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## CONTENTS

### SYMPOSIUM ON THE STRUCTURES OF CARE WORK

SYMPOSIUM EDITOR  
KATHARINE B. SILBAUGH

FOREWORD: THE STRUCTURES OF  
CARE WORK *Katharine B. Silbaugh* 1389

CONTRACT AND CARE *Martha Albertson Fineman* 1403

The current social contract between individuals and society is flawed. The background rules in the social contract have changed as society changes; however, the social contract has not reflected those changes. Individuals and families have no one to help them with caretaking as the existing social contract does not recognize the burdens of caretaking. Society has a responsibility to help individuals with their dependency responsibilities as part of the social contract.

FROM DIFFERENCE TO DOMINANCE  
TO DOMESTICITY: CARE AS WORK,  
GENDER AS TRADITION *Joan Williams* 1441

This Article introduces the notion of gender not as difference or as dominance, but as tradition. The work of Pierre Bourdieu and Judith Butler are tapped for insights into the cultural system that defines the relationship of market work to family work; the term "domesticity" is used to describe that system. Domesticity is presented as an important, if partial, model that offers crucial insights into the work/family axis of gender—and into the strengths and limitations of conceptualizing work/family issues in terms of "care." This Article argues that "care" is work, and distinguishes seven distinct types of care work.

#### COMMENTARY:

CARING FOR CHILDREN AND CARETAKERS *Mary Becker* 1495

This Commentary remarks on the work of Fineman and Williams, particularly their contributions to this Symposium. Both argue for better supports for caretakers and link such support to equality for women. In addition, this Commentary remarks on a recent article by Katherine Franke attacking feminist arguments for support of caretakers. Becker argues that better social and economic supports for caretakers and their dependents are necessary, not just to lessen the inequality between women and men, but as key components of a government fulfilling its primary goal—ensuring that all citizens are able to develop their capabilities.

**COMMENTARY:****TAKING CARE***Katherine M. Franke* 1541

In this Commentary, Franke seeks to historically contextualize the Symposium contributions of Fineman and Williams. Given that both Fineman and Williams urge a larger role for the state, the market, and private employers in addressing the demands of human dependency, Franke turns to the experiences of African Americans in the immediate post-Civil War period to illuminate the precedent for externalizing the costs of dependency outside the family, as well as the complexities of so doing. The experiences of African Americans during this time instruct that public support brings with it a set of disciplinary norms that render that support a new site for both subjectivity and subjection. This historical example demonstrates how new opportunities for political identity and for agency cannot be analyzed apart from how private and public power is organized.

**COMMENTARY:****CARE, WORK, AND THE ROAD  
TO EQUALITY: A COMMENTARY  
ON FINEMAN AND WILLIAMS***Michael Selmi* 1557

In this Commentary, Selmi questions whether a strategy designed to enable women to devote more time to care work is likely to lead to greater equality for women. Selmi canvasses recent data on women's labor force activity and suggests that the key to equality remains with attaining greater convergence in men's and women's work behavior.

**RACED HISTORIES, MOTHER FRIENDSHIPS,  
AND THE POWER OF CARE: CONVERSATIONS  
WITH WOMEN IN PROJECT HEAD START***Lucie E. White* 1569

This Article seeks to disrupt the polarized debate about care that is taking shape among feminist scholars. Drawing from ethnographic interviews with low-income women in a South Central Los Angeles Head Start program, White sets forth a conception of care that is grounded in historical practices within African American communities for confronting race and gender violence, affirming each person's dignity and potential, and promoting social justice.

**COMMENTARY:****THE SECOND COMING OF CARE***Kathryn Abrams* 1605

In this Commentary on White's article, Abrams examines the differences between two incarnations of the feminist conversation about care: an early version, that viewed care as a characteristic of, or emanation from, women; and a more contemporary version, that focuses on caregiving as an often undervalued social practice, central to the lives of many women but also performed by others. Abrams examines the ways in which White's article forms a bridge between these two moments, and also offers a new conception of law's relation to caregiving and other feminist goals: a view of law as *enabling*, rather than *producing* those social arrangements that are part of progressive change.

**KINSHIP CARE AND THE PRICE OF STATE  
SUPPORT FOR CHILDREN***Dorothy E. Roberts* 1619

Kinship foster care replaces a traditional, private African American family arrangement with a similar structure that is regulated by state child welfare agencies. Formal kinship care often involves relinquishing custody of children in exchange for services and benefits that families need, and state payments for kinship caregiving are

correlated to the level of state supervision of caregivers. Incorporating kinship care into the child welfare system, moreover, sometimes disrupts family ties. This onerous price exacted from poor black families for public assistance stems from the failure of more general support for caregiving and demonstrates the need for fundamental change in our philosophy of care.

### COMMENTARY:

#### ALTERNATIVE CARETAKING AND FAMILY AUTONOMY: SOME THOUGHTS IN RESPONSE TO DOROTHY ROBERTS

*Katharine K. Baker* 1643

In this Commentary, Baker highlights two important issues raised by Roberts's article. First, she shows that the structure of state support for caretaking affects caretaking norms. If women, and particularly women of color, want to take advantage of the benefits of more collective caretaking arrangements like kinship networks, the state support should not be limited to individual women who choose to caretake in isolated, non-communal settings. Second, she suggests that in order to maximize the benefits of kinship arrangements, it is important to articulate a theory of state deference to family that does not rely on traditional notions of financial independence or parental rights.

#### UNRAVELING PRIVILEGE: WORKERS' CHILDREN AND THE HIDDEN COSTS OF PAID CHILDCARE

*Mary Romero* 1651

In this Article, Romero argues that individual solutions to the problem of childcare in the United States results in hidden costs of paid reproductive labor that is transferred to the families of private household workers and nannies. Without a nationally funded childcare program that provides services for all families, regardless of economic means or citizenship status, employers are unwilling to pay a living wage and benefits to workers. Socially appropriate mothering prescribed by childcare experts, advocates child-centered, emotionally demanding, labor-intensive, and financially draining methods. The substitute mothering that is currently purchased by hiring domestics and nannies transfers the more physical and taxing part of childcare to the workers while employers upgrade their own status to mother-managers. Interviews conducted with the adult children of domestics and nannies demonstrate the social reproduction of difference in both employee and employer families. Private childcare arrangements provide a significant social space for reproducing inequality between families and for teaching children about privilege, as well as their place in the gendered, racialized, and class-based social hierarchy. Reproducing the contemporary middle-class family with all its current privileges, requires vulnerable workers who are stigmatized in the labor force by their citizenship and economic status (and frequently racialized) in order to retain an unequal distribution of reproductive labor at the societal level. Childcare policies and programs that are not inclusive of all mothers, regardless of class, race, or citizenship, maintain a system of privileges that relies on subordination.

#### CARE AS A PUBLIC VALUE: LINKING RESPONSIBILITY, RESOURCES, AND REPUBLICANISM

*Linda C. McClain* 1673

This Article argues that care is a public value and that facilitating it is a component of government's responsibility to foster persons' capacities for self-government. Ample foundation for recognizing this value may be found in feminism and liberalism; this Article also suggests that important civic republican ideals, such as the political economy of citizenship, might be reconstructed to support it. "Welfare reform, phase two," with its rhetoric of supporting "working families," offers an opportunity to think creatively about institutional arrangements that would move the United States closer to a new caregiving order and to address the human costs of the current care crisis and

gendered care economy. This Article also considers the potential of promoting “responsible fatherhood” to help move toward a new caregiving order.

**COMMENTARY:**

**CHANGING THE MEANING  
OF MOTHERHOOD**

*Martha M. Ertman* 1733

Ertman responds to McClain’s suggestion that we should alter our understandings of care for children to see it as a public value rather than a private responsibility. Ertman both echoes McClain’s focus on the importance of finding theoretical and doctrinal grounds for remunerating the work that many primary homemakers do for their families and sounds a note of caution about the majoritarian morality that often accompanies public law solutions. In light of the downside of a public law focus, Ertman explores how private law mechanisms, or public-private hybrids, might serve as alternative means to get financial support to those who need it most: poor women.

**COMMENTARY:**

**HOW HIGH THE APPLE PIE? A FEW  
TROUBLING QUESTIONS ABOUT WHERE,  
WHY, AND HOW THE BURDEN  
OF CARE FOR CHILDREN  
SHOULD BE SHIFTED**

*Mary Anne Case* 1753

In this Commentary, Case urges more careful thought from a feminist perspective about the as yet underexplored details and implications of proposals to shift more of the burden of care for children from mothers to employers or the state. Among her concerns is that some possible ways of structuring employer or governmental responsibility risk further increasing the advantages of men with wives and children at the expense of relatively untraditional women such as the childless and those in jobs disproportionately occupied by men with dependent spouses.

**THE MORRIS LECTURE**

**CONFLICTING LAWS IN A COMMON MARKET?  
THE NAFTA EXPERIMENT**

*H. Patrick Glenn* 1789

NAFTA represents an experimental common market, in which no measures have been taken, at the North American level, to resolve legal diversity and conflicts of laws and jurisdiction. The obvious contrast is with the European Union, with its pan-European institutions and formal program of legal unification. This Article defends the underlying philosophy of NAFTA, as appropriate for North America. There has also been substantial adaptation of the national laws of the NAFTA countries, which indicates that a process of informal harmonization is adequate for common market needs.

**STUDENT NOTES**

**ADVANCE PRICING AGREEMENTS:  
CONFIDENTIAL RETURN INFORMATION  
OR WRITTEN DETERMINATIONS  
SUBJECT TO RELEASE?**

*John L. Abramic* 1823

Since the inception of the IRS Advance Pricing Agreement (“APA”) program in 1991, the IRS, in order to protect participant confidentiality, had refused to disclose APAs. In 1996, The Bureau of National Affairs filed suit against the IRS in order to

force disclosure of APAs. Before the dispute was resolved in 1999, Congress amended section 6103 of the tax code to include APAs among the types of confidential tax return information that may not be publicly disclosed. This Note discusses the law relevant to the issue of whether or not APAs should be disclosed, the recent litigation concerning APA disclosure, the more recent legislation concerning APA confidentiality, and the tension between public agency review and taxpayer confidentiality.

WHEN HISTORY IS HISTORY: MAXWELL STREET,  
"INTEGRITY," AND THE FAILURE OF  
HISTORIC PRESERVATION LAW

*Mark D. Brookstein* 1847

As part of its \$500-million expansion, the University of Illinois, Chicago Campus, is expanding its present campus south over the area that includes historic Maxwell Street, Chicago's entry point for disparate ethnic and racial groups. Interested parties sought to have the area declared a historic district under the National Historic Preservation Act in order to prevent demolition of many buildings in the area. The nomination was subsequently rejected by the keeper of the National Register, after the city of Chicago recommended against nomination due to Maxwell Street's blighted condition. This Note explores historic preservation law in general and as it relates to Maxwell Street specifically, concluding that culturally and historically significant properties of minority groups must be afforded increased protection from local political pressures. This Note concludes by proposing statutory guidelines that local governments should follow in order to properly implement federal historic preservation laws and regulations.

QUASI IN REM ON THE CYBERSEAS

*David F. Fanning* 1887

As the Internet continues to evolve into a truly global marketplace, there arises the inevitable problem of how to adequately protect one who suffers an online breach at the hands of an often anonymous party. In the United States, the law of personal jurisdiction may offer adequate recourse against those parties that can be readily identified; however, the traditional personal jurisdiction analysis offers little protection against anonymous parties, allowing them to breach online contracts with impunity. The attachment of property upon which in rem or quasi in rem jurisdiction can be asserted, or legal devices similar in effect, have for centuries provided protection against anonymous parties, especially in the context of maritime law. This same procedure should be available to provide protection against anonymous online parties. Moreover, because of the identifiable, permanent, unique, and alienable nature of a Web site's domain name, it is that piece of intangible property that should be a proper target for attachment for the purposes of asserting quasi in rem jurisdiction.

ABANDONED EQUITY AND THE BEST  
INTERESTS OF THE CHILD: WHY ILLINOIS  
COURTS MUST RECOGNIZE SAME-SEX  
PARENTS SEEKING VISITATION

*Laurie A. Rompala* 1933

In Illinois, the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") governs child custody and visitation issues. In the past, Illinois courts have adopted common law equitable principles to find standing for individuals who play significant parental roles in a child's life, and who seek visitation. Recognizing that it serves the best interests of the child, these courts have exercised their equitable powers to find standing for individuals who are the practical equivalent of parents. The Illinois Appellate court in *In re C.B.L.* recently rejected this common law tradition when asked to find standing for a nonbiological lesbian co-parent seeking visitation. This Note provides an overview of the legal ramifications of chosen routes to parenthood and the issues raised when lesbian or gay parents end a romantic relationship with one another, but intend to maintain their parental relationships with the children. It also critiques the reasoning offered by the *C.B.L.* court, and presents a basis for extending equitable principles to lesbian or gay co-biological parents seeking visitation under both common law and the IMDMA.

THE E-SIGN ACT: THE MEANS TO  
EFFECTIVELY FACILITATE THE GROWTH  
AND DEVELOPMENT OF E-COMMERCE

*Scott R. Zernick* 1965

In this new world of electronic communications and digital information technology, e-commerce is not only forcing companies to redefine the means of conducting their business, but it is also changing the basic legal infrastructure. There is currently an enormous amount of activity underway by the states to clarify the law regarding the conduct of e-commerce transactions. Though the various state legislative initiatives, including the Uniform Electronic Transactions Act, show an agreement among the states to develop a legal infrastructure that will support the use of security procedures with the public policy goal of further facilitating the growth and development of e-commerce, there is little agreement among the states on how to attain such a goal. Unlike the current state electronic signature legislation, the E-Sign Act provides three key components, uniformity, flexibility, and predictability, and will prove to be the means to successfully facilitate the growth and development of e-commerce.

SYMPOSIUM ON  
THE SECOND AMENDMENT:  
FRESH LOOKS

Carl T. Bogus  
Symposium Editor

