept of children as the private property of individual parents.[35]

On an individual level, the experience of unconditional love has been especially important in the black parenting experience. Black children affirm their mothers; this affirmation is important in a society plagued by racism and the politics of black womanhood. As legal feminist Dorothy Roberts explains, "The mother-child relationship continues to have a political significance for Black women. Black women historically have experienced motherhood as an empowering denial of the dominant society's denigration of their humanity."[36] Alice Walker offers a glimpse of the positive liberatory potential of the black mother-child relationship:

> [I]t is not my child who tells me: I have no femaleness white women must affirm. Not my child who says: I have no rights black men must respect.
> It is not my child who has purged my face from history and herstory and left mystory just that, a mystery; my child loves my face and would have it on every page, if she could, as I have loved my own parents' faces above all others . . . .
> . . . .
> We are together, my child and I. Mother and child, yes, but *sisters* really, against whatever denies us all that we are.[37]

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

35. Patricia Hill Collins explains this point as follows:[S]topping to help others to whom one is not related and doing it for free can be seen as rejecting the basic values of the capitalist market economy.

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

See COLLINS, *supra* note 33, at 182.

36. *See* ROBERTS, *supra* note 14, at 238.

37. *See* Alice Walker, *One Child of One's Own: A Challenging Personal Essay on Childbirth and Creativity*, MS., Aug. 1979, at 75.

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

B. Gay/Lesbian Care Practices

Gay men and lesbians also have long suffered state-sponsored discrimination with regard to their reproduction, sexuality, and family life.[38] As in the race context, the state has effected this discrimination through the denial of substantial rights and benefits of citizenship. Gay men and lesbians have challenged this discrimination in part through their intimate relationships, not solely outside of them as traditional liberal theory would suggest. Given the possibility of a radical alternative to the hetero-patriarchal family presented by same-sex intimacy, the potential for political emancipation (as well as oppression) through family and intimate life is well understood by gay men and lesbians and by the larger society.

In the realm of family and intimate life, the state has relied on sexual orientation to deny gay and lesbian individuals sexual privacy, marriage and its benefits, child custody, alternative reproduction services, and adoption rights. Indeed, a core historical purpose of family law has been the promotion of heterosexual, monogamous marriage and patriarchal gender relations. For example, coverture, adultery, legitimacy, and other pre-1970s family regulations instituted procreative, heterosexual, patriarchal marriage as the American norm. Although constitutional litigation has resulted in the elimination of most de jure preferences for the patriarchal family,[39] it continues a robust de facto existence in the law. For example, family law, income security law, and tax law all privi-

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38. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 30-31, 122-23, 350 (Harper & Row, 1988); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 42-43 (1999); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 38, 43, 101 (Robert Hurley trans., Pantheon Books 1978); Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 *passim* (1976); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 527-43 (1990) [hereinafter Polikoff, *Redefining Parenthood*].

39. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (decriminalizing private, consensual sodomy); Clark v. Jeter, 486 U.S. 456, 465 (1988) (equalizing the rights of marital and nonmarital children with regard to paternity statutes of limitation); Moore v. City of E. Cleveland, 431 U.S. 494, 499-500 (1977) (protecting extended families from state intervention); Orr v. Orr, 440 U.S. 268, 282-84 (1979) (invalidating gender-based spousal support statutes); Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (decriminalizing the use of contraception by unmarried persons).

lege heterosexual, married individuals, especially men within heterosexual marital relationships.[40] The marginalization and elimination of nonheterosexual, nonpatriarchal intimacy has been an essential corollary to this normalization project.

Certain themes emerge from this history that shed light on my central claim that transgressive caregiving may constitute a form of political resistance or expression. First, the state has sought to enforce compulsory heterosexuality through family law, rendering the family a key site of emancipatory struggle for gender and sexual nonconformists.[41] The legal regulation of the family, through rules that seek to control the sexuality, reproduction, and parenting of gay men and lesbians, represents a central component of the state's heteronormalization effort.

Second, the protection of children from allegedly oversexed, predatory gay men has been a recurring theme in the history of state regulation of same-sex intimacy and family life.[42] Indeed, social historians attribute the development of the concept of the homosexual in America around the turn of the twentieth century in part to cultural anxieties about the protection of the sexual innocence of children.[43] These anxieties translated into legal rules with both benign and harmful effects. Under the auspices of child protection, states adopted increasingly strict laws prohibiting child molestation and rape, but they also used child protection as a pretext for the widespread criminalization of adult, consensual, same-sex intimacy and the civil regulation of gay reproduction, adoption, and parenting.[44] For example, until relatively recently, some states criminalized same-sex sexuality,[45] no state recognized same-sex marriage,[46] and express presumptions existed against child custody for gay or lesbian parents, particularly when a heterosexual parent sought custody.[47]

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40. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 143-64 (1995) (examining and critiquing the cultural and legal processes which designate the sexual intimate connection, and the marital family in particular, as the dominant construction of the family within our society); Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 313, 326-27 (2003) (detailing the privileging of married couples conforming with traditional gender roles within tax and social security law); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2248-54 (1994) (demonstrating the continued informal operation of coverture in the context of divorce).

41. *See* ESKRIDGE, *supra* note 38, at 271-92; Polikoff, *Redefining Parenthood*, *supra* note 38; Nancy D. Polikoff, *Recognizing Partners But Not Parents/Recognizing Parents But Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 730-50 (2000) [hereinafter Polikoff, *Recognizing Partners*].

42. *See* D'EMILIO AND FREEDMAN, *supra* note 38; ESKRIDGE, *supra* note 38.

43. *See* PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 61-66, 85-87, 90, 124-25, 156-63 (1998).

44. *See* ESKRIDGE, *supra* note 38; JENKINS, *supra* note 43.

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

46. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971).

47. *See* Roe v. Roe, 324 S.E.2d 691, 692-93 (Va. 1985).

To be sure, there has been enormous progress in all of these areas in the past two decades.[48] At the same time, it would be a mistake to conclude that gay men and lesbians have achieved full freedom or equality with regard to the law of domestic relations. The state continues to exercise significant regulatory control over same-sex intimacy and family life. For example, in custody disputes states now generally follow the "nexus" doctrine, which makes the sexual orientation of a parent irrelevant unless there is evidence that it will negatively impact the best interests of the child. However, courts commonly deny gay and lesbian parents custody or visitation for seemingly insufficient reasons, suggesting that there is still bias operating in custody disputes.[49] For example, courts applying the nexus test commonly cite a gay parent's "lifestyle" in limiting custody or visitation,[50] especially if the parent resides with an intimate partner.[51] And some states still explicitly retain a presumption against custody by an openly gay or lesbian parent[52] or retain it as a factor in the best interest determination.[53] Such rules and decisions effectively operate as a "don't ask, don't tell" policy in the context of custody law.

Although relatively early and widespread acceptance of second-parent adoption[54] for gays and lesbians is a hallmark of the American gay rights movement,[55] increasing anxieties over same-sex marriage beginning in the 1990s fueled renewed attention on preventing lesbians and gay men from adopting. From 1994 to 1999, four states enacted prohibitions on second-parent

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48. *See* Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 30-32 (2005).

49. *See, e.g.*, Hertzler v. Hertzler, 908 P.2d 946, 949 (Wyo. 1995) (limiting visitation of mother not because of her lesbianism, but because both parents could not resolve their conflict over religious and gay values; the mother snuggled with children and her female companion in bed, had children march with her in a gay and lesbian rights parade, and had children participate in a commitment ceremony with her companion).

50. *See, e.g.*, Tucker v. Tucker, 910 P.2d 1209, 1217-18 (Utah 1996) (denying custody to lesbian mother because she did not have a stable "lifestyle").

51. *See, e.g.*, Holmes v. Holmes, 255 S.W.3d 482, 488 (Ark. Ct. App. 2007) (reversing a temporary custody award to a lesbian mother and giving permanent custody of the child to the heterosexual father, because the mother's "illicit" cohabitation with different sexual partners "is detrimental to children."); McGriff v. McGriff, 99 P.3d 111, 116-19 (Idaho 2004) (affirming the transfer of custody from a gay father to a heterosexual mother, *inter alia*, because of the "[f]ather's plan to openly reside with his homosexual partner" and his "unilateral decision to discuss his sexual orientation with one of the children."); *cf.* A.O.V. v. J.R.V., 2007 WL 581871, at *6 (Va. App. 2007) (holding that a trial judge did not abuse his discretion by prohibiting a gay father from allowing his companion to occupy the home overnight or engage in displays of affection while visiting the children).

52. *See, e.g.*, L.A.M. v. B.M., 906 So. 2d 942, 946-48 (Ala. Civ. App. 2004) (holding that *Lawrence v. Texas* did nothing to disrupt that state's presumption against child custody for gay parents, and affirming a change of custody from a lesbian mother to a heterosexual father pursuant to that presumption).

53. *See, e.g.*, Davidson v. Coit, 899 So. 2d 904, 909-10 (Miss. Ct. App. 2005); Dexter v. Dexter, 2007 WL 1532084, ¶ 32 (Ohio Ct. App. May 25, 2007).

54. *See* Polikoff, *Redefining Parenthood*, *supra* note 38.

55. *See* Polikoff, *Recognizing Partners*, *supra* note 41.

adoption by same-sex couples;[56] five additional states embraced similar prohibitions in this decade.[57] For example, in 2002 a Nebraska court denied a petition by two mothers to have the nonbiological mother adopt their son, even though she had helped to raise him from birth and was his primary caretaker.[58] In 2000, the Utah legislature passed a law restricting adoption to married couples and unmarried individuals not cohabiting in a sexual relationship.[59] Although not formally stated, its purpose was widely perceived as the exclusion of gay men and lesbians from adoption in a manner that would withstand constitutional attack.[60] In contrast, "every state in the country except Florida permits gay, lesbian, and bisexual persons to petition individually to adopt children",[61] evidencing the existence of a "don't ask, don't tell" policy in the context of adoption as well as custody.

The Supreme Court's recent decision in *Lawrence v. Texas* decriminalizing private, consensual sodomy on substantive due process (constitutional privacy) grounds has thus far had little impact on state-sponsored discrimination against gay men and lesbians in the area of parental rights. For example, in 2004, gay foster parents Steven Lofton and Roger Croteau failed in their constitutional attack of Florida's statutory ban on adoption by gay people.[62] The court upheld the law, even though Lofton and Croteau were the only parents of their foster child, Bert, since he was an infant. Similarly, an Alabama court held in 2004 that *Lawrence* did nothing to disrupt that state's presumption against child custody for gay parents, transferring custody from a lesbian mother to a heterosexual father.[63]

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56. *See In re* Adoption of T.K.J., 931 P.2d 488, 490-91 (Colo. Ct. App. 1996); *In re* Adoption of Baby Z., 724 A.2d 1035, 1038, 1061 (Conn. 1999); *In re* Adoption of Doe, 719 N.E.2d 1071, 1071-72 (Ohio Ct. App. 1998); *In re* Angel Lace M., 516 N.W.2d 678, 680, 686 (Wis. 1994). Earlier prohibitions included Florida and New Hampshire. *See* FLA. STAT. § 63.042(3) (Supp. 2004) (enacted 1977); N.H. REV. STAT. ANN. §§ 170-B:2(XV), 170-F:2 (IV) (2005) (enacted 1986), *repealed by* Act of May 3, 1999, 1999 N.H. Laws 18.

57. *See* MISS. CODE ANN. § 93-17-3(2) (2004); S.J.L.S. v. T.L.S., No. 2006-CA001730-ME, 29-30 (Ky. Ct. App. Sept. 12, 2008), *available at* http://opinions.kycourts.net/coa/2006-CA-001730.pdf; *In re* Adoption of Luke, 640 N.W.2d 374, 378 (Neb. 2002); OKLA. STAT. § 7502-1.4(A) (2004) (prohibiting the recognition of "an adoption by more than one individual of the same sex from any other state or foreign jurisdiction"); UTAH CODE ANN. § 78-30-1(b) (2004) (prohibiting adoption by unmarried cohabitants).

58. *In re* Adoption of Luke, 640 N.W.2d at 378.

59. UTAH CODE ANN. § 78-30-1(b) (2004). A similar law is currently under consideration in Akansas. *See* 2008 Arkansas Ballot, *available at* http://www.votenatually.org/2008_elections/Proposed_Initiative_Act_No1.pdf.

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

61. *See* Lambda Legal, Overview of State Adoption Laws, http://www.lambdalegal.org/our-work/issues/marriage-relationshipsfamily/parenting/overview-of-state-adoption.html (last visited Sept. 8, 2008).

62. *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 827 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 869 (2005); *but see In re* Doe, 2008 WL 4212559, at 41-42 (Fla. Cir. Ct.) (finding Florida's ban on adoption by lesbians and gay men unconstitutional).

63. *See* L.A.M. v. B.M., 906 So.2d 942, 946-48 (Ala. Civ. App. 2004).

And, of course, same-sex marriage is still illegal in all but three American states,[64] and a significant backlash developed in the wake of the California, Connecticut, and Massachusetts decisions, and earlier victories.[65] For example, in 1996, Congress passed the Defense of Marriage Act ("DOMA").[66] DOMA defines marriage as a union between a man and a woman for federal purposes (for example, Family and Medical Leave Act leave, federal taxes, Social Security benefits) and relieves states of any obligation to recognize a same-sex marriage validly entered into in another state under the Full Faith and Credit Clause.[67] Along the same lines, after the Massachusetts decision legalizing same-sex marriage, the 2004 election season saw thirteen states newly amend their constitutions to define marriage as a union between one man and one woman.[68] Most recently, Proposition 8 is an attempt to overrule the legalization of same-sex marriage in California by state constitutional amendment. The initiative defines marriage as a union between a man and a woman and will appear on the November 2008 General Election ballot.[69]

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

The notion that gay care practices may constitute a positive, political practice of resistance is supported by a significant body of social science research. To paraphrase anthropologist Kath Weston, "gay families we choose," includ-

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64. *See In re* Marriage Cases, 183 P.3d 384, 461, 467 (Cal. 2008); Kerrigan v. Comm'r Pub. Health, 957 A.2d 407, 481-82 (Conn. 2008); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969-70 (Mass. 2003).

65. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

66. Defense of Marriage Act of 1996, codified at 28 U.S.C. § 1738c and 1 U.S.C. § 7 (2000).

67. U.S. CONST. art. IV, § 1.

68. Kessler, *supra* note 48, at 36.

69. Proposition 8, Eliminates Right of Same-Sex Couples to Marry, Initiative Constitutional Amendment, California General Election (Nov. 4, 2008), *available at* http://www.voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf#prop8. Two additional states, Arizona and Florida, have similar propositions on their November 2008 ballots. *See* Proposed Constitutional Amendment 102, Arizona General Election (Nov. 4, 2008), *available at* http://www.azsos.gov/election/2008/Info/PubPamphlet/english/Prop102.htm; Proposition 2, Florida General Election (Nov. 4, 2008), *available at* http://election.dos.state.fl.us/initiatives/initiativelist.asp.

ing families in which children are present, represent opportunities for a radical departure from conventional understandings of kinship.[70] A gay family of choice may include lovers, ex-lovers, friends, co-parents, and children brought into the family through adoption, foster care, prior heterosexual relationships, and alternative reproduction.[71]

The AIDS epidemic provides a specific example of how chosen families and gay communities are co-constitutive. John-Manuel Andriote, in his exploration of how gay culture was reshaped by the disease, notes that "[w]hen AIDS first struck gay men, in 1981, activists quickly rallied to share information, provide services, raise money, prevent new infections, and demand assistance from a skittish federal government."[72] Support groups and "buddy programs" were organized throughout the country.[73] Volunteer "buddies" helped out with grocery shopping, cleaning, cooking, and emotional support. This impressive generosity and volunteerism served to sustain many men whose families had alienated them and friends had stopped calling.

The AIDS epidemic also opened new possibilities for imagining lesbians and gay men as members of a unified community. In the words of one lesbian activist, "People used to say to me all the time, 'Why do you work with AIDS and GMHC [Gay Men's Health Crisis]? They wouldn't work for breast cancer.' . . . That's partly true—but what did it have to do with the fact that all my friends were dying?"[74]

Like the tradition of othermothering within the black community, gay families of choice are made up of fluid networks that have different purposes—including emotional support, economic cooperation, socialization, reproduction, consumption, and sexuality—which may overlap but are not necessarily coterminous.[75] The willingness of gay men and lesbians to care for each other in sickness and in health has been central to the success of their bids over the last quarter century for recognition and dignity as a community and as couples. Such families of choice also undermine the defining features of the heteropatriarchal family: heterosexual sexual relations, the male breadwinner ideal (and the sexual division of family labor on which it rests), and biological reproduction.

The addition of children to gay families of choice does not necessarily diminish their transformative potential. Although viewing childlessness as a form of resistance to patriarchy is a strong theme within certain strands of feminist

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

71. *Id*. at 3, 31, 111-12.

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

73. *Id*. at 109.

74. *Id*. at 117 (interview with Sandi Feinblum, in New York City, N.Y., Apr. 26, 1995).

75. *See* WESTON, *supra* note 70, at 108.

and queer theory inside of law,[76] researchers of gay and lesbian families within the social sciences have demonstrated how lesbian parenting may also "represent[] a radical and radicalizing challenge to heterosexual norms that govern parenting roles and identities."[77]

For example, according to sociological studies, lesbian parenting is characterized by a more egalitarian division of household labor than heterosexual families;[78] the detachment of motherhood from its biological roots through social motherhood;[79] the inclusion of known sperm donors in some cases who actively co-parent, becoming a "junior partner in the parenting team";[80] and the involvement of social kin in children's lives.[81] As one mother stated, "Our close friends really drew in and became aunties. It's like it created an extended sort of family with a lot of our friends. Astrid [our daughter] has many aunties."[82] Psychologists have observed the potentially restorative, affirming effect of parenthood for gay men and lesbians. Children affirm their gay and lesbian parents; this affirmation is important in a society plagued by homophobia.[83]

Finally, gay and lesbian care practices may have powerful political effects irrespective of individual political consciousness. This is because identical symbols can carry very different meanings in different contexts.[84] By discon-

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76. *See* Kerry L. Quinn, *Mommy Dearest: The Focus on the Family in Legal Feminism*, 37 HARV. C.R.-C.L. L. REV. 447, 449, 474-75 (2002); Franke, *supra* note 2, at 184-85; *cf.* Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 *passim* (2000-01) (noting the resistance by men to sharing childcare responsibilities with women and advocating for more attention to the position of childless women in discussions over workplace policies benefitting parents); Shultz, *supra* note 1, at 1899-1919 (arguing that feminist strategies aimed at valuing family care work serve to reify traditional gender norms).

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

78. *Id.* at 13; *see also* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 127-31, 148-51 (1983); MAUREEN SULLIVAN, THE FAMILY OF WOMAN: LESBIAN MOTHERS, THEIR CHILDREN, AND THE UNDOING OF GENDER 93-123 (2004) [hereinafter SULLIVAN, THE FAMILY OF WOMAN]; Valory Mitchell, *Two Moms: The Contribution of the Planned Lesbian Family to the Deconstruction of Gendered Parenting*, 7 J. FEMINIST FAM. THERAPY 47, 55 (1995); Maureen Sullivan, *Rozzie and Harriet? Gender and Family Patterns of Lesbian Coparents*, 10 GENDER & SOC'Y 747, 756 (1996); WESTON, *supra* note 70, at 114.

79. *See* SULLIVAN, THE FAMILY OF WOMAN, *supra* note 78, at 62-92; Susan E. Dalton & Denise D. Bielby, *"That's Our Kind of Constellation": Lesbian Mothers Negotiate Institutionalized Understandings of Gender within the Family*, 14 GENDER & SOC'Y 36, 57 (2000); Dunne, *supra* note 77, at 15.

80. *See* Dunne, *supra* note 77, at 25.

81. *See id.* at 14; Fiona Nelson, *Lesbian Families: Achieving Motherhood*, J. GAY & LESBIAN SOC. SERVICES, Vol. 10 No. 1, 1999, at 27, 38-39.

82. Nelson, *supra* note 81, at 39.

83. *See* Deborah F. Glazer, *Lesbian Motherhood: Restorative Choice or Developmental Imperative?*, 4 J. GAY & LESBIAN PSYCHOTHERAPY, Vol. 10 No. 2, 2000-01, at 31, 37.

84. *See* JUDITH BUTLER, GENDER TROUBLE 1-2 (1990); Judith Butler, *Competing Universalities*, *in* CONTINGENCY, HEGEMONY, UNIVERSALITY 177 (2000).

necting family formation and reproduction from heterosexual relations, extended gay kin networks and gay parenthood reveal heterosexuality and biology to be mere symbols of a privileged relationship. To the extent that these symbols still constitute the central organizing principles of family law, then, same-sex intimacy serves as a powerful destabilizing force against the law itself. As such, care can be deeply transgressive and possess significant political potential. This account of care as a positive politics contrasts with dominant accounts of care within certain strands of feminist and queer legal theory. This conception of political activism also varies from traditional liberal conceptions of politics, because it transforms the private sphere of the family into a site of political resistance. This idea has much to offer to the discourse over care work within feminist and queer legal theory.

C. Care Practices of Men

Workplace norms and the broader cultural male breadwinner ideal work in tandem to discourage many men from partaking in caregiving work.[85] Although a comprehensive review of the law's role in disciplining men out of caregiving roles is not possible here, a few contemporary examples from employment discrimination, family, and other areas of law are illustrative.

Significantly, the Supreme Court's 2001 decision in *Nevada Department of Human Resources v. Hibbs* recognized our country's history of employment discrimination against men with regard to family care work. The plaintiff sought leave under the FMLA to care for his ailing wife, who was recovering from a car accident, experiencing chronic pain and suicidal tendencies, and waiting to undergo neck surgery. His employer terminated him before he exhausted his leave. He lost at the trial level.

Chief Justice Rehnquist, in his decision reinstating Hibbs' claim and upholding the FMLA, found that Congress' passage of the FMLA was justified on the basis of our country's long history of workplace discrimination against women, but he also emphasized the continued relevance of stereotypes against men: "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave."[86]

The employment context nicely demonstrates society's devaluation of men's family care work, but perhaps the most compelling context in which to study this phenomenon is in the realm of family law. As Nancy Dowd's[87] research on the status of fathers within the law persuasively shows, family law has largely conceived of fathers as the owners of children or as family breadwinners, but support for the nurturing aspect of fatherhood is very limited. For

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85. *See* NANCY E. DOWD, REDEFINING FATHERHOOD 4 (2000); MICHAEL KIMMEL, MANHOOD IN AMERICA 2 (1996); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1064-80 (1993-94); WILLIAMS, *supra* note 3.

86. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

87. *See* DOWD, *supra* note 85.

example, the law of paternity defines fatherhood "by the status it can confer upon children, rather than in terms of responsibilities, obligations, relationship, or nurturing."[88] For most of the twentieth century, states presumed men unfit to serve as custodians of children in the absence of a child's mother.[89] Although the law has moved dramatically in the direction of shared parenting after divorce,[90] joint physical custody is still quite rare and most custody and visitation schemes assume only a limited fathering role.[91] After divorce, men are treated by the law primarily as economic providers, even though most men do not fulfill even that role.

The welfare context, too, illustrates the law's role in disciplining men out of family caregiving roles. Historically, the welfare system was intended to support the family caregiving of women. Men were presumed able to work, and the public welfare system for men was designed primarily around their links to the workforce in the form of unemployment, income security, and worker's compensation insurance.[92] Although these latter social insurance systems provide significantly greater benefits, come with fewer conditions, and are generally considered entitlements, the gendered bifurcation of the public welfare state in America also evidences the disfavored status of caregiving men within the law.

Two recent Supreme Court decisions further highlight the construction of men as inauthentic family caregivers within the law. In 2001, the Supreme Court upheld the constitutionality of a statute giving immigration preference to children born abroad to unmarried American mothers, but not to unmarried American fathers.[93] The plaintiff was a nonmarital father who had raised a child abandoned by his foreign mother. The Court justified the sex-based rule—and the son's deportation—because "[i]n the case of a citizen mother . . . the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth . . . . The same opportunity does not result from the event of birth . . . in the case of the unwed father."[94]

In 2004, the Supreme Court rejected a father's First Amendment challenge to the policy of his daughter's public elementary school requiring teacher-led

88. *Id*. at 5.

89. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 658-59 (1972) (holding unconstitutional state rule presuming unwed fathers unfit to raise their children upon the death of the mother); Devine v. Devine, 398 So. 2d 686, 687, 696-97 (Ala. 1981) (holding unconstitutional state rule presuming the mother to be the proper person to be vested with custody of young children after divorce).

90. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (2002) (proposing to allocate physical custodial responsibility such that it approximates the time each parent spent performing caretaking functions prior to their separation, resulting in a true shared custody outcome where parents equally split caretaking tasks before divorce).

91. *See* DOWD, *supra* note 85, at 134-42.

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

93. Nguyen v. I.N.S., 533 U.S. 53, 73 (2001).

94. *Id*. at 65.

recitation of the Pledge of Allegiance.[95] Demonstrating an astonishingly technical reading of custody law, the Court held that only the child's mother had standing to challenge the policy, even though the parents shared joint legal custody and the father had a strong presence in his daughter's life,[96] because the family court order granting custody had stated that the mother "will continue to make the final decisions . . . if the two parties cannot mutually agree."[97]

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

II. FEMINIST AND QUEER LEGAL THEORIES OF CARE

This Part contrasts the positive political potential of care presented in Part I with the dominant accounts of care work within feminist and queer legal theory. Many such theorists explicitly or implicitly reject family caregiving as a potentially liberating practice for caregivers qua caregivers. For the most part, feminists and queer theorists engaged in the recent legal academic discourse over care work instead regard family labor as a source of gender-based oppression or as an undervalued public commodity at best. They have set their sights on wage work[98] or sexual liberation[99] as more promising sources of emancipation for women. Although some legal feminists continue to focus on the problem of devalued family labor, they have tended to justify societal support for care work primarily on the basis of the oppression it causes for women, the benefits it confers on children and society, or the material needs it creates for caregivers.[100]

A. Maternalist Conceptions of Care

We start with maternalist conceptions of care because the recent controversy over care within legal feminism was sparked by this body of work, which

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

96. *See* Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1277 (2005) ("[H]e and his daughter's mother coparented their daughter, sharing physical custody and living in close proximity. Approximately thirty percent of his daughter's time is spent with Newdow, and Newdow frequently pressed for fifty percent.").

97. *Elk Grove*, 542 U.S. at 14 n.6.

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

99. *See* HALLEY, *supra* note 2; Franke, *supra* note 2.

100. *See* MCCLAIN, *supra* note 3; FINEMAN, MYTH, *supra* note 3; WILLIAMS, *supra* note 3; Becker, *supra* note 3; Fineman, *supra* note 3.

has grown substantially in both its objects of critique and sophistication in the past decade.

1. Care as a Source of Gender Oppression

Nonmaternalists view care work as a form of gender oppression, but they do not have a monopoly on this perspective. Indeed, it can fairly be said that the foundation of maternalist legal feminism is a theory of women's oppression stemming from the gendered division of family labor and the law's role in instantiating it.

For example, Joan Williams has developed a theory of women's gender oppression she calls "domesticity."[101] Domesticity is an ideological system that organizes market work around the life experiences of men and marginalizes family caregivers. She argues that domesticity is a form of sex discrimination against women (and men) that feminists should work to eliminate through the reorganization of market and family work. Central to the concept of domesticity is the idea that family care work is compulsory and oppressive. Williams envisions a world in which care work is shared more equally between women and men, and in which the workplace is structured around the life patterns of people with family responsibilities.

Martha Fineman[102] is less concerned about the assignment of caretaking to women than Williams. Her focus is more narrowly on the inequities that flow from the assignment (a concern which Williams shares) and on obtaining support for caretakers in the form of state financial support and institutional accommodations. Other maternalist legal feminists, such as Mary Becker,[103] go as far as to suggest that care work may include an element of pleasure. Although Fineman and Becker are perhaps less focused than Williams on shifting the actual performance of domestic labor from women to men and the market, seeing care work as a form of gender oppression is central to their maternalist projects.[104]

Thus, few maternalists embrace romanticized conceptions of the gratifications of domestic labor or biological explanations of women's suitability for care work. For example, Fineman explicitly rejects the propositions that only women can or should be mothers and that children are the only legitimate subjects of care work.[105] Rather, like nonmaternalist legal feminists, maternalists

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101. WILLIAMS, *supra* note 3.

102. FINEMAN, MYTH, *supra* note 3.

103. Becker, *supra* note 3, at 71.

104. *See* Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 FORDHAM L. REV. 2007, 2039 (2001); FINEMAN, MYTH, *supra* note 3, at 41-42, 49.

105. She explains:

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

conceive family care work as a socially constructed, gendered practice that serves as a source of inequality for women. Indeed, a conception of care work as oppression is foundational to the maternalist project of increasing societal support for care work.

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

Recently, there has been a discernable shift in the rhetoric of legal maternalism from discrimination theory to the economic language of public goods and subsidy. For example, Fineman has employed the language of subsidy to expose the myths of individual independence, autonomy, and self sufficiency assumed by market ideology.[106] According to Fineman, society and all its public institutions are dependent on the uncompensated and unrecognized dependency work assigned to caretakers within the private family. Joan Williams has similarly employed the subsidy concept to critique autonomy as the organizing principle of the American workplace. According to Williams, the American "ideal worker" norm can exist only with the benefit of a flow of household work from women.[107] These analyses suggest that the family is subsidizing the workplace and society.

Maternalists also have employed the idea of care as a public good in their arguments for increased legal and societal recognition for care work, an economic concept related to subsidy. Martha Fineman[108] argues that the family is crucial to the reproduction of important public goods such as children, workers, consumers, and taxpayers. Mary Becker is also a proponent of the children-as-public-goods theory,[109] which she traces to feminist economists Paula England and Nancy Folbre.[110] Drawing on political theory, Linda McClain[111] makes a similar argument in her conceptualization of care work as constitutive of important public values, including caring, democracy, community, and civic participation. She argues that the government should provide support for care because it is part of its responsibility to foster individuals' capacities for self-government.

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

Fineman, *supra* note 40, at 234-35.

106. *See* FINEMAN, MYTH, *supra* note 3, at 49-51.

107. Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 95-96, 114 (1998).

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

109. Becker, *supra* note 3, at 62-63 ("Children are a 'public good,' that is, a benefit to the general society like a good defense system or good roads.").

110. *See* Paula England & Nancy Folbre, *The Silent Crisis in U.S. Child Care: Who Should Pay for the Kids?* 563 ANNALS AM. ACADEMY POL. SCI. & SOC. SCI. 194 (1999); Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86, 86 (1994) ("[A]s children become increasingly public goods, parenting becomes an increasingly public service.").

111. MCCLAIN, *supra* note 3 *passim.*

All of these conceptions of care—as a subsidy, public good, or public value—are aimed at reconstructing care as a public responsibility, or at least at shifting part of that responsibility to public institutions such as employers and the state.

3. Care as a Source of Legitimate Needs

A final conception of care work promoted by legal maternalists centers on the legitimate needs of caregivers and those who depend on them. Building on the concept of needs, Martha Fineman[112] has developed a comprehensive theory of dependency relationships within families and between families and other societal institutions. Fineman questions how it is that only some members of society are assigned the status of dependent and asks us to consider "the conditions under which caretakers should be expected by the society to undertake responsibility for inevitable dependency."[113] Because dependency negatively impacts participation in the paid labor force, caregivers need both monetary and material resources.[114] She calls for a public response in the form of a robust social welfare state.[115]

Mary Becker also has taken this approach. Drawing on international human rights literature and the work of Amartya Sen[116] and Martha Nussbaum[117], she argues that a central goal of government should be to develop citizens' autonomy, capabilities, and connections with others.[118] Poverty interferes with these basic human needs (and implicitly, rights) and highly correlates with being a woman and serving as a caretaker of children. Becker's analysis suggests that the United States is violating the human rights of children and their caregivers by not meeting their basic human needs.

B. Nonmaternalist Conceptions of Care

Legal maternalism has provoked a number of critical reactions by a group of legal feminists I will call nonmaternalists. Nonmaternalist legal feminists reject the inevitability of motherhood for women. They have set their sights on other aspects of women's identity such as sexual liberation or wage work as more promising sources of emancipation for women. Central to the nonmaternalist critique of legal maternalism is the claim—reminiscent of the 1980s critique of cultural feminism—that maternalism essentializes women around gender roles.

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112. Martha A. Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 91-93 (1998).

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

114. *See* FINEMAN, MYTH, *supra* note 3, at 48-49.

115. *Id.* at 54.

116. Amartya Sen, *Capability and Well-Being*, *in* THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993).

117. MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 39-47 (1999).

118. Becker, *supra* note 3.

1. The Charge of Essentialism

Nonmaternalists charge maternalists with perpetuating an essentialist conception of women's identity. They critique the narrow definition of valuable care work implicit in much maternalist work, as well as maternalists' inattention to life endeavors other than care work.

As to the first concern, Mary Anne Case[119] suggests that many maternalists are inattentive to the circumstances of childless women and women with family commitments that do not revolve around children. She suggests that the workplace and society are already unfairly subsidizing certain preferred families with dependents. Case also raises the concern that legally mandated employment benefits for employees with children, which some maternalists have sought, will cause childless women workers to suffer increased discrimination and workload burdens. Although Case notes that many of her concerns would be addressed if workplace benefits were available regardless of parental status, her critique of legal maternalism is more fundamental: "The difficulty I have experienced goes beyond privileging certain kinds of family over others, and more broadly extends to a privileging of family matters over an employee's other life concerns."[120]

Katherine Franke takes up this point in an essay challenging legal feminists for insufficiently theorizing sexuality as a positive force in women's lives. She asks:

> Why do legal feminists frame questions of sexuality more narrowly than our colleagues in other fields? Is there something intrinsic to a legal approach to sexuality that deprives us of the tools, authority, or expertise to address desire head on? Can law protect pleasure? Should it? Or have legal feminists implicitly made the (I believe mistaken) strategic judgment that feminist legal theory cannot explore sexuality positively until danger and dependency are first eliminated?[121]

Vicki Schultz makes a similar assertion with regard to the significance of paid work for women. In an essay that can be seen as a companion piece to Franke's, she argues that legal maternalists have failed to take women seriously as wage workers.[122] Paid work, according to Schultz, is the cornerstone of equal citizenship. From this proposition, Schultz questions feminist "family-based" strategies to value women's domestic labor through divorce reform and welfare laws.[123] Explicit in her analysis is the assertion that family care work is a less promising route to equal citizenship than wage work.

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119. Case, *supra* note 76.
120. *Id*. at 1767.
121. Franke, *supra* note 2, at 182-83.
122. Shultz, *supra* note 1, at 1892-93, 1899.
123. *Id*. at 1899-1919.

Janet Halley's work provides a final example of the critical reaction to feminist work aimed at valuing care in the law. In her provocative 2006 book, *Split Decisions*, Halley critiques Robin West,[124] Carol Gilligan,[125] and cultural feminism generally for presenting a theory of sexuality that constructs women as infantile,[126] deletes women's desire for "phallic masculinity" in men,[127] erases men's capacity to nurture women,[128] and fails to acknowledge the positive dimensions of men's phallic drive and aggression.[129] Cultural feminism, by allegedly prescribing a normatively preferable feminine sexual ethics of mutuality and care "for everybody," "in its governance mode wants to rule the world."[130] Halley's charge of essentialism is distinct from Case, Franke, and Schultz's; its target is a particular vision of sexuality, rather than repronormativity per se. Yet it shares with those scholars' critiques a concern that certain individuals and experiences have been left out of legal feminist work on care. Perhaps even more devastating than the other critiques discussed, in her celebration of aggression, masculinity, the phallus, and non-mutuality, Halley seems to implicitly reject care as a project worthy of feminist attention.

2. The Dangers of State Support for Care

A second critique of legal maternalism concerns maternalists' affinity for public, state-based solutions to the problem of devalued family labor. According to this critique, maternalists' efforts to justify employer and state support for dependency based on the valuable role of the family in social reproduction carries serious risks of government intrusion into the family, risks that are more likely to be borne by nontraditional families. For example, Katherine Franke[131] warns of the mixed blessing of state involvement for emancipatory movements, citing the devastating social and economic consequences for African Americans of Reconstruction-era state efforts to "civilize" emancipated slaves by disciplining their familial lives to conform to the gendered rules of marriage.[132]

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

The nonmaternalist account of legal maternalism suggests a large gap between the two camps. I think this is wrong for two reasons. First, legal maternalism is not the crude form of cultural feminism that the nonmaternalists have made it out to be. Given a fair reading, legal maternalism is far more consistent

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124. ROBIN WEST, CARING FOR JUSTICE (1997).
125. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).
126. HALLEY, *supra* note 2, at 67.
127. *Id.* at 66.
128. *Id.*
129. *Id.*
130. *Id.* at 60.
131. Katherine M. Franke, *Taking Care*, 76 CHI-KENT L. REV. 1541 (2000-01).
132. *Id*. at 1550-51.

with legal nonmaternalism than the nonmaternalist account suggests. Second, and perhaps less obvious, legal maternalists *also* view care as an oppressive practice that women should be cautious to define themselves around. Although maternalism does not explicitly adopt this position, it is apparent, however subtle, in maternalists' reliance on antidiscrimination-, child-, or needs-focused justifications for the legal recognition of care work—all justifications that stop short of acknowledging the potentially positive meaning of the practice of care to individual caregivers. Thus, we see that despite their fundamental disagreements, both maternalists and nonmaternalists demonstrate an explicit or implicit discomfort with viewing care as a practice with liberatory potential.

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

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

Contrary to this caricature, legal maternalism draws on widely divergent legal feminist traditions. In its presentation of a comprehensive theory of rights, legal maternalism represents the best of the tradition of liberal feminism.[133] In its disruption of the heterosexual marital family, it is deeply radical. In its highly sophisticated critique of neoliberalism, it represents a refreshing and sorely needed revival of socialist feminism. In its deconstruction of the public and private, its understanding of the role of law in women's oppression, and its incorporation of axes of subordination other than gender (such as class), it is a postmodern feminism. And finally, in its strategic deployment of socially constructed gender differences to unsettle inequities between the sexes, legal maternalism is indeed consistent with cultural feminism.

Further, the insistence by nonmaternalists that the law reforms proposed by legal maternalists merely serve to perpetuate gender ideology insufficiently

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

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

For example, looking to wage work as a promising source of citizenship for women, as Schultz has done,[134] is a project worthy of feminist support; but to identify it as the preferred route to women's emancipation insufficiently credits the transformative power of legal maternalism and perpetuates a racist, classist, and heterosexist understanding of the meaning of wage work. Work has meant equal citizenship primarily for white, straight, economically privileged women and men; it has been a significant source of exploitation for women and men of color,[135] lower-class whites,[136] and gay people,[137] many of whom have historically occupied the bottom rungs of our wage economy. To be fair, Schultz acknowledges the oppressive effects of modern capitalism. However, in the final analysis she maintains that wage work is a more viable source of women's liberation than care, thereby diminishing the significance of her concession that there is nothing inherently democratizing or equalizing about the workplace.

Similarly, although developing a liberationist theory of sexuality is an important project, I question whether legal maternalism constitutes as significant a roadblock to such a project as Franke[138] and Halley[139] suggest. Although many legal maternalists accept the inevitability of motherhood for women—indeed, this defines legal maternalism in part—perhaps this position should not be so facilely equated with repronormativity. "Repronormativity" does not describe all reproduction, as Franke's argument suggests. Rather, it refers to women's reproduction for men, particularly white, straight men. The transgressive parenthood that legal maternalism potentially supports may thus present a subver-

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134. Schultz, *supra* note 1.

135. *See* COLLINS, *supra* note 33, at 45-48, 55; PHYLLIS PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945 12 (Ronnie J. Steinberg ed., 1989); Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1, 18-19 (1992); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions about Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1032-33, 1036-37 (2004).

136. *See* ALICE KESSLER-HARRIS, OUT TO WORK 185, 188 (1982).

137. *See* ESKRIDGE, *supra* note 38, at 231-234.

138. Franke, *supra* note 2.

139. HALLEY, *supra* note 2, at 67-70.

sion of repronormativity, not a furtherance of it.[140] As Part I explored, what of the reproduction and parenting of lesbians and gay men? Of racial minorities? Although the women at the center of a great deal of maternalist discourse are at least implicitly heterosexual (that is, women who are unmarried due to divorce or poverty), legal maternalism can easily accommodate women who do not seek to have sex with, reproduce with, or parent with men. It also can easily accommodate men who transgress traditional gender roles.

Can we not work toward a vision in which women (and men) are fully, positively, freely sexual beings and parents or caregivers as well? Other than the fact that human beings should not have to choose among various potential sources of joy, is it even possible to single out for protection, the "domain of sexuality that is the excess over reproduction"?[141] Which potential allies and liberatory paths are cut off as well as enabled by such a dualistic notion? Aside from the fact that a great deal of heterosexual sex is always potentially about reproduction, reproduction is potentially about sexual pleasure. Consider these findings: Many women experience increased sexual response and achieve orgasm more easily during pregnancy.[142] Some women experience intense sexual pleasure or even orgasm during birth.[143] Although the primary justification for breastfeeding is the health benefits afforded to infants, it also happens to be highly pleasurable for many mothers.[144] A recent study suggests the pheromones produced by lactating women and their infants increased the sexual motivation of other women, as measured by sexual desire and fantasies.[145] To the extent that Franke is correct that women's sexuality has been conceptualized by legal feminists as little more than an object of biological or economic exploitation, something like a factory,[146] or as a means of giving pleasure to men, reclaiming the sexual pleasure involved in reproduction could threaten these conceptualizations just as readily as the sex for sex's sake approach.

It is also worth considering the effect of women's reproduction on traditional gender relationships. Women's interest in sex with men decreases significantly in the postpartum period and marital satisfaction and stability decline

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140. *See* FINEMAN, *supra* note 40.

141. Franke, *supra* note 2, at 205.

142. HEIDI MURKOFF ET AL., WHAT TO EXPECT WHEN YOU'RE EXPECTING 233-35 (3d ed. 2002).

143. *See* CAROLE MASO, THE ROOM LIT BY ROSES 142 (2000); Laura Shanley, *Orgasmic Childbirth*, http://www.unassistedchildbirth.com/sensual/orgasmic.html (last visited Sept. 8, 2008) (collecting accounts of orgasmic childbirth and birth erotica from various sources).

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

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

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

with parenthood.[147] In some instances, this decline in marital satisfaction after the birth of a first child is a significant contributing factor to divorce.[148] Perhaps reproduction is *threatening* to repronormativity and heteronormativity. Could we not just as easily be dusting off our Adrienne Rich[149] as our Shulamith Firestone?[150] Franke's antiessentialist critique of maternalism unnecessarily slams the door on these promising lines of inquiry.

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

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

Why have legal maternalists, of all legal feminists, relied on justifications for supporting care that do not fully credit the liberatory potential of care for individual caregivers? The first reason is external to legal maternalism. Because legal maternalists are operating within the confines of the discipline of

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

148. *See* HILARY HOGE, WOMEN'S STORIES OF DIVORCE AT CHILDBIRTH 9-11, 204 (2002) (finding that the transition to parenthood may contribute to divorce among previously happy couples); *cf.* Jay Belsky & Emily Pensky, *Marital Change Across the Transition to Parenthood*, 12 MARRIAGE & FAM. REV. 133, 133 (1988) (reviewing studies showing that, for married couples, the transition to parenthood is characterized by a more traditional division of household labor, a decrease in couple leisure activities, a decrease in positive interchanges, an increase in conflict, and a decrease in the overall satisfaction with the marriage and feelings of love for the spouse, especially in the case of wives).

149. ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 13 (1976) (arguing that women need liberation not from motherhood, but from male domination of motherhood).

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

law, they must speak in its language. This has meant turning to justifications that may not sufficiently capture the positive potential of care. For example, legal maternalists' construction of care as a matter of public responsibility is a direct response to the law's definition of the private family as the proper societal institution for meeting the needs of dependents in our society. The argument that children are a public good represents an effort to counteract, on its own terms, neoliberal ideology, which increasingly dominates political and legal discourse. Theorizing the problem of devalued care as a form of gender discrimination is consistent with the rights tradition that lies at the center of liberal legal theory and our law. These translation efforts mean that the battle is already half lost when it has begun.[151] This is inevitable for any liberatory movement that employs law; one cannot get completely outside the frame.

The second reason for the legal maternalist reluctance to recognize that care may be political in a positive, subversive sense is primarily strategic. Although legal maternalists explicitly reject the notion that supporting individuals in traditional gender roles will necessarily perpetuate them, I think their less than full exploration of the potentially positive meaning of caregiving for caregivers evinces such a fear. As demonstrated by Part I, contrary to the nonmaternalist critique and the implicit position of legal maternalists, care can be radical, at least to the degree that any practice can be. As such, legal maternalists do not have to turn away from care in their efforts to subvert oppressive gender, race, class, and sexuality norms. Rather, such a project can be furthered through a fuller recognition of transgressive caregiving as politics.

On the other hand, the nonmaternalist critique presents a series of legitimate concerns that should be addressed by maternalists—again, not by changing the subject as some nonmaternalists have suggested[152]—but by developing a thicker, more positive conception of care. Here it is worth asking: Do the justifications relied upon by legal maternalists tap into the full potential of legal maternalism to fashion a theory of justice that takes into account the broadest array of individuals who could be, and should be, benefited by their projects? Are there risks involved when we rely on justifications that construct the family essentially as a site of public reproduction? Who stands to benefit and who stands to lose from such a conception? Those individuals for whom the state has been most disciplinary—for example, women of color and gays and lesbians—are at serious risk from such a conception of care, however useful it may be to challenging the present shift to private ordering. Further, can appeals to justice and human needs succeed in a country so committed to individualism and to liberal conceptions of rights? Will our efforts require a further articulation of why human needs should be recognized as human rights in a language our legal and political systems are likely to understand? And finally, can we supplement the existing conceptions of care with accounts that reflect the full range of care's meaning, including its positive potential? Here I am not arguing

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151. *See* LEFT LEGALISM/LEFT CRITIQUE 16 (Wendy Brown & Janet Halley eds., 2002).

152. *See* HALLEY, *supra* note 2; Franke, *supra* note 2.

for a cheery story for its own sake or for appeasement of those tired of hearing about women as victims. Many are victims in many ways. But it is also true that caregiving constitutes a potentially empowering practice. Which additional important experiences are overlooked by these conceptions? I would suggest that it is the full range of experiences of those who engage in transgressive caregiving practices.

IV. IMPLICATIONS FOR LAW

What are the implications for law of recognizing transgressive caregiving as a political practice with subversive potential? Although the present status of transgressive caregiving within the law is in many regards consistent with past patterns of regulation and marginalization, it is increasingly gaining recognition and protection. At this emancipatory moment, the potential for transformation is great, but so are the risks that legal acceptance of previously marginalized relationships and care practices will come on assimilatory terms. If this is true, strategies that do not easily fit within mainstream legal constructs will be potentially more subversive than those that simply seek to articulate rights in easily cognizable terms.

The impulse at this historic moment of recognition for transgressive caregivers, such as people of the same sex who wish to marry, is to use the language of equality. Although the formal equality strategy may have more appeal to lawmakers than the "transgressive caregiving as politics" conception, it also is more likely to reify the very hierarchies it seeks to undermine. Explicitly adding the political dimensions of transgressive caregiving to the current rights discourse over same-sex marriage may counteract some of its assimilatory effects by maintaining the culture and social practices of gay people while also avoiding sociobiological conceptions of difference.

Beyond same-sex marriage, family law would be greatly enriched and the quality of people's lives improved if the law recognized and protected transgressive care practices as a form of valuable political expression. For example, although many states now permit a child to have two legal parents of the same sex[153]—a significant step forward for transgressive caregiving practices—American family law generally takes the position that a child can have no more than two legal parents.[154] Where consensual and in the best interests of the child, why not allow more than two adults to serve as the legal parents of a child, with designated primary and secondary parents? As a practical matter, this reflects the arrangement of many families within minority communities al-

153. *See* Kessler, *supra* note 48.

154. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 130-31 (1989) (holding that a child did not have a due process right to maintain filial relationship with both putative natural father and husband); Elisa B. v. Superior Ct., 33 Cal. Rptr. 3d 46, 51 (Cal. 2005) (suggesting in dicta that a child may have two natural mothers, except when more than two parties are eligible for parentage); Johnson v. Calvert, 851 P.2d 776, 786-87 (Cal. 1993) (refusing to recognize that a child had two legal mothers where gestational mother, genetic mother, and genetic father desired to continue relationship with child).

ready.[155] Along the same lines, in the case of family dissolution, why not augment a child's right to receive child support from only one noncustodial parent—typically a male, biological parent? If we look to the parenting practices in African-American and gay communities, a whole range of individuals are likely to have economic and affective ties to a child worth preserving. These care practices can be highly functional and are constitutive of such communities. Recognizing them would represent long-deserved recognition of their value.[156]

This recognition could take various forms. For example, the Court of Appeal for Ontario recently granted legal parental status to a child's biological mother and her lesbian partner without extinguishing the parental rights of the child's biological father.[157] In that case, the three adults agreed that the women partners would be the child's primary parents, but that the father would play an active role in the child's life. The non-biological mother sought a judicial declaration that she, along with child's biological parents, was one of the child's legal parents. Using its *parens patriae* power, the court held it would not be in the child's best interest to lose the parentage of any of the parties, and ultimately declared the non-biological mother a legal parent without diminishing the status of either biological parent. Recently, an American appellate court reached a similar result, allocating legal and physical custody of four children among three adults in a custody dispute.[158]

Along the same lines, for some time Canadian courts have had the authority to order more than one noncustodial parent to pay child support concurrently (for example, a biological father and a stepfather) if the nonbiological parent stood in the place of a parent to the child,[159] apportioning support ac-

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155. Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 57-58 (2007). *But see* Susan Frelich Appleton, *Parents by the Numbers* 37 HOFSTRA L. REV. (forthcoming 2008) (manuscript, on file with author) (examining whether family law is ready for the potential complications of multi-party custody litigation and suggesting that expanded parental numbers might reinforce traditional norms and hierarchies instead of challenging them), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1284031.

156. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 *passim* (1984); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. FAM. STUD. 231, 240 (2007); Kessler, *supra* note 155, at 72-74; Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 454-55 (2008).

157. A.A. v. B.B., [2007] 83 O.R.3d 561 (Can.).

158. Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (Pa. 2007) (in which the Pennsylvania Superior Court allocated shared legal and physical custody among three adults: a woman who was the adoptive mother of two children and the biological mother of two others, her partner who stood *in loco parentis* to the four children, and the couples' friend, who was the sperm donor for the two biological children and was involved in the children's lives).

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

cording to the role each adult played in the child's life or even applying the full guideline amount to each adult independently.[160]

Or perhaps a more robust social welfare state, in which both the state and a set of individuals are jointly responsible for childhood and other conditions of human dependency, would be the logical consequence of a society in which caregiving—transgressive and not—were recognized. For example, the state and private employers offer significant support for caregiving and caregivers through health and other insurance benefits, Social Security benefits, and family leave.[161] These benefit schemes rarely contemplate care that occurs in extended families and larger care networks, even though much care work in our society occurs outside the legal family or the home.[162] A deeper recognition of transgressive care practices might justify the expansion of these public and private systems for insuring dependency to include a more diverse set of care relationships.

Other law reforms that might follow from a commitment to transgressive caregiving include wider acceptance of open adoption[163] and a foster care system where parental rights are not terminated on a fast track,[164] but are shared with foster parents consistent with a child's welfare.

In addition to informing debates surrounding the legal recognition of alternative family forms, reconceptualizing care as possessing positive political content under certain circumstances may serve to inform present discourses over the provision of welfare. That is, recognizing the political significance of transgressive caregiving adds a new justification for supporting the care work of women receiving welfare while providing a conceptual basis for limiting state intervention into their families.

Finally, as a strategy that is likely to involve a wide range of individuals, conceptualizing transgressive caregiving as a positive political practice of resistance is likely to further advance such progressive law reform efforts. For example, the explicit linkage of gay and minority care practices may serve to forge important coalitions across race lines that will strengthen both the gay liberation and welfare rights movements. Along the same lines, although the legal feminist discourse on care has largely conceptualized the interests of men and women as adverse, to the extent that men are transgressive caregivers in certain contexts, they too can potentially be part of law reform efforts aimed at valuing care. In sum, highlighting the common political content of transgres-

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160. *See* 2 Dep't of Justice of Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* 49-50 (2002).

161. *See* Murray, *supra* note 156, at 405-06.

162. *Id.* at 406-08; Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 204-05 (2007).

163. *See* Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 180-83 (1999).

164. *See* ROBERTS, *supra* note 14, at 150-54; Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 652-55, 689-91 (2006).

sive caregiving across race, class, sex, gender, and sexuality lines may serve as a basis for more effective coalition building and law reform.

CONCLUSION

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

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

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