

FROM PARENTAL LEAVES TO NURTURING LEAVES

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INTRODUCTION

This article addresses the need for a comprehensive, nationally-funded system of compassionate or nurturing work leaves to permit and support a variety of increasingly needed caregiving services. However, because the article was presented at an employment discrimination colloquium as part of a debate termed "equal versus special treatment," a few introductory remarks spelling out the link between the two topics are in order.

Traditionally, our society has merged childrearing and childbearing into a single notion of maternity, which has been viewed as a special and uniquely female function. Motherhood has been perceived as a woman's primary role to which other activities and functions should be, and often are, subordinated. One manifestation of this phenomenon is the assumption that women who become pregnant will quit or reduce their commitment to participating in the paid workforce.

Contemporary feminists have attempted to sever the automatic linkage of pregnancy and parenting that assigns childrearing, as well as childbearing, to females.¹ Most feminists who identify with the approach called the "special treatment" or "positive action" approach, as well as those who identify with the approach known both as the "equal treatment" or "comparative treatment" approach, seek to define the parenting function in sex-neutral terms and to promote participation by men.² Both groups, for example, would insist that childrearing work leaves be called parental leaves, rather than maternity leaves, and be extended to men as well as women.³

Both groups also regard rules or practices according differential treatment to pregnant women as sex-based classifications. Adherents of the two approaches differ, however, in when they would tolerate such classifications,

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1. See, e.g., Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 *Golden Gate* 513, 515 (1983).

2. See, e.g., *id.* at 551-64.

3. See generally *id.* at 544-45; Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *Women's Rts. L. Rep.* 175, 194-200 (1982) (though both groups approach pregnancy and some abortion questions differently, the two groups share an expansive goal of removing stereotype-laden restraints on women who choose to work).

and thus in when courts should strike down government use of such classifications. Special treatment advocates accept, and in fact welcome, such classifications where they benefit women. For example, a law that prohibits the firing of disabled pregnant women but permits the firing of other temporarily disabled workers would be acceptable under a special treatment theory. Equal treatment advocates, like myself, doubt that laws that appear to accord pregnant women preferential treatment will ever really benefit women. Instead, such laws are likely to jeopardize the hiring of women to begin with, because of the potential increase in costs to the employer. Such special treatment of women workers is also likely to engender resentment by male co-workers, and to reinforce the notion, for both men and women, that women's maternal role is primary.⁴

The equality model not only recognizes that rules which single out pregnant women are generally harmful sex-based classifications, but seeks to group the experience of pregnant women with the experiences of others in society. Specifically, the equality model seeks to link pregnant workers with all other workers who are equally able or unable to work.⁵ Making these links allows women to share in benefits already accorded males. It also serves to underscore the common elements of various human experiences. Thus the particular power of the approach lies in its potential for encouraging individuals of both genders to see similarities in their experiences, thereby diffusing the narrow focus on motherhood, which has limited women's societal participation to date.

A major criticism of the equality approach from the special treatment perspective, is that it fails to take account of a real difference in the sexes' physical make-up. Proponents of special treatment postulate that by analogizing pregnancy-related disabilities to other temporary disabilities, the equal treatment approach ignores a physical fact that must be accommodated. In their view, in the absence of special rules to deal with this special burden that women bear, women are in fact being denied equality. Special treatment advocates thus call for legislation ensuring income replacement, job security and similar benefits for women disabled by pregnancy, whether or not other temporarily disabled workers receive such benefits. Equal treatment advocates agree that their approach is inadequate without positive programs that recognize and accommodate the needs of pregnant women. These needs, however, must be met in the context of meeting the needs of other temporarily disabled

4. The no-leave policies may, however, have a disparate impact on female employees. In such cases, employers unable to meet their burden of showing a business necessity for the policy should be found to have violated Title VII, 42 U.S.C. § 2000. The remedy for such a violation would be to establish a leave policy for all employees, not merely pregnant women. See *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 817-18 (D.C. Cir. 1981).

5. As a model developed primarily in the employment context, the equal treatment model has focused almost exclusively on ability to work. In other contexts, it may promote equality to relate other aspects of pregnancy to other human experiences — for example, the generative component to other creative activities.

workers. Both camps agree on the need for positive programs, such as guaranteed leaves with income replacement, to facilitate parenting activity.

Like many directly engaged in the equal vs. special treatment debate, I am concerned with the types of positive programs that are required to promote workplace equality for women, in light of their biological and historical role in reproduction. One of my major concerns, however, is that the special treatment approach—and indeed the whole debate—overemphasizes not only the problem of pregnancy, but the problem of parenting as well.

Work norms which tolerate no-leave and no-absence policies and work schedules that are incompatible with child care make it difficult, if not impossible, for many working women to compete on an equal basis with men. Furthermore, men are unlikely to become involved in child care to any great extent when such work is neither paid nor easily coordinated with paid work in the market. Moreover, there is little hope of tempering the ideology that assigns affective activities to women and the family, and productive activities to men and the marketplace, without developing positive employment-related programs that recognize and accommodate parenting functions. Although such programs cannot supplant the need for collective child care services, they are essential as an option. In Sheila Kamerman and Alfred Kahn's words,

An updated program along these lines becomes the cornerstone of any response to the question of child rearing and child care. It assures a good start for parenting and child growth, with both parents able to participate, and in a financially viable way. It represents social endorsement of parenting, yet it is not so extensive as to create negative consequences for women who want to continue work, and it does not create financial incentive to stay away so long as to lose the continuity of the workplace attachment. It treats women and men equally and equitably.⁶

These same practical and ideological concerns, however, make it equally important to address other caregiving functions which are traditionally performed by women. Otherwise, the single-minded focus on problems of childbearing and childrearing will simultaneously reinforce both the myth of motherhood that has confined women to date and the invisibility of other significant burdens borne by women. It is out of this concern that I urge the development of positive programs to permit and endorse a broader range of caregiving activities.

This article proceeds, then, from a premise shared by equal treatment and special treatment proponents — the need for affirmative legislation establishing a system of parental leaves, in addition to collective child care programs. It argues first that leave and hour reduction programs should be established and expanded in two dimensions, broadening both the types of needs

6. S. Kamerman & A. Kahn, *Child Care, Family Benefits and Working Parents: A Study in Comparative Policy* 256 (1981) [hereinafter *Child Care*].

caregivers may serve and the categories of caregivers who may be eligible for such programs. The article then explores some of the crucial policy choices such programs would entail. Finally, it suggests the particular type of program that could be pursued as an interim goal.

I

THE NEED FOR EXPANDED LEAVE PROGRAMS

There is no question that an adequate governmental leave system, accompanied by an expansion of child care services, would go a long way toward resolving the current tension between the demands of work and home life which so often restrict women's employment opportunities. Even among large firms, opportunities for parental leaves are currently extremely limited. A 1984 sample of major U.S. industrial, financial and service companies indicates that only slightly more than half of the firms offered unpaid maternity leaves, while less than eight percent offered paid maternity leaves.⁷ Approximately thirty-seven percent offered unpaid leaves to fathers.⁸ Opportunities for undifferentiated personal leaves that can be used for the care of others are also extremely limited. Data from 1980 show that only twenty percent of workers in medium and large U.S. firms were entitled to formal paid personal leave, and only five percent were eligible for more than five days per year.⁹

Various proposals are being developed in response to this need. Kamerman and Kahn, for example, have proposed a "benefit-service package" which joins parental leaves with extensive educational and day care programs for children available from infancy.¹⁰ The benefit aspect consists of three major components: (1) a right for either parent to take a paid leave from work, with full job security and full social benefits, for a period of six months to a year; (2) a right for parents to take a specified number of paid days after each year to care for sick children at home; and (3) options for shorter work days for parents of young children.¹¹

As important as these benefits are, leave programs of the sort outlined above are too constricted in the type of nurturing relationships they endorse. They fall short in two major respects. First, they are unduly restrictive in the type of need for which leave is authorized. Second, they are unduly restrictive in their delineation of the person who may satisfy that need. In making the care of small children their primary, if not sole, object, parental leave proposals fail to recognize other equally compelling and rapidly increasing societal

7. Results of the survey involving 420 companies located throughout the nation, and conducted by Catalyst, were announced at a recent conference promoting a national parental leave policy. Dullen, *Conference Discusses Parental Job Leave*, N.Y. Times, Mar. 11, 1985 at C11, col. 2.

8. *Id.*

9. United States Department of Labor, Bureau of Labor Statistics, Bulletin 2107, *Employee Benefits in Industry*, 1980, 2 (Sept., 1981).

10. Child Care, *supra* note 6, at 254-57.

11. *Id.* at 255.

needs. In making the parent-child relationship their primary focus, they are to a large degree out of step with the reality of many contemporary living arrangements. To limit the proposals in this fashion is to miss an important opportunity to meet society's changing needs by endorsing other important and satisfying forms of nurturing relationships.

A. Cognizable Needs

The most conspicuous omission from existing and projected family leave programs is care of the elderly. Even in those nations which have explicit family policies, such as Sweden, France, and the Federal Republic of Germany, the policies are centered on females with young children. Despite isolated services and benefits, policies for the aging are not generally a component of the overall family programs.¹² Furthermore, the available services, which generally take the form of constant attendance allowances, home help programs, and respite care, are far from adequate.¹³ They do, however, highlight real needs.

The need to provide care for the elderly will obviously continue to grow with time. Demographic projections suggest that by 1990 there will be about 28.9 million people 65 or older in the United States, and about 30.6 million by the year 2000 as compared with 3 million in 1900 and 22.9 million in 1976.¹⁴ The proportion of older people in the non-working population, assuming zero population growth, is also expected to increase significantly, so that by the year 2025, people 65 and over will represent 40% of the dependent population, as compared to 25% in 1975.¹⁵ Moreover, the oldest part of the population will continue to grow more rapidly than the population of older people as

12. S. Kamerman, *Public Policy for the Elderly: The Dilemmas in a Family Perspective*, in *Strengthening Informal Supports for the Aging* 12, 14 (1981) (available from the Community Service Society of New York).

13. See Gibson, *Family Support Patterns, Policies and Programs*, in *Innovative Aging Programs Abroad: Implications for the United States* 159-95 (C. Nisberg, M. Gibson & S. Peace eds. 1984) [hereinafter Gibson]. According to Gibson, the old age and invalid insurance programs of most industrialized Western nations, with the exception of the United States, Canada, and the Federal Republic of Germany, include a cash benefit or constant attendance allowance for the care of permanently disabled persons at home. In the Federal Republic of Germany, limited constant attendance allowances are available to neighbors and relatives through the public assistance program, while aid and attendance allowances are available to veterans and their widows in the United States. Benefit levels rarely correspond to the actual costs of such care. In Sweden and the United Kingdom, social security credits are available for the years caregivers remain at home.

Most Western industrialized countries also offer limited home help services for the elderly who are ill. However, such programs are often subject to means-tests, and even where services are universally available, priority over scarce resources may go to low-income individuals and those lacking family support.

Respite care, which permits caregivers some time off is becoming increasingly common, particularly in Northern Europe. Such services have been made available through hospital geriatric departments, nursing homes, community agencies and various voluntary auspices, rather than through national programs.

14. Brody, *The Aging of the Family*, 438 *Annals* 13, 15 (July 1978).

15. *Id.* Citing Shanas & Hauser, *Zero Population Growth and the Family Life of Old*

a whole, so that by 2000 the proportion of people 75 and older will be 44%, as compared to 38% in 1975.¹⁶ This population is, of course, more vulnerable and requires more services than the 65 and over group as a whole.

Although it is difficult to anticipate with any certainty the nature of the care any one person will require, overall estimates of the population needing supportive services hover around one-third. It is known that five percent of all older persons are institutionalized at any one time; of those aged 75 to 84, the figure is 7.1%, while among those over 85 it is 19.3%. Among the elderly not institutionalized about 8 to 10% are as impaired as those in institutions, while an additional 10% are bedfast or housebound, and another 6 to 7% can go out only with difficulty.¹⁷

The handicapped also have substantial needs. There are an estimated 36 million mentally and physically handicapped children and adults.¹⁸ Though harder to quantify, temporary disabilities in both children and adults also may require significant amounts of caregiving.

On the other hand, the proportion of young children is decreasing. Currently, approximately 3.75 million children are being born each year.¹⁹ Birth rate projections suggest that by 1990 there will be 19.2 million children under 5 years old,²⁰ as compared to 19.7 million persons 65 and over with health care expenses reimbursed by Medicare hospital insurance and/or supplementary medical insurance.²¹ By the year 2025, the number of older people needing health care will be more than twice the number of children under five years old.²² Thus, in terms of sheer numbers, the care needs of older people will vastly exceed those of infants in the first year of life.

Apart from the population issue, care for the elderly is similar to child care in a number of respects. The majority of older people receiving assistance are cared for by family members living in the same home or nearby.²³ One

People, 30 J. Soc. 4, 79 (1974). Shanas and Hauser define the dependent population as people who are under 20 years old and over 65. *Id.* at 81.

16. Brody, *supra* note 14, at 16.

17. Brody, "Women in the Middle" and Family Help to Older People, 21 *The Gerontologist* 471, 472 (1981).

18. Telephone interview with Jean Canale, New Jersey Representative of the National Organization on Disability, Wash., D.C. (Oct. 16, 1984).

19. Statistical Abstract of the United States, National Data Book and Guide to Sources 9, at 9, Chart No. 7 (1984).

20. *Id.* at 63, Chart No. 83. This figure reflects the total number of live births in 1982, less the incidence of non-fetal infant deaths (less than one year old).

21. United States Department of Health and Human Services, Health Care Financing Administration, Annual Medicare Program Statistics (1983) (Summary Data Tables 1 & 2).

22. Statistical Abstract of the United States, *supra* note 19, at 32, Chart No. 31.

23. See Brody, *supra* note 14, at 18. See also National Center for Health Statistics, Public Health Service, United States Department of Health, Education, and Welfare, Home Care for Persons 55 and Over, United States, July 1966-June 1968 (1972) (80%). M. Cantor, *Caring for the Frail Elderly: Impact on Family, Friends and Neighbors* (Table 2) (Nov. 1980) (presented at Symposium: Family Support of the Elderly Current Research Findings and Directions for the Future, at the 33rd Annual Scientific Meeting of the Gerontological Society of America, San Diego, California) (52%) [hereinafter cited as Cantor]. Further, the presumption that most

person often assumes the primary responsibility for caregiving, and the resulting relationship between the caregiver and the person receiving assistance has been analogized to the bonding found between parent and child.²⁴ Here, too, families provide physical care plus love, intimacy, affection and solidarity, particularly as contrast to the services available from an institution.²⁵

Like children, older people receive care primarily from women. Together with spouses, adult daughters and daughters-in-law give personal care, shop and run errands, maintain the household, mobilize, coordinate and monitor services from other sources, and fill in when other care arrangements break down.²⁶ Available research suggests that caregiving for aged parents, parents-in-law and spouses restricts women's employment possibilities just as child care does. While increasing numbers of women have entered the workforce, recent studies indicate that a significant number actually quit their jobs in order to fulfill their caregiving functions. Others deliberately limit the nature or the hours of their employment for the same reasons.²⁷ For others, the need to provide financial support for elderly parents, as well as for children, obligates them to continue working.²⁸ Although there is some evidence that work serves as a useful safety valve for the emotional stress of caregiving,²⁹ coping with the multiple roles of worker, caregiver, spouse and family member frequently involves restricting one's life to the minimum essentials. The time and energy constraints of caregiving, particularly for women in the workforce, often mean sacrificing socializing, pursuing personal interests, and relaxing.³⁰ Research suggests that a significant amount of institutionalization of the elderly results from caregiver burnout due to pressures of these sorts.³¹

people institutionalize their dependent elderly is a myth. See, e.g., Brody, *supra* note 17, at 471; *supra* note 14, at 19-21.

24. S. Poulshock, *The Effects of Families of Caring for Impaired Elderly in Residence 6* (Oct. 1982) (unpublished manuscript available from the Margaret Blenkner Research Center for Family Studies of the Benjamin Rose Institute, Cleveland, Ohio).

25. Address by Marvin Sussman, *The Role of the Family and Other Mediating Structures in Providing Care*, in *Enhancing and Sustaining Informal Support Networks for the Elderly and Disabled* — Conference Proceedings 37, 44-45 (Nov. 1981) (available from the New York State Health Advisory Council).

26. Brody, *supra* note 17, at 474. These range, on the average, from 3 hours weekly (for subjects 40 to 49 years old) to 15.6 hours (for those 50 to 59) to 22.7 hours (for those 60 to 69). *Id.* at 476. In 40% of the cases in which an impaired adult lives with an adult child, the caregiving time is equivalent to a full time job. B. Soldo, *The Dependency Squeeze on Middle-Aged Women 6* (Center for Population Research, Georgetown University) [hereinafter Soldo].

27. Brody, *supra* note 17, at 471, 475. See also Land, *Social Policies and the Family: Their Effect on Women's Paid Employment in Great Britain*, in *Equal Employment Policy for Women* 366, 373 (R. Ratner ed. 1980); Soldo, *supra* note 26, at 11.

28. Brody, *supra* note 17, at 478 n.11 (citing Social Security Administration, *Longitudinal Retirement History Study* (Henretta & Rand eds. 1980)).

29. Horowitz, *The Impact of Caregiving on Children of the Frail Elderly 14-15* (Mar. 1982) (paper presented at the 59th Annual Meeting of the American Orthopsychiatric Association, San Francisco, California).

30. Cantor, *supra* note 23, at 26.

31. Cantor, *Strain Among Caregivers: A Study of Experience in the United States*, 23 *The Gerontologist* 597, 600 (1983) (emotional and physical stress greater than financial stress). See

In short, the flow of women into the paid labor force creates the same need for public support of caregiving, whether the recipient of the care is old, disabled or a small child. Work outside the home reduces the time available for caregiving in all cases. Likewise, the demands of caregiving in all cases interfere with women's ability to compete equally with men in the workplace.

In some respects, child care and care for the elderly and handicapped are perceived similarly. On the one hand, both are understood as quasi-social functions. Schools and, to some extent, day care and certain medical programs receive public support because society considers them necessary endeavors, which would not be accomplished without a collective commitment. Social Security, Medicare, and the limited, overlapping services now available for the aging represent similar understandings. Indeed, the fact that child care and care for disabled dependents or spouses receive identical treatment under the current tax code confirms that the two needs are in fact viewed similarly.³²

There are obvious differences between the needs of the very young and the very old, having to do both with the type of care that is required and the reasons why a society might undertake to fashion a social policy to foster that care. Thus, although the actual tasks that a caregiver provides in both cases—feeding, bathing, toileting, giving medication, providing links with the larger world—may be remarkably similar, there are conspicuous differences in the contexts. Children's self sufficiency increases, while the aged's declines. People who have lived a large part of their lives have had, in theory at least, an opportunity to provide for care in their old age. Children bring a promise of future contributions to society, while the aged have already made theirs. Perhaps in recognition of such contributions, the government provides a minimal floor of basic services in the form of Social Security and a hodge-podge of other limited in-kind services for the elderly.

It is not clear, however, that these differences argue for a policy that recognizes child care and not care for the elderly. From the caregiver's perspective, the care of the aged may present a greater drain on emotional and financial resources due to the reordering of family relationships, the deterioration in functioning of the recipient and the persistent nature of the need. Caregivers for the elderly are usually middle-aged or older themselves. Even if the person they care for needs minimal financial assistance, the time they must take from work may present an opportunity cost they can ill afford.

Other apparent differences also lose significance upon examination. Proposals for child care leaves are usually justified by the need for infants to form a sound relationship with their parent(s) at least at the outset of their lives. Love and affection, as well as physical care, are viewed as necessary to sound psychological development. Adults are considered already developed psycho-

also Teresi, Toner, Bennett, & Wilder, *Factors Related to Family Attitudes Toward Institutionalizing Older Relatives* 19 (Nov. 1980) (paper presented at the 33rd Annual Scientific Meeting of the Gerontological Society of America, San Diego, California).

32. 26 U.S.C. § 44A.

logically. Thus, the need for loving caregiving may be viewed as desirable but its absence may be considered of less consequence. However, substantial questions have been raised as to the need for single full-time parental care, even in infancy.³³ Even those who argue for a full-time caregiver for developmental reasons, rarely claim that the caregiver need be a biological parent.³⁴ Rather, the decision to develop parental leave policies reflects in large measure a particular conception of how families should look and how both parents and children should experience life. Analogous decisions could well be made about programs to support family members caring for adults. Programs of both types involve a choice to honor and promote feelings of intimacy and security, for caregiver and recipient. In both cases, the existence of emotional bonds makes it more likely that the work of giving personal services will be done — perhaps at less cost — than if institutional arrangements were required. Indeed, in an aging population where a greater number of vulnerable people will be dependent for assistance on relatively fewer young persons, care for the elderly may well come to be seen as a more compelling need.

In light of the similarities between child care and other caregiving work, it is wrong to concentrate on problems of parenting young children without addressing other important needs. While addressing one set of needs before the others is hardly likely to be found unconstitutional,³⁵ it is misguided as a matter of policy. Concern for human decency suggests that we must find a way to provide care for the wide range of people who require it. At the same time, concern for gender equality suggests that programs to adjust work requirements to minimize the conflict between work and home accurately reflect the wide range of burdens experienced by women.

The concerns are closely intertwined. Women's caregiving or nurturing work is not and will not be focused solely or even primarily on their children. Meshing work done in the marketplace with child care but not other work done in the domestic sphere will, as a practical matter, leave caregiving women with substantial unalleviated burdens and dependent persons with substantial unalleviated needs. Other consequences are likely as well. The view that women are preeminently childbearers and childrearers has been crucial to their subordination. That view has meant that women have had the major obligation for parenting. It has also meant that stereotypical qualities associated with childbearing and childrearing have been invoked to limit women's opportunities in the workplace. At the same time, that view has prevented structuring the workplace in a way that takes account of the actual difficulties

33. Child Care, *supra* note 6, at 265; Kagan, *The Psychological Requirements for Human Development, in Family in Transition* 400 (A. Skolnick & J. Skolnick 2d ed. 1977).

34. J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 12-13, 19 (1973).

35. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970); *Geduldig v. Aiello*, 417 U.S. 484 (1974). As unfortunate as the choice may be for women, putting child care needs before other dependent care needs should not be considered unconstitutional even by the *Geduldig* dissenters since the choice does not involve sex discrimination.

experienced by women as a result of their assigned role. Deeply embedded in our culture, the view that woman's primary role is that of mother has been internalized by women as well as men. To single out and endorse only that nurturing work which is directly associated with women's childbearing function is to underscore the debilitating cult of motherhood. This is not to say that the work of parenting is not real work that needs recognition and accommodation, but that such work should be acknowledged and valued in the context of a broader program. Otherwise, the remaining work, including care of the aged, the infirm, and the disabled, will be even more invisible and devalued.

B. Cognizable Relationships

Existing leave programs and forthcoming proposals generally limit eligibility to immediate family members. Conventional definitions of the family refer to persons related by blood, marriage or adoption, varying only in degrees of consanguinity. Such definitions, however, assume the presence of emotional ties that may be absent and ignore emotional ties among those not related according to such definitions. Limiting eligibility for caregiving leave and work reduction programs to family members is both unrealistic and undesirable. It is unrealistic in view of the proportion of those needing care and those able to give care who are not situated in conventionally defined families. It is undesirable because current demographics suggest that reliance on conventionally defined family members will not result in adequate care for the elderly and disabled and because the traditional nuclear family has proved confining and even destructive to many.

Available statistics make clear that the traditional nuclear family is no longer the dominant family form. In 1981, households headed by married couples represented only 60% of all households; projections for 1990 indicate the figure will drop to 55%.³⁶ Of these, less than 26% are likely to have children (under 18) in the home.³⁷ Only about 80% of family households contained married couples.³⁸ Marriages are occurring later³⁹ and a growing number of women and men may never marry.⁴⁰ The divorce rate doubled between 1970 and 1980 and is likely to continue to rise somewhat by the end of the 1980s.⁴¹ About half the first marriages of people aged 25 to 34 in 1980 may end in divorce.⁴² Remarriage rates have also been falling, and levels may

36. Glick, *How American Families are Changing*, 6 *Am. Demographics* 21, 23 (Jan. 1984).

37. *Id.*

38. 1980 *Census Demographics for States and Large Metropolitan Areas*, 4 *Am. Demographics* 28, 28 (Dec. 1982).

39. Glick, *supra* note 36, at 22. In 1970, 45% of the men and 64% of the women in their early twenties had already married; in 1980, the figures were 31% for men and 50% for women.

40. *Id.* at 23 (12% women and 10% men now aged 25 to 29).

41. *Id.* at 22.

42. *Id.* at 23.

be 5 to 10 percentage points lower by 1990.⁴³

As marriage and remarriage rates decline, nonmarital living arrangements are on the rise. At the beginning of this decade (1981), over a fifth of all households consisted of people living alone;⁴⁴ by 1990, it is likely to be over one fourth.⁴⁵ While still relatively rare (4%), opposite sex adult cohabitation has increased dramatically, essentially tripling between 1970 and 1980.⁴⁶ By 1980, the average household size had fallen to fewer than three persons (2.75).⁴⁷

Other significant changes in family structure reveal the inadequacy of tying caregiving programs to traditional family relationships. Having children is far from a universal experience for adults. Fertility rates remain low, despite the fact that the baby-boom generation has reached childbearing age. The share of American women between 25 to 29 years who have never married more than doubled between 1965 and 1979, reflecting both decisions to forego children and to defer childbearing.⁴⁸ Although not conclusive, surveys of birth expectations and other projections indicate childlessness will increase significantly.⁴⁹ One demographer suggests that as many as 35% of American single women have no expectation of ever bearing children.⁵⁰ Family size is also decreasing, and the data suggest that this trend will continue.⁵¹ At the same time, growing up in a home with two parents is far from a universal experience for children. In 1981, only a little more than 75% (76.4%) of American children lived with both parents; 20% lived with one parent, with the small remainder living in other situations.⁵² Current projections indicate that by 1990 less than 70% will be living in two parent households, and that almost 60% (59%) of children born during the early 1980s may expect to live with only one parent for at least a year before they are 18.⁵³ Close to 35% of all children may expect to live with a stepparent during part of their childhood.⁵⁴ As of 1981, 28% of households containing unmarried, opposite sex couples have at least one child present.⁵⁵

43. *Id.* at 24.

44. *Id.* at 23.

45. *Id.* at 23 (25.7%).

46. Spanier, *Living Together in the Eighties*, 4 *Am. Demographics* 17 (Nov. 1982).

47. Russell, *Inside the Shrinking Household*, 3 *Am. Demographics* 28 (Oct. 1981).

48. Pebley & Bloom, *Childless Americans*, 4 *Am. Demographics* 18 (Jan. 1982) [hereinafter Pebley & Bloom].

49. *Id.*

50. *Id.* (of single women).

51. Twenty-two percent of families with children now have only one child. G. Collins, *Dispelling Myths About the Only Child*, N.Y. Times, Aug. 13, 1984, at C16, col. 1 (citing T. Falbo, *The Single-Child Family* (1984)). The number of families with one child between the age of six and eighteen was 3.3 million in 1982. National Data Book, *supra* note 16, at 52, Chart No. 67. See Bloom, *Putting Off Children*, 6 *Am. Demographics* 30 (Sept. 1984).

52. Glick, *supra* note 36, at 25.

53. *Id.* (citing Arthur J. Norton of the Census Bureau).

54. *Id.*

55. Spanier, *supra* note 46, at 17.

In short, a substantial segment of the population is not now living in stable, two-parent, two-children nuclear families and is not likely to do so in the future. These developments obviously reinforce the need for programs to permit single parents and others to integrate their work and caring obligations. But they also demonstrate the insufficiencies of leave programs keying eligibility to traditional family relationships. There is little reason to assume that someone needing care will have someone fitting the conventional definition of a family member available or willing to provide care. Shared lives and reciprocal expectations are no longer inherent in legal and blood ties. Rather, the contacts that lead to emotional bonds and opportunities that now must make for caregiving are, to a great extent, the product of desire and circumstance. Divorced stepparents or even new spouses of stepparents, for example, may just as likely be in a position to care for children as biological parents. Similarly, lovers, friends, and colleagues may be the most likely source of assistance for needy adults. Like marriage, divorce and cohabitation trends, decreased childbearing will reduce the pool of formally related potential caregivers. For the increasing numbers of elderly there will be fewer spouses, children and siblings to rely on for care and companionship.

In addition, programs that tie eligibility to conventional definitions of family membership have an especially harsh impact on certain societal groups. Such programs will totally exclude partners in same-sex couples who are legally foreclosed from marriage. Unlike legally recognized spouses, these partners would receive no help in adjusting their work obligations to provide care for each other. Unlike biological or adoptive parents, they would receive no help in adjusting their work obligations to provide care for a partner's child who they may parent. And, unlike daughters-in-law, they would receive no help in adjusting their work obligations to provide care for a partner's parent.⁵⁶

Other important relationships are also ignored by attaching family-member eligibility requirements to caregiving leave programs. The very poor sustain themselves by forming networks for pooling and sharing resources. As Carol Stack and others have documented, among urban blacks these domestic networks are organized around the care of children and often include honorary kin, as well as actual kin. Such kinship occurs when friends assume a serious, family-type commitment.⁵⁷ This sort of relationship complements biological and legal ties that may not survive the strains and mobility associated with poverty.⁵⁸

One glaring defect of benefit programs restricted to conventionally de-

56. As of March 1983, 761,000 male and 575,000 female same-sex households existed in the U.S.; the figures include five thousand male and sixty-five thousand same sex households with children. Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1983 46-47, (1984) (Table 7).

57. C. Stack, *All Our Kin: Strategies for Survival in a Black Community* (1974).

58. Rapp, *Family and Class in Contemporary America: Notes Toward an Understanding of Ideology*, in *Rethinking the Family* 168, 176-79 (B. Thorne & M. Yalom eds. 1982).

financed family members, then, is their failure to provide assistance for substantial segments of the U.S. population which need these services. Family-based programs are also flawed in concept. To structure a benefit program around membership in the family is to reward and attempt to channel people into an institution that has proved oppressive to many, generally women. To an alarming extent, this oppression has taken the form of interspousal and intergenerational violence.⁵⁹ Moreover, as Heidi Hartmann points out, even where such violence does not occur, the family has traditionally been a locus of struggle among its members, at the same time that its members struggle as a unit against the larger world.⁶⁰ To the extent that social arrangements, such as women's exclusion from the opportunity to earn on equal terms with men and the denial of reproductive autonomy, have made women dependent on men, men have been able to exploit women's personal and household services. There are also psychological asymmetries in the traditional family in that women supply far more emotional support than they receive.⁶¹

Thus, despite continuing social, political and economic pressures, to live in conventional nuclear families, traditional family forms are breaking down. Individuals are seeking to alter their situations as they perceive the constraints of traditionally defined roles. Some women, for example, are choosing to relinquish their traditional roles as primary caretakers of their children, though they may seek to retain contact with their children in other roles.⁶² Others, of both sexes, are continuing to form new kinds of "family" relationships, centering around honorary kin, friends or colleagues in the workplace.⁶³ However, much of the change is due not to individual choice, but to more general changes in material conditions and ideology.⁶⁴ Substantial numbers of divorced women, particularly those with children, are far worse off economically, for instance, than they were while married.⁶⁵ Such problems are best

59. M. Straus, R. Gelles & S. Steinmetz, *Behind Closed Doors: Violence in the American Family* (1980) (abuse by parents of children, husbands of wives, wives of husbands, siblings of each other, and children of grandparents). See generally W. Stacey & A. Shupe, *The Family Secret: Domestic Violence in America* (1983).

60. Hartmann, *The Family as the Focus of Gender, Class, and Political Struggle: The Example of Housework*, 6 *Signs* 366, 369 (Spring 1981).

61. L. Pogrebin, *Family Politics: Love and Power on an Intimate Frontier* 90-91 (1983).

62. Glubka, *Out of the Stream: An Essay on Unconventional Motherhood*, 9 *Feminist Stud.* 223, 224 (1983).

63. See, e.g., K. Lindsey, *Friends as Family* (1981).

64. Barbara Ehrenreich argues, for example, in *The Hearts of Men* (1983) that men began abandoning their families and their support obligations in the 1950's, substantially before the women's movement caught on.

65. L. Woods, *Child Support: A National Disgrace* 6 & n.14 (1983) (available from National Center on Women and Family Law). "In the first year after divorce, the standard of living of women declines 73 percent while their husbands' standard of living improves 42 percent." *Id.* (citing Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards*, 28 *UCLA L. Rev.* 1181, 1245 (1981)) [hereinafter cited as Woods]. See Bureau of Census, *Current Population Reports, Money Income of Households, Families and Persons in the United States: 1981* 5 (Table 1) (divorced woman's median income, \$12,380, is 50.3% of married woman's income when husband is present) [hereinafter cited as Money Income].

addressed head-on by attacking the institutional arrangements that prevent women from earning decent wages⁶⁶ and collecting adequate child support.⁶⁷ Given the inequities and pain many have experienced in the family, new institutional arrangements should provide support to those in non-traditional situations, without excluding those still within the family.

Major opponents of this rather liberal position are Christopher Lasch and others who regard the permanence, authority and love attributed to the formal family as essential to the development of habits required for citizenship in a democratic society. In Lasch's words:

[T]he best argument for the indispensability of the family [is] that children grow up best under . . . conditions of "intense emotional involvement" [with their parents] . . . Without struggling with the ambivalent emotions aroused by the union of love and discipline in his parents, the child never masters his inner rage or his fear of authority.⁶⁸

Lasch's argument may be reputed by empirical evidence. It is not obvious that the family ever embodied the mix of love and discipline that Lasch attributes to it. Nor is it clear that the capacities for self-direction and self-control are transmitted in the manner Lasch claims. But Lasch's argument may also be challenged ideologically. Lasch, in essence, argues that the nuclear family is crucial to societal well-being because children must submit to demanding, albeit loving, (male) parental authority in order to accept and identify authority as adults.⁶⁹ At the same time, Lasch recognizes and purports to be sympathetic to claims that the family has proved oppressive to women. However, he sees the feminist program, which he construes as focusing primarily on economic self-sufficiency, as taking women out of the home and thus undermining important values associated with the family. Until a radical reorganization of society permits women to compete economically with men without sacrificing families, Lasch would put families first.⁷⁰ In

66. See Money Income, *supra* note 65, at 117-18 (1983: Table 37) (women's median income is 61% of men's). Henle & Ryscavage, *The Distribution of Earned Income Among Men and Women, 1958-77*, 103 *Monthly Lab. Rev.* No. 4, 3 (1980). One of the goals of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended at 26 U.S.C. §§ 72, 401, 402, 410, 411, 414, 417, 6057, 6652, and 29 U.S.C. §§ 1001 note, 1025, 1052-156, 1144 (1984)) was to eliminate discrimination in pensions caused by maternity leaves. The enacted law allows for up to 501 hours of maternity or paternity leave for pregnancy of the individual, the birth of a child of the individual, the trial period prior to adoption, or care for the child immediately following the birth or placement for adoption. S. Rep. No. 575, 98th Cong., 2d Sess. 9-10 (1984); H.R. Rep. No. 655 (part 2), 98th Cong., 2d Sess. 9-10 (1984).

67. Woods, *supra* note 65, at 2-3, 5 (nearly one third of all court ordered support awards go unpaid; only 49% are paid in full; of men who earn \$12,000 a year or more, 70% fail to pay any support). See also Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified and amended at 26 U.S.C. §§ 6103, 6402, 7213 and 42 U.S.C. §§ 602, 603, 606, 651-58, 664, 666, 667, 1305 note, 1315, 1396d).

68. C. Lasch, *Haven in a Heartless World* 123 (1979).

69. *Id.* at xvi-xvii.

70. Members of the Frankfurt School conceive of the traditional family similarly, but take

short, Lasch appears to choose authority over autonomy and equality, a choice that seems questionable at best. Inculcation of respect for authority hardly seems to justify channeling the unwilling into traditional family forms.

One final consideration before turning to program specifics is the relationship between programs aiding individual caregivers and programs providing collective or institutional care. The emphasis thus far has been on positive programs that recognize and compensate caregiving work performed by individuals — traditionally women — because such programs are an important step in achieving sexual equality and may also provide a low cost alternative to institutional care. However, these proposals for assisting individuals must be regarded as complements to collective programs. It is essential that programs subsidizing individual caretaking not be used as a substitute for collective care facilities for several reasons.

First, collective care cannot always be replaced by individual care. Sometimes, the nature of the need, or the lack of an appropriate caregiver, makes institutional care the only viable alternative. Second, total reliance on unlimited individual care programs will channel women out of the paid workforce, rather than allowing parents and others to harmonize their caregiving responsibilities with conventional paid employment. Collective care serves as an important alternative to caregivers who, for financial or personal development reasons, wish to maintain their attachment to the workforce, at least on a part-time basis.

Finally, collective services are an important source of respite, which is crucial to the continuation of full-time care by individuals.⁷¹

II

POLICY OPTIONS

This section reviews the programmatic choices involved in devising a system of caretaking leaves, drawing where possible on existing social welfare programs. Once it is determined that a broad caring or nurturing leave is desirable, it is necessary to consider just what conditions will justify the leave. There are two aspects to this problem: (1) What types of needs will be recognized? (2) How serious must the need or condition be? One approach to these questions is to devise essentially a shopping list of covered conditions, including the requisite degree of seriousness for each one. This is the approach taken in a recent Swedish proposal for sickness-related caring leaves from work.⁷² Under this proposal, which would supplement the rather extensive parental

a distinctly negative view of that function. "Under the pressure of the father children were supposed to learn not to conceive failures in terms of their societal causation, but to stop at the individual aspect and to render this absolute in terms of guilt, inadequacy and personal inferiority." *The Family, in Aspects of Sociology* 141 (1973), quoted in M. Barret & M. MacIntosh, *The Anti-Social Family* 28.

71. Gibson, *supra* note 13, at 159-95.

72. Anhörigvardskommitten, *Ledighet för anhörigvard*, S.O.U. 1983: 64, Socialdepartementet 9-15 [hereinafter *Ledighet för anhörigvard*].

leave programs already in operation in Sweden, workers would be eligible for up to thirty days of unpaid leave to provide care when the care recipient is (1) very seriously ill; (2) awaiting a bed in a nursing home; (3) eligible for a bed in a convalescent home, though living at home; (4) on respite leave from a nursing home; or (5) sixteen or under and seriously handicapped.

An alternative approach is to articulate a single eligibility criterion that reflects a need for care, irrespective of the source of that need. This is the approach taken by the U.S. tax code provisions authorizing tax credits for employment-related dependent care expenses. Section 44A of the Internal Revenue Code permits such credits for the care of disabled dependents or spouses, who are "physically or mentally incapable of caring for [themselves]," as well as children under fifteen.⁷³ The applicable regulations further specify that an individual is considered physically or mentally incapable of self care, if the individual requires the constant attention of another person.⁷⁴

The shopping list approach may have certain advantages. It can be attractive politically in that it focuses funding on the most sympathetic cases. It also permits different degrees of severity to be recognized for different types of conditions. The single standard approach, however, has the advantage of permitting the inclusion of unanticipated needs. More important, it is an embodiment of the idea that different caring needs are appropriately grouped together. Given its focus on commonality, a single degree of severity is probably preferable.

As the foregoing discussion makes clear, a second crucial policy choice involves the question of what relationship caregivers must bear to care for recipients. The arguments for moving beyond traditional definitions of family have been reviewed above. But there are practical problems in finding acceptable formulations. The Austrian and Swedish programs represent two possible extremes, in that the Austrian program delineates by statute the precise family relationships rendering a caregiver eligible⁷⁵ and the Swedish program permits anyone who actually performs the caregiving work to take leaves.⁷⁶ Current American constitutional doctrine argues for an intermediate position without suggesting any particular formulation.

Attempts to limit cohabitation in the zoning context to the immediate nuclear family have been found too restrictive,⁷⁷ while limits on cohabitation by unrelated adults have been upheld.⁷⁸ The U.S. tax code permits credits on behalf of (1) children, (2) spouses, (3) specified relatives who receive over half their support from the taxpayer *plus* (4) unrelated persons who both receive

73. 26 U.S.C. § 44A.

74. 26 C.F.R. § 1.44A-1(b)(1).

75. § 16 Erl. 1-14 (Austrian Statutes Commentary).

76. *Ledighet för anhörigvård*, *supra* note 72, at 9-15.

77. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (ordinance precluded grandmother from living with grandson).

78. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (ordinance restricted land use to persons related by blood, adoption or marriage).

over half their support from the taxpayer and who reside in the taxpayer's household.⁷⁹ To insist on the narrow Austrian-type traditional family relationships is unduly restrictive. On the other hand, under current conditions, including the absence of a legal tradition according recognition to many non-formalized caring relationships, the Swedish approach poses a grave risk of inequitable administration. Thus, while all the reasons previously discussed make it crucial to find a way ultimately to assist all caregivers, the tax code approach has distinct advantages at this time.

A third key question concerns the type of work adjustment a caregiving program would permit. There are basically three possibilities: long-term leaves, short-term leaves and limited work hours. The primary precedent for long-term leaves is the child care programs found throughout Europe. These programs, generally for women only,⁸⁰ permit leaves of two months to three years.⁸¹ A long-term leave provision is also included in the recent Swedish proposal for caring leaves. Under this proposal, when more than thirty days of care is required, the caregiver receives an indefinite leave with pension credits and job guarantee and is placed on the payroll of the county health department.⁸²

Short-term leave programs are less universal. The Austrian program constitutes one model. By legislation, employers are required to provide a minimum of one week paid leave for the care of near relatives living in the worker's household who have fallen ill. The new Swedish proposal also contains a variant on the short-term leave. As noted, the proposal would permit unpaid leave of up to thirty days, taken in whole or half days. Workers' positions would be guaranteed, and they would receive social security credits for their leave time. One of the three Swedish parental leave programs may also be considered an example of a short-term leave program. Swedish parents of children under ten may take up to sixty paid days to care for a child when the child, or the child's regular caretaker, is sick.⁸³ French mothers and Norwegian parents of both sexes are allowed a similar leave, for much briefer periods.⁸⁴

A second component of the Swedish parental leave program illustrates

79. 26 U.S.C. §§ 44A, 152.

80. Sweden, Denmark and France are the most notable exceptions. Labour Canada, Women's Bureau, Series A: Equality in the Workplace, No. 4, A National System of Full-Paid Parental Leave for Canada: Policy Choices, Costs and Funding Mechanisms 9 (1983) [hereinafter *Equality in the Workplace*]; Conference of European Ministers Responsible for Family Affairs XVII, Conference, National Answers to the Questionnaire: France 16-18 (April 10, 1981) [hereinafter *European Ministers (France)*]; Ligestillingsradet (Danish Equal Status Council) Annual Report 154-56 (1982).

81. Child Care, *supra* note 6.

82. Ledighet för anhörigvård, *supra* note 72, at 9-15.

83. Equality in the Workplace, *supra* note 80, at 24.

84. French women employed by the civil service are allowed twelve working days. European Ministers (France), *supra* note 80, at 17. Norwegian parents are entitled to ten days leave. Conference of European Ministers Responsible for Family Affairs, XVII Conference, National Answers to the Questionnaire 4 (Jan. 21, 1981) [hereinafter *European Ministers (Norway)*].

the shortened work hours option. Under this provision, which affords parents an additional ninety days paid leave, parents may opt to take quarter-days, thereby reducing their workday to six hours.⁸⁵ This leave must be taken in significant blocks prior to the child's eighth birthday.

Two problems inhere in these options: how to best accommodate the care recipients' needs and how best to absorb the program costs of compensation and work disruption. It is not immediately obvious, however, which way these considerations cut. The issue of recipient need requires a detailed assessment of demand and available services, which raises the initial question of what needs will be recognized. For example, recognizing the need for preventive care for the elderly entails recognizing the need for shortened work hours to permit caregivers to provide services. Similarly, disruption costs, including co-worker resentment, may be lessened when the leave permits the hiring of a temporary replacement.

A less obvious set of considerations involves the impact of program choices on gender equality. For example, long-term leaves may be necessary to meet certain needs while permitting caregivers to retain their attachment to the workforce. However, experience with childrearing leaves suggests that when women take long-term leaves, male participation in household tasks declines and women return to the labor force only as part-time workers.⁸⁶ On the other hand, men do seem to participate in significant numbers in short-term leave programs.⁸⁷

A fourth key option is the form of compensation to be afforded caregiving leaves. Even when a program does not offer income replacement, employment or position guarantees and assurances of pension and/or social security credits give leave programs real content. However, payment ensures that the leave will be an option for everyone, not merely the well-to-do. The most obvious trade-off is between the length of the leave and the level of compensation. Another important question is whether compensation should be measured by the income it replaces or by the job's worth. As an ideological matter, the need to recognize the value of women's historically invisible contributions suggests measuring compensation by the job done, rather than the job left. Unfortunately, as can be seen from market rates and welfare programs such as Aid to Families with Dependent Children, caring work, as women's work, has been undervalued historically. If compensation is set according to the market, the rate is likely to be low, thereby discouraging participation in the program. An

85. M. Pettersson, *Deltidsarbete* (1981); *Equality in the Workplace*, *supra* note 80, at 23.

86. Hoffman, *Employment and Quality of Working Life: The Situation of Women in Hungary* 19 (presented at International Symposium on Women and Industrial Relations, Vienna, Sept. 12-15, 1978).

87. In 1983, 270,000 Swedish mothers and 200,000 Swedish fathers stayed home to take care of sick children. Kindlund, *Family Policy in Sweden* 6 (presented at the Working Family, a seminar conducted by the Swedish Information Service and the Swedish Embassies in Washington and Ottawa (May 1984). Approximately 50% of workers using the Austrian Leave for Care of Relatives are male. Interview with Dr. Dorothea Gaudart, Austrian Federal Ministry of Social Affairs, in Vienna, Austria (Sept. 12, 1984) [hereinafter Interview with Dr. Gaudart].

adequate rate is important not only to ensure that workers of all classes can avail themselves of the leave programs, but also to minimize the financial pressures that may militate against men becoming caregivers. The concern for adequate compensation thus militates for the income replacement approach.

A related eligibility issue involves workforce attachment. If the purpose of leave programs is to encourage the integration of paid labor and women's traditional work in the private sphere, requiring some indication of the caregiver's commitment to the workforce seems eminently sensible. In theory, labor force attachment can be required both before and after a leave, but as a practical matter, recouping benefits from workers who do not return to the paid workforce may not be worth the effort. Therefore, adjusting the leave length seems to be the more effective means of pressuring caregivers to return to their jobs. There may be a trade-off between the length of the leave and the previous service requirement. The French (unpaid) parental leave, for example, may last up to two years, but requires at least one year's prior service.⁸⁸ The Austrian caring leave, by contrast, lasts only one week, but has no prior service requirement.⁸⁹

Conditioning eligibility on minimum prior work periods serves both to keep down program costs and to ensure that benefits will be channeled to those who are leaving the workforce only temporarily. It may minimize co-worker resentment, as well. On the other hand, extremely lengthy threshold work requirements may have a particularly adverse impact on women who have intermittent employment patterns precisely because of their caring obligations.

Notice provisions requiring workers to advise their employers of their intentions to take leaves are obviously important to the employers' planning process. However, not all needs can be anticipated, and even where the need can be known in advance, it may be difficult to assure compliance with notice requirements. In the case of maternity leaves, it would be in the worker's interest to comply with her obligation to notify her employer if pregnancy entitles her to certain job protections.⁹⁰ Comparable enforcement mechanisms are hard to envision for other types of leaves. It may be possible, however, to reward notification by providing a higher compensation rate after notice is given. Although those subject to true emergencies may be disadvantaged by initial disqualification from the higher rate, their disqualification need last only as long as it takes for the notice period to run.

Policing or monitoring mechanisms involve an additional set of program options. Monitoring can be intrusive both in terms of the kinds of questions asked and the means of obtaining answers. As they currently operate, Euro-

88. European Ministers (France), *supra* note 80, at 17.

89. Social Security in Austria 46 (I. Schweikert & G. Rudolf eds. 1980) [hereinafter *Social Security in Austria*]; 16 Erl. 1-14 (Austrian Statutes Commentary).

90. See, e.g., *Social Security in Austria*, *supra* note 89, at 20-21 (requiring women to notify their employers as soon as they are aware they are pregnant and affording them protection against work in hazardous jobs).

pean leave programs only require verification that the underlying condition exists, e.g., childbirth, illness.⁹¹ No inquiry is made into whether, or how well, the caregiving work is being done. Nor are caregivers asked to verify their relationship to the care recipient. Such restraint is probably due to the fact that only parents, in the case of childrearing leaves, and close relatives, as in the Austrian sick relative leave,⁹² may become caregivers. The assumption apparently is that the relationship is sufficient to ensure performance of the work. Provisions requiring employers to reimburse employees for verification costs may also tend to restrain demands in practice. In the case of the proposed Swedish caregiving leaves, which would be available to anyone willing to perform the caregiving work,⁹³ monitoring is inherent in the employment relationship long-term caregivers enter into with the country. Similarly, short-term caregivers on unpaid leaves may be required to submit documentation to their employers, though the documentation contemplated seems only to be proof of the underlying condition.⁹⁴ The unpaid nature of the leave and the employers' familiarity with their workers' circumstances appear to be considered the major safeguards against abuse.

The choice of mechanisms for monitoring caregiver behavior is closely connected with other policy options. For example, choosing longer leaves and less defined relationships between caregiver and recipient will increase the pressure to police a program closely. An important counterweight to the need to limit abuses, however, is the need to protect the participants' privacy. Administration of leave programs may involve employers, social insurance systems and/or unemployment agencies. Should any one of these begin to accumulate detailed information as to the day-to-day activities of caregivers and recipients in order to minimize leave program abuse, participation in such programs would pose tremendous risks to individual privacy.

The final area of policy determinations relates to financing mechanisms. Here there are three basic funding models:⁹⁵ individual employer funding, payroll tax funding, and general tax funding; and three basic administrative models: state-run programs, federal programs, and programs employing coop-

91. Interview with Dr. Gaudart, *supra* note 87. Interview with Professor Gert Rudolf, Hauptverband der o. Sozialversicherungstraeger, in Vienna, Austria (Sept. 12, 1984); interview with Gudrun Nörle, Social Department, in Stockholm, Sweden (Sept. 3, 1983) [hereinafter Interview with G. Nörle].

92. Social Security in Austria, *supra* note 89, at 46.

93. Ledighet för anhörigvård, *supra* note 72, at 13-14.

94. Interview with G. Nörle, *supra* note 91.

95. Detailed consideration of the financial feasibility of a caring leave program of the kind proposed is beyond the scope of this paper. Suffice it to say that the proposal presupposes a commitment to reallocating resources so as to support nurturing, rather than destructive activities. It also presumes that one of two circumstances will characterize the United States economy. Either modes of production and the economic situation will continue more or less as they are at present or, more likely, automation will permit the same or greater levels of production with fewer workers. In the latter case, we will need to conceive of entitlement to income as separate from employment or broaden our definition of gainful employment substantially. See generally Leontief, *Distribution of Work and Income*, *Sci. Am.* 188 (Sept. 1982).

erative federalism.⁹⁶

Employer financing comes about through legislation, such as that codifying the Austrian caring leave program, which requires employers to grant their employees paid leaves. While individual employer-funded schemes frequently result from statutes extending benefits gained through collective bargaining, there is no immediately apparent *a priori* argument in favor of this form of funding. Indeed, in the instant context, several arguments cut against it. First, the purpose of the program is to recognize and facilitate work performed outside the workplace for the benefit of society in general, rather than for the employer in particular. Imposing the cost on the employer tends to undercut society's endorsement of the activity. Second, the ability of employers to pass on program costs depends in large measure on the nature of their product or service and the structure of their industry. Since these differences in circumstances bear little relation to the purpose or operation of the leave program, substantial inequities may result. Third, the imposition of costs on employers will tend to promote sex segregation of the workforce since it is likely that initially, at least, more women than men will use the leave program. Employers are thus likely to consider women as more costly to employ and may therefore avoid hiring and promoting them.

Payroll tax funding mechanisms share some, though not all, of the drawbacks of individual employer-funded schemes. A payroll tax suggests a connection to the workplace, when the appropriate focus is on work done elsewhere. In this respect, caring programs are unlike the Old Age and Survivors' Insurance portions of Social Security, in which the benefit is seen as related to the worker's contribution on the job. A payroll tax, generally imposed on both employer and employee as a percentage of earnings, may also be passed on in differing degrees by different employers. Moreover, the standard use of ceilings to limit the wage base, subject to tax results in the payroll tax has a pronounced regressive effect. On the other hand, a payroll tax without more is unlikely to affect segregation of the workforce in either direction.

At times, however, payroll taxes are linked with experience rating schemes that adjust the tax rate in accordance with the employer's track record. Employers are taxed at higher rates under the unemployment insurance program, for example, when their layoff rate exceeds certain figures. While the purpose of such unemployment rating systems is to discourage use of the benefit program, it might be possible to use the general concept of experience rating to promote use of caring leave programs. Thus employers who are particularly flexible about permitting their workers to use a leave program might be rewarded with lower tax rates. Such incentives might, however, encourage certain types of employers to hire women who are likely to use the leaves in greater numbers than men, once again promoting sex segregation in the labor market.

96. For a general overview of the models discussed here, see R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice*, 717-41 (1980).

In contrast to payroll tax funding mechanisms, financing based on general revenues has the advantage of allowing use of non-regressive taxes. The added flexibility of general budgetary contributions may also make it easier to adjust leave compensation rates upward. On the other hand, requiring the program to compete annually in the budget process may make it more vulnerable politically. Nevertheless, despite this latter disadvantage, the general revenue route appears preferable.

As noted, the program may be operated by one or more states, by the federal government or by both the state and federal governments through a system of cooperative federalism. The primary advantage of the state option is the greater experimentation it permits. Variation in benefit levels, eligibility requirements and administrative mechanisms are all possible when control resides at the state level. At the same time, that variation may be a disadvantage; just as it allows for greater liberality in some states, it permits very limited programs in others. A federal program, by contrast, ensures that minimum standards are met throughout the country and removes the competitive pressure to which liberal states are subjected by their less generous neighbors. A federal program is also able to draw on superior funding sources.

Cooperative federalism schemes, financed by federal and state matching funds and administered by states in accordance with federal standards, appear to offer the best of both worlds. In practice, however, they may be subject to restrictions imposed by state budgetary limits. They may also be confusing, cumbersome and wasteful. Further, the historic use of cooperative federalism in connection with programs for the poor may well result in a tendency to carry over demeaning and intrusive practices.⁹⁷ On balance, then, nationwide programs appear superior.

III

THE INTERIM GOAL

Significant attention is currently being given to the formulation of parental leave policies.⁹⁸ To broaden this debate and to begin the movement toward

97. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971) (eligibility for New York's program of Aid to Families with Dependent Children conditioned on recipients agreeing to home visits by welfare caseworkers).

98. The Congressional Caucus for Women's Issues is considering a Family Employment Security Act which includes "disability/parental leave; study of paid leave; and sick leave." Memorandum from Sherry Cassidy, Congressional Caucus for Women's Issues to FESA Task Force (Sept. 24, 1984) [hereinafter Congressional Caucus for Women's Issues]. Several state bills covering parental leave are also being proposed or developed. See Massachusetts H.R. Bill 1314, to be introduced in 1985 by Rep. Mary Jane Gibson (12 weeks parenting leave related to birth or adoption of a child with job security and benefit retention provisions); New York Assembly Bill 1526, introduced 1983-84 Regular Session by Assembly Members Newburger & Lipschutz (amendment to civil service law for New York State employees providing for retirement system credit during leaves of absence due to pregnancy of either the employee or employee's spouse); California Assembly Bill 613, introduced 1985 by Assembly Member Moore (unlawful employment practice for any employer to refuse to grant an employee's reasonable request for child rearing with job security and retention provisions); and New Jersey legislative

a program that meets the needs of all segments of society, it is important to offer alternative formulations. A principled legislative proposal can focus discussion on both the need for and the best means of meeting the broad concerns articulated above. This section therefore offers such a proposal. The proposed program has two components: (1) for caregivers, a system of guarantees that preserves work attachment and benefits; and (2) for care recipients, a voucher system that facilitates compensation to caregivers.

Separation of work attachment from the compensation mechanism and the placement of the compensation mechanism in the recipient's hands, serves several important purposes. First, up to this point, the needs of caregivers and recipients have been considered together. However, as pressures on women, the traditional caregivers, grow, the young, the old, and the handicapped will also benefit from programs that allow caregivers to accommodate the competing demands on their time and energies. In many cases, there may be little question as to the appropriate form of care or the identity of the most desirable caregiver. But this will not always be the case, and it is important to recognize that control over such choices properly resides in the recipient whenever possible. Where the recipient is underage or otherwise incompetent, the figure with decision-making power is likely to be, but need not be, the caregiver. Existing mechanisms for allocating the power to act on behalf of incompetents should be sufficient to determine who has the power to select the caregiver.

Second, in a program that gives more than the minimal amount of leave time to meet caring needs, particularly for non-related individuals, there will be significant political pressure to monitor expenditures and control abuse. By giving control of the purse strings to the recipient, the need for government agencies and employers to accumulate intimate information about program beneficiaries will be minimized.

Finally, separating the work adjustment provisions from the compensation mechanism permits the work to be valued independently of the income it replaces. Though this has the advantage of attributing value to the work itself, it may also have the disadvantage of carrying forward the historical undervaluation of work traditionally performed by women.

Drawing on the dependent care provisions of the U.S. tax code, the proposed system would permit adjustment of workplace obligations for care of anyone who is physically or mentally incapable of self care or under the age of fifteen.⁹⁹ Like the dependent care credit, the proposed leave program would be restricted to those needing full-time care. Although this restriction makes the proposal fall short of a truly comprehensive program permitting part-time and

proposal, under development by New Jersey American Civil Liberties Union (personal communication from J. Fogel, Exec. Director N.J. ACLU, Mar. 4, 1985) (parental leave for either spouse with job security and benefit retention provisions). See also Brozan, *Leaves for Child Care Studied*, N.Y. Times, Dec. 14, 1984, at B18, col. 4.

99. I.R.C. § 44A (Law Co-Op. 1984).

preventive care, it relies on a readily implemented standard, incorporates a precedent within our system, and addresses a clearly recognizable need.

The delineation of relationships cognizable under the proposed program would also draw on U.S. tax code provisions. Eligible caregivers would extend beyond the immediate nuclear family and immediate relatives to include those living within the same household. Drawing on the dependent care tax credit provisions in this respect, allows a modest extension beyond the traditional legal definition of family. Although this formulation fails to recognize certain existing honorary kin practices, to the extent that households can be combined at the point that the leave and the caretaking commence, the formulation may foster less conventional caregiving relationships to a limited extent.

To achieve the goal of integrating caring work with paid employment, it is important for the proposed leave program to include all three forms of work adjustment: long-term leaves, short-term leaves, and shorter work hours. Long- and short-term leaves for the care of children are already being contemplated by concerned Congressional and state legislature groups. The long-term leaves contemplated at the federal level are likely to entail a twenty-six week period of unpaid, job-protected leave, with reinstatement to the same position and continuation of benefits. Obviously, the proposal for a broader leave should be aligned with this proposal. The short-term leave under discussion would require employers to afford a minimum paid sick leave that could also be used for the care of sick children. It is no doubt reasonable to set the number of employee sick days to accord with the common U.S. white collar practice of ten to thirty days.¹⁰⁰ However, in terms of providing additional leave, for relatives' care, the one-week Austrian model,¹⁰¹ the ten-day Norwegian model,¹⁰² or the twelve-day French model¹⁰³ may be appropriate precedents. As for shortened work hours, there is sound support in the Swedish parental option of converting short-term leave to blocks of half or quarter work days. Under the Swedish system the total time allotted is ninety days, to be taken over an eight-year period;¹⁰⁴ but the initial American experience would no doubt be substantially shorter.

Setting the level of compensation for caregiving is a difficult proposition politically, given the enormous pressures today to keep expenditures down. Interested Congressional and state legislative bodies envision no more than studying the issue at this point.¹⁰⁵ Like the constant attendance allowances available in most Western European countries, veterans' care allowances avail-

100. United States Department of Labor, Bureau of Labor Statistics, *Employee Benefits in Industry*, 1980 Bulletin 2107, 3, 12 (1981) (5370 of medium and large employers provided sick leave annually; white collar workers averaged from 10 to 30 days.).

101. Social Security in Austria, *supra* note 89, at 46.

102. European Ministers (Norway), *supra* note 84, at 4.

103. European Ministers (France), *supra* note 80, at 17.

104. Equality in the Workplace, *supra* note 80, at 23.

105. Congressional Caucus for Women's Issues, *supra* note 98.

able in the United States are uniformly low.¹⁰⁶ Market rates for caring work are, of course, also low. Rather than specifying any particular sum, the proposal here suggests a source of figures: salaries paid military medical and paramedical personnel. No one is likely to argue that such figures are inflated, and by drawing on a male tradition of acknowledged public service, the process of rate setting can itself help endorse the value of caring work. Alternatively, the rate can be set at the average wage for the relevant geographical area.¹⁰⁷ Given the relatively open-ended quality of the eligibility requirements and the importance of compensating the work, it is important for an initial proposal to include limitations on the number of leaves a given worker may take. No such limitations appear in parental leave programs, either because such programs have been motivated at least in part by pronatalist policies or because inherent limits are assumed to exist. Limitations may be expressed in terms of minimal workforce attachment or in terms of maximum numbers during an overall block of time. In light of the variety and lack of predictability of the needs a particular worker may be called upon to fill, the latter alternative seems preferable, with a reasonable maximum perhaps being three long-term leaves over ten years.

Finally, for all the reasons discussed in the preceeding section, the proposed program should be funded and administered through general taxes at the national level. A national program of this sort, however, is most likely to come about following a degree of experimentation at the state level.

In some sense any specific proposal involves arbitrary choices and undesirable trade-offs; the interim goal offered here is no exception. The time has come, however, to move beyond a single-minded focus on the role of women as mothers of small children to a broader discussion of the ways our society can, consistent with a commitment to full gender equality, meet all of the caring needs traditionally assigned to women. Having an immediate goal, so long as it is seen as but one step, may contribute to that movement.

106. Gibson, *supra* note 13, at 159-95.

107. State disability plans, for example, set income replacement rates in relation to average state wages. See, e.g., N.J. Stat. Ann. § 43:21-40, § 43:21-3(c) (West 1985 Supp.) (2/3 of employee's average weekly wage subject to maximum of 50% of the statewide average weekly remuneration as determined by the Commissioner of Labor).

RESPONSES

MYRNA MARTINEZ: I don't have a prepared text, but I do have some observations, comments, and questions based on my reading of the two articles. One of the first things that I question about the special treatment mode is the fact that by characterizing pregnancy as unique it echoes Justice Rehnquist's reasoning in the *Gilbert* case. The Supreme Court simply said that pregnancy was a disability unique to women and that where women were receiving the same benefits as men, this additional disability was not discrimination on the basis of sex. So it seems to me that we are really going back to that kind of reasoning. I was wondering, Wendy, how Linda Krieger is able to use the same characterization of pregnancy as uniqueness, but still come out on the other side.

WENDY WILLIAMS: She views men and women as being fundamentally the same, except for pregnancy, just as Justice Rehnquist does. I said that to her once, but we never could quite agree about it. When you get right down to it, I think what she is really looking at, and what she really senses, is that pregnancy means that women as a class are going to suffer more disabilities than men. Therefore any workplace policy is going to affect women as a group more adversely than men as a group. I think that is what she is really trying to say.

MYRNA MARTINEZ: The equal treatment mode has challenged the laws and regulations that codified stereotypes of women as being mothers and of women's place as being in the home. Going back to a special treatment mode is actually turning back the clock. I don't think we've reached a point where we can say that in this society there are no acts of discrimination on the basis of sex or that the Pregnancy Disability Act (PDA) has reached the limit of its potential. From a historical perspective, ten years in the development of civil rights is too short a period of time to know whether one approach is ineffective.

WENDY WILLIAMS: Yes and trade it for one that only a decade ago was yielding all kinds of horrendous results. I am a little hesitant on that basis as well as the others I outlined.

MYRNA MARTINEZ: Also, as a sole practitioner, if I am representing a woman who has a claim against an employer for violation of the Pregnancy Disability Act, and if I am able to prevail on that act of discrimination, then I want to fashion some affirmative relief. If I adopt a special treatment mode, would that mean that I would require as part of the affirmative relief that the employer enact special treatment, or would a declaratory statement that the em-

ployer shall not discriminate on the basis of sex be sufficient? Just as a nuts and bolts issue, how do you fashion the affirmative relief when you prevail on an individual claim of discrimination?

WENDY WILLIAMS: One of the interesting things about the pregnancy problem is that it arrives in all kinds of manifestations which are then challenged under Title VII and the PDA. It would depend on the particular situation. If it were a termination because a woman became pregnant, presumably we would be talking reinstatement and back pay. If it were an across-the-board rule that a woman had to quit in her fourth month of pregnancy, which was the standard provision of only a decade ago, but which is by and large now handled by the PDA and Title VII, then you're talking about a situation where the provision is invalidated and the class gets some kind of monetary relief for the period of time that they were forced off the job, and so on and so on. So, I think the question for practitioners has to be asked in the context of a particular provision and its consequences for the individual plaintiff class.

JOAN BERTIN: I want Wendy to tell us, as a practical matter, what to do for women in female intensive industries, where there is essentially no comparable male work force, who are denied all disability leaves. I'm thinking now of a hospital work force, which is an area that we get a lot of calls about. How do we work the impact analysis in a context in which there is no comparative statistical pool?

WENDY WILLIAMS: It's a good question because Title VII, like any non-discrimination provision, is much more about what you can't do than what you have to do. I think the point I was trying to make at the end is that there is no rose garden here. To the extent we want to institute certain guarantees, we're at the point where we are now going to have to go out and affirmatively fashion them. And the question is, what kind of guarantees do we want to see enacted? Do we want a special treatment model or an equal treatment model?

I find your question very important for the following reason. Miller-Wohl is a company in the retail clothing business, and guess what the work force looks like? It is a very much female-dominated work force with low pay, high turnover, all the terribles. Terrible benefits, and other classic female-intensive workplace rules. No leave during the first year is the kind of policy they have in those jobs. It underscores for me how limited the view is that approaches the question in terms of what we do for pregnant women in that situation. We're talking about a work force that is being treated unfairly in general, and we're talking predominantly about women with other disabilities also not getting what they need and deserve. So, when we're talking about solving problems we're going to have to say sometimes, "Yes, it's time to talk to our legislature," and then the question becomes whether to use the equal treatment model or special treatment model in the affirmative mode.

JOAN BERTIN: I have no problem with the answer to that question, but I do see another problem. I don't think that it's always so obvious in these female intensive work forces that all of the disabilities are related to pregnancy or childbirth; in fact, the incidence of those disabilities may be fairly low.

NADINE TAUB: But isn't that a question of what the age composition of the work force is? My guess is that back at a time when there were no-marriage rules, and when the model of the work force was that single women dropped out either when they married or when they had their first child, then in the high-turnover as well as in other jobs employing women, workers were predominantly young women. Disabilities would have been primarily from mostly pregnancy. Now, however, you have much greater participation in the work force at all ages. Even though there are higher turnover jobs, they're not necessarily going to be filled by women of childbearing age, so pregnancy is not necessarily going to be the main reason for disability.

WENDY WILLIAMS: It underscores again that we need to look broadly at these questions. I don't think it's true in many situations that the main problem for women is pregnancy. Nadine's point on that reflects my own experience, which is that pregnancy was a very small part of a very large problem. The larger problem is what to do after the child arrives, when the kid gets sick, when the kid has to see the pediatrician or when the child care person is sick. In the little towns in Montana and where I grew up, it's the older women who were often working in the retail establishments, for example. So, I'm not willing to conclude "off the bat" who is injured in any particular workplace setting. The disparate impact analysis answers that question. It looks at the particular work setting and asks who a rule affects.

NADINE TAUB: But it doesn't deal with the problem when you have basically a female work force. My question about who is in the work force has to do with whether a legislative remedy should be designed to take care of all disabilities.

JOAN BERTIN: But what is the interim relief until you have the legislative remedy? There are very significant problems.

WENDY WILLIAMS: It's exactly what I said. If the legislation is not there, and if it's an all female work force, you don't have the interim relief. And that underscores the point. Lawyers can't hang out in the courts and expect all our problems to get solved.

AUDIENCE REMARK: Interim relief is to organize.

WENDY WILLIAMS: Right. Right. Those of you who are interested in creative ways of writing collective bargaining agreements to reflect some of these concerns should talk to Marley Weiss who has been in the business of doing

just that for the UAW for a couple of years. She has been a real inspiration to me in thinking about these problems. Some of the stuff she came up with is great stuff that brings workers together and gets them to see their commonalities, rather than dividing men from women and parents from nonparents.